television stations, and up to three television stations in markets with 18 or more television stations.[296] The Commission retained the prohibition on combinations involving more than one station ranked among the top four in the market, thus prohibiting combinations in markets with four or fewer television stations.[297] The Commission eliminated consideration of overlapping Grade B contours,[298] however, and decided to look instead only at whether a station is assigned by Nielsen to a DMA.[299] The *2002 Biennial Review Order* also modified the Commission's criteria for waiver of the local television ownership rule.[300] Although the Commission stated that it would continue to allow entities to seek a waiver if at least one of the stations in the proposed combination is failed, failing, or unbuilt,[301] it removed the requirement that the waiver applicant demonstrate that there is no buyer outside the market willing to purchase the station at a reasonable price.[302]

91. *The Prometheus Decision.* On review in *Prometheus*, the court upheld the Commission's determination that "broadcast media are not the only media outlets contributing to viewpoint diversity in local markets."[303] In light of its decision to remand the Commission's numerical limits, the court found that it need not decide "the degree to which non-broadcast media compensate for lost viewpoint diversity to justify the modified [local television] rule."[304] In addition, in light of evidence in the record, including evidence that "commonly owned television stations are more likely to carry local news than other stations" and studies showing that "consolidation generally improved audience ratings," the court rejected petitioners' contention "that the Commission's finding of localism benefits from consolidation was unsupported."[305] The court also upheld the Commission's decision to retain the top four-ranked station restriction, stating that it "must uphold an agency's line-drawing decision when it is supported by evidence in the record."[306] It found "ample evidence in the record" to support the Commission's reliance on a "cushion" of audience share percentage points between the fourth- and fifth-ranked stations in most markets to restrict combinations among the top four-ranked stations "as opposed to the top three or some other number."[307]

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[296] *Id.* at 13668, ¶ 134.

[297] *Id.* As under the existing rule, the revised rule provided that a station's rank would be based on the station's most recent all-day audience share, as measured by Nielsen or any comparable professional and accepted rating service, at the time an application for transfer or assignment of license is filed. *Id.* at 13692, ¶ 186.

[298] *Id.* at 13692, ¶ 187. Combinations in existence as of the time of the *2002 Biennial Review Order* were grandfathered. *Id.* at 13807-08, ¶¶ 482-84.

[299] *Id.* at 13692, ¶¶ 186-87.

[300] *Id.* at 13708, ¶ 225 (eliminating requirement to show that no out-of-market buyer is available for failed, failing and unbuilt station waivers); *id.* at 13710, ¶ 231 (stating that the Commission also would consider waivers of the local television ownership rule where the stations at issue are in the same DMA, but are not available over-the-air or via MVPDs in any of the same geographic areas); *id.* at 13708-10, ¶¶ 227-30 (in markets with 11 or fewer stations, parties can seek a waiver of the top four-ranked restriction by making certain showings).

[301] *Id.* at 13708, ¶ 225. *See* 47 C.F.R. 73.3555 Note 7 (setting forth the criteria that must be met in order for a station to qualify as "failed, failing, or unbuilt").

[302] *2002 Biennial Review Order*, 18 FCC Rcd at 13708, ¶ 225.

[303] *Prometheus,* 373 F.3d at 414.

[304] *Id.* at 415.

[305] *Id.* at 415-16.

[306] *Id.* at 417 (citing *Sinclair,* 284 F.3d at 162; *AT&T Corp.*, 220 F.3d at 627).

[307] *Id.* at 417-18.

92. Nonetheless, the court remanded the numerical limits in the new rule for further justification. The limits were premised on the need to ensure six equal-sized competitors. The size of an owner was tied to the number of stations owned, rather than the audience shares of those stations. The court held that the Commission had unreasonably failed to consider the audience shares of stations in setting its numerical limits, finding that "[n]o evidence supports the Commission's equal market share assumption, and no reasonable explanation underlies its decision to disregard actual market share."[308] Further, although the court recognized that the Commission did not intend the numerical limits to be a mechanical application of the *DOJ/FTC Merger Guidelines*, it concluded that the rule was unreasonable because it would allow levels of concentration exceeding the 1800 HHI benchmark relied upon by the Commission in setting its numerical limits.[309]

93. The court also remanded for further consideration the Commission's elimination of the requirement to demonstrate that no out-of-market buyer is reasonably available when seeking a failed, failing, or unbuilt television station waiver. The court found that "in repealing the [rule] without any discussion of the effect of its decision on minority television station ownership[,]" the Commission "entirely failed to consider an important aspect of the problem."[310]

94. *Issues Raised by Commenters.* Some commenters support retention of the rule in its current form.[311] Other commenters suggest that the current rule should be tightened.[312] On the other hand, several commenters appear to prefer elimination of the rule.[313] Still other commenters ask the Commission to loosen the rule in some manner.[314]

95. Several commenters identify negative effects of consolidation they claim would result if the Commission repealed the local television ownership rule.[315] Other commenters extol the competitive benefits that would result from the ability to merge television stations.[316] Some commenters seek elimination of the top four prohibition.[317] Some commenters favor a failed station solicitation rule,[318]

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[308] *Id.* at 420.

[309] *Id.* at 419-20.

[310] *Id.* at 421 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983).

[311] *See, e.g.*, CWA Comments at 61.

[312] *See* AFL-CIO Comments at 45; AFTRA Comments at 15; CU Comments at 21; UCC Comments at 45-47.

[313] *See* Fox Comments at 18-20; Gannett Comments at 39-45; Gray Comments at 1-6; Sinclair 12/11/07 Comments at 4.

[314] *See* KTBS Comments at 1-4; Belo Comments at 18; Belo 12/11/07 Comments at 7-8; Block Comments at 1-6; Cascade Comments at 1-3; Entravision Comments at 5-9; Hearst-Argyle Comments at 4, 26; KVMD Comments at 3-7; NAB Comments at 87; NAB 12/11/07 Comments at 15-23; Nexstar Comments at 22; Smaller Market Television Station ("SMTS")12/11/07 Comments at 8-9; SMTS Comments at 13.

[315] *See* Cequel Comments at 2-4 (asserting that consolidation increases broadcasters' negotiation leverage with cable operators, allowing them to seek "inflationary" retransmission consent terms); Children's Media Policy Coalition Comments at 9-11, 13-15 (stating that media consolidation reduces the availability of children's programming); CWA Comments at 13 (stating that consolidation results in job losses).

[316] *See, e.g.*, Belo Comments at 25; Cascade Comments at 1-3; Entravision Comments at 9-10; KVMD Comments at 6-7; NAB 12/11/07 Comments at 22-23; Nexstar Comments at 14-16; SMTS 12/11/07 Comments at 8-9.

[317] *See* Gannett Comments at 46-48; Granite Comments at 2-6; Hearst-Argyle Comments at 33-46; Hoak Media Comments at 8-9; Sinclair Comments at 34-38; NAB Comments at 107.

[318] *See* Hearst-Argyle Comments at 30; SMTS Comments at 26.

while others oppose it.[319] Other commenters provide no specific guidance as to the type of rule, if any, that the Commission should adopt.[320]

B. Discussion

96. As discussed below, we are persuaded from the evidence in the record that the current rule is consistent with the public interest. Therefore, we will continue to allow an entity to own two television stations in the same DMA if: (1) the Grade B contours of the stations do not overlap; or (2) at least one of the stations in the combination is not ranked among the top four stations in terms of audience share, *and* at least eight independently owned and operating commercial or non-commercial full-power broadcast television stations would remain in the DMA after the combination. To determine the number of voices remaining after the merger, the Commission will continue to count those broadcast television stations whose Grade B signal contours overlap with the Grade B signal contour of at least one of the stations that would be commonly owned. With respect to the waiver standard for the local television ownership rule, we will reinstate our requirement that a waiver applicant demonstrate that there is no buyer outside the market willing to purchase the station at a reasonable price.[321]

97. We base our decision on our assessment that the Commission's local television ownership rule promotes competition for viewers and advertisers within local television markets. The public is best served when numerous rivals compete for a viewing audience. In the video programming market, competitors profit by attracting new audiences and by attracting existing audiences away from their competitors. Competition thus provides an incentive to television stations to invest in better programming and to provide programming that is preferred by viewers. The local community benefits from competition among broadcast television stations in the form of higher quality programming provided to viewers. As the Commission concluded in the *2002 Biennial Review Order*, we cannot rely on competition from cable programmers to respond to local needs and interests because most cable programming is provided by cable networks, and those networks respond primarily to national and regional forces. Local broadcast television stations have incentives to respond to conditions in local markets, and those incentives may be diminished by mergers between stations that reduce competition to anticompetitive levels. Competition among local broadcast television stations is also necessary to preserve competition for advertising by local businesses that want to advertise their products on television. Lower advertising costs benefit consumers by promoting efficiency and by allowing firms to pass the savings on to consumers of the advertised products. In the *2002 Biennial Review Order*, the Commission determined that the exercise of market power in broadcast television markets would result in targeted and non-uniform price increases to those advertisers that do not have good substitutes for broadcast television, without raising prices for those advertisers that do have good substitutes for broadcast television.[322]

98. We decline to tighten the local television ownership rule, as requested by some commenters. We recognize that owning a second in-market station can result in substantial savings in overhead and management costs and can allow the local broadcaster to innovate by spreading its fixed costs and operating capital over a larger number of operating units and to better compete with non-

[319] *See* UCC Comments at 30-32 (stating that the Commission should not grant waivers for failing stations, but that if it does, it should retain the failed station solicitation rule).

[320] *See generally* NBC Universal Comments; Equity Broadcasting Comments.

[321] We decline to broaden our waiver standard, as suggested by some commenters. *See* Belo 12/11/07 Comments at 8 (urging the adoption of a general waiver standard that would "permit a broadcaster to demonstrate that, regardless of market size or the number of other local television stations, an individual combination would benefit its local community"); Sinclair 12/11/07 Comments at 4 (arguing that a waiver should be granted whenever the applicant can demonstrate that no harm would be caused and that public interest benefits would ensue).

[322] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13676, ¶ 152.

broadcast content providers for advertising dollars.[323] We find that these potential significant benefits of duopolies permitted under the parameters of the rule, in markets with a plethora of diverse voices, outweigh commenters' speculative claims that duopolies harm diversity and competition.

99. We find that a minimum of eight independently owned-and-operated television stations is appropriate to ensure that there will be robust competition in the local television marketplace.[324] As an initial matter, the "eight voices" test will ensure that each market includes four stations affiliated with the four major networks in each market (*i.e.*, ABC, NBC, CBS, and Fox), plus at least an equal number of independently owned-and-operated broadcast television stations that are not affiliated with a major network. Preserving the independent ownership in each local market of four stations that are neither owned by or affiliated with a major network nor commonly owned with a network affiliate in that market will help to ensure that local television stations, spurred by competition, will provide dynamic and vibrant alternative fare, including local news and public affairs programming. Recognizing the vital competitive role played in local television markets by stations that are not owned by or affiliated with the major networks' stations, we believe that it is important that there be a sufficient number of such stations that are truly independent of the major network stations in each market and that will therefore vigorously compete with each of the major network stations for viewers. Such vibrant competition will improve the programming aired by both independent stations and major network stations. In addition, we believe that the eight voices test is supported by the general structure of the local television marketplace. While our 2003 rule was premised on maintaining the presence of six equal-sized competitors in the marketplace, the Third Circuit in *Prometheus* pointed out that this assumption of equal-sized competitors was flawed. Indeed, the Commission itself has found that there is generally a significant gap between the top four stations in a market and the remaining stations. In light of this concentration among the top four stations in most markets, we believe that it is prudent to require the presence of at least four (rather than two) competitors not affiliated with a major network in order to ensure vibrant competition in the local television marketplace.[325] We believe that such competition will ultimately benefit the public by spurring more innovative programming and more programming responsive to local needs and interests.

100. For purposes of the local television ownership rule, we include only full-power television stations in counting voices because our primary goal in preserving the rule is to foster competition among local television stations. We conclude that the local television ownership rule is no longer necessary to foster diversity because there are other outlets for diversity of viewpoint in local markets, and a single-service ownership restriction is not necessary to foster diversity. Therefore, although we recognize that other types of media, such as radio, newspapers, cable, and the Internet, contribute to viewpoint diversity within local markets,[326] we do not believe they should be counted as voices under the local television

[323] *See* Belo Comments at 25; Cascade Comments at 2-3; Entravision Comments at 9-10; KVMD Comments at 5-7; Nexstar Comments at 10; *see also, e.g.,* Remarks of Joe Lewin, President and General Manager of WHTM-TV, Media Ownership Hearing in Harrisburg, Pennsylvania (Feb. 23, 2007), Transcript at 51-56; Remarks of Paul Quinn, President and General Manager of WGAL-TV, Media Ownership Hearing in Harrisburg, Pennsylvania (Feb. 23, 2007), Transcript at 64-69.

[324] As the court in *Sinclair* stated, "[c]hoosing the number eight and defining 'voices' are quintessentially matters of line drawing invoking the Commission's expertise in projecting market results." 284 F.3d at 162.

[325] We note that the eight voices test is based on the unique characteristics of local television markets rather than general HHI analysis. As a result, it is not directly tied to the actual market shares of stations in a particular market. Nevertheless, we think that it is appropriate for us to consider the general characteristics of market structure (*i.e.*, the disparity between the top four stations in a market and the remaining stations) in formulating an appropriate rule that will promote competition.

[326] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13668, ¶ 133.

ownership rule.[327] In *Sinclair*, the court found that the Commission failed to provide an adequate explanation for defining "voices" differently in the radio-television cross-ownership rule and the local television ownership rule.[328] We believe that, given our conclusion that the local television ownership rule is necessary to preserve competition among broadcast television stations in local markets, it is appropriate to limit our voices test to television stations in that rule. In contrast, because the cross-ownership rules are designed to foster viewpoint diversity, it is appropriate within the context of those rules to consider additional sources of viewpoint diversity.[329]

101. We recognize that the Commission concluded in the *2002 Biennial Review Order* that the current local television ownership rule was not necessary to protect competition given "the competitive impact of other video programming outlets" on local broadcasters.[330] We now reverse that determination because we find that eliminating the rule could harm competition among broadcast television stations in local markets. CWA, for example, asserts that "the Commission has ample justification for retaining the rule."[331] AFL-CIO states that the Commission should retain the rule currently in effect and asserts that failure to do so would trigger multiple station mergers in local markets, resulting in a loss of newscasts and shared news product.[332] We agree with UCC when it states that competition, and not concentration of market players, leads to better programming.[333] Because we are retaining the rule primarily to foster competition among local television stations, our determination regarding the continued need for the rule does not depend on the competitive impact of other video programming outlets.[334] While other outlets contribute to the diversity of voices in local markets, we still find that it is necessary in the public interest to ensure that there are at least eight independently owned local television stations in order to ensure robust competition for local television viewers and the continued provision of video programming responsive to the needs and interest of viewers in local markets.

102. As we found in the *2002 Biennial Review Order*, we continue to believe that combinations of top four stations should be prohibited because mergers of those stations would be the most deleterious to competition. In the *2002 Biennial Review Order*, the Commission determined that mergers of stations owned by any of the top four firms often would result in a single firm with a significantly larger market share than the others.[335] The Commission determined that combinations among the top four would reduce incentives to improve programming that appeals to mass audiences.[336] We find that the top four prohibition remains necessary to prevent deleterious levels of concentration.

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[327] *But see* Nexstar Petition at 7-8 (suggesting that the Commission failed to consider local cable competition adequately).

[328] 284 F.3d at 164.

[329] We therefore disagree with commenters that there is no reasoned basis under *Sinclair* for defining voices differently for different ownership rules. *See* SMTS 12/11/07 Comments at 3-4; Sinclair 12/11/07 Comments at 2-3.

[330] *2002 Biennial Review Order*, 18 FCC Rcd at 13668, 13671, ¶¶ 133, 140.

[331] CWA Comments at 61; *see also* CWA Comments at 13-15 (citing examples of television broadcast mergers that led to job losses); CU Comments at 26.

[332] AFL-CIO Comments at 42-44.

[333] UCC Comments at 53-54.

[334] *But see, e.g.*, NAB 12/11/07 Comments at 19-21 (asserting the relevance of cable and satellite viewing and advertising with respect to the competitive position of local television stations); Remarks of Paula Madison, President and General Manager of KNBC-TV, Media Ownership Hearing at El Segundo, California (Oct. 3, 2006), Transcript at 29-33 (discussing competition from cable providers).

[335] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13695, ¶ 194.

[336] *Id.* at 13697, ¶ 200.

The top four prohibition minimizes the likelihood that the market share of two merged stations will significantly overtake the market share of the largest station in a local market, which, as discussed in the *2002 Biennial Review Order*, could create welfare harms.[337] We also find that, in general, a significant "cushion" of audience share percentage points continues to separate the top four stations from the fifth-ranked stations. As noted above, the number of locally owned stations remained fairly constant, with only a slight increase in the number of stations and a slight decrease in the number of owners, from 2002 to 2005. In addition, allowing two top four stations to merge would harm competition in the local broadcast television advertising market because the top four networks (whose affiliates tend to be the top four broadcasters in a given market) enjoy a large and growing advantage over other broadcasters with regard to advertising volume and prices. Accordingly, we find that comments suggesting that the rule is no longer justified are unpersuasive. Prohibiting mergers between the top four television stations in a market prevents well-established competitive harms.

103. In the *2002 Biennial Review Order*, we also concluded that the current rule potentially threatens local programming and that the efficiencies to be gained by relaxing the rule could result in a higher quantity and quality of local news and public affairs programming.[338] We find that the record now before us is unpersuasive regarding the effects of multiple ownership on local programming. Some commenters argue that multiple ownership of television stations enhances local programming,[339] and others claim the opposite.[340] We reject as contrary to the record evidence UCC's contention that there is little evidence that corporations reinvest efficiency-enabled cost-savings into better local programming.[341] Belo states that multiple ownership has permitted it to develop and produce innovative news products because it can spread its fixed costs and operating capital over a larger number of operating units.[342] Entravision contends that group ownership creates efficiencies that enable stations to compete more effectively with non-broadcast content providers and suggests that group ownership results in expanded local news and additional programming responsive to local communities.[343] Nexstar similarly asserts that station groups can experience increased efficiencies, which permit more local programming and community involvement.[344] NBC states that station combinations advance the public interest by creating efficiencies, through combined resources, that result in more local news offerings.[345] Given our finding that there is insufficient evidence to conclude that the current rule threatens local programming, we conclude that it serves the public interest to retain it in order to preserve vigorous competition among local television stations.

104. We maintain the current rule's Grade B overlap provision to avoid disruption to current ownership arrangements and to promote television service in rural areas. In the *2002 Biennial Review*

[337] *Id.* at 13694, ¶ 194.

[338] *Id.* at 13678-83, ¶¶ 155-64.

[339] *See, e.g.,* Belo Comments at 25; Belo 12/11/07 Comments at 7-8; Cascade Comments at 1-3; Entravision Comments at 9-10; KVMD Comments at 6-7; NAB 12/11/07 Comments at 16-19; Nexstar Comments at 14-16; SMTS 12/11/07 Comments at 9.

[340] *See, e.g.,* AFL-CIO Comments at 42-44; AFTRA Comments at 14-15; Remarks of James C. Joyce, Vice President, Nat'l Assoc. of Broadcast Employees and Technicians, CWA, Media Ownership Hearing in El Segundo, California (Oct. 3, 2006), Transcript at 43-47.

[341] UCC Comments at 50-53

[342] Belo Comments at 25.

[343] Entravision Comments at 9-10.

[344] Nexstar Comments at 14-16.

[345] NBC Reply at 8-9.

Order, the Commission eliminated the Grade B contour test for allowing duopolies based on its finding that the DMA is the relevant geographic market in which television broadcasters compete.[346] The Commission's finding was not new. When the Commission changed the geographic scope of the rule to DMAs in 1999, it noted that DMAs are a better measure of actual viewing patterns than the Grade B signal contour standard.[347] Nonetheless, the Commission kept the Grade B overlap test as part of the rule in 1999, noting that it was not the Commission's intent to further restrict the duopoly rule and that the rule without the Grade B provision might be more restrictive in some large DMAs, particularly those west of the Mississippi River.[348] The Commission noted that keeping the Grade B overlap provision "avoids disrupting current ownership arrangements involving stations in the same DMA with no Grade B overlap."[349] In the *2002 Biennial Review Order*, because the Commission significantly relaxed the local television ownership rule, the elimination of the Grade B overlap provision would have been less likely to cause disruption. We do not revise our decision that DMAs are the more precise geographic markets. Nonetheless, in the instant Order, unlike in the *2002 Biennial Review Order*, we are not relaxing the local television ownership rule, and, accordingly, to avoid disruption to settled expectations, we retain the Grade B overlap provision. Furthermore, we believe that maintaining the Grade B provision will promote television service in rural areas by continuing to enable station owners to build or purchase an additional station in a remote corner of the DMA, beyond the reach of their Grade B signal, without regard to the top four/eight voices restriction.

105. *Issues Raised by the Prometheus Court on Remand.* We find that with one exception, the issues remanded by the *Prometheus* court all regarded the new local television ownership rule adopted in 2003. Because we reject that rule and instead retain the eight-voices rule, those issues are moot. The one exception is the court's criticism that the Commission did not consider the potential impact on minority owners when it eliminated the out-of-market buyer requirement for the waiver standard.[350] To ensure that we do not negatively impact minority owners, we now reinstate that requirement in the waiver standard.

106. *Issues Raised in Petitions for Reconsideration.* Various parties sought reconsideration of the revisions the Commission made to the local television ownership rule in the *2002 Biennial Review Order*, arguing that the Commission's analysis was flawed.[351] As discussed above, others appealed these revisions and, ultimately, the Third Circuit remanded them to the Commission.[352] We will not revisit the findings on which the Commission based its earlier decision to revise the local television ownership rule and we dismiss as moot those petitions for reconsideration. Instead, as required by the Third Circuit's remand and by Section 202(h), we reexamine this rule based on the record developed in response to the *Further Notice* and *Second Further Notice*.

107. We also note that a number of parties sought reconsideration of the Commission's decision to retain the prohibition on combinations that would result in a single entity owning more than

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[346] *2002 Biennial Review Order*, 18 FCC Rcd at 13692, ¶ 187.

[347] *Local TV Ownership Report and Order*, 14 FCC Rcd at 12926, ¶¶ 47-48, *clarified on recon.*, 16 FCC Rcd at 1070, ¶ 9.

[348] *Local TV Ownership Report and Order*, 14 FCC Rcd at 12928-29, ¶¶ 51, 53.

[349] *Id.* at 12929, ¶ 53.

[350] *See Prometheus*, 373 F.3d at 420-21.

[351] CFA/CU Petition at 5, 19-20; MMTC Petition at 28-36; UCC Petition at 17-26; *see also* Duff, Ackerman & Goodrich Petition for Clarification, MB Dkt. No. 02-277 at 1-3 (seeking clarification that, under the revised rule, noncommercial stations that duplicate the programming of an in-market parent station would be excluded from the count of television stations).

[352] *Prometheus*, 373 F.3d at 418-20.

one station that is ranked among the top four stations in the market based on audience share.[353] Others appealed that prohibition and, ultimately, it was upheld in *Prometheus*. We discussed above our decision to retain the top four prohibition.

108. UCC challenged our decision to consider, among other things, whether a merger is needed to facilitate the digital transition in deciding whether a waiver of this "top four" restriction is justified.[354] UCC argued that such a consideration would render a waiver standard meaningless because every waiver applicant could make such an argument. We grant UCC's petition for reconsideration. Given that we are adopting the rule as it existed prior to the *2002 Biennial Review Order*, our waiver standard will not include this consideration.

109. Some parties sought reconsideration of our decision to eliminate the failed station solicitation rule, which required an applicant for a waiver to provide notice of the sale of the failed, failing or unbuilt station to potential out-of-market buyers before it could sell that television station to an in-market buyer.[355] To the extent these petitioners argued against this action, we grant their petitions for reconsideration. As discussed above, we have decided to reinstate this requirement, as it was part of the old rule, and we continue to believe that it is necessary to ensure that out-of-market buyers, including qualified minority broadcasters, have notice of, and an opportunity to bid for, a station before it is combined with an in-market station. A waiver of the rule should only be permitted when no out-of-market buyer is interested in purchasing the station. We think that it is inappropriate to assume, as the Commission did in the *2002 Biennial Review Order*,[356] that no out-of-market buyer will be interested unless an effort is made to find one.

VI. LOCAL RADIO OWNERSHIP RULE

110. For the reasons discussed below, we conclude that the current local radio ownership rule, including the market definition as revised in the *2002 Biennial Review Order*, remains "necessary in the public interest" to protect competition in local radio markets. As directed by the *Prometheus* court, we also provide a reasoned justification for our decision to retain the existing numerical limits on local radio ownership. In addition, we deny or dismiss a number of pending petitions for reconsideration of the Commission's action concerning the local radio ownership rule in the *2002 Biennial Review Order*. Accordingly, an entity may own, operate, or control (1) up to eight commercial radio stations, not more than five of which are in the same service (*i.e.*, AM or FM), in a radio market with 45 or more full-power, commercial and noncommercial radio stations; (2) up to seven commercial radio stations, not more than four of which are in the same service, in a radio market with between 30 and 44 (inclusive) full-power, commercial and noncommercial radio stations; (3) up to six commercial radio stations, not more than four of which are in the same service, in a radio market with between 15 and 29 (inclusive) full-power, commercial and noncommercial radio stations; and (4) up to five commercial radio stations, not more than three of which are in the same service, in a radio market with 14 or fewer full-power, commercial and noncommercial radio stations, except that an entity may not own, operate, or control more than 50 percent of the stations in such a market.[357]

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[353] Nexstar Petition at 1-14; LIN Television Corp. and Raycom Media, Inc. ("LIN/Raycom") Petition at 3-13.

[354] UCC Petition at 17-26.

[355] *Id.*; MMTC Petition at 28-36.

[356] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13708, ¶ 225.

[357] *See* 1996 Act § 202(b); 47 C.F.R. § 73.3555(a). A single AM/FM combination is always permitted. Note 539 of the *2002 Biennial Review Order*, 18 FCC Rcd at 13717, ¶ 250 n.539, specified that a single AM/FM combination is always permitted, citing 47 C.F.R. § 73.3555(a)(2). That section of the Commission's rules was inadvertently removed by the *2002 Biennial Review Order*. We are taking this opportunity to reinstate this rule to state "overlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service."

A. Background

111. In the *2002 Biennial Review Order*, the Commission retained the local radio numerical limits and the AM/FM service caps that Congress adopted in the 1996 Act.[358] The Commission determined, however, that its contour-overlap methodology for defining radio markets and counting stations in the market was flawed as a means to protect competition in local radio markets.[359] The Commission therefore modified the definition of a local radio market by replacing the contour-overlap approach with an Arbitron Metro market definition where Arbitron markets exist.[360] In addition, the Commission decided to include noncommercial stations when determining the number of radio stations in a market for purposes of the ownership rules.[361] The Commission also decided to attribute certain radio station Joint Sales Agreements ("JSA") toward the brokering licensee's permissible ownership totals.[362] Recognizing that there could be some existing combinations of broadcast stations that would exceed the revised ownership limits, the Commission grandfathered existing combinations of radio stations and of radio and television stations.[363]

112. The *Prometheus* court upheld the Commission's decision to define the market using Arbitron Metros, to attribute JSAs, to count noncommercial stations in defining the size of a market and to impose restrictions on the transfer of grandfathered combinations.[364] Although the *Prometheus* court affirmed the Commission's rationale that numerical limits help guard against consolidation and foster opportunities for new entrants and therefore upheld the use of numerical limits, the court remanded the Commission's decision to retain the existing numerical limits. The court held that the limits were unsupported by the Commission's rationale that they ensure five equal-sized competitors in most markets.[365] The court held that the Commission had failed to justify five as the appropriate benchmark and did not reconcile that benchmark with the *DOJ/FTC Merger Guidelines* it had used to derive the local television ownership limits. The court also stated that the Commission had failed to show that the limits

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[358] *2002 Biennial Review Order,* 18 FCC Rcd at 13712, 13733-34, ¶¶ 239, 294. The Commission maintained the AM and FM ownership limits due to technical and marketplace disparities between the two services. *Id.* at 13733-34, ¶ 294.

[359] *Id.* at 13712, 13717-24, ¶¶ 239, 250-72.

[360] *Id.* at 13712, 13724-28, ¶¶ 239, 273-81.

[361] *Id.* at 13713, ¶ 239. The Commission held that its prior exclusion of these stations failed to account for their competitive impact on a radio market. *Id.* at 13730, ¶ 287. The Commission found that although they do not compete in the radio advertising market, noncommercial stations exert competitive pressure in the radio listening and radio program production markets. *Id.* at 13734, ¶ 295.

[362] *Id.* at 13742-46, ¶¶ 316-25.

[363] *Id.* at 13807-09, ¶¶ 482-86.

[364] *Prometheus,* 373 F.3d at 421-30. Although the Commission did not require owners to divest their interests in stations, it held that parties would have to comply with the ownership rules at the time a transfer of control or assignment application is filed, unless the entity acquiring control of the combination was an "eligible entity," which was defined as an entity that would qualify as a small business consistent with Small Business Administration ("SBA") standards for its industry grouping. *Id.* at 13809-13, ¶¶ 487-90. The *Prometheus* court subsequently lifted the stay with respect to using Arbitron Metro markets to define local radio markets, including noncommercial stations in determining the size of a market, attributing stations whose advertising is brokered under a JSA to a brokering station's permissible ownership totals, and imposing a transfer restriction. *See* paragraph 4 of this Order, *supra.*

[365] *Prometheus,* 373 F.3d at 432-34 (Because the Commission "has in the past extolled the value of audience share data for measuring diversity and competition in local radio markets," its "reliance on the fiction of equal-sized competitors, as opposed to measuring their actual competitive power, is even more suspect in the context of the local radio rule.").

ensured that five equal-sized competitors have emerged or would emerge under the numerical limits.[366] The court further faulted the Commission for not explaining why it could not take "actual market share" into account when deriving the numerical limits. Finally, the court held that the Commission did not support its decision to retain the AM subcaps.[367]

B. Discussion

113. Under Section 202(h), we consider whether the local radio ownership rule continues to be "necessary in the public interest as a result of competition." In determining whether the rule meets that standard, we consider whether the rule serves the public interest, which, in radio broadcasting, traditionally has encompassed competition, localism, and diversity.[368] For the reasons discussed below, we conclude that the current rule meets that standard. We also conclude that it is appropriate to maintain the current numerical limits on local radio ownership based on our examination of the record before us.

114. *Competition.* As an initial matter, we reaffirm our finding in the *2002 Biennial Review Order* that the relevant geographic market for purposes of our local radio ownership rule is the Arbitron Metro market. We also reaffirm our conclusions in the *2002 Biennial Review Order* that radio broadcasters operate in three relevant product markets: radio advertising, radio listening, and radio program production.[369] Contrary to the arguments of several commenters, there continues to be a lack of persuasive evidence that various entertainment alternatives (*e.g.*, reading and watching television) are

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[366] The court noted that the Commission's decision to rely on a five-firm theory for purposes of the local radio ownership rule conflicts with the *DOJ/FTC Horizontal Merger Guidelines*, under which a market with five equal-sized competitors is considered "highly concentrated." The court held this conflict "suspect" because, elsewhere in the *2002 Biennial Review Order*, the Commission had relied on the *DOJ/FTC Horizontal Merger Guidelines* to derive its local television ownership limits. The court directed the Commission to address this apparent discrepancy on remand. *See id.* at 433-34. In addition, the Commission had cited game theory articles to support its finding that a market that has five or more relatively equal-sized firms can achieve a level of market performance comparable to a fragmented, structurally competitive market. The court directed the Commission to respond to the argument that these game theory articles do not rule out market structures other than equal-sized competitors (such as one large firm and many small ones) as equally competitive markets. *Id.* at 432-33.

[367] *Id.* at 434-35.

[368] Some commenters take issue with the Commission's treatment of localism and diversity. For example, the FMC alleges that we failed to treat localism and diversity as separate policy goals in the context of radio regulation. FMC Petition at 2-5. Instead, FMC argues that the Commission treated localism and diversity as byproducts of competition. It states that the Commission lacks evidence to show that competition ensures localism and diversity. FMC urges the Commission to establish multiple measures of localism and diversity to ensure that the policy goals are met. *See id.* FMC also contends that the Commission failed to explain how its radio ownership rules support localism and to define "competitive market performance" as it relates to localism. *See id.* at 7-8. As indicated by examination of paragraphs 9-12 of this Order, FMC's assertions are incorrect. The Commission separately analyzes the effectiveness of the Commission's rules in promoting each of its three key goals. FMC also contends that the Commission failed to provide enough evidence to show how radio combinations are efficient and that the Commission inconsistently discussed entry conditions for the radio industry. *Id.* at 8-9. First, economic theory indicates that consolidation permits a firm to achieve economies of scale and scope in operations. This, in turn, provides that firm with the capability to achieve greater efficiencies than smaller firms. Firms that fail to achieve such efficiencies are unlikely to compete successfully. DENNIS W. CARLTON AND JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION, 35-48 (3d ed. 2000). Second, our entry analysis is not inconsistent because the evidence shows that a number of transactions are still taking place. *See* Media Ownership Study 2 at 7; "Review of Radio Industry," by George Williams, FCC (2007) ("Media Ownership Study 10"), *available at* http://www.fcc.gov/ownership/studies.html at 5. Thus, contrary to FMC's arguments, radio spectrum is not "locked up," and our ownership tiers are designed to prevent that from occurring.

[369] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13714-16, ¶¶ 243-47.

good substitutes for listening to radio.[370]

115. Having discussed the relevant product and geographic markets for radio, we now undertake our obligation under Section 202(h) to determine whether the current limits on radio station ownership are necessary to promote the public interest in competition. We conclude that the current rule meets that standard.

116. We reaffirm our conclusion in the *2002 Biennial Review Order* that the ownership tiers in the current rule represent a reasonable means for promoting the public interest as it relates to competition, and that numerical limits on radio station ownership help to keep the available radio spectrum from becoming "locked up" in the hands of one or a few owners, thus helping to prevent the formation of market power in local radio markets.[371]

117. We also conclude that retention of the existing numerical limits in the local radio ownership rule is necessary in the public interest. In so concluding, we depart from the Commission's rationale in the *2002 Biennial Review Order* that the existing limits are appropriate because they allow for roughly five equal-sized firms in each market.[372] Instead, we rest our decision on our conclusion that relaxing the rule to permit greater consolidation would be inconsistent with the Commission's public interest objectives of ensuring that the benefits of competition and diversity are realized in local radio markets. Making the numerical limits more restrictive would be inconsistent with Congress' decision to relax the local radio ownership limits in the 1996 Telecommunications Act and would disserve the public interest by unduly disrupting the radio broadcasting industry. Based on our examination of the record, we are persuaded that the current numerical limits strike the appropriate balance.

118. The evidence in the record indicates that retaining the numerical limits at the current level is necessary to protect against excessive market concentration. Prior to 1992, our radio ownership rules prohibited most radio mergers.[373] In 1992, we relaxed our local radio ownership rules in recognition of the fact that our rules prevented some firms from achieving the economies of scale that they needed to survive financially.[374] Congress further relaxed the local radio ownership limits in the 1996

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370 Clear Channel Reply at 4-6, 10-13, 43-46 (citing competition from satellite radio, MP3 players, Internet radio stations, subscription-based music services from cable, DBS and IPTV providers, and Wi-Max); NAB Reply at 32-34, 50-52.

371 *See 2002 Biennial Review Order,* 18 FCC Rcd at 13730-31, ¶ 288; *see also Prometheus,* 373 F.3d at 431-32.

372 *See 2002 Biennial Review Order,* 18 FCC Rcd at 13731, ¶ 289; *see also Prometheus,* 373 F.3d at 433. Though UCC questions our former justification (based on a five equal-sized competitors theory) for retaining the existing numerical limit, we offer a new rationale for our decision, which renders UCC's questions on this issue moot. UCC Petition at 26-29.

373 Before 1989, the Commission relied on interference contours to determine whether two commonly owned radio stations implicated the rule. *See* 47 C.F.R. § 73.3555(a)(1) & (a)(2) (1988). In 1989, the Commission began using principal community contours. In either case, parties could own a single AM-FM combination even if their contours overlapped. *See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets,* MM Docket No. 01-317, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19861, 19863-64 ¶¶ 5-7 (2001); *see also Amendment of §73.3555 of the Commission's Rule, the Broadcast Ownership Rules,* MM Docket No. 87-7, First Report and Order, 4 FCC Rcd 1723, 1723, ¶ 1 (1989); 47 C.F.R. §73.3555(a)(1),(2) (1989) ("*1989 Multiple Ownership First Report and Order*").

374 *See Revision of Radio Rules and Policies,* MM Docket No. 91-140, Report and Order, 7 FCC Rcd 2755, 2757-60, ¶¶ 4-10 (1992) ("*1992 Radio Ownership Order*"); *see also* 47 C.F.R. §73.3555(a)(1) (1995). Under the 1992 rules, a party could own two AM and two FM radio stations in markets with 15 or more commercial radio stations, and three radio stations of which no more than two could be AM or FM stations in smaller markets. The 1992 rule also imposed an audience share limit on radio station combinations in the larger market. *See* 47 C.F.R. §73.3555(a)(1) (1995).

Telecommunications Act.[375] Congress's 1996 radio ownership rules revisions have had a substantial effect on the market structure of radio broadcasting, resulting in further consolidation of radio station ownership at both the national and the local level.[376] By maintaining the current numerical limits, we seek to guard against additional consolidation of the strongest stations in a market in the hands of too few owners and to ensure a market structure that fosters opportunities for new entry into radio broadcasting. The number of commercial radio station owners declined by 39 percent between 1996 and 2007, with most of the decline occurring during the first few years after the 1996 Act.[377] Although the average number of commercial owners across all Arbitron radio markets currently is 9.4, the largest commercial firm in each Arbitron Metro market has, on average, 46 percent of the market's total radio advertising revenue, and the largest two firms have 74 percent of the revenue.[378] In 111 of the 299 Arbitron Metro markets, the top two commercial station owners control at least 80 percent of radio advertising revenue.[379] The top four commercial firms also dominate audience share.[380] And evidence in the record indicates that the increase in concentration in commercial radio markets has resulted in appreciable, albeit small, increases in advertising rates.[381] All of this data in the record supports the conclusion that the current numerical limits are not unduly restrictive and that additional consolidation would not serve the

[375] 1996 Act § 202(b).

[376] *See* FMC Reply App., *False Premises, False Promises: A Quantitative History of Ownership Consolidation in the Radio Industry* by Peter DiCola ("FMC DiCola Study") at 50-81; AFL-CIO Comments at 45-47; UCC Comments at 79-80; Remarks by James Wolfe, President of WFXK and WJAK Radio in Jackson, Tennessee, Media Ownership Hearing in Nashville, Tennessee (Dec. 11, 2006) (noting high concentration levels in the radio industry).

[377] Media Ownership Study 10 at 1 (the conclusions of Media Ownership Study 10 are based on an analysis of the commercial broadcast radio industry).

[378] *Id.* at 2.

[379] *Id.* at 7 ("In the 50 largest markets, on average, the top firm holds 34 percent of market revenue, the second firm holds 24 percent, and firms three and four split the next 26 percent. For the 100 smallest markets, on average, the first firm holds 54 percent, the second firm holds 30 percent, and the next two firms split 13 percent."); *see also* CU Reply at 19 ("at the local level, half of all local radio markets are effectively duopolies and almost 10 percent are monopolies"); FMC DiCola Study at 74 ("Numeric caps at the current level *or even lower levels* are needed to protect the public, the small business community, and the political sphere against excessive market concentration") (emphasis in the original); and at 68 ("Out of 297 Arbitron markets, 232 had HHIs greater than 1800 in Spring 2005. Sixty three more had HHIs between 1000 and 1800. [For the other two markets, no HHI measure was available.] In sum, the majority of local radio markets have levels of concentration that ordinarily give rise to antitrust concerns about excessive market power.").

[380] *See 2002 Biennial Review Order,* 18 FCC Rcd at 13731, ¶ 290, n.616 and accompanying text; *see also* UCC Comments to Media Ownership Studies at 16-17 ("Study 10 ... reveals that common ownership of media outlets in markets is alarmingly high, with four firm concentration ratios averaging 97% in smaller markets and 84% in the 50 largest markets.") (citing Media Ownership Study 10 at 22); CU Reply at 21-22, and Attach., Reply Study at 66-67 ("CU Reply Study") (showing that the top two owners have an average market share of 2/3, and the top four having 90 percent).

[381] *2002 Biennial Review Order,* 18 FCC Rcd at 13732, ¶ 290, n.620 and accompanying text (citing MOWG Study No. 4 at 18, which concluded that "[o]verall..., local consolidation appears to increase the prices paid by national and regional advertising agencies for local radio advertising ... local concentration accounted for approximately 3-4% out of the 68% increase in real advertising rates.") *But see* "Station Ownership and Programming in Radio," by Tasneem Chipty, CRA International, Inc. (Jun. 2007) (:Media Ownership Study 5"), *available at* http://www.fcc.gov/ownership/studies.html at 41 (concluding that "[t]here are no differential effects of local radio consolidation of ownership across big and small markets."); Media Ownership Study 10 at 15-16 ("Overall, it appears that the cost of radio advertising has nearly doubled since the 1996 Act was passed. By contrast, the CPI ... increased 29 percent during the same time period. In other words, the CPI increased approximately 3 percent per year during this time period, while the annual growth rate in radio prices was approximately 10 percent.").

Commission's competitive goals.[382]

119. We also conclude that making the numerical limits more restrictive is not justified based on examination of the current record.[383] Prior to 1992, the local radio ownership rules did not effectively recognize that a certain level of consolidation can be efficient. Given the generally difficult economic conditions at the time, the inability of stations to seek efficiencies through consolidation may have contributed to the industry's financial difficulties. We do not seek to undermine the benefits that consolidation has brought to the financial stability of the radio industry.[384]

120. In addition, further tightening of the local radio ownership rule would disrupt the marketplace by necessitating widespread divestitures. In this regard, the Future of Music Coalition cites data showing that at least one radio station owner was at the ownership cap in 194 of 297 Arbitron Metro markets.[385] Requiring widespread divestitures would undermine settled expectations in a market where broadcasters needed regulatory relief to achieve the economies of scale necessary to compete just 10 years ago.[386] Many broadcasters incurred significant financial risks by acquiring the additional stations permitted under this rule and are creating business development plans for the future based on these current economies of scale. Decreasing the limit would thus be a significant shock to the market.[387] Moreover, it could undermine efficiency gains that such firms otherwise might realize from their current economies of scale, efficiency gains that could bolster the stations' financial standing and increase their ability to provide their local communities with quality programming. We should not cause such a disruption absent persuasive evidence that further tightening of the local radio ownership rule would serve the public interest more effectively than the current rule.

121. Of course, we recognize that the need for widespread divestitures could be avoided by grandfathering existing station combinations, as the Commission chose to do in the *2002 Biennial Review*

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[382] Thus, we decline to relax our rule as recommended by some commenters. Clear Channel Comments at 50-59; Clear Channel 12/11/07 Comments at 9-12; NAB Reply at 50; NAB 12/11/2007 Comments at 24-27; CBS Reply at 11-13.

[383] UCC urges us to tighten the local radio ownership limits. UCC Comments to Media Ownership Studies at 39, 48. FMC urges us to either retain or lower the current limits. FMC Comments at 1-6.

[384] Our research has shown that radio firms have strong earnings, though they do carry high debt loads and thus experience a certain level of volatility in their stock market valuations. Through much of the period before 2000, the valuations of these radio companies outperformed the broad market of publicly traded companies, as reflected in Standard and Poor's 500 (S&P 500) index returns. After 2000, however, the returns of radio companies, on average, have fallen slightly below the S&P returns. While it is not our mandate to assure the profits of a given media sector, we are concerned with financial stability insofar as it assures the continued service that the public has come to expect. *See* Media Ownership Study 10 at 2. Several parties also describe the amount of consolidation that has occurred under the current ownership limits. *See* Remarks of Cheryl Salomone, Vice President and Marketing Manager of New Northwest Broadcasters, Media Ownership Hearing in Seattle, Washington (Nov. 9, 2007), Transcript at 128-32 (noting efficiencies of consolidation) ("Salomone Remarks"); Remarks of Bud Walters, President of Cromwell Radio, Media Ownership Hearing in Nashville, Tennessee (Dec. 11, 2006) (six of Cromwell's radio stations would be off the air if not for consolidation) ("Walters Remarks"); Remarks of Pat Roberts, President of Florida Association of Broadcasters, Media Ownership Hearing in Tampa, Florida (Apr. 30, 2007), Transcript at 65-59; Remarks of Joyce McCollough, General Manager of Radio Stations WLPO, WAJK, WKOT in LaSalle, Illinois, Media Ownership Hearing in Chicago, Illinois (Sept. 9, 2007), Transcript at 208-12 (touting efficiencies of consolidation) ("McCollough Remarks").

[385] *See* FMC Comments at 6-8 (citing Media Access Pro (Radio Version) and BIA data as of November 2005).

[386] *See, e.g., Costa de Ora Television, Inc. v. FCC*, 294 F.3d 123, 129 (D.C. Cir. 2002) (discussing the Commission's decisions to let prior rulings stand to "'avoid disturbing settled expectations'").

[387] Media Ownership Study 10 notes that publicly traded commercial radio firms "have generally used more debt than the typical S&P 500 company to finance operations and growth." Media Ownership Study 10 at 11-12.

Order. Again, however, doing so here would involve negative policy consequences that must be avoided if possible. Grandfathering existing combinations would exacerbate competitive imbalances enjoyed by current group owners – those that assembled combinations under the current rules – and would disfavor those that cannot assemble competing combinations because of new ownership restrictions. In other words, grandfathering would "lock in" the competitive advantage of the largest group owners and permanently disadvantage those who have not yet consolidated. Although the Commission previously chose to grandfather existing station combinations based on countervailing considerations,[388] we find that doing so now is not in the public interest.

122. Furthermore, we cannot conclude that tinkering with the existing numerical limits is warranted merely to rationalize the specific numerical limits that Congress chose in 1996 in light of the strong countervailing considerations set forth above. Congress adopted the existing limits in 1996, and mandated that the Commission periodically examine whether they remain necessary in the public interest. The *Prometheus* court rejected the Commission's attempt to rationalize the limits that Congress chose based on game theory and the *DOJ/FTC Horizontal Merger Guidelines*. Had the Commission initially established its own numerical limits, of course, it might have chosen different tiers and/or different caps. Nevertheless, we believe that it would be inconsistent with the public interest, as well as with the deference that we owe to Congress's line-drawing, to modify those limits merely to suit a new rationale, given the negative policy consequences associated with such tinkering. Instead, we believe that retaining the current numerical limits strikes the appropriate balance between protecting competition in local radio markets and enabling radio owners to achieve efficiencies through consolidation of facilities.[389]

123. We also find that the AM/FM subcaps are relevant to our consideration of competition issues, as well as our overall public interest goals in considering our media ownership rules. Thus, we explain our decision to retain the AM/FM subcaps below.[390]

124. *Localism*. Our localism goal stems from our mandate to ensure that licensed broadcast facilities serve and are responsive to the needs and interests of the communities to which they are licensed. By preserving a healthy, competitive local radio market, the local radio ownership rule helps promote our interest in localism. Aside from the positive effect on localism that ensues from a competitive radio market, however, the Commission has never found that the local radio ownership rule significantly advances our interest in localism.[391]

125. Although some parties suggest that localism has suffered as a result of consolidation, others forcefully argue that consolidation has benefited localism by giving group owners more resources to provide local news and public interest programming and to undertake initiatives responsive to the local needs and interests of the communities that they serve.[392] For example, some critics of consolidation cite

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[388] *Cf. 2002 Biennial Review Order*, 18 FCC Rcd at 13808-09, ¶¶ 484-86 (concluding that disparity between grandfathered and non-grandfathered owners did not outweigh the equitable considerations in favor of grandfathering under the circumstances).

[389] Thus, for the reasons discussed above, we dismiss petitions urging us to tighten our radio ownership limits and to create, through selective divestiture, more opportunities for small broadcasters. Amherst Alliance and Virginia Center for the Public Press Petition at 6.

[390] For further discussion of the AM/FM subcaps, see paragraphs 130-134 of this Order.

[391] *2002 Biennial Review Order*, 18 FCC Rcd at 13738, ¶ 303 (citing generally to the *1992 Radio Ownership Order*, 7 FCC Rcd 2755 and to the *1989 Multiple Ownership First Report and Order*, 4 FCC Rcd 1723).

[392] *Compare* AFL-CIO Reply at iii, 16; FMC Reply at 9-10, *and* Lockhart Informal Reply at 4-5, *and* Mt. Wilson Comments at 15-16, *and* Remarks of Kevin Brinson, CEO of CWAL, Inc., Media Ownership Hearing in Chicago, Illinois (Sept. 20, 2007), Transcript at 159-61, *and* Remarks of Mike Mills, Member of R.E.M. and Member of Recording Artists Coalition, Media Ownership Hearing in Los Angeles (Oct. 3, 2006), Transcript at 63-67, *and* Remarks of Rick Carnes, President of Song Writers Guild of America, Media Ownership Hearing in Nashville, (continued...)

to a Future of Music Coalition Study, which contends that consolidation permitted under our rule reduces opportunities to air music from local artists.[393] In addition, these commenters refute studies showing that large radio groups air a greater number of local programs.[394] Some commenters point to specific examples of alleged failures by a large national radio owner to provide vital public emergency programming as evidence of the harm to localism caused by consolidation.[395] In contrast, NAB argues that the record establishes that station groups are rolling out more news and talk stations and are otherwise providing substantial service to their local listeners; thus, NAB concludes that common ownership provides affirmative benefits to the public by increasing listening choices and enhancing local service.[396]

126. Based on our examination of the record, the evidence does not show that consolidation in local markets has harmed localism. Media Ownership Study 4.2 finds that the existence of economies of scope in production and distribution is supported by the findings that stations owned by parents that have more pervasive radio operations are more likely to air informational programming. The Study also provides some evidence that stations with nearby owners air more news and more local news.[397] We also note that the parties who criticize the effect of consolidation on localism often focus on the overall *national* size of the radio station group owner rather than the number of radio stations commonly owned in a local market. For example, several commenters criticize the practice of airing national music

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Tennessee (Dec. 11, 2006), *and* Remarks of Jenny Toomey, Executive Director of the Future of Music Coalition, Media Ownership Hearing in Nashville, Tennessee (Dec. 11, 2006), *and* Remarks of Mr. Carlson, Citizen Participant, Media Ownership Hearing in Seattle, Washington (Nov. 9, 2007), Transcript at 86-91, *and* Remarks of John Haer, Executive Director of Pittsburgh Local AFTRA, Media Ownership Hearing in Harrisburg, Pennsylvania (Feb. 23, 2007) Transcript at 254-55, *and* Remarks of Hannah Sassaman, Citizen Participant, Media Ownership Hearing in Harrisburg, Pennsylvania (Feb. 23, 2007) Transcript at 215-16 (arguing generally that the current local radio ownership rule undermines the Commission's localism goal), *with* Clear Channel Reply at 26-31, *and* NAB Reply at 53 (contending that consolidation promotes localism), *and* Remarks of Sue Sensenig, Hall Communications, Media Ownership Hearing in Harrisburg, Pennsylvania (Feb. 23, 2007) Transcript at 102-04, *and* Walters Remarks at Media Ownership Hearing in Nashville; Remarks of Art Rowbotham, President of Hall Communications, Tampa, Florida (Apr. 30, 2007) Transcript at 69-72 (noting the benefits of consolidation with respect to localism).

[393] FMC Reply at 11; FMC DiCola Study at 83-93; AFL-CIO Reply at 34 (citing FMC Study).

[394] FMC Reply at 10-11 (criticizing findings in studies commissioned by NAB and Clear Channel).

[395] *See* UCC Comments at Appendix D, Citizens Speak: The Real World Impacts of Media Consolidations at 26 (quoting testimony from FCC Commissioner Jonathan Adelstein alleging that radio stations owned by Clear Channel failed to provide citizens in Minot, North Dakota with information during an emergency in 2002). Clear Channel responded that the failure to transmit emergency information was a result of the local authorities' use of outdated EBS equipment instead of the EAS equipment that should have been implemented in 1997. Clear Channel Reply at 33-35. Clear Channel nevertheless concedes that some of its stations use voice tracking and that the decision to air that company-wide programming is made by an individual station's programming director and is primarily aired by stations in smaller markets. *Id.* at 33-34.

[396] NAB Reply at 53.

[397] "Ownership Structure, Market Characteristics and the Quantity of News and Public Affairs Programming: An Empirical Analysis of Radio Airplay," by Kenneth Lynch, FCC (2007) ("Media Ownership Study 4.2"), *available at* http://www.fcc.gov/ownership/studies.html at 1. Peer review of this study observes that the impacts of ownership characteristics are generally weak, both in terms of statistical and economic significance, and the conclusions reflect these findings. *See* Media Ownership Study 4.2 Peer Review by Scott J. Savage at 2, *available at* http://www.fcc.gov/mb/peer_review/peerreview.html. Each of these findings is subject to some caveats. For example, each additional in-market station owned by the parent decreased expected news (the effect is not statistically significant) and increased public affairs programming (the effect is statistically significant). Overall, we conclude that there are at least some economies of scope that continue to benefit the radio marketplace.

playlists by large national radio station groups.[398] As we noted in the *2002 Biennial Review Order,* however, this criticism seems to focus more on Congress's decision to eliminate the national radio ownership cap, which we are not reviewing in this proceeding.[399] In any event, these concerns do not address whether consolidation of radio stations in a *local* market harms localism.[400]

127. *Diversity.* Although media other than radio play an important role in the dissemination of local news and public affairs information, the Commission previously has concluded that its competition-based limits on local radio ownership promote diversity by ensuring a sufficient number of independent radio voices and by preserving a market structure that facilitates and encourages new entry into the local media market.[401] The Commission has declined to rely on format diversity to justify the local radio ownership rule.[402]

128. Though commenters hold various opinions on this issue,[403] our recent studies show that common ownership allowable under our tiers is not associated with reductions in format or programming diversity. Media Ownership Study 5 finds that consolidation of radio ownership does not diminish the diversity of local format offerings.[404] Similarly, the results of Media Ownership Study 10 show that the variety of radio formats available to consumers has held steady.[405] Peer review finds that Media

[398] FMC Reply at 9; AFTRA Comments at 16-17; *see also* Remarks of Big Kenny Alfend, Recording Artist, Media Ownership Hearing in Nashville, Tennessee (Dec. 11, 2006); Remarks of Harold Bradley, Vice President of American Federation of Musicians, Media Ownership Hearing in Nashville, Tennessee (Dec. 11, 2006); Remarks of Dobie Gray, Member of AFTRA, Media Ownership Hearing in Nashville, Tennessee (Dec. 11, 2006).

[399] *2002 Biennial Review Order*, 18 FCC Rcd at 13738, ¶ 304.

[400] We also address localism in a separate proceeding. *Broadcast Localism,* Report on Broadcast Localism and Notice of Proposed Rulemaking, MB Docket No. 04-233, adopted Dec. 18, 2007, Press Release (FCC 07-218).

[401] *2002 Biennial Review Order,* 18 FCC Rcd at 13739, ¶¶ 305-06.

[402] *Id.* at 13742, ¶ 315.

[403] Some commenters contend that the consolidation allowable under the local radio rule harms diversity and creates more homogenized programming. *See* AFL-CIO Reply at 34-37; CU Reply at 21, 37; O'Donnell Informal Reply at 2-4; Remarks of Dan Navarro, Citizen Participant, Media Ownership Hearing in Los Angeles, California (Oct. 3, 2006) Transcript at 93-96; Remarks of Summer Reese, Citizen Participant, Media Ownership Hearing in Los Angeles, California (Oct. 3, 2006) Transcript at 135-38; Remarks of Craig Wiseman, Songwriter, Media Ownership Hearing in Nashville, Tennessee (Dec. 11, 2006). On the other hand, Clear Channel states that consolidation enables radio firms to offer programming that audiences want to hear. Clear Channel Reply at 24-26; *see also* Buckley Broadcasting Reply at 5-8; Salomone Remarks at Media Ownership Hearing in Seattle, Transcript at 128-32; McCollough Remarks at Media Ownership Hearing in Chicago, Transcript at 208-12. NAB also touts the benefits of consolidation, arguing that changes within local radio markets since 1996 have enabled stations to provide more varied audio programming that is specifically tailored to meet the needs and interests of minority groups. NAB Reply at 52. Critics of consolidation make the additional point that minority owners are more likely to include programming of concern to ethnic and racial minorities. *See* CU Reply at 37. We note that we have addressed this topic specifically in a separate proceeding. *See Diversity Order*, note 7, *supra.*

[404] If anything, the market level analysis suggests that more concentrated markets have fewer stations with the same format categories, and therefore more format diversity. Similarly, large national radio owners offer more formats. Moreover, owners with several local stations offer longer, uninterrupted blocks of sports programming in the evening. The analysis also suggests that common ownership results in more diversity in actual programs aired. Based on an analysis of news and sports formatted stations, the study finds there is some overlap in actual programs aired across the two formats generally, but not within commonly owned station-pairs within the same market. Further, there are no significant differences in the effects of consolidation in radio on programming content, across big and small markets. Media Ownership Study 5 at 3.

[405] However, in recent years the average number of formats appears to have declined slightly for some of the large markets, while increasing slightly for most of the smaller ones. Media Ownership Study 10 at 8. As noted above,
(continued...)

Ownership Study 5 provides an exhaustive analysis of the data using different measures of programming and ways of treating the data (*e.g.*, looking at programming using market level averages or using observations on each station). Moreover, the review showed that the study's results were easy to replicate due to the simplicity of the study's econometric analyses and the transparency of the explanation of the specifications.[406] Peer review of Media Ownership Study 10 found that the discussion of the descriptive statistics relied on established techniques and theoretical concepts and that the interpretation of the financial indicator trends was sensible and consistent with professional standards. The review also showed that the count of formats statistic was a simple yet plausible measure of format diversity, and that the data sources used for the study were generally viewed as reliable.[407] Some commenters disagree with the results of these studies. For example, Professor Byerly and Professor Arnold contend that Media Ownership Study 5 shows a paucity of news programming compared to advertising airtime and conclude that stations are not fulfilling their public service obligation.[408] UCC asserts that the studies demonstrate that the consolidation that has occurred in the radio industry since the rule was relaxed in 1996 has significantly reduced the number of independently owned outlets, which the Commission has found to be the best proxy for measuring diversity.[409] However, based on our examination of the record, and in light of the fact that peer review confirms the validity of our studies, which show that our radio ownership limits do not decrease format diversity, we are not persuaded that common ownership allowable under our tiers is associated with reductions in format or programming diversity.

129. Based on our examination of the record, we cannot conclude that the local radio ownership rule is necessary to protect format diversity. Nevertheless, we find that retaining the current, competition-based numerical limits on local radio ownership will promote diversity indirectly for the same reasons that the Commission pointed to in the *2002 Biennial Review Order*. Thus, it is proper for us to retain the status quo, as the ownership tiers serve the public interest in light of competition.

130. *AM/FM Subcaps*. We also reaffirm the AM and FM ownership limits in the current rule. As stated above, the Third Circuit held that the Commission did not adequately support its decision to

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the conclusions of this study are based on an analysis of the commercial broadcast radio industry. Media Ownership Study 10 also notes that radio listening has continued to decline since 1998. *Id.* at 14-15.

[406] *See* Media Ownership Study 5 Peer Review, by Andrew Sweeting, Duke University at 1, *available at* http://www.fcc.gov/mb/peer_review/peerreview.html. The review also points out that the study results reflect correlations in the data between ownership and programming, and that there is no direct evidence of causal effects. *Id.* at 2.

[407] Media Ownership Study 10 Peer Review, by George S. Ford, Phoenix Center for Advanced Legal & Econ. Policy Studies, *available at* http://www.fcc.gov/mb/peer_review/peerreview.html. Ford found that, as a whole, the conclusions in Media Ownership Study 10 followed from the analysis. *Id.* at 3.

[408] Carolyn M. Byerly, Ph.D. and John R. Arnold, Ph.D Comments to Media Ownership Studies at 2. Byerly and Arnold also argue that Media Ownership Study 5 assumes "diversity" to mean how many different program formats a station airs, rather than the ideas or other substantive content present within those formats. They claim that this assumption is contrary to current understandings of the word, both in mass communication research and in media law. *Id.* at 2-3.

[409] UCC contends that format diversity is not a good proxy for diversity. Nonetheless, UCC concedes that the studies show that format diversity is not affected much one way or another by consolidation. UCC Comments to Media Ownership Studies at 39. UCC concludes that none of the findings offer compelling public interest justifications for further relaxation of the radio ownership limits. Instead, UCC contends that the studies support further tightening of the limits. *Id.* at 45-48. By contrast, Clear Channel states that the studies overwhelmingly support its contention that relaxing, if not eliminating, the local radio ownership rules has affirmative public interest benefits in terms of diversity and localism with no adverse affect on competition. Clear Channel Comments to Media Ownership Studies at 4-8.

retain the AM subcap and directed the Commission to justify its approach on remand.[410]

131. We sought comment on whether to retain the AM/FM subcaps in the *Further Notice*.[411] Five commenters addressed the issue. Clear Channel, CBS, and Multicultural Radio Broadcasting oppose retention of both the AM and FM subcaps and believe they should be eliminated.[412] Specifically, Clear Channel states that the elimination of the AM/FM subcaps will permit large broadcasters to acquire more FM stations and divest AM stations, thus fostering increased radio ownership by small businesses and minorities.[413] Multicultural Radio Broadcasting states that it owns 45 radio stations, almost all of which are AM stations, providing ethnic and foreign language programming.[414] However, in the Los Angeles and New York markets, Multicultural is prohibited from buying additional AM stations, though it could buy more FM stations under the radio ownership limits.[415] CBS argues that "no party to this proceeding has made any showing that the sub-caps serve any purpose in the promotion of competition or diversity."[416]

132. In contrast, UCC and Mt. Wilson both support retaining the caps.[417] UCC argues that "nothing has changed the need for the FM subcap," as "FM stations have tremendous technological and economic advantages."[418] In addition, UCC argues that "the digital transition does not upset, and possibly increases, these technological and economic advantages, as FM stations have rights to more spectrum and are further along in their digital transition."[419] UCC also argues that retaining the AM subcap serves the public interest because the limit on the number of AM stations one entity can own both promotes new entry and fosters diversity.[420] Mt. Wilson argues that "while generally AM stations do not command an audience size comparable to FM stations (irrespective of the reason), AM stations are in fact a contributor to the market share data for the respective broadcast entities. Moreover, the number of broadcast outlets available to a group owner can be a factor in attaining economic dominance and, further, stifling competition."[421]

133. We agree with UCC that retaining the AM subcaps serves the public interest by promoting new entry. As we have recognized, because it can reach specific demographic groups more easily than other forms of mass media, and because of its relative affordability compared to other mass media, radio remains a likely avenue for new entry into the media business, particularly by small

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[410] *Prometheus*, 373 F.3d at 434-35.

[411] *Further Notice*, 21 FCC Rcd at 8843, ¶ 22.

[412] Clear Channel Comments at 66; Clear Channel Reply at 49; Clear Channel 12/11/2007 Comments at 5-8; CBS Reply at 13; Multicultural Radio Broadcasting Comments at 2; Multicultural Radio Broadcasting 12/11/2007 Comments at 1.

[413] Clear Channel Comments at 72.

[414] Multicultural Radio Broadcasting Comments at 2.

[415] *Id.* at 3.

[416] CBS Reply at 13.

[417] UCC Comments at 84; Mt. Wilson Reply at 21.

[418] UCC Comments at 84.

[419] *Id.*

[420] *Id.* at 84-85. In addition, UCC argues that "retaining the AM subcap will foster ... diversity. Because of their inferior sound quality, AM stations are more likely to provide talk rather than music formats. Without the AM subcap, one entity in a locality could own a large number of the stations devoted to news or public affairs, considerably reducing local diversity in news and public affairs programming." *Id.*

[421] Mt. Wilson Reply at 21.

businesses, women, minorities, and entrepreneurs seeking to meet market demand by providing programming to underserved communities.[422] New entry promotes outlet diversity, which in turn enhances diversity and the public interest. UCC explains in its comments that AM stations are generally far less expensive than FM stations, permitting entry with far lower capital investment.[423] We therefore find that retaining the current, competition-based subcaps will promote diversity indirectly by facilitating and encouraging entry into the local media market by new and underrepresented parties, and we thus conclude that the AM subcaps are in the public interest.

134. We also agree with Mt. Wilson that eliminating the service limits would improperly ignore the significant technical and marketplace differences between AM and FM stations and would be inconsistent with our interest in protecting competition in local radio markets.[424] Although, in many cases, these differences between AM and FM stations militate solely in favor of FM ownership limits due to factors such as AM stations' lesser bandwidth, inferior audio signal, and smaller radio audiences due to such technical differences, there is evidence in the record indicating that AM subcaps are necessary as well, as Mt. Wilson suggests. For example, Clear Channel points out that AM stations are ranked number one in 11 of the top 50 Arbitron Metro markets, and that seven additional top-50 markets had AM stations rated among the top three stations.[425] Thus, in certain local markets with top-ranked AM stations, the AM subcaps are necessary to prevent excessive market power from being concentrated in the hands of one station owner. At this time, we do not believe there is any reason to further relax, eliminate, or strengthen the AM/FM subcaps. Further loosening of the AM and FM ownership limits at this time would not be in the public interest.

135. In addition, various parties have also raised other issues in this proceeding that we decline to specifically address here.[426]

C. Petitions for Reconsideration

136. *Arbitron Markets.* We deny petitions for reconsideration of our decision to use Arbitron Metro markets to define local radio markets.[427] The Third Circuit found that the decision to adopt the

[422] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13739, ¶ 306.

[423] UCC Comments at 84-85. UCC claims that if the AM subcaps were removed, "large companies could bid up the price of AM stations and further erode th[e] abysmally low representation" of minority and female radio station owners. *Id.* at 85.

[424] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13733-34, ¶ 294.

[425] Clear Channel Comments at 66-73.

[426] *See* Stilwell Comments (urging Congress to permanently freeze the maximum number of radio stations an entity can own); *see also* Remarks by Rachel Stilwell, Media Ownership Hearing in El Segundo, California (Oct. 3, 2006), Transcript at 130-32; Amherst Alliance Supp. Comments at 1-6 (re LPFM policies); CCVM Comments at 3, 8 (contending that a connection exists between increased consolidation and increased indecency complaints); FMC Reply at 14-15 (asking that the Commission to collect more ownership-related information from licensees). These issues are outside the scope of this proceeding.

[427] We note that a number of parties challenged the Commission's decision in the *2002 Biennial Review Order* to define local radio markets using Arbitron Metro markets instead of a contour overlap methodology. Some sought Commission reconsideration. *See* Cumulus Petition at 3, 9-15; *see also* Main Street Petition at 2-6; Monterey Petition at 13-14 (also arguing the two-year hold on changes to Arbitron markets will not prevent manipulation or abuse of the definition of a radio market); Saga Petition at 2, 5-7 (also arguing, like Monterey, that the two-year hold on changes to Arbitron markets will not prevent manipulation or abuse of the definition of a radio market); WJZD Petition at 6-8, 18 (also arguing that the Commission should vacate the new radio rules, issue an NPRM on Arbitron markets and create alternative rules for case-by-case analysis of radio acquisitions); WTCM Radio Petition at 3-5. However, we note that the *Prometheus* court upheld our decision and lifted the stay with respect to using Arbitron markets. We decline to reconsider our decision or to adopt additional measures. *See Prometheus,* 373 F.3d at 425; *see also Prometheus Rehearing Order*. Furthermore, NABOB urges us to reinstitute our flagging policy. NABOB (continued...)

Arbitron Metro market definition was in the public interest and was supported by reasoned analysis.[428] We have been successfully applying the new definition for over three years and see no need to revisit its use here.

137. *JSAs and Noncommercial Stations.* We decline to reconsider our decision in the *2002 Biennial Review Order* to attribute certain JSAs.[429] We also decline to review our decision to include noncommercial radio stations in determining the size of the radio market.[430] As discussed above, both of these decisions were upheld by the Third Circuit in *Prometheus.*[431] We therefore deny petitions seeking reconsideration of these aspects of the *2002 Biennial Review Order.*

138. *Grandfathering/Transition Issues.* Several parties seek reconsideration of the Commission's grandfathering and transition procedures.[432] We address all issues regarding sales of grandfathered combinations to eligible entities in the separate Order addressing ownership diversity.[433]

(Continued from previous page)

Petition at 8-9, NABOB Petition (Second) at 4-6 (Oct. 9, 2003). However, we decline to do so because the *Prometheus* court affirmed our use of Arbitron markets, and we have no evidence here to make us resume the flagging policy. *See 2002 Biennial Review Order*, 18 FCC Rcd at 13813, ¶¶ 496-97; *see also Prometheus Rehearing Order.* ARSO asks the Commission to use a different radio market definition than the Arbitron Metro definition for the island of Puerto Rico. ARSO Petition at 1-7. We have granted ARSO's waiver request to use the interim contour-overlap methodology pending the outcome of its Petition, which will be resolved in a separate proceeding. *See* Letter from Peter Doyle, Chief, Audio Division, Media Bureau, FCC, to Luis A. Soto, President, ARSO Radio Corp., and Luis A. Mejia, President, Bestov Broadcasting, Inc., 22 FCC Rcd 2549, 2553 (Feb. 9, 2007). Therefore, we dismiss ARSO's petition in this proceeding.

428 *Prometheus,* 373 F.3d at 423, 425.

429 A number of parties challenged the Commission's decision to attribute certain radio JSAs. Bennco Petition at 4-5; Monterey Petition at 3-4. While some petitioned the Commission to reconsider this determination, others appealed it. However, the Prometheus court affirmed the attribution of JSAs. *Prometheus*, 373 F.3d at 429-30; *see also* Prometheus Rehearing Order. Thus, we decline to reconsider our decision and decline to adopt additional measures. *Cf.* Letter to David D. Oxenford, Esq. In re KEGK(FM), Wahpeton, North Dakota, 21 FCC Rcd 9805 (MB Sept. 1, 2006) (Triad and Monterey Licenses, its wholly owned subsidiary, granted six months to come into compliance with the local radio limit following release of FCC decision addressing their request that the Commission reconsider the decision to attribute radio JSAs.). *See also* n.432, *infra*. Mt. Wilson also asks us to extend JSA provisions to underwriting agreements with noncommercial stations and to apply our limits to noncommercial stations. Mt. Wilson Petition at 3, 6-7. We deny Mt. Wilson's petition, which we find fails to justify extending our ownership limits or our JSA provisions to noncommercial stations. In addition, Galaxy urges us to make further refinements to our method of counting stations for purposes of calculating numerical limits. Galaxy Petition at 1-6 (arguing that we should count two same-market stations that simulcast as one and three Class A FM stations in the same market as one). The *Prometheus* court upheld our decision and lifted the stay with respect to our station counting methodology. *See Prometheus,* 373 F.3d at 426, 429-30; *see also Prometheus Rehearing Order*. We decline to adopt Galaxy's proposals.

430 Various parties sought reconsideration of the Commission's decision to include noncommercial radio stations in determining the size of a local radio market for purposes of applying the local radio ownership rule. FMC Petition at 10-12; Main Street Petition at 10; NABOB Petition at 12; UCC Petition at 28-29.

431 *Prometheus,* 373 F.3d at 425-26.

432 *Compare* Cumulus Petition at 19 (requesting rule to permanently grandfather existing radio station combinations that do not comply with the new rules), *and* Entercom Petition at 3-8 (proposing exception for certain community of license changes), *and* Great Scott Petition at 2 (also proposing exception for certain community of license changes), *with* NABOB Petition at 9-12 (requesting reversal of the decision to grandfather existing combinations that exceed the local radio ownership rule and require divestiture instead), *and* Treasure and Space Coast Radio Petition at 7-8 (opposing the grandfathering rule), *and* Monterey Petition (opposing decision to grandfather existing JSAs only until September 4, 2005). As noted below, the *Prometheus* court upheld our decision and lifted the stay with respect to the grandfathering/transition policy, and we decline to adopt additional measures.

433 *See Diversity Order*, *supra* note 7.

As to all other requests that we reconsider our grandfathering and transition policies, we decline to do so.[434] The *Prometheus* court upheld our decision and lifted the stay as to the grandfathering/transition rules in 2004.[435] We decline to reconsider our decision or to adopt additional grandfathering measures.[436]

VII. DUAL NETWORK RULE

139. The Commission's dual network rule provides: "A television broadcast station may affiliate with a person or entity that maintains two or more networks of television broadcast stations unless such dual or multiple networks are composed of two or more persons or entities that, on February 8, 1996, were 'networks' as defined in Section 73.3613(a)(1) of the Commission's regulations (that is, ABC, CBS, Fox, and NBC)."[437] Thus, the rule permits common ownership of multiple broadcast networks, but prohibits a merger between or among the "top four" networks. In this Order, we conclude that the dual network rule remains necessary in the public interest as a result of competition and localism, and we therefore retain the rule without modification.

140. In the *2002 Biennial Review Order*, the Commission retained the dual network rule, concluding that it was necessary in the public interest to promote competition and localism.[438] The Commission concluded that, given the level of vertical integration of each of the top four networks, as well as their continued operation as a "strategic group" in the national advertising market, a top four network merger would give rise to competitive concerns that the merged firm would be able to reduce its program purchases and/or the price it pays for programming.[439] It reasoned that these competitive harms

[434] We deny petitions seeking clarification of the grandfathering rules with respect to transfer of control due to death or departure of existing owners of closely held businesses because that issue is outside the scope of this proceeding. Mid-West Family Petition at 2-6. We also reject Cumulus's contention that application of our modified radio market definition to applications pending at the time of the *2002 Biennial Review Order* is impermissibly retroactive. *See* Cumulus Petition at 17-19; *cf. Chadmoore Comm'ns, Inc. v. FCC*, 113 F.3d 235, 240 (D.C. Cir. 1997) (denial of an application in a rulemaking proceeding based on the conclusion that grant "would be contrary to the underlying goals of this proceeding" was not impermissibly retroactive because, *inter alia,* it lacked retroactive effect; "the Commission's action did not increase CCI's liability for past conduct or impose new duties with respect to completed transactions. Nor could it have impaired a right possessed by CCI because none vested on the filing of its application.")

[435] *Prometheus,* 373 F.3d at 426-27; *see also Prometheus Rehearing Order.*

[436] We also dismiss other petitions that raise issues that are outside the scope of this proceeding. *See* Mid-West Family Broadcasters Petition at 2-6 (asking for exceptions to transfer policies for grandfathered combinations); *see also* WTCM Petition at 16-17 (urging us to adopt "satellite status" for radio stations that rebroadcast "parent radio stations"). In addition, WJZD raises concerns with respect to petitions to deny mooted by the *2002 Biennial Review Order.* WJZD Petition at 5-6. However, we note that this issue is moot because the application WJZD petitioned to deny was ultimately dismissed by staff on other grounds. *See 2002 Biennial Review Order,* 18 FCC Rcd at 13813, ¶ 498 ("Petitions … that contest pending applications solely on grounds of competition pursuant to the interim policy will be dismissed as moot."); *see also* Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, FCC, to WJZD, c/o Dennis J. Kelly, Esq. *at* 2, 5-6, DA 05-1537 (May 26, 2005) (noting that WJZD petitioned to deny WQYZ's Assignment Application on February 6, 2003, but that Commission staff dismissed WQYZ's application on Nov. 18, 2003 and, in a subsequent filing, explicitly addressed WJZD's objections to WQYZ's new filing).

[437] 47 C.F.R. § 73.658(g).

[438] *2002 Biennial Review Order,* 18 FCC Rcd at 13847-58, ¶¶ 592-621.

[439] *Id.* at 13850-55, ¶¶ 600-10. A strategic group refers to a cluster of independent firms within an industry that pursue similar business strategies. For example, the top four networks supply their affiliated local stations with programming intended to attract mass audiences and advertisers that want to reach such large, nationwide audiences. By contrast, the emerging networks target more specialized, niche audiences similar to cable television networks. *Amendment of Section 73.658(g) of the Commission's Rules – The Dual Network Rule*, Report and Order, 16 FCC Rcd 11114, 11122-23 ¶ 20 (2001) ("*Dual Network Order*").

would reduce program output, choices, quality, and innovation to the detriment of viewers. The Commission also concluded that elimination of the dual network rule would harm localism by allowing a top four network merger, which would reduce the ability of affiliates to bargain with their network for favorable terms of affiliation, reducing affiliates' influence on network programming, and thereby diminishing the ability of the affiliates to serve their communities.[440]

141. No petitions were filed asking the Commission to reconsider its decision to retain the rule, and no challenges were filed in *Prometheus*.[441] We sought comment in the *Further Notice* on whether the dual network rule remains necessary in the public interest to promote the Commission's policy goals.[442] Almost all of the few parties[443] commenting on the rule in this proceeding support retaining the rule in its current form.[444] They claim that the dual network rule continues to promote competition in the television advertising and program acquisition markets[445] and helps ease market entry by new networks.[446] They also contend that the rule promotes diverse programming because it prohibits the same companies from owning numerous media outlets,[447] and promotes localism by preserving the balance of power between the networks and their affiliates.[448] Other parties argue that relaxing or eliminating the rule would increase concentration to the detriment of competition, diversity, and localism.[449] No specific changes to the dual network rule were proposed,[450] and only two parties – Fox and CBS – oppose retaining the rule in any form.[451] Neither of these parties has provided evidence

[440] *2002 Biennial Review Order*, 18 FCC Rcd at 13855, ¶ 611.

[441] Media General generally opposes justifying the Commission's ownership rules, including the dual network rule, on viewpoint diversity grounds, claiming that the Commission has never demonstrated a link between its structural ownership rules and viewpoint diversity. Media General Comments at 31-32. CCC objects that the Commission wrongly concluded that it could not be justified on program diversity or viewpoint diversity grounds. CCC Petition at 9-10.

[442] *Further Notice*, 21 FCC Rcd at 8848, ¶ 33.

[443] Seven commenters support retaining or tightening the rule (AFL-CIO Comments at 58-62; AFTRA Comments at 24-25; Network Affiliated Stations Alliance ("NASA") Comments at 6-8; SAG Comments at 8, 31-34; Crudele Informal Comments at 1-3; Nelson Informal Comments at 1; NASA Reply Comments at 5-6). Three commenters seek to relax or eliminate the rule (CBS Reply at 19; Fox Comments at 25 n.88; Media General Comments at 31-32).

[444] *See, e.g.*, AFL-CIO Comments at 58-62; NASA Comments at 6-8; SAG Comments at 8, 31-34; Smith Comments at 4; Crudele Informal Comments at 1-3; Nelson Informal Comments at 1.

[445] SAG Comments at 8; Crudele Informal Comments at 1-2; Nelson Informal Comments at 1.

[446] SAG Comments at 31-33. Smith asks that the rule permit the top four networks to operate new or other smaller networks, such as NBC's Telemundo. Smith Comments at 4. The Commission modified the rule in that respect in 2001. *Dual Network Order*, 16 FCC Rcd at 11114, ¶ 1. After the rule was modified, Viacom, the owner of CBS, was allowed to purchase UPN, and NBC was allowed to purchase Telemundo, the second-largest Spanish-language network in the United States.

[447] Nelson Informal Comments at 3.

[448] Crudele Informal Comments at 1-2.

[449] AFL-CIO Comments at 58-62; SAG Comments at 34; Crudele Informal Comments at 2-3.

[450] One party's suggestion that the Commission should consider restrictions on the common ownership of broadcast and cable networks by a single entity is unrelated to this proceeding. Desmond Comments at 8.

[451] Fox argues that the rule is unnecessary because antitrust review can address the Commission's concerns about competition in the national advertising and program production markets. As explained above, our concerns here are with competitive harms that would reduce program output, choices, quality, and innovation to the detriment of viewers, and with reduced affiliate power and influence. We do not think that antitrust enforcement would protect (continued...)

convincing us that a departure from our 2002 decision to retain the rule in its current form is warranted. Accordingly, for the same reasons recited by the Commission in 2002, we continue to believe that the dual network rule is necessary in the public interest to promote competition and localism. Therefore, we retain the dual network rule in its current form.

VIII. UHF DISCOUNT

142. In the *2002 Biennial Review Order*, the Commission retained the 50 percent UHF discount, which is applied in calculating a UHF station's audience reach under the national television cap.[452] The Commission decided, however, that when the transition to digital television is complete, the UHF discount would be eliminated for those stations owned by the four largest networks.[453] Subsequently, in 2004, Congress set the national television ownership cap at 39 percent and excluded the national cap from the quadrennial review requirement in Section 202(h).[454] In *Prometheus*, the court mooted challenges to the Commission's decision to retain the discount, holding that the UHF discount is a rule "relating to" the national audience limitation.[455] The court then stated that the Commission may decide the scope of its authority to modify or eliminate the UHF discount. In the *Further Notice*, the Commission sought comment on whether the holding in *Prometheus* was ambiguous with respect to the UHF discount rule.[456] The Commission also asked whether it should retain, modify, or eliminate the UHF discount, and requested comment on the basis for the Commission's authority to take such action.[457]

143. We find that the Commission is foreclosed from addressing the issue of the UHF discount in this proceeding by the 2004 Consolidated Appropriations Act. Although the Act did not specifically mention the UHF discount, the *Prometheus* court observed that the statutory 39 percent national cap would be altered if the UHF discount were modified. The court observed that the Appropriations Act amended Section 202(h) to exclude "any rules relating to" the 39 percent national cap, and determined that the UHF discount was a rule "relating to" the national television cap. The Third Circuit concluded that Congress "apparently intended to insulate the UHF discount from periodic review," but left open the possibility that the Commission may consider the discount in a rulemaking "outside the context of Section

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against these harms. CBS contends that the variety of broadcast and cable networks available to viewers makes the rule no longer necessary in the public interest. We continue to believe that the four largest broadcast networks serve a unique role in the electronic media and note that no other networks, cable or broadcast, reach nearly as large an audience as they do. Therefore, we do not believe that the advent of other networks makes this rule unnecessary.

452 47 C.F.R. § 73.3555(e)(2)(i); *2002 Biennial Review Order*, 18 FCC Rcd at 13845-47, ¶¶ 585-91. In applying the national television ownership limit, national audience reach means the total number of television households in the Nielsen DMA in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license. Under the UHF discount, for purposes of calculating a station's national audience reach, UHF television stations are attributed with 50 percent of the television households in their DMA.

453 *2002 Biennial Review Order*, 18 FCC Rcd at 13847, ¶ 591.

454 *See* the 2004 Consolidated Appropriations Act. Section 629(1) amends Section 202(c) of the 1996 Act to direct the Commission to modify the national television ownership limit, contained in section 73.3555 of the Commission's rules, to specify 39 percent as the maximum aggregate national audience reach of any single television station owner. *See* 47 U.S.C. § 202(c)(1). The 2004 Consolidated Appropriations Act also provides that Section 202(h) "does not apply to any rules relating to the 39% national audience limitation." 118 Stat. at 100.

455 *Prometheus*, 373 F.3d at 396-97. The court held that "Congress apparently intended to insulate the UHF discount from periodic review, a position that is consistent with our reading of the legislation as endorsing the almost 20-year-old regulatory definition of 'national audience reach' that provides for the UHF discount." *Id.* at 397.

456 *Further Notice*, 18 FCC Rcd at 8849, ¶ 35.

457 *Id.*

202(h)."[458] Accordingly, we conclude that the UHF discount is insulated from review under Section 202(h).

144. As the *Prometheus* court noted, the Commission may decide, in the first instance, the scope of its authority to modify or eliminate the UHF discount outside the context of Section 202(h). The court noted that, prior to the *Prometheus* decision, the Commission had sought comment on its authority going forward to modify or eliminate the UHF discount in light of the Appropriations Act.[459] Accordingly, we will separately address the petitions, comments, and replies that were filed concerning the extent of the Commission's authority to alter the UHF discount and the substantive petitions and comments as to whether the Commission should retain, revise, or eliminate the UHF discount.

IX. PUBLIC INTEREST OBLIGATIONS OF TELEVISION BROADCAST LICENSEES

145. We note that in the pending proceeding titled *Public Interest Obligations of TV Broadcast Licensees,*[460] commenters ask the Commission to impose additional "public interest" obligations on television broadcasters. Some of the issues raised in that proceeding have already been resolved by the Commission. For example, in January 2007, the Commission's new children's programming requirements went into effect. And, even more recently, the Commission adopted a requirement that all television broadcasters must file a standardized form on a quarterly basis providing information about their programming, including programming related to local civic affairs, local electoral affairs, public service announcements (whether sponsored or aired for free), and independently produced programming. In addition, the Commission has concurrently adopted a Localism Report and Notice of Proposed Rulemaking that addresses actions the Commission will take to ensure that broadcasters are meeting the needs of their local communities. With respect to other ideas raised in this proceeding, such as whether the agency should establish more specific minimum public interest requirements for licensees and how broadcasters could improve political candidates' access to television, the Commission declines to take any further action at this time. We find the need to impose additional obligations premature in light of the Commission's recent decision to require broadcasters to file enhanced disclosure reports about the programming they are providing to serve local communities' interests and needs. Nevertheless, to the extent that circumstances change, we will revisit this decision and initiate proceedings as appropriate.

X. DATA QUALITY ACT

146. We reject the complaints filed by Free Press, Consumer Federation of America, and Consumers Union (collectively, "Free Press")[461] claiming that the Commission violated the Data Quality Act ("DQA") and guidelines issued by the Office of Management and Budget ("OMB") implementing the DQA.[462] The complaints relate to 10 media ownership studies that the Commission posted on its website

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[458] *Prometheus*, 373 F.3d at 397.

[459] *Id.* (citing *Media Bureau Seeks Additional Comment on UHF Discount in Light of Recent Legislation Affecting National Television Ownership Cap, Public Notice,* DA 04-320 (rel. Feb. 19, 2004), 69 Fed. Reg. 9216-17 (Feb. 27, 2004)).

[460] *Public Interest Obligations of TV Broadcast Licensees*, Notice of Inquiry, 14 FCC Rcd 21633 (1999).

[461] *See* Complaint Under the Data Quality Act of Free Press, Consumer Federation of America, & Consumers Union (Sept. 11, 2007) ("First Complaint"); Second Complaint Under the Data Quality Act and Motion for Extension of Time of Free Press, Consumer Federation of America, & Consumers Union (Nov. 9, 2007) ("Second Complaint").

[462] Pub. L. No. 106-554 (2001), codified at 44 U.S.C. § 3516 note. In relevant part, the DQA required OMB to issue guidelines that would "ensur[e] and maximize[e] the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies." In furtherance of this statutory mandate, OMB thereafter issued guidelines which, in turn, required each federal agency to publish its own data quality guidelines. *See* 67 Fed. Reg. 8452 (2002). The Commission's guidelines are published in *Information Quality Guidelines*, 17 FCC Rcd 19890 (2002).

on July 31, 2007. Although Free Press concedes that the DQA creates no judicially enforceable rights,[463] it alleges that the Commission violated the DQA by failing to give interested parties sufficient time to "reproduce" the results of those studies.[464] Neither the DQA nor the OMB guidelines requires a federal agency to allot time in a rulemaking proceeding for third parties to reproduce the results of studies released by the agency. Moreover, the facts belie the allegation that Free Press had insufficient time to review the studies. The Commission made available for inspection the bulk of the non-proprietary data underlying the studies beginning on July 31, 2007, and released the proprietary data under a Protective Order by September 6, 2007. In response to a request from Free Press, the Media Bureau extended the deadline for submitting comments on the studies from October 1 to October 22, 2007, and extended the deadline for reply comments from October 16 to November 1, 2007.[465] Thus, Free Press had 46 days after September 6 to prepare comments and 10 more days to prepare reply comments. Free Press took full advantage of the extended comment period – it filed nearly 2,500 pages of comments on the studies.[466] We find that Free Press had adequate time to review the data underlying the studies and to reproduce their results.[467]

147. We also reject the complaints filed by Free Press and other commenters[468] that the Commission failed to comply with the peer review guidelines promulgated by OMB.[469] The OMB Bulletin provides for the peer review of disseminations of scientific information containing "findings or

[463] *See* Ex Parte of Consumer Federation of America, Consumers Union, and Free Press at 38 (Nov. 14, 2007) (Nov. 14 Ex Parte); *see also Americans for Safe Access v. U.S. Dept. of Health & Human Services*, 2007 WL 2141289, slip op. at 3 (N.D. Cal. July 24, 2007) (courts "have unanimously and persuasively rejected a right of judicial review" under the DQA); *Salt Institute v. Thompson*, 345 F. Supp. 2d 589, 601 (E.D. Va. 2004), *aff'd on other grounds sub nom. Salt Institute v. Leavitt*, 440 F.3d 156 (4th Cir. 2006) ("judicial review does not exist under the [DQA] because there is no private right of action"); *see generally Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (availability of private right of action depends upon "statutory scheme that Congress enacted into law").

[464] *See* First Complaint at 10-12. A study is "reproducible" if "independent analysis of the original or supporting data using identical methods would generate similar analytic results, subject to an acceptable degree of imprecision or error." 67 Fed. Reg. at 8460 ¶ V.10; 17 FCC Rcd at 19897, ¶ 13.

[465] *See Media Bureau Extends Filing Deadlines for Comments on Media Ownership Studies*, Public Notice, DA 07-4097 (rel. Sept. 28, 2007).

[466] *See* CU Comments to the Media Ownership Studies; CU Reply to the Media Ownership Studies.

[467] The Center for Regulatory Effectiveness ("CRE") also filed comments concerning the DQA. Specifically, CRE suggested that the Commission should not rely on two media ownership studies because they do not meet the requirements of the DQA. *See* Comments and Data Quality Petition of the Center for Regulatory Effectiveness (Oct. 12, 2007) (regarding Media Ownership Study 8, "The Impact of the FCC's TV Duopoly Rule Relaxation on Minority and Women Owned Broadcast Stations 1999-2006"); Comments of The Center for Regulatory Effectiveness (Oct. 12, 2007) (regarding "Do Local Owners Deliver More Localism? Some Evidence From Broadcast News"). Because we are not relying on either of those studies in this Order, we need not address the merits of CRE's comments.

[468] The filings by Free Press on this subject include the First Complaint, the Second Complaint, Comments to the Media Ownership Studies, and the November 14 Ex Parte. *See also* Letter by Congresspersons Maurice D. Hinchey, Bart Stupak, Tammy Baldwin, Louise M. Slaughter and David Price to FCC Chairman Kevin J. Martin, dated September 14, 2007 ("September 14 Congressional Letter"); Motion for Issuance of a Further Notice, or in the Alternative, an Extension of Time to Comment on Studies, filed by the Office of Communication of the United Church of Christ, Inc. (Sept. 18, 2007); Comments on Media Ownership Studies 4 and 6, filed by the Center for Regulatory Effectiveness (Oct. 12, 2007).

[469] *See* OMB Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664 (Jan. 14, 2005) ("OMB Bulletin").

conclusions that represent the official position of one or more agencies of the Federal government."[470] It requires federal agencies to ensure that its official disseminations have met rigorous standards of quality control through a peer review mechanism or to put the public on notice that the information has not been through a rigorous quality review.[471] The Bulletin expressly provides that it is intended to improve the internal management of the executive branch and that it does not create any enforceable legal rights.[472]

148. Free Press incorrectly claims that the Commission acted contrary to the OMB Bulletin by releasing the 10 media ownership studies prior to completing peer reviews of the studies.[473] The Commission posted the media ownership studies to its website on July 31, 2007, shortly after they were completed, in order to give the public and the peer reviewers access to their contents expeditiously. The Commission issued a Public Notice that same day requesting public comment on the studies.[474] The Public Notice specifically stated that the studies had not yet been peer reviewed; accordingly, the public was accurately informed that the studies at that point did not necessarily meet rigorous quality review standards. In addition, it was clear from the disclaimers on some of the studies that those particular studies did not represent the agency's official view. In order to forestall any confusion on this point, the Commission has posted an explanatory disclaimer with regard to each of the studies on the web page that is the public's primary access point to them, making it clear that they do not represent the Commission's official views, and were not being disseminated as such.[475] Furthermore, the Media Bureau extended the comment period on the studies until November 1, 2007. The extension of time allowed a total of 58 days from the posting of the peer reviews on September 4, 2007, and more than 90 days from the posting of the studies for public review and comment on July 31, 2007. We also note that the Commission accepts *ex parte* filings from members of the public past the end of the formal comment period, which gives parties an opportunity to supplement the record with additional information.[476] Thus, the public has been

[470] *Id.* at 70 Fed. Reg. introduction at 2666. A concern was raised in the September 14 Congressional Letter that the 10 media ownership studies should have been considered "highly influential scientific assessments" under the OMB Bulletin. The OMB Bulletin provides that a "scientific assessment" is a very specific, intensive subset of "scientific information" in the Bulletin, such as a comprehensive review or meta-analysis of the existing studies or scholarship in an entire field. OMB Bulletin at Sec. I.7. After review, the Commission concluded that none of the 10 studies was a comprehensive review of media ownership policy or a meta-analysis of previous studies, and therefore that none of the studies came within the Bulletin's definition of "highly influential scientific assessment." *See* OMB Peer Review Bulletin, Sec. III.1. The OMB Bulletin calls for additional steps in the peer review of "highly influential scientific assessments." These include sponsoring a public meeting for presentations to the peer reviewers before they complete their review. See *id.* at V.5.

[471] *See* 70 Fed. Reg. at 2667.

[472] *Id.* at Sec. XII ("This Bulletin is intended to improve the internal management of the executive branch, and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity....").

[473] *See, e.g.,* First Complaint at 8.

[474] *See FCC Seeks Comment on Research Studies on Media Ownership*, Public Notice, DA 07-3470 (rel. July 31, 2007).

[475] The disclaimer states: "The findings and conclusions in this report are those of the author(s) and do not necessarily represent the views of the Federal Communications Commission." *See* http://www.fcc.gov/ownership/studies.html .

[476] *See* 47 C.F.R. § 1.1206. Free Press claims that the peer review reports on third-party quantitative studies were released too late for the authors of those studies to incorporate the suggestions into their comments during the formal comment period. Along similar lines, Free Press claims that because the Commission released revised versions and additional peer reviews of the 10 studies on the last day of the reply comment period the public was denied the opportunity to incorporate the revisions into their comments. *See* November 14 Ex Parte at 40. However, Free Press made a substantive and lengthy *ex parte* filing after the close of the formal comment period, illustrating the utility of the Commission's *ex parte* procedures. Although the comment period formally closed on November 1, 2007, Free Press made a filing of nearly 2,500 pages on November 14, 2007. *See id.*