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BROADCASTERS®

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November 1, 2007

Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
455 12th Street SW
Washington DC 20554

Re: *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets*, MB Docket Nos. 06-121, *et al.*

Dear Ms. Dortch:

The National Association of Broadcasters ("NAB") hereby submits this filing in order to respond to several arguments presented by Consumers Union *et al.* ("CU"), Prometheus Radio Project ("Prometheus"), and certain other parties regarding positions taken, and studies submitted, by NAB in this proceeding. As will be shown below, the attacks mounted on NAB's arguments and empirical evidence are without merit and do nothing to undermine the reality that the Commission's existing bundle of broadcast-only local ownership restrictions need reform because they threaten broadcasters' continued ability to provide important local programming and services. Thus, the time is now right for the Commission to act in this docket and afford reasonable regulatory relief to broadcasters.

I. DESPITE ARGUMENTS THAT AUDIENCE OR MARKET SHARE MUST BE CONSIDERED, THE FCC'S PARAMOUNT CONCERN IN MEASURING DIVERSITY MUST BE CONSUMERS' ACCESS TO ALTERNATIVE MEDIA OUTLETS.

As NAB demonstrated in its comments filed previously in this proceeding, it would understate the level of diversity very significantly and be antithetical to First Amendment values to refuse to count, or to substantially discount, available media outlets based on their current popularity (e.g., audience share), or their share of the advertising market, when measuring diversity.[1] The Supreme Court has instructed time and again that the First Amendment protects expression without regard "to the truth, popularity, or social utility of the ideas and beliefs which are offered."[2] By arguing that the Commission is obligated to discount outlets based on the "size of the audience," CU turns these elemental principles and, indeed, the First Amendment itself, upside down.[3]

To the extent that CU further suggests that the Third Circuit's decision in the *Prometheus* case imposes an absolute requirement that the Commission consider audience or market share,[4] its position rests on an incorrect interpretation of that Circuit's decision. With respect to the local television ownership rule and the Cross-Media Limits, the Third Circuit simply found that the *evidentiary* record upon which the Commission relied to reject use of an audience share test was lacking, or that its decision to do so was inconsistent with other aspects of its analysis.[5] With respect to the local radio ownership rule, the Third Circuit simply found that the "five equal-sized competitor" rationale that the Commission had used to support its choice of an outlet-based test for the local radio ownership rule,[6] was logically flawed.[7] The Third Circuit did *not* say – as CU's filing suggests it did – that the FCC is legally obligated to take audience shares into account. A decision to do so, moreover, would not be judicially sustainable for several independent reasons, none of which the Third Circuit appears to have considered in *Prometheus*.

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[1] *See* Comments of the National Association of Broadcasters, MB Docket Nos. 06-121, *et al.*, at 54-56 (filed Oct. 23, 2006) ("NAB Comments").

[2] *Id.* at 55 n.134 (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)); *see also Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684, 689 (1959) (explaining that First Amendment guarantees are "not confined to the expression of ideas that are conventional or shared by a majority," and they protect "expression which is eloquent no less than that which is unconvincing").

[3] Reply Comments of Consumers Union, Consumer Federation of America and Free Press, MB Docket Nos. 06-121, *et al.*, at 22-26 (filed Jan. 16, 2007) ("CU Reply Comments"); *see also* Mark Cooper, *Misleading Industry Market Analysis*, at 67-69 (Study 4 attached to CU Reply Comments) ("*CU Reply Study 4*"); Mark Cooper, *Media Usage and Substitutability*, at 132 (Study 8 attached to CU Reply Comments) ("*CU Reply Study 8*"); *see also* Further Comments of Consumers Union, Consumer Federation of America and Free Press, MB Docket Nos. 06-121, *et al.*, at 159 (filed Oct. 22, 2007) ("CU Ownership Studies Comments") (suggesting that the FCC's inclusion of independent local Internet websites in its media market analysis must reflect those websites' small audiences).

[4] CU Reply Comments, at 24; *CU Reply Study 4*, at 67; *CU Reply Study 8*, at 132.

[5] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 419 (3d Cir. 2004) (rejecting outlet-based test for the local television ownership rule based on finding it was "unsupported" and "inconsistent" with the top-four rule – which NAB believes cannot be sustained anyway, *see* NAB Comments, at 102-106); *Prometheus*, 373 F.3d at 409-10 (rejecting outlet-based test for the Cross-Media Limits due to alleged internal inconsistencies and lack of record evidence).

[6] *See 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13731 (¶ 289) (2003) ("*2002 Biennial Review Order*") (subsequent history omitted).

[7] *Prometheus*, 373 F.3d at 432-34.

First, the use of audience shares when assessing diversity would, as noted above, be fundamentally inconsistent with core First Amendment principles. As NAB and others have already shown, the First Amendment precludes the government from elevating one form of speech – such as that which meets some arbitrary measure of "popularity" as measured by audience ratings – above another, or weighting speech based on its appeal to the masses.[8] Indeed, a fundamental tenet of our First Amendment jurisprudence is that even the most unpopular beliefs may have value, as "[t]he First Amendment protects expression, be it of the popular variety or not."[9] And, as the Supreme Court has explained, "the fact that an idea may be embraced and advocated by increasing numbers of people is *all the more reason* to protect the First Amendment rights of those who wish to voice a different view."[10] Indeed, Chief Justice Roberts recently explained the issue as follows:

> We do not need a First Amendment to protect speech that is trendy, popular, conventional or politically correct. . . . The First Amendment ensures that the voice of real nonconformists – the upstart, the underdog, the unfashionable – can also be heard.[11]

Clearly, just because certain content or ideas are currently less popular with consumers does not make that content any less significant from a First Amendment point of view. CU's suggestion that available outlets offering less mainstream content should be discounted in any diversity analysis is thus contrary to our First Amendment values. Simply put, the Commission should not fall into the trap of "equating" the "unpopular with the unimportant" when considering the level of diversity in media markets.[12] CU's implication that less popular content, measured solely by audience size, is necessarily less important or influential in the marketplace of ideas is also erroneous, and has little basis in how ideas and viewpoints are actually diffused, accepted, changed or rejected by consumers.[13] The Third Circuit did not consider these principles, and CU completely overlooks them.[14]

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[8] *See* NAB Comments, at 54-55; Reply Comments of the National Association of Broadcasters, MB Docket Nos. 06-121, *et al.*, at 10-11 (filed Jan. 16, 2007) ("NAB Reply Comments"); Comments of Gannett Co., Inc., MB Docket Nos. 06-121, *et al.*, at 32-33 (filed Oct. 23, 2006) ("Gannett Comments").

[9] *Boy Scouts of America v. Dale*, 530 U.S. 640, 660 (2000).

[10] *Id.* (emphasis added); *see Perez v. Ledesma*, 401 U.S. 82, 119 n.10 (1971) ("[T]he First Amendment . . . was intended to protect vigorous, robust and unpopular speech.") (citations omitted).

[11] John Roberts Jr., Chief Justice of the United States, Keynote Speech at the Dedication of the Newhouse III Building at Syracuse University (Sept. 17, 2007), *available at* http://blog.syracuse.com/specialreports/2007/09/newhouse_iii_audio_of_john_rob.html#more (last visited Oct. 5, 2007).

[12] *South Boston Allied War Veterans Council v. City of Boston*, 875 F. Supp. 891, 913-14 (D. Mass. 1995); *see also Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("time has upset many fighting faiths," and the "best test of truth is the power of the thought to get itself accepted in the competition of the market").

[13] Indeed, factors and individuals other than the media (especially just the "traditional" media) are intimately involved in this process in the Internet age. Mass communication scholars have long pointed out that interpersonal communications with "opinion leaders" greatly influence the diffusion and acceptance of ideas among people as a

Second, the use of an audience share test to measure diversity under the ownership rules would create disincentives for owners and would penalize those who are successful in serving the needs and interests of their audiences. Both audience shares – which measure popularity with viewers and listeners – and revenue shares – which measure success in selling advertising – are largely attributable to investments made by broadcast licensees in talent, programming development and acquisition, and other inputs. Under CU's proposal, an owner who made "good" investments, and thus saw higher audience ratings or revenue share, would be limited in its ability to expand its ownership of stations in a market, while one who made "bad" investments translating into low ratings and low revenues could purchase more properties. This would be a perverse result, and CU never addresses how using a test that seemingly *discourages* licensees from serving viewers' and listeners' needs can be squared with the Commission's overarching duty to ensure that the public interest is served. And, for good reason; taking audience or market share into account would, due to the disincentives it would create, run directly counter to that statutorily-mandated goal.

Third, taking audience share into account would be inconsistent with the recognition of both the Supreme Court, and the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") in their Horizontal Merger Guidelines, that the current programming or performance of a specific media outlet is not necessarily an accurate predictor of future programming or performance. As the Supreme Court has explained:

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whole. *See* Elihu Katz & Paul Lazarsfeld, *Personal Influence: The Part Played by People in the Flow of Mass Communications* (1955). The Internet, of course, tremendously enhances interpersonal communications and thus greatly affects the diffusion and acceptance of ideas. More recent thinkers have focused on the influential roles played by small number of certain types of people ("connectors" with wide social circles or especially knowledgeable "mavens") in the spread of social phenomena. *See* Malcolm Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference* (2000). Clearly, media outlets with quite small audiences can easily be the source of new ideas that gain widespread acceptance, especially if "opinion leaders" are among their audience.

[14] While CU purports to set forth the "Supreme Court's understanding that 'undue economic concentration' and 'excessive impact on public opinion' are the core of the issue" of diversity, CU Reply Comments, at 24; *see CU Reply Study 4*, at 68, it does not actually attribute these quotations to any Supreme Court decision through citation. Furthermore, it does not appear that any Supreme Court decisions touching on First Amendment issues actually use these phrases. Opposing commenters may not properly rely on the Supreme Court's decision in *Nat'l Citizens Comm. for Broad. v. FCC*, 436 U.S. 775 (1978) ("*NCCB*") to assume constitutionality of ownership rules. In *NCCB*, the Court simply described the rationale behind the newspaper/broadcast cross-ownership rule as being based "on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." *Id.* at 780. Although the Court ultimately upheld the FCC's decision to restrict cross-ownership, it did so based on a media landscape that existed well over a quarter-century ago – and that bears no resemblance to the one that exists today. Furthermore, the Court explicitly recognized that the Commission's rationale rested on an "inconclusive[] . . . rulemaking record." *Id.* at 796. The decision, properly interpreted, hardly constitutes a recognition that restrictions on media ownership are *per se* permissible because of concerns that media owners have "control" over their audiences or advertising markets. *See* NAB Comments, at 55. And, even if certain media owners did possess a degree of control in 1975, they certainly do not do so today. *See id.* at 55-56; *see also, e.g.*, *id.* at 5-22; NAB Reply Comments, at 16-34. In light of the dramatic changes in the media landscape that have occurred since 1975, the reasoning of a decision rendered then clearly cannot be carried over wholesale to today. Rather, as NAB and others have explained, both Section 202(h) and the Administrative Procedure Act place an affirmative obligation on the FCC to ensure that its media ownership rules reflect *current* marketplace realities. *See, e.g.*, NAB Comments, at 3-6; NAB Reply Comments, at 6-8.

> [E]vidence of past production does not, as a matter of logic, necessarily give a proper picture of a company's future ability to compete. . . . Even if one could define markets and assign market shares in the marketplace of ideas, just how reliable would these historic market shares be under dynamic market conditions?[15]

The DOJ/FTC Merger Guidelines similarly require that equal shares be imputed to each competitor in instances where current revenue market shares are misleading indicators of competitive performance, stating that "[w]here all firms have, on a forward-looking basis, an equal likelihood of securing sales, the Agency will assign firms equal shares."[16] Here too, CU fails to proffer any explanation of how its proposal to weigh outlets for diversity purposes based on their current popularity squares with the settled views of the Supreme Court or the entities charged with enforcing the country's antitrust laws.

Fourth, the use of market or audience share in the local radio ownership rules, in particular, is legally unsustainable. As an initial matter, the use of such a test for radio is statutorily barred.[17] The 1996 Act expressly replaced the Commission's prior rule – part of which had been based on an audience share limitation – with numeric limits. Before passage of the 1996 Act, in markets with 15 or more stations, the FCC's local radio ownership rule permitted a single entity to own up to two AM and two FM stations, provided that the combined audience share of those stations did not exceed 25%.[18] In Section 202(b), however, Congress expressly further relaxed the local radio ownership limits by requiring the FCC to raise its local radio ownership caps to allow a greater number of stations in markets of various sizes, and set the caps based *solely* on the number of radio stations owned, not the audience (or market) share of the proposed station group.[19] When Congress legislates against the background of settled interpretations, it must be presumed that Congress was aware of the earlier interpretations and effectively adopted them in formulating the statute.[20] In Section 202(b), by *explicitly* choosing an outlet-based test and

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[15] *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 501 (1974); *see* Maurice E. Stucke and Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 Antitrust L.J. 249, 277 (2001).

[16] DOJ/FTC Merger Guidelines § 1.41 n.15.

[17] *See, e.g.*, Comments of Clear Channel Communications, Inc., MB Docket Nos. 06-121, *et al.*, at 59-60 (filed Oct. 23, 2006) ("Clear Channel Comments").

[18] *See Revision of Radio Rules and Policies*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 6387, 6393 (¶ 32) (1992). In markets with fewer than 15 stations, a single entity could own up to three stations, no more than two in the same service, provided that the stations accounted for less than 50 percent of the total number of stations in the market. *See id.*

[19] *See* Telecomms. Act of 1996, Pub. L. No. 104-104, § 202(b), 110 Stat. 56, 110 (1996) ("1996 Act") (allowing ownership of: (1) "up to 8 commercial radio stations" in markets with 45 or more stations; (2) "up to 7 commercial radio stations" in markets with 30-44 stations; (3) "up to 6 commercial radio stations" in markets with 15-29 stations; and (4) "up to 5 commercial radio stations" in markets with 14 or fewer stations).

[20] *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S 967, 992 (2005) (concluding that Congress enacted statutory definitions contained in the Communications Act "against the background of th[e FCC's] regulatory history"); *Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993) (noting presumption that Congress is aware of "settled judicial and administrative interpretation" when it enacts a statute); *Goodyear Atomic*

eliminating the previous use of an audience share test in certain-sized markets, Congress did so *expressly*.

While the Third Circuit cited to the Commission's previous 25% audience share limit in its discussion of the local radio ownership rules,[21] the FCC had not explained, in the *2002 Biennial Review Order* or its briefs to the Third Circuit, that the elimination of the audience share component of its local radio ownership rule had been compelled by Congress. The Court of Appeals thus appears to have been unaware of this critical fact or, at the very least, to have failed to consider it. Accordingly, the Third Circuit's decision does not – and, indeed, cannot – preclude reliance on Congress's choice of an outlet-based test to justify the FCC's continued use of such a test in the local radio ownership rule.

In addition, the record reflects that radio market and audience shares, in particular, are extremely volatile due to the ease with which stations change formats. NAB's comments explained the degree of the volatility of ratings and audience share in the radio industry.[22] As noted therein, several empirical studies document this reality, including a 2005 study by Department of Justice economists and a 2002 study by BIA Financial Network.[23] Each of these studies demonstrates the ease with which radio stations change formats and the substantial impact that format changes can have on audience ratings. Clear Channel provided significant evidence regarding ratings volatility in its comments as well, and submitted a study by Professor Jerry Hausman of MIT providing further evidence that volatility of radio ratings is high, and that, accordingly, actual market shares are not a reliable guide to future competitive significance.[24] The record does not contain a shred of evidence to rebut the substantial showings of share volatility. Nor does CU present any explanation as to how the Commission could reasonably consider market or audience share as part of ownership limits that apply at the time of a proposed transaction when there is no guarantee that those measures will remain static after the transaction is consummated and, indeed, there is a high likelihood that they will not. In the *2002 Biennial Review Order*, and despite the presence of evidence in the record showing that radio ratings and shares are highly unpredictable based in part on the prevalence of format changes, the Commission did not

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Corp. v. Miller, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."); *see also Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 983 (1986) ("[C]ongressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress."); *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) ("[O]nce an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.") (citations omitted).

[21] *Prometheus*, 373 F.3d at 434 n.81.

[22] NAB Comments, at 76-78.

[23] *Id.* (discussing Charles Romeo and Andrew Dick, *The Effect of Format Changes and Ownership Consolidation on Radio Station Outcomes*, 27 Review of Industrial Organization 351 (2005) (Attachment I to NAB Comments)); BIA Financial Network, *Volatility in Radio Market Shares* (2002) (Attachment C to NAB Comments in MM Docket Nos. 01-317 and 00-244 (filed Mar. 27, 2002)).

[24] Statement of Professor Jerry A. Hausman (Oct. 2006) (Exhibit 2 to Clear Channel Comments).

expressly address either of these issues, and the Third Circuit did not either. It is therefore not possible to read the *Prometheus* decision as absolutely requiring – as CU apparently contends – consideration of audience or market share, and the actual evidence precludes the use of such metrics for diversity purposes.

II. CRITICISMS OF NAB'S MARKET ANALYSES ARE UNFOUNDED.

CU and Prometheus also mount a series of attacks on NAB's market analyses. As will be shown below, none of their critiques have any basis. First, the alleged "inconsistencies" that Prometheus purports to identify do not exist; NAB's market definition analyses are consistent and appropriate for their intended uses. Second, efforts to understate the value of new contributors to diversity and competition – including the Internet – in today's media marketplace are at odds with evidence and reality. Third and finally, NAB's analysis of the numerosity of traditional radio outlets is sound, and Prometheus' suggestion that it contains "math errors" is simply wrong.

A. NAB'S Market Definition Analyses are Consistent and Appropriate for Their Intended Uses.

As an initial matter, CU and Prometheus claim that NAB has taken an inconsistent position on the issue of whether audiences should be counted.[25] This is unfounded. Quite clearly, NAB's position is that audience share cannot be taken into account in determining the degree of diversity in the media marketplace.[26] As explained fully above, due to First Amendment constraints and market realities, what matters *for diversity purposes* is the availability of outlets, not the extent to which they are popular.[27] Furthermore, to the extent that CU contends that NAB's use of statistics regarding the migration of American media consumers away from traditional media outlets, including free over-the-air broadcast stations, to new media is somehow inconsistent with the view that actual market share is irrelevant for diversity purposes,[28] its position is untenable. The fact that new media have fragmented the marketplace and given consumers many more choices beyond broadcast stations shows that these media are genuine contributors to the marketplace of ideas, regardless of their current precise proportion of audience share. Lest there be any confusion, NAB certainly never said, and never meant to suggest, that the contributions of these new competitors must be judged solely by the percent of the market that they enjoy today.

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[25] CU Reply Comments, at 23; *CU Reply Study 4*, at 69; Reply Comments of Prometheus Radio Project, MB Docket Nos. 06-121, *et al.*, at 26-27, 34-35 (filed on Jan. 16, 2007) ("Prometheus Reply Comments"); Gregory Rose, *Report of Doctor Gregory Rose on Economic Studies Submitted by the National Association of Broadcasters in 2006 Quadrennial Review MB Docket No. 06-121*, at 17-18 (Attachment A to Prometheus Reply Comments) ("*Rose Report*").

[26] NAB Comments, at 54-56; NAB Reply Comments, at 10-11.

[27] *See* Section I, *supra*.

[28] *See, e.g.,* CU Reply Comments, at 23.

For purposes of measuring the *competitive* situation faced by broadcasters, it is true to at least some extent that anything that takes people away from viewing or listening to broadcast stations is relevant. As NAB has already documented and as further shown below, there has recently been a tremendous growth in the advertising dollars being spent on the Internet and on local cable advertising, and these trends are necessarily reducing the advertising revenues of traditional local media such as television, radio stations, and newspapers.[29] Erosion of crucial advertising revenues by a myriad of new media necessarily concerns over-the-air broadcast stations, which, unlike subscription services, are uniquely dependent on such revenues for their financial viability and for their ability to provide high quality programming and other services to viewers and listeners.

B. Efforts to Understate the Value of the Numerous New Contributors to Diversity and Competition in Today's Media Marketplace Are at Odds with Evidence and Reality.

1. It is Fanciful to Deny the Revolutionary Effect of the Internet on the Media Landscape.

CU claims in its reply comments that the Internet has had only "minuscule" and "minor" effects on how Americans interact with media, including in their consumption of news and information.[30] In addition, in its comments on the media ownership studies released by the FCC in July 2007, CU goes to great lengths to purportedly show that the Internet (and cable) are "swamped" by broadcast stations and local newspapers as sources of local news and current affairs and that independent websites contribute little to the total output of original local content.[31] These contentions are, as NAB and others have already shown and as further discussed below, both misguided and misleading.

Preliminarily, CU's analyses, which focus largely on whether Internet sources are *more* important than traditional media, miss the point entirely. By way of example, CU dedicates an entire chapter of its comments on the FCC's ownership studies to the notion that "traditional media are still the *dominant* sources of local news and public affairs."[32] In another chapter, CU analyzes the production of original local content by independent local websites, emphasizing its finding that these websites' audiences are small and transient as compared to websites affiliated with traditional media, which CU claims have a much larger "cyberspace presence."[33] Although acknowledging the growth of alternative media as sources of local news and information, CU finds it decisive that, in its view, these outlets do not "come anywhere near displacing the

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[29] *See*, *e.g.*, NAB Comments, at 29-35; NAB Reply Comments, at 60-63; Reply Comments of The Newspaper Association of America, MB Docket Nos. 06-121, *et al.*, at 20-22 (filed Jan. 16, 2007) ("NAA Reply Comments").

[30] CU Reply Comments, at 31; *CU Reply Study 8*, at 131, 144.

[31] *See* CU Ownership Studies Comments, at Chapters V and VI.

[32] *Id.* at 110-123 (emphasis added).

[33] *Id.* at 124-159; *see also CU Reply Study 9*, at 146-179.

traditional media as the dominant sources."[34] Surely, however, the FCC need not wait for Internet, cable, and other outlets to *displace* traditional media before properly considering these alternative media in its review of the ownership rules.[35] As demonstrated previously and further confirmed below, the data clearly show that the Internet is *a source* to which Americans turn. This fact alone is sufficient to require the Commission to take the Internet into account in analyzing the degree of competition and diversity that exist in today's media marketplace. Indeed, NAB has already shown above why a diversity analysis that focuses exclusively on actual audience share or usage levels – as CU would apparently have it – is not permissible.[36]

Moreover, the essential attributes of the Internet are exactly what makes it such a powerful contributor to diversity and competition. Because the Internet experience is uniquely personal and interactive, the medium's true impact on users and on the marketplace cannot adequately be measured simply by looking at pure consumption. NAB and other commenters have made these points time and time again, and have supported them with real-world evidence and examples.[37] Further, the Commission rightly acknowledged the reality that the Internet must be taken into account in the 2002 *Biennial Review*.[38] For its part, CU has never adequately responded, and certainly does not do so in its reply comments or comments on the FCC's ownership studies.

Perhaps more importantly, CU is simply incorrect as a factual matter when it states that the level at which Americans substitute the Internet for traditional media is "minuscule."[39] Based on a plethora of sound research, NAB has proven that the Internet's contribution to media competition and diversity already is substantial, and that its impact continues to grow to the detriment of

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[34] CU Ownership Studies Comments, at 123.

[35] Specifically, contrary to CU's contention, the growth of alternative media "to such an extent that traditional media sources do not matter anymore," CU Ownership Studies Comments, at 113, is not a prerequisite for repeal of the newspaper/broadcast cross-ownership ban. When analyzing whether the cross-ownership ban is justified on the basis of diversity, the Commission should instead, consistent with the First Amendment, focus on the number of alternative outlets that offer information and entertainment to the public. *See* NAB Reply Comments, at 11-12.

[36] *See* Section I, *supra*.

[37] NAB Comments, at 12-22, 32-34, 51-54; NAB Reply Comments, at 20-30; Reply Comments of Belo Corp., MB Docket Nos. 06-121, *et al.*, at 4-10 (filed Jan. 16, 2007); Reply Comments of Gannett Co., Inc., MB Docket Nos. 06-121, *et al.*, at 3-6 (filed Jan. 16, 2007); Reply Comments of Media General, MB Docket Nos. 06-121, *et al.*, at 15-20 (filed Jan. 16, 2007); NAA Reply Comments, at 14-19; Reply Comments of Reply Comments of CBS Corporation, FOX Entertainment Group, Inc. and FOX Television Stations, Inc., NBC Universal, Inc. and NBC Telemundo License Co., and The Walt Disney Company, MB Docket Nos. 06-121, *et al.*, at 2-3 (filed Jan. 16, 2007).

[38] *2002 Biennial Review Order*, 18 FCC Rcd at 13661-62 (¶¶ 117-19) (concluding that the Internet "provides an unrestrained forum for the dissemination and consumption of ideas" and thus allows "[n]ews and information [to be] available . . . like they have never been available to the public before"). The majority of the Third Circuit panel in *Prometheus* confirmed the Commission's finding that the Internet contributes to viewpoint diversity. *See Prometheus*, 373 F.3d at 400.

[39] *CU Reply Study 8*, at 144.

broadcast and print sources.[40] Further, since NAB last commented on the subject, researchers have released additional data demonstrating the extent to which the Internet is changing the media landscape. As the evidence continues to accumulate, CU cannot rationally persist in denying that the Internet has had a revolutionary effect on the media marketplace, and an attempt by the Commission to accept CU's contentions on this score would surely be reversed as arbitrary and capricious.

With respect to competition, NAB showed in its initial comments that Americans' increased usage of the Internet can be readily measured by examining how advertising dollars have migrated from television and radio to the Internet.[41] At the time, NAB expected that online advertising revenue would increase over 25% in 2006 to set a new high.[42] More than a year ago, NAB explained that if Internet advertising spending simply continued to grow at its current pace, some researchers predicted that it would surpass broadcast spending in less than three years.[43]

Recent events confirm these predictions and demonstrate that the upward trend in Internet advertising is indeed continuing, as advertisers find a wider available audience online. In just the first three months of 2007, Internet advertising set new records by taking in $4.9 billion, a 26% increase over the previous year.[44] Meanwhile, advertisers are expected to spend 5% less on local and national spot advertising in 2007 than they did last year.[45] U.S. Internet advertising spending is now predicted to overtake radio advertising in 2007.[46] A full 90% of U.S. companies now say that they will devote at least some of their marketing budgets to "new media," which includes not only Internet advertising, but also marketing in connection with video games and virtual communities.[47] As expected, Google has been at the forefront of the growing market, first by offering $3.1 billion for online advertising firm DoubleClick, and then by seeking new ways to turn its YouTube online video site into a profitable venture by selling ads.[48] Not to be outdone,

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[40] NAB Comments, at 32-33 (describing how the explosive growth in Internet advertising is eroding broadcast advertising revenues); NAB Reply Comments, at 62-64 (same).

[41] NAB Comments, at 29.

[42] *Id.* at 33.

[43] *Id.* at 32.

[44] *Internet ads hit another milestone*, Chicago Tribune, June 7, 2007.

[45] Jack Myers Media Business Report, *2007 Advertising and Marketing Communications Forecast* (Nov. 1, 2006), *available at* http://www.mediavillage.com/jmr/2006/12/05/jmr-12-05-06-spending/.

[46] Louis Hau, *Web Ad Spending To Eclipse Radio In '07*, forbes.com, Aug. 29, 2007.

[47] *Most U.S. advertisers now spending on new media: survey*, Reuters, Feb. 7, 2007, *available at* http://www.reuters.com/article/technologyNews/idUSN0743418920070207. Double Fusion, a company that connects advertisers and video game publishers, has new technology that allows advertisers to mount last-minute ad campaigns in games the same way they use spot TV ads. *See* Reuters, *In-game advertising company adopts TV ad model*, CNET news.com, Sept. 3, 2007.

[48] Miguel Helft, *Google Aims to Make YouTube Profitable With Ads*, N.Y. Times, Aug. 22, 2007; *YouTube introduces video adverts*, BBC News, Aug. 22, 2007, *available at* http://news.bbc.co.uk/2/hi/business/6958103.stm;

Microsoft recently offered approximately $6 billion to acquire another online advertising company, aQuantive.[49] Additionally, Facebook Inc., the operator of the fast-growing social networking site for teens and adults, is touting plans to introduce targeted advertisements.[50]

These examples and the dozens of others that NAB recounted in its comments and reply comments illustrate the Internet's emergence as a thriving competitor to broadcast and print media, and preclude the Commission from accepting CU's assertions, which have no foundation in reality. Indeed, current research considering actual use of the Internet continues to show that Americans are shifting from traditional media to online sources. For example, Arbitron/Edison Media Research recently found that the Internet is now regarded by consumers as the second "most essential" media in American life, and researchers predict that "it is likely that the Internet will soon" move into "first place."[51] To that end, respondents to a Harris Interactive survey reported considerable *direct substitution* of YouTube for television.[52] With home broadband adoption rising rapidly and content providers offering more diverse video programming online,[53] this substitution effect can only be expected to grow stronger in the future.

Louise Story and Miguel Helft, *Google Buys an Online Ad Firm for $3.1 Billion*, N.Y. Times, Apr. 14, 2007; Miguel Helft, *Google to Put YouTube Videos on Its Ad Network*, N.Y. Times, Oct. 9, 2007.

[49] Notably, Microsoft's offer for aQuantive came in at 10 times estimated revenue of the company because of its "medium to long term" potential. Miguel Helft and Eric Pfanner, *Microsoft to Buy Online Ad Company*, N.Y. Times, May 19, 2007.

[50] Vauhini Vara, *Facebook Gets Personal With Ad Targeting Plan*, Wall St. J., Aug. 23, 2007, at B1.

[51] Arbitron/Edison Media Research, *Internet & Multimedia 2007 Report Summary*, at 1, June 26, 2007, *available at* http://www.edisonresearch.com/home/archives/Q3%20Media%20Perceptions%20-%20large%20slides%20_2_.pdf; *see also* Erik Sass, *IBM Study: Internet Overtakes TV Time*, MediaDailyNews, Aug. 23, 2007, *available at* http://publications.mediapost.com/index.cfm?fuseaction=Articles.san&s=66218&Nid=33541&p=405859 (reporting that an IBM survey found time spent on the Internet will soon surpass time spent watching TV in the average American household).

[52] Harris Interactive, *One-Third of Frequent YouTube Users are Watching Less TV to Watch Videos Online*, Jan. 29, 2007, *available at* http://www.harrisinteractive.com/news/allnewsbydate.asp?NewsID=1168; *see also* Richard Verrier, *TV takes step into 'Afterworld': The Web series on MySpace is melding different kinds of media*, L.A. Times, Aug. 23, 2007 (reporting on an advertising-supported video program, "Afterworld," scheduled to run weekly on the MySpace social network site); Michel Marriott, *Nothing to Watch on TV? Streaming Video Appeals to Niche Audiences*, N.Y. Times, Aug. 6, 2007 (describing new streaming video services that compete with cable networks for niche audiences).

[53] *See* Pew Internet & American Life Project, *Home Broadband Adoption 2007*, June 2007, *available at* http://www.pewinternet.org/pdfs/PIP_Broadband%202007.pdf (finding that broadband penetration in the United States grew 5 percentage points in 2006 among all adults, and 9 percentage points among African American adults); Pew Internet & American Life Project, *Online Video: 57% of internet users have watched videos online and most of them share what they find with others*, July 25, 2007 (concluding that "mainstream audiences [have] embrace[d] online video viewing").

One of the recent FCC-commissioned ownership studies confirms that the Internet is gaining as a competitor to traditional media outlets.[54] Respondents to the Nielsen Media Research survey in *FCC Study 1* reported greater weekly Internet usage (12.8 hours) than usage of both broadcast television (10.4 hours) and radio (6.2 hours).[55] When compared to similar survey results from 2002, *FCC Study 1* also strongly indicates that the extent to which Americans are substituting the Internet for television and radio is increasing over time.[56] In just the five years between the two Nielsen surveys, the percentage that responded that they did not use the Internet fell steeply from 31.3% to only 5.4%.[57] Cumulatively, these research findings conclusively refute CU's argument that substitution of the Internet for traditional media exists only at a "minuscule level."[58] Certainly other recent studies of media usage do not support CU's contentions.[59]

Furthermore, as NAB has explained before, it would clearly be arbitrary and capricious to ignore how the Internet contributes to the diversity of sources that provide local, regional, and national news, and public affairs.[60] For example, NAB previously reported that roughly 50 million Americans use the Internet as a news source on any given day, and that 46% of younger Americans under age 34 use the Internet as their primary news source.[61] NAB also highlighted the power of Internet video, blogs, and online political tools – technologies that had only begun to emerge during the Commission's 2002 Biennial Review.[62] Other commenters presented similar data and examples.[63]

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[54] Nielsen Media Research, Inc., *Federal Communications Commission Telephone Study: May 7-27; May 29-31; June 1-3, 2007* (released as Study 1 in MB Docket Nos. 06-121, *et al.*) ("*FCC Study 1*").

[55] *Id.* at 4, 30, 72.

[56] *Compare* Nielsen Media Research, Inc., *Consumer Survey on Media Usage* (Sept. 2002), at 88, 94 (released as Study 8 in MB Docket No. 02-277, *et al.*) ("*2002 Nielsen Consumer Survey*"), with *FCC Study I*, at 4, 72 (showing that number of respondents not using traditional media, including television and radio, increased substantially between 2002 and 2007).

[57] *2002 Nielsen Consumer Survey*, at 90; *FCC Study 1*, at 30.

[58] *CU Reply Study 8*, at 144.

[59] *See, e.g.*, Thomas Patterson, *Young People and News*, A Report from the Joan Shorenstein Center on the Press, Politics and Public Policy, John F. Kennedy School of Government, Harvard University, July 2007 at 23 ("The sharp decline in newspaper circulation in the past decade, and the continuing drop in television news viewing, coincides with, and relates to, the emergence of the Internet as a medium of news, entertainment, work, and schooling.").

[60] *See, e.g.*, NAB Reply Comments, at 30.

[61] *See id*., at 20.

[62] *See id.*, at 25-26, 28-29, 30.

[63] *See*, *e.g.*, Comments of Hearst-Argyle Television, Inc., MB Docket Nos. 06-121, *et al.*, at 6-13 (filed Oct. 23, 2006) ("Hearst-Argyle Comments"); Comments of Media General, Inc., MB Docket Nos. 06-121, *et al.*, at 49-55 (filed Oct. 23, 2006) ("Media General Comments"); Comments of Newspaper Association of America, MB Docket

In the face of this voluminous record evidence, CU baldly asserts that the Internet has caused only "minor changes" in how Americans access news and information.[64] This is simply contrary to the facts. NAB already has shown that online video and locally focused blogs have revolutionized how many Americans consume news.[65] Recent reports also refute CU's argument. For example, *FCC Study 1* found that Americans consider the Internet their second-most-important source of in-depth news, behind only cable news channels.[66] Also, *The New York Times* has reported that major newspapers, such as *The Los Angeles Times*, are scaling back their efforts to attract print readers because advertisers are more interested in reaching narrowly tailored audiences on the Internet.[67] The Project for Excellence in Journalism has further recently found that news selected by users of popular Internet websites, such as Digg, Reddit, and Del.icio.us, differs markedly from news covered in the mainstream press.[68] News selected by Internet users, the study determined, is more likely to focus on health and lifestyle issues, and more likely to come from blogs and web-only sources.[69] And blogs themselves are "expanding at warp speed," with blog-based media becoming professionalized and profit-earning.[70]

In fact, obtaining news and information (along with sending or receiving e-mail) are the most popular on-line activities. As of early 2007, 72% of all Internet users report that they "get news" online, with 37% of all Internet users reporting that they got news "yesterday" online.[71] Online video, including news videos, now reach a mainstream audience, with 57% of online adults using the Internet to watch or download video and nearly one-fifth (19%) doing so on a "typical

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Nos. 06-121, *et al.*, at 33-34, 47-64 (filed Oct. 23, 2006) ("NAA Comments"); Comments of Tribune Company, MB Docket Nos. 06-121, *et al.*, at 15-26, 44-46, 53-55, 62-64, 70-72, 78-79 (filed Oct. 23, 2006) ("Tribune Comments").

[64] CU Reply Comments, at 31; *CU Reply Study 8*, at 131.

[65] NAB Comments, at 16-19; NAB Reply Comments, at 18-19, 30-31; *see also* Nikki Schwab, *Blogs Chronicle War from Soldiers' Perspectives*, Wash. Post, May 2, 2007 (citing examples of the thousands of "milblogs" maintained by U.S. soldiers in Iraq and Afghanistan); Terry McDermott, *Blogs can top the presses*, L.A. Times, March 17, 2007 ("*Blogs can top the presses*") (describing how the blog Talking Points Memo first accumulated evidence of multiple firings of U.S. attorneys); Mike Sachoff, *Americans Blogging Habits*, webpronews.com, Aug. 30, 2007 (close to half of Americans have visited blogs, and when questioned about the kind of information people obtain from blogs, 65% said they get opinions, 39% news and 38% entertainment).

[66] *FCC Study 1*, at 89.

[67] *See* Richard Pérez-Peña, *Why Big Newspapers Applaud Some Declines in Circulation*, N.Y. Times, Oct. 1, 2007, at C1.

[68] *See* Project for Excellence in Journalism, *The Latest News Headlines–Your Vote Counts*, Sept. 12, 2007, *available at* http://www.journalism.org/files/usernewspdf_0.pdf ("*The Latest News Headlines*").

[69] *Id.* at 2-3.

[70] Sam Zuckerman, *Yes, Some Blogs Are Profitable—Very Profitable*, SFGate.com, Oct. 21, 2007 ("many observers believe" that blog-based media could be poised "to become one of the dominant sources of news, information and opinion").

[71] Pew Internet & American Life Project, *Home Broadband Adoption 2007* at 11-12.

day."[72] More than three in four (76%) young adult Internet users (ages 18-29) report online consumption of video, with 31% watching or downloading some type of video on a typical day. News content is the most popular type of online video overall and with every age group, except the youngest. Overall, 37% of adult Internet users report watching news videos.[73]

Thirty-one percent of all Americans (and 46% of Internet users) used the Internet during the 2006 campaign to obtain political news and information and discuss the races through e-mail.[74] Fifteen percent of all American adults reported that the Internet was the "primary source for campaign news" during the 2006 mid-term elections, up from only 7% in the 2002 mid-term elections.[75] Broadband users under age 36 said that the Internet was a "more important political news source than newspapers."[76]

Moreover, real-world evidence about the use of the Internet by 2008 political candidates provides a striking illustration of the Internet's impact on both competition and diversity. Early data shows that candidates are spending large sums on Internet advertising and relying heavily on the Internet to communicate with supporters.[77] Similarly, potential voters are looking more to the Internet to find political information, either directly from candidates or from blogs and other online news sources.[78] Google and CNN capitalized on these voters' engagement with the Internet to hold the first-ever "YouTube Debate," in which YouTube users asked the 2008 presidential candidates questions directly through videos submitted online.[79] Additionally, every single one of the 2008 presidential candidates is using social networking tools, such as Facebook,

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[72] Pew Internet & American Life Project, *Online Video* at i.

[73] *Id*. at i-ii.

[74] Pew Internet & American Life Project, *Election 2006 Online: The number of Americans citing the internet as the source of most of their political news and information doubled since the last midterm election*, Jan. 17, 2007, *available at http://*www.pewinternet.org/pdfs/PIP_Politics_2006.pdf.

[75] *Id*. at i.

[76] *Id*. at ii.

[77] Jim Hopkins, *The 2008 candidates are running 'e-lection' campaigns*, USA Today, Apr. 3, 2007; Amy Schatz, *In '08 Race, Web Tactics Are Even More Integral*, Wall St. J., Mar. 19, 2007; Jose Antonio Vargas and Sam Diaz, *Online Firms Boot Up for Political Campaigns*, Wash. Post., Mar. 17, 2007.

[78] *See* Peter Johnson, *Media Mix: Web becomes source – not outlet – for news*, USA Today, Mar. 25, 2007 (reviewing an anti-Hillary Clinton video posted on YouTube caused a stir on network news broadcasts); Reuters, *MySpace launches politics channel*, Mar. 18, 2007, *available at http://www.reuters.com/article/topNews/idUSN1823706120070318*; Shankar Gupta, *DoubleClick: Four in 10 Rely on Web for Political Info*, Online Media Daily, Feb. 22, 2007, *available at* http://publications.mediapost.com/index.cfm?fuseaction=Articles.san&s=55917&Nid=27671&p=233953; Pew Internet & American Life Project, *Election 2006 Online*.

[79] Katharine Q. Seelye, *YouTube Passes Debates to a New Generation*, N.Y. Times, June 14, 2007; Amy Schatz, *YouTube Fuels – and Foils – Campaigns*, Wall St. J., June 12, 2007; *see also* James Wolcott, *The YouTube Election*, Vanity Fair, June 2007.

to reach out directly to Internet users and shepherd them to the candidate's own website.[80] MTV and social networking site MySpace have announced a joint plan to hold a series of dialogues featuring presidential candidates to be streamed live on both MySpace and MTV's Web site, with voters being able to instant-message, e-mail or text message their questions during the discussions, which will also include online viewers' responses to candidates' answers.[81] Candidates are, therefore, revealing that they understand what CU has ignored: the Internet competes readily with broadcast for advertising dollars, and the Internet is a cost-effective way to reach a diverse audience with new perspectives and ideas. In the face of real-world evidence that the Internet has revolutionized American political campaign tactics, CU's assertions cannot be credited.

Beyond the Internet serving as a major source of news, information and opinion for consumers, the Internet further enables, as recognized by one of the studies recently conducted for the Commission, "an ever increasing number of people and perspectives" to gain "an active voice, along with an extremely efficient means for connecting with an ever expanding audience."[82] With the "extremely low" entry costs for Internet media, "people who are interested in serving even the smallest segments of the population can gain easy access to a broad platform."[83] Thus, technology has provided individuals with vastly increased sources of information and entertainment, greater command over how they consume that information, and the ability to speak to anyone in the world who chooses to listen. CU's claims about the "minor" effect of the Internet on the media marketplace thus defy reality.

Additionally, CU makes several more unsupportable claims about the Internet. Among other things, CU argues that: (i) young Americans today likely will follow the media usage habits of those before them, despite the fact that the Internet has grown exponentially in its reach, significance, and diversity in recent years; (ii) Internet sources should be discounted or ignored because some are operated by traditional sources or contain content that comes from such sources; (iii) the Internet lacks local news and information; (iv) Internet sources should be discounted to the extent they fail to provide original reporting on "hard" news topics; and (v) in a recent indecency decision, the Commission dramatically changed its position on the Internet's prominence in the media marketplace. These assertions are unsupported, misleading, and, in some cases, completely irrelevant.

First, CU's conjecture about how young Americans will adopt the habits of current older Americans in the future is contradicted by a wealth of evidence. CU suggests that the current decline in the use of traditional media for news is simply a phase that will pass as young

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[80] Reuters, *Online 'Friends' Could Be Pivotal in 2008 U.S. Race*, N.Y. Times, Aug. 23, 2007; Jose Antonio Vargas, *Young Voters Find Voice on Facebook*, Wash. Post, Feb. 17, 2007.

[81] VOA News, *MTV, MySpace to Host US Presidential Candidates with Web Chats*, voanews.com, Aug. 23, 2007.

[82] Arie Beresteanu and Paul B. Ellickson, *Minority and Female Ownership in Media Enterprises* at 14 (June 2007) (released as Study 7 in MB Docket Nos. 06-121, *et al*.) ("*FCC Study 7*").

[83] *Id*.

Americans "discover" broadcast and print sources.[84] At the same time, however, CU recognizes that the current generation of young Americans is the first to grow up in the Internet age.[85] As already described, this generation communicates using online social networking tools such as MySpace and Facebook, and entertains itself with videos from YouTube. CU's contention that young Americans will rely on online tools for communication and entertainment, but then turn to TV and newspapers for news as they age, demonstrates nothing short of ignorance of – or, more likely, intentional disregard for – these realities. Put another way, CU's argument is based on not one, but two faulty assumptions. It assumes that Americans will not increase their usage of the Internet to obtain news, and also that Generation X and Generation Y will follow the same media consumption habits as baby boomers. As NAB has shown multiple times throughout this proceeding, neither of these is likely to occur.[86] Recent studies and articles have also concluded, contrary to CU's speculation, that young Americans today do not demonstrate an appetite for traditional news sources and are highly unlikely to develop the "news habits" of previous generations.[87]

Second, CU's argument that Internet sources should be discounted because many of them are operated by, or contain content that originates from, traditional media, has already been fully rebutted.[88] The record makes clear that the content on websites of local broadcasters and newspapers is considerably different from the material available via the traditional media, in part due to the expansive and unique nature of the Internet.[89] Indeed, the record provides substantial evidence of the incredible breadth of local news and information now available to consumers on the Internet, and how Internet content differs from that provided on television and radio and in the newspaper.[90] In addition, CU's assertion is directly contradicted by recent evidence from the University of Maryland's Institute for Interactive Journalism showing that "citizen media" websites are multiplying quickly, particularly in small markets.[91] These sites, researchers have confirmed, tend to focus on "hyperlocal" issues "occurring just beneath the notice of the nearest dailies or broadcast news operations."[92] Furthermore, the recent study by the Project for Excellence in Journalism discussed above found that the news items featured on user-driven

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[84] *See* CU Reply Comments, at 31-32; *CU Reply Study 8*, at 135-37.

[85] *Id.* at 137.

[86] *See* NAB Comments, at 51-53, 74; NAB Reply Comments, at 22.

[87] *See*, *e.g*., Patterson, *Young People and News*; Dan Kennedy, *Plugged in, tuned out: Young Americans are embracing new media but failing to develop an appetite for news*, MassINC (Fall 2007).

[88] *See CU Reply Study 8*, at 138-139; CU Ownership Studies Comments, at 125, 159.

[89] *See, e.g.*, NAA Comments, at 57-58; Belo Comments, at 12-13; Gannett Comments, at 28-29.

[90] *See* NAA Reply Comments, at 17-19.

[91] Jan Shaffer, *Citizen Media: Fad or the Future of News?: The rise and prospects of hyperlocal journalism*, February 2007, *available at* http://www.kcnn.org/research/citizen_media_report ("*Citizen Media Report*").

[92] *Id.* at 33.

news sites such as Digg, Reddit, and Del.icio.us originate from a wide variety of sources, the vast majority of them outside of the mainstream media. Over a one week period, 40% of the stories on these sites originated on blogs and 31% on non-news information sites, with traditional media and wire services accounting for only 25% and 5%, respectively.[93]

Third, CU's contention that the Internet contains a dearth of local information is incorrect.[94] As a threshold matter, local news is not the only relevant measure of diversity.[95] As NAB has explained previously, traditional local newscasts of television and radio stations cannot be regarded as the sole source of all the content appropriately deemed "local."[96] This is even more true in light of numerous competing media outlets and the Internet, which can directly connect citizens and news makers (such as political leaders and government officials) and thereby serves as a unique and highly valuable source of "local" information.[97] Moreover, the expression of a government preference for local news and information over other content, such as national and regional news, would be arbitrary and raise serious First Amendment concerns.[98]

Plainly stated, even if true, CU's conclusion that traditional media "swamp" the Internet as a source of local news and current affairs would not justify the FCC's broadcast-only local ownership restrictions.[99] CU offers its own econometric and statistical analyses of *FCC Study 1*'s data, supposedly showing that alternative and traditional media are not complete substitutes.[100] Full substitutability is not the determinative issue, however, in the Commission's

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[93] *The Latest News Headlines* at 4.

[94] *See* CU Reply Comments, at 33; *CU Reply Study 9* at 148; CU Ownership Studies Comments, at 110-23.

[95] CU's myopic focus on the extent to which the Internet provides *local* news and information in its discussion of the Internet's relevance for *diversity* purposes also improperly conflates the Commission's stated goals of localism and diversity. *See 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 17 FCC Rcd 18503, 18515 (¶ 29) (2002) ("Each of the rules under review in this proceeding seeks to further one or more of three important public interest goals – diversity, competition and localism. The Commission long has embraced these values as the foundation of its ownership rules and policies."). Just as Congress is presumed to intend for each provision of a statute to be given independent effect, so too must each of the Commission's stated public interest goals – diversity, localism, and competition – be presumed to serve separate purposes. *Cf. Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, 'to every clause and word of a statute.'") (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)) (internal quotation marks omitted); *United States v. Cooper*, 396 F.3d 308, 312 (3d Cir. 2005) ("It is a well known canon of statutory construction that courts should construe statutory language to avoid interpretations that would render any phrase superfluous.") (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)); *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1108 (D.C. Cir. 1979) (rejecting an interpretation that would render a provision "mere surplusage" because "[i]t is axiomatic that a statute must be construed . . . so that no provision will be inoperative or superfluous").

[96] *See* NAB Comments, at 57.

[97] *See id.*

[98] *See, e.g.*, *infra* Section II.B.2; NAB Comments, at 56-57.

[99] *See* CU Ownership Studies Comments, at 110.

[100] *See id*. at 115-22.

diversity analysis. Of paramount importance is that the Internet does add to the public discourse about innumerable issues, including local ones, and increases the overall quantity of information available to the public. Even if the Internet is used by some consumers as a complement to traditional media for accessing local information, it would be preposterous to ignore its considerable and growing importance in the marketplace of ideas.

Thus, as discussed above, whether the Internet is the *predominant* source to which Americans turn for local news and information is not dispositive in this proceeding. What matters is that the Internet is a widely available source of local news and information, and a significant one at that. Indeed, even some of the same data cited by CU to demonstrate the dominance of traditional media confirms this reality. For example, as CU recognizes, *FCC Study 1* finds that 40.6% of survey respondents who use the Internet do so to obtain local news and current affairs.[101] Though CU criticizes the wording of one survey question for allegedly combining local and non-local news and current affairs,[102] *FCC Study 1* clearly considers the distinction between local and other content in other survey questions on media usage, and finds that consumers do access the Internet for local news and information.[103] Additionally, as the Institute for Interactive Journalism found, the Internet is quickly becoming a haven for enterprising local journalists who see gaps in traditional news coverage.[104] The Institute's web sites, www.j-lab.org and www.kcnn.org, seek to foster the growth of citizen media by providing online instruction and other tools for citizen journalists. The Institute's websites also catalog more than 450 citizen media sites, covering all 50 states.[105] All 450 provide local news over the Internet, and many of them consider local traditional media sources as their primary competition.[106]

Fourth, CU's emphasis on whether websites offer "hard" news stories based on "original reporting" and its insinuation that websites lacking these characteristics are not as important in today's media marketplace are misguided.[107] As part of its analyses of content provided by independent local websites, CU purports to assess whether stories on the websites provided "hard" news (i.e., focused on issues like crime, politics, labor, transportation, or city planning) or "soft" news (i.e., focused on topics like sports, arts and entertainment, food, or human interest), and concludes that the latter is more prevalent.[108] Also, CU criticizes independent local websites for not containing "original reporting" with the typical characteristics of traditional media

[101] *See id*. at 112; *FCC Study 1*, at Table 012.

[102] *See* CU Ownership Studies Comments, at 113-14.

[103] *See, e.g., FCC Study 1*, at Tables 012, 035, 036.

[104] *See Citizen Media Report*, at 2.

[105] *See* KCNN: Citizen Media Sites, http://www.kcnn.org/citmedia_sites/full_list (last visited Oct. 11, 2007).

[106] *See Citizen Media Report*, at 9.

[107] *See, e.g.,* CU Ownership Studies Comments, at 129, 132, 142, 148, 155; *CU Reply Study 9*, at 172.

[108] *See, e.g.*, CU Ownership Studies Comments, at 129, 132, 142, 148, 155; *CU Reply Study 9*, at 149, 156, 158-61, 172.

stories, such as "quotes from anonymous or named sources" or "reporting from an event attended by the author."[109]

Even if CU's contentions were true, this would not mean that such websites are any less contributors to diversity, since the critical question is whether these sources add to the level of public discourse, which they undoubtedly do. Indeed, the fact that "there are sharp differences in the types of information consumers obtain from the different media"[110] actually proves why alternative media must be properly considered in the Commission's diversity analysis. Blogs and other websites may not mirror the journalistic practices of broadcast stations and newspapers, but they offer the public different kinds of news and information, presented in different ways. For example, as noted above, the Internet provides an opportunity for citizen journalists to fill perceived gaps in traditional news coverage, focus on "hyperlocal" issues, and even serve as the first sources of breaking news stories.[111] Contrary to CU's assertions, these websites' references and hyperlinks to other news sources actually *add* value by directly and conveniently linking to other sources, serving as a mechanism for providing consumers with other diverse points of view. In addition, CU fails to recognize that local websites may merely be responding to the increasing appetite of the public, especially Internet users, for stories on issues like health, entertainment, and lifestyle, all prevalent topics in today's public discourse.[112] Indeed, that websites play a somewhat different role than traditional print publications or broadcasters in local reporting is part of what makes their contribution to the news and information marketplace so important and truly diverse. Further, CU fails to provide any comparative analysis of the "original reporting" or "hard" news/"soft" news nature of stories offered by same-market newspapers or broadcast stations.[113]

Finally, contrary to CU's contention, the Commission's November 2006 indecency decision has no relevance whatsoever to this proceeding.[114] In that decision, the Commission simply reiterated its long-held position that the broadcast medium is appropriately subject to indecency regulation whereas other media, including cable and the Internet, are not.[115] However, the legal

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[109] *See* CU Ownership Studies Comments, at 129-30.

[110] *See id.*, at 114.

[111] *See supra* pp. 17-18. As additional examples, blogs were the first to gather evidence regarding multiple firings of U.S. attorneys in the recent scandal involving former Attorney General Alberto Gonzales, and the first to report on forged documents concerning President Bush's military service presented by Dan Rather on "60 Minutes." *See* McDermott, *supra* n.65; Howard Kurtz, *After Blogs Got Hits, CBS Got a Black Eye*, Wash. Post, Sept. 20, 2004, at C1.

[112] *See, e.g.*, *The Latest News Headlines* at 1-3.

[113] Traditional media also derive many of their news stories from information gathered by other media outlets or from news wire services like Reuters or the Associated Press.

[114] *See CU Reply Study 8*, at 142-43.

[115] *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 13299, 13318-19 (¶ 49) (2006) ("*Indecency Order*").

question of whether the broadcast medium is subject to a lower level of First Amendment protection than would otherwise apply is completely independent from the factual question, involved in this proceeding, of whether the Internet contributes to competition and diversity. The Commission's *Indecency Order* suggests that the treatment of the broadcast medium as "pervasive" is simply a matter of *stare decisis*, based on the composition of the media landscape as it existed in 1978 at the time that the Supreme Court decided *FCC v. Pacifica Foundation*.[116] The FCC in the *Indecency Order* simply rejected the argument that, due to the emergence and popularity of new media not subject to content regulation, it was unlikely that aggressive enforcement of the restrictions on broadcast indecency would shield children from exposure to offensive content.[117] The question presented here – whether the Internet on its own terms is a "source" that the Commission must include in its evaluation of the degree of competition and diversity that currently exists in the media marketplace – is entirely different. Based on the record accumulated thus far, the Commission must find that the Internet is a source, and an important, influential one at that, and nothing in the *Indecency Order* can logically be read to suggest otherwise.

2. Cable Television Undoubtedly Contributes to Diversity and Competition.

Like the Internet, cable television has emerged as an important source of news, including local news. Nonetheless, CU goes to great lengths in an attempt to undermine the significance of cable in today's media marketplace.[118] CU not only misses the mark both factually and legally, but also mischaracterizes the comments of NAB and others in this proceeding.

As an initial matter, to the extent that it suggests in its reply comments that NAB and other commenters intended to argue that *all* regional cable networks air local news, CU's approach is, at best, disingenuous. On the contrary, NAB intended simply to illustrate that consumers rely on cable as a source of local news and information. Plainly stated, NAB's points were that cable provides an additional source of programming, that consumers view cable programming as a significant source of news and information, and that some news and information offered by cable networks is local.[119] In support of its arguments, NAB highlighted the results of a 2002 survey conducted by Nielsen Media Research, which found that consumers rely on cable for local news

[116] *Id.*; *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994).

[117] *Indecency Order*, 21 FCC Rcd at 13319-21 (¶¶ 51-52).

[118] *See* CU Reply Comments, at 29-31 (attempting to refute industry commenters' claims that "viewers have access to previously unavailable sources of news, chiefly local cable news channels, which make positive contributions to both source diversity and viewpoint diversity"); Adam Lynn, Mark Cooper, and S. Derek Turner, *Local Cable News Channels Do Not Significantly Contribute to Source or Viewpoint Diversity* (Study 7 attached to CU Reply Comments) ("*CU Reply Study 7*"); CU Ownership Studies Comments, at 110-123 (discussing the dominance of traditional media as sources of local news and information).

[119] *See* NAB Comments, at 50-51. As NAB demonstrated in its opening comments, the total number of cable networks has increased dramatically since 1986 and some of the programming networks offered by local cable systems are regional or local. *See* NAB Comments, at 10 n.19; BIA Financial Network, *Media Outlets Availability by Markets*, at 10-12 (Oct. 23, 2006) (Attachment A to NAB Comments).

to some extent.[120] Notably, an update to the *2002 Nielsen Consumer Survey* was recently released as *FCC Study 1* in this proceeding, and fully confirms this conclusion.[121] In *FCC Study 1*, 41.7% of respondents who watch cable or satellite television indicate that they rely on cable or satellite channels as a source of local news or local current affairs.[122] The updated study also demonstrates that some viewers consider cable news channels like CNN or MSNBC to be the *most important* source of local news and current affairs.[123] Clearly, the evidence in this proceeding supports the claims made by NAB and others that cable channels do, in fact, make positive contributions to diversity through the provision of local, regional, national and international news content.

The significance of local cable content in today's media marketplace is borne out by the dramatic increase in local cable television advertising revenue in recent years.[124] Cable's share of local television advertising has grown substantially, with cable local advertising revenues increasing 12.2% from 2003 to 2004 and 12.0% from 2004 to 2005.[125] Indeed, innovative new services such as Spot Runner, an Internet-based advertising agency that produces, buys, places, and distributes television advertisements, make it easier for local businesses to utilize cable television to reach their target audiences.[126] Despite CU's contentions, as cable operators continue to make gains in local advertising markets at the expense of television broadcasters, cable's role as a competitor in local markets becomes increasingly hard to overlook.

In its reply comments, not only does CU misinterpret the substance of NAB's argument about local cable news, but it also misapprehends the ultimate object of its criticism. CU casts its argument as an attempt to refute claims made by NAB and other industry commenters. At bottom, however, CU's criticisms are aimed primarily at data compiled *by and for the Commission*.

For example, NAB's arguments in the opening comments that cable has "emerged as a significant source of local news" and many consumers "viewed broadcast television, cable and satellite news channels, daily newspapers and radio all as substitutes for each other in obtaining

[120] *See 2002 Nielsen Consumer Survey*.

[121] *See generally FCC Study 1*.

[122] *See FCC Study 1*, at Table 007. This group of survey respondents watched cable or satellite television for "information on news, current affairs and local happenings" for a weekly mean of six hours. *See id.* at Table 008.

[123] *See id.* at Table 035 (cable news channels ranked third among sources of local news and current affairs, with 11.2% of respondents considering cable news as the most important source).

[124] *See* NAB Comments, at 29-32; NAB, *Local Television Market Revenue Statistics* (Attachment F to NAB Comments).

[125] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, Table 4 (2006) ("*Twelfth Annual MVPD Competition Report*").

[126] *See* Spot Runner, http://www.spotrunner.com; John Heilemann, *Commercial Interest: Nick Grouf is betting that advertising buys from the little guys can amount to big bucks*, Business 2.0, Apr. 3, 2007, *available at* http://money.cnn.com/magazines/business2/business2_archive/2007/03/01/8401040/index.htm.

local or national news" were drawn from the results of the *2002 Nielsen Consumer Survey*.[127] This survey, which CU attacks (albeit indirectly), was not created by NAB, but rather conducted for the Commission during the prior biennial review.[128] In addition, CU presents a study purporting to analyze the content aired by cable channels that were "cited" by NAB and other media industry commenters.[129] Even a casual further review of *CU Reply Study 7*, however, elucidates the true sources of the data that it employs. In reality, the regional cable networks analyzed in that study represent a compilation of the FCC's own list of 96 regional cable networks, 12 additional networks identified through CU's own research, and 13 other networks cited by Media General.[130]

Moreover, even if CU's "analysis" of the purported dearth of local news content on cable were accurate, the this would in no way justify dismissing cable's contributions to diversity in the media marketplace. Indeed, to consider the provision of local news content as the sole measure of cable outlets' contributions to diversity would be arbitrary and capricious, as well as raising First Amendment issues.[131] NAB has frequently stressed that, for the purpose of analyzing program diversity, consumers' access to alternative media outlets and content – not the level of any particular content offered by any given outlet – is of paramount importance.[132]

Nonetheless, in its comments on the FCC's ownership studies, CU persists in downplaying the importance of cable as a source for local news and information, stressing the dominance of traditional media and the lack of substitutability between traditional and alternative media.[133] As discussed above, however, cable need not completely displace broadcast television or

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[127] *See* NAB Comments, at 50-51.

[128] *See generally 2002 Nielsen Consumer Survey*.

[129] CU Reply Comments, at 30 (characterizing its study as examining "whether the more than one hundred regional cable-only networks *cited in the comments of media industries companies* serve as significant sources of local news and information") (emphasis added); *CU Reply Study 7,* at 100-101 (supposedly demonstrating that "many of the cable channels cited by [NAB, Media General, Sinclair, Nexstar, and KVMD] do not produce local news reporting").

[130] *See CU Reply Study 7*, at 102; *see also Twelfth Annual MVPD Competition Report*, 21 FCC Rcd at 2579 (¶ 166) (observing that, of 96 regional programming networks identified by the FCC in 2005, a "significant number of regional networks offer local news or sports programming").

[131] *See, e.g., Turner*, 512 U.S. at 642 ("regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content" or "compel speakers to utter or distribute speech bearing a particular message" – are subject to strict scrutiny); *Carey v. Brown*, 447 U.S. 455, 462 n.6 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on [or preferences for] particular viewpoints, but also to prohibition of public discussion of an entire topic.") (quoting *Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980)).

[132] *See, e.g.*, NAB Comments, at 54-57; *see also 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*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13627, 13633 (¶¶ 19, 42) (2003) (defining source diversity as "the *availability* of media content from a variety of content producers" and viewpoint diversity as "the *availability* of media content reflecting a variety of perspectives") (emphases added).

[133] *See* CU Ownership Studies Comments, at 110-14.

newspapers as a provider of local news in order to warrant consideration in the FCC's analysis of the media ownership rules.[134] NAB recognizes that local news is one of the most important services media outlets provide to viewers and listeners. However, cable networks' significant contributions to diversity in local communities through coverage of national and international (as well as local and regional) news cannot be ignored. Indeed, compared to other media outlets, more viewers consider cable news channels to be the most important source of national news and current affairs, breaking news, and in-depth information on specific news and current affairs topics.[135] Plainly, cable, like the Internet, makes important contributions to the public discourse concerning myriad issues, only one of which is local news.[136]

Finally, the decisions of the D.C. Circuit in *Sinclair* and the Third Circuit in *Prometheus* counsel that cable's contributions to viewpoint diversity should be considered in the Commission's review of its ownership rules. In *Sinclair*, the D.C. Circuit found that the FCC had acted arbitrarily and capriciously by excluding cable and other "non-broadcast media" from the eight-voices threshold of the local television ownership rule.[137] Likewise, in affirming the FCC's determination that the newspaper/broadcast cross-ownership ban was not necessary to protect diversity, the Third Circuit stated it was perfectly "acceptable for the Commission to find that cable and the Internet contribute to viewpoint diversity."[138] In light of this precedent, relevant First Amendment principles, and the importance of non-local news content in today's media landscape, the Commission in its diversity analysis may not properly discount the contributions of cable based solely on a purported shortage of local cable news content.

3. Out-of-Market Listening and Viewing Likewise Contributes to Diversity and Competition.

Similarly, the Commission may not ignore the contributions to competition and diversity from sources that are not physically located within the geographic boundaries of consumers' local markets, including cable/satellite delivered video channels and terrestrial television and radio stations that may be "assigned" elsewhere by Nielsen or Arbitron but are viewed within a given market. As NAB stressed in its opening comments, some surveys submitted in this proceeding exclude "out-of market" listening and viewing, thus dramatically underestimating the number of

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[134] *See supra* Section II.B.1.

[135] *See FCC Study 1*, at Tables 031, 033, and 037. As NAB has noted previously, many of the most important and controversial issues facing Americans today are national or international in scope, including terrorism, the war in Iraq, energy prices, and the economy, and these vital issues clearly have local and regional implications. *See* NAB Comments, at 56.

[136] *See supra* Section II.B.1.

[137] *See Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 165 (D.C. Cir. 2002).

[138] *Prometheus*, 373 F.3d at 400; *see also id.* ("We agree record evidence suggests that cable and the Internet supplement the viewpoint diversity provided by broadcast and newspaper outlets in local markets.").

media outlets in local markets.[139] Indeed, consumers can, and do, routinely access radio and television stations from distant markets, thus further enhancing the diversity of their programming choices.[140]

In their reply comments, however, CU and Prometheus attack NAB's reliance on out-of market listening and viewing.[141] CU argues that out-of-market sources likely do not produce local news and information, thereby depriving viewers of content that is "directly relevant to the market in which the signal is being received."[142] As NAB has repeatedly shown, however, local news is *not* the only relevant measure of diversity.[143] In fact, aside from local news and information provided by in-market terrestrial radio and television stations, viewers and listeners today have access to a diverse array of other content "directly relevant" to their lives.[144]

Prometheus also notes the supposed "irony of NAB's reliance on out-of market signals as additional sources of diverse news, given NAB's strenuous efforts to limit importation of out-of-market signals by MVPDs."[145] This argument, however, misses the point entirely. Regardless of whether NAB supports or opposes the importation of such signals, the fact of the matter is that the signals *are* imported in numerous instances pursuant to the Communications Act and the FCC's implementing regulations,[146] as the *BIA Out-of-Market Voices Study* submitted by NAB clearly shows.[147] In light of this marketplace reality, NAB's stance in unrelated proceedings on importation of distant signals has no bearing on the Commission's diversity analysis.

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[139] *See* NAB Comments, at 10-12; BIA Financial Network, *A Second Look at Out-of-Market Listening and Viewing: It Has Even More Significance* (Oct. 23, 2006) (Attachment C to NAB Comments) ("*BIA Out-of-Market Voices Study*").

[140] *See* NAB Comments, at 10-12; *see generally BIA Out-of-Market Voices Study*. The *BIA Out-of-Market Voices Study* found that "the extent of out-of-market viewing and listening remains extremely significant and actually has increased in the past three years." *BIA Out-of-Market Voices Study*, at 2.

[141] *See* CU Reply Comments, at 16; Prometheus Reply Comments, at 29-30.

[142] CU Reply Comments, at 16.

[143] *See, e.g., supra* Sections II.B.1, II.B.2; NAB Comments, at 56-57.

[144] *See, e.g., supra* Sections II.B.1 (discussing Internet content), II.B.2 (discussing cable news content); NAB Comments, at 56-57 (discussing the importance of national and international news sources and local programming other than traditional newscasts). Moreover, out-of-market stations are often located in close proximity to the listening market, possibly even within the same state (*e.g.*, Ann Arbor, MI and Detroit, MI). Certainly, regional issues covered by these nearby stations are also relevant and important to members of the listening community.

[145] Prometheus Reply Comments, at 29.

[146] *See, e.g.*, 47 U.S.C. §§ 339, 340; 17 U.S.C. § 111; 47 C.F.R. § 76.54; *see also Cable Television Syndicated Program Exclusivity Rules; Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television*, Report and Order, 79 FCC 2d 663 (1980) (eliminating the FCC's then-existing distant signal rule, which restricted the number of distant signals a cable system could import).

[147] According to the study, in 2005, there were 58 small markets where adjacent market television stations received sufficient viewing share to meet minimum reporting standards. *See BIA Out-of-Market Voices Study*, at 8. Many out-of-market stations are imported into those markets via carriage on local cable systems, in some cases attracting large

Prometheus goes on to advance a number of specific criticisms of the *BIA Out-of-Market Voices Study*, none of which have any merit.[148] First, to the extent that Prometheus means to suggest that the *BIA Out-of-Market Voices Study* amounts to nothing more than a critique of the Nielsen and Arbitron geographic market definitions, that suggestion is misplaced.[149] On the contrary, the purpose of the study was to document the reality that radio and television stations do not stop at county borders and that, particularly because in some cases the added number of stations is significant, stations in adjoining markets have to be considered.

Second, while Prometheus faults the *BIA Out-of-Market Voices Study* for failure to include the underlying data, the data used for the study are readily available from Nielsen and Arbitron, and actually, from BIAfn presentations of that data which are available to the public. Contrary to Prometheus' suggestion, moreover, the fact that the data are available on out-of-market media usage does not render the study's conclusions "specious."[150] In fact, the opposite is true: it is precisely *because* actual viewing and listening data show that stations are viewed or listened to in markets other than those to which they are assigned by Nielsen or Arbitron that a simple count of the in-market stations artificially depresses the number of relevant competitors.

Third, Prometheus' contention that the study's significance is limited because the effect of out-of-market listening is greatest in the smallest markets simply makes no sense.[151] In the smaller markets, the number of stations is, by definition, small; hence, any increase in the number of stations could have profound effects on the degree of diversity and competition. Indeed, in the smaller Arbitron markets (101+) more than one third (35.7%) of the listening is to out-of-market radio stations. And in the smallest television markets (101+), nearly 62% of the viewing is to non-local broadcast television stations or to cable/satellite delivered channels, with just over 38% of the viewing going to in-market television stations.[152]

Finally, Prometheus' attack on the study's supposed failure to explain how the number of viewers that receive a distant station's signal was established reflects a misunderstanding of ratings methodology and a misreading of the study.[153] Noting that many MVPD subscribers may not actually receive a given out-of-market signal, Prometheus appears to presume that the number of viewers receiving such signals was not taken into account in the BIA analysis. In reality, the *BIA Out-of-Market Voices Study* was based on *ratings*, which measure nothing other

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audiences. *See id*. For example, the study found that more than 20% of the total viewing in five markets (Mankato, MN; Lafayette, IN; Zanesville, OH; St. Joseph, MO; and Harrisonburg, VA) was of terrestrial television stations located in adjacent markets. *See id.*

148 Prometheus Reply Comments, at 30; *Rose Report*, at 8-9.

149 *See Rose Report*, at 8.

150 *Id.* at 9.

151 *See id.*

152 *See BIA Out-of-Market Voices Study* at 7, 11.

153 *See* Prometheus Reply Comments, at 30.

than *actual viewership*.[154] Both Arbitron and Nielsen have minimum reporting standards under which each company's measurement techniques (diaries or "people meters") must indicate that a sufficient number of households listened to or viewed an out-of-market station before the station will be reflected as having reportable ratings in a market. Clearly, Prometheus' criticisms of the *BIA Out-of-Market Voices Study* are based on a misunderstanding of the study's purpose, underlying assumptions, and methodology.

C. NAB's Analysis of the Numerosity of Traditional Media Outlets Is Sound.

CU also contends that the *Media Outlets Availability by Markets* study conducted by BIA Financial Network and submitted by NAB in this proceeding[155] is flawed because it overstates voice counts for radio by using Nielsen DMAs rather than Arbitron metro markets to define the relevant geographic market, does not count the number of radio owners in the DMA, and does not consider market share.[156] These criticisms are meritless. CU's complaint regarding the use of Nielsen DMAs rather than Arbitron metro markets reflects a fundamental misunderstanding of the purpose of the study. While it might well have been rational to utilize Arbitron metro markets if the study's sole purpose had been to measure levels of competition in selected radio markets, the *Media Outlets Availability by Markets* study had a broader goal. That was to document "the enormous increase in the choices now available to consumers in markets of all sizes" in terms of a wide range of media, including *not only* terrestrial radio stations, but also television stations, satellite-delivered radio, multi-channel video programming delivery services (including cable, satellite, and now telephone-company provided video services), information and entertainment sources available via the Internet, and newspapers.[157] Data for these other media outlets is simply not available on an Arbitron metro market basis. Furthermore, DMAs were chosen as the relevant measure for this particular study because of their more comprehensive coverage. Nielsen assigns each county in each state to a DMA.[158] Arbitron metro markets, by contrast, only cover "approximately 60% of the commercial radio stations, 30% of the counties, and 78% of the population above the age of 12 in the United States."[159] For these very reasons, the FCC's

[154] *See BIA Out-of-Market Voices Study*, at 8-9 (listing the "total adjacent market viewing shares" for various markets); *id.* at 10 (observing that "the total viewing share to local in-market television stations is over eleven points lower in 2005 than nine years earlier); *see also* NAB Comments, at 11 (describing the study as measuring "television stations from adjacent DMAs [that] received a reportable viewing share").

[155] *See* BIA Financial Network, *Media Outlets Availability by Markets* (Oct. 23, 2006) (Attachment A to NAB Comments).

[156] *See* CU Reply Comments, at 21; *CU Reply Study 4*, at 64-67.

[157] *See Media Outlets Availability by Markets*, at i, 1-17.

[158] *See* Nielsen Media Research, FAQs, http://www.nielsenmedia.com/nc/portal/site/Public/menuitem.55dc65b4a7d5adff3f65936147a062a0/?vgnextoid=34953b318b906010VgnVCM100000880a260aRCRD (last visited Oct. 5, 2007) ("There are 210 DMAs, covering the entire continental United States, Hawaii, and parts of Alaska. Each county is assigned to only one DMA."). Parts of Alaska and Puerto Rico are not assigned to a DMA by Nielsen.

[159] *2002 Biennial Review Order*, 18 FCC Rcd at 13729 (¶ 282).

most recent study measuring the level of diversity across a broad range of media, including radio, used data compiled on the basis of DMAs.[160] CU's claim that the NAB study is flawed because it does not list the number of owners in Arbitron metro markets[161] falters on the very same basis. For this study, DMAs were used, and the study prominently lists the current number of owners of radio stations in each DMA within its scope.[162] And NAB has already conclusively shown why it is entirely appropriate, and, indeed, necessary as a legal matter, to omit audience share analysis from any study meant to measure the level of diversity in local media markets.[163]

Prometheus launches a related attack on the *Media Availability Outlets by Markets* study[164] that fares no better. As an initial matter, the claim that the study contains "errors in basic mathematics"[165] is preposterous. All of the calculations in the study regarding percentage changes were performed using the previous number of stations as a base. Prometheus' "corrections" simply use the current number of stations as a base. When the purpose is to show the percentage change *from* one period in time *to* another, it is accurate to use the pre-existing number as the starting point.[166] The study thus does not, contrary to Prometheus' contention, overstate percentage changes in NAB's favor. Quite the opposite, it is Prometheus' method that would inaccurately understate the degree of change in its favor, and it is Prometheus that apparently needs a lesson in "basic mathematics." For example, suppose there were 4 stations previously, and in the interim 2 stations came on the air. The analysis employed in NAB's study would find that there was a 50% increase in the number of stations (2 divided by 4), while Prometheus would say there was only a 33% increase in the number of stations (2 divided by 6).[167] But when the question is "how much did something increase during the relevant time

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[160] *See* Kiran Duwadi, Scott Roberts, and Andrew Wise, *Ownership Structure and Robustness of Media* (released as Study 2 in MB Docket Nos. 06-121, *et al.*) ("*FCC Study 2*"). Moreover, another study submitted by NAB in this docket, *Independent Radio Voices in Radio Markets*, does include comprehensive data regarding the number of radio stations owned by independent owners in all of the 297 Arbitron metro markets. *See* NAB, *Independent Radio Voices in Radio Markets* (Aug. 2006) (Attachment B to NAB Comments).

[161] CU Reply Comments, at 21; *CU Reply Study 4,* at 65.

[162] *See generally Media Outlets Availability by Markets*.

[163] *See* Section I, *supra*.

[164] *See* Prometheus Reply Comments, at 28-29; *Rose Report,* at 1-6.

[165] Prometheus Reply Comments, at 28; *see Rose Report*, at 2-3.

[166] *See, e.g.*, http://www.purplemath.com/modules/percntof.htm (last visited Oct. 5, 2007) ("Suppose a certain item used to sell for seventy-five cents a pound, you see that it's been marked up to eighty-one cents a pound. What is the percent increase? First, I have to find the absolute increase: 81 – 75 = 6. The price has gone up six cents. Now I can find the percentage increase over the original price. (Note this language, "increase/decrease over the original," and use it to your advantage: it will remind you to put the increase or decrease over the original, and divide.) This percentage increase is the relative change: 6/75 = 0.08. ...or an 8% increase in price per pound.").

[167] Furthermore, use of Prometheus' proposed method would overstate a percentage change if the results showed decreases. Example: if there were 6 stations previously and it went down to 4 stations, NAB's method would calculate a 33% decrease (2 divided by 6), while Prometheus would calculate a 50% decrease (2 divided by 4).

period," it makes no sense whatsoever to use the *later* point in time as the basis for analysis of change.

Prometheus also complains about the particular markets selected for analysis, and baldly claims that they were not selected randomly because more larger markets than smaller markets were included.[168] That result, in fact, shows just the opposite – if the markets selected had been evenly distributed across market sizes, then they would not bear the hallmark of "random" selection. Moreover, the study includes only two of the top ten markets, five of the top twenty-five markets, and nine of the top fifty markets. Hence, contrary to Prometheus' suggestion, there is no genuine bias towards the larger markets. Furthermore, the purpose of the *Media Outlets Availability by Markets* study was to examine the changes over time in the number of outlets in these randomly selected markets. There is no suggestion in the data that the change in the number of outlets (either in absolute or percentage terms) was any different across varying market sizes, rendering Prometheus' criticism on this score irrelevant. In any case, *FCC Study 2* includes data on *all* Nielsen DMAs that is comparable to that contained in the NAB analysis.[169] Accordingly, the information that Prometheus claims is lacking is contained in the record should the Commission determine that it is necessary to examine it.

Finally, Prometheus launches a variety of uncompelling attacks on the data sets used in the *Media Outlets Availability By Markets* study's analyses of low-power television, satellite radio, cable and alternative multichannel delivery systems ("ADS") (such as DBS and telco-delivered video), and Internet.[170] With respect to low-power television, the study simply makes the point that these outlets are now present, and add to the vast realm of video programming choices available to viewers. With respect to satellite radio, while Prometheus attacks the NAB study's use of an average satellite radio penetration metric which assumes that penetration is evenly distributed across DMAs, it points to no alternative measure. With respect to cable and ADS, Prometheus' arguments, perhaps not surprisingly, reflect a lack of knowledge regarding the changes that have occurred in the past ten years. It is not at all shocking, for example, that cable penetration decreased between 1986 and 2006 while cable + ADS penetration went up significantly, as subscribers have migrated from cable to DBS, which was not launched on a wide scale until the 1990s, and other more recently-introduced alternative delivery platforms.[171] And with respect to the Internet, Prometheus complains about the use of data compiled by The Media Audit, but again fails to provide any reasonable alternative. Furthermore, Prometheus' contention that the analysis is flawed because it merely demonstrates that the Internet is

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[168] Prometheus Reply Comments, at 28; *Rose Report*, at 2.

[169] *See FCC Study 2*; *see also FCC Study 2 Related Data*, http://www.fcc.gov/ownership/studydata/2007/study02data.zip (last visited Oct. 5, 2007).

[170] Prometheus Reply Comments, at 28-29; *Rose Report*, at 1-2, 4-6.

[171] *See, e.g.*, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, 9 FCC Rcd 7442, 7475 (¶ 65) (1994) (reporting that as of September 1994, DBS served only 40,000 households); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, 2539 (¶ 72) (2006) (reporting that DBS currently serves 26.12 million subscribers).

available rather than measuring the extent of Internet usage amounts to nothing more than a restatement of the parallel contention that audience share must be taken into account when measuring diversity, which NAB has already fully rebutted above.[172]

III. CONTINUED ATTEMPTS TO DISCREDIT NAB'S TELEVISION FINANCIAL ANALYSES MUST BE REJECTED, AS THE DATA CLEARLY SHOW THAT TELEVISION STATIONS, AND PARTICULARLY THE LOWEST RATED ONES IN MID-SIZED AND SMALL MARKETS, ARE STRUGGLING.

In its comments on the FCC's ownership studies, CU again tries to discredit the analyses of the financial condition of television stations in medium and small markets that NAB has submitted in this proceeding.[173] CU's arguments, however, have not gotten better with age, repackaging, or repetition, and continue to be insufficient to undermine the evidence that stations – and particularly the lowest ranked ones – in mid-sized and small markets are struggling, and that reformation of the duopoly rule is thus long overdue.

In this latest effort to undermine NAB's persuasive showing on this score, CU purports to analyze all station revenues in all markets between 1996 and 2006, and claims that its analysis shows that, among other things, average station revenues have grown higher and less variable over that period.[174] This argument is nothing more than a slight variation on the contention that, examined as a whole, television stations remain profitable.[175] As NAB has explained, however, that is simply not the point. Its *TV Financial Reports*, as is apparent on their face, are not designed to, and do not purport to, show that *all* television stations in *all* markets are struggling.[176] Rather, the analysis is primarily aimed at demonstrating that stations in smaller

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[172] *See* Section I, *supra*.

[173] On September 25, 2007, NAB submitted a written ex parte which fully rebutted arguments regarding the analysis of the financial condition of television stations in medium and small markets that NAB has submitted in this proceeding. *See* Letter from Jane E. Mago, Marsha J. MacBride, and Jerianne Timmerman, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 06-121, *et al.* (filed Sept. 25, 2007) ("*TV Financial Ex Parte*"). That filing fully rebutted the contentions of CU and Prometheus regarding the evidence that NAB had, as of that date, submitted in this proceeding, regarding television stations' economic struggles. *See generally id.*; *see also* NAB, *The Declining Financial Position of Television Stations in Medium and Small Markets* (Sept. 2007) ("*September 2007 TV Financial Report*") (Attachment B to *TV Financial Ex Parte*); *see also* NAB, *The Declining Financial Position of Television Stations in Medium and Small Markets* (Dec. 2006) ("*December 2006 TV Financial Report*") (Attachment to Reply Comments of NAB); NAB, *The Declining Financial Position of Television Stations in Medium and Small Markets* (Aug. 2006) ("*August 2006 TV Financial Report*") (Attachment J to Comments of NAB). The *September 2007 TV Financial Report*, *December 2006 TV Financial Report*, and *August 2006 TV Financial Report* will be referred to collectively as the "*TV Financial Reports*." The arguments contained in this section respond to the latest attempt by CU to discredit NAB's analysis in its comments on the FCC ownership studies. *See* CU Ownership Studies Comments, at 161-72.

[174] *See* CU Ownership Studies Comments, at 163-64.

[175] *See, e.g.*, Prometheus Reply Comments, at 33; Comments of Consumers Union, Consumer Federation of America and Free Press, MB Docket Nos. 06-121, *et al.*, at 17 (filed Oct. 23, 2006).

[176] *TV Financial Ex Parte*, at 20; *see also* NAB Reply Comments, at 60-70.

markets are facing significant financial challenges, that there is a large disparity between the profitability of lower-rated stations and higher-rated stations, and that low-rated stations in smaller markets are in a particularly precarious financial situation.[177] CU's most recent filing does not distinguish among markets based on their size, nor does it distinguish between low- and high-rated stations. It is therefore completely irrelevant to NAB's primary contention.

Furthermore, while CU goes on at length regarding the alleged impropriety of NAB's exclusion of even-numbered years from its analysis, a review of industry data that includes those years yields results that are consistent with the findings of NAB's previous *TV Financial Reports*. Indeed, data from all stations responding to the annual NAB/BCFM Television Financial Survey between 1996 and 2005 indicate that in *every single group* of markets ranked 51 and higher, the lower 25% of stations had average station revenues that were *negative* over that period.[178] Further, even when only the even-numbered years in that time period are considered, the lower 25% of stations in all but three groups of markets experienced a decrease in profitability from 1996 to 2004.[179] In six market groupings, the percentage change from 1996 to 2004 shows that the lower 25% of stations experienced a decrease in profits of between 17.5% and 268.2%, and in two market groupings the percentage change over that period shows an increase in *actual losses* of nearly 30%.[180] Moreover, in 2004, in seven market groupings the lower 25% of stations reported *actual losses* of between \$39,042 and \$623,380.[181] And when the total period is

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[177] *TV Financial Ex Parte*, at 20; *see also August 2006 TV Financial Report*, at 4 ("A review of television station profitability in smaller markets reveals that profit margins are already at risk today, *especially for the lower rated affiliated stations*.") (emphasis added); *December 2006 TV Financial Report*, at 5 (same); *see also, e.g.*, NAB Comments, at 93 (explaining that the study "compared the cash flow and pre-tax profits of the average high-rated affiliated station in these markets to the cash flow and profits of the average low-rated affiliate"); *id.* (noting that the study "unequivocally demonstrates the *financial differences* between the average high-rated and low-rated network affiliates in these mid-sized and small markets") (emphasis added); NAB Reply Comments, at 65 (citing the *December 2006 TV Financial Report* for the proposition that "[i]n particular, lower-rated network affiliated stations in the smallest markets (126+) have experienced actual losses in 2001, 2003, and 2005"); *see also* NAB Comments, at 97 ("Smaller market television broadcasters (*especially those who are not the ratings leader in their markets*) are experiencing serious financial distress. . . . These financial problems are sufficiently severe to threaten the long-term viability for lower-rated stations.") (emphasis added).

[178] *See* Attachment A hereto. Data for this attachment were obtained from the annual NAB, BCFM Television Financial Reports for the years 1996-2005. This is a long-standing annual survey of all commercial television stations conducted by NAB in conjunction with an outside accounting firm. In each of these years 1996-2005, approximately two-thirds of all commercial television stations reported their revenue and expense information directly to the independent accounting firm. No one at NAB sees any of the individual stations' completed survey data. *See September 2007 TV Financial Report*, at 2-3; *TV Financial Ex Parte*, at 15-18.

[179] *See id.*

[180] *See id.*

[181] *See id.* When only even-numbered years are considered, even when the percentage change from 1996 to 2004 shows an increase in profits or a decrease in losses, which might suggest an improvement of stations' financial situation, an examination of the data reveals that stations are still facing significant challenges. In markets ranked 101 to 110, even though profits are shown to have increased, stations suffered substantial losses in two even-numbered years, and three odd-numbered years, in the interim. In markets ranked 111 to 120, losses decreased, but again, not nearly enough to make up for the prior successive years of poor financial performance. And in markets

examined, the findings are even more bleak – the percentage change from 1996 to 2005 shows declining profitability among the lower 25% of stations in every single group of markets, and all but one group of stations experienced actual losses in 2005.[182]

This data adds to the already fulsome evidence that commercial television stations in mid-sized and small markets are at substantial risk, and that the lower-rated stations in those markets are suffering the most. Whether one looks at odd-numbered years, even-numbered years, or all years, the reality is the same: relaxation of the duopoly rule and elimination of the top-four rule is necessary in order to preserve the ability of television stations, particularly the lower-ranked stations, to continue to offer high quality programming and other services to viewers, including local news.

CU's further contention that the availability of duopoly rule waivers on a case-by-case basis for stations that are failed or failing is sufficient to fix the problems that television broadcasters face is equally without merit.[183] As an initial matter, the Commission acknowledged in its *2002 Biennial Review Order* that the availability of waivers for failed or failing stations was not sufficient to guard against the harm caused by strict enforcement of the duopoly rule with its "top four restriction," stating that *even with such waivers* available, the rule "disserve[s] the public interest by preventing marginal – but not yet 'failing' – stations from effectively serving the needs of their communities."[184] Furthermore, it is clear that "[t]he FCC cannot save an irrational rule by tacking on" – or through reliance on – "a waiver procedure."[185] Because, as NAB has established, maintenance of the duopoly rule and the top-four restriction would be arbitrary and capricious, and because the Commission has already found waivers for failed or failing stations to be insufficiently broad to provide necessary relief, the continued availability of such waivers cannot possibly justify retention of the rule in its current form.

IV. <u>CHILDREN NOW'S RECENTLY RELEASED STUDY ON THE EDUCATIONAL AND INFORMATIONAL PROGRAMMING PROVIDED BY DUOPOLY STATIONS IS FLAWED.</u>

In a recently-released study, Children Now purports to show that the formation of television duopolies has led to declining quantities of children's television programming.[186] Upon

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ranked 176 and higher, although losses are shown to have decreased when only even-numbered years are considered, stations still suffered actual losses of $229,823 in 2004. *See id.*

182 *See id.*

183 *See* CU Ownership Studies Comments, at 172.

184 *2002 Biennial Review Order*, 18 FCC Rcd at 13709 (¶ 227).

185 *Alltel Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988); *see United States Telecom Ass'n v. FCC*, 359 F.3d 554, 571 (D.C. Cir. 2004).

186 *See* Children Now, *Big Media, Little Kids 2: Examining the Influence of Duopolies on Children's Television Programming*, Sept. 2007, *available at* http://publications.childrennow.org/assets/pdf/cmp/big-media-little2-07.pdf ("*Big Media, Little Kids 2*").

examination, however, it is clear that this study suffers from numerous analytical problems. In other respects, the data that the study reports do not support Children Now's substantive arguments. Thus, the FCC may not rely on this study as evidence that harm flows from common ownership of television stations.

Most significantly, the study purports to compare the total amount of all children's programming and E/I programming aired on television stations that were once stand-alone stations (e.g., were not part of duopolies) with the total amount of such programming aired on stations that are presently part of duopolies (and one triopoly), and finds what the study terms substantial decreases among duopoly stations from 1998 to 2006.[187] From this, Children Now extrapolates that when stations go from separate to common ownership, they decrease the amount of children's programming that they air.[188] However, in three out of the seven duopoly markets included in the study, stations that are part of duopolies today had been operated under LMAs in 1998.[189] Thus, the LMA partner – who later became the licensee – was already cooperating with the previous licensee in decisions affecting station operations and management in 1998. Attributing what Children Now refers to as a "decrease" in children's programming to a change from non-duopoly status to duopoly status thus appears more unlikely, because the very same entity was involved in station operations and likely had an impact on programming decisions at both of the points in time that are included in the study. Given this factor, which Children Now overlooks, the study can hardly be viewed as providing evidence of a causal relationship between common ownership and a decline in children's programming.

In addition, the Children Now study suffers from a variety of other flaws that, considered alone or taken together, only further undermine its conclusions. First, the study does not control for factors other than common ownership that might have resulted in decreases in children's programming. While Children Now points to the decline that occurred in the children's offerings of duopoly stations as supposed evidence of the harms that flow from common ownership, it is at least equally plausible to conclude that, over the same period, these stations might well have decreased their children's programming even further in response to competition (i.e., Nickelodeon, Disney) had they not been part of duopolies. In fact, in its examination of the average amounts of children's programming aired across both duopoly and non-duopoly stations, the study finds decreases regardless of ownership structure.[190] This trend suggests that

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[187] *See id.* at 3.

[188] *See, e.g., id.* at 1, 3.

[189] Specifically, in Nashville, WZTV and WUXP were under LMAs with Sinclair and ultimately became part of the "triopoly" (which, of course, is not a true triopoly because Sinclair still operates WNAB under an LMA); in Portland-Auburn, WPME was operated under an LMA with Pegasus, which then owned WPXT, and the WPME-WPXT combination later became the only duopoly in the market; and in Spokane, KSKN was operated under an LMA with Belo, the parent company of the licensee of KREM, and the KSKN-KREM combination later became the only duopoly in that market. *See* BIA Financial Network, *Investing In Television 1999, 1st Edition*, 1999.

[190] *See Big Media, Little Kids 2,* at 4-5, Figures 1-4 (evaluating average children's programming offerings across all stations in terms of hours of children's programming, the number of children's series, hours of educational programming, and the number of educational series, and showing declines in each category); *id.* at 6, Tables 1-4 (same). Similarly, in some of the markets studied, there were decreases in children's programming among both duopoly and non-duopoly stations. *See id.* at 9, Tables 12-13.

something other than common ownership caused the change – and the most likely other factor is competition from MVPDs.

Second, in many of the variables examined, the actual "performance" of duopoly stations is in fact superior to the performance of their non-commonly-owned counterparts, such that the data do not support Children Now's conclusions.[191] Indeed, while the average number of hours of children's programming on duopoly stations is shown to have decreased by a larger percentage, that total amount of children's programming aired is still higher (5.93 vs. 5.08) than non-duopoly stations.[192] Similarly, in several individual markets commonly owned stations are shown to provide more children's programming, measured in absolute terms, than their non-duopoly counterparts. In Nashville, for example, the commonly owned stations aired 7 hours of children's programming a week, while the independently owned stations aired 5.5.[193] And in Portland-Auburn, the duopoly stations aired 5.75 hours a week, while the independently owned stations aired 4.5.[194] Further, when the study compares the performance of duopoly stations and non-duopoly stations in terms of the hours of children's programming that is aired, it finds no market in which the non-duopoly stations are offering more hours of children's programming than the duopoly stations and one market, Buffalo, in which the duopoly stations are actually offering statistically significantly more such programming than the non-duopoly stations.[195]

Third, the study attempts to downplay the significance of cable and satellite programming as contributors to the universe of programming options that currently exist for young audiences by pointing out that those services are not universally available.[196] In doing so, Children Now, as NAB explained in its comments filed in the children's programming proceeding, altogether ignores the role of free, over-the-air noncommercial stations, on which children's programming is often the "centerpiece" of program line-ups.[197] Furthermore, television broadcasters have to be concerned about the whole audience that may tune in, not just viewers without cable or satellite. Hence, because of competitive conditions television broadcasters must, in order to succeed in the marketplace, attempt to maximize their audiences by providing programming that is distinct from that offered by *all* other video sources, including networks carried on cable and satellite. For the very same reason, the study's statement that because broadcasters suggest that duopolies are "necessary to preserve and enhance [their] ability to serve viewers and communities in markets of all sizes, we would expect to find that the decreases in children's

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[191] *See id.* at 6, Table 1; *id.* at 7, Table 5.

[192] *See id.* at 6, Table 1; *see also id.* at 6 n.10. Although the study notes that this difference is not significant, that outcome is likely due at least in part to the small number of duopoly situations included in the study.

[193] *See id.* at 8, Table 6.

[194] *See id.* at 9, Table 10.

[195] *See id.* at Table 14.

[196] *See id.* at 3.

[197] *See* NAB Comments, MM Docket No. 00-167, at 9-10 (filed Sept. 5, 2007); NAB Reply Comments, MM Docket No. 00-167, at 5-6 (filed Oct. 1, 2007).

programming at duopoly stations would be less than the decreases at non-duopoly stations"[198] is a non-sequitur. Broadcasters have to serve the entire community, in addition to their child audiences, and NAB's position is that providing duopoly relief is necessary to enable broadcasters to continue to compete in the ever-expanding multimedia marketplace and to continue offering a variety of quality, costly programming, including local news, to all their viewers.

Fourth, the study overlooks the reality that, while the average number of "core" children's programming hours has decreased somewhat between 1998 and 2006, the stations included in its analysis are still airing more – and, indeed, a full hour more – than the FCC's guidelines for children's programming.[199] Far from showing that broadcasters are not complying with their legal mandate, this aspect of the study confirms that, in fact, commercial television stations are doing much to serve their child audiences.

Fifth, the study's attempt to use the average number of children's series (as opposed to hours of programming) to show a decrease in diversity makes no logical sense. Children Now never explains – nor does there appear to be a logical explanation – why the airing of one-hour programs, as opposed to thirty-minute programs, would provide less service to children. But under their analysis, an hour-long program would be valued less highly than two thirty-minute programs, because it would be one series instead of two. Furthermore, broadcasters may well air additional episodes of a given program due to its high ratings. But if a particular program is popular, this shows that children are watching it (and, accordingly, receiving the educational and informational message that it conveys), and airing more episodes of that program would only serve to increase the youth who are exposed to its content. As a result of these myriad flaws, the FCC should not rely on the Children Now study in considering whether to provide relief from the television duopoly rule.

V. CONCLUSION

For all of these reasons, it is plain that the claims of those parties attacking NAB's arguments and submissions in support of modest relaxation of the media ownership rules lack merit. The Commission can and should rely on the evidence submitted by NAB in this record in taking such action, despite the efforts of some to hold back the tide of technological and regulatory change that is required in light of the fundamental changes in the media marketplace.

Respectfully submitted,

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[198] *See Big Media, Little Kids 2*, at 7.

[199] *See id.* at 4.

ATTACHMENT A

ANNUAL TELEVISION FINANCIAL SURVEYS

Pre-Tax Profits – All Stations Responding – 25th Percentile

	Markets 176+	Markets 151-175	Markets 131-150	Markets 121-130	Markets 111-120	Markets 101-110	Markets 91-100	Markets 81-90	Markets 71-80	Markets 61-70	Markets 51-60
1996	-321,402	331,609	-141,587	-217,010	-231,004	158,765	336,092	419,666	370,665	282,782	504,288
1997	-258,559	-3,840	-345,230	-358,750	-718,967	37,939	-235,276	-307,523	240,170	159,461	713,055
1998	60,336	-79,243	-425,298	-562,413	-670,057	63,957	-318,823	-218,487	-187,572	223,666	48,506
1999	-95,050	-146,003	-825,747	-710,348	-1,095,331	-615,124	-567,430	-772,874	-1,105,739	-412,170	134,172
2000	-176,307	-357,107	-530,546	26,973	-658,700	-199,771	-1,020,062	-175,280	-743,991	203,737	-694,519
2001	-318,285	-312,206	-998,440	-1,125,969	-1,696,665	-849,021	-2,168,276	-1,932,492	-2,328,460	-1,325,192	-1,462,123
2002	-464,802	-25,130	-655,697	-281,293	124,362	-226,334	75,945	-32,217	-1,235,966	-419,880	-347,083
2003	-362,498	-315,702	-854,781	-294,479	-804,500	-194,193	-519,969	-140,255	-781,202	-147,554	-399,194
2004	-229,823	-39,042	-179,528	-280,463	420	366,368	277,243	167,183	-623,380	-41,615	-591,390
2005	-444,215	-152,788	-552,335	-950,821	-286,671	86,949	-671,316	-576,918	-1,299,696	-11,451	-644,163
% Change Even 1996-2004	**Losses Decreased 28.5%**	**Profits Decreased 111.8%**	**Losses Increased 26.8%**	**Losses Increased 29.2%**	**Losses Decreased 100.2%**	**Profits Increased 130.8%**	**Profits Decreased 17.5%**	**Profits Decreased 60.2%**	**Profits Decreased 268.2%**	**Profits Decreased 114.7%**	**Profits Decreased 217.3%**
% Change Odd 1997-2005	**Losses Increased 71.8%**	**Losses Increased 3878.9%**	**Losses Increased 60.0%**	**Losses Increased 165.0%**	**Losses Decreased 60.1%**	**Profits Increased 129.2%**	**Losses Increased 185.3%**	**Losses Increased 87.6%**	**Profits Decreased 641.2%**	**Profits Decreased 107.2%**	**Profits Decreased 190.3%**
% Change Total 1996-2005	**Losses Increased 38.2%**	**Profits Decreased 146.1%**	**Losses Increased 290.1%**	**Losses Increased 338.1%**	**Losses Increased 24.1%**	**Profits Decreased 45.2%**	**Profits Decreased 299.7%**	**Profits Decreased 237.5%**	**Profits Decreased 450.6%**	**Profits Decreased 104.0%**	**Profits Decreased 227.7%**
AVERAGE 1996-2005	**-261,061**	**-109,945**	**-550,919**	**-475,457**	**-603,711**	**-137,047**	**-481,187**	**-356,920**	**-769,517**	**-148,822**	**-273,845**