Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

REPLY COMMENTS OF PROMETHEUS RADIO PROJECT

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SUMMARY

The initial comments contained scores of new studies supporting existing ownership rules, while those opposing ownership limits presented sparse and often questionable materials in their comments.

Prometheus Radio Projects reply comments largely focus on the legal issues raised in the initial comments. Although a number of broadcasters still insist that the Commission should apply a "presumption in favor of deregulation" in its analysis, Prometheus shows that the applicable legal standard, as established by the Third Circuit Court of Appeals, is that there is no such presumption. This and other ***legal*** determinations of the appeals court govern the FCC's analysis on remand under the law of the case doctrine. However, the Commission is free - and, in fact, obligated - to make entirely new ***factual*** determinations based on the full record established in this proceeding, rather than rely on factual determinations previously made on a more limited record.

Prometheus next addresses claims that the vast expansion of new media outlets using new distribution technologies somehow renders the Supreme Court's *Red Lion* case obsolete and changes the First Amendment test under which the Commission operates. This is an argument which the Court of Appeals previously rejected, but even were that not so, it is quite wrong. The system of broadcasting chosen, and perpetuated by, Congress presupposes exclusivity. This has not changed. Indeed, Prometheus discusses the numerous legislative and FCC actions over the last 40 years which have maintained, and increased the scarcity of governmentally administered spectrum. Among these measures are the Children's Television Act, the must-carry provisions of the 1992 Cable Act and the 1996 Telecommunications Act, which ***increased*** the scarcity of television spectrum (and the artificially created value of TV licenses) by making digital TV licenses available

only to incumbent (analog) TV broadcasters. Congress further enhanced the value and scarcity of the opportunity to be a broadcaster by providing essentially guaranteed renewal for radio and TV licensees and precluding any opportunity for competing applications to be filed at the time of renewal.

The remainder of Prometheus' reply comments address specific arguments made in various of the deregulatory comments. Prometheus submits a detailed analysis of the economic studies presented by the National Association of Broadcasters, showing that they are deeply flawed. It appears that NAB has actively sought to skew the data it present in a manner that cannot be squared with even the most generous definition of academic rigor.

Prometheus responds to those who support continuation of the UHF Discount, showing that it is inconsistent with FCC policies which long ago stopped favoring UHF service. The legal and factual arguments offered to justify continuation of the UHF Discount not only fall short of the mark, but none of the defenders even try to justify maintaining the current level of the discount at 50%.

Finally, Prometheus addresses arguments of those opposing cross-ownership rules. In particular, it shows that many or most of the synergistic benefits which are attributed to common ownership can be, and regularly are, generated without common ownership. Over 100 television stations have news or staff sharing arrangements with non-commonly-owned local newspapers. Prometheus also responds to Clear Channel's challenge to the local TV/radio ownership rule, showing that economies of scale do not exist and in any event, would not promote localism.

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REPLY COMMENTS OF
PROMETHEUS RADIO PROJECT

Initial comments in this proceeding have created a remarkably one-sided record. Supporters of maintaining existing ownership rules, including a number of industry groups, have presented extensive, detailed and methodologically sound documentation of the continuing utility of rules which promote diversity and competition and, thereby, continue to be necessary in the public interest. By contrast, critics of the existing rules have submitted self-serving encomia to deregulation, but their comments are remarkably sparse in terms of detailed evidence.

In these Reply Comments, Prometheus addresses the legal framework under which the Federal Communications Commission ("Commission" or "FCC") must operate and discusses a number of legal issues raised in the Comments of those broadcast industry parties seeking to relax existing ownership rules. Prometheus discusses that a number of the legal issues raised by opponents of the rules already have been resolved by the Courts and there is no justification to reverse this precedent. Prometheus also discusses the constitutional validity of maintaining ownership regulations.

Because the most extensive, albeit not necessarily the most persuasive, support for deregulation appears in the Comments of the National Association of Broadcasters ("NAB"), Prometheus also discusses the many inconsistencies and inadequacies of the supporting "studies" upon which NAB relies. Prometheus then briefly addresses the UHF Discount and finally, discusses several particularly erroneous claims which have been made with respect to the Commission's cross-ownership rules.

I. THE COMMISSION IS UNDER NO OBLIGATION TO APPLY A PRESUMPTION IN FAVOR OF DEREGULATION.

The threshold legal issue in this proceeding is how the Commission should assess the factual record in light of the Third Circuit's remand in *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) In its *2002 Biennial Review Order*, the Commission made a fundamental, if understandable, error of law in contending that Section 202(h) of the 1996 Act requires the Commission to apply a presumption in favor of deregulation. 2002 Biennial Review, *Report and Order and Notice of Proposed Rulemaking*, 18 FCCRcd 13620, 13624, ¶11 (2003) ("*2002 Biennial Review Order*"). The Commission was relying on a misreading of a D.C. Circuit decision, *Fox Television Stations v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) ("*Fox I*"). Prior to clarification on rehearing, *Fox Television Stations v. FCC*, 293 F.3d 537 (D.C. Cir. 2002) ("*Fox II*"), *Fox I* could be read to have held that such a presumption is required. *Fox I*, 280 F.3d at 1048.

The Commission misconstrued the law. It is now clear that Section 202(h) does ***not*** mandate any special deregulatory presumption. On review, the Third Circuit unequivocally rejected the FCC's analysis in its *Prometheus* decision, 373 F.3d at 390-92, and squared its holding with the D.C. Circuit case law as well. *Id.* at 393.

A number of broadcast parties nonetheless insist that this proceeding should be conducted as if Section 202(h) establishes a presumption in favor of deregulation. Relying on *Fox I* and *Sinclair Broadcast Group, Inc. v FCC*, 284 F.3d 148 (D.C. Cir. 2002), a decision issued after *Fox I*, but before *Fox II*, they read the statutory command as requiring the Commission to repeal or modify any rule which is no longer "necessary," where necessary means "indispensable." *See, e.g.*, Comments of Clear Channel Communications, Inc. ("Clear Channel") at 5. They are correct insofar as, under this construction of the word, the Commission would have to treat all of its rules as presumptively subject to repeal.

However, *Fox I* and *Sinclair* do not stand for such a proposition. As the Third Circuit held, the D.C. Circuit definitively resolved the question of whether there is any special deregulatory presumption in *Cellco Partnership v. FCC*, 357 F.3d 88 (D.C. Cir. 2004). The *Prometheus* Court explained that

> *Cellco* limited *Fox I*'s statement that "necessary" implied a presumption in favor of modification or elimination of existing regulations, *see* 280 F.3d at 1048, to the context in which it was made: discussing whether vacating or remanding the national television ownership rule was the appropriate remedy. *Cellco*, 357 F.3d at 98. And while *Sinclair* apparently endorsed this language from *Fox I*, *see* 284 F.3d at 159, the *Cellco* Court characterized *Sinclair* as merely "piggyback[ing]" on *Fox I* without "adopt[ing] a general presumption in favor of modification or elimination of regulations when considering a substantive challenge to the adequacy of the Commission's determinations." *Cellco*, 357 F.3d at 98. In sum, the D.C. Circuit Court determined that the definition of "necessary" was not constrained by either its *Fox* or *Sinclair* decision. It remained an open issue for the Commission to decide in the first instance, as it did when it released the 2002 Biennial Regulatory Review. *Id.*

Prometheus, 373 F.3d at 393

Many of the broadcast parties nevertheless cite the *Prometheus* Court as agreeing with *Fox I's* analysis concerning the claimed deregulatory thrust of Section 202(h). However, the Third Circuit made clear that the only deregulatory element of Section 202(h) is the requirement that the rules be revisited regularly (*i.e.*, once every four years),[1] but does not dictate that the rules be subjected to heightened scrutiny during those periodic reviews.[2] The Court said

> What, then, makes § 202(h) "deregulatory"? It is this: Section 202(h) requires the Commission periodically to justify its existing regulations, an obligation it would not otherwise have. A regulation deemed useful when promulgated must remain so. If not, it must be vacated or modified.
>
> Misguided by the *Fox* and *Sinclair* Courts' "deregulatory presumption" characterization and lacking the benefit of *Cellco*'s subsequent clarification, the Commission concluded that § 202(h) "appears to upend traditional administrative law principles" by not requiring it to justify affirmatively a rule's repeal or modification. *Order* ¶ 11. This overstates the case. Rather than "upending" the reasoned analysis requirement that under the APA ordinarily applies to an agency's decision to promulgate new regulations (or modify or repeal existing regulations), *see State Farm*, 463 U.S. at 43, 103 S.Ct. 2856, § 202(h) *extends* this requirement to the Commission's decision to retain its existing regulations.

Prometheus, 373 F.3d at 395.[3]

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[1]The fact that Congress has recently changed the frequency of review from 2 years to 4 years suggests that, if anything, Congress wishes to temper the claimed deregulatory thrust of Section 202(h).

[2]Broadcasters' repeated quotation of colorful language from *Fox I* does not change the fact that this view of Section 202(h) was discredited in *Fox II* and *Cellco*. *Fox II, 293* F.3d at 539-540, *quoting Fox I*, 280 F.3d at 344; *Cellco*, 357 F.3d at 98.

[3]Clear Channel's mischaracterization of *Cellco* is especially misleading. Clear Channel at 3. It claims that *Cellco* "affirm[ed the] standard applicable to FCC biennial reviews pursuant to Section 11 of Communications Act, which the FCC indicated in the *2003 [Biennial Reivew] Order* is the same standard that governs the FCC's section 202(h) inquiries...." As the Third Circuit makes clear, Cellco ***rejected*** the notion that "necessary" meant "indispensible" and supports the conclusion that

Whatever confusion may have been caused by *Fox I* has now been definitively resolved. This proceeding is not to be conducted with any special presumption in favor of deregulation; the burden of establishing that any rules are no longer necessary in the public interest is on the opponents of those rules.

II. THE LAW OF THE CASE DOCTRINE APPLIES TO THE LEGAL INTERPRETATIONS OF THE COURT OF APPEALS, BUT THE COMMISSION MUST REASSESS ITS FACTUAL FINDINGS BASED ON THE COMPLETE FACTUAL RECORD.

A second preliminary question raised in the initial comments is the effect of prior court rulings on the current proceeding. The answer is that *Prometheus* determined the legal framework under which this remanded proceeding will be conducted, and thus determined the law of the case. However, the Commission is free and, in fact, obligated, to reassess the facts pertaining to its broadcast ownership rules based on the full record being adduced in this matter.

The leading case in defining the law of the case doctrine as it applies to administrative agencies is *FCC v. Pottsville Broadcasting Co. v. FCC*, 309 U.S. 134 (1940), where the Supreme Court held that

> "Whether the commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the commission and govern its action, are appropriate questions for judicial decision." *Federal Radio Comm'n v. Nelson Bros. Co.*, 289 U.S. 266, 276 [(1933)].
>
> On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. *Federal Power Comm'n v. Pacific Co.*, 307 U.S. 156 [(1939)]. But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative

Section 202(h) does not imply any presumption in favor of deregulation.

> agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. *Cf. Ford Motor Co. v. Labor Board*, 305 U.S. 364 [(1939)].

FCC v. Pottsville Broadcasting Co., 309 U.S. at 144-145; *Bridge v. U.S. Parole Commission*, 981 F.2d 97, 104-5 (7th Cir. 1992) ("[L]egal error in an agency decision does not prevent the agency from expanding its record and rethinking its original order."); *City of Cleveland v. FPC*, 561 F.2d 344, 348 (D.C. Cir. 1977) ("The decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority.").

Thus, it is clear that the Third Circuit's construction of the Constitution and Section 202(h) and other provisions of the Communications Act are the law of the case and the FCC is bound to follow them. However, factual determinations must be based on the full record before the FCC at the time of its decision, including newly adduced evidence generated from comments and analyses available to the Commission. To the extent the record compels a different determination, the Commission must so state.

As noted in the preceding section, a number of parties evidently seek to reargue or to evade the legal interpretations of the Third Circuit *Prometheus* decision.[4] However, the *Prometheus* decision is the law of the case, and the Commission lacks authority to apply different interpretations in this proceeding. While this would be true in any event, the controlling nature of the *Prometheus* decision is underscored by the fact that the Third Circuit explicitly retained jurisdiction of this matter

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[4]Other parties incorrectly argue that the Commission is bound by prior factual determinations. *See, e.g.*, Comments of Newspaper Association of America ("NNA") at 17, Tribune at 13-16, Media General at 5-7.

on remand.[5]

One argument that bears special mention is that of Sinclair, which suggests the Commission has not complied with the mandate of the D.C. Circuit in *Sinclair*, and that the Commission should not continue to enforce existing local TV ownership rules. Comments of Sinclair Broadcast Group, Inc. ("Sinclair") at 8. This is doubly wrong. First, by issuing the *2002 Biennial Review Order*, which adopted a new local TV ownership rule and then attempted to justify that choice, the Commission ***did*** comply with the D.C. Circuit's directive. The Court simply instructed the FCC to reexamine the local TV ownership rule,[6] which is exactly what the Commission did in the *2002 Biennial Review Order*. Second, unlike the *Prometheus* Court, in *Sinclair*, the D.C. Circuit opted not to vacate the local TV ownership rule.[7] Thus, this matter now properly resides in the jurisdiction of the Third Circuit which, stayed operation of the new rule. *Prometheus Radio Project v. FCC*, 2003 WL 22052896 (September 3, 2003). Moreover, unlike the D.C. Circuit, the Third Circuit specifically chose to retain jurisdiction of further FCC action on the local TV ownership rule. *Prometheus*, 375 F.3d at 435.

Another argument meriting brief discussion is the claim of the NNA and several newspaper

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[5]*Prometheus*, 373 F.3d at 435 ("The stay currently in effect will continue pending our review of the Commission's action on remand, over which this panel retains jurisdiction.").

[6]*Sinclair*, 284 F.3d at 169 ("[W]e remand the rule to the Commission for further consideration.").

[7]The D.C. Circuit's determination to leave the local TV ownership rule in place while the FCC reevaluated it was in marked contrast to its handling of the cable/TV cross-ownership rule, which the Court specifically vacated. *Fox I*, 280 F.3d at 1040 ("[U]nder §202(h) a reviewing court may vacate the underlying rule if it determines not only that the Commission failed to justify retention of the rule but that it is unlikely the Commission will be able to do so on remand.").

publishers that (in the words of NNA) "[t]he FCC is compelled to eliminate the blanket [newspaper/broadcast] cross-ownership ban in this proceeding." NNA at 17. *See also* Comments of Tribune Company ("Tribune") at 13-16; Comments of Media General, Inc. ("Media General") at 5-7. They argue that the Commission's determinations in the *2002 Biennial Review Order* are "' off the table,' " Media General at 5, because the Commission determined based on the facts then before it that the NBCO was no longer necessary in the public interest, that the newspaper/broadcast cross-ownership rules ("NBCO") undermines localism and (according to Media General) "insufficient evidence exists to conclude that ownership influences viewpoint to warrant a cross-ownership ban...." Media General at 6.

The case law discussed above definitively establishes that these arguments are incorrect. The factual and evidentiary determinations the Commission made based on the record then before it are precisely the kind of administrative decisions that are not foreclosed by the law of the case doctrine. *See Communication Workers of America v. NLRB*, 784 F.2d 847, 849 (7th Cir. 1986) ("Judicial review of the Board's orders permits correction of legal mistakes, and once any mistake as been exposed further proceedings are in the Board's charge.").

Moreover, and in any event, these arguments are based on an overreading of the Third Circuit's holding in *Prometheus*. First, the Court by no means held that the cross-ownership limits is unjustified; to the contrary, it held only that the particular new rule the Commission adopted was unsupported by the evidence. *Prometheus*, 373 F.3d at 400. Second, the Court did not say that the Commission must repeal the NBCO. Rather, what it said was that the Commission "reasonably concluded that repealing the cross-ownership ban was necessary to promote competition and localism, while retaining some limits was necessary to ensure diversity." *Id*. at 400-401. However, it is clear from the Court's decision that the Commission is directed to compile a new record, and that it has complete freedom on remand to make new factual determinations, including a determination to retain all existing cross-ownership rules and policies.

This is reinforced by the Third Circuit's refusal to lift its stay of the Commission's *2002 Biennial Review Order.* Tribune, supported by the NAA, moved for a partial lifting of the Court's September, 2003 stay of the Commission's *2002 Biennial Review Order*. It argued that "in light of the Court's determination in this case, the continuing stay of the entire Order is now overbroad." *Motion of Petitioner Tribune Company for a Partial Lifting of This Court's Stay of the FCC's Cross-Ownership Rules*, July 21, 2004, p. 2. By unpublished *Order* dated September 3, 2004, the Third Circuit denied Tribune's Motion, stating that "Inasmuch as we held...that the cross-ownership rules proposed by the Federal Communications Commission...are not supported sufficiently...the foregoing motion by Tribune Company for a partial lifting of the stay of the cross-ownership rules is denied."

Plainly then, the Court has required the Commission to come up with a new rule which is adequately supported by evidentiary record. The Court in no way delimited the Commission from retaining the existing NBCO on remand if the record as of that time should compel such a conclusion.

III. NEW MEDIA OUTLETS DO NOT ABSOLVE THE NEED FOR OWNERSHIP REGULATIONS OR DIMINISH BROADCASTERS' OBLIGATIONS TO THE PUBLIC.

Industry parties have documented at great length the explosion of new media outlets using new distribution technologies. *See, e.g.*, Sinclair at 12-31, Clear Channel at 7-17, Tribune at 16-26, Media General at 50-63, NAB at 5-22. They argue that the abundance of such resources somehow changes the First Amendment standard under which the Commission should evaluate broadcast ownership regulation. *See, e.g.*, Media General at 69-73, Sinclair at 39-41, Tribune at 88-90. They claim that the *Red Lion* case, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), which gives preeminence to the "paramount" First Amendment rights of the public, has been overtaken by technological change. *See, e.g.*, Sinclair at 39-41, Media General at 72-73, Tribune at 88-90.

This argument is not properly raised here, because it was explicitly rejected by the Third Circuit's *Prometheus* decision, which established the law of the case. *See* Section II, *supra*. Referring to the *NCCB* decision, *FCC v. NCCB*, 436 U.S. 775 (1978), the Court said:

> Even were we not constrained by Supreme Court precedent, we would not accept the Deregulatory Petitioners' contention that the expansion of media outlets has rendered the broadcast spectrum less scarce. In *NCCB,* the Court referred to the "physical scarcity" of the spectrum-the fact that many more people would like access to it than can be accommodated. 436 U.S. at 799. The abundance of non- broadcast media does not render the broadcast spectrum any less scarce. *See, e.g., Ruggiero v. FCC*, 278 F.3d 1323, 1325 (D.C. Cir.2002), *rev'd en banc,* 317 F.3d 239 (D.C.Cir.2003) (citing the Commission's statement that "[n]ow ... radio service is widely available throughout the country and very little spectrum remains available for new full-powered stations.").

Prometheus, 373 F.3d at 402.

For what it is worth, the Third Circuit was right. Scarcity, as defined in *Red Lion,* persists, as does the Commission's authority to regulate in the public interest, *i.e.*, for the benefit of the citizens whose First Amendment rights are "paramount." *Red Lion*, 395 U.S. at 390.

Preliminarily, Prometheus observes that current policies do not single out broadcasting as thoroughly as *Red Lion's* opponents suggest. Other electronic media are subjected to significant ownership and other restrictions. For example, cable is subject to national ownership limitation and leased access programming rules, as well as various obligations pursuant to its franchise agreements.

See, e.g., 47 U.S.C. §613(f) (mandating cable TV ownership rules); 47 U.S.C. §612 (leased access); 47 U.S.C. §611 (giving franchisers authority to impose PEG duties). Indeed, certain content-based obligations apply to them as well. *See, e.g.*, 47 U.S.C. §315(c)(2) (applying "equal opportunities" obligations to cable). Similarly, DBS can be regulated as a broadcaster subject to *Red Lion*, *see NAB v. FCC*, *supra*,[8] and is also subject to ownership restrictions, *see, e.g.*, *EchoStar Communications Corporation*, 17 FCCRcd 20559 (2002) (refusing to approve proposed merger of DBS operators) and specified programming obligations. *See, e.g.*, 47 U.S.C. §335 (applying "equal opportunities" and "reasonable access" obligations to subscription DBS and setting aside 4-7 percent of DBS capacity for non-commercial educational and informational programming).

It is not the case that *Red Lion* has been rendered technologically obsolete. Even leaving aside the question of the degree to which such developments as the Internet can be substituted for free over-the-air broadcasting, it is important to emphasize that what has ***not*** changed is the fact that operators of cable, the Internet and other media not fully subject to *Red Lion* can enter the market without encountering the physical limitations that characterize broadcasting (and require exclusivity). *Compare Reno v. ACLU*, 521 U.S. 844, 870-71 (broad First Amendment latitude is required in the absence of absent access limitations) *with Red Lion*, 395 U.S. at 389-96. (exclusive licensing creates a need for government to preserve speech rights of the public).[9] As the Supreme Court has recently recognized, broadcasting, unlike print media or the internet, has a history of pervasive regulation.

[8]Over-the-air subscription programming, be it terrestrial or DBS, is not a broadcast service. *NABB v. FCC*, 849 F.2d 665, 669 (D.C. Cir. 1988).

[9]Unlike the case of broadcasting, when a medium does allow access to new competition, government imposed exclusivity violates the First Amendment rights of would-be competitors. *See City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986).

Reno v. ACLU, 521 U.S. at 868 (citing *Red Lion* as exemplar of a "history of extensive regulation of the broadcast medium [and] the scarcity of available frequencies") (citations omitted).

The system of broadcasting chosen, and perpetuated, by Congress presupposes exclusivity. Shared licenses and shared spectrum options have been consciously eschewed. Congress and the FCC have rejected shared time arrangements and excluded broadcasting from "spectrum flexibility" policies that have been applied to most other segments of the spectrum. The Commission and the Congress have taken numerous steps to maintain especially strong protections against interference with terrestrial broadcasting.

Red Lion's framework thus remains. Where, as here, the system is premised on exclusivity and careful management,

> [I]t is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same 'right' to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves.

Red Lion, 395 U.S. at 389.

As was the case in 1969, broadcasters still receive temporary access to a limited resource administered for the benefit of the general public. No commercial licensee is forced to apply for the privilege to operate what can be, and typically is, a highly profitable business using that spectrum essentially free of charge. The consequence of this bargain is that the rights of those who volunteer to serve as trustees in using publicly held spectrum must be balanced against the rights of the many who are denied access to it, including the First Amendment guarantee that citizens are entitled to have access to a "diversity of information from antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

The broadcaster's license brings tremendous advantages. Congress "imposed a specific set of restraints upon broadcasters that common carriers do not face and then, to cement the compromise, explicitly provided that a broadcaster should not be regulated as a common carrier." *NAB v. FCC*, 740 F.2d 1190, 1199-1200 (D.C. Cir. 1984). But, as the Supreme Court has emphasized, the prize brings with it important obligations and limitations.

> By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."

Red Lion, 395 U.S. at 389. The trade off was described by then-Judge Burger as follows:

> A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot. After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty."

Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966) (Burger, J.).

Accordingly, government may continue to use its authority to insure that broadcasting promotes citizen access to diverse views, "a government interest of the highest order, for it promotes values central to the First Amendment." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994).

IV. THE NBCO RULE DOES NOT VIOLATE THE FIFTH AMENDMENT.

Several newspaper publishers also argue that the NBCO violates the equal protection clause of the Fifth Amendment. Here, too, the law of the case was established by the Third Circuit, which noted that this claim was specifically rejected by the Supreme Court in *FCC v. NCCB*. *Prometheus*, 373 F.3d at 401, *citing FCC v. NCCB*, 436 U.S. at 801-802.

The publishers nonetheless argue that, in the words of Tribune, the *NBCO* "no longer can satisfy the *NCCB* test because it unconstitutionally singles out newspapers among other non-broadcast major media...." Tribune at 93.[10] They point to the emergence of new media platforms which, they say, change the NCCB equation. *See, e.g.*, Media General at 89 ("The major media outlets of today unquestionably include not only cable television, but also the Internet and multichannel video program distributors like satellite and broadband services...."). Thus, they conclude, "Newspapers are the only non-broadcast media today that are subject to any restrictions on the ownership of broadcast stations." Tribune at 93; *see also*, Media General at 87-90.

These claims are based on a clearly erroneous recasting of *NCCB*. Even leaving aside the relevance of internet and broadband to the comparison, the premise that the emergence of new ***national*** media platforms would change the application of the *NCCB* case finds no support in the decision. As the Third Circuit held,

> We decline the Deregulatory Petitioners' invitation to disregard Supreme Court precedent because of changing times. Surely there are more media outlets today (such as cable, the Internet, and satellite broadcast) than there were in 1978 when *NCCB* was decided. But it cannot be assumed that these media outlets contribute signif-

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[10]Tribune does not even quote from *NCCB*. Media General does concede that "Based on the then current technological and regulatory landscape, however, the NCCB Court disagreed...." Media General at 89.

icantly to viewpoint diversity as sources of *local* news and information.

Prometheus, 373 F.3d at 401 (emphasis in original). *See also*, *FCC v. NCCB*, 436 U.S. at 785-786.[11] *See also*, *id.*, 436 U.S. at 787 n 10. It is worth noting in this regard that the NBCO was carefully circumscribed so that it does not apply to nationally distributed newspapers such as *USA Today* and the *Wall Street Journal*. *See* 47 CFR §73.3555(d)(1). Similarly, the NBCO does not apply to "magazines and other periodicals, or out-of-town radio or television stations not encompassing the entire community with a clear signal, since--aside from their often small market share--these sources could not be depended upon for coverage of local issues." *FCC v. NCCB*, 436 U.S. at 787.

Nor is it the case that the FCC treats newspapers disparately from broadcasting stations. The *Prometheus* case rejected this argument as well, holding that "the regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communications were already treated under the Commission's multiple-ownership rules...." 373 F.3d at 401, *quoting NCCB*, 436 U.S. at 801. What the publishing interests fail to acknowledge is that the FCC prohibits ***combinations*** of newspapers and broadcast properties, however created. An owner of a TV station purchasing a local newspaper is subjected to the rule in essentially the same way that a newspaper publisher is not allowed to purchase a TV station. In fact, newspaper publishers coming under the NBCO rule are treated more leniently than broadcast licensees.[12]

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[11]"While recognizing the pioneering contributions of newspaper owners to the broadcast industry, the Commission concluded that changed circumstances made it possible, and necessary, for all new licensing of broadcast stations to 'be expected to add to local diversity.'" *Id.* (citation omitted).

[12]The Commission has opted not to require immediate divestiture of the broadcasting property but has instead allowed the remainder of the license term to minimize the possibility of a fire sale is immaterial. Multiple Ownership of Standard, FM and Television Broadcast Stations, *Second*

V. SPECTRUM SCARCITY CONTINUES TO JUSTIFY REASONABLE REGULATION.

A number of parties make reference to a footnote in a 22 year-old Supreme Court decision. In that footnote, the Court upheld regulation based on spectrum scarcity, adding that

> We are not prepared...to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.

FCC v. League of Women Voters, 408 U.S. 364, 376 n. 11 (1984). Several argue that the signal has been given, cite or that it should be given now. Sinclair at 40; Media General at 75-76, Tribune at 91. After nearly a quarter century, during which time Congress and the FCC have repeatedly relied upon, and strengthened scarcity-based regulation, it is time to stop looking for "signals" which have not come, and will not come any time in the forseeable future.

There is absolutely no justification for the Commission to change course now. First, the fundamental circumstances of broadcast policy as discussed in *Red Lion* have not changed since that decision was issued in 1969, much less since 1983. Indeed, government action in recent years has significantly increased the value of these exclusive grants of special authority. This is also borne out by the market, since the sales price of station licenses those licenses has continued to increase. Second, Congress has taken numerous actions since 1983 which signal a continued, and increased, commitment to broadcast regulation based on the limited space allocated to free, over-the-air broadcasting. This legislative policy is reflected in many FCC statements and actions which reinforce the scarcity-based system of regulation upheld in *Red Lion*.

Report and Order, 50 FCC2d 1046, 1076 n. 25 (1975).

A. *Red Lion's* Holding Remains As Fully Justified As When It Was Issued.

Because Red Lion's holding on spectrum policy has been so frequently misstated, it is important to quote that decision at length. Speaking for a unanimous Court, Justice White wrote that:

> It is argued that even if at one time the lack of available frequencies for all who wished to use them justified the Government's choice of those who would best serve the public interest by acting as proxy for those who would present differing views, or by giving the latter access directly to broadcast facilities, this condition no longer prevails so that continuing control is not justified. To this there are several answers.
>
> Scarcity is not entirely a thing of the past. Advances in technology, such as microwave transmission, have led to more efficient utilization of the frequency spectrum, but uses for that spectrum have also grown apace. Portions of the spectrum must be reserved for vital uses unconnected with human communication, such as radio-navigational aids used by aircraft and vessels. Conflicts have even emerged between such vital functions as defense preparedness and experimentation in methods of averting midair collisions through radio warning devices. 'Land mobile services' such as police, ambulance, fire department, public utility, and other communications systems have been occupying an increasingly crowded portion of the frequency spectrum and there are, apart from licensed amateur radio operators' equipment, 5,000,000 transmitters operated on the 'citizens' band' which is also increasingly congested. Among the various uses for radio frequency space, including marine, aviation, amateur, military, and common carrier users, there are easily enough claimants to permit use of the whole with an even smaller allocation to broadcast radio and television uses than now exists.

Red Lion, 395 U.S. at 396-97 (footnotes omitted).

Very much the same circumstances apply today to spectrum management. While new technologies, especially ubiquitous digitization, has "led to more efficient utilization," it surely remains the case that "uses for that spectrum have also grown apace." Similarly, it remains true that "'[l]and mobile services' such as police, ambulance, fire department, public utility, and other communications systems have been occupying an increasingly crowded portion of the frequency spectrum...." *Red*

Lion, 395 U.S. at 397. And the clamor for the soon to be vacated analog TV spectrum shows that now, as before, "there are easily enough claimants to permit use of the whole with an even smaller allocation to broadcast radio and television uses than now exists." *Id.*

The Commission has consistently recognized the need to expand the availability of new spectrum. A host of Commission task forces and orders have recognized the voracious demand by the public for new fixed and mobile wireless services. *See, e.g., In re Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, 21 FCCRcd 10521 (2005) ("Growth in demand for mobile wireless services, coupled with the rise of the Internet and greater broadband availability, have increased the need for additional spectrum"); *Wireless Broadband Access Report*, 20 FCCRcd 5138 (2004); *Spectrum Policy Task Force Report*, ET docket No. 02-135 at 11-13 (2002) (immediate and urgent need for spectrum reform due to "explosive demand for spectrum-based services and devices"). In particular, the Commission has frequently expressed the need to develop new and innovative ways to free spectrum for wireless broadband services. *See, e.g., In Re Wireless Operations in the 3650-3700 Band*, 20 FCCRcd 6502, 6503 (2005); *In re Promoting Efficient Use Spectrum Through the Elimination of Barriers to the Development of Secondary Markets*, 19 FCCRcd 17503 (2004).

Indeed, the Commission has found the need for new spectrum so pressing that it has wedged new services, and auctioned exclusive licenses for the privilege of offering such services, in every conceivable nook and cranny of the spectrum chart. *See, e.g., In re Former Nextel Communications, Inc., Upper 700 MHz Gaurd Band Licenses and Revisions to Part 27*, 21 FCCRcd 10413 (2006); *Amendment of Part 90 Rules in the 904-909.75 and 919.75-928 MHz Bands*, 21 FCCRcd 2809 (2006); *In re Amendment of Part 22 of the Commission's Rules to Benefit*

Consumers of Air to Ground Telecommunications Services, 20 FCCRcd 19663. That the Commission continues to feel the need to license and auction every available sliver of spectrum, and that private parties still bid for these extremely limited use licenses, negates any argument that the spectrum scarcity identified in *Red Lion* has become a thing of the past.

The quest for new spectrum to meet the ever increasing demand has spread beyond the FCC, further underscoring the scarcity of available spectrum. The National Telecommunications and Information Administration ("NTIA") recently announced the formation of a federal advisory committee for the express purpose of finding new ways for the Executive branch to release new spectrum for commercial use. NTIA Public Notice, *Commerce Department Announces Committee to Advise on Management of Nation's Airwaves*, November 3, 2006.[13]

Congress likewise continues to signal that scarcity remains the defining attribute of access to spectrum. Congress has responded to the increasing need for spectrum, and the value generated by its scarcity, by repeatedly ordering the clearance of new spectrum for auction to the private sector. *See* Digital Television Transition and Public Safety Act of 2005, Title III of the Deficit Reduction Act of 2005, Pub. L. No. 109-171; Commercial Spectrum Enhancement Act, Pub. L 108-494. The most recent of these auctions, the "Advanced Wireless Services" Auction, produced nearly $14 billion in bids. *See* "Public Notice: Auction for Advanced Wireless Services Licenses Closes," (September 20, 2006). Given this ample record, no one can doubt that it remains true that "[l]and mobile services' such as police, ambulance, fire department, public utility, and other communications systems have been occupying an increasingly crowded portion of the frequency spectrum." *Red*

[13]Available at http://www.ntia.doc.gov/ntiahome/press/2006/specadvisory_110306.htm.

Lion, 395 U.S. at 397.

Plainly then, the circumstances that impelled the *Red Lion* holding have not materially changed. Moreover, there has been no real movement towards the conditions that might someday justify revisiting *Red Lion*. The *Red Lion* decision very explicitly anticipated that the impact of spectrum scarcity would persist for a long time going forward. The Court went out of its way to stress that, even if spectrum scarcity were to begin to diminish, the residual impact of scarcity-based regulation would have, to use a currently fashionable phrase, a "long tail:"

> Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. ***Some present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest.***

Red Lion, 395 U.S. at 400 (emphasis added).

In short, spectrum scarcity as defined in *Red Lion* persists and, if anything, is greater now than at any time in the past. And even if that were not so, the lingering effects of spectrum based regulation would justify its maintenance for a long time to come.

B. Both the FCC and Congress Have Continued to Recognize the Persistence of Spectrum Scarcity.

It has been 22 years since the Supreme Court issue its footnoted invitation to Congress and the FCC asking if the time had come to reassess regulation based on spectrum scarcity. Nothing that has happened since that time has suggested that there is any Congressional support for such a fundamental change. To the contrary, Congress and the FCC have significantly enhanced their reliance on spectrum scarcity.

Far from signaling a need to end treating broadcast spectrum as a scarce resource, Congress has repeatedly and consistently taken steps to recognize and perpetuate the special reserve of spectrum for over the air broadcasting. Among the most significant of these measures is the Children's Television Act of 1990, Pub. L. No 101-437, *codified at* 47 U.S.C. §303(a), in which Congress explicitly found that broadcasters should have special obligations to meet the programming needs of children in their audience. *See also* H.R. Rep. No. 101-385 at 8 (citing *Red Lion* and affirming continuing validity of spectrum scarcity rationale). The content-based but viewpoint neutral programming mandate under that statute is justifiable only if scarcity-based regulation is maintained. *See, e.g., Children's Television Obligations of Digital Television Broadcasters*, 19 FCCRcd 22943, 22945 (2004) ("For more than 30 years, the Commission has recognized that, as part of their obligation as trustee of the public's airwaves, broadcasters must provide programming that serves the particular needs of children.").

Another instance in which Congress reaffirmed scarcity based regulation was the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385. In Section 2(a)(9), Congress specifically found that the so-called "must carry" requirement of that statute

> is necessary to serve the goals contained in section 307(b) of the Communications Act of providing a fair, efficient, and equitable distribution of broadcast services.

In Section 2(a)(10), Congress found that

> [a] primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation.

In the Telecommunications Act of 1996, Pub. L No. 104-104, Congress dramatically ***in-creased*** the scarcity of television spectrum (and the artificially created value of TV licenses) by making digital TV licenses available only to incumbent (analog) TV broadcasters. 47 U.S.C. §336(a)(1). Congress further enhanced the value and scarcity of the opportunity to be a broadcaster by providing essentially guaranteed renewal for radio and TV licensees and precluding any opportunity for competing applications to be filed at the time of renewal. See 47 U.S.C, §309(k).

That Congress has permitted the use of spectrum auctions for new broadcast licenses in no way changes the equation. Thus, Media General has it backwards when it claims that "Congress itself has eliminated any principled foundation for the 'scarcity doctrine' by dramatically curtailing the Commission's oversight role in awarding licensees for new spectrum" when it chose to allocate spectrum through auction or competitive bidding, rather than comparative hearings. Media General at 75-76. However, the very use of auctions is premised on scarcity, and underscores the exclusivity of the privilege that comes with a license. *See* H.R. Rep. No 105-49 at 670-72. Successful bidders do not buy spectrum; they obtain the conditional (and revocable) right to use a particular portion of the spectrum for a limited time. Prices paid reflect these limitations, including the fact that Congress or the FCC may change the license scheme and/or impose new obligations during that term. The Communications Act

> draws no categorical distinctions among the three methods of license allocation - comparative hearing, lottery and auction. Each is presumed to be a regulatory tool for ensuring that licenses are distributed in the way that fulfils the goals of the [Act]. *See* 47 U.S.C. §309(a). And each license, on whatever basis it is awarded, is not to "be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. §301.

In re NextWave, 200 F.3d 43, 53 (2d Cir. 1999).

The 1996 Act also strengthened the FCC's power to oversee broadcast programming (and ownership) by readopting the public interest standard and applying it to digital television. Indeed, the Commission has recognized the "explicit Congressional intent expressed in Section 336 of the Communications Act, as amended, to continue to require digital broadcasters to serve the public interest." *Children's Television Obligations of Digital Television Broadcasters*, 19 FCCRcd at 22948 (citing 47 U.S.C. §336(d).

With regard to the radio spectrum, Prometheus Radio Project can attest better than anyone that scarcity remains the defining characteristic of access to broadcast licenses. Every week, Prometheus receives inquiries from would-be applicants who want nothing more than to provide an additional local voice to the FM radio dial. For the most part, however, Prometheus must send away these would-be community broadcasters disappointed.

Although the NAB and other supporters of consolidation claim that scarcity has passed, they have no difficulty in calling upon the power of the Commission under the scarcity rationale to foreclose the opportunity to others to broadcast. *See generally* Eric Klinenberg, *Fighting For Air: The Battle To Control America's Media*, Chapter 10 "Low Power to the People," Metropolitan Books (2007) (detailing history of LPFM). At the NAB's prompting, the Commission exercises its authority pursuant to the scarcity rationale to shut down unauthorized "pirate" broadcasters without the need to demonstrate any real interference or danger of interference with other licensed services. *See United States v. Szoka*, 260 F.3d 516 (6th Cir. 2001). When the Commission authorized the Low Power FM service, the NAB successfully lobbied Congress to exercise its power pursuant to the scarcity rationale to reduce significantly the number of available licenses and retroactively to prohibit issuing a license to anyone who had operated an unauthorized FM transmitter. *Ruggiero v. FCC*, 317 F.3d 239 (D.C. Cir. 2003) (*en banc*). Despite the finding by a Congressionally-mandated independent study that LPFM as authorized by the Commission in 2000 would cause no interference to full power broadcasters, the restrictions imposed by Congress persist. *See* Report to Congress on the Low Power FM Interference Testing Program, Pub. L. No. 10-553 (rel. Feb. 19, 2004).

As if these restrictions were not enough, LPFM must compete for the sliver of spectrum that remains to them with FM translators. Although both services are secondary to full power stations, FM translators and LPFM stations are considered co-equal. Accordingly, potential interference conflicts are resolved by recourse to a rule of "first in time, first in right." The effect of this, as the Commission has acknowledged, has been to create an unfortunate competition between these services for the few available allocations on the FM dial. *In re Creation of a Low Power FM Service*, 20 FCCRcd 6763, 6776-78 (2005).

Finally, LPFM licensees remain subject to "encroachment" by new full power stations or by full power stations granted an increase in power. Even operational LPFM stations, on whom communities rely for local news and local programming, must curtail their activity or shut down altogether in the face of a distantly-generated full-power signal. *Id.* at 6780-81. As a consequence, already scarce licenses made artificially scarcer by NAB's Congressional lobbying efforts continue to grow even scarcer all the time.

Nor has the NAB limited its efforts to leverage the scarcity rationale to LPFM. The NAB and other incumbents have repeatedly sought to have the FCC use its scarcity-derived regulatory power to limit the ability of potential commercial competitors. For example, the NAB has sought to prevent satellite radio providers from offering traffic and weather services, and from using their ground repeaters from providing local content or new services. *See Request for Comment on Petition Filed* *by National Association of Broadcasters Regarding Programming Carried By Satellite Digital Audio Radio Service*, 19 FCCRcd 7203 (2004); *See generally In re Establishment of Rules and Policies for the Digital Audio Radio Satellite Service*, 12 FCCRcd 5754, 5788-5792 (1997). Other incumbents have likewise sought to leverage the Commission's authority against competitors. *See, e.g., In re XM Radio, Inc.*, 19 FCCRcd 18140 (2004). Again, these actions are incompatible with the claims made here that scarcity has become a thing of the past, or that the Commission may no longer regulate under the logic of the scarcity rationale.

One may add to these examples numerous other examples, both old and new. For example, both Congress and the Commission recognize the importance of non-commercial speech, and have used the regulatory power provided by the scarcity rationale to prohibit commercial speech on certain frequencies. *See, e.g.,* 47 U.S.C. §§399a, 399b (prohibiting commercials on public broadcasting); 47 CFR §§73.501, *et seq.* (Noncommercial full-power FM service). For example, the Commission retained the non-commercial educational requirement when it reorganized the 2.5 GHz band into the "Broadband Radio Service" and the "Educational Broadband Radio Service." *In Re Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 Mhz Bands*, 19 FCCRcd14165 (2004). Congress mandated that only non-commercial speakers may avail themselves of the "public interest set aside" on DBS systems. 47 U.S.C. §335(b). Congress exempted noncommercial licenses from auction requirements, relying on the Commission's longstanding policy to limit certain portions of the broadcast spectrum to non-commercial speakers. 47 U.S.C. §309(j)(2)(c). And, particularly in the wake of 9/11, Congress and the Commission have consistently emphasized the importance of setting aside spectrum for public safety uses. *See, e.g.*, Digital Television Transition and Public Safety Act of 2005, Title III of the Deficit Reduction Act of 2005, Pub. L. No. 109-171.

These rules, like the ownership rules, are structural in nature and content neutral. And, like the ownership rules, depend upon the scarcity rationale for their continued vitality. Given the continued reliance of Congress, the Commission, ***and the broadcasters themselves*** on scarcity outside the ownership debate, it would be arbitrary to conclude that scarcity has passed away.

VI. THE NAB'S SUBMISSIONS PROVIDE NO VALID JUSTIFICATION FOR MODIFICATION OR REPEAL OF EXISTING OWNERSHIP RULES.

In its initial Comments, NAB includes a number of economic studies which purport to provide justification for further relaxation of the ownership rules. The attached Report from Dr. Gregory Rose examines these submissions and explains why they fail to make a case for further relaxation of the media ownership rules. *See* Attachment A, *Report of Dr. Gregory Rose On Economic Studies Submitted By the National Association of Broadcasters In the 2006 Quadrennial Regulatory Review* ("Rose Report"). Dr. Rose provides specific criticism of several reports NAB submitted, detailing numerous flaws in their methodology and in their conclusion. Accordingly, the Commission should give these studies minimal, if any, weight.

In addition, Dr. Rose explains that NAB's two apparent choices for defining the media market do not provide an adequate or effective framework for measuring media concentration. As discussed below, NAB appears to provide a choice between an overly expansive view of the "media market place" that treats all possible means of delivering video and audio content as equal and equivalent, or an overly simplistic analysis which sees broadcast television as directly competing with cable television and DBS while broadcast radio competes with satellite radio. As the Commission's own recently released research demonstrates the media market does not fit into such simplistic models. *See* Jerry B. Duvall & Andrew Stewart Wise, "Competing On Quality: Two-Sided Competition, the Sutton Paradigm, and the Multichannel Video Industry; A Graphical Approach, FCC (2006) (complexity of modeling the MVPD market); Jonathan Levy, Marcelino Ford-Livene, and Anne Levine, "OPP Working Paper Series No. 37: Broadcast Television: Survivor In A Sea of Competition," FCC (2002) (continued growth of profitability for broadcast television advertising despite increasing challenge from cable networks and direct broadcast satellite defies expectations of traditional competition model)("OPP Working Papers Series No. 37").

The Rose Report explains that the media marketplace does not behave in accordance with either of the simplistic models NAB has suggested. The Commission therefore has considerable work to do before it can settle on a market framework that will have greater validity than the ill-fated "Diversity Index" the Commission previously attempted. This work must include multiple iterations of proposed models with opportunity for the public to provide useful criticism and additional data to refine the model.

For this reason also, the Commission should give little weight to the studies NAB submitted. Without a proper framework for analysis, NAB's repeated assertions that there is "enough" competition to justify loosening the ownership rules cannot stand.

A. Specific Criticism Of NAB Reports.

The Rose Report painstakingly reviews the critical submissions from NAB. Each has extensive methodological flaws. While all of these flaws raise significant concerns as to the validity of the studies, some stand out as so great that they completely undermine any evidentiary value the studies may have had. Indeed, it appears that NAB has chosen not merely to hide its lack of favorable evidence in a blizzard of paper, it has actively sought to skew what data it does posses in a manner that cannot be squared with even the most generous definition of academic rigor.

1. Fratrik "Media Outlets," NAB Attachment A.

For example, Mark. R. Fratrik's "Media Outlets Availability by Markets," BIA Financial Network (October 23, 2006) ("Fratrik Media Outlets") contains consistent errors in basic mathematics when tabulating the final results. For example, although the relevant table states that the number of full power stations has increased 39%, tabulation of the numbers provided (assuming their accuracy) shows an increase of only 26.16%. *See* Rose Report at 2-3. The Fratrik Media Outlets paper contains such errors in every calculation of a percentage change (except those cases where no change occurs). The errors in calculation ***always*** exaggerate the change in favor of NAB's contention that the number of competing outlets has grown. Such a consistent pattern of "sloppy math" raises significant questions as to the veracity of the study as a whole.

Similarly, although the Fratrik Media Outlets paper purports to select a random and representative sample of DMAs to demonstrate a uniform trend of increase in media outlets, the sample heavily skews to the largest markets and completely omits the smallest markets. Rose Report at 2. The study also fails to provide any explanation for its inclusion of certain outlets in some years but the exclusion of these same outlets in other years for which the author has included reports for full power broadcast outlets. For example, Fratrik includes numbers for low power television stations in some years, but not others. And, although Fratrik admits to the lack of reliable data for DBS programming, Fratrik includes calculations by making a host of unjustified and unexplained assertions. Rose Report at 3-5. Fratrik's discussion of cable and internet availability likewise display similar problems of questionable data sets and unexplained assertions that somehow miraculously come out exactly where NAB wants. Rose Report at 5-6.

Coupled with the "sloppy math" discussed above, it is hard to escape the conclusion that the Fratrik paper has cherry-picked data in an effort to convey a false impression as to the number of outlets available to viewers and listeners.

2. Gunzeraith, "Independent Radio Voices," NAB Attachment B.

Similarly, NAB's effort to use David Gunzeraith, "Independent Radio Voices in Radio Markets," to support the conclusion that a "myriad of independent voices" exists in the broadcast world suffers from overstatement of the papers conclusions and methodological problems with the paper itself. Rose Report at 7-8. Here, the study simply declines to address the relevant ownership questions as to whether a station is genuinely independent and seeks to hide the relationships between stations by focusing on a very limited data set. Even with the data presented, Dr. Rose demonstrates that the market has become far more concentrated and less "independent" than Gunzeraith and NAB suggest. The lack of critical data on horizontal ownership further emphasizes the effort to disguise the real levels of consolidation in radio.

3. Fratrik, "Out of Market Listening and Viewing," NAB Attachment C.

As an initial matter, Prometheus is constrained to point to the irony of NAB's reliance on out-of-market signals as additional sources of diverse views, given NAB's strenuous efforts to limit importation of out-of-market signals by MVPDs. But even accepting this sudden reversal on the importance of distant signals, NAB's contention that out-of-market signals provide an important source of diversity of views lacks merit.

NAB submits Mark R. Fratrik's "A Second Look at Out-of-Market Listening and Viewing: It Has Even More Significance" in support of an argument that the BIA Media Outlets Survey and the FCC Media Outlets Study underestimate the levels of competition and diversity in local media markets because they do not consider "the substantial number of 'out-of-market' radio and television outlets routinely accessed by consumers." NAB at 10. As Dr. Rose explains, the failure of Fratrik to include the data on which Fratrik based his assumptions about market structure, or to explain how he arrived at his conclusions about the importance of out-of-market signals, makes the report impossible to evaluate. Rose Report at 8-9. Especially in light of the methodological and mathematical errors in the other Fratrik paper submitted, the Commission should reject the study and the conclusions unless NAB supplements the record to cure these deficiencies.

Even on its face, however, NAB's effort to rely on Fratrik's analysis of distant signals raises significant methodological concerns. For example, thanks to the successful lobbying efforts of NAB, the ability of DBS or cable operators to import signals from neighboring markets is severely limited. *See* 47 CFR §76.54 (limiting carriage of out of market signals to "significantly viewed" signals and providing method for providing such signal). Fratrik provides no explanation for how to establish the number of viewers that actually receive the out of market signal, given that many viewers that subscribe to an MVPD may not, in fact, receive the out of market signal.

Ultimately, as Dr. Rose concludes:

> What this study amounts to is an NAB strategy of relying on Nielsen and Arbitron data to argue for high competition levels, while throwing in an argument that even Nielsen and Arbitron data do not accurately present real competition levels in local markets. They cannot have it both ways.

Rose Report at 9.

4. Gunzeraith, "Local Market Revenue Statistics" NAB Attachment F.

NAB argues that the increased fragmentation of the video programming market, as evidenced by the loss of overall share by broadcast providers to cable networks, must also demonstrate diminishing profitability. As proof, NAB provides David Gunzeraith, "Local Market Revenue Statistics." As Dr. Rose observes, however, Gunzeraith provides no proof for his conclusions, merely asserting them as if they were self-evident. Rose Report at 10-11.

Because Gunzeraith fails to provide any relevant data to support his claims, the Rose Report confines itself to a theoretical critique. However, NAB's argument that a decline in market share for broadcast programmers has led to a decline in station profitability is directly contradicted by the Commission's own research. *See* Jonathan Levy & Anne Levine, "The Evolving Structure and Changing Boundaries of the U.S. Television Market," FCC (2006) ("TV Market Boundaries") at 19-21;[14] OPP Working Paper Series No. 37, *supra*. This independent FCC research found that, despite the audience erosion described by Gunzeraith, advertising revenue for the broadcast industry substantially increased from 1991 to 2000. Following the downward decline in business cycle triggered by the bursting of the "Internet Bubble," revenue declined sharply in 2001.[15] OPP Working Paper Series No. 37, *supra*. Again, following the general rise in the overall economy, advertising revenue increased (despite the supposed emergence of greater competition from broadband and digital cable) until it regained its previous levels in 2004, and reached new highs in 2005. *Id.*

Further, as Levy, *et al.* explain, actual station profitability varies widely and depends on a variety of factors. While Levy, *et al.*, do not purport to provide a definitive answer to the question

[14]This study evidently was released in draft form. Available at http://www.fcc.gov/ownership/materials/newly-released/evolving060106. pdf.

[15]This study evidently was released in draft form. Available at http://www.fcc.gov/ownership/materials/newly-released/evolving060106. pdf.

of market structure and profitability, their research soundly refutes the simplistic model NAB advances, *i.e.*, that eroding aggregate market share must create a decline in advertising revenue and thus a decline in overall profitability.

It is worth noting that T.J. Ottina, "The Declining Financial Position of Television Stations in Medium and Small Markets" ("Ottina Market Study"), Attachment J to NAB's comments, likewise refutes the connection between declining aggregate audience share and declining profitability. The Ottina Market Study found that top four stations experienced a rise in profitability in nearly every market, and that other stations in other markets also experienced a rise in revenue and profitability.

As discussed below, the Ottina Market Study has profound flaws and is wholly unreliable and contradictory on its face. The fact that NAB submitted two studies that undermine one another, however, underscores the utter failure of NAB to present a coherent view of the media market. Rather, NAB appears to have thrown together a melange of arguments made over the years in a variety of sources and dumped them in the record in the hope that a sympathetic Commission will find ***something*** upon which to rely to relax ownership rules.

5. Studies of Smaller Markets

NAB submits two reports purporting to show that television broadcast stations in smaller markets will not survive unless the FCC relaxes its current ownership rules. Mark R. Fratrik, "Economic Viability of Local Television Stations in Duopolies," BIA Financial Network (Attachment H) and the Ottina Market Study. Dr. Rose provides extensive criticism of these papers, particularly of the Ottina Market Study. Rose Report at 11-16. The Ottina Market Study in particular is noteworthy for two reasons. First, as Dr. Rose explains, the Ottina Market Study represents a blatant and unconscionable effort to cherrypick data that will confirm NAB's argument that stations in small markets need "regulatory relief" to survive.

Second, even given the enormous effort to include only the data most favorable to NAB, the Ottina Market Study fails to make a convincing argument. Even accepting Ottina's underlying assumptions and choice of data, most of the stations studied remained profitable. Rather than proving the need for relaxation, the Ottina Market Study provides considerable evidence for maintaining the Commission's "four station" rule prohibiting joint ownership of any 2 of the top four rated stations in a market. The profitability studies also support the argument that the Commission should maintain the duopoly rule, as profitability even among lower rated stations increased in a number of the markets studied.

B. NAB's Attempts to Define the Media Market Are Overly Simplistic and Contrary to the Record Evidence.

The second part of the Rose Report explores the basic problems with NAB's overall approach and, unfortunately, the overall approach to date by the Commission. Rose Report at 16-21. The Commission lacks a thorough understanding of the video competition market and how its various rules and components interact. Individual Commission studies have highlighted both the complexity of the video market and its tendency to produce market results in direct contradiction to the results expected under simplistic models. *See, e.g.,* Jerry B. Duvall & Andrew Stewart Wise, "Competing On Quality: Two-Sided Competition, the Sutton Paradigm, and the Multichannel Video Industry; A Graphical Approach, FCC (2006) (complexity of modeling the MVPD market); Nodir Adilov & Peter J. Alexander, "Asymmetric Bargaining Power and Pivotal Buyers," FCC (2002) (modeling negotiations between cable programmers and cable operators); OPP Working Paper Series

No. 37 (extensive analysis of market structure and how it produces counter-intuitive results).

Traditionally, the Commission developed its media ownership rules on an *ad hoc* basis in response to perceived needs in a changing media market. *See FCC v. NCCB*, 436 U.S. at 786-787 (1978). The Congressional mandate to conduct a comprehensive review of ownership every two (now every four) years, combined with decisions of the D.C. Circuit finding the hodgepodge of rules and separate justifications arbitrary, *See Sinclair*, 284 F.3d at 148, have forced the Commission to develop an overarching and coherent market framework for its media ownership rules.

At the same time, however, the Commission cannot simply declare that an abundance of potential news and video platforms eliminates the need for any regulation. The Commission made exactly this mistake in the *2002 Biennial Review Order*, cobbling together a "Diversity Index" based on unjustified assumptions contradicted by the record. As a consequence of proceeding wily-nilly into a process that takes years of research, analysis, and criticism, the FCC suffered a complete reversal by the Third Circuit, which sharply criticized the Diversity Index as irrational. *Prometheus*, 373 F.3d at 408.

In the instant proceeding, NAB (and others supporting further relaxation of ownership rules) have again rushed headlong into the process of trying to deregulate without a rigorous, overarching framework to provide a suitable guide. Instead, as Dr. Rose explains, NAB has proposed two equally implausible models.

On the one hand, the endless recitation of websites and services capable of delivering some form of video or audio content appears to replicate the framework soundly rejected by the Third Circuit that all possible sources of video or audio programming are equal, regardless of how people actually use them in the real world. As Dr. Rose explains:

> Certain frameworks, however, can be eliminated even at this stage. The National Association of Broadcasters (NAB) and its commissioned studies have provided two potential overarching frameworks. The first suggests that anything which might distract viewers from broadcast entertainment is a "competing" product. This broad definition would include such diverse goods as DVDs, MP3s, and "web surfing." The idea that anything which draws potential viewers away from watching broadcast television or radio is a competitor in a meaningful economic market is absurd and impossible to operationalize. It would make public libraries, manufacturers of golfing equipment, and child-rearing (not to mention child-conceiving) into regulatable competitors of the broadcasting industry. The Commission itself has repeatedly rejected the efforts of incumbent cable operators to so define the programming market and should do so again here.

Rose Report at 17-18 (footnotes omitted).

The other framework NAB and its supporters propose would simply compare cable television programming, DBS, SDARS, low power television, and other broadcast and subscriber video and audio programming platforms. While this might seem plausible (especially if one excludes something as broad as "the Internet" in favor of a more narrowly tailored definition for something that resembles a traditional real-time programming stream), this overly simplistic definition likewise fails to capture the complexity of the media market.

For example, the complex relationship between cable programming and television broadcasting does not resemble the simplistic "competition for eyeballs" which NAB and other supporters of deregulation portray. *See* OPP Working Paper Series No. 37, *supra*. For example, as Dr. Rose explains:

> While it is an established fact that a majority of viewers would not select cable or satellite television if local broadcast content were not carried, for a substantial minority of viewers, local broadcasting does not constitute a competing good insofar as they prefer a bundle of networked content of a size and complexity which cable and satellite television provides and to which local broadcasting cannot begin to aspire. For this subset of viewers it is not clear that local broadcast television is even in the same market as cable and satellite television. Again, these are complexities which cry out for rigorous study and analysis as a prolegomenon to the Commission's

consideration of an overarching theoretical framework.

Rose Report at 20. Similarly, NAB's insistence on including Low Power Television broadcasters in its analysis as if they competed toe-to-toe with their full power cousins replicates precisely the argument the Third Circuit rejected when it concluded that any market framework that treated the Duchess Community College television station and the ABC affiliate in New York City as equals "would require us to abandon both logic and reality." *Prometheus*, 373 F.3d at 408.

NAB and its supporters apparently continue to believe, despite the detailed explanation of the *Prometheus* Court, that the availability of news and diverse viewpoints has become so ubiquitous that it is self-evident and, accordingly, no more analysis remains needed. But the *Prometheus* Court held exactly the opposite. The FCC must justify any decision with regard to the broadcast ownership rules based on an empirical record and sound analysis. Neither NAB nor the Commission can short-cut the process of developing a suitable framework. NAB's continued insistence on a simplistic framework supported by inconsistent and inconclusive data does not provide the Commission an adequate foundation upon which to act.

VII. THE COMMISSION HAS THE AUTHORITY TO REPEAL THE UHF DISCOUNT, AND THE RECORD SUPPORTS ITS REPEAL.

Several parties rise to the defense of the UHF Discount, arguing that the Commission lacks authority to modify it and that it is in any event justifiable as a matter of policy. *See, e.g.*, Comments of Fox Entertainment Group, Inc. ("Fox") at 32-34, Comments of Univision Communications Inc. ("Univision") at 2-3.

None of the pro-UHF Discount comments offer persuasive arguments to suggest that the Commission lacks authority to modify this outdated policy. For the reasons Prometheus set forth in its initial comments, as well as those advanced by the Network Affiliated Stations Association ("NASA") at pages 3-7 of its comments, the Commission clearly has the legal power to modify and/or repeal the UHF Discount.

Nor do the friends of the UHF Discount present any arguments not fully addressed by Prometheus, Capitol Broadcasting and the NASA with respect to the merits of why the UHF Discount should be repealed. Prometheus does, however, wish to note that a recent law review article effectively sums up the many inconsistencies between the UHF Discount and other established Commission policies. Accordingly, Prometheus presents a passage of this article, with footnotes omitted:

> B. Maintaining the UHF Discount is Inconsistent with a Line of Decisions Eliminating Regulatory Assistance Measures for UHF Television
>
> The Commission's findings throughout the 1980s and 1990s indicated that the gap between UHF and VHF television was drawing to a close. Throughout those decades, the Commission began repealing regulations designed to aid UHF stations based on evidence showing their technical improvement and economic viability. These Orders show the years of findings that spurred the recission of many rules, providing logical support for the elimination of the UHF discount. Inexplicably, the Commission has failed to consider this evidence as grounds to do so.
>
> A close look at the history of FCC rulemakings shows that the Commission began to change its attitude toward protecting UHF stations as early as 1977. In 1960, the Commission sought to protect UHF stations with the UHF Impact Policy, which restricted the competition presented by new VHF television stations to UHF stations. Under the UHF Impact Policy, a UHF station owner could prevent the Commission from granting a license to a new VHF station by proving that building this station would cause the UHF station economic harm. Subsequent technical advancements to television sets and UHF receivers fostered the growth of UHF television, and by the mid 1970s, the Commission substantially relaxed this competitive restriction.
>
> In 1988 the Commission eliminated the UHF Impact Policy, finding that the UHF service had achieved a sufficient degree of comparability with the VHF service to obviate the need for this restriction. Findings showed that UHF television had improved "dramatically," and that the signal disparities between UHF and VHF

service had been largely eliminated. Numerous findings like this kindled a wave of rulemakings in the late 1980s and throughout the 1990s eliminating provisions that were designed to compensate for the technical and market handicaps of UHF television. The Commission found that restricting competition from VHF stations against UHF stations was no longer necessary in the public interest.

In 1995, the Commission repealed the Secondary Affiliations rule, which was created in 1971 to encourage greater access to network programming for then-struggling UHF stations. When the Secondary Affiliation Rule was adopted, there were certain markets with two VHF network affiliates and one UHF independent station. In such markets, the third network would choose to place its programs on one or both of the VHF stations on a secondary basis rather than to affiliate with the UHF station. The provision restricted a station from acquiring a second network affiliation by directing that a network first offer affiliation to an independent, unaffilliated station. The basic goal underlying the Commission's adoption of the Secondary Affiliation Rule was to increase the likelihood that UHF television would develop into a viable and competitive service.

By the mid 1990s, however, the Commission could not ignore the improvement of UHF television, and repealed the Secondary Affiliation Rule based on two major factors: (1) the improvement of UHF reception; and (2) the increased availability of programming and competition for affiliates. The Commission concluded that these developments removed the factors for which the Secondary Affiliation Rule was designed to compensate. It found that independent UHF stations had become more competitive despite their lack of affiliation with the traditional networks and concluded that they no longer appear to need regulatory assistance to attract affiliations of new networks.

The 1995 Review of Broadcast Rules Order is a powerful piece of evidence showing the Commission's acknowledgment of UHF viability and foreshadows a general movement away from regulations assisting UHF television. Specifically, the Commission found a 250% growth in the number UHF stations over the previous two decades as well as a tripling of profits over the previous year. The Order noted the recent elimination of the Secondary Affiliation rule, and previewed its request for comments on the comparability between UHF and VHF television. While this Order did not do away with all regulatory assistance measures for UHF television, the fact that the Commission was seeking comment on the topic is proof of the Commission's inference, almost ten years ago, that UHF television could be healthy enough to stand on its own.

The next UHF assistance measure that met its end in 1995 was the Prime Time Access Rule ("PTAR"). PTAR prohibited network-affiliated television stations in the top fifty television markets from broadcasting more than three hours of network programs during the four prime time viewing hours. This rule was created in 1970 in response to a concern that the three major television networks--ABC, CBS, and NBC--dominated the program production market and inhibited the development of competing program sources. The rule was seen as a way to promote the growth of independent stations by preventing them from competing with Top 50 Market Affiliates in acquiring off-network programs. The Commission found that the rule did not address the technical disparity between UHF and VHF, but rather provided a competitive advantage to independent stations by limiting the programming options available to Top 50 Market Affiliates, even in cases where the affected network affiliates were themselves UHF stations. Ultimately, the FCC concluded that the UHF handicap did not justify continuing the Prime Time Access Rule.

In the Review of the Prime Time Access Rule Order, the Commission recognized the robust growth of UHF television, as well as the vast improvements to quality of the UHF signal, and found that the pervasiveness of cable removes all disparities between UHF and VHF television in almost every home in the nation. The Commission also found that the development of the new networks, such as United Paramount Network ("UPN") and Warner Brothers' WB network were indications of the health of UHF television, as these networks affiliate primarily with UHF stations.

In 1996, Congress passed the Telecommunications Act. This law made sweeping changes to broadcast ownership rules, and mandated that the Commission review its broadcast rules biennially. The Act was explicitly silent with respect to the UHF discount. However, growing evidence of unprecedented media concentration, and the role that the UHF discount played in this concentration, became a concern for the Commission. As a result, in its first Notice of Proposed Rulemaking after the Telecommunications Act of 1996, the Commission sought comments on retaining the discount based on its findings that technological advancements and the high penetration rate of cable may have rendered the provision unnecessary.

In 1998, the Commission reconsidered the status of the UHF discount but concluded that the technical disparity between the signals had not been completely ameliorated and did not justify repealing the UHF discount, despite growing evidence from commentators that the handicaps facing UHF television had largely disappeared. Companies like ABC, CME Press Broadcasting, and Greater Media argued that the pervasiveness of cable, along with vast technical improvements in the industry had almost completely eliminated the reasons for the creation of the UHF discount.

The Commission is currently taking comments regarding the elimination of the discount based on whether or not the language of the 2004 Appropriations Act signifies "congressional approval, adoption or ratification" of the UHF discount. Be-

> yond this consideration of congressional intent, the Commission's posture on the UHF discount in the 2002 Biennial Review suggested that it will consider applying a sunset provision to the UHF discount once the transition to digital television is nearly complete, although it declined to fix a date for that transition. The Commission reasoned that digital television will "substantially equalize" UHF and VHF signals, but failed to explain how this "substantial equality" is more significant or persuasive than the "substantial alleviation" of the technical inequalities the Commission found in 1995. Likewise, the Commission failed to explain why the equality brought to UHF and VHF by digital television is more persuasive than its 2002 finding that UHF and VHF signals were "largely equalized" over cable. This about-face is more inexplicable given that the Commission took comments on eliminating the UHF discount in the 2002 Biennial Review.
>
> The Commission has gathered abundant evidence on the performance of UHF television, the growth of cable, and the effects of its own regulations to foster the growth of UHF stations. Despite the strength of its findings on the health of UHF television, the Commission has failed to apply this evidence to the UHF discount. The improvements to UHF television that justified repealing three prior auxiliary regulations had not disappeared. Nevertheless, the Commission has refused to apply this evidence to the question of retaining the UHF discount. Although the Commission designed each UHF-assistance rule to compensate for a different aspect of the UHF handicap, it should define viability consistently when describing UHF television in the marketplace. From one order to the next, the Commission inconsistently evaluates UHF television stations and the networks affiliated with them. The Commission also inconsistently evaluates the viability of UHF television with respect to each rule. For example, in the orders repealing the Secondary Affiliation Rule, UHF Impact Policy, and Prime Time Access Rule, the Commission asserts the viability of UHF television as justification for its decision. By contrast, the 2002 Biennial Review Order insists that disparities in economic and technical viability continue to exist between UHF and VHF stations sufficient to support the continuation of the UHF discount.

Cecelia Rothenberger, *The UHF Discount: Shortchanging the Public Interest*, 53 Am. U. L. Rev. 689, 712-718 (2004).

Finally, it is notable that none of the parties supporting the UHF Discount even mention the issue of the ***size*** of the Discount. As Prometheus pointed out in its comments at page 9, "there is absolutely no factual basis to support the 50% figure originally adopted in 1985."

IX. REPEAL OF THE RADIO/TV CROSS-OWNERSHIP RULE AND NBCO WOULD

NOT BENEFIT THE PUBLIC INTEREST.

Among the arguments of those seeking repeal of the Commission's cross-ownership rules, Prometheus singles out a few for brief discussion here because they are especially off base.

A. There Is No Need to Repeal the Cross-ownership Rules to Realize Many of the Claimed "Synergies" of Common Ownership.

Several newspaper industry parties and Clear Channel argue at length about the claimed synergies that come with common ownership because this allegedly enables them to share staff and other newsgathering resources. *See, e.g.*, Media General at 7-10, Clear Channel at 83-84, NNA at 66-79, Comments of Gannett Co., Inc. ("Gannett") at 26-29.

These claims do not support repeal or relaxation of the NCBO or TV/radio crossownership rules. What these parties do not acknowledge is that most, if not all, of the claimed benefits of combined operations can be obtained without the loss of diversity that comes with common ownership. The ability to realize these synergistic effects without common ownership is not speculative, but is proved by everyday experience from dozens of cities.

More than 100 local TV and radio stations ***not*** under common ownership realize the same kind of benefits by forming partnerships with each other to share information and resources. According to the Ball State University's Center for Media Design, "Half of the television station news operations in the United States have a news partnership with a newspaper and those partnerships exist across market size." *Television Newsroom Partnership Survey, Executive Summary* (June 2005) ("Ball State Report"). Thus, while Gannett touts the benefit of its common ownership of a TV station and a newspaper in Phoenix, Gannett at 26-29, it does not need to own a TV station to obtain essentially similar synergies for the Knoxville *News-Sentinel* because it has an agreement to share resources with station WBIR. In fact,

> cooperation is the norm for Gannett-owned WBIR and the News-Sentinel. Reporters collaborate on four big projects a year, newspaper editors appear regularly on the station's newscasts, and managers are in daily contact.

Allison Romano, *Newspapers and Stations Try Cross-Pollination*, Broadcasting and Cable, July 25, 2005, p. 16. *See also*, Michael Roberts, *Lets Get Together*, Westword, October 31, 2002.

There are numerous radio stations that have similar arrangements with local newspapers not under common ownership. An unusual, and prominent, example of such relationships is the Washington Post's agreement to provide much of the content for a radio station in Washington, D.C.

According to the Ball State Report, "news directors report their partnerships frequently perform many functions associated with convergence: cross-promotion of partners' content and some sharing of daily news lineups. Ball State Report at 1. Thus, if the concern is that the public interest can better be served through the efficiencies and synergies of cooperation, repeal or modification of the NBCO rule is not necessary to achieve this goal.

B. The Radio/TV Cross-Ownership Rule Must Be Maintained to Ensure Competition, Localism and Diversity.

Clear Channel urges the Commission to repeal the restriction on radio-television cross ownership. Clear Channel at 80-90. According to Clear Channel, the rule is not necessary since it does not promote competition, localism or diversity.

With respect to competition, Clear Channel argues that since advertisers do not consider radio and television as "adequate substitutes" regardless of the size of the market, they do not compete with each other for advertising revenue. Clear Channel at 82-83. While advertisers currently may not see radio and television as substitutes, that is not a sufficient condition for concluding that the radio and television markets are distinctly separate. The behavior of conglomerates could change advertisers' incentives. In particular, a media conglomerate might sell bundles of radio and television ad space. If the conglomerate chooses its prices strategically (*i.e.*, in a way that enables the conglomerate to make more money but still provides lower prices to advertisers), these bundles could lead more advertisers to use the conglomerate's outlets than the non-conglomerate competitors.

Moreover, despite Clear Channel's criticism of the notion that the size of markets makes cross-ownership rules unnecessary, it is clear that the number of outlets matters a great deal for radio. The number of stations in a market varies widely across the 297 Arbitron markets in the United States. Concentration tends to be much higher in small markets. *See* False Premises, False Promises: A Quantitative History of Ownership Consolidation in the Radio Industry, Future of Music Coalition (December 2006), Chapter ; George Williams and Scott Roberts, *Radio Industry Review 2002: Trends in Ownership, Format and Finance*, FCC Media Bureau Staff Research Paper at 5-6 (September 2002). Thus the competitive harms from conglomeration could be much worse in small markets.

According to Clear Channel, localism would benefit by the repealing the cross-ownership rules. Clear Channel at 83-84. Clear Channel assumes that economies of scale do actually exist in media, and therefore, will benefit localism. For instance, Clear Channel argues that radio and television newsrooms could pool resources. Clear Channel at 83. However, in actuality radio newsrooms have shrunk considerably. Thus, there are not necessarily additional local news-radio staffers capable of engaging in more reporting.

Further, Clear Channel asserts that cross-ownership will expend the resources available for local news. Clear Channel at 84. However, there is no guarantee that a conglomerate having more resources will actually spend more resources on local television reporting. Rather, the conglomerate simply has the option to spend more. Since Clear Channel provides no conclusive evidence about whether the existing cross-owned stations actually provide more news, more local news, or higher-quality news, it simply cannot assume that is or would be the case.

Clear Channel also assumes that because "' media owners face increasing pressure to differentiate their products, including by means of differing viewpoints,'" promoting diversity is not longer a concern. Clear Channel at 85, quoting *2002 Biennial Review Order*. However, Clear Channel ignores the idea that the source of a viewpoint also matters. Viewpoint diversity does not solely occur when the same speaker offers two sides of the same issue. Rather, true viewpoint diversity can only exist when two truly independent speakers articulate their views and analysis.

Finally, Clear Channel claims the current radio-television cross ownership restriction is "inconsistent with Congress' decision in the 1996 Act to repeal the closely analogous cable/broadcast cross-ownership prohibition, as well as the D.C. Circuit's decision in *Fox* vacating the FCC's decision to retain its separate cable/broadcast cross-ownership regulation." *See* 87-88. In the 1996 Act, Congress eliminated the statutory broadcast station-cable cross ownership restriction. Yet, while Congress expressly chose to eliminate the Commission's statutory broadcast station-cable cross ownership restriction (and the network-cable cross ownership rule), it made a conscious decision to retain the restriction on television-radio cross ownership. As such, there is nothing inconsistent in the Commission's retention of the current radio-television cross ownership restriction.

Respectfully submitted,

/s/

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January 16, 2007

ATTACHMENT A

REPORT OF DOCTOR GREGORY ROSE
ON ECONOMIC STUDIES SUBMITTED BY THE
NATIONAL ASSOCIATION OF BROADCASTERS
IN 2006 QUADRENNIAL REGULATORY REVIEW
MB DOCKET NO. 06-121

1. My name is Dr. Gregory Rose. I am an independent consultant working with Media Access Project on matters pertaining to the 2006 Quadrennial Regulatory Review, MB Docket No.06-121.

2. I have analyzed the studies commissioned and submitted by the National Association of Broadcasters (NAB) in support of its comments in the MB 06-121 proceeding, examining the methodology of these studies and whether or not they (1) are internally consistent and coherent in the reporting and use of data and (2) support the contentions of the NAB as claimed. Finally I have examined the question of whether the NAB and these studies present a theoretically coherent and consistent and empirically defensible account of market structure and market power.

3. The NAB cites Mark. R. Fratrik, "Media Outlets Availability by Markets," BIA Financial Network (October 23, 2006),[1] as confirmatory evidence that previously submitted studies[2] indicating "the growth of traditional broadcasters and multichannel provides have resulted in a proliferation of outlets available to consumers nationally and

[1] Comments of the National Association of Broadcasters in MB Docket No. 06-121, (filed October 23, 2006), attachment A.
[2] E.g., Comments of Hearst-Argyle Television, Inc., in MM Docket Nos. 01-235 and 96-197, 5-10 (filed December 3, 2001); David Pritchard, , Appendix A, Comments of Viacom Inc. in MM Docket Nos. 01-317 and 00-244 (filed March 27, 2002); and Scott Roberts, Jane Frenette, and Diane Stearns, *A Comparison of Media Outlets and Owners For Ten Selected Markets* (1960, 1980, 2000), September 2002.

in local markets"[3] and have changed dramatically the media market. This study exhibits serious methodological problems and exhibits a general failure to provide theoretical basis for its claims about market structure.

The study claims to be based on a random selection of twenty-five Nielsen DMAs.[4] However, the "randomness" of this sample is immediately suspect upon examination: eighteen of the DMAs are from the top two quartiles of DMAs (nine each), while three are from the third quartile, and four from the fourth. There appears to be a systematic bias toward the upper end of the distribution of the DMAs (72% of cases) in the study's selection which calls into question the representativeness of the data for the presumed market as a whole.

The study's analysis of local over-the air television stations and low-power television stations is both incoherent and misleading. Table 1, "Number of Local Television Station and Owners in Selected Markets," purports to show changes in the number of stations from 1986 to 1998 to 2006, percent change in number of stations, number of station owners in 2006, and number of low-power TV stations in 2006 in these twenty-five markets. The impression is that there has been huge growth in the number of outlets since deregulation and ownership consolidation: an average increase of 39% in twenty years in full-power stations and an average increase of 28.21% in low-power stations. There appear to be serious computational errors in the table: e.g., an increase from 18 to 21 stations is 14.29%, not 16.7%; such errors occur in every measure of

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[3] Comments of the National Association of Broadcasters in MB Docket No. 06-121, (filed October 23, 2006, 4.
[4] Mark. R. Fratrik, "Media Outlets Availability by Markets," BIA Financial Network, in Comments of the National Association of Broadcasters in MB Docket No. 06-121, (filed October 23, 2006), attachment A, 2.

percent change in the table except the three cases in which there is no change. Every error is in a direction which supports the NAB's contention of a massive change in market structure. The actual average change in number of full-power stations over the twenty years is 26.16%, not 39%. This sort of careless imprecision calls the entire study into question. Examination of the data also discloses that the bulk of the increase in full-power stations took place in the period 1986-1998: 25.74%. This suggests that the difference is principally a function of the Commission's increased provision of licenses rather than any market-driven structural changes in the full-power TV market. Furthermore, there are no comparative data on station ownership for 1986 and 1998, so the implication that the increase in the number full-power TV stations is somehow related to FCC policy on station ownership is utterly unsubstantiated. The recitation of the number of low-power TV stations in 2006 also has no comparanda for the earlier years presented, which makes the implication of a huge impact on market structure equally unsubstantiated.[5] This is part of a poorly theoretically conceptualized notion of market structure which will be discussed below.

The study's presentation of the situation in local radio stations is equally incompetent. Examining Table 2 – "Number of Local Radio Stations and Owners in Selected Markets" – which presents claimed numbers of stations in 1986, 1998 and 2006, percent change from 1986 to 2006, and number of owners in 2006,[6] one begins to despair

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[5] No data is provided to support the contention that there were an average of 8.4 low-power stations in 1986. If this were not a function of concentration in a handful of DMAs in 1986, it is difficult to explain why the earlier low-power TV distribution is not presented in the table with the full-power TV numbers.
[6] Mark. R. Fratrik, "Media Outlets Availability by Markets," BIA Financial Network, in Comments of the National Association of Broadcasters in MB Docket No. 06-121, (filed October 23, 2006), attachment A, 6.

of the author's ability to do simple math. A change from 146 local radio stations in 1986 to 197 is 25.89%, not 34.9%. Computational errors are found in every reported pe rcent change in every DMA. Once again, the errors are uniformly in a direction which supports the NAB's contention. The average change from 1986 to 2006 is 31.22%, not 42.3%. Again the principal change in number of stations occurs in the period 1986 -1998, 23.88%. And, once more, no comparanda for the earlier years is offered for the 2006 ownership data, rendering it useless for analysis.

The study's treatment of satellite delivered programming is an exercise in blue smoke and mirrors which reflects its general methodological limitations. It admits the availability of no explicit data on market penetration of these services and then engages in an estimation which leaves one gasping at its flight of fancy: national numbers of number of channels and subscribers are used to derive the average number of added channels; the author then assumes that penetration of these services is evenly distributed across DMAs to derive DMA penetration from the total number of U.S. households. He arrives at an estimate of 15.1 satellite radio channel available in all the selected DMAs and "20.7% more radio services over and above the average number of local radio stations discussed previously."[7] That fact that there is no available data on market penetration makes this hypothesizing completely arbitrary.[8] Given the apparent computational failures in the study's tables, even if one could overcome the unrealistic

[7] Ibid., 7.

[8] A more realistic attempt to model a hypothesized distribution of satellite radio penetration would have been to focus on the distribution of high-end car and truck sales, the means by which the service was initially primarily deployed, and using those figures per DMA to estimate penetration.

assumptions of the estimation method, one can have very little confidence that these estimates represent anything found in reality.

The study's treatment of satellite- and cable-delivered programming is a mixed bag, as shown in Table 3, "Penetration Rates (Percentages) of Cable and ADS in Selected Markets," which presents cable penetration in 1986, 1998, and 2006, cable and ADS penetration in 2006, and percent change in penetration from 1986 to 2006.[9] One is relieved to see that the average percent increase in cable penetration from 1986 to 2006 is correctly reported in the text as 52% to 86.5%. However, the percent change 1986-2006 column in the table once more has significant computational errors for the DMAs. It is also confusing that the percent change column does not indicate whether it is comparing the 1986 cable penetration percentages to the 2006 cable penetration percentages or the 2006 cable and ADS penetration. In any case, in the Boston DMA a change from 56% to 86% is a change of 30% and a change from 56% to 94% is a change of 38%; neither is a change of 39%. More troubling is the data presented for the percentage change from 1998 to 2006, which shows decreases in cable penetration in all but 7 of the 25 DMAs, ranging from a 40% decrease in the Harlingen-Weslaco-McAllen-Brownsville, TX DMA, a 33% decrease in Quincy, IL-Hannibal, MO-Keokuk, IA DMA, and a 26% decrease in the Sacramento-Oakland-San Jose, CA DMA to a 1% decrease in the North Platte, NE DMA. These data are even more puzzling when compared to the figures in the percentage of cable and ADS penetration column, which show 60%, 66%, 84%, and 94% cable and ADS penetration, respectively, in these DMAs. Either ADS providers have

[9] Ibid., 9.

secured massive gains of which they are unaware or the data in these columns is hopelessly misreported.

The study's examination of the change in number of cable channels available in the selected DMAs (Table 4) is remarkably free of error.

In discussing the role of the internet in market structure [10] the study relies on estimates of number of adults who have online access in the selected markets provided by The Media Audit in March 2006. Given the notorious difficulties in making such estimates, it would be useful for the study to have addressed the methodology by which these estimates were generated. However, it appears to take the data at face value, leaving little room for any decision as to their reliability. It is difficult to move from an estimate of the number of adults who have online access in a DMA to a measure of this access as a competitor to broadcast television or radio, since having access does not imply that every adult in a household uses that access, nor is it a measure of how much time is spent online by these adults. Furthermore, the data beg the question of whether it is theoretically justifiable to regard internet usage as part of media market structure, as we shall see below.

The study's discussion of daily (Table 6) and weekly (Table 7) newspapers is, frankly, trivial and fails to note that the general decrease in number of daily newspapers has been a function of media consolidation. Furthermore, there is no evidence adduced as to the ways in which weekly newspapers might present competition to broadcast television and radio.

[10] Ibid., 12-13.

4. The NAB presents David Gunzeraith, "Independent Radio Voices in Radio Markets," National Association of Broadcasters, August 2006,[11] as evidence that "despite recent ownership changes within the broadcast industry, myriad independent voices remain and competition is robust."[12] This is a misrepresentation of the brief study and its implications. The study is also deceptive about the implications of station ownership for market structure in two ways. First, by concentrating on number of standalone stations or of pairs of stations in an Arbitron-rated market it ignores the numbers of stations held by a single owner where more than two stations are owned in that market. Second, the study makes no mention of whether the owner who holds a standalone or two stations in a given market also owns stations in other markets; this ignores entirely the effects of horizontal concentration across markets. Even on its own terms the study's presentation is intentionally misleading. Using the same BIA Media Access Pro ownership data upon which the study relies, it becomes apparent that there are 140 Arbitron-rated markets in which a single owner owns 3 three stations (47.14% of Arbitron-rated markets), 167 in which 4 stations are owned by a single owner (56.23%), 135 in which 5 stations are owned (45.45%), 125 in which 6 stations are owned by a single owner (42.09%), 54 in which 7 stations are owned by a single owner (18.18%), 26 in which 8 stations are owned by a single owner (8.75%), 11 in which 9 stations are owned by a single owner (3.70%), 5 in which 10 stations are owned by a single owner (1.68%), 2 in which 11 stations are owned by a single owner (.67%), and 1 in which 14 stations are owned by a single owner (.34%). All told, there are 251 Arbitron-rated markets of 297 in which a single owner

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[11] David Gunzeraith, "Independent Radio Voices in Radio Markets," National Association of Broadcasters (August 2006) in Comments of the National Association of Broadcasters in MB Docket No. 06-121, (filed October 23, 2006), attachment B.
[12] Ibid, 9.

owns three or more stations: a total of 84.51%. This is hardly the model of independent and diverse voices in radio which the study and the NAB claim. The failure to address the question of the number of stations owned by a single owner across markets is even more damning, since precisely this sort of horizontal concentration has become the principal form of media concentration in radio broadcasting; one can only conclude that it is not addressed because accurate data would hardly support the NAB's position.

5. The NAB presents M. Fratrik, "A Second Look at Out-of-Market Listening and Viewing: It Has Even More Significance," BIA Financial Network (October 23, 2006)[13] in support of an argument that the BIA Media Outlets Survey and the FCC Media Outlets Study further underestimate the number of outlets – and thus the levels of competition and diversity – in local media markets because they do not consider the substantial number of 'out-of-market' radio and television outlets routinely accessed by consumers."[14] The study is essentially a critique of Arbitron and Nielsen decisions about designation of geographical boundaries of markets, suggesting that their reporting fails to capture significant data about out-of-market listening and viewing habits of consumers, particularly in the smaller markets, updating a 2003 study.[15] Evaluation of this study is particularly hampered by the author's failure to provide the data on which his analysis of in-market and out-of-market accessing of radio and TV outlets is predicated. This is

[13] M. Fratrik, "A Second Look at Out-of-Market Listening and Viewing: It Has Even More Significance," BIA Financial Network (October 23, 2006) in Comments of the National Association of Broadcasters in MB Docket No. 06-121, (filed October 23, 2006), attachment C.

[14] Comments of the National Association of Broadcasters in MB Docket No. 06-121, (filed October 23, 2006), 10.

[15] M.R. Fratrik, "Out-of-Market Listening and Viewing: It's not to be Overlooked," submitted as Attachment A, NAB Comments in MB Docket No. 02-277 (filed Jan. 2, 2003).

especially troubling given the methodological and data reporting problems evident in the other study by Dr. Fratrik considered above.[16] In some respects the argument is clearly specious, e.g., out-of-market national network and local/regional programming channel viewing is clearly reported by Nielsen, since the author would not otherwise be able to quantify it by market. The argument that out-of-market listening and viewing – both national and adjacent-market -- should be regarded as significant forms of competition to local TV and radio broadcasts is more difficult to evaluate for several reasons. First, the author provides no test statistics the significance of which can be evaluated. The suspicion is that what the author means by "significant" is simply "larger than hitherto expected." Since this phenomenon is by the study's own admission primarily confined to the smallest Arbitron-rated markets and Nielsen DMAs, there is a prima facie expectation that, in the absence of statistical tests, significance in a majority of markets is unlikely to be the case. Second, the argument is embedded in theoretically-questionable assumptions about market structure which will be discussed below. What this study amounts to is an NAB strategy of relying on Nielsen and Arbitron data to argue for high competition levels, while throwing in an argument that even Nielsen and Arbitron data do not accurately present real competition levels in local markets. They cannot have it both ways.

[16] Mark. R. Fratrik, "Media Outlets Availability by Markets," BIA Financial Network, in Comments of the National Association of Broadcasters in MB Docket No. 06-121, (filed October 23, 2006), attachment A.

6. The NAB presents David Gunzeraith, "Local Market Revenue Statistics," National Association of Broadcasters (August 18, 2006)[17] to introduce two arguments into the record. The first is trivial, namely, that "not only are smaller TV markets more challenged in the advertising marketplace simply because they have fewer eyeballs to sell to prospective advertisers, but also, the viewers they do have are less valued by advertisers on a per household basis than are those in the larger markets."[18] This has been known for some time. The second argument is for the existence of "an ongoing erosion of advertising market share from local broadcast to local cable in recent years, a circumstance that further challenges the financial health of local television broadcasting."[19] The claim of a change in cable share of local TV revenues between 1999 and 2004 is non-controversial. However, it does not in itself establish the existence of a significant challenge to the financial health of local TV stations. Unless operating costs have risen substantially and systematically – and there is no evidence presented for this claim – even if local TV advertising revenues have risen sufficiently in the examined period, the financial health of local broadcasting stations may not have been significantly affected merely by a growth in local cable revenue. Indeed, even a reduction in the profitability of a station which was already highly profitable would not necessarily make that station unprofitable. The study's argument requires presentation of data about local station profitability in 1999 and 2004 to be persuasive, and this data is neither reported nor analyzed by the study. Furthermore, absent the presentation of data to the contrary,

[17] David Gunzeraith, "Local Market Revenue Statistics," National Association of Broadcasters (August 18, 2006) in Comments of the National Association of Broadcasters in MB Docket No. 06-121, (filed October 23, 2006), attachment F.
[18] Comments of the National Association of Broadcasters in MB Docket No. 06-121, (filed October 23, 2006), 3.
[19] Ibid., 5.

there is no way to rule out the possibility that the disparity between local cable and local broadcast advertising revenues is an artifact of local broadcast advertising having been maximized out.

7. The NAB presents M. Fratrik, "Over-the-Air Radio Service to Diverse Audiences," BIA Financial Network (October 23, 2006), [20] in support of the contention that "the multiple ownership of radio stations in local markets has enabled group owners to offer more varied and more targeted programming to listeners." [21] The study, however, while describing trends in programming, fails to establish a causal relationship between these programming trends and patterns in station ownership, merely baldly asserting it. Additionally, the study provides no raw data against which to check its summaries and aggregations, a disturbing fact given the patent computational errors in other studies by this author discussed above.

8. The NAB presents M. Fratrik, "Economic Viability of Local Television Stations in Duopolies," BIA Financial Network (October 23, 2006), [22] in support of the contention that "[m]edium and small market television stations have experienced substantial declines in the viewing shares of their late-night newscasts over the past ten years." [23] It should be noted that the study samples only duopolies in the 51-75, 76-100, 101-125, 126-150, and 151+ markets cohorts. The study explicitly ties viability of local

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[20] M. Fratrik, "Over-the-Air Radio Service to Diverse Audiences," BIA Financial Network (October 23, 2006) in Comments of the National Association of Broadcasters in MB Docket No. 06-121, (filed October 23, 2006), attachment G.
[21] Comments of the National Association of Broadcasters in MB Docket No. 06-121, (filed October 23, 2006), 40.
[22] M. Fratrik, "Economic Viability of Local Television Stations in Duopolies," BIA Financial Network (October 23, 2006) in Comments of the National Association of Broadcasters in MB Docket No. 06-121, (filed October 23, 2006), attachment H.
[23] Comments of the National Association of Broadcasters in MB Docket No. 06-121, (filed October 23, 2006), 52.

production primarily to the downward trend of viewing share "restricting the amount of advertising revenues to support this programming"[24] without examination of whether stations are able successfully to subsidize this programming with advertising revenues from other programming or, more importantly, of the exact relationship between advertising revenues and particular levels of local coverage (i.e., whether these local news revenues previously been subsidizing other station operations in addition to local news programming and, thus, their reduction need not impact local news programming until a specific threshold has been reached). The absence of such examination makes it impossible to evaluate whether local news programming is, in fact, imperiled by this trend. Similarly, the absence of data about the effects of reduced viewer share on actual station revenue makes it impossible to deduce the author's desired conclusion from his arguments. Furthermore, with the exception of an uptick in the 101-125 markets cohort, the decline in viewing share itself declines the smaller the market, a phenomenon which goes unexplained and which may bear significant implications for local news programming in the smallest markets.

9. The NAB presents T.J. Ottina, "The Declining Financial Position of Television Stations in Medium and Small Markets," National Association of Broadcasters (August 2006),[25] in evidence as "on the financial position of television stations in medium and small markets [which] clearly demonstrates the perilous financial situation of stations,

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[24] M. Fratrik, "Economic Viability of Local Television Stations in Duopolies," BIA Financial Network (October 23, 2006) in Comments of the National Association of Broadcasters in MB Docket No. 06-121, (filed October 23, 2006), attachment H, 7.

[25] T.J. Ottina, "The Declining Financial Position of Television Stations in Medium and Small Markets," National Association of Broadcasters (August 2006) in Comments of the National Association of Broadcasters in MB Docket No. 06-121, (filed October 23, 2006), attachment J.

especially lower-rated ones, in many of these markets [DMAs ranked 51-175]."[26] The argument is deployed in support of the NAB's contention that the FCC's duopoly rule should be changed to allow for formation of duopolies in all markets.

It is difficult to know where to begin an evaluation of this study, since it contains so many serious methodological errors, and errors so gross it is difficult to imagine how they could have escaped scrutiny in the review process at NAB since the study was generated in-house, that it can be characterized as little less than a fraud perpetrated on the Commission. The study selects its sample of data from network-affiliated stations from the years 1997, 2001, and 2003. The reason for selection of these years is explained by the NAB: "None of these years involved a national election or the Summer Olympics to avoid the sometimes inconsistent impact of advertising associated with these events."[27] In other words, the selection strategy involved excluding observation of regularly-occurring advertising revenue maxima. The avoidance of 1999 is not explained by the NAB, but it is consistent with the NAB's exclusion of even-numbered years: 1999 was the maximum of the upswing of a business cycle which began to downturn in mid-2000 and, thus, stations enjoyed the maximum advertising revenue for the seven-year period. Again, a maximum was arbitrarily excluded. There can be several reasons for excluding observations, most notably normalization of a data distribution. However, such normalization involves dropping outlier observations from both ends of the distribution, maxima and minima. These exclusions of observations aim at removing inconvenient maxima so as to depress the sample mean toward the minima: it is an intentional attempt

[26] Comments of the National Association of Broadcasters in MB Docket No. 06-121, (filed October 23, 2006), 92-93.
[27] Ibid., 93 n.217.

to present a false impression by excluding data which would show the true financial situation of these stations. It is more than gross incompetence; it is using statistics to lie to the Commission, since the cyclical revenue provided by national elections and the Olympics is very much touted by broadcasters in attempting to interest financial markets in their business model. The NAB then reports further excluding markets in which "both the highest-rated and lowest-rated affiliated stations" did not participate in the survey.[28] This is suspicious, given the systematic exclusion of years of income maxima; without an explicit listing of which markets are included from each market ranking it is impossible to determine whether the highest revenue-producers among the highest-rated stations were systematically excluded to depress the mean and fit the data to a desired trend line as was done with the year selections. This is complicated further still by the NAB's decision to vary sample size both by year and by market size so that it is impossible to determine how many of the same stations are being observed longitudinally. No explanation is provided for the sharp drop in station participation in the survey from 1997 to 2001. Unfortunately the research design gets worse. Four variables were selected for capture – mean cash flow, mean pre-tax profit, mean network compensation, and mean news expense – and treated as proxies for station profitability. However, no effort is made to explain the specific relationship of each variable to overall station profitability, nor was there any attempt to include a measure of station profitability itself. The study takes no account of the relationship between profitability and whether a station is in fact profitable, since the effects of a reduction in profitability on whether a station makes a

[28] T.J. Ottina, "The Declining Financial Position of Television Stations in Medium and Small Markets," National Association of Broadcasters (August 2006) in Comments of the National Association of Broadcasters in MB Docket No. 06-121, (filed October 23, 2006), attachment J, 3.

profit can vary substantially, given the actual rate of return. This appears to be both a theoretical shortcoming and part of a systematic attempt to use ambiguity as misdirection. Further, the study does not explicitly address one-time DTV transition costs,[29] which occurred primarily in the latter period of the survey and which artificially depress the profitability trend of stations if their non-recurrence is not explicitly noted. Finally, no station-level data accompanies the study, making it impossible to determine whether computational and other errors occurred in the data aggregation.

Ironically, despite all the methodological obfuscation, the study fails to support the NAB's contention of a perilous trend in station profits for all medium and smaller markets. In the markets 51-75 cohort, both mean cash flow and mean pre-tax profits increased from 1997 to 2003 for highly-rated stations.[30] In the markets 76-100 cohort mean cash flow increased for higher-rated stations, while mean pre-tax profits increased for both higher- and lower-rated stations, in the latter case by an astounding 243.3%.[31] In markets cohort 151-175 higher-rated stations increased mean cash flow (16.6%) and mean pre-tax profits (155.5%).[32] The study's analysis takes little note of these contrary trends. It is only in markets cohorts 101-125 and 126-150 that a uniformly negative trend

[29] This failure is particularly odd, given the NAB's insistence that "[t]he Commission must consider the costs of DTV transition as a factor when addressing the need to permit competitively viable ownership structures in local television markets" [Comments of the National Association of Broadcasters in MB Docket No. 06-121, (filed October 23, 2006), 90].
[30] T.J. Ottina, "The Declining Financial Position of Television Stations in Medium and Small Markets," National Association of Broadcasters (August 2006) in Comments of the National Association of Broadcasters in MB Docket No. 06-121, (filed October 23, 2006), attachment J, 5.
[31] Ibid., 6.
[32] Ibid 9.

is observed. Clearly something more complex is going on in many of the selected markets which even this study's throttling of the data cannot disguise.

10. The question of the proper market framework for analysis remains central to resolving the issues in this proceeding. The Commission has long struggled with this very question. Initially, the Commission did not attempt the theoretical project of modeling an overarching market framework. Rather, it developed its rules piecemeal in response to specific changes in specific market segments; e.g., the Commission created the Newspaper-Broadcast cross-ownership rule in part in response to the increasing concentration in the daily newspaper market. Because a large number of markets went from more than one daily paper to a single daily paper in a relatively short period of time, the Commission determined that it would no longer serve the public interest to allow one entity to control a broadcast voice and what was rapidly becoming the only daily newspaper.[33]

Over time, however, the Commission has been compelled by Congress and the courts to develop an overarching framework rather than employ specific frameworks for specific rules. The Section 202(h) command that the Commission evaluate the rules in light of "competition" to determine whether they continue to serve the public interest, and to modify them if necessary to ensure that they continue to do so, of necessity requires the Commission to model the appropriate competitive framework in its determinations. Further, in *Sinclair Broadcasting Group, Inc. v. FCC*,[34] the court found it inherently arbitrary -- absent explanation by the Commission -- to consider only television stations

[33] *See FCC v. National Citizens Committee for Better Broadcasting*, 436 U.S. 775, 786 - 787 (1978).
[34] 284 F.3d 148 (D.C. Cir. 2002).

as "voices" for purposes of the duopoly rule but to consider other sources of information "voices" for purposes of other rules.[35]

As a consequence, in the 2002 Biennial Review, the Commission sought to develop the appropriate framework. The result was the ill-fated "Diversity Index," which the *Prometheus* court rejected as producing results so arbitrary that, in the words of the court, it "would require us to abandon both logic and reality."[36]

The Commission's experience with the Diversity Index underscores the complexity of the competition analysis. A successful theoretical framework must derive from a proper understanding of the empirical reality, which includes not merely some limited subset of viewer behavior data, but an overall appreciation of how all aspects of the market treat the variety of products loosely grouped together as "news, information and entertainment." Furthermore, it must admit the considerable level of empirical complexity which challenges attempts to fit the competitive dynamics of media markets into relatively simplistic economic models. Rather, the Commission must expect that the process of constructing an overarching framework cannot possibly take place until it has analyzed the data submitted, conducted its own studies, and then subjected its proposed analysis of market structure to further review and refinement.

Certain frameworks, however, can be eliminated even at this stage. The National Association of Broadcasters (NAB) and its commissioned studies have provided two potential overarching frameworks. The first suggests that anything which might distract viewers from broadcast entertainment is a "competing" product. This broad definition

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[35] *Id*. at 162-165.
[36] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 408 (3rd Cir. 2004).

would include such diverse goods as DVDs, MP3s, and "web surfing."[37] The idea that anything which draws potential viewers away from watching broadcast television or radio is a competitor in a meaningful economic market is absurd and impossible to operationalize. It would make public libraries, manufacturers of golfing equipment, and child-rearing (not to mention child-conceiving) into regulatable competitors of the broadcasting industry. The Commission itself has repeatedly rejected the efforts of incumbent cable operators to so define the programming market and should do so again here.[38]

This is not to say that, for example, there might not be specific subsets of internet-related products which function like competitors to broadcast programming in a traditional economic market exhibiting strict substitutability of goods – some forms of internet provision of news services and streaming video come to mind – but inclusion of thirty-second clips from YouTube does not meet even the most minimum standards of such an economic analysis. Separating a very little wheat from the mountain of chaff in the NAB's mélange of suggested "competitors" cries out for considerably more rigorous and exhaustive study than has been presented heretofore.

Second, the NAB and its studies also propose a more conventional market model involving cable and satellite television, low-power television, and satellite radio as competitors of broadcast television and radio. While initially plausible in some dimensions, this proposed market structure obscures complexities which are highly

[37] There are other conceptual problems with this framework which arise from the lack of an economically-compelling construal of the cognitive variables involved in multitasking: people do watch TV and web-surf at the same time.
[38] *In re Commission's Cable Horizontal and Vertical Ownership Limits*, 20 FCC Rec 9374, 9412 (2005).

relevant to analysis of market power and ignores aspects of empirical reality which are likely to be the real determiners of actual market structure.

An excellent example of complexity uncaptured in a conventional market analysis is the relationship between broadcast television and cable and satellite television providers. Broadcast television stands both as an alternative to, and a facilitator of, cable and satellite television. In the latter role it has proved pivotal. The experience of both DBS and cable television suggests that an inability to carry local broadcast television content would have made both industries economically unviable. Broadcast television's role as a content provider to cable and satellite television makes it as least as much a key element of the chain which sustains cable and satellite television economically as it does a competing alternative; indeed, the economic consequences of this shift toward content provision are likely to become dominant for the broadcast industry over time. The NAB's conventional construal of market structure tends to ignore this fundamentally changed dynamic and in doing so minimizes the potential economic damage broadcasting can suffer at the hands of cable and satellite providers.

The case of local cable and satellite advertising revenues is particularly relevant. The NAB's construal of the decline of local broadcast advertising revenues as evidence of the reduced competitive capability of local stations versus cable and satellite providers ignores the real dynamic. Despite the fact that access to local broadcast content is a sine qua non of cable and satellite television's economic viability, cable and satellite providers are able to use their broader market power to engage in what amounts to rent seeking on local broadcast content by imposing an additional revenue stream through selling additional local advertising on that content. If broadcasters are to be required to provide that content, regulation of cable and satellite television providers' rent seeking on the fruits of that requirement seems at a minimum just.

There are additional problems with the NAB's conventional analysis of market structure. Idiosyncracies of viewer preference set make it by no means clear that for all viewers broadcast television and cable or satellite television are directly substitutable goods. While it is an established fact that a majority of viewers would not select cable or satellite television if local broadcast content were not carried, for a substantial minority of viewers, local broadcasting does not constitute a competing good insofar as they prefer a bundle of networked content of a size and complexity which cable and satellite television provides and to which local broadcasting cannot begin to aspire. For this subset of viewers it is not clear that local broadcast television is even in the same market as cable and satellite television. Again, these are complexities which cry out for rigorous study and analysis as a prolegoumenon to the Commission's consideration of an overarching theoretical framework.

The NAB's suggestion that low-power television provides a level or type of competition analogous to that of cable or satellite television beggars credulity. The mere fact that no financial market in the world trades in the stock of a low-power television company suggests that Goliath is intentionally over-touting the paltriest of Davids. While low-power television seems to have achieved niche status, it remains almost exclusively a provider of services to rural areas which broadcast, cable, and satellite television have proved to be incapable of servicing or unwilling to service, or of religious and ethnic programming in other areas where broadcast, cable, and satellite providers undersupply such programming. Low-power television is successful precisely to the extent that it exists in places where broadcast, cable, and satellite television have substantially abandoned the market.

12. In conclusion, it is lamentable that the studies commissioned and presented by the NAB generally fail to meet the standards of professional economic analysis. The grave methodological problems which many exhibit, the rate of computational error, the failure in many cases to supply the raw data against which the study's construal of that data can be evaluated make the submitted studies useless as a basis for Commission decision-making. However, two related phenomena make these studies by and large more suspect still. First, methodological incompetence and computational error far too often occurs in ways which apparently favor the NAB's contentions. The idea that data has been "cooked" to produce the desired results is inescapable; this is a well-known phenomenon in research which has been purchased on criteria of advocacy. Second, there is not infrequently a disparity between what the NAB claims that these studies prove and what they actually do. It is difficult to avoid concluding that intentional misdirection is occurring here. Even this limited sample is potent evidence of the need for the Commission to subject such submitted studies to rigorous scrutiny before accepting them as evidence in proceedings and to sanction submitters whose submitted studies fail to maintain acceptable professional research standards when those failures constitute an attempt to mislead the Commission. Such a policy would be valuable in elevating the level of discourse in proceedings and would go far in eliminating self-serving purchase of research designed merely to provide footnotes which appear to support the advocated position.