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

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In the Matter of
2010 Quadrennial Regulatory Review -- Review of
the Commission's Broadcast Ownership Rules and
Other Rules Adopted Pursuant to Section 202 of
the Telecommunications Act of 1996
MB Docket No. 09-182

NOTICE OF INQUIRY

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By the Commission: Commissioners Copps and McDowell issuing separate statements.

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## I. INTRODUCTION

1. The Commission has long imposed limits on concentration of ownership of broadcast media in order to promote the Communications Act goals of competition, localism, and diversity. With this Notice of Inquiry (“NOI”), we initiate the Commission’s fifth review of its media ownership rules since the passage of the Telecommunications Act of 1996.<sup>1</sup> We launch this proceeding pursuant to the statutory mandate that we review our media ownership rules every four years to determine whether they “are necessary in the public interest as the result of competition.”<sup>2</sup> Dramatic changes in the marketplace make it highly appropriate that we take a fresh look at our current ownership rules in order to determine whether they will serve our public interest goals of competition, localism, and diversity going forward. While technologies and marketplace conditions change, the core values we seek to protect are the same – to foster a strong and independent broadcast media that provides Americans with multiple and diverse sources of news, public affairs, and entertainment programming, helping to equip them to be informed participants in our democracy at the local and national levels. Our challenge is to adapt our rules to ensure that they promote these values in the new marketplace and into the future.

2. In this NOI we ask fundamental questions, the answers to which will help us define our analytical framework, the scope of this proceeding, and the considerations that should underlie media ownership rules for today’s environment. The comments and information gathered through this NOI will help us to formulate a subsequent Notice of Proposed Rulemaking, in which we will invite comment on proposals for regulations that will best promote our policy goals in the context of the current media marketplace.

3. We first seek a comprehensive understanding of the current media marketplace in order to determine whether the current ownership rules are necessary in the public interest as the result of competition. In order to accomplish this, we will explore the impact our current ownership rules have on the affected industries, including radio, television, and, indirectly, the newspaper industry. We will seek to determine, for example, whether our ownership rules affect the media industries in distinct or different ways. If we determine that the current rules are not satisfying the public interest standard, we will assess the potential impact of any new or amended rules we might adopt. Given the profound marketplace, economic, and industry changes in recent years, we commence this proceeding with no preconceived notions about the framework that will result from this review or what rules we will adopt. We will examine ownership issues based on the record that is established in this proceeding and will seek to establish a forward-looking framework based on the media marketplace of today, not on marketplace factors as they may have existed in the past.

4. We will take a close look at the impact of consolidation on media markets. In 1996, Congress relaxed our local radio ownership rule, providing the basis for the limits in place today.<sup>3</sup> The

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<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996) (“1996 Act”); Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004) (“Appropriations Act”) (amending Sections 202(c) and 202(h) of the 1996 Act).

<sup>2</sup> Section 202(h) of the 1996 Act requires the Commission to review its media ownership rules on a quadrennial basis to determine “whether any of such rules are necessary in the public interest as the result of competition” and to “repeal or modify any regulation it determines to be no longer in the public interest.” 47 U.S.C. § 303 note. In *Prometheus Radio Project, et al. v. FCC*, 373 F.3d 372 (3d Cir. 2004) (“*Prometheus*”), the Third Circuit concluded that “necessary in the public interest” is a “‘plain public interest’ standard under which ‘necessary’ means ‘convenient,’ ‘useful,’ or ‘helpful,’ not ‘essential’ or ‘indispensable.’” *Id.* at 394. Courts have noted that “the first instruction [of 202(h)] requires the Commission to take a fresh look at its regulations periodically in order to ensure that they remain ‘necessary in the public interest.’” *See, e.g., id.* at 391. In 2004, Congress revised the then-biennial review requirement to require such reviews quadrennially. *See Appropriations Act*, 118 Stat. at 100.

<sup>3</sup> 1996 Act, § 202(h)(1); 47 U.S.C. § 303 note; *see infra* ¶ 20.

1996 revisions allowed for significant consolidation of radio ownership. In 1996, there were 10,257 commercial radio stations and 5,133 radio owners. Today, there are 11,202 commercial radio stations and 3,143 owners, representing a 39% decrease in the number of owners since 1996.<sup>4</sup> The 1996 Act also required the Commission to review its local television station ownership limits and in 1999, the Commission adopted the current limits.<sup>5</sup> In 1996, there were 1,130 commercial television stations and 450 owners. In 2010, there are 1,302 commercial stations and 303 owners, a 33% decrease in the number of owners.<sup>6</sup> There are currently 175 television station duopolies, which includes owners with attributable local marketing agreements, in the 210 Nielsen TV markets.<sup>7</sup> There are roughly 50 newspaper/broadcast same-market combinations in markets across the country.<sup>8</sup>

5. The media marketplace has seen other dramatic changes in recent years. Broadcasters have navigated the digital television transition, and a transition to digital radio is under way. In addition, increased penetration of the Internet, and the availability of alternative sources of news, information, and entertainment online have presented the broadcast television, radio, and newspaper industries with increased competition for audiences, as well as advertising dollars, the primary sources of revenue for these industries.

6. Broadcast audiences and newspaper readership are on the decline, as reflected in the biennial news consumption surveys issued by the Pew Research Center for People and the Press (“Pew”).<sup>9</sup> The Pew Center for Excellence in Journalism (“PEJ”) similarly reports that, between 2008 and 2009, viewership of late, early evening, and early morning broadcast television news fell 6.4%, 6.7%, and 5.5%, respectively.<sup>10</sup> However, recent PEJ research also shows that on a typical day, 78% of Americans state that they get news from a local television station.<sup>11</sup> PEJ reports that, while the number of Americans reporting that they listen to radio regularly has remained static over the last five years, in 2009 nearly one in three stated that they listen to online radio. Likewise, Pew reports that between 2006 and 2008, the percentage of people surveyed who stated they had read a newspaper the previous day dropped from 40% to 34%.<sup>12</sup> Between 2008 and 2009, industrywide newspaper circulation declined 10.6%. In contrast, the

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<sup>4</sup> FCC staff analysis based on data from BIA’s Media Access Pro Database, as of March 26, 2010 (“BIA Database”).

<sup>5</sup> 1996 Act, § 202(h)(1); 47 U.S.C. § 303 note; *see infra* ¶¶ 18-19. *Review of the Commission’s Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Rcd 12903, 12911-12 ¶ 17 (1999), clarified in Memorandum Opinion & Second Order on Reconsideration, 16 FCC Rcd 1067 (2001) (“*Local TV Ownership Order*”).

<sup>6</sup> BIA Database.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *See* PEW RESEARCH CENTER FOR PEOPLE AND THE PRESS, KEY NEWS AUDIENCES NOW BLEND ONLINE AND TRADITIONAL SOURCES: AUDIENCE SEGMENTS IN A CHANGING NEWS ENVIRONMENT (2008), available at <http://people-press.org/report/444/news-media> (“*Pew People and the Press*”) (reporting that between 2006 and 2008, the percentage of those surveyed who stated they had tuned in to local television or radio news the previous day declined, from 54% to 52% for television news, and from 36% to 35% for radio news).

<sup>10</sup> PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2010: AN ANNUAL REPORT ON AMERICAN JOURNALISM (2010), available at <http://www.stateofthemediamedia.org/2010/> (“*The State of News Media 2010*”); *see id.*, Key Findings, available at [http://www.stateofthemediamedia.org/2010/overview\\_key\\_findings.php](http://www.stateofthemediamedia.org/2010/overview_key_findings.php).

<sup>11</sup> PEW RESEARCH CENTER’S PROJECT FOR EXCELLENCE IN JOURNALISM, UNDERSTANDING THE PARTICIPATORY NEWS CONSUMER (2010), available at [http://www.journalism.org/analysis\\_report/understanding\\_participatory\\_news\\_consumer](http://www.journalism.org/analysis_report/understanding_participatory_news_consumer) (“*Participatory News Consumer*”).

<sup>12</sup> *Pew People and the Press*, available at <http://people-press.org/report/444/news-media>.

number of people stating that they turn to online news at least three days a week rose from 31% to 37% between 2006 and 2008.<sup>13</sup> Of the 25 most-visited news websites in 2008, 20 shared corporate owners with cable television, broadcast television, or newspaper properties.<sup>14</sup>

7. Media industries also are experiencing declining advertising revenues, precipitated in part by the downturn in the national economy. Between 2006 and 2008 the total amount of money spent on advertising in the United States for all media declined 3.9%, from \$281.7 billion to \$270.8 billion.<sup>15</sup> During that period, advertising revenue declined 13.4% for broadcast television stations; advertising revenue for radio stations dropped 10.7%; and newspaper advertising revenue dropped by 23.1%.<sup>16</sup> Because operating costs for these broadcast television and radio industries are relatively fixed in the short term, revenue is a key variable in determining profitability.<sup>17</sup> When demand for commercial time enables broadcasters to charge high rates, profits can be high. When advertising revenues decline, as they have over the past several years as a result of both structural and cyclical economic factors, these industries see immediate declines in profits. PEJ, citing data from BIA Kelsey, estimates that between 2008 and 2009, revenues for the broadcast television and radio industries each fell 22%.<sup>18</sup> PEJ, citing data from the Newspaper Association of America, estimates that revenues for daily newspapers fell 26% between 2008 and 2009.<sup>19</sup> In contrast, total Internet advertising revenues rose: 25% between 2006 and 2008,<sup>20</sup> but dropped 5% between 2008 and 2009.<sup>21</sup>

8. Television and radio licensees, as well as newspaper publishers, who issued bonds and borrowed money to fund the acquisitions of assets and other broadcasting and publishing companies, have had difficulty making interest payments. The credit crisis in the fall of 2008 also has made it difficult for broadcasters and newspaper publishers to find buyers for their properties, since they also have difficulty obtaining serviceable loans and servicing debt without strain. Consequently, in 2009, a total of 12 broadcast television and radio companies filed for bankruptcy.<sup>22</sup> In addition, several radio companies have recapitalized, i.e., negotiated with lenders, effectively wiping out shareholder equity in the process, including Westwood One Inc.<sup>23</sup> and Cumulus Media Partners.<sup>24</sup> In addition, several newspaper publishers

<sup>13</sup> *Id.*; see also *The State of the News Media 2010; Key Findings*, available at [http://www.stateofthemediamedia.org/2010/overview\\_key\\_findings.php](http://www.stateofthemediamedia.org/2010/overview_key_findings.php) (noting that out of 4,600 news sites tracked by Nielsen Net Ratings, the top 7% collect 80% of the traffic).

<sup>14</sup> PROJECT FOR EXCELLENCE IN JOURNALISM, *THE STATE OF THE NEWS MEDIA 2009: AN ANNUAL REPORT ON AMERICAN JOURNALISM* (2009), available at [http://www.stateofthemediamedia.org/2009/narrative\\_online\\_ownership.php?media=5&cat=5](http://www.stateofthemediamedia.org/2009/narrative_online_ownership.php?media=5&cat=5).

<sup>15</sup> FCC staff analysis based on data supplied by Robert J. Coen, Universal McCann (“Coen data”); see also, Posting of Douglas Galbi, *Robert J. Coen, Advertising Data Hero*, PURPLE MOTES, A JOURNAL OF WHIMSY AND HOPE, (May 10, 2009), <http://purplemotes.net/2009/05/10/robert-j-coen-advertising-data-hero/> (“Purple Motes”).

<sup>16</sup> Coen data.

<sup>17</sup> See HAL VOGEL, *ENTERTAINMENT INDUSTRY ECONOMICS* 283-84 (7<sup>th</sup> ed. 2007).

<sup>18</sup> *Id.*

<sup>19</sup> *The State of the News Media 2010, Key Findings*, available at [http://www.stateofthemediamedia.org/2010/overview\\_key\\_findings.php](http://www.stateofthemediamedia.org/2010/overview_key_findings.php).

<sup>20</sup> Coen data; see also, Purple Motes.

<sup>21</sup> ADVERTISING AGE, *DIGITAL MARKET FACTS 2010* (2010), available at <http://adage.com/digitalfamilytrees2010/>.

<sup>22</sup> Tony Lenoir & Justin Nielson, SNL Kagan, *Citadel, NextMedia Chapter 11 Filings End 2009 With 12 Broadcast Bankruptcies*, BROADCAST INVESTOR: DEALS & FINANCE, 11-12 (Jan. 29, 2010).

<sup>23</sup> Westwood One, Inc. is a provider of radio programming and traffic information.

have either ceased operations or filed for bankruptcy protection. Cities that lost one or more newspapers include Denver, Seattle, and Phoenix.<sup>25</sup>

9. Newspapers and broadcasters have responded to declining revenues in part by cutting print staff. For example, newspapers have cut investigative journalists, closed news bureaus, or shifted emphasis to their online operations. Some newspapers have given up print editions altogether to concentrate exclusively on online operations. PEJ estimates that the newspaper industry has lost \$1.6 billion in annual reporting and editing capacity since 2000, or roughly 30%. Similarly, PEJ estimates that local television has cut over 1,600 jobs—roughly 6% of its workforce—over the last two years.<sup>26</sup>

10. This contraction is accompanied by an increase in content from Internet and mobile platforms, resulting in dramatic changes in the marketplace for news, public affairs programming, and entertainment programming. Changes in technology—particularly an accelerating trend toward online and mobile formats—are reshaping how people get their news and audio and video programming. Consumers now access news, video and audio programming, and public safety information from online and mobile sources not available a few years ago. PEJ reports that in 2009, Twitter and other social media have emerged as powerful tools for disseminating information and mobilizing citizens. It reports that 59% of Internet users now use social media and blogging and networking sites.<sup>27</sup> These new patterns of media consumption and use have provided media producers with new ways to offer content to consumers and provided many consumers with a wide variety of ways of watching, listening, or reading content.<sup>28</sup> However, PEJ reports that a sustainable business model currently does not exist to finance the production of online content and finds that even the best new media sites have limited ability to produce content.<sup>29</sup>

11. The Internet clearly has not wholly supplanted traditional media, such as broadcast stations, newspapers, and cable systems, but it has increased the quantity of news and programming available to consumers. Our review must take account of the Internet's role and significance. We will

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<sup>24</sup> Cumulus Media Partners is a privately held radio broadcasting company.

<sup>25</sup> Joseph Agnese, Mark Basham, & Tom Graves, *Industry Surveys: Publishing & Advertising* (Oct. 22, 2009), INDUSTRY SURVEYS 6 (vol.1, Jan. 2010). Both the Tribune Company and the Journal Register Company have filed for bankruptcy protection.

<sup>26</sup> *The State of News Media 2010*, Key Findings, available at [http://www.stateofthemediamedia.org/2010/overview\\_key\\_findings.php](http://www.stateofthemediamedia.org/2010/overview_key_findings.php); see also Erik B. Kolb, *Industry Surveys: Broadcasting, Cable & Satellite* (July 30, 2009), INDUSTRY SURVEYS 7 (vol. 2., Jan. 2010) (reporting that in 2008, Citadel Broadcasting laid off 7% percent of its employees, and Emmis Communications cut 10%); RadioInsight, *Major Clear Channel Layoffs*, April 28, 2009, <http://radioinsight.com/major-clear-channel-layoffs/> (reporting that Clear Channel announced it would cut 1,850 jobs).

<sup>27</sup> *The State of the News Media 2010*, Introduction, available at [http://www.stateofthemediamedia.org/2010/overview\\_intro.php](http://www.stateofthemediamedia.org/2010/overview_intro.php).

<sup>28</sup> In its recent study "How News Happens," PEJ examined for one week all outlets that produce local news in Baltimore, Maryland to determine which sources actually originate the news. See [http://www.journalism.org/analysis\\_report/how\\_news\\_happens](http://www.journalism.org/analysis_report/how_news_happens). PEJ found that most of the information people receive contain no original reporting. Eight of the ten stories studied repeated or repackaged stories originated from other sources. The study found that 95% of original stories were from traditional media, mostly newspapers. At the same time, it found a significant expansion of news media outlets in Baltimore. Currently, Baltimore has 53 different news outlets producing local news content, most of which are multi-platform operations. These outlets range from blogs to talk radio to news sites created by former journalists. *Id.*

<sup>29</sup> *The State of the News Media 2010*, Introduction, available at [http://www.stateofthemediamedia.org/2010/overview\\_intro.php](http://www.stateofthemediamedia.org/2010/overview_intro.php). (finding that 79% of online news consumers rarely, if ever, click on online advertising).

examine how traditional media producers are integrating the Internet into their business models and whether revenues from Internet advertising can mitigate the effects of the loss of other advertising dollars. We will attempt to weigh and assess these trends and evaluate the interrelationships between the marketplace and the Commission's ownership rules.

12. Views differ on the impact of the marketplace changes discussed above. Commenters in previous media ownership proceedings have raised concerns that increased consolidation places control of programming choices in the hands of too few owners. They have asserted that consolidation results in insufficient programming variety to serve the needs of local communities. Parties have asserted that owners of multiple stations in a market may reduce or cease production of local programming on some of their co-owned stations and instead rely on the news produced by their other stations or newspapers.<sup>30</sup> Throughout this proceeding, we will examine whether consolidation adversely affects consumers of media, advertisers, creators of content, and platform owners.

13. Some believe that the economic downturn for traditional media will lead to reduced news coverage and a less informed citizenry. Others believe that the advent of new and creative sources of news available on the Internet will fill any gaps left by traditional news media. In this proceeding, we will examine these issues fully and consider what these and other marketplace and technological changes mean for the regulation of media ownership. After a thorough review of marketplace developments, we may determine that the current rules are serving the public interest, or we may determine that changes are necessary.

14. As noted, our ownership rules must be designed to promote our enduring public interest goals in the marketplace of today and tomorrow. Historically, the Commission has formulated its ownership rules to benefit consumers by promoting the three principal policy goals of competition, localism, and diversity. The ownership rules have typically sought to promote these goals by limiting the numbers and types of media outlets a single party can own.<sup>31</sup> We have set limits on the numbers of TV and radio facilities an entity may own in local markets, limited the audience reach nationally of commonly owned television stations, and restricted the cross-ownership of broadcast facilities and newspapers in local markets. Through our ownership rules we strive to ensure that owners promote programming responsive to local needs, including public safety information and quality children's programming. All of these types of programming serve the public interest. The Commission thus must seek to achieve a balance in addressing media ownership limits to ensure that consumers have access to these and other types of important programming. In this NOI, we invite comment on how to ensure that our rules are properly calibrated to promote our goals under current marketplace conditions.

15. In Section II of this NOI, we describe our media ownership rules as a starting point for our review of whether they serve our policy goals. We then turn, in Section III, to the fundamental questions of how to define and measure the Commission's traditional policy goals and whether there are additional objectives we should strive to achieve through our media ownership rules. In Section IV, we seek comment on whether our current ownership rules remain "necessary in the public interest as the result of competition." We seek comment also on alternatives to bright-line, sector-specific rules. We seek broad input on the developments in the marketplace since our last media ownership review and on whether and how to account for those developments in our ownership rules. Finally, we ask in particular

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<sup>30</sup> See "Local TV News in the Los Angeles Media Market: Are Stations Serving the Public Interest?" by Martin Kaplan, Ph.D., Norman Lear Prof. of Ent., Media & Soc'y, Dir., The Norman Lear Center, USC Annenberg Sch. for Comm. & Journalism and Matthew Hale, Ph.D., Assoc. Prof. and Chair, Dept. of Public and Healthcare Admin., Seton Hall U. (March 2010), available at <http://www.learcenter.org/pdf/LANews2010.pdf> (analyzing the news available on eight television stations in the market and the content of the *Los Angeles Times* on several randomly selected days).

<sup>31</sup> *FCC v. Nat'l Citizens Comm. For Broad.*, 436 U.S. 775, 780 (1978) ("*FCC v. NCCB*").

whether to continue using broadcast television predicted signal contours for purposes of our ownership rules, and, if so, how to implement the technical changes necessitated by the transition to digital television service.

16. Throughout the NOI, we invite suggestions for analytical frameworks that will allow us to assess and balance the goals of the ownership review. We ask commenters to submit relevant data and studies that will assist us in crafting our ownership rules and to identify any ongoing studies or projects that we should take into consideration. Our goal is to have the broadest possible participation from all sectors of the public.<sup>32</sup>

## II. MEDIA OWNERSHIP RULES

17. Five of the Commission's media ownership rules are the subject of this quadrennial review: the local TV ownership rule, the local radio ownership rule, the newspaper/broadcast cross-ownership rule, the radio/TV cross-ownership rule, and the dual network rule. We discuss each of these rules below. In 2004, Congress amended Section 202(h) of the Telecommunications Act of 1996 to exclude the national television multiple ownership rule from the Commission's quadrennial review obligation. We seek comment on what, if any, authority we retain to evaluate the national television multiple ownership rule set at 39% of television households nationwide as part of this quadrennial review or otherwise.<sup>33</sup>

18. *Local Television Ownership Limit.* The local television ownership rule provides that an entity may own two television stations in the same designated market area ("DMA") only if: (1) the Grade B contours of the stations (as determined by 47 C.F.R. § 73.684) 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-operated commercial or noncommercial full-power broadcast television stations would remain in the DMA after the combination.<sup>34</sup> To determine the number of voices remaining after the merger, the Commission counts those broadcast television stations whose Grade B

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<sup>32</sup> To help us in structuring this NOI, the Media Bureau has held a number of public workshops to discuss aspects of the review process. On November 2, 3, and 4, 2009, the Bureau held workshops to discuss the scope and methodology of the proceeding and the analytical framework we should use for conducting its review. See Media Ownership Workshop - Policy Scholars' Panel, <http://www.fcc.gov/ownership/workshop-110209.html>; Media Ownership Workshop - Public Interest Group Panel, <http://www.fcc.gov/ownership/workshop-110309.html>; and Media Ownership Workshop - Broadcasters & Industry Panel, <http://www.fcc.gov/ownership/workshop-110409.html>. On January 12, 2010, the Bureau held a workshop to examine current financial and economic conditions and marketplace factors affecting the media industry and how the FCC should take them into account in establishing its ownership framework. See Media Ownership Workshop - Financial & Marketplace Issues, <http://www.fcc.gov/ownership/workshop-011210.html>. On January 27, 2010, the Bureau held a workshop to examine how the media ownership rules affect the Commission's goal of promoting minority and female ownership and other issues relating to diversity in broadcasting. See Media Ownership Workshop - Minority & Female Ownership, <http://www.fcc.gov/ownership/workshop-012710.html>. On February 23, 2010, the Bureau held a workshop in Columbia, South Carolina on the state of local radio and television. See Media Ownership Workshop - Local Television & Radio Marketplace Issues, <http://www.fcc.gov/ownership/workshop-022310.html>. . On April 20, 2010, the Bureau held a workshop in Tampa, Florida on the impact of newspaper/broadcast cross-ownership in the media marketplace. See Media Ownership Workshop - Newspaper/Broadcast Cross-Ownership Impact in the Media Marketplace, <http://www.fcc.gov/ownership/workshop-042010.html>. On May 21, 2010, the Bureau held a workshop in Palo Alto, California to discuss the impact of new media on broadcast stations, <http://www.fcc.gov/ownership/workshop-052110.html>. Webcasts of these workshops and comments received in connection with them are included in the record of this proceeding and are available on the Commission's media ownership website.

<sup>33</sup> See Appropriations Act, 118 Stat. at 100.

<sup>34</sup> 47 C.F.R. § 73.3555(b).

signal contours overlap with the Grade B signal contour of at least one of the stations that would be commonly owned.<sup>35</sup>

19. When the Commission adopted the local television ownership rule, it stated that one of the most important purposes of the ownership rules was to encourage diversity in ownership in order to foster a diversity of viewpoints.<sup>36</sup> In the 2006 *Quadrennial Review Order*, the Commission held that the local television ownership rule promotes competition for viewers and advertisers within local television markets and that the public is best served when numerous rivals compete for a viewing audience.<sup>37</sup> In addition, the Commission historically has prohibited mergers among any of the top-four television stations in a market in order to promote competition.<sup>38</sup> It has more recently determined 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.<sup>39</sup> The “eight voices” test assures 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.<sup>40</sup>

20. *Local Radio Ownership Rule.* The local radio ownership rule provides that a person or 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 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) 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) 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 radio stations, except that an entity may not own, operate, or control more than 50 percent of the stations in such a market unless the combination of stations comprises not more than one AM and one FM station.<sup>41</sup> Congress initially specified these limits – both the market tiers and

<sup>35</sup> 47 C.F.R. § 73.3555(b)(1)(ii); see also, *infra* Section IV.C.1 for a discussion of the definition of digital contours.

<sup>36</sup> *Local TV Ownership Order*, 14 FCC Rcd at 12911-12 ¶ 17.

<sup>37</sup> *2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Order on Reconsideration, MB Docket No. 06-121, et al., 23 FCC Rcd 2010, 2064 ¶ 97 (2008) (“*2006 Quadrennial Review Order*”).

<sup>38</sup> 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. *2002 Biennial Regulatory Review- Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, MB Docket No. 02-277 et al., 18 FCC Rcd 13620, 13694 ¶ 196 (2003) (“*2002 Biennial Review Order*”); see also *Prometheus*, 373 F.3d at 416-18 (upholding the Commission’s decision to retain the “top-four” restriction).

<sup>39</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2065 ¶ 99; see also *Local TV Ownership Order*, 14 FCC Rcd at 12934 ¶ 67.

<sup>40</sup> *Id.* In *Sinclair Broadcasting Group, Inc. v. FCC*, 284 F.3d 148, 161 (D.C. Cir. 2002), the D.C. Circuit held that in adopting the local television ownership rule, the Commission had adequately explained how the rule advanced its goals of preserving diversity of viewpoints and competition, but that the Commission did not adequately explain its decision to include only broadcast television stations in its definition of “voices” in the market. The court observed that “[o]n remand, the Commission conceivably may determine to adjust not only the definition of ‘voices’ but also the numerical limit.” *Id.* at 162.

<sup>41</sup> 47 C.F.R. § 73.3555(a). For radio stations located outside Arbitron Metros, the Commission initiated a rulemaking proceeding to define the appropriate geographic market and instituted a modified contour-overlap

numerical limits – in the 1996 Act, subject to subsequent Commission review under Section 202(h), and the Commission adopted them by Order.<sup>42</sup>

21. The Commission historically has intended in local radio ownership limits to “promote competition in both the economic marketplace and the marketplace of ideas.”<sup>43</sup> In the *2002 Biennial Review Order*, the Commission retained the local radio numerical limits and the AM/FM service caps that Congress specified in the 1996 Act, concluding that the numerical limits promote the public interest as it relates to competition.<sup>44</sup> Similarly, in the *2006 Quadrennial Review Order*, the Commission concluded that the current ownership tiers “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.”<sup>45</sup> The Commission concluded that any relaxation of the rule “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,”<sup>46</sup> and “more restrictive limits 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.”<sup>47</sup>

22. *Newspaper/Broadcast Cross-Ownership Rule*. The newspaper/broadcast cross-ownership rule adopted in 1975 prohibited common ownership of a full-service broadcast station and a daily newspaper if (1) a television station’s Grade A service contour completely encompassed the newspaper’s city of publication, (2) the predicted or measured 2 mV/m contour of an AM station completely encompassed the newspaper’s city of publication, or (3) the predicted 1 mV/m contour for an FM station completely encompassed the newspaper’s city of publication.<sup>48</sup> The Commission adopted the newspaper/broadcast cross-ownership rule “in furtherance of our long standing policy of promoting

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approach pending completion of that rulemaking proceeding. *2002 Biennial Review Order*, 18 FCC Rcd at 13724 ¶ 274. We intend to address this issue in a separate proceeding.

<sup>42</sup> 1996 Act, § 202(h)(1); 47 U.S.C. § 303 note; *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996*, Order, 11 FCC Rcd 12368 (1996).

<sup>43</sup> *Revision of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755, 2773 ¶ 34 (1992) (citing *Genesee Radio Corp.*, 5 FCC 183 (1938)).

<sup>44</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13712 ¶ 239, 13730 ¶ 288, 13733-34 ¶ 294. The Commission maintained the separate AM and FM ownership caps due to technical and marketplace disparities between the two services. *Id.* at 13733-34 ¶ 294. The Commission also modified the definition of a local radio market by replacing the contour-overlap approach with an Arbitron Metro market definition where Arbitron markets existed and by including noncommercial stations and all stations whose communities of license are located within the Arbitron Metro’s geographic boundary when determining the size of a radio market. *Id.* at 13712, 13734, 13727 ¶¶ 239, 280, 295.

<sup>45</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2072 ¶ 116 (citing *2002 Biennial Review Order*, 18 FCC Rcd at 13730-31 ¶ 288); see also *Prometheus*, 373 F.3d at 431-32.

<sup>46</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2072 ¶ 117.

<sup>47</sup> *Id.*; see also *Prometheus*, 373 F.3d at 432 (upholding the Commission’s decision to retain the numerical limits rule structure, but remanding the specific limits for additional justification).

<sup>48</sup> 47 C.F.R. § 73.3555(d)(1)(i)-(iii); see also, *infra* Section IV.C.1 for a discussion of the definition of digital contours.

diversification of ownership of the electronic mass communications media.”<sup>49</sup> In that Order, the Commission stated that its policy to promote diversity was “derived from both First Amendment and anti-trust policy sources.”<sup>50</sup>

23. In the *2006 Quadrennial Review Order*, the Commission modified the newspaper/broadcast cross-ownership rule to allow cross-ownership in cases where the Commission finds that the proposed ownership combination serves the public interest.<sup>51</sup> The revised rule establishes presumptions for the Commission to apply in determining whether a specific newspaper/broadcast combination serves the public interest.<sup>52</sup> Specifically, the rule provides for a presumption that a waiver of the cross-ownership rule is not inconsistent with the public interest where (i) a daily newspaper seeks to combine with a radio station in a top 20 DMA, or (ii) a daily newspaper seeks to combine with a television station in a top 20 DMA and (a) the television station is not ranked among the top four stations in the DMA; and (b) at least eight independently owned and operating “major media voices” would remain in the DMA after the combination. The *2006 Quadrennial Review Order* defines major media voices as full-power commercial and noncommercial television stations and major newspapers, based on the conclusion that such entities are generally the most important and relevant outlets for news and information in local markets.<sup>53</sup> On March 23, 2010, the *Prometheus* court lifted the 2003 stay of the revised rule.<sup>54</sup>

24. For markets below the top 20 DMAs, there is a presumption that it is inconsistent with the public interest for an entity to own a newspaper-broadcast combination. The Commission requires an applicant attempting to overcome this negative presumption to demonstrate, by clear and convincing evidence, that the merged entity will increase the diversity of independent news outlets and competition among independent news sources in the relevant market. The Commission will reverse the negative presumption in two limited circumstances: (i) when the proposed combination involves a failed/failing station or newspaper, or (ii) when the proposed combination is with a broadcast station that was not

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<sup>49</sup> *Amendment of Sections 73.34, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Second Report and Order, 50 F.C.C.2d 1046, 1048 ¶ 9 (1975) (“1975 Second Report and Order”).

<sup>50</sup> *Id.* at 1048 ¶ 10 (citing *Associated Press v. United States*, 326 U.S. 1 (1945)). In the *2002 Biennial Review Order*, the Commission eliminated the newspaper/broadcast cross-ownership ban, finding that the rule, which does not account for either market size or the number of available outlets in a market, failed to promote competition, localism, or diversity. *2002 Biennial Review Order*, 18 FCC Rcd at 13748 ¶ 330. The Commission also concluded that the existing rule was not necessary to promote diversity because of the vast array of media outlets available in many markets. *Id.* at 13760-62 ¶¶ 355-59. The Third Circuit in *Prometheus* affirmed this conclusion, agreeing with the Commission that the blanket ban undermined localism and was unnecessary to protect competition or diversity. *Prometheus*, 373 F.3d at 398-400. However, the court remanded the FCC’s decision to replace the ban with more permissive “Cross Media Limits.” *Id.* at 402-03. The court continued a stay of the Commission’s order, with the consequence that the 1975 rule remained in effect. *Prometheus*, Order, No. 03-3388, 2003 WL 22052896 (3d Cir. Sept. 3, 2003).

<sup>51</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2018 ¶ 13; 47 C.F.R. § 73.3555(d)(2).

<sup>52</sup> 47 C.F.R. § 73.3555(d)(3).

<sup>53</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2042-43 ¶ 57.

<sup>54</sup> *See supra* n.50. *See also Prometheus*, Order, Nos. 08-3078 et al. (3d Cir. Mar. 23, 2010). In its Response to Order to Show Cause, filed January 7, 2010, the Commission asked the court to continue to hold the litigation in abeyance given the considerable passage of time since the release of the *2006 Biennial Review Order*, the substantial changes in the Commission’s membership during that time, and the Commission’s commencement of the 2010 quadrennial review proceeding. It noted that the 2010 quadrennial review will most likely supersede the previous review and will be determined on a new record.

offering local newscasts prior to the combination, and the station will initiate at least seven hours per week of local news after the combination.<sup>55</sup> No matter which presumption applies, the Commission's analysis of the following four factors will inform its review of a proposed combination: (1) the extent to which cross-ownership will serve to increase the amount of local news disseminated through the affected media outlets in the combination; (2) whether each affected media outlet in the combination will exercise its own independent news judgment; (3) the level of concentration in the DMA; and (4) the financial condition of the newspaper or broadcast station, and if the newspaper or broadcast station is in financial distress, the owner's commitment to invest significantly in newsroom operations.<sup>56</sup>

25. *Radio/Television Cross-Ownership Rule.* The radio/television cross-ownership rule allows a party to own up to two television stations (to the extent permitted under the local television ownership rule) and up to six radio stations (to the extent permitted under the local radio ownership rule) in a market where at least 20 independently owned media voices would remain post-merger. In markets where parties may own a combination of two television stations and six radio stations, the rule allows a party alternatively to own one television station and seven radio stations. A party may own up to two television stations (where permitted under the current local television ownership rule) and up to four radio stations (where permitted under the local radio ownership rule) in markets where, post-merger, at least 10 independently owned media voices would remain. The rule allows a combination of two television stations (where permitted under the local television ownership rule) and one radio station regardless of the number of voices remaining in the market.<sup>57</sup>

26. The Commission adopted this rule in 1999, balancing diversity and competition concerns against the desire to permit broadcasters and the public to realize the benefits of common ownership.<sup>58</sup> The Commission retained the rule in the 2006 *Quadrennial Review Order* "to provide protection for diversity goals in local markets and thereby serve the public interest."<sup>59</sup> The Commission declined to tighten the rule, finding that it currently strikes an appropriate balance between diversity and competition goals.<sup>60</sup> The Commission also declined to relax the rule, finding that the record did not indicate that local radio and television ownership limits alone provide sufficient protection to assure a diversity of viewpoints in those media markets.<sup>61</sup>

27. *The Dual Network Rule.* The Commission's dual network rule permits common ownership of multiple broadcast networks, but prohibits a merger between or among the "top four" networks (that is, ABC, CBS, Fox, and NBC).<sup>62</sup> In the 2002 *Biennial Review Order*, the Commission concluded that the dual network rule was necessary in the public interest to promote competition and

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<sup>55</sup> 47 C.F.R. § 73.3555(d)(7).

<sup>56</sup> 47 C.F.R. § 73.3555(d)(3)-(7).

<sup>57</sup> 47 C.F.R. § 73.3555(c). For purposes of this rule, media voices include television stations, radio stations, newspapers, and cable systems. *Id.* § 73.3555(c)(3).

<sup>58</sup> 2006 *Quadrennial Review Order*, 23 FCC Rcd at 2058 ¶ 81 (citing *Local TV Ownership Order*, 14 FCC Rcd at 12948 ¶ 102). The Commission's decision in the 2002 *Biennial Review Order* to replace the rule with "Cross Media Limits" was remanded by the Third Circuit. *Prometheus*, 373 F.3d at 402-03.

<sup>59</sup> 2006 *Quadrennial Review Order*, 23 FCC Rcd at 2058 ¶ 82.

<sup>60</sup> *Id.* at 2059 ¶ 83.

<sup>61</sup> *Id.* at 2059 ¶ 84.

<sup>62</sup> The rule provides that "[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 . . ." 47 C.F.R. § 73.658(g) (emphasis in original).

localism.<sup>63</sup> 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.<sup>64</sup> It reasoned that these competitive harms would reduce program output, choices, quality, and innovation to the detriment of viewers. The Commission also concluded allowing a merger of the top four networks would harm localism by reducing the ability of affiliates to bargain with their networks for favorable terms of affiliation, diminishing affiliates’ influence on network programming, and thereby harming the ability of the affiliates to serve their communities.<sup>65</sup>

### III. POLICY GOALS

28. As we review our existing media ownership rules pursuant to Section 202(h) and consider alternative approaches to regulating media ownership in the public interest, a valuable initial step is to explore further how to define the policy goals that we seek to promote. A clear understanding of our policy goals will aid us in determining whether various possible rules will actually promote those goals. In analyzing our policy goals, we consider their relationships to four groups of participants in the media marketplace, each of which may be affected by our ownership rules: (1) consumers of media or “end users,” i.e., viewers, listeners, and readers; (2) advertisers; (3) creators of content; and (4) platform owners, i.e., media distributors, including broadcasters, newspapers, and cable systems.

29. As noted, the Commission has implemented its public interest authority and the Section 202(h) mandate by seeking to promote competition, localism, and diversity through its media ownership rules. The Commission and the courts have recognized that, “[i]n setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power.”<sup>66</sup> The legislative history of the 1996 Act also recognizes localism as an important public interest consideration in media ownership.<sup>67</sup>

30. In this NOI, we invite comment on the task of relating our policy goals to our media ownership rules. Specifically, we seek comment on how to: (1) define the policy goals of competition, localism, and diversity; (2) determine how best to promote these goals in today’s media market; (3) analyze the relevance of our policy goals to each of the four groups of market participants we have identified;<sup>68</sup> (4) measure whether particular ownership structures promote these goals; (5) determine

<sup>63</sup> 2002 Biennial Review Order, 18 FCC Rcd at 13858 ¶ 621.

<sup>64</sup> *Id.* at 13850 ¶ 601. 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, much like some cable television networks do. *Amendment of Section 73.658(g) of the Commission’s Rules – The Dual Network Rule*, Report and Order, MM Docket No. 00-108, 16 FCC Rcd 11114, 11122-23 ¶ 20 (2001).

<sup>65</sup> 2002 Biennial Review Order, 18 FCC Rcd at 13855 ¶ 611.

<sup>66</sup> *Prometheus*, 373 F.3d at 383 (citing *FCC v. NCCB*, 436 U.S. at 780).

<sup>67</sup> 2002 Biennial Review Order, 18 FCC Rcd at 13644 ¶ 75 (citing H. Rep. No. 104-104 (1996) at 221 (“Localism is an expensive value. We believe it is a vitally important value, however [and] should be preserved and enhanced as we reform our laws for the next century.”)).

<sup>68</sup> As noted, we have identified four groups of market participants potentially affected by our media ownership rules: (1) consumers of media or “end users,” i.e., viewers, listeners, and readers; (2) advertisers; (3) creators of content; and (4) platform owners, i.e., media distributors, including broadcasters, newspapers, and cable systems. See discussion *supra* ¶ 28.

whether any new or revised rules we could adopt would promote these goals; (6) determine when a goal has been achieved; and (7) balance the goals when they conflict with each other. We also ask whether there are other goals we should consider. To inform our policy decisions, we seek relevant data and studies about the levels of competition, localism, and diversity in a variety of media markets, including small and large markets, consolidated and unconsolidated markets, markets with existing cross-ownership, and markets without cross-ownership. Are there existing public or proprietary datasets that the FCC should obtain? Are there ongoing studies or projects that we should consider? While we intend to base our conclusions on empirical and factual data to the extent feasible, we also seek comment on the extent to which our policy goals are quantifiable. Are there alternative bases for our analysis, including, for example, theoretical analysis, modeling, or simulations?

#### A. Competition

31. As stated above, Section 202(h) requires the Commission to review its media ownership rules every four years to determine “whether any of such rules are necessary in the public interest as the result of competition” and to “repeal or modify any regulation it determines to be no longer in the public interest.”<sup>69</sup> This statutory directive directly links the Commission’s review of the media ownership rules to ensuring that media markets are competitive. We invite comment on how to define the competition goal in today’s media marketplace. What analytical approaches should we employ to determine whether common ownership of multiple media outlets increases or decreases competition?

32. In order to evaluate the performance of the media marketplace, how should we measure the current level of competition in that marketplace? We seek to assess the competitive performance of the relevant markets, not of particular firms, and in that connection we are particularly interested in proposed definitions of relevant product and geographic markets. Those definitions directly impact the applicability of media ownership limits because product market definitions determine which entities compete with each other and thus, how many media outlets are in a market. A narrow product market definition could limit ownership if we were to adopt limits based on market size. Previously, the Commission’s competition analysis has focused on whether the rules result in lower prices, higher output, more choices for buyers, and more technological progress than would be the case if markets were unregulated.<sup>70</sup> Are these still the relevant competitive factors to consider? Are there other factors? Is the competition goal best conceptualized as economic competition?

33. How should the Commission measure whether our ownership rules enhance competition in a way that benefits consumers? As noted above, traditional competitive analysis focuses on price, quality, and innovation. Indeed, competition is not an end in itself but a means to advance consumer welfare. Because broadcast radio and television content is available for free to end users, we cannot use price in analyzing competition for listeners and viewers. Accordingly, we seek comment on potential proxies for consumer welfare.

34. The Commission has found that competition among broadcast outlets is likely to benefit consumers by making available programming that meets consumers’ preferences.<sup>71</sup> Is this still the case today? For instance, should we seek to determine whether consumers are getting the content they want

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<sup>69</sup> 47 U.S.C. § 303 note; *supra* n 1.

<sup>70</sup> See 2002 Biennial Regulatory Review- Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, MB Docket No. 02-277, 17 FCC Rcd 18503, 18521-22 ¶ 52 (2002).

<sup>71</sup> See 2002 Biennial Review Order, 18 FCC Rcd at 13638 ¶ 57 (“We hereby affirm our longstanding commitment to promoting competition by ensuring pro-competitive market structures. Consumers receive more choice, lower prices, and more innovative services in competitive markets than they do in markets where one or more firms exercises market power.”) (citation omitted).

from broadcast media? If consumer satisfaction is an important metric for assessing the state of our competition goal with regard to consumers, how do we measure it?

35. For example, we could look at consumer satisfaction directly by performing survey research. How useful is survey research for assessing end user satisfaction with the range of content provided in the local market? Alternatively, would it be useful for us to look at empirical and theoretical analyses of competition in other markets to gather information about what market structures, as reflected by the number of firms competing in a market and market share distribution generally, result in a competitive market structure?<sup>72</sup> Once we obtain such a figure, could we apply it to the media marketplace?

36. Are there more easily measurable proxies for consumer satisfaction, such as media utilization? For instance, should we consider factors such as increases or decreases in utilization to determine satisfaction? If there is an increase in video programming consumption on the Internet (measured by minutes of use) and a decrease in such consumption via broadcast stations, is that a relevant factor in determining consumer satisfaction for purposes of evaluating our competition goal? What weight should we give to consumer choices in obtaining media content, as revealed by actual behavior?

37. What is the best way to measure consumer satisfaction among particular demographic groups, such as women, racial and ethnic minorities, non-English speakers, and people with disabilities? What is the nexus between media ownership and whether or not a particular demographic group within a designated market area is being served by available broadcast media platforms?

38. We also seek comment on the degree to which various media providers compete for consumers and how we can measure this. Can consumers easily switch among different forms of media without suffering a loss in satisfaction? If not, what are the trade-offs among the levels of satisfaction and the forms of media among which they may switch? Should we analyze the television and radio markets separately or jointly? Do consumers consider radio and television to be substitutes in choosing any service and, if so, for what services? Do television stations adjust the content that they provide in response to changes in content delivered over radio stations and *vice versa*? How do radio and television respond to competition for consumers from other platforms such as the Internet or mobile devices?

39. Turning to the second group of market participants that our ownership rules may affect, we invite comment on whether promoting competition in advertising markets should be one of the goals of our ownership rules. If so, how should we measure the state of competition in advertising markets? Should we consider performance metrics that are broader than price, or should we rely on traditional competitive analysis in this area? If competitive analysis is the appropriate framework, how should we define the relevant product and geographic markets? We seek comment on the appropriate analytical framework that would implement the framework that commenters suggest we use.

40. While end user prices for broadcast radio and television do not exist, advertising prices are available, making it possible to do a traditional competitive analysis of advertising markets. Historically, the Commission has relied on assessments of competition in advertising markets as a proxy for consumer welfare in media markets.<sup>73</sup> Does the state of competition in the advertising market provide

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<sup>72</sup> Previously, the Commission has looked to general competition analyses to derive a rule of thumb regarding the number of independent firms in a market that is likely to ensure reasonable competition. For instance, in the *2002 Biennial Review Order*, the Commission used five competitors in a given market for television and six competitors in a given market for radio, justifying the different number of competitors by noting the strong influence of cable on broadcast television. 18 FCC Rcd at 13693-99 ¶ 192-203, 13731-33 ¶ 289-93.

<sup>73</sup> See *2002 Biennial Review Order*, 18 FCC Rcd at 13639-40 ¶ 60 (citing *Amendment to § 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and TV Broadcast Stations*, Report and Order, 100 F.C.C.2d 17 (1984); *Revision of Radio Rules and Policies*, 7 FCC Rcd 6387 (1992)).

a useful indicator of the state of competition for end users? Does an efficient competitive advertising market ensure that all end users have choices that are relevant to their interests and their particular cultures? If the advertising market is found to be competitive, can we then infer that the menu of content broadcasters provide is doing a good job of attracting the demographic groups in which advertisers are interested? Are certain demographic groups underserved in the media market, or is competition in the advertising market a sufficient indicator that our competition policy goal with respect to all consumers is being satisfied?

41. Media markets have been considered “two-sided markets,” in which platforms use content to bring together consumers on one side and advertisers on the other side. How should the Commission take this structure into account? For instance, we are specifically interested in how differences in the program preferences of viewers and advertisers affect our competition policy goal, and how we should balance those preferences if they are not compatible.

42. How should we assess the impact of our ownership rules on content creators? Platform owners purchase content from creators in the programming market. To what extent should competition for content among platforms be a goal of our ownership rules? Should we seek to promote competition in the programming market as an end in itself, beyond the effect it has on consumers and advertisers? If so, why? Can we fully measure competition in the programming market by observing our performance metrics in the consumer and advertising segments, or should we develop different measures in this area?

43. Finally, should our ownership rules seek to promote competition among distribution platform owners as an end in itself, apart from any impacts on the other groups of market participants? Does the race, gender, or ethnicity of platform owners affect the interests of consumers, advertisers, or content creators, and how? How do we assess and measure the significance of competition in platform ownership?

44. As we consider the effects of market structure on media market participants, how should we address different effects on different groups? For example, to the extent that platforms are able to generate efficiencies from joint operations, should we require those efficiencies to be passed through to end users (in the form of more and/or better content) or to advertisers (in the form of a more efficient advertising market with better demographic targeting and/or lower prices) before concluding that they contribute to our policy goal? To what extent should the analysis of the impact of market structure on media market participants differ in the context of unserved and underserved communities? What, if any, changes to the media ownership rules could promote minority and female ownership of broadcast stations? What marketplace or other factors would encourage new entry by minorities and/or females? Does consolidation hinder such ownership or does the opportunity to obtain efficiencies of scale and scope help promote growth and better public service by minority and female owners?

45. The markets in which broadcasters operate continue to change, and we seek comment on how marketplace changes should affect our competition analysis. Television stations are facing more competition for viewers from a greater variety of sources than ever before, and audience fragmentation continues apace. Thus, for example, local television news is now seeing rapid audience declines.<sup>74</sup> PEJ research shows that viewership of the late evening news fell an average of 6.4% in 2009, four times the rate of a year earlier.<sup>75</sup> Viewership of early evening news, at the dinner hour, fell 6.7% (similar to 2008), and viewership of early morning news, the programs that air prior to network morning shows that have been an island of relative stability for audiences, fell by 5.5% on average.<sup>76</sup>

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<sup>74</sup> *The State of the News Media 2010, Key Findings*, available at [http://www.stateofthemediamedia.org/2010/overview\\_key\\_findings.php](http://www.stateofthemediamedia.org/2010/overview_key_findings.php).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

46. Radio audiences remain more stable. Recent PEJ research shows most people still listen to news, talk, and music for at least a little while every week, and they do most of this listening through terrestrial radio.<sup>77</sup> Approximately 236 million Americans listened to at least some radio in an average week in the fall of 2009, a number that has been basically static for the past five years, and news/talk/information remains among the most popular formats.<sup>78</sup> NPR's audience in 2009 rose slightly, up 0.1%, from 2008.<sup>79</sup> But new technology is encroaching on the amount of traditional radio use. More than four in 10 Americans now say they listen to less terrestrial radio due to iPod/MP3 player use, and nearly one in three now say they listen to online radio.<sup>80</sup> PEJ research also shows that the radio industry is suffering from continued losses of profits and revenues. In 2009, terrestrial broadcast radio saw an 18% drop in advertising revenue.<sup>81</sup> Satellite radio company SiriusXM continues to see revenue losses also. In 2009, SiriusXM lost \$441 million, down from the \$902 million loss in 2008.<sup>82</sup>

47. Newspapers continue to struggle. Recent PEJ research shows that in September 2009, industry-wide newspaper circulation fell 10.6% from a year earlier.<sup>83</sup> The industry has lost 25.6% in daily circulation since 2000.<sup>84</sup> Advertising revenue for newspapers (for print and online combined) fell 26%, a rate of decline that was more than 50% steeper than a year earlier (16%).<sup>85</sup> Even online ads fell, 10%, a far cry from the 35% growth rates of a few years ago.<sup>86</sup> With those numbers added in, total revenue for newspapers fell about 22% to a total of \$38 billion.<sup>87</sup>

48. Recent PEJ research shows that on a typical day, 61% of Americans get news online, which puts the Internet just behind television and ahead of newspapers as a source for news.<sup>88</sup> More than a quarter of adults now commonly access the Internet on their phones and PDAs.<sup>89</sup> Online news users skew younger than the general adult population. About two-thirds of online news users (68%) are under the age of 50, including 29% who are under the age of 30.<sup>90</sup> Research cited in the Commission's Broadband Plan finds that 80% of home broadband users access local or community news online; 60% access information about or apply for jobs online; and 54% access advice from government websites on

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* (citing Radio Advertising Bureau, "09 Year-End Results Confirm Positive Signs for Radio Digital Sector Continues to Gain Importance," Feb. 19, 2010.)

<sup>82</sup> *The State of the News Media 2010, Key Findings*, available at [http://www.stateofthemediamedia.org/2010/overview\\_key\\_findings.php](http://www.stateofthemediamedia.org/2010/overview_key_findings.php).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Participatory News Consumer*, available at [http://www.journalism.org/analysis\\_report/understanding\\_participatory\\_news\\_consumer](http://www.journalism.org/analysis_report/understanding_participatory_news_consumer).

<sup>89</sup> *Id.*

<sup>90</sup> *The State of the News Media 2010, Audience Behavior*, available at [http://www.stateofthemediamedia.org/2010/online\\_audience.php](http://www.stateofthemediamedia.org/2010/online_audience.php).

health and safety issues.<sup>91</sup> Overall, 26% of all Americans say they get some form of news today via cellphones, which amounts to 33% of cell phone owners.<sup>92</sup>

49. Citing data from eMarketer, PEJ states that online advertising during 2009 declined for the first time since 2002.<sup>93</sup> The firm's updated August projections called for online ad spending to fall 4.6% to \$22.4 billion. But some categories fared better than others. Search engines such as Google were projected to grow to 3% in 2009 to \$10.8 billion, and by the end of the year, nearly half (48%) of the total online ad market was expected to be in search engines.<sup>94</sup> But display advertising revenue, on which news sites rely, was expected to fall 2% to \$4.8 billion.<sup>95</sup> Even here, news does not get the greatest portion of display advertising revenue. Aggregators and Internet service providers take in 28%, television websites (including both news and entertainment material) get 6%, newspaper websites get 5%, and other news and current-event sites less than 3%.<sup>96</sup> Another key ad category for news online, classified ads, is eroding in the face of free classifieds from places like Craigslist.<sup>97</sup> Classified advertising revenue was projected to drop 31% to \$2.2 billion in 2009. Accounting for 17% of online ad spending in 2003, classified ad spending is now just 9%.<sup>98</sup>

50. Consumers of broadcast video content also have choices for video programming among hundreds of cable channels carried by multichannel video programming distributors (MVPDs), and on many Internet sites such as hulu.com, fancast.com, abc.com, fox.com, and available for download at Netflix.com and at iTunes. Some of the Internet sites provide free content viewable with online commercial interruptions; some provide fee-only content; and others offer content only to their subscribers or members. Consumers of broadcast radio can choose also among over 100 audio channels carried by satellite radio, downloadable podcasts, audio streaming, and other audio entertainment available in cars, on mobile devices, and on computers. What is the impact of such changes on the economic viability of broadcasters, including specifically the viability of their local news and public affairs programming, in terms of the cost of production and resulting station revenue from such programming? Do new media provide opportunities for entry by minorities and females?

51. In what ways does competition from the Internet affect the financial condition of broadcasters? What are the consequences of the current challenges that traditional media face in monetizing their content on the Internet? How should the current financial and other problems being faced by newspapers factor into our analysis? What role have debt and profit margins played in the current media structure?<sup>99</sup> Are there other anticipated near-term marketplace changes that should affect

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<sup>91</sup> Federal Communications Commission, *The National Broadband Plan, Chapter 3 (2010)* (citing Horrigan, *Broadband Adoption and Use in America 16*), available at <http://download.broadband.gov/plan/national-broadband-plan.pdf> ("Broadband Plan").

<sup>92</sup> *Participatory News Consumer*, available at [http://www.journalism.org/analysis\\_report/understanding\\_participatory\\_news\\_consumer](http://www.journalism.org/analysis_report/understanding_participatory_news_consumer).

<sup>93</sup> *The State of the News Media 2010, Key Findings*, available at [http://www.stateofthemediamedia.org/2010/overview\\_key\\_findings.php](http://www.stateofthemediamedia.org/2010/overview_key_findings.php).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> In a PEJ survey conducted in association with the American Society of News Editors (ASNE) and the Radio Television Digital News Association (RTNDA), 59 percent of news executives surveyed from ASNE and RTNDA

our analysis?<sup>100</sup>

52. Are there unique attributes of broadcasting that should lead us to define and measure broadcast competition without reference to other media? If not, what other media should the FCC consider as it assesses competition in the relevant markets and measures performance?

53. In sum, we request data, studies, and analyses to evaluate the competitive environment in which each of the four sets of media market participants operate, and how our ownership rules affect that competitive environment.

#### **B. Localism**

54. We invite comment on how to define and promote localism in the context of the media ownership rules.<sup>101</sup> How does ownership structure affect localism? Historically, the broadcast regulatory framework has been designed to foster a system of local stations that provide programming responsive to the unique concerns and interests of the audiences within the stations' service areas.<sup>102</sup> For instance, broadcasters provide public safety information to communities to ensure that consumers have access to such information. The Commission has relied on two measures to determine whether licensees are meeting their local programming requirements: (1) the selection of programming responsive to local needs and interests of broadcasters' communities of license, and (2) local news quantity and responsiveness.<sup>103</sup> The courts, too, have long recognized localism to be an important public interest objective of broadcast regulation.<sup>104</sup> Does our traditional localism goal need to be redefined in today's media marketplace?

55. As with our competition goal, we seek comment on what performance metrics to use to analyze the relevance our localism goal for each group of market participants in determining whether our ownership rules are in the public interest. First, how should we define and measure localism as it applies to consumers? One approach to measuring localism is to measure programming of interest to the community in general and local news and public affairs programming in particular. Such programming

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responded that profit margin demands were too high as a "dominant" or "major factor" leading to journalism's current challenges. See, [http://www.stateofthemediamedia.org/2010/specialreports\\_survey\\_executives.php](http://www.stateofthemediamedia.org/2010/specialreports_survey_executives.php).

<sup>100</sup> See *infra*, Section IV.C.2., for a discussion of the Commission's Broadband Plan.

<sup>101</sup> We do not intend in this proceeding to address localism issues that range beyond the effect of the structural media ownership rules on our localism goal. There are other pending proceedings addressing the public interest obligations of broadcasters and how to enhance localism through behavioral rules. See, e.g., *Broadcast Localism*, Notice of Inquiry, MB Docket No. 04-233, 19 FCC Rcd 12425, 12427 ¶ 7 (2004) ("*Localism NOI*"); *Broadcast Localism*, Report and Notice of Proposed Rulemaking, MB Docket No. 04-233, 23 FCC Rcd 1324 (2008).

<sup>102</sup> *Localism NOI*, 19 FCC Rcd at 12427 ¶ 4. For instance, Section 307(b) of the Communications Act of 1934 requires the Commission to distribute licenses "among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." *2002 Biennial Review Order*, 18 FCC Rcd at 13643 ¶ 74 (citing 47 U.S.C. § 307); see also *id.* at 13643 ¶ 74 (citing *Second Annual Report of the Federal Radio Commission to the Congress of the United States for the Year ended June 30 (1928)* at 8-9 ("The Commission found it possible to reassign the allocated stations to frequencies which would serve as many communities as possible to ensure those communities had at least one station that would serve as a basis for the development of good broadcasting to all sections of the country. . . . New York and Chicago stations were not allowed to dominate the situation.")).

<sup>103</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13644 ¶ 78.

<sup>104</sup> See, e.g., *NBC v. United States*, 319 U.S. 190, 203 (1943) ("[l]ocal program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community").

could be evaluated based on the quantity of programming responsive to local needs and interests.<sup>105</sup> Such an approach would largely continue our traditional approach of defining and measuring localism in terms of community responsive news and public affairs programming offered by over-the-air broadcasters. If we implement such an approach, what programming should be deemed responsive to the community? How should we define and measure the quantity of local programming, and news in particular? What sources of content should the Commission consider? Should we measure the quantity of local content by time or space devoted to issues, stories, programs or articles, the total number of these, or some combination thereof?

56. Are there other ways of measuring the extent to which our localism goal is being achieved in today's media marketplace? As an alternative to measuring the quantity of local content, would a survey on citizen consumption of, and satisfaction with, local content be a useful measure of localism? Is the satisfaction of local end users (viewers, listeners, or readers) an adequate measure of whether locally oriented programming adequately serves local needs? If so, how should we gauge audience satisfaction with locally oriented content? If consumers are satisfied with the amount and responsiveness of local content, does that signify that the media ownership rules are successfully promoting our goal of promoting localism?

57. An alternative approach to measuring localism with respect to consumers would be to examine local programming inputs, such as the number of local journalists, the number of local news bureaus, or expenditures on local news and public affairs, either in absolute terms or as a percentage of total revenues or expenditures. Would such inputs to local programming content be a useful performance metric? Are such inputs a valid proxy for the responsiveness of local programming?

58. In determining the importance of our localism goal, should we consider consumers' interest in locally oriented programming? How should the extent of consumer demand for free, local content factor into the media ownership rules? For instance, if ratings for local news broadcasts have declined over the years, should that affect the emphasis we place on the goal of localism? Alternatively, is the provision of local news programming socially valuable in itself, regardless of variations in consumer interest in such programming? If so, would measures of civic engagement such as voter turnout or civic knowledge be useful to measure achievement of the localism goal?

59. How should we define and measure localism as it applies to historically underserved minority communities? What is the best approach to measuring satisfaction among particular demographic groups with the quantity and effectiveness of locally-oriented programming? Are there aspects of localism that are relevant specifically to minority communities? Are there particular types of

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<sup>105</sup> We also seek comment on the ease and usefulness of the license renewal process as it relates to the public's ability to evaluate compliance with the Commission's ownership rules. For instance, does the public have reasonable access to the program files of the broadcasters in order to assess how broadcasters are fulfilling their public interest obligations? In another proceeding, the Commission adopted rules replacing the current "issues/programs" list for television stations with a standardized form and requiring television broadcasters to make their public inspection files available on the Internet. *See Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Report and Order, 23 FCC Rcd 1274 (2008) (petitions for reconsideration pending). Five parties have appealed the Report and Order, and the cases have been consolidated in the D.C. Circuit, where they are being held in abeyance until the Commission acts on several pending petitions for reconsideration. *National Ass'n of Broadcasters et al. v. FCC*, No. 08-1135 et al., slip op. at 1 (D.C. Cir. July 11, 2008). In addition, the Commission has sought comment on whether to apply the new standardized reporting requirements to broadcast radio licensees; that proceeding is pending. *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, Second Report and Order, First Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 10344, 10391 (2007). Until the effective date of the new disclosure rules, television broadcast stations, like radio stations, continue to be required to report on their public interest programming by means of the quarterly issues/programs list. *See* 47 C.F.R. §§ 73.3526 (commercial stations) and 73.3527 (noncommercial educational stations).

programming, including news and informational programming, which are specifically relevant to minority communities? If so, how should such programming be defined and measured?

60. As we define and measure localism, should we consider radio and television (and other content platforms such as newspapers, cable, and the Internet) as separate product markets or as a single product market for purposes of achieving our localism goal? How should we account for nonbroadcast distribution outlets for locally oriented programming? How should we account for new media in our analysis, both in terms of the metrics we adopt and in terms of the impact of new media on traditional media (e.g., the level of news and analysis that broadcasters offer)? For instance, how does the Internet affect our evaluation of whether the goal of localism is being served? While not all consumers have broadband Internet access, information first reported on the Internet – through local blogs, websites, listservs and similar online sources – may be picked up by the traditional media and further disseminated to non-users of the Internet. Is that a relevant factor? Does the Internet play a role in the promotion of localism by providing a unique forum for communities and local organizations to share information on niche topics and community-oriented information not provided by other media platforms?<sup>106</sup> For instance, what is the impact of hyper-local websites and what weight should we give them?<sup>107</sup>

61. Community groups across the country now provide free websites for resident information that previously was available in community papers. Should we consider such distribution platforms? Or is it the case that most local news originates from traditional media sources, such as broadcasting and newspapers? How heavily should origination factor into our analysis? How should any measure of quantity account for re-broadcasting or re-purposing of content? Does the current prevalent business model for traditional media, in which many companies provide free Internet content, have any adverse effect on the quantity or responsiveness of local content provided? Should we consider mobile platforms in our analysis? Consumers increasingly use smart phones and other mobile devices to access up-to-date information on local school events and closings, local weather, and local civic information. Consumers also are using mobile devices to deliver news and information through social networking websites. Should we consider consumer-to-consumer information in our analysis?

62. Should the Commission seek to promote localism with regard to the advertising sector of media markets? Is there a policy reason for the Commission to promote local advertisers' access to local media? If there is such a policy concern, can it be addressed by ensuring that the advertising market is competitive?

63. Should the Commission consider content creators in deciding whether our ownership rules are necessary to advance localism? We invite comment on whether locally produced or originated content makes a particular contribution toward our localism goal, and, if so, how to define "local production" or "origination" in today's media marketplace.<sup>108</sup> What entities should qualify as local content creators? If we focus on local production, how should we measure the quantity and responsiveness of locally oriented and produced content?

64. Should the Commission consider platform owners in deciding whether our ownership rules are necessary to advance localism? Is local ownership a goal in itself or simply a means to foster the provision of local programming to consumers? Are there differences in the amount and responsiveness of local content provided in markets where there are significant numbers of locally owned and/or managed

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<sup>106</sup> In its April 2009 study, "Home Broadband Adoption 2009," Pew found that 63% of adult Americans have broadband Internet access at home, leaving one third of the population without broadband access in the home. See <http://www.pewinternet.org/Reports/2009/10-Home-Broadband-Adoption-2009.aspx>.

<sup>107</sup> See *infra*, Section IV.C.2., for a discussion of the Commission's Broadband Plan.

<sup>108</sup> As noted above, we do not intend in this proceeding to adopt behavioral rules relating to local production or other aspects of localism. Rather, our focus is on the structural media ownership rules.

stations as opposed to markets characterized by nonlocal owners and/or managers?

65. We seek comment on how market structure affects localism in all of these respects. Is there any particular ownership structure that would best promote our localism goal? Does combined ownership of outlets within a platform, such as in radio alone, or across platforms, such as with respect to radio/television cross-ownership or newspaper/broadcast cross-ownership, promote or hinder localism goals? We invite commenters to provide predictive evidence as to how any proposed changes in any ownership rule (whether the change be an elimination, relaxation, or tightening of an ownership rule or even a waiver or grandfathering of noncompliance with a rule) would likely affect the amount, quality, and/or diversity of the local news, public affairs programming and other information in the community affected by the change. Is there a difference in the degree to which our localism goal is achieved in markets with many single station owners versus markets in which multiple station ownership is more common? Is there any difference in markets where a TV station or radio station is co-owned with a newspaper as opposed to ones that are not? We seek any relevant studies or data with respect to these issues.

### C. Diversity

66. We invite comment generally on how to define diversity. Promoting diversity has long been a central goal of the Commission's multiple ownership rules.<sup>109</sup> The Commission historically has approached the diversity goal from five perspectives—program diversity, viewpoint diversity, source diversity, outlet diversity, and minority and female ownership diversity.<sup>110</sup> In this NOI we seek comment on the relative importance of each of these aspects of diversity. For each of these aspects of diversity we seek to refine the performance metrics and thresholds that we use to judge how well the current rules operate to achieve our overall diversity goal. In considering the various potential ways to measure diversity, we seek comment on how their use comports with the values and principles embodied in the First Amendment. We invite commenters to support their comments with sound empirical evidence demonstrating a link between structural rules and our diversity goal.<sup>111</sup>

67. We seek comment on the proper geographic area and the proper product market within which to analyze the achievement of our diversity goal. We tentatively conclude that the appropriate geographic unit is an area within which, roughly speaking, all citizens have the same range of media choices. We seek comment on this tentative conclusion. Do existing geographic market definitions satisfy this criterion? Are there any reasons to evaluate diversity on a national level for some facets of diversity?

68. Should we apply performance metrics for the diversity goal that aggregate all media outlets in a geographic area or that separate outlets of each media type? Do particular types of media contribute more than others to particular aspects of diversity? Should we analyze local television and radio separately? Should we consider only content aired on broadcast outlets or are other platforms

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<sup>109</sup> See 2006 Quadrennial Review Order, 23 FCC Rcd at 2016-17 ¶ 9; 2006 Quadrennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Further Notice of Proposed Rulemaking, MB Docket No. 06-121, 21 FCC Rcd 8834, 8837 ¶ 4 (2006) (citing 2002 Biennial Review Order, 18 FCC Rcd at 13627 ¶ 17); *Prometheus*, 373 F.3d at 446-47. See also *Prometheus*, 373 F.3d at 383 (citing *FCC v. NCCB*, 436 U.S. 775, 780 (1978) ("In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power.")).

<sup>110</sup> See, e.g., 2002 Biennial Review Order, 18 FCC Rcd at 13627-37 ¶¶ 18-52.

<sup>111</sup> Courts have required that we demonstrate a close connection between the ownership rules and our diversity goals. See *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1042-44 (D.C. Cir. 2002); *Sinclair*, 284 F.3d at 158-60.

relevant as well? How should we take account of the vast number of channels and range of content available via cable television, satellite television, and the Internet? Which media, if any, are close enough substitutes to be considered in the same “product market?” The costs associated with cable television, satellite television, and the Internet (including paying for the connection and for necessary home equipment) put some services out of reach for some segments of the population. How should we account for that fact? If we conclude that the Internet provides the capability to distribute a nearly limitless variety of content, which facets of the diversity goal would be satisfied? Focusing on the Internet, how should we assess the importance of Internet news blogs and aggregators, such as the Huffington Post or the Drudge Report? Do aggregators contribute to media market diversity, even if they produce little or no original content? We invite commenters to submit studies and data that evaluate the significance of the Internet in formulating media ownership regulation.

69. The Commission previously has concluded that program diversity, which refers to the variety of programming formats and content, is promoted by competition among media outlets.<sup>112</sup> Is competition among media outlets the optimal way to achieve program diversity generally? Viewed this way, a market structure that provides an acceptable level of competition would also be considered to provide an acceptable level of program diversity. Does increased competition among independently owned media outlets always lead to increased program diversity? Are there situations in which concentrated ownership increases program diversity? Is it possible to obtain an objective measure of program diversity? Are the performance metrics suggested above in connection with the competition goal (e.g., consumer satisfaction, media utilization) adequate for this task? If additional performance metrics are necessary, what would they be and how should they be collected?

70. There are certain types of programming that the Commission historically considers to promote the public interest that we would consider in our analysis of diverse programming. For instance, the Commission requires broadcast licensees to provide programming designed to educate and inform children and to protect children from excessive and inappropriate commercial messages.<sup>113</sup> What is the impact of market structure on the availability of such programming?

71. Viewpoint diversity refers to the availability of media content reflecting a variety of perspectives.<sup>114</sup> How should we measure the level of viewpoint diversity? Is there an objective measure of viewpoint diversity? Should we attempt to measure viewpoint diversity through an analysis or census of available content? Are news and public affairs programs the only relevant sources of viewpoint diversity? How should we define news and public affairs programming? For example, is “Entertainment Tonight” or “The Daily Show” news programming? Can we make such judgments consistent with the First Amendment?

72. As an alternative to measuring the “supply” of content to assess viewpoint diversity, should we take a “demand side” approach and utilize measures of audience satisfaction and media consumption as proxies for viewpoint diversity? How do differences in the number of independent media outlets in an area affect diversity? Do multi-outlet news content providers contribute more or less to viewpoint diversity than singly owned outlets? How does platform ownership and market structure influence viewpoint diversity? Do markets with more independent owners provide more divergent viewpoints on controversial issues?<sup>115</sup> Alternatively, are there benefits of combined ownership, even

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<sup>112</sup> See 2002 Biennial Review Order, 18 FCC Rcd at 13631-32 ¶¶ 36-37.

<sup>113</sup> 47 C.F.R. §§ 73.670-73.673. See also Children’s Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, codified at 47 U.S.C. §§ 303a, 303b, 394; *Empowering Parents and Protecting Children in an Evolving Media Landscape*, Notice of Inquiry, MB Docket No. 09-194, 24 FCC Rcd 13171 (2009).

<sup>114</sup> See 2002 Biennial Review Order, 18 FCC Rcd at 13627 ¶ 19.

<sup>115</sup> See *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, Notice of Proposed Rule Making and Further Notice of Proposed Rule Making, MM Docket No. 01-317, 16 FCC Rcd 19861,

though it reduces the number of independent owners in a market? Can combined ownership benefit consumers by allowing economies of scale or scope that can benefit end users by enabling broadcasters to provide more diverse programming? In particular, does consolidated ownership enable owners to provide more news programs that represent wide-ranging viewpoints? Does the existence of multiple independent decision makers (sometimes referred to as “gatekeepers”) increase the likelihood that all significant viewpoints will be delivered to the public by at least one local outlet? To what extent does consolidated ownership affect the ability of nonaffiliated/independent small companies or women/minority-owned companies that produce programming to get their programming on the air? What effect, if any, has consolidated ownership had on the availability of a variety of diverse viewpoints to women and minority consumers? Are women and minorities increasing their ownership levels in companies that are content providers or in other aspects of media production aside from station ownership?

73. Source diversity refers to the availability of media content from a variety of content creators.<sup>116</sup> What role does source diversity play in our overall policy goal? Is source diversity an end in itself or simply a means to achieving other diversity goals? Would an appropriate level of outlet diversity obviate any separate concerns about source diversity? How should we measure the level of source diversity? Is the availability of independent content creators a measure of source diversity? If so, how should we define “independent content creator”? Is source diversity important for all types of programming? What role should consumer satisfaction or media consumption play in evaluating source diversity? Do the responses to these questions change according to whether the focus is on the airing of local news, public affairs programming or other information?

74. Outlet diversity refers in part to the number of independently owned media outlets in a relevant market. Many of our ownership rules have been stated in terms of the number of independent media “voices” in relevant local markets. Should one of the Commission’s goals in prescribing media ownership rules be to promote more independent owners in the platform sector of the media marketplace? Should we view outlet diversity as an instrument for ensuring other types of diversity, such as viewpoint and source diversity, or as an end itself? How should we measure the relationship between diverse ownership and our other diversity metrics?

75. Another aspect of outlet diversity is the ownership of platforms by diverse individuals and entities, including minorities, women, and small businesses.<sup>117</sup> In this country, minorities and women own very few broadcast stations. The Commission previously has cited to one set of studies that found that while minorities comprise 34% of the U.S. population, they own only 3.15% of full power commercial television stations and 7.7% of full power commercial radio stations, and, similarly, while women comprise 51% of the U.S. population, they own only 5.87% of full power commercial television stations and 6% of full power commercial radio stations.<sup>118</sup> What was the impact of the relaxation of the

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19877 ¶ 37 (2001) (citing *Amendment of Sections 73.34, 73.240 and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Second Report and Order, 50 F.C.C. 2d 1046, 1074 ¶ 99 (1975) (“The multiple ownership rules rest on two foundations: twin goals of diversity of viewpoints and economic competition. . . . Sometimes, [the competition policy] will yield, however, to the even higher goals of diversity and the delivery of quality broadcasting service to the American people.”)).

<sup>116</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13633 ¶ 42. In the *2002 Biennial Review Order*, the Commission, citing the “explosion of programming channels now available in the vast majority of homes,” concluded that source diversity should not be a policy goal of our broadcast ownership rules. *Id.* at 13634 ¶ 45.

<sup>117</sup> See generally *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, MB Docket No. 07-294, 23 FCC Rcd 5922 (2008) (“*Diversity Third Further Notice*”).

<sup>118</sup> *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Fourth Further Notice of Proposed Rulemaking, MB Docket No. 07-294, 24 FCC Rcd 5896, 5897 ¶ 1 n.2 (2009) (citing Derek Turner and Mark Cooper, “Out of the Picture 2007: Minority & Female TV Station Ownership in the United States,”

radio ownership limits mandated by Congress in 1996 on minority and female ownership of radio stations, and what studies have been done documenting that impact? We seek comment also on whether our structural media ownership rules have an effect on broadcast ownership by minorities, women, and small businesses. We seek comment also on the relationship between diversity of broadcast ownership and viewpoint diversity. We encourage commenters to support their views with data, studies, and analysis. Should our ownership rules be used to promote diverse types of broadcast owners and, if so, how can the Commission pursue this goal in a manner consistent with the Constitution and relevant case law?<sup>119</sup>

#### **D. Potential Conflicts Among Goals**

76. As indicated above, we recognize that there may be tension among the goals of competition, localism, and diversity. For example, proposed transactions may generate efficiencies and enhance program offerings but reduce the number of independent media owners, viewpoint diversity, minority ownership, or localism. How should we weigh our competition, localism, and diversity goals when they conflict? Should we set minimum thresholds for each goal and permit consolidation as long as the thresholds are met? Should any of our ownership rules be designed to serve one or two goals, rather than all three goals? Are any of our goals more important in regulating some media sectors than others?

77. Should we apply different performance cutoffs or different trade-offs across goals in different-sized markets? Our local TV, radio, and radio/TV cross-ownership rules currently allow more combined ownership in larger markets because of the greater number of media outlets in such markets. Broadcasters have argued that the existence of high fixed costs means that some markets can support fewer total outlets and that allowing combined ownership could lead to economies of scale that could help support stations in small markets. Should our goal to promote competition outweigh our goal to promote diversity of ownership in certain instances? Does the impact of consolidation differ between small markets and large markets? For instance, does market size affect whether consolidation results in more or less local or diverse news and public affairs programming? Should we measure performance on an absolute level or proportionally to market size? For instance, should we consider hours of local news and public affairs programming per 100,000 households in the market as opposed to hours of local news in the market?

#### **E. Other Policy Goals**

78. We seek comment on whether we should consider any other policy goals, in addition to our competition, diversity, and localism goals, in determining ownership limits in this proceeding. If so, what other goals should we consider, and why are they important and appropriate to consider from a statutory perspective in this proceeding? For instance, should the Commission consider the impact of its media ownership rules on the availability to all Americans of news and information, not only local but also national news and information? The Commission separately has issued a Public Notice to invite

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(Oct. 2007) available at <http://www.freepress.net/files/otp2007.pdf>; S. Derek Turner and Mark Cooper, "Off the Dial: Female and Minority Radio Station Ownership in the United States," (June 2007) available at [http://www.stopbigmedia.com/files/off\\_the\\_dial.pdf](http://www.stopbigmedia.com/files/off_the_dial.pdf). The authors define ownership for purposes of these studies as holding more than 50% voting interest. Free Press Studies at 11).

<sup>119</sup> For constitutional standards applicable to race and gender based government classifications, see *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *Grutter v. Bolinger*, 539 U.S. 306, 326 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 246-47 (2003). In addition, see discussion of constitutional issues from the Media Bureau's January 27, 2010 Workshop - Minority & Female Ownership, <http://www.fcc.gov/ownership/workshop-012710.html>. See also *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992) (invalidating the Commission's previous gender preference used in its comparative license hearings because of a lack of evidence showing connection between owner gender and programming content).

comment on various issues relating to the information needs of communities.<sup>120</sup> The issues raised in that notice are interrelated to issues raised in this ownership proceeding although the focus of this proceeding is narrower, since we concentrate here only on our media ownership rules. Should we consider the impact of our ownership rules on investigative journalism? If so, should the Commission consider only investigative journalism in broadcast media or across all media? If commenters believe that we should undertake such an examination in this proceeding, we invite comment on whether revising multiple ownership rules is necessary to preserve or enhance the availability of news and information and journalism, and, if so, what specific measures should be taken to promote these goals.<sup>121</sup>

#### IV. ANALYSIS

##### A. Rules Analysis

79. As noted, this is a broad inquiry into what broadcast ownership rules would best serve our policy goals. We invite comment on whether our current ownership rules continue to serve those goals. If we decide to retain the current ownership rule structure, we must evaluate each of the current rules to determine whether it is “necessary in the public interest as the result of competition.”<sup>122</sup> Accordingly, we invite comment, supported by empirical or other available evidence, on each of the current ownership rules described above in Section II, and whether it satisfies the statutory standard.

80. For each of the current ownership rules reviewed in this proceeding, we seek comment on how the rule affects the local market structure and in turn impacts the Commission’s policy goals. Commenters should propose specific analytical frameworks for linking the ownership rules to the policy goals discussed above and measuring the impact of the rules on the policy goals. Would it be useful to target particular rules to particular goals, for example, to use the local television and radio ownership rules to advance the competition goal and the cross-ownership rules to advance the diversity and localism goals? Are there any changes we should make to our rules to promote our goals more effectively? Do the current numerical limits set forth in the ownership rules continue to be necessary to serve our competition, localism, and diversity goals? If we decide to retain the current limits, how should we justify them? Commenters who believe that the current rules do not promote competition, localism, and diversity should propose specific modifications to these rules or describe in detail an alternative framework that would better promote our goals. We ask commenters to support their contentions with empirical evidence and explain how their recommended approaches would affect the various stakeholders, such as end users, advertisers, content creators, and platform owners. We ask commenters also to raise any additional pertinent issues with respect to each of these rules beyond those on which we specifically invite comment.

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<sup>120</sup> On January 21, 2010, the Commission released a public notice posing a series of questions to be considered in its examination of the media landscape, entitled “The Future of Media: Meeting Community Information Needs in a Digital Age.”, *FCC Launches Examination of the Future of Media and Information Needs of Communities in a Digital Age*, Public Notice, GN Docket No. 10-25, 25 FCC Rcd 384 (MB/OSP 2010). Responses to those questions from all interested parties are due May 7, 2010. The objective of the study “is to assess whether all Americans have access to vibrant, diverse sources of news and information that will enable them to enrich their lives, their communities, and our democracy.” *Id.* at 1. Ultimately, the Commission expects to issue an assessment of the current media landscape and policy recommendations. Commenters must separately file in the official record of this proceeding any responses to the Future of Media Public Notice that they want us to take into consideration in this proceeding.

<sup>121</sup> On December 1-2, 2009, the Federal Trade Commission held a two-day workshop, “How Will Journalism Survive the Internet Age?” to explore how the Internet has affected journalism. Broadcasters, newspaper editors and owners, bloggers, analysts, economists, and others addressed broad-ranging issues that may be relevant in this proceeding. See <http://www.ftc.gov/opp/workshops/news/index.shtml>.

<sup>122</sup> 47 U.S.C. § 303 note.

81. We encourage commenters who seek modification of our existing rules to address how we can ensure that any revisions to our rules are consistent with the courts' decisions reviewing earlier Commission media ownership orders.<sup>123</sup> For example, what evidentiary bases and what methodological approaches would enable the Commission to provide a reasoned analysis that would be adequate to satisfy judicial scrutiny of any numerical limits it may adopt?

82. We invite commenters who advocate retention of our current ownership rule structure, with or without modification, to address the following specific questions about the rules:

**1. Local Television Ownership Rule**

83. With regard to the local television ownership rule, does the eight-voices test continue to serve our goals?<sup>124</sup> How does the eight-voices requirement promote competition, diversity, and localism? Should we continue to count only full-power television stations as voices, or should a broader or narrower set of voices be considered? We seek comment on what media we should consider when determining the number of voices in a market in applying this rule. Are there other criteria we should use to determine what we should count as a voice in a given market? Does the current prohibition of mergers among the top-four-rated television stations in a market continue to serve our policy goals? While the Grade B contour no longer exists in the digital world,<sup>125</sup> is an overlap provision or some resort to contours still necessary?<sup>126</sup> Should we make changes to the failed/failing station waiver standard?<sup>127</sup> Should we account for market share other than through the prohibition of a merger among the top-four rated stations? Are there any other aspects of the local television ownership rule that should be revised?

84. We ask commenters to evaluate the local television ownership rule in the context of the larger marketplace for delivered video. What is the impact on television broadcast programming of competition among MVPDs, and how should we consider this impact in the context of our local television ownership rule? Does the 1996 Act require the Commission to maintain competition among television

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<sup>123</sup> See *Prometheus*, 373 F.3d at 402-411, 418-20, 430-35 (remanding the numerical limits governing cross-ownership and local television and local radio ownership that the Commission adopted in the 2002 *Quadrennial Review Order*); *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 152 (D.C. Cir. 2002) (remanding the local television ownership rule due to the Commission's failure to demonstrate that its exclusion of non-broadcast media in the eight voices exception was not arbitrary and capricious). See also *supra* note 40.

<sup>124</sup> See *supra* ¶¶ 18-19.

<sup>125</sup> We seek comment on how to address the absence of a Grade B contour in the digital world elsewhere in this NOI. See *infra* ¶¶ 102-105. Here we invite comment on whether to continue to apply some sort of contour standard in our local television ownership rule.

<sup>126</sup> When it eliminated the Grade B contour overlap test for allowing duopolies based on its finding that the DMA is the relevant geographic market in which television broadcasters compete, the Commission nonetheless continued the Grade B overlap provision to avoid disruption to current ownership arrangements and to promote television service in rural areas, noting that the rule without the Grade B provision might be more restrictive in some large DMAs, particularly those west of the Mississippi River. *Local TV Ownership Order*, 14 FCC Rcd at 12928 ¶ 51.

<sup>127</sup> In the *Local TV Ownership Order*, the Commission established a waiver standard for purposes of the local TV ownership rule. Under the "failing" station standard, a waiver is presumed to be in the public interest if (1) one of the merging stations has had low all-day audience share (i.e., 4% or lower), (2) the financial condition of one of the merging stations is poor, and (3) the merger will produce public interest benefits. *Local TV Ownership Order*, 14 FCC Rcd at 12939 ¶ 81. In order to qualify as "failed," the newspaper or broadcast outlet has to have stopped circulating or have been dark for at least four months immediately prior to the filing of the assignment or transfer of control application, or must be involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings. *Id.* at 12954 ¶ 115. The unbuilt station waiver standard presumes a waiver is in the public interest if (1) the combination will result in the construction of an authorized but as yet unbuilt station; and (2) the permittee has made reasonable efforts to construct, and has been unable to do so. *Id.* at 12941 ¶ 86.