Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF CONSUMERS UNION, CONSUMER FEDERATION OF AMERICAN AND FREE PRESS

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SUMMARY

Consumers Union, Consumer Federation of America and Free Press have produced a *Compendium of Public Interest Research on Media Ownership, Diversity and Localism* in response to the Commission's request for public comment on the continued importance of media ownership rules. Applying a wide lens, we have analyzed and presented the basis of law, economics, and social science that lies at the foundation of the public interest limits on media ownership. Taken together, these multiple and comprehensive studies underscore the essential link between democracy and an open, local, diverse, competitive, and independent media. We urge the Commission to avoid its prior errors and adopt media ownership rules that cultivate localism, encourage a diversity of viewpoints, and preserve a competitive marketplace of ideas for American communities.

This proceeding carries extraordinary consequences for the future of the American mediascape and the health of our political system. The only way democracy can truly work is if there is a free flow of news and information from diverse and independent sources. The public depends upon such open sources to inform itself of pressing political issues at ***both*** the national and local levels. This is the bedrock principle of the First Amendment that remains as true today as when it was conceived by the Founders.

Changes in technology do not eliminate the need for media ownership limits. Even with the explosion of the Internet and cable channels, most people still rely on their local newspapers and local television stations as the most important sources of local news and information. Those sources thus have disproportionate impact on public opinion. Access to local, independent news sources is already a precious commodity, and further consolidation would be highly problematic. Today, people living in all but a handful of the very largest

cities generally have access to only one local newspaper and at most four local television stations producing local news.

Media ownership rules traditionally have protected democracy by keeping sources of news and information diverse and competitive. Attempts to relax these rules require satisfying a very heavy burden of proof – namely, demonstrating that doing so will not implicate fundamental constitutional principles. The compendium of studies accompanying these joint comments show that the vast weight of evidence supports, at a minimum, retaining the newspaper/broadcast cross-ownership and local TV-ownership rules. If further concentration is permitted through relaxation or elimination of these rules, the diversity of local news and information will fall to unacceptably low levels. Cashiering a vibrant marketplace of ideas to suit the interests of a small number of consolidated corporations is simply not in the public interest. American communities can ill afford media concentration that impoverishes the values of localism and gives vertically integrated corporations in horizontally concentrated markets undue influence over the public through control over sources of news and opinion.

Our studies also demonstrate that permitting greater media consolidation directly conflicts with the Commission's statutory obligation, under Section 309(j) of the Communications Act of 1934, to disseminate licenses among a wide variety of businesses, including businesses owned by members of minority groups and women. Racial and ethnic minorities are dramatically underrepresented as media owners. The Commission has a responsibility to broaden, not undermine, the diversity of media owners in order to facilitate a diversity of viewpoint and representation. It cannot fulfill that obligation by simultaneously relaxing media ownership rules. Empirical evidence shows that minority owners better serve their communities, reinforcing the broad principle that the dispersion of ownership to minorities serves the public interest. Our research also shows that relaxing ownership limits undermines the goal of promoting minority ownership.

Perhaps most significantly, our economic analysis of market structures shows unequivocally that the Commission must preserve sensible limits on media ownership. It must prohibit major newspapers from buying up local television stations; and it should not expand the number of TV stations a single company may own in one market. Even in the largest cities in America, the television market is already concentrated. Permitting further mergers will raise concentration levels well above thresholds that would trigger antitrust oversight in any marketplace. The media marketplace must be held to the highest standard in order to protect a diversity of viewpoint.

Our studies of law and social science offer further support for retaining media ownership limits. The Supreme Court has a clear track record on this issue – the FCC's media ownership rules, authorized by Congress, are not only constitutional, they are necessary to preserve and implement First Amendment values. Reasonable media ownership limits can ensure that the public will continue to have access to local news and information, encourage more minority ownership of media outlets, and ensure that diverse viewpoints will get heard.

Finally, our economic and other studies also demonstrate that if the Commission relies upon appropriate local market analysis that correctly defines product and geographic markets, and accounts for the influence of local media outlets, it cannot rationally justify relaxing media ownership rules even in the nation's largest media markets. It is necessary in the public interest to prohibit major newspapers from buying up local television stations and thereby stifling local news production, and also to preserve the existing limits on the number of television stations a single company may own in one market.

Reasonable media ownership limits help ensure that the public will continue to have access to local news and information, encourage more minority ownership of media outlets, and ensure that diverse viewpoints will get heard. An open and robust media is the lifeblood of our democracy because it can serve as a check and balance to government and corporate excess. Thus, there is an essential connection between democracy and a diverse, local, competitive and independent media. We urge the Commission to adopt media ownership rules that encourage a diversity of viewpoints in both ownership of outlets and sources of content, cultivate localism, and preserve competitive outlets. This is the lifeblood of our democratic system and a matter of singular importance to the American people.

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COMMENTS OF CONSUMERS UNION, CONSUMER FEDERATION OF AMERICAN AND FREE PRESS

Consumers Union, Consumer Federation of America and Free Press (collectively, "CU *et al.*"), respectfully submit these Joint Comments in response to the Further Notice of Proposed Rule Making, FCC 06-93 ("Notice" or "NPRM"), released July 24, 2006 by the Federal Communications Commission ("FCC" or Commission").[1]

[1] A summary of the Notice was published in the Federal Register on August 9, 2006 (71 Fed. Reg. 45511). By Order, DA 06-1663 (rel. Sept. 18, 2006), the Chief, Media Bureau extended the comment and reply comment deadlines to October 23, 2006 and December 21, 2006, respectively.

I. INTRODUCTION

A. Interest and Expertise of Commenters

Consumers Union, the publisher of Consumer Reports,® is an independent, nonprofit testing and information organization serving only consumers. CU does advocacy work from four offices in New York, Washington, San Francisco, and Austin. CU's public policy staff addresses a broad range of telecommunications, media and other policy issues affecting consumers at the regional, national and international level. CU staff members frequently testify before Federal and state legislative and regulatory bodies and participate in rulemaking activities at the Commission and elsewhere.

The Consumer Federation of America is an advocacy, research, education and service organization established in 1968. CFA has as its members some 300 nonprofit organizations from throughout the nation with a combined membership exceeding 50 million people. As an advocacy group, CFA works to advance pro-consumer policy on a variety of issues before Congress, the White House, federal and state regulatory agencies, state legislatures, and the courts.

Free Press is a national nonpartisan organization working to increase informed public participation in crucial media policy debates, and to generate policies that will produce a more competitive and public interest-oriented media system with a strong nonprofit and non-commercial sector.

CU and CFA have participated extensively in the Commission's previous media ownership rulemakings. Filing jointly with other consumer, civil rights and public interest organizations, we actively participated in the Commission's 2001 review of the newspaper/broadcast cross-ownership rules,[2] its 2002 Biennial Review rulemaking[3] and in proceedings before the U.S. Court of Appeals for the Third Circuit and the Supreme Court[4] that culminated in reversal of substantially all of the Commission's *2002 Biennial Review Order*.

B. The Tasks before the Commission

The Commission initiated this proceeding with two stated purposes. First, the Commission is seeking input on how it should respond to the Third Circuit's remand of *2002 Biennial Review Order*. The Commission's second stated purpose is to commence the next quadrennial review of the media ownership rules, a periodic review required by Section 202(h) of the Telecommunications Act of 1996 (the "'96 Act").

The ownership rules under review in this proceeding were adopted to promote the diversity of viewpoints presented to the public through newspapers and broadcast stations (both television and radio). The NPRM, as required by Section 202(h), asks whether the regulations now in force remain "necessary in the public interest" in light of changes in the media marketplace. On each of the three previous occasions when the Commission's efforts to modify its media ownership rules were reviewed by federal appellate courts, the modifications were not affirmed, but rather reversed, remanded or vacated.[5]

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[2] *See, e.g.,* Comments of Consumers Union *et al*., MM Docket No. 01-235, December 3, 2001 (2001 Cross-Ownership Comments).

[3] *See, e.g.,* Comments of Consumer Federation of America, Consumers Union, Center for Digital Democracy and Media Access Project, MB Docket No. 02-277, January 2, 2003 (2002 Biennial Review Comments)

[4] *Prometheus Radio Project v. FCC,* 373 F.3d 372 (3rd Cir. 2004) (*Prometheus*), *cert. denied*, 125 S. Ct. 2903 (2005).

[5] *Fox TV Stations v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002); *Sinclair Broadcast Group v. FCC,* 284 F.3d 148 (D.C. Cir. 2002); *Prometheus Radio Project v. FCC, 373* F.3d 372 (3rd Cir. 2004), *cert denied,* 125 S. Ct. 2903 (2005).

In *Prometheus*, the most recent remand, the Third Circuit was particularly harsh in its criticism of the methodology used by the Commission to evaluate the state of competition in local media markets. The Court declined to uphold the Commission's Cross-Ownership Limits because the Commission failed to provide a reasoned analysis to support the limits that it chose, which led to plainly arbitrary results (such as the Dutchess County, New York local UHF station receiving more weight for diversity and localism purposes than the *New York Times*) and employed internally contradictory reasoning.[6]

In these comments and in the attached *Compendium of Public Interest Research on Media Ownership, Diversity and Localism,* we describe how citizens, including minority groups, use the media as a means of discharging their civic responsibilities as participants in our democratic society. We also present empirical evidence of current media market conditions and the economic forces influencing publishers and mass media producers and distributors. We believe that once the Commission evaluates this information, it will conclude (as we have) that it is necessary in the public interest to prohibit major newspapers from buying up local television stations and thereby stifling local news production, and also to preserve the existing limits on the number of television stations a single company can own in one market. Even in the largest cities in America, the television market is already concentrated.

II. DISCUSSION

A. Concentration Analysis: A Starting Point

In remanding the Cross-Ownership Limits, the *Prometheus* court recognized the legitimacy of concentration analysis as a starting point for the Commission's review. But the court also cautioned that the Commission's statutory public interest mandate, as well

[6] *Prometheus*, 373 F.3d at 408 (3rd Cir. 2004).

as a consistent line of judicial precedent, requires the Commission to examine issues that are beyond the narrower scope of antitrust enforcement.

> The Commission ensures that license transfers serve public goals of diversity, competition, and localism, while the antitrust authorities have a different purpose: ensuring that merging companies do not raise prices above competitive levels. *See, e.g.*, Clayton Act, § 7, 15 U.S.C. § 18 (restraining mergers that would lessen competition in a market); Dep't of Justice and Federal Trade Comm'n, Horizontal Merger Guidelines § 0.1 (1997 rev. ed.) ("Merger Guidelines") (seeking to protect consumers by ensuring mergers do not result in anticompetitive prices)."[7]

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The logic of the court was sound. There are important differences between markets as defined for antitrust purposes and the "marketplace of ideas." The former is concerned with the ability of a firm (*e.g.*, a producer of "widgets") to maintain a supra-competitive price over a sustained period. But ideas are not widgets. An unfettered media market is not likely to present a full range of diverse and antagonistic views that inform and enlighten the citizenry. This is particularly true as large firms concentrate their holdings and market power through vertical and horizontal integration.[8]

Media as a product in a concentrated market is not likely to be produced in the service of democratic values, such as an informed electorate and robust debate on issues of public importance, and will not serve all audiences efficiently and fairly. Media producers, especially for broadcast distribution, have a strong incentive to produce content for the "lowest common denominator," *i.e.*, the largest number of consumers,

[7] *Id.*, at 414.

[8] *Compendium* Study 18, at 345-347, discusses the available empirical evidence on the tendency toward oligopoly in contemporary media markets. *Compendium* study 2, at 46-55, describes how the contemporary, concentrated commercial mass media fail to provide the broad and positive discourse that democracy needs.

presenting material that serves, and does not offend, prevailing majority tastes.[9] The economic characteristics of media markets lead natural market forces to discriminate against the preferences of minorities – racial, ethnic, and any other relatively small groups whose tastes in media differ from the majority's.

Media is a public good and possesses significant "positive externalities." Like clean air and national defense, benefits accrue to society at large that cannot be captured by the market. For example, investigative journalism uncovering government waste or consumer fraud benefits all citizens—even those who do not read the newspaper or advertise on its pages.

Communications and First Amendment jurisprudence squarely and for decades has supported the proposition that acceptable media policy is about more than economics[10] and requires concern for preservation of a vigorous debate[11] that includes the presentation of a diversity of views[12] on a broad array of issues.[13]

Moreover, in the "marketplace of ideas" there is a need to consider both the potential long-term and short-term (or transitory) effects of concentration. Long-term effects include censorship, either by the government or by a private monopoly or

[9] *Compendium* Study 18, at 349-353 reviews the available evidence on the tendency to under serve minorities, while Study 12, at 235-238, presents new evidence on this point.

[10] *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Fox Television Stations, Inc., v. FCC*, 280 F.3d 1027, 1047 (D.C. Cir. 2002). *Compendium* Study 2, at 37-43, examines the shows that the reliance on the market to meet society's information needs is a recent theory that is inconsistent with the context and implementation of the First Amendment in the young American republic.

[11] *Red Lion Broadcasting v. FCC*, 395 US 367, 390 (1969) (hereinafter *Red Lion*). *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 638-39 (1994).

[12] *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

[13] *Red Lion Broadcasting v. FCC*, 395 US 367, 390 (1969). *Compendium* Study 2, at 22-37, reviews First Amendment scholarship that concludes the narrow view of the First Amendment adopted by the Commission is inconsistent with its origin and intent.

oligopoly. But the short-term effects, though perhaps less obvious, are equally pernicious.[14] The last few days and weeks prior to a local election or referendum, when voters focus their attention and make decisions, are particularly crucial times for the communication of divergent views. This temporal dimension (short voter attention span, short shelf life/volatility of issue-centric information) necessitates a more conservative approach when dealing with media ownership than when addressing other goods and services.

For all these reasons, the development of the Commission's media ownership rules should begin, but cannot permissibly end, with concentration analysis.[15] Other things being equal, a media market with 50 radio stations, 16 TV stations and five newspapers is less likely to be "at risk" for excessive concentration than a smaller market. However, any index or quantitative metric should only used as a screening device to identify transactions needing special scrutiny – a "yellow light" or caution signal. An index should ***never*** be used as the basis for giving a transaction an automatic "green light," because an index may only measure one aspect of "diversity" (*e.g.,* diversity of ownership), while neglecting or giving too little weight to other aspects of diversity ("viewpoint diversity" and "source diversity") that the FCC is obligated to preserve and promote. When one reviews the language used by the Supreme Court over the course of

[14] *Compendium* Study 6, at 97-113, examines the broad impact of television on the political process and the unique characteristics of elections that heighten the influence of the media during campaigns. Study 19, at 365-379, discusses the influence of the media on political processes more generally. Both suggest that the antitrust standard for economic market power – a significant, non-transitory increase in price – is too narrow for the broader concerns about influence in the political marketplace.

[15]*Prometheus*, 373 F.3d at 402-403 (3rd Cir. 2004) ("We do not object in principle to the Commission's reliance on the Department of Justice and Federal Trade Commission's antitrust formula, the Herfindahl-Hirschmann Index ("HHI"),as its starting point in measuring diversity in local markets.").

half a century and the Courts of Appeals in the last decade,[16] there can be little doubt that the concern with "undue concentration of economic power"[17] is an important but nonetheless small part of the broader goal of First Amendment policy[18] to prevent "an inordinate effect on public opinion,"[19] achieve a "vigorous debate"[20] and access to "controversial issues,[21]" and "suitable access to social, political, aesthetic, moral and other ideas and experiences.[22]"

B . The Pivotal Role of Localism in this Proceeding

Far from being rendered irrelevant by the profusion of cable and satellite channels and the Internet, localism is more important than ever in our increasingly diverse society.[23] The late House Speaker, Thomas P. "Tip" O'Neill, once famously remarked "All politics is local." Not only are our representatives to state and federal legislatures elected on a local basis, but many public policy decisions vital to the quality of life and the fabric of our society, including education, land use, law enforcement and emergency services, are made predominantly at the local level.[24]

While the political dimensions of localism are important, the public's need for local news and information transcends politics. Localism also plays a vital role in both

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[16] *Compendium* Study 1 provides a thematic review of this history.

[17] *FCC v. Nat'l Citizens Comm. for Broad.,* 436 U.S. 775, 780 (1978).

[18] *See Associated Press*, 326 U.S. at 28 (1945); *Fox,* 280 F.3d at 1047 (D.C.Cir. 2002).

[19] *Sinclair,* 284 F.3d at 148 (D.C. Cir. 2003).

[20] *Red Lion*, 395 U.S. at 385 (1969).

[21] *Id.*

[22] *Id.*, at 390.

[23] *Compendium*, Study 4, at 69-77, discusses the increasing diversity of the American population over the past thirty years.

[24] *Compendium* Study 2, at 15-18.

our criminal and civil justice systems. Juries are selected locally, and render decisions on issues ranging from simple negligence (the "reasonable person" standard) to obscenity and indecency (the "contemporary community standards" criterion), applying what are fundamentally local standards. Citizen interaction at the local level, in the political, social and cultural spheres, provides the basis for community involvement, identity formation and civic action.[25]

The Commission's own research has demonstrated what Americans have long known intuitively—locally owned broadcast stations provide more local and community news than non-locally owned stations.[26] This is a conclusion the Commission was reticent to concede. An FCC study conducted in early 2004, publicly released only after it was leaked to U.S. Senator Barbara Boxer two years after it was drafted,[27] concluded just that.[28] This is a real-world difference that should inform and drive the decision to hold ownership limits in place to promote localism.

C. Localism and Diversity Under Siege: Current Media Environment

1. Local Television and Daily Newspapers are the Dominant Local Media

The Commission's *2002 Biennial Review Order* did not cite a single survey asking the key questions: "What media do people rely on most for local news and information?;" and "What media most influence people's opinions about local public

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[25] *Compendium* Studies 2, at 18-21, 4, at 59-61.

[26] *Compendium* Study 16, at 302-306, reviews the record and the new evidence on this point.

[27] See Letter from FCC Chairman Kevin Martin to Sen. Boxer, Sept. 18, 2006, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267475A1.pdf

[28] Federal Communications Commission, "*Do Local Owners Deliver More Localism? Some Evidence from Local Broadcast News*," June 2004, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267448A1.pdf.

affairs?"[29] The answers matter because they are factors in determining the weight of each media outlet in analyzing the impacts of further consolidation, factors the Commission failed to consider in its *2002 Biennial Review Order* and one of the reasons for the *Prometheus* court's remand.

Studies 7 and 8 of the *Compendium* present answers to these questions. In two surveys, conducted in 2004 and 2006, we asked consumers to identify the local news sources that they used most often and those they considered most important. Local newspapers and television are far and away the most important sources, each cited by about one-third of the respondents.[30] Radio and local weeklies were each mentioned by about ten percent of respondents. Our results are consistent with other research, reviewed in Studies 7 and 8, which carefully seeks to identify the sources of news and information that the public uses.

Only a very small percentage of the population (4% first mention, 7% second mention) regards the Internet as a frequently used source of local news and information.[31] Even those who rely on the Internet for local news overwhelmingly go to web sites of traditional media – local newspapers, local TV and national TV – which generally utilize "repurposed" content substantially identical to their traditional distribution formats. Among the 11% of respondents say that the Internet is their most frequent or second most frequent source of local news, the websites of local TV stations and local newspapers account for about half of the sites they visit most frequently.[32] Sites not affiliated with

[29] *Compendium* Study 7, at 118-122.

[30] *Compendium* Study 7, at 123-133.

[31] *Compendium* Study 8, at 135-148.

[32] As the *Prometheus* court observed: "There is a critical distinction between websites that are independent sources of local news and websites of local newspapers and

traditional media outlets (blogs, list serves, alternative news sites and others – including aggregators) account for 17% of the sites visited most and second most.

When asked about the credibility of web sites, the overwhelming majority (about 70%) of online news users said that an association between a web site and a traditional source of news would make the website more credible. The evidence on preferences for web sites and the complementarity and linkages between traditional outlets and Internet sites provide support for the *Prometheus* court's criticism of the Commission's treatment of the Internet in developing the Diversity Index.[33]

That the Internet plays a small role in providing news and information about local public affairs should not be surprising when one examines the function of Internet web sites and bloggers, as we have in Study 8, at 145-151. They simply do not undertake the reporting and editing functions that typify journalism as traditionally defined. The *Prometheus* court offered just such a penetrating analysis of the role of the media and its characterization is just as true today as it was three years ago.[34] If we are concerned

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broadcast stations that merely republish the information already being reported by the newspaper or broadcast station counterpart. The latter do not present an 'independent' viewpoint and thus should not be considered as contributing diversity to local markets. Accordingly, the Commission should have discounted the respondents who primarily rely on these websites from its total number of respondents who indicated that they use the Internet to access local news." *Prometheus,* 373 F.3d at 405-06 (3rd Cir. 2004)

[33] A separate study conducted by Pew, also summarized in Study 8, focuses on bloggers, Study 8, at 149-151. The results of the Pew study provide further support for the *Prometheus* court's observation that websites of individuals and organizations cannot be viewed as "media outlets" for viewpoint diversity purposes.

[34] *Prometheus,* 373 F.3d at 407 (3rd Cir. 2004) (internal citations omitted). ("In terms of content, 'the media' provides (to different degrees, depending on the outlet) accuracy and depth in local news in a way that an individual posting in a chat room on a particular issue of local concern does not. But more importantly, media outlets have an entirely different character from individual or organizations' websites and thus contribute to diversity in an entirely different way. They provide an aggregator function (bringing news/information to one place) as well as a distillation function (making a judgment as to what is interesting, important, entertaining, *etc.*) Individuals… and entities… may use

about the dissemination of information, not just opinion, about local public affairs, traditional local outlets remain the dominant sources.

2. The Diversity Index: A Flawed Snapshot of Media Markets

In its most recent Notice, the Commission tentatively concludes, given the fundamental flaws revealed on appeal from its 2002 proceeding, that the Diversity Index "is an inaccurate tool for measuring diversity."[35] The *Prometheus* court accepted the idea that a single index drawn from the general antitrust framework ***could*** be created, but nevertheless found fault with the Commission's implementation. Indeed, all three courts examining the Commission's rules since 2002 that have remanded regulations accepted the proposition that we must count "voices" without regard to their content and substitutability, and adopted the principle that the Commission must fashion an approach that is consistent, logical and rational, leading to a result that reasonably reflects media market reality.

The *Prometheus* court identified three principal problems with the Diversity Index. First, the Commission assumed that all outlets within a media type had equal market shares. Second, it assigned weights to different media types that were both inconsistent and not based on sound empirical measures. Finally, the link the Commission established between the index and the merger approval rule was tenuous at best.[36]

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the Internet to disseminate information and opinions about matters of local concern… but … are not, themselves… 'media outlets' for viewpoint-diversity purposes. Like many entities, they just happen to use a particular media outlet – the Internet – to disseminate information. Similarly, advertiser-driven websites such as hvnet.com… hardly contribute to viewpoint diversity.")

[35] NPRM at ¶32.

[36] *See Compendium* Studies 20, at 389-392; and 21, at 398-405.

In *Compendium* Studies 20 and 21, we review the critique of the Commission's methodology and follow the *Prometheus* court holding to construct a reasonable measure of market structure. In Studies 23 through 39, we present analyses of approximately 50 markets. We begin in Study 23 with a comparison across ten markets (the same ten markets the Commission reviewed in detail) of the results of the Commission's Diversity Index and an alternative approach—one that seeks to respond to the principal criticisms the *Prometheus* court leveled against the Diversity Index. The weights assigned to each media type are based on the results of a national random sample survey conducted in August 2006. Available industry data on market shares of individual firms were used in place of the Commission's "equal market shares" assumption that the court found counter-intuitive and irrational.

In 2002, Commission's approach yielded unrealistically low estimates of media market concentration. The FCC found only one of the ten markets to be above the concentrated threshold and none above the highly concentrated threshold. However, when audiences of the media outlets are properly factored in, the results are dramatically different: ***every*** market is above the concentrated threshold and eight of the ten are above the highly concentrated threshold.[37]

In *Compendium* Study 24 we examine the impact of newspaper-TV mergers on the market structure of the ten FCC sample markets. In Study 25, we examine the impact of TV-TV mergers on 15 markets. Our analysis concludes that in every case, the increase in concentration caused by the mergers would exceed the Department of Justice *Merger Guidelines.*

[37] *Compendium* Studies 24-39, examine over 50 markets.

3. Concentration of Ownership Undermines Localism and Diversity

Several of the studies included in the *Compendium* document how the deleterious effects on localism and diversity flow from concentration of ownership within local markets,[38] consolidation of media into national chains, and conglomeration across media types.

We review an extensive body of quantitative and qualitative evidence. National chains and conglomerates reduce local-oriented content. The trend in commercial mass media, particularly television, is toward a reduction in news coverage of local issues in the period leading up to elections.[39] Local public affairs programming is notable by its absence on most television stations.[40] Recent studies based on FCC data confirm much of the earlier research. Consolidation and conglomeration give rise to a "largest market share/lowest common denominator" ethic that undercuts stations' ability to deliver culturally diverse programming, locally-oriented programming and public interest programming.[41]

We address in detail the role that ownership plays in the viewpoints presented in mass media outlets. Academic and anecdotal evidence compiled since the Commission's

[38] Studies 4, at 61-63; 6, at 104-112; 10, at 196-210; and 16, at 302-306, review and present qualitative and quantitative evidence that addresses various aspects of the impact of concentration and conglomeration on localism, diversity and the quality of news and information that reach the public. *Compendium* Studies 15, at, 289-295, and 16, at 306-321, demonstrate that concentration does not improve the quality or increase the quantity of local news and public affairs programming.

[39] *Compendium* Study 4, at 63-69.

[40] *Compendium* Studies, 4, at 63-69; and 16, at 312-329.

[41] *Compendium* Study 18, at 345-353.

2002 Biennial Review Order convincingly demonstrates that media ownership matters.[42] The owners of media outlets influence what and how events are covered. Owners may seek to influence policy processes. They may also exhibit "slant" or "bias," and may not serve the needs of all members of the community.[43] Slant or bias affects not only the tone of coverage, but also the quantity of coverage and the subjects on which media outlets choose to editorialize.[44]

We also note the systemic problems that economic pressures induced by concentrated ownership cause in newsrooms. Producing local news, supporting in-depth investigative journalism, and offering extensive coverage of local politics is costly.[45] The economic logic of consolidation is to reduce labor costs by centralizing content production, reducing reporting expenditures, repurposing content across media platforms, and filling the news hole with low-budget content such as coverage of weather, crime, and accidents. Meanwhile, coverage of local politics and elections has reached crisis levels of inadequacy. Yet, *Compendium* Study 9 shows that disinvesting in good journalism accelerated the spiral of decline, rather than reversing it.[46]

D. Concentrated Ownership: Risky Business for Media Companies.

We examine the economics of today's newspaper and television industries in *Compendium* Study 9. When the Commission voted to relax its cross-ownership rules in 2003, it gave substantial weight to the argument that unless media owners were permitted

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[42] Studies 5, at 81-91; and 18, at 345-353, review the literature. Study 16, at 302-306, reviews analyses based on the Commission's data that shows that consolidations, conglomeration and concentration detract from localism and diversity.

[43] *Compendium* Studies 5, at 81-91; and 18, at 345-353.

[44] *Compendium* Studies 5, at 91-94; and 18, at 353-360.

[45] *Compendium* Study 18, at 353-360.

[46] *Compendium* Studies 9, at 161-162, 165-166; and 10, at 196-206.

to engage in consolidation and conglomeration in pursuit of scale economies, local media outlets would be seriously weakened or unable to survive.[47] But over the past three years, the premise that consolidation and conglomeration are necessary to the economic well-being of media companies has been challenged by reality.

Data derived from recent sales of media properties, as well as evidence from other sources, including trade and academic literature as well as the popular press, show that newspaper and television properties are selling at healthy multiples of cash flow and experiencing profit margins comparable to other media businesses.[48] Large conglomerates and chains — which have emphasized centralization, the realization of synergies and staff cuts — are struggling, but smaller chains and stand-alone properties with a focus on quality news and locally produced content have been thriving.[49]

Consequently, although traditional media outlets face economic challenges today as their audiences and advertisers migrate to the Internet, more conglomeration and consolidation will not solve the problem. Therefore, the Commission should not rely on the spurious claim that more concentration in ownership is the key to local media survival as justification for relaxing media ownership rules. The actual data simply do not support that conclusion. As the *Prometheus* court explained, the Commission has discretion to draw lines, but when it does so must have a quantitative basis in actual evidence, not mere suppositions or anecdotes, to do so.[50]

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[47] For example in 2002 *Biennial Review Order* ¶¶ 360, 366.

[48] *Compendium* Study 9, at 157-169.

[49] *Compendium* Studies 9 at 157-169 and 10 at 196-206.

[50] *Prometheus*, 373 F.3d at 407 (3rd Cir. 2004).

1. Consolidation and Conglomeration Do Not Yield Improvements in the Quality or Quantity of Local News and Information.

Compendium Studies 15 and 16 offer a critical examination of the record evidence relied upon by the Commission in the *2002 Biennial Review Order* in support of its conclusion that media cross-ownership can enhance quality. Neither of the two studies relied on by the Commission — a study by the Project on Excellence in Journalism and another by the Commission's own Media Ownership Working Group (MOWG) study 7 — provides a valid basis for reaching the stated conclusion.

In paragraph 32 of the current NPRM, the Commission asks for comments on how it should approach cross-ownership limits, including whether the newspaper/broadcast cross-ownership rule and the radio/television cross-ownership rule are necessary in the public interest as a result of competition. We provide a comprehensive answer: although the Commission previously reached, and the *Prometheus* court accepted, the wrong conclusion based on an inadequate evidentiary record, it is not too late to reverse course. There is no credible evidence that consolidation and/or conglomeration have positive effects.[51] On the contrary, subsequent rigorous empirical evidence shows that newspaper/TV combinations and duopolies do not result in increases in the quantity or quality of local news and information available to the public. The very data on which the Commission relied to lift the newspaper-TV cross-ownership ban, when reanalyzed by its own staff, contradicts its earlier conclusion.[52]

[51] *Compendium* Studies 15, at 288-295 and 16, at 305-315.

[52] *Compendium* Study 16, at 302-306.

2. Media Concentration Does Not Increase Diversity or Produce More Innovation

In the *2002 Biennial Review*, the Commission found that concentration of the media is good for consumers.[53] It did so by relying on two theories: Peter Steiner's argument that concentrated media companies provide greater diversity,[54] and Joseph Schumpeter's theory that monopolists produce more innovation. It is debatable whether these theories, first articulated more than 50 years ago, were ever validly applied to media markets. But not unsurprisingly, the actual data once again contradict the Commission's earlier presumptions.

Part VII of the *Compendium* evaluates the question of consumer benefits of diversity and innovation and from media consolidation and concludes that consolidation produces irreparable consumer harms.[55] It is overwhelmingly clear that they do not apply to 21st century American mass media. Profit-maximizing behavior increases bias. News coverage and political speech tend to be targeted toward the larger and more desirable demographic groups, leaving minority audiences under-served. The phenomena of targeting, slanting and spinning, particularly in political discourse, have been extensively documented in the literature.[56] Competition matters. There will probably always be partisan media outlets and a natural tendency for media organizations to stake out positions at the extremes. Competition between mass media is important, regardless of

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[53] 2002 *Biennial Review Order* ¶¶ 194, 396, claimed economic efficiencies but the like to the public interest goals is lacking.

[54] 2002 *Biennial Review Order* ¶ 188.

[55] *Compendium* Study 18, at 353-360.

[56] *Compendium* Study 19, at 371-379.

whether it reduces bias, or merely exposes conscientious readers and viewers to a wider range of news sources.[57]

E. Localism and Diversity Must Be Preserved and Promoted

1. Media Ownership Limits Provide a Needed Counterweight to Market Forces Tending Toward Ever-Increasing Concentration.

The market structures of commercial mass media in the first decade of the 21st century have moved far from atomistic competition in the direction of oligopoly and monopolistic competition. Among the factors contributing to this trend are economies of scale and strong differences in preferences between population groups, which tend to drive commercial mass media to target programming toward larger social groups and under-serve minorities. National chains and media conglomerates have amassed market power sufficient to enable their owners to pursue their political preferences, both through economic power and the owners' control over staffing decisions and editorial policy.[58] Advertisers reinforce the trend by targeting commercial messages to preferred demographics and by avoiding sponsorship of programs that might be viewed by their target audience as controversial or discomforting.[59]

The literature[60] establishes that a more competitive market structure, particularly one characterized by diversity of ownership across geographic, ethnic and gender lines, would increase the diversity of programming. Minority owners have been shown to be more likely to serve the needs of their communities.[61] Public policies promoting

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[57] *Compendium* Study 19, at 379-382.

[58] *Compendium* Studies 9, at 185-196, and 18, at 345-360.

[59] *Compendium* Studies 5, 91-94 and18, at 358-359,

[60] *Compendium* Study 18, at 347-353.

[61] *Compendium* Studies 4, at 59-61, and 12, at 235-238.

ownership diversity are necessary to counteract the loss of diversity resulting from media concentration.[62]

2. Limitations on Media Ownership Are Needed to Preserve and Enhance Source Diversity.

In the *2002 Biennial Review Order*, the Commission failed to treat source diversity as a separate goal and it failed to analyze the role and state of source diversity in detail.[63] It failed to examine the ownership of programming and ignored the evidence in the record that the ownership and control of programming in the television market is concentrated. These errors contributed to the Commission's decision to relax the duopoly rule, tripling the number of markets in which multiple stations could have been owned by a single entity had the rules not been remanded.

Evidence in the record, summarized in *Compendium* Study 17, demonstrates that had the Commission conducted a proper analysis of the programming market and the impact of concentration of ownership on source diversity, it would have concluded that the restrictions on duopolies and triopolies should be much more stringent because the concentration of ownership of outlets undermines diversity by reducing the ability of independent programmers to produce content.

3. The Commission Must Consider the Impact of Its Ownership Rules on New Entrants, Including Women and Minorities.

The *Prometheus* court rebuked the Commission for failing to consider the effects that the repeal of the Failed Station Solicitation Rule would have on potential minority

[62] *Compendium* Studies 4 at 61-63; and 19, at 379-385. *Compendium* Study 14 presents a case study that shows the vastly different perspectives portrayed by local and national papers of a major event.

[63] See Study 17.

station owners.[64] As previously noted, Part V of the Compendium concludes that minority-owned full-power television stations are more likely to produce local news content than their non-minority-owned counterparts; similarly we find that minority and female station owners are more likely to focus on the needs of the local community. *Compendium* Study 11, which corrects many flaws in the FCC data on TV licenses held by women and members of minority groups, paints a troubling picture of the small and declining percentage of full-power commercial television stations owned by female and minority owners:

- Women comprise 51 percent of the U.S. population, but own a total of only 67 stations, or 4.97 percent of the total.
- Minorities comprise 33 percent of the U.S. population, but own a total of only 44 stations, or 3.26 percent of the total.

We find that by standard measures of performance and in comparison to other areas of the economy, broadcast television is one of the worst performing areas of American life when it comes to minority ownership.

In Study 12, we reaffirm the finding that minority owners do a better job of serving their communities.[65] In Study 13 we demonstrate empirically that minority owners tend to thrive in more competitive (less concentrated) markets and that relaxation of media ownership limits in the past have led to less minority ownership, rather than more.[66] Conversely, the likely outcome of further industry consolidation and concentration will be fewer minority-owned stations, in general, and fewer minority-owned stations airing local news content.

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[64] *Prometheus*, 373 F.3d at 431-32 (3rd Cir. 2004).

[65] *Compendium* Study 12, at 235-238.

[66] *Compendium* Study 13, at 257-267.

The Commission is obligated by statute to eliminate "market entry barriers for entrepreneurs and other small businesses" and to do so by "favoring diversity of media voices."[67] However, the Commission has shown little interest in turning the raw ownership data it gathers from stations on a routine basis via an automated process into useful reports. A thorough and comprehensive study of the current and historical ownership of all broadcast stations (radio as well as television) should be undertaken by the Commission and the results of the study, as well as the raw data, made available to the public before the Commission considers the adoption of further revisions to its media ownership rules. It is clear that if the Commission wishes to permit further media consolidation, it must explain how that result does not undermine its ability to meet its statutory obligation to promote minority ownership.

4. Limits on Media Ownership Are Needed to Protect Diversity, Localism & Competition

As the actual market and audience data analyzed in the *Compendium* demonstrates, today's media marketplace, dominated by a handful of mega-corporations, allows a small number of organized private interests to circumscribe the limits of public debate, to marginalize the views of unprofitable or politically undesirable speakers by denying them access to high-impact mainstream media, and to undermine competition. It is the Commission's responsibility to temper private control over the media system through the adoption of public policies that promote a diversity of voices, expanding the marketplace to include all voices, and safeguarding citizens' ability to deliberate with all viewpoints. Limits on media ownership are necessary, as are policies designed to expand ownership of media outlets and viewpoint diversity.

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[67] 47 U.S.C. §257, §309(j).

The *Compendium* provides the Commission with a number of specific proposals for economic methodology for use in its review. We draw special attention to our model of market structure analysis. In the *Compendium* study, "Building a Reasonable Measure of Market Structure," we suggest methodology that serves as a useful successor to the failed Diversity Index and which rigorously complies with the *Prometheus* court's remand order. It combines the same general approach to geographic markets employed by the Commission in its earlier review, but also incorporates usage data derived from commercial sources and on survey data that appropriately weight the influence of each type of media. This measure produces a ranking that reflects reality, addresses the court's criticisms, and eliminates the absurd results that the Commission's Diversity Index produced in several markets, including New York. We also recommend that although standard measures of concentration from the Department of Justice and the industrial organization literature are used in the analysis, the Commission should apply a higher standard in recognition of the importance of media to public discourse. However, the attached *Compendium* studies of specific markets find that even using traditional and inadequate antitrust guidelines, *any* mergers of dominant local media violate those guidelines. Using the *Compendium's* proposed methodology, the conclusion that the Commission cannot and must not allow mergers in concentrated media markets becomes inescapable.

III. CONCLUSIONS & RECOMMENDATIONS

In order to properly address the remand from the *Prometheus* court and to uphold its statutory obligations to serve the public interest, the Commission must engage in a thorough review of the available economic and social scientific evidence. This evidentiary record must be vetted and scrutinized to determine its reliability and consequences, and then to fashion the proper course of action.

The *Compendium* provides a robust and well-researched starting point for the Commission's analysis. Moreover, the Commission must expansively and meaningfully involve the public. We strongly support the initiation of public hearings which began in October of 2006, and we trust that these will continue through the coming months. To meet that goal, the Commission must also release a further notice of proposed rulemaking providing the public with detailed proposals for any media ownership rule changes and the opportunity to comment prior to making any rule changes final.

The Commission must also conduct a thorough review of minority and female ownership of broadcast stations prior to issuing any media ownership order. It is to the considerable shame of the Commission that it has neither performed such a study in recent years, nor collected data sufficient to accurately analyze the question. No consolidation should be permitted in any form prior to the completion of a Commission study of minority ownership in radio and television and a justification as to how media consolidation and an expansion of minority ownership of broadcast stations can coexist.

Democracy requires a free flow of information from diverse and independent sources. Most people look to their local newspapers and local television stations for the local news and information they use to inform themselves of pressing political issues. Local news markets are already highly concentrated. The Commission bears a heavy burden of proof to demonstrate that any rule change it makes is in the public interest. The evidence submitted into the record through the *Compendium* makes clear it cannot be met.

The Commission must preserve sensible limits on media ownership. It must prohibit cross-ownership of local dominant newspapers and local television stations, in order to prevent one company from gaining excessive control over one community's news and information. It should not expand the number of TV stations a single company can own in one market. Even in the largest cities in America, the television market is already concentrated. There is no justification in law, economics, or social policy for permitting further media consolidation and inflicting its harmful results on local communities.

Reasonable media ownership limits can ensure that the public will continue to have access to local news and information, encourage more minority ownership of media outlets, promote competition, and ensure that diverse viewpoints will get heard. A diverse, antagonistic and competitive local media is the lifeblood of our democracy because it serves as a check against government and corporate excess and against competitor abuses, and provides multiple sources for local news, information and viewpoints so essential for a well-informed electorate. The courts have recognized there is an essential connection between democracy and a diverse, local, competitive and independent media. As the Commission proceeds, we urge it, too, to recognize and preserve that same principle.

In sum, the Commission should adopt media ownership rules that encourage a diversity of viewpoints, cultivate localism, and preserve competitive outlets. Such rules are vital to our democratic system and a matter of singular importance to the American public.

Respectfully submitted,

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