Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
2014 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. 14-50
	)	
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
	)	
Promoting Diversification of Ownership In the Broadcasting Services	)	MB Docket No. 07-294
	)	
Rules and Policies Concerning Attribution of Joint Sales Agreements In Local Television Markets	)	MB Docket No. 04-256

Comments of the National Association of Broadcasters

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS

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August 6, 2014

Executive Summary

The world has changed considerably since the last meaningful ownership review in 2006. The digital and IP revolutions have fundamentally altered the way Americans consume, produce and share information and entertainment. Nearly all available evidence – including substantial updated data provided in these comments – demonstrates conclusively that the overwhelming increase in information and the platforms on which that information is available has revolutionized the way we consume media. All one need do is look at today's news and see the massive consolidation that has taken place and continues to take place in industries that directly compete, and in many cases, overwhelm broadcasters. As a result, media companies, including local TV and radio stations, have had to adjust their business models to remain relevant in a now highly competitive marketplace.

In these comments, the National Association of Broadcasters (NAB) respectfully requests that the Commission recognize and come to grips with the impact these changes are having on broadcasters, consumers, the development of content and the flow of information. NAB also requests that the Commission – in recognition of rapidly changing consumer habits and in accordance with its Section 202(h) directive – amend or, where necessary, remove ownership restrictions that apply solely to the broadcast industry. Local broadcast stations remain an essential part of the communications landscape – but they are no longer the dominant medium that they were decades ago. Regulations that substantially reduce broadcasters' marketplace flexibility have the dual effect of hampering their ability to compete against ever-growing cable, satellite and

wireless rivals and limiting their capacity to serve local communities as they have for the last 90 years.

These comments also provide empirical evidence that specifically debunks the core rationale underlying several of the media ownership rules – that television broadcasters compete only against themselves. Detailed analysis by economists Hal J. Singer and Kevin W. Caves of Economists Incorporated (attached to these comments) shows that the relevant product market to consider should include non-broadcast alternatives such as cable television. Using a large data set, Drs. Singer and Caves found no empirical evidence that local television broadcasters charge higher advertising prices in markets where there are common ownership or joint arrangements. In fact, they found some evidence that markets with sharing arrangements have prices some 16 percent lower than other markets, suggesting that these arrangements benefit consumers. Consistent with this study and with its charge in Section 202(h), the Commission must consider the competitive effects of rival industries, including the Internet and mobile, which are expected to rapidly increase their share of the local advertising market over the course of the few years, far surpassing the market share of broadcasters.

The *Notice* unfortunately suggests that the Commission is going to stay the course, yet again postponing important and necessary adjustments to the ownership rules that would more accurately reflect today's and tomorrow's marketplace. Instead of making these adjustments, the *Notice* describes an impossibly high standard to relax the ownership restrictions, effectively protecting the rules against any rational argument for change. This impossibly high standard is in direct contravention of the Commission's

202(h) mandate as interpreted by both the DC and Third Circuit Courts of Appeal. As it is required to by statute, the Commission should take a fresh look *now* at the increased competition for advertisers, viewers and listeners. The Commission should reconsider its proposed standards before it makes any final decisions in this proceeding.

In light of the tectonic shift in the media landscape, nearly every one of the broadcast ownership rules needs updating. On the television side, the local ownership rules have a disproportionate negative impact on smaller markets where relief from the rules is needed most. For example, the Top 4 merger prohibition effectively prevents any kind of efficiency-producing combinations in small and medium sized-markets. Contrary to the Commission's longstanding assertion that a merger of two top 4 TV stations in a market would create one locally dominant, and therefore anticompetitive, entity, evidence submitted here and previously by NAB shows that, in many cases, combinations among top 4 stations would actually *increase* competition in local markets by allowing for combinations that could challenge the top one or two stations in the market. Likewise, the increasingly outdated and cumbersome "eight voices test" all but prevents combinations among lower rated stations in small and medium markets that, if allowed, would likely lead to more financially viable competitors that would have the wherewithal to commit resources to increased local news and better technology. The net effect of these rules is a weakened local TV industry that cannot serve its local communities as well as it could absent these restrictions.

The so-called cross-ownership rules, both between radio and television stations and especially between broadcast entities and newspapers, can no longer be rationally maintained. The newspaper-broadcast cross-ownership rule, in particular, should have

been eliminated years ago. Failure to do so has likely led to the hastened diminishment of the newspaper industry and should serve as a warning to the Commission of what can happen to the marketplace when it ignores its deregulatory mandate and waits too long to adjust its rules. NAB supports the proposal to eliminate the radio/television cross-ownership rule because that restriction does not promote the Commission's localism, competition or diversity goals.

If the Commission is looking for evidence of major market changes since it last reviewed the ownership rules, it need look no further than smartphone adoption, which has increased more than 500 percent in the last five years. Smartphone ownership gives Americans instant, on-the-go access to the Internet and multiple streaming media options. This is having a profound and clear impact on radio stations in particular. The streaming music service Pandora, for example, has been downloaded by more than half of all smartphone owners. With this increased competition in mind, the Commission can no longer justify maintaining the existing local radio ownership restrictions on either localism or viewpoint diversity grounds.

Likewise, existing ownership restrictions have been a proven failure to increase ownership for female and minority entities. If the Commission wants to get serious about increasing female and minority ownership, it must address the most obvious barrier to ownership – access to capital sufficient to purchase and operate a broadcast station. Purposefully depressing the value of broadcast stations through ownership limitations only makes it more difficult for current licensees to maintain operating capital in order to compete or for possible new entries to secure funding. It simply has not worked. The time has come for the Commission to consider better incentives-based alternatives.

Finally, in response to the inquiry in the *Further Notice*, NAB suggests the Commission must refine its data request regarding Shared Services Agreements (SSAs). We note specifically that the proposed scope of mandatory SSA disclosure is overbroad and unrelated to any statutory mandate or public interest harm. It overlaps information already covered by Commission regulation and raises serious legal and policy concerns. The overbroad data collection will likely have an unnecessary and detrimental chilling effect on beneficial arrangements.

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COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

I. INTRODUCTION

The National Association of Broadcasters (NAB)[1] submits these comments in response to the Federal Communication Commission's ("FCC" or "Commission") *Further Notice of Proposed Rulemaking and Report and Order* concerning its broadcast

[1] NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the FCC and other federal agencies, and the courts.

ownership rules.[2] The present review – the 2014 quadrennial review – is a continuation of the Commission's 2010 quadrennial review, which, per this *Notice*, remains "ongoing."[3]

In these comments, NAB presents substantial new data demonstrating profound changes in the media marketplace. The evidence presented here overwhelmingly confirms that the digital and IP-revolutions have fundamentally altered Americans' media consumption habits. In light of these changes, the Commission should re-examine its broadcast ownership restrictions, most of which impede broadcasters' ability to effectively compete against a panoply of rapidly growing rivals.

These comments begin, in Section II, with an examination of the impossibly high legal standard for reform presented in the *Notice*. Section III includes a detailed – although not exhaustive – update on the seismic changes that have transformed the media marketplace. Section IV explains how the Commission's long-standing local ownership rules for television are no longer tenable and likely diminish the level of service stations can provide their local communities. Section V shows how increased competition from new audio sources like Pandora and Spotify – and especially the increased adoption of smartphones – radically undercut the rationale for local ownership restrictions on radio. Sections VI and VII consider the twin cross-ownership restrictions and explains why both rules have long since outlived their usefulness. Section VIII makes the case for better incentive-based rules that address the core impediment to

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[2] *2014 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*, 29 FCC Rcd 4371, 4374-75 (2014) ("*Notice*")

[3] *Notice* at ¶ 1.

increased female and minority ownership. And Section IX addresses the Commission's proposal contained in the *Further Notice* to require disclosure of shared service agreements.

II. THE PROPOSED LEGAL STANDARD FOR REFORM OF THE BROADCAST OWNERSHIP RULES IS ARBITRARY AND CAPRICIOUS AND DOES NOT COMPORT WITH SECTION 202(h)

It is indisputable that Section 202(h) of the Telecommunications Act of 1996 (1996 Act) directs the Commission to review the rules every four years to determine whether they "are necessary in the public interest as the result of competition" and to "repeal or modify any regulation [the Commission] determines to be no longer in the public interest."[4]

NAB continues to believe that Section 202(h) "carries with it a presumption in favor of repealing or modifying the ownership rules," as the D.C. Circuit Court of Appeals has twice held.[5] We acknowledge, of course, the less stringent formulation offered by Third Circuit.[6] Under this reading, Section 202(h) requires the Commission "to take a fresh look at its regulations periodically in order to ensure that they remain

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[4] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996) ("The Commission shall review its rules adopted pursuant to this section and all of its ownership rules . . . and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest."); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004).

[5] *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002), *modified on reh'g,* 293 F.3d 537 (D.C. Cir. 2002); *Sinclair Broad. Group v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002) (also stating that Section 202(h) was designed to continue the process of deregulation).

[6] *See 2014 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*, 29 FCC Rcd 4371, 4374-75 (2014) ("*Notice*") (stating that there is no presumption in favor of repealing or modifying the ownership rules (citing *Prometheus Radio Project v. FCC,* 373 F.3d 372, 395 (3d Cir. 2004) (*Prometheus I*)).

'necessary in the public interest.'"[7] Even the Third Circuit, however, has found that Section 202(h) imposes an "obligation" on the Commission that "it would not otherwise have" to periodically "justify its existing regulations" and vacate or modify those no longer in the public interest – a requirement that "makes § 202(h) 'deregulatory.'"[8]

There is no value dwelling on the differences between the interpretations of Section 202(h) by the reviewing courts. Both courts agree that there is a need to take a serious look at the broadcast ownership rules. In this Notice, however, the Commission appears be avoiding that obligation by applying a different, and impossibly high, standard of review to its existing cross-ownership rules. That standard is heavily weighted in favor of retaining the rules unchanged and cannot be squared with the deregulatory context of the statute.

In connection with the newspaper/broadcast cross-ownership rules, for example, the Commission admits that there is no basis for maintaining the rules unless they can be shown to be necessary to promote viewpoint diversity.[9] Despite acknowledging a limited number of the many studies supporting the conclusion that ownership does not have a marked impact on viewpoint diversity,[10] the Commission nonetheless concludes that this evidence is insufficient because "evidence undermining the premise that

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[7] *Prometheus I*, 373 F.3d at 391. "The text and legislative history of the 1996 Act indicate that Congress intended periodic reviews to operate as an 'ongoing mechanism to ensure that the Commission's regulatory framework would keep pace with the competitive changes in the marketplace . . . .'" (internal citations omitted).

[8] *Prometheus I*, 373 F.3d at 395 (also acknowledging that "§ 202(h) was enacted in the context of deregulatory amendments"). *Id*. at 394.

[9] *See Notice* at ¶ 123 ("We propose to adopt the *NPRM*'s tentative findings that the NBCO rule is not necessary to foster our localism and competition goals."); *see also* ¶¶ 145-48.

[10] *See id.* at ¶ 127.

ownership always influences viewpoint does not signify that a connection never exists."[11] The Commission also criticizes such evidence for failing to demonstrate that ownership influence over viewpoint is not even theoretically possible.[12] These criticisms imply that the Commission believes that repeal of the newspaper/broadcast cross-ownership rules would be warranted only in the face of evidence that there was no potential (not even theoretical) that cross ownership would ever restrict diversity of viewpoint.

The Commission likewise suggests that parties must "prove a negative" in connection with the question of whether the newspaper/broadcast cross-ownership rule promotes localism. The Commission notes that the "evidence in the 2010 Quadrennial Review record does not appear to negate the basic proposition that newspaper/broadcast cross-ownership may enable commonly owned properties to produce and disseminate more and sometimes better local news."[13] The Commission then criticizes its own prior finding that cross ownership may actually produce benefits to localism, asserting that such benefits to localism "are not guaranteed."[14] Read together, this language suggests that the Commission may require parties supporting repeal of the newspaper/broadcast cross-ownership rules to produce evidence not only negating the possibility that restrictions on cross ownership may support localism, but also guaranteeing that cross ownership will benefit localism.

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[11] *Id.* at ¶ 126 (emphasis added).

[12] *Id.* at ¶ 127 (criticizing a study by David Pritchard because it "does not negate . . . the 'theoretical power' of media owners to control viewpoint.").

[13] *Id.* at ¶ 135 (emphasis added).

[14] *Id.*

In a similar vein, the Commission suggests that it will only give weight to competition from online sources if and when Internet usage can be shown to have completely "supplanted" traditional media sources.[15]

Elsewhere in the Notice, the Commission tentatively concludes that non-broadcast sources of audio programming are not yet meaningful substitutes for broadcast radio stations even though "a significant portion of adult U.S. broadband households (42 percent) listen to Internet-delivered audio programming."[16] In reaching this conclusion, the Commission discounts evidence that consumer usage of Internet radio is growing on the grounds that such evidence does not show that Internet radio has "replaced broadcast radio stations."[17]

The Notice's stringent evidentiary requirements for repeal or modification of the rules contrast sharply with the lack of rigor with which it approaches proposals to retain broadcast ownership restrictions. For instance, the Notice suggests that the newspaper/radio cross-ownership rule might be retained so long as parties supporting retention of the rule demonstrate a connection between the rule and viewpoint diversity, that it not "too tenuous," while parties supporting repeal will have to demonstrate there is not even a theoretical potential that cross ownership will restrict diversity of viewpoint.[18]

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[15] *Id.* at ¶ 130.

[16] *Id.* at ¶ 82. NAB observes that the *Notice* relies on data from early 2012 for these figures; obviously, they are unlikely to be accurate today.

[17] *Id.* at n. 204.

[18] *Id.* at ¶ 147. This, of course, begs the question of how much more attenuated the link between the newspaper/radio cross-ownership prohibition must be before the Commission deems it to be "too tenuous." The Commission has held onto the newspaper/radio cross-ownership ban for almost 40 years while conceding repeatedly that there is virtually no nexus

The tentative conclusion that full-power television stations and major newspapers are the only relevant voices for purposes of any newspaper/television cross-ownership rule and waiver policy is also lacking in rigor. That conclusion is based upon conclusions reached in the now eight-year-old 2006 quadrennial review and upon generalities and "reasonable proxies."[19] Even more telling, the Notice observes that the FCC's decision in its 2006 review to retain the radio/television cross-ownership rule was partially based on a "desire to preserve the status quo."[20] Such conclusions do not meet the standard of Section 202(h).

It is plainly impossible for parties to advocate successfully in favor of repeal or modification of the broadcast ownership rules when the Commission's standard of review is so heavily weighted in favor of retaining the rules. Thus, it would be arbitrary and capricious if the Commission were to apply these review standards. "[I]mpossible requirements imposed by an agency are perforce unreasonable."[21]

Nor does Section 202(h) permit such a high standard. Section 202(h) "[r]ecogniz[es] that competitive changes in the media marketplace could obviate the public necessity for some of the Commission's ownership rules.[22] Accordingly, the

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between newspaper/radio cross-ownership and diversity of viewpoint or any other policy goal underlying the cross-ownership prohibitions.

[19] *Id.* at ¶ 181.

[20] Notice at n. 633.

[21] *Alliance for Cannabis Therapeutics v. DEA,* 930 F.2d 936, 940 (D.C. Cir. 1991); *see also Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1530 (11th Cir. 1996); *D.C. Transit Sys., Inc. v. Washington Metropolitan Area Transit Comm'n*, 466 F.2d 394, 402 (D.C. Cir. 1972) ("Conditions imposed by [the] order are . . . unreasonable by virtue of being impossible to meet."), *cert. denied*, 409 U.S. 1086 (1972). *Lex non cogit ad impossibilia:* The law does not compel the doing of impossibilities. BLACK'S LAW DICTIONARY 1844 (9th ed. 2009).

[22] *Prometheus I*, 373 F.3d at 391.

Commission is required to "take a fresh look at its regulations periodically" to "ensure that they remain 'necessary in the public interest.'"[23] Taking a "wait-and-see approach" to review of its ownership rules is contrary to statute.[24]

Even without Section 202(h), principles of administrative law require the Commission to "evaluate its policies over time to ascertain whether they work – that is, whether they actually produce the benefits the Commission originally predicted they would."[25] Agencies do not "establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy."[26]

In short, both Section 202(h) and administrative law principles require the Commission to apply an appropriate standard to its review of the broadcast ownership rules. The impossible standard suggested in the *Notice* is contrary to law.

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[23] *Id.*

[24] *Sinclair*, 284 F.3d at 164 (rejecting such an approach, even if there are "unresolved questions" and no "definitive empirical studies").

[25] *Becthel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993) (quoting *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992)); *cf. FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981) ("The Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully.").

[26] *Am. Trucking Ass'ns, Inc. v. Atchinson, Topeka & Santa Fey Ry Co.*, 387 U.S. 397, 416 (1967); *NBC v. United States*, 319 U.S. 190, 225 (1943) (the Commission cannot retain a rule "[i]f time and changing circumstances reveal that the 'public interest' is not served by application of the Regulation[]"); *see generally Geller v. FCC*, 610 F.2 973 (D.C. Cir. 1979); *Amendment of Section 73.3555, [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 17, 23 ¶ 19 (1984) ("The Commission not only has the authority to reexamine longstanding rules as circumstances change, but is virtually required to do so in order to ensure that it continues to regulate in the public interest."); *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) ("changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy").

III. THE COMMISSION MUST CONSIDER THE REALITIES OF TODAY'S COMPETITIVE MARKETPLACE AND THEIR DIRECT IMPACT ON LOCALISM AND DIVERSITY

To fulfill its obligations under both Section 202(h) and Section 706(2)(a) of the Administrative Procedure Act, the Commission must consider the larger media marketplace to understand the competitive environment in which local broadcast stations operate. All three foundational canons of statutory construction – the language, the statutory design (which includes context, structure, and purpose), and the legislative history – compel this conclusion. First, the plain language of Section 202(h) expressly directing the Commission to focus on "competition" is not qualified by any adjectives or limiting clauses. Congress directed the FCC to "determine whether any of such rules are necessary in the public interest as the result of competition."[27] Indeed, it is the only one of the FCC's three traditional public interest goals that the statutory provision specifically references.

Second, the overall statutory design of Section 202(h) supports the conclusion that the FCC must address competition broadly – and not limit the analysis to only certain types of outlets that exist solely within a particular local market. Section 202(h) mandates that the Commission's ownership review be done "as part of its regulatory reform review under Section 11 of the Communications Act," a section that requires the

[27] Telecommunications Act of 1996. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[I]n interpreting a statute a court should always turn to one cardinal canon before all others.... [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) ("This case requires us to apply settled principles of statutory construction which we must first determine whether the statutory text is plain and unambiguous. If it is, we must apply the statute according to its terms.") (internal citations omitted).

Commission to focus on whether there is "meaningful economic competition…."[28] In addition, Section 202's various subsections cover both national-level and local-level rules,[29] and so the design of the entire section is expansive as to geographic scope. It therefore cannot be construed as instructing the FCC to ignore the competitive impact that media platforms that are regional or national in scope have on broadcast stations in local markets.

Third, the legislative history of Section 202 confirms that lawmakers intended the Commission to address changes in competitive realities over time, including changes involving media beyond broadcast stations.[30] Congress's inclusion of a periodic review requirement strongly indicates that lawmakers expected the marketplace to change and gave the Commission full scope to address the ramifications of those changes,

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[28] 1996 Act § 202(h), 110 Stat. at 111-12; 47 U.S.C. § 151. While Congress lengthened the review period from two to four years, it did not de-link the section 202(h) review from section 11 of the Act. Appropriations Act § 629, 118 Stat. 99-100. *See generally United Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.") (internal citations omitted); *Utility Air Regulatory Group v. Environmental Protection Agency*, No. 12-1146 et al., slip op. at 15 (2014) ("[T]he fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (internal quotations omitted); *Abramski v. United States*, 134 S. Ct. 2259, 2267, n. 6 (2014) ("[W]e must (as usual) interpret the relevant words not in a vacuum, but with reference to the statutory context, structure, history, and purpose.... We ... recognize that courts should not interpret each word in a statute with blinders on, refusing to look at the word's function within the broader statutory context.") (internal quotations omitted).

[29] *Compare* 1996 Act §§ 202(a), (c)(1), (e), 110 Stat. at 110, 111 *with* 1996 Act §§ 202(b), (c)(2), (d), 110 Stat. at 110, 111.

[30] *See Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 26 (1988) (purposes of [statute at issue], as evidenced in legislative history, confirm a textual reading of the statute); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 515 (1990) (reference to Senate report for evidence of "the primary objective" of the Boren amendment to the Medicaid law).

whatever they might be. In developing the 1996 Act, lawmakers considered "Broadcast Communications Competitiveness" and reported that "the audio and video marketplace" had undergone "significant changes over the past fifty years," including the emergence of cable television, satellite-delivered television, low-power broadcasting, and home video-recording and -playback technologies.[31] They called for a "substantial reform of Congressional and Commission oversight of the way the broadcasting industry develops and competes" to ensure that "over-the-air broadcasting" remained "a vital element" in the much broader media marketplace.[32] Congress fashioned the resulting Section 202 of the 1996 Act, including its review provision, as a means of "depart[ing] from traditional notions of broadcast regulation" by "rely[ing] more on competitive market forces."[33] More specifically, the legislative history indicates that Section 202(h) directs the Commission to determine whether rules are necessary "as the result of competition" without limitation.[34]

Consistent with the explicit directives of Section 202(h) of the 1996 Act, the more general directives of the Administrative Procedure Act establish a baseline requirement that agencies act rationally and justify their decisions with empirical evidence.[35] When required to act by a statutory provision such as Section 202(h), an agency may not sit

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[31] H.R. Rep. No. 204, 104th Cong., 2d Sess. at 54-55 (1995) ("House Report").

[32] House Report at 55.

[33] House Report at 55.

[34] S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 163.

[35] *See* 5 U.S.C. § 706(2)(A) (agency "action, findings, and conclusions" may not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *see also* 5 U.S.C. § 706(2)(D) (agency action, findings, and conclusions must "observ[e] procedure required by law").

on its hands in defiance of the facts in its own record – and in sharp contrast to its own pronouncements in other proceedings.[36] If it did so, the agency would both be "fail[ing] to consider an important aspect of the problem" and "offer[ing] an explanation for its decision that runs counter to the evidence."[37] More recently, the Supreme Court emphasized this exact point when considering a Commission action, "[W]e insist that an agency 'examine the relevant data....'"[38]

Against this backdrop, it is clear that the Commission must address the nature of digital and IP-based communications and the profound changes they have brought to today's larger and more complex media marketplace when considering the broadcast ownership rules. For example, the Commission has described broadband Internet as an "unrivaled forum for free expression,"[39] and our "modern town square."[40] In contexts other than its quadrennial reviews, the Commission has internalized the revolutionary impact of the Internet and other broadband communications platforms – and pointed to that development as the impetus for most of its most significant policy initiatives,

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[36] *See infra* Section III.B.1.

[37] *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.") ("*Motor Vehicle Mfrs. Ass'n*").

[38] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (quoting *Motor Vehicle Mfrs. Ass'n)*.

[39] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Order, at ¶ 15 (2014) (Open Internet Order).

[40] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, at 92 (2014) (Concurring Statement of Commissioner Rosenworcel) ("Open Internet NPRM").

including the upcoming incentive auctions and other proceedings designed to redeploy wireless spectrum for commercial uses.

The Commission must also recognize what the Internet's transformative powers mean for broadcast ownership regulation. Refusal to recognize the online medium's impact on the media marketplace – and the logical consequences of that impact on the rationale for the broadcast ownership rules is arbitrary and capricious.

It is simply untenable to ignore the 87 percent of Americans who use the Internet and the more than 200 million who subscribe to high-speed broadband – or to overlook the data showing that their use of the medium has a measurable impact on competition among content providers in the media marketplace, regardless of whether those providers use paper, wires, airwaves or some combination of platforms to reach consumers. Moreover, vague references to policy concerns about the "current level of access to and adoption of" broadband Internet services[41] are not a substitute for the competitive analysis required by Section 202(h). Given that Americans' broadband adoption rates already stand at more than four times the level of newspaper subscription rates,[42] the Commission cannot satisfy its basic APA obligations if the

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[41] *Notice* at fn. 61.

[42] *Pew Local Community Report* at 22. In addition, the rise of local websites, blogs and similar platforms that concentrate on particular topics or neighborhoods is well documented. *See, e.g.*, INC Report at 121-22; Norman H. Nie et al., *The World Wide Web and the U.S. Political News Market*, 54 AM. J. POL. SCI. 428, 430 (2010); Daniela Gerson, *Hyperlocal Forums Like "Nextdoor" Aim to Give Local News a Makeover, Foster Neighborliness*, GOOD MAGAZINE, Feb. 24, 2013, http://magazine.good.is/articles/hyperlocal-news-sites-like-nextdoor-give-local-news-a-makeover-foster-neighborliness. Neighborhood-based platforms such as Washington, D.C.'s The Hill Is Home, available at www.thehillishome.com, provide an impressive combination of original content and aggregated links to similar news and information sites in the city – some of which, like the construction/development website JDLand (http://www.jdland.com/dc/index.cfm) offer an arguably obsessive level of detail that no broadcast station or newspaper could ever provide.

agency ignores the Internet while continuing to regulate other media. The empirical evidence set forth below make plain that the Internet has fundamentally changed how Americans access news, information and entertainment, which in turn has altered the financial underpinnings of the media outlets that predate the online medium. The FCC may not postpone its reckoning with that impact any longer.

Internet sources need not resemble traditional mass media outlets in all particulars to have a significant effect offline. The facts show that online sources and platforms operate both as substitutes for, and complements to, broadcast stations and newspapers. It therefore would be illogical to frame the issue as a question of whether a blogger's content is a direct, one-to-one replacement for a local TV newscast or daily edition of the local newspaper.[43] The sum total of content provided by information sources online, especially those that offer highly specialized information far surpasses what a consumer might obtain from a local TV or radio station.[44] This is no criticism of traditional local news reporting. It simply is a matter of space and/or available time and, of course, resources.

It also is a manifestation of the difference between the 20th century's now-traditional one-to-many media model and the more fragmented and individually tailored media model that attracts many 21st century news and information consumers. As discussed below, the democratization of IP-delivered information is not just a consumption revolution – it also is a production revolution.[45] Far more people have a

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[43] *Notice* at ¶ 133.

[44] *See infra* Section III.B.1.

[45] *See infra* Section III.B.1.

hand in creating, posting, editing, verifying, and challenging information today than there has been at any point in history. This development has clear implications for both the FCC's diversity and localism goals.

The Commission seems reluctant, however, openly to acknowledge the challenges the not-so-new medium poses for the agency's justifications for its ownership rules. Instead, the Notice grasps for some better reason than uneasiness with the Internet's implications as a basis for rationalizing the agency's inaction in the 2010 quadrennial review – and latches onto local content as the lifebuoy. Because of local content concerns, the Notice contends, the FCC may ignore the competitive effects of hundreds of cable networks and online video on local TV stations,[46] similar effects of online audio/satellite radio on local radio stations,[47] and the effects of online and social media on both broadcasters and newspapers.[48]

Yet the local or nonlocal character of the content on these platforms is irrelevant to the issue of their competitive impact on local media outlets, which is factually indisputable. Moreover, much of the content accessible online actually is local – ranging from information disseminated directly by local governments, political candidates, schools, businesses, and other organizations to locally focused social

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[46] *Notice* at ¶ 23 ("While we are keenly aware of the growing popularity of video programming delivered via MVPDs and the Internet, we tentatively find that competition from video programming providers is currently of limited relevance.... These programming alternatives compete largely in national markets ....").

[47] *Id.* at ¶ 83.

[48] *Id.* at ¶ 133 ("We tentatively find that the diversity of local news coverage is not enhanced by the fact that newspapers from around the world are only a click away."); *Id.* at ¶ 79 (refusing to including non-broadcast sources of audio programming in the relevant market).

media sites, blogs, websites, etc., all of which complement or extend the local information provided by the communities' broadcasters and newspapers.[49]

These platforms and outlets – whether their content is local, regional or national or even devoid of content other than marketing/sales material – impact the FCC's localism goal in a clear and directly traceable way: They divert viewers/listeners, and thus advertising revenues, away from local stations (and newspapers) that provide local service. The Commission therefore must not put blinders on with regard to this impact, but focus on how to promote localism in an age where there are virtually unlimited opportunities for consumer and advertiser diversion by regional, national, and even international media outlets.

The competitive impact of IP-based communications also negatively affects the ability of broadcast outlets (and daily newspapers in particular) to continue contributing to the Commission's diversity goal. Media outlets cannot add to the diversity of voices in a local community if they do not exist, and newspaper disappearance is no longer a theoretical concept.[50] Reduced publication frequency and smaller news holes are hardly optimal outcomes from a policy perspective either.

The facts in this extended rulemaking record show that unnecessarily hobbling local broadcasters and newspapers' ability to compete in a more complex media marketplace is contrary to the public interest. The Commission cannot keep declining to address the effects of IP-based communications, cable and other forms of multichannel video services, and other unregulated media outlets, on the financial foundations of the

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[49] *See supra* Section III.B.1 and B.2.

[50] *See supra* Section III.B.2.

broadcasting and newspaper businesses. Maintaining a willful and irrational ignorance about the current state of the competitive marketplace would be arbitrary and capricious, and it would flout Congress' plain-English directive that competition matters in this proceeding. The FCC must eliminate or relax the outdated ownership restrictions that apply to only broadcasters and daily newspapers – and to none of their competitors.

A. THE COMMISSION MUST CONSIDER CHANGES IN MEDIA CONSUMPTION AND THEIR EFFECTS ON BROADCASTERS' ABILITY TO FULFILL THE AGENCY'S GOALS

As the Commission approaches this quadrennial review, it must consider the extent to which traditional media outlets that the FCC historically has counted as the sum total of the "local market" have lost advertising shares – and gross revenues – to new rivals that advertisers also use to reach consumers. This is true regardless of whether these advertising rivals supply local, regional, or national content, or in fact any non-advertising content at all.

Consumers today access many more sources of news, information and entertainment than existed at the time the Commission imposed the current broadcast ownership restrictions, and that trend is growing more pronounced among younger consumers. Consumers also are "engaging" with information in unprecedented ways by creating, sharing, editing and commenting on content, all of which is changing the very definition of media. As a result, "mass media" audiences have fractured. This is important because the resulting broad dispersal of advertising revenues directly affects the ability of local outlets to actually produce and disseminate local content.

In this context, insistence that only competition in the local market among certain media outlets should be considered in the review of the broadcast ownership rules is

simply wrong. Certainty, empirical evidence demonstrating the shrinking percentage of advertising revenue available to support local broadcasters' production of content, including local news and information, is clear and consistent across numerous independent reports.[51]

Further, as the attached analysis by Economists Incorporated shows for television broadcasters, a properly defined relevant product market should include non-broadcast alternatives such as cable.[52] As discussed above, the Commission is statutorily bound to consider the full range of data concerning the consumer advertising marketplace and assess its impact on broadcasters' ability to continue serving the FCC's diversity and localism goals.

B. THE INTERNET HAS ACCELERATED THE FRAGMENTATION OF THE MEDIA MARKETPLACE, WITH CONSEQUENT BENEFITS FOR CONSUMERS AND CHALLENGES FOR THE COMPETITIVENESS OF TRADITIONAL MEDIA OUTLETS

1. CONSUMERS INCREASINGLY CONTROL THEIR OWN RICH MEDIA MIXES, WITH ERODING ATTACHMENTS TO ANY PARTICULAR MEDIA OUTLET

Media consumption has fundamentally changed, and analysts expect it will continue to rapidly evolve as the digital communications marketplace grows and matures[53] – particularly with the emergence of succeeding generations of "digital

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[51] *See* Section III.B.3.

[52] *See* Attachment A, Kevin Caves and Hal Singer, *Competition in Local Broadcast Television Advertising Markets*, Economists Incorporated, at 3-4 (August 6, 2014) ("Economists Incorporated Study").

[53] According to Pew, "[w]hile commercial digital native sites remain a relatively small part of the economics of the news industry, their digital audience figures compete with those of much larger legacy news organizations. In April, May, and June of 2013, for example The Huffington Post averaged 45 million unique visitors, putting it second only to Yahoo among the top news sites." PEW RESEARCH CENTER, STATE OF THE NEWS MEDIA 2014: KEY INDICATORS IN MEDIA AND NEWS 6 (2014) ("*State of the News Media 2014: Key Indicators*")

natives." Consumers enjoy a plethora of platforms and outlets to access information and entertainment content that either did not exist or were in their infancy when the ownership rules were adopted or last revised. These include smartphones, tablets, and WiFi-connected devices that consumers use to connect to content throughout the broadband ecosystem, whether accessed via social media, websites, topic-specific apps, or other IP-based outlets. Digital platforms of broadcasters and daily newspapers are part of today's mix, but they are far from the only players and, as discussed below, they are not the only sources of local news, information and entertainment.

Data from independent researchers attests to the user-controlled power of the online medium to transform how Americans are communicating and obtaining information today:

- In 2013, the number of Americans using the Internet – 232 million – was roughly comparable to the 256 million users of television and 243 million users of radio. Internet users back in 2003, by contrast, numbered just 139 million. [54]

- Eighty-seven percent of American adults now use the Internet; among young adults ages 18-29, usage is 97 percent.[55]

- As of May 2013, 70 percent of Americans ages 18 and older had a high-speed broadband connection at home.[56]

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[54] ARBITRON INC. AND EDISON RESEARCH, THE INFINITE DIAL 2013: NAVIGATING DIGITAL PLATFORMS 5 (2013) ("Arbitron and Edison Report"). As of 2013, 67 percent of Americans live in homes with Internet access, up from 48 percent in 2010. *Id.* at 9.

[55] *See The Web at 25 in the U.S.*, Report, Pew Research Center, at 5 (Feb. 27, 2014)

[56] *See* Kathryn Zickuhr, Home Broadband 2013, Pew Research Internet Project (Aug. 29, 2013). Moreover, smartphones and other internet-connected mobile devices are bringing even more people online. Pew Internet Project, Mobile Technology Fact Sheet (Jan. 2014), http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet (last visited July 29, 2014) ("…63 percent of adult cell owners use their phones to go online"). In particular, the African-American and Hispanic communities have widely adopted smartphones. *Id.* (As of January 2014, 59 percent of African-Americans and 61 percent of Hispanics own smartphones.).

- One in four people now live in homes with five or more devices connected to Wi-Fi,[57] and almost half of U.S. households have access to some form of digital video recording capability.[58]

- Seventy-five percent of Americans aged 18-24 owned a smartphone in 2013.[59] Overall, an estimated 61 percent of Americans (160 million) owned a smartphone as of this year, compared to just 9 percent of the population in 2009.[60]

- Of those who owned a smartphone in 2013, 83 percent used it to browse the Internet, 63 percent used it to use social networking sites, 57 percent used it to play games, 56 percent used it to watch videos, and 44 percent used it to listen to online radio.[61]

- By one recent estimate, the number of websites stands at more than 750 million, with more than 14.3 trillion webpages.[62] Forty-three percent of the top 1 million websites are hosted in the United States.[63]

- The percentage of broadcast television and radio stations that deliver information via websites or mobile apps is above 95 percent,[64] but many traditional sources of news and information also maintain their own websites or social media sites to provide "unfiltered" news and information to the public.[65]

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[57] Arbitron and Edison Report at 10.

[58] Arbitron and Edison Report at 70.

[59] Arbitron and Edison Report at 32.

[60] EDISON RESEARCH AND TRITON DIGITAL, THE INFINITE DIAL 2014, 33 ("Infinite Dial 2014").

[61] Arbitron and Edison Report at 33.

[62] Facts Hunt: Facts, Records & Mysteries, *Total number of Websites & Size of the Internet as of 2013*, (July 23, 2014), http://www.factshunt.com/2014/01/total-number-of-websites-size-of.html ("*Size of the Internet*").

[63] *Size of the Internet.*

[64] Bob Papper, *What's New Online for Radio and TV*, http://www.rtdna.org/article/what_s_new_online_for_radio_and_tv#.U9aVr2P1mJg (visited July 28, 2014)

[65] *Size of the Internet*. Nearly 90 percent of municipal managers used websites and online newsletters to announce key decision meetings, but used newspapers 84 percent of the time. MARY FEENEY, *ET AL*. INSTITUTE FOR POLICY AND CIVIC ENGAGEMENT, TRANSPARENCY, CIVIC ENGAGEMENT, AND TECHNOLOGY USE IN LOCAL GOVERNMENT AGENCIES: FINDINGS FROM A NATIONAL SURVEY 10 (April 2011), http://tigger.uic.edu/orgs/stresearch/Documents/IPCE_REPORT_FINAL_April_2011.pdf .

- It is now commonplace for local churches, businesses, and social clubs to maintain websites or communicate through social media,[66] as do a wide variety of neighborhood-based news and information blogs, listservs, and social media sites.[67]

- Social media use has exploded, with 74 percent of online adults involved with at least one social media site or service as of 2014.[68] Survey data indicates that 50 percent of social network users share or repost news

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[66] For example, as of three years ago, nearly 80 percent of Protestant churches maintained websites. David Roach, *Research: Churches Divided on Web Use*, LIFEWAY, Jan. 21, 2014, http://www.lifeway.com/Article/LifeWay-Research-Churches-divided-web-use (detailing varied uses of site, including promotion of services, sharing congregational news and information, and registering worshippers for events). Some denominations offer guidance to members on web usage, *see* The Church of Jesus Christ of Latter-Day Saints, *Internet Usage Helps for Members*, https://www.lds.org/pages/internet-usage-helps?lang=eng (last visited July 31, 2014), and others offer broad platforms to link individual parishes to one another, *see, e.g.*, Episcopal Diocese of Washington, *Find a Church* http://www.edow.org/find-a-church (last visited July 31, 2014); Gather the Jews: Hyperlocal Jewish News and Events, http://www.gatherthejews.com (last visited July 31, 2014). Religious entities also track website usage to detect trends and focus on users' needs. Jeremy Weber, *New Research Reveals Why People Visit Church Websites,* CHRISTIANITY TODAY, May 31, 2012, http://www.christianitytoday.com/gleanings/2012/may/new-research-reveals-why-people-visit-church-websites.html (last visited July 31, 2014); Lauren Hunter, *Church Website Usage Stats*, CHURCH TECH TODAY, Feb. 20, 2012, http://churchtechtoday.com/2012/02/20/church-website-usage-stats-infographic (last visited July 31, 2014) ("Everyone knows that the church website is the gateway into the church experience for many, many people.")

[67] Various forms of "citizen journalism" represent "new forms of inclusive, participatory journalism." The Center for Media and Democracy, Source Watch, *List of Citizen Journalism Websites*, http://www.sourcewatch.org/index.php?title=List_of_citizen_journalism_websites (last visited July 31, 2014). As one former professional journalist and current journalism professor has explained,

> Put very simply, citizen journalism is when private individuals do essentially what professional reporters do - report information. That information can take many forms, from a podcast editorial to a report about a city council meeting on a blog. It can include text, pictures, audio and video. But it's basically all about communicating information of some kind.
>
> The other main feature of citizen journalism is that it's usually found online. In fact, the emergence of the Internet - with blogs, podcasts, streaming video and other Web-related innovations - is what has made citizen journalism possible.
>
> The Internet gave average people the ability to transmit information globally. That was a power once reserved for only the very largest media corporations and news agencies.

Tony Rogers, *What Is Citizen Journalism?*, http://journalism.about.com/od/citizenjournalism/a/whatiscitizen.htm (visited July 30, 2014).

[68] *State of the News Media 2014: Key Indicators* at 11.

> stories, images or videos while nearly as many (46 percent) discuss news issues or events on social network sites.[69]

The Commission itself has repeatedly recognized the transformative impact of IP-based communications on the way Americans disseminate and receive information. Just weeks ago, the new Open Internet Notice of Proposed Rulemaking described the online medium as

> America's most important platform for economic growth, innovation, competition, free expression, and broadband investment and deployment.… [T]he Internet has been, and remains to date, the preeminent 21st century engine for innovation and the economic and social benefits that follow.... [O]pen architecture allows innovators and consumers at the edges of the network "to create and determine the success or failure of content, applications, services and devices," without requiring permission from the broadband provider to reach end users. As an open platform, it fosters diversity and it enables people to build communities.[70]

Nearly all Americans can take advantage of the Internet, and a sizeable majority of them do so. According to the agency's most recent broadband progress report, 94 percent of Americans are technically capable of connecting to residential broadband Internet service sufficient to support streaming or downloading of video programming.[71]

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[69] PEW RESEARCH CENTER, STATE OF THE NEWS MEDIA 2014: OVERVIEW 5 (2014) ("*State of the News Media 2014: Overview*").

[70] Open Internet NPRM at ¶ 1 (emphasis added); *id*. at 5652 (Separate Statement of Rosenworcel, Com'r, concurring) (describing the Internet as "the most dynamic platform for free speech ever invented. It is our modern town square. It is our printing press. It is our shared platform for opportunity. Online we are sovereign – we can choose, create, and consume content unimpeded by the preferences of our broadband providers.").

[71] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 11-121, Report, 27 FCC Rcd 10342, 10369 ¶¶ 44-45 (2012). The FCC additionally noted that Americans unserved by fixed broadband may have access to mobile and/or satellite broadband. *Id.* at n. 197.

Some opt not to subscribe, and as policymakers already know, for many people the reason is not a monetary one.[72] Despite efforts by U.S. policymakers and others to increase adoption levels,[73] the percentage of Americans actually subscribing to broadband Internet service is unlikely to ever dovetail precisely with broadband availability.[74] This is hardly surprising; other types of paid services that are widely available, including traditional multichannel video services and daily newspapers, do not have 100 percent adoption rates either. Moreover, residential high-speed Internet access subscription data focuses on fixed broadband and do not consider the considerable access Americans have to broadband services through mobile devices connected to public Wi-Fi and wireless carriers.

The dramatic changes in media consumption certainly will continue, and likely accelerate, over the course of the next decade as "digital natives" becomes the core focus of both new media platforms and advertisers.[75] One particularly noteworthy trend is the tendency of younger consumers to bypass traditional media outlets. A good number show a disinclination to look directly to professional media outlets for information and instead often prefer social media sources that allows for peer

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[72] *See* National Broadband Plan at 129 (discussing, *e.g.*, lack of interest or perception of relevance); PEW INTERNET & AMERICAN LIFE PROJECT, DIGITAL DIFFERENCES 2, (2012).

[73] *See generally Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011), *pets. for review pending sub nom. In re: FCC11-161*, No.11-9900 (10th Cir. argued Nov. 19, 2013).

[74] *See* National Broadband Plan at 129 ("And some will never choose to subscribe to broadband, just as a small percentage of Americans do not see the need for television or telephone service.").

[75] The FCC recognized this trend over a decade ago. *2002 Biennial Review Order* ¶ 88 ("This digital migration is having an effect on today's youth in a way that television had on the "baby boom" generation of the early fifties, and radio had on the youth of the Depression.").

evaluation, recommendations, and prompts.[76] Analysts note that many users look to multiple outlets and platforms for news and information they care about, with a consequent reduction in adherence to any one source.[77]

The Internet allows consumers to avoid the "intermediation" of professional media if and when they wish to.[78] There now are now a wide variety of platforms – many of which are ad-supported – that allow consumers to gain and share information through friends, family, neighbors and/or complete "non-professional" strangers in the same age or interest cohort. For example, recent statistics indicate that 67 percent of Americans have a profile on a social networking site,[79] the average number of social

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[76] Half of Facebook users obtain news through that service at least sometimes, and one in five YouTube users get news on that platform. PEW RESEARCH CENTER, NEWS VIDEO ON THE WEB: A GROWING, IF UNCERTAIN, PART OF NEWS 13 (2014).

[77] Susan Athey, *The Impact of the Internet on Advertising Markets for News Media*, STANFORD UNIVERSITY, (Apr. 2013), at 2, ("*Impact of the Internet on Advertising Markets*").

[78] Shin Haeng Lee, *The End of the Traditional Gatekeeper*, 12 GEO. J. COMMUNICATION, CULTURE, AND TECHNOLOGY (Spring 2012), http://gnovisjournal.org/2012/04/26/the-end-of-the-traditional-gatekeeper ("*End of the Traditional Gatekeeper*"); Seth C. Lewis, *The Tension Between Professional Control and Open Participation*, INFORMATION, COMMUNICATIONS & SOCIETY 4, 7 (2012) ("*Tension Between Control and Participation*"), *available at* http://bit.ly/1uLK1Yc. Lewis posits that "the professionalization process has made the press so inwardly focused on peer judgment and elite access – as professions are wont to do – that it has lost much of its understanding for everyday people and their concerns; the essence of the public journalism movement was to correct this deficiency." *Id*. at 14 (internal citations omitted); *see also id*. at 16 (noting "shift" becoming "particularly evident since the mid-2000s emergence of … Web 2.0 – a second generation of internet applications focused on participatory information creation, tagging, sharing, and remixing – as well as the present fascination with social media spaces such as Facebook, Twitter, and Google Plus."). *See also* FCC, Steven Waldman, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*, July 2011, at 126, *available at* http://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf ("INC Report") ("It should come as no surprise, then, when young people these days say they do not feel the need to seek out news sources, because if something important happens 'the news will find me.'").

[79] The Infinite Dial 2014 at 44.

media user "friends" was 350,[80] and 75 million Americans check their social network "several times per day."[81] Consumer-review services such as Yelp are highly popular for delivering "news you can use" on an individually tailored basis,[82] while many consumers find it both efficient and helpful to go directly to sites maintained by entities or groups with they are engaged for the information they need.[83] Professional media have responded to this trend by allowing consumers to comment on or criticize stories directly on the media outlet's digital platform and to add consumer-generated content to the outlet's website.[84] More recently, some online platforms of traditional media allow

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[80] The Infinite Dial 2014 at 48.

[81] The Infinite Dial 2014 at 49.

[82] "Yelp had an average of approximately 132 million monthly unique visitors in Q1 2014," according to the service, and its users – "Yelpers" – "have written over 57 million local reviews." Yelp, *About Us*, http://www.yelp.com/about (last visited July 23, 2014).

[83] PEW RESEARCH CENTER, HOW PEOPLE LEARN ABOUT THEIR LOCAL COMMUNITY 1, 24-28 (2011), *available at* http://www.pewinternet.org/files/old-media/Files/Reports/2011/Pew%20Knight%20Local%20News%20Report%20FINAL.pdf ("*Pew Local Community Report*"); INC Report at 119, 122. Some of this information has never been a major focus for traditional professional media, which traditionally focuses on news of general interest to a large number of people. *See* The Missouri Group, NEWS REPORTING AND WRITING 248 (10th ed. 2011) ("NEWS REPORTING 101"); C. Edwin Baker, MEDIA, MARKETS, AND DEMOCRACY 302 (2004) (noting that mass media's terrain is the "one to many" communications model). A number of traditional media beats, such as restaurant reviews and cultural reporting, are fading as IP-supported communications, including peer-generated content, have grown in popularity. *See* Jack Shafer, *The Long, Slow Decline of Alt-Weeklies*, REUTERS, Mar. 15, 2013, http://blogs.reuters.com/jackshafer/2013/03/15/the-long-slow-decline-of-alt-weeklies; Josh Ozersky, *In Praise of the Endangered Restaurant Critic*, TIME, Mar. 16, 2010, http://content.time.com/time/nation/article/0,8599,1972335,00.html.

[84] *See State of the News Media 2014: Overview* 7 (2014) ("11% of all online news consumers have submitted their own content (including videos, photos, articles or opinion pieces) to news websites or blogs"). *See also, e.g., INC Report* at 119 (discussing how Internet-facilitated comment posting "has transformed a staple of the traditional newspaper: the letter to the editor"); *Tension Between Control and Participation* at 16 ("what sets apart the present media moment is the ease with which individuals may participate in the creation and distribution of media, on a scale and with a reach unimaginable in earlier times, mainly because of the internet"); Steve Outing, *The 11 Layers of Citizen Journalism*, POYNTER INSTITUTE (updated Mar. 2, 2011), *available at* http://www.poynter.org/uncategorized/69328/the-11-layers-of-citizen-

consumers to, in effect, "curate" the online outlet's content offering by giving consumers access to "most read" or "most emailed" lists.[85]

Data shows that consumers increasingly turn to sources other than TV, radio, or daily newspapers for news and information on several key topics for daily life, including local information about housing, schools, jobs, businesses, health care and social services, and entertainment and culture. The Pew Research Center's detailed 2011 analysis, "How People Learn About Their Local Community," reported survey results demonstrating that

> different platforms serve different audience needs…. The [survey] result is a more complex portrait of how people learn and exchange information about community. The new data explodes the notion, for instance, that people have a primary or single source for most of their local news and information.[86]

Internet sources of various sorts provide "significant local information," according to Pew, being either the first or second most important source of local news and information for 15 of the 16 subject matters examined.[87] The Internet also is key for

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journalism ("At its simplest level, user comments offer the opportunity for readers to react to, criticize, praise or add to what's published by professional journalists."

[85] *End of the Traditional Gatekeeper*.

[86] *Pew Local Community Report* at 4.

[87] *Pew Local Community Report* at 22. In addition, the rise of local websites, blogs and similar platforms that concentrate on particular topics or neighborhoods is well documented. *See, e.g.*, INC Report at 121-22; Norman H. Nie et al., *The World Wide Web and the U.S. Political News Market*, 54 AM. J. POL. SCI. 428, 430 (2010); Daniela Gerson, *Hyperlocal Forums Like "Nextdoor" Aim to Give Local News a Makeover, Foster Neighborliness*, GOOD MAGAZINE, Feb. 24, 2013, http://magazine.good.is/articles/hyperlocal-news-sites-like-nextdoor-give-local-news-a-makeover-foster-neighborliness. Neighborhood-based platforms such as Washington, D.C.'s The Hill Is Home, available at www.thehillishome.com, provide an impressive combination of original content and aggregated links to similar news and information sites in the city – some of which, like the construction/development website JDLand (http://www.jdland.com/dc/index.cfm) offer an arguably obsessive level of detail that no broadcast station or newspaper could ever provide.

peer-generated information, both as "a way to give people information that is personal and particular," but also as "a place where locally-oriented content creators can share material directly with specific audience groups that traditional news organizations have not covered comprehensively."[88]

Among professional media outlets, local TV news operations continue to provide perhaps the highest percentage of local content relative to their news hole, with ongoing strength in coverage of local political news, breaking news, weather and traffic.[89] Data shows that newspapers remain the top source for information about civic affairs, such as the conduct of local government, taxes and crime – although relatively few consumers actually seek out information on these topics.[90] Government sources and political candidates and campaigns are much more directly accessible thanks to the Internet – and those online sources are used regularly by consumers.[91]

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[88] *Pew Local Community Report* at 23.

[89] *Pew Local Community Report* at 16-21. Broadcast radio, as a highly mobile medium, is tied with television as the top source for current traffic information. *Pew Local Community Report* at 2, 35.

[90] *Pew Local Community Report* at 1-2, 15.

[91] *See, e.g.,* PEW INTERNET & AMERICAN LIFE PROJECT, POLITICS ON SOCIAL NETWORKING SITES 3 (2012), *available at* http://www.pewinternet.org/files/old-media//Files/Reports/2012/PIP_PoliticalLifeonSocialNetworkingSites.pdf ("25 percent of [social network site] users say they *have become more active in a political issue* after discussing it or reading posts about it on the sites.") (emphasis in original); PEW INTERNET & AMERICAN LIFE PROJECT, SOCIAL MEDIA AND POLITICAL ENGAGEMENT 2 (2012), *available at* http://www.pewinternet.org/files/old-media//Files/Reports/2012/PIP_SocialMediaAndPoliticalEngagement_PDF.pdf (39 percent of all Americans have done at least one of eight civic or political activities with social media.); Aaron Smith, Online Political Videos and Campaign 2012, Pew Research Internet Project (Nov. 2, 2012) (66 percent of registered voters that use the Internet and 55 percent of *all* registered voters went online during the 2012 election season to watch videos related to the election campaign or political issues.).

The data are consistent with common sense: People go to many different sources of information to fulfill many different information and entertainment needs. To put it another way, no single medium today – whether professional or citizen-driven – serves all needs of all people. Moreover, consumers are savvy enough not to expect any one source to serve all their needs and interests, and have proven quite capable of finding their way to the information they want.

2. The Abundance Of Sources Ensures A Rich, Multi-Stream "Information Flow" That Eliminates Any Serious Concern About Traditional Media Agenda-Setting Or Gatekeeping

None of the marketplace fragmentation trends identified above are new. The FCC recognized seven years ago that the explosion of news and information outlets then – including but not limited to what is now dubbed citizen journalism online – had fundamentally altered the underpinnings of one of the agency's key policy rationales for ownership restrictions: Concerns decades ago about traditional media "gatekeeping" and "agenda setting" power over the "local news and information" available "to most American communities" no longer made much sense by 2007.[92] By the last decade, the Commission understood that "[t]he new and broader array of inputs from online sources available to the American public not only affects mainstream journalists' decisions on

[92] *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, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2022-23 ¶ 36-37 (2008) ("*2006 Quadrennial Review Order*"); *id*. at 2015 ¶ 21. The Commission explained that its adoption of the newspaper/broadcast cross-ownership rule in 1975 was motivated largely by fears of broadcast and newspaper "power to select, to edit, and to choose the methods, manner and emphasis of presentation" of important information to their local communities. *Id.* at 2015 ¶ 21 (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*, Docket No. 18110, Second Report & Order, 50 FCC 2d 1046 (1975)) (internal citations omitted).

what to report and how to report it, but websites also act as competing outlets – even, at times, as work-around channels of information in cases where the mainstream media has been slow or reluctant to react."[93]

The old theoretical gatekeeping and agenda-setting concerns make even less sense in 2014. Since the time of the 2006 quadrennial review, online communications platforms obviously have only extended and deepened. At that time, although the Commission did not explicitly predict the rise of social media and apps rich with local information, the agency did foresee that "the trends supporting our conclusion that traditional media sources no longer enjoy the same degree of control over the gathering and delivery of news and information will grow stronger as the Internet and other communications networks develop."[94] That prediction has been proven true, as recent scholarship confirms.[95] Traditional media outlets simply do not have the power to either (1) determine which issues are newsworthy or (2) influence how people may think about them.[96]

This fact does not mean, however, that broadcasters and newspapers now have no role in gathering and disseminating news and information important to their

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[93] *2006 Quadrennial Review* Order at ¶ 36 (internal citations omitted).

[94] 2006 Quadrennial Review Order at ¶ 39, n. 131.

[95] *See, e.g.*, *End of the Traditional Gatekeeper*; *see also generally Tension Between Control and Participation*, 1-31 (review of empirical literature concerning professional journalists' struggle to move from "one-way publishing control" to new environment in which media is "a multi-way network") (internal citations omitted). As early as 2006, the Project for Excellence in Journalism of the Pew Research Center declared that traditional media outlets were not "gatekeepers over what the public knows." 2006 State of the News Media Report, Overview/Introduction.

[96] *End of the Traditional Gatekeeper* ("Based on the interactive nature [of] the web, news stories online can be selected and emphasized by a different system of filtering and gatekeeping from traditional media.")

communities. TV stations and daily papers in particular still serve as key newsgatherers and an important trust sources. Pew's "Baltimore Study" underlined a paradigm that many professional journalists already understood: Information reported by traditional media often feeds the greater digital information flow that broadly informs a community, and those facts in turn are magnified, criticized, and/or embellished upon as the content spreads through the digital environment.[97] Consequently, "viewpoint diversity," in the sense of widely shared commentary and debate on local issues, has never been more robust.[98]

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[97] *Pew Baltimore Study* at 1; *State of the News Media 2013: Digital; cf. The 11 Layers of Citizen Journalism*. Outing of the Poynter Institute reviews at length the various ways that professional news outlets and largely unpaid citizen journalists extend and build upon each other's input, including through the use of "citizen add-on reporter[s]" and "citizen blogs that complement what the news staff produces. A great promise of citizen blogs is that they can cover topics and areas uncovered by or too narrow to warrant the interest of the news staff." *Id*. *Accord, INC Report* at 121-122; Tracie Powell, *Proposed: Citizen Journalists Should Fill Gaps in 'Information Ghettos'*, POYNTER INSTITUTE (July 2, 2012).

[98] Because traditional media outlets are unable to act as agenda-setters or gatekeepers today, reform of the broadcast ownership restrictions cannot harm the FCC's fundamental diversity goal. The digital information flows that the Commission first recognized in 2007 ensure that consumers can comment on, and magnify, whatever compelling information or news they encounter – whatever the source may be – and that they are not solely dependent on professional media to obtain information that matters to them. As the FCC explained then,

> The nearly instantaneous speed with which consumers can now communicate via the Internet has created a vastly improved two-way flow in the sharing of ideas between traditional news gatherers and news consumers, with a consequent power to affect the priority that the traditional media place on coverage of certain events and topics. Many previously passive consumers of news are already taking advantage of the opportunities the Internet allows to influence the newsgathering process. More than ever before, readers and audiences are themselves communicating with news gatherers to demand, directly and indirectly, coverage of specific topics. There are many high-profile examples of news organizations slow to pick up on a story which, after percolating among bloggers and others in the online arena, grows into an issue that traditional news media eventually cover.

2006 Quadrennial Review Order at ¶ 38. Among other online platforms, Twitter has had a noticeable impact on today's two-way information flow. Not only are links to professional news reports frequently tweeted, but the contents of those messages loop back around into news

The "Baltimore paradigm" does not support continued or greater ownership regulation, as some have suggested. To the contrary, it underscores the importance of Commission action to eliminate unnecessary regulation that may harm local professional media outlets' ability to continue gathering and reporting local news and information that feeds the complex information flow in a local community.[99] As discussed further below, by hindering local media outlets' ability to compete and survive in the advertising marketplace, unnecessary ownership rules threaten to undercut the FCC's localism and diversity goal.

3. The Dispersion Of Consumer Attention To Other Content Sources Has Fractured The Advertising Marketplace And Thereby Altered Broadcasters' Competitiveness, Which In Turn Affects Localism And Diversity

Because traditional media have lost ground to new advertising vehicles, broadcasters and newspapers now face serious challenges in delivering professionally produced local content. The proliferation of various communications platforms/outlets that provide many more content options for viewers and listeners also divert them away

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reporting: "More than four in ten Americans hear or read about tweets almost every day in the media." Arbitron and Edison Report at 49.

[99] The Pew researchers themselves pointed out at the time that the *Baltimore Sun*, identified as the leading source of news disseminated further by local web-based sources, already was suffering from a shrinking news hole and diminishing reporter ranks: *The Sun* in 2009 produced 32 percent fewer stories than it had in 1999. *Pew Baltimore Study* at 2. *The Sun* has suffered only more losses of reporter resources since then, as has the newspaper industry as a whole. Rachel Bernstein, *Baltimore Sun Looking to Buy Out up to 25 Employees*, THE DAILY RECORD, Aug. 10, 2011, http://thedailyrecord.com/2011/08/10/baltimore-sun-looking-to-buy-out-up-to-25-employees; James Briggs, *Baltimore Sun Layoffs as Tribune Cuts 6% of Its Publishing Workforce*, BALTIMORE BUSINESS JOURNAL, Nov. 20, 2013, http://www.bizjournals.com/baltimore/news/2013/11/20/tribune-to-cut-700-jobs-including.html; INC Report at 16. Plainly the FCC's retention of the newspaper/broadcaster cross-ownership ban has done nothing to alleviate this situation, and by barring *The Sun* from even considering joint ownership with a broadcast station, the FCC's refusal to change the rule may have further weakened the newspaper and also deprived broadcasters of greater depth of local journalism resources.

from traditional outlets, fragmenting once "mass" audiences. Inevitably, advertisers – the lifeblood of free, over-the-air broadcasting and a centuries-old mainstay of daily newspapers – follow the consumers. That development, in turn, had led to downsizing of professional newsrooms across the country, especially in the newspaper industry.

For example, as shown in detail in Section IV, evidence unequivocally demonstrates the diversion of viewers away from broadcast stations to hundreds of cable networks. IP-based communication platforms also are pulling consumers from traditional media in a quantifiable way. Rising demand for the online medium is evident in penetration statistics from 2013, which indicate that the Internet is close to television in popularity.[100] Pew researchers analyzing the dispersion of local news and information determined that for adults under age 40, "the internet rivals or surpasses other platforms on every single topic area except [breaking local news]."[101] Digital news consumers report using multiple devices to follow news developments.[102] In contrast, broadcast TV viewing has not gained,[103] while newspaper subscription rates have plummeted: Just under 17 percent of U.S. households now pay to read a daily paper.[104]

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[100] *See supra* Section III.B.1.

[101] *Pew Local Community Report* at 22.

[102] Alan Mutter, *Digital News Puts Consumers in Control*, NEWSOSAUR, Sept. 2013, at 1.

[103] *State of the News Media 2014: Key Indicators* at 5.

[104] See AMERICAN PRESS INSTITUTE, THE PERSONAL NEWS CYCLE: HOW AMERICANS CHOOSE TO GET THEIR NEWS 22 (2014), *available at* http://www.americanpressinstitute.org/wp-content/uploads/2014/03/The_Media_Insight_Project_The_Personal_News_Cycle_Final.pdf. The report states that only 26 percent of Americans pay for one or more news subscriptions, and of that relatively small segment of the population, 64 percent subscribe to newspapers. Accordingly, approximately 16.6 percent of all Americans pay for a newspaper subscription.

The time that consumers devote to non-traditional media also is rising. The U.S. Chamber of Commerce estimated this year that during an eight-hour work day, people on average spend about an hour on social media, and millennials in particular spend about 1.8 hours on social sites.[105] Recent data indicates that the average combined time spent daily on TV, radio and the Internet equaled 8 hours and 15 minutes,[106] while average Internet/online-only usage accounted for more than five hours daily.[107] Heavy Internet users logged 7 hours and 16 minutes online each day,[108] accounting for nearly a third of all hours daily – or close to half the number of hours Americans aged 15 and older spend awake in each 24-hour period.[109] Overall, these latest "time spent" statistics show a marked tilt toward IP-based platforms just since 2007, when an FCC-commissioned Nielsen study reported that TV news usage lead Internet news usage, although newspaper usage already trailed both.[110]

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[105] Joseph William, *Millennials in Focus: Social media is the message*, EXCLUSIVE, July 2, 2014, at 1.

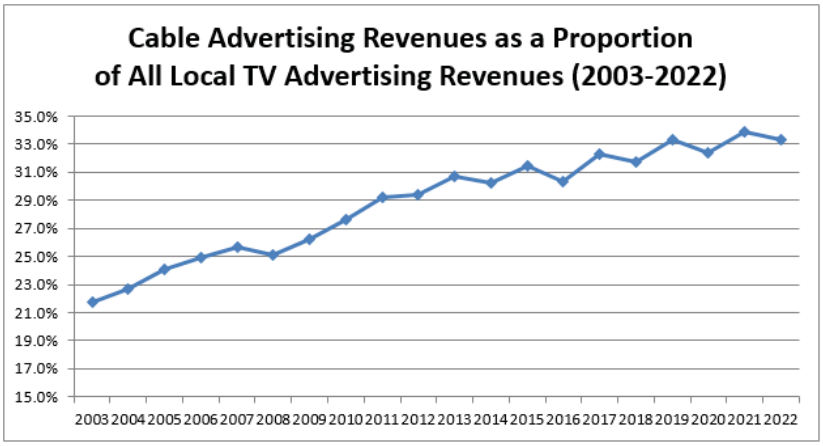
[106] Arbitron and Edison Report at 6.

[107] *Digital Set to Surpass TV in Time Spent with US Media*, EMARKETER, Aug. 1, 2013, at 1, *available at* http://www.emarketer.com/Article/Digital-Set-Surpass-TV-Time-Spent-with-US-Media/1010096 1 ("The average adult will spend over 5 hours per day online, on nonvoice mobile activities or with other digital media this year.").

[108] Arbitron and Edison Report at 63.

[109] Terence P. Jeffrey, *BLS: Americans – on Average – Sleep Twice as Many Hours as They Work,* CNSNEWS.COM, June 18, 2014, at 1, *available at* http://cnsnews.com/news/article/terence-p-jeffrey/bls-americans-average-sleep-twice-many-hours-they-work (Bureau of Labor Statistics survey reports the total American civilian population 15 years and over slept, on average, 8.48 hours daily).

[110] Nielsen Media Research, Inc., FCC Study 1 (June 2007), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-07-3470A2.pdf.



Source: SNL Kagan; Includes broadcast/cable/telco

Advertisers have taken note of both the change in news consumption trends and a reduction in consumer "loyalty to any one outlet."[111] As shown in this graph and discussed in detail in Section IV below, cable systems increasingly compete with broadcast television stations for local advertising and now receive very significant shares of local television ad revenue.

Just as significantly, online-only advertising outlets are taking increasingly large percentages of overall ad spending. These include search engines such as Google and specialty platforms that provide little original content beyond marketing pitches and sales links: Digital advertising in total is a $43 billion market. Digital ad revenue leaped by almost $6 billion from 2012 to 2013, representing a growth rate of 15.7 percent.[112] Experts predict that overall online advertising – including those beyond news-oriented online platforms – will "increase 16.7 percent [in the next year] to $140.2 billion and for

[111] *Impact of the Internet on Advertising Markets* at 2. Advertisers also recognize that the move toward IP-based platforms affects the time actually spent on a particular news outlet: "[W]hile consumers may have spent 25 minutes reading the morning print newspaper, they may spend on average 90 seconds on [a particular] news website," even though they may access multiple online news outlets. *Id*. (citing Varian, 2010).

[112] *State of the News Media 2014: Key Indicators* at 7; *see also Pew Revenue Study* at 3 (digital advertising revenue increased from $36.8 billion in 2012 to $42.6 billion in 2013).

the first time will account for more than 25% of total ad spending."[113] The mobile space is also proving attractive to advertisers; one specialty agency "sees mobile advertising revenues passing the total ad revenues for newspapers this year and more than tripling them in 2018."[114]

In contrast, ad revenues for traditional media platforms are either largely stagnant or falling. According to Pew, although TV advertising currently is not falling as fast as it was,[115] "[p]rint advertising continues its sharp decline."[116] And for both types of traditional media, "the steady audience migration to the web will inevitably impact th[eir] business model[s]."[117]

The data for newspapers is particularly grim: "[D]aily newspaper advertising revenue of $25.2 billion equals only half of the $49 billion earned in the newspaper industry in 2005."[118] More ominously, the ongoing erosion of classified advertising,

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[113] *Global Ad Spending to Double Pace in 2014*, BLOOMBERG, July 9, 2014, at 1, *available at* http://www.bloomberg.com/news/2014-07-09/global-ad-spending-to-double-pace-in-2014-emarketer-says.html.

[114] Rick Edmonds, *As Mobile Ad Revenue Continues to Soar, Newspapers Still Struggle to Catch the Wave*, POYNTER, July 2, 2014, at 2, *available at* http://www.poynter.org/latest-news/mediawire/257611/as-mobile-ad-revenue-continues-to-soar-newspapers-still-struggle-to-catch-the-wave (quoting eMarketer).

[115] *See State of the News Media 2014: Key Indicators* at 8 ("Local TV stations make the vast majority of their revenue from on-air advertising, which typically follows a cyclical pattern of increases in election years and decrease in non-election years. In 2013, total local TV ad revenue was expected to decline 2.5% from election-year 2012, according to BIA/Kelsey, amounting to $19.7 billion. But this is less of a decline than in 2011, when advertising revenues dropped by about 8% from the year before, and in 2009, when the decline was 22%.")

[116] *Pew Revenue Study* at 3.

[117] *Pew Revenue Study* at 3.

[118] *Pew Revenue Study* at 6; *see also* NEWSPAPER ASSOCIATION OF AMERICA, BUSINESS MODEL EVOLVING, CIRCULATION REVENUE RISING (2014), *available at* http://www.naa.org/Trends-and-Numbers/Newspaper-Revenue/Newspaper-Media-Industry-Revenue-Profile-2013.aspx ("NAA Study").

which once accounted for well over half of newspaper ad income, is expected to keep on falling.[119] The ad losses have a two-fold and related impact: First, the "news hole," meaning the space devoted to news and editorial material, is shrinking.[120] Second, with a smaller news hole and less revenue for salaries, professional newspaper journalists continue to be laid off or persuaded to take early retirement.[121] In 2012 alone, full-time professional journalist positions at newspapers fell by 2,600 jobs, or 6.4 percent.[122] The resulting total of 38,000 newspaper newsroom employees is down 33.2 percent – or almost 19,000 jobs – from its 1989 peak of 56,900, according to the annual census of the American Society of News Editors.[123] The trends prompt some analysts and

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[119] 10-Year Newspaper Projections, SNL Kagan, 2012.

[120] INC Report at 1.

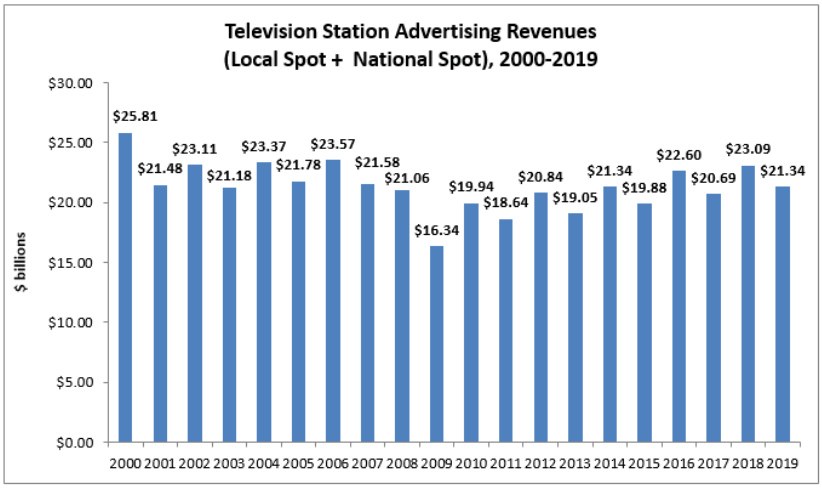
[121] Emily Guskin, *Newspaper Newsrooms Suffer Large Staffing Decreases*, PEW RESEARCH CENTER, June 25, 2013, *available at* http://www.pewresearch.org/fact-tank/2013/06/25/newspaper-newsrooms-suffer-large-staffing-decreases. For example, in connection with its sale to new owners, the Minneapolis Star Tribune announced buyouts of 19 veteran journalists representing 586 years of combined experience. See Joe Kimball, *Star Tribune to Lose 19 Veterans in the Newsroom in Buyouts Triggered by Paper's Sale*, MINNPOST, July 8, 2014, *available at* http://www.minnpost.com/political-agenda/2014/07/star-tribune-lose-19-veterans-newsroom-buyouts-triggered-papers-sale (paper has lost more than 125 journalists since 2007). Specialists providing experienced insights on certain "beats" important to civic affairs also suffering from diminished ranks. *See* PEW RESEARCH CENTER, AMERICA'S SHIFTING STATEHOUSE PRESS: CAN NEW PLAYERS COMPENSATE FOR LOST LEGACY REPORTERS?, (2014), *available at* http://www.journalism.org/files/2014/07/Americas-Shifting-Statehouse-Press_full_report.pdf (number of newspaper statehouse journalists has dropped by 35% between 2003 and 2014, representing a loss of 164 jobs).

[122] *State of the News Media 2014: Key Indicators* at 13-14; *see also* PEW RESEARCH CENTER, THE GROWTH IN DIGITAL REPORTING: WHAT IT MEANS FOR JOURNALISM AND NEWS CONSUMERS 3 (2014), *available at* http://www.journalism.org/files/2014/03/Shifts-in-Reporting_For-uploading.pdf (from 2003 to 2012, 16,200 full-time newspaper newsroom jobs were eliminated).

[123] *State of the News Media 2014: Key Indicators* at 13-14. According to ASNE, most of that multi-year job loss occurred in the last six years.

consultants to urge newspaper publishers to abandon print even though that would trigger at least a short-term hit to ad revenues.[124]

Broadcasters are weathering the digital revolution better than newspapers, but broadcast TV station advertising revenues have not yet equaled, let alone surpassed, ad revenues of 2000 and are not projected to do so even by 2019. And total Internet advertising revenues surpassed total broadcast TV ad revenues -- for the first time ever – in 2013.[125] Section IV addresses local TV station's increasingly challenging position in the modern advertising marketplace more specifically.



Although online revenue for traditional media is growing,[126] the fact remains that profits from digital ads are lower than from traditional on air commercials and print

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[124] Mark Potts, *What the New York Times Innovation Report says about the State (and Future) of Digital News*, AMERICAN JOURNALISM REVIEW, May 19, 2014 at 9, *available at* http://ajr.org/2014/05/19/new-york-times-innovation-report-digital-news/ In 2009, the *Ann Arbor News* became the first city daily to abandon print completely. *See* Lindsay Kalter, *The Ann Arbor Precedent*, American Journalism Review, Aug. 28, 2012, at 1 *available at* http://ajrarchive.org/article.asp?id=5377 A number of other daily papers have dropped their paper publication schedule to three days a week. *Id.*

[125] PWC & IAB, IAB INTERNET ADVERTISING REVENUE REPORT 2013 FULL YEAR RESULTS 19 (2014), *available at* http://www.iab.net/media/file/IAB_Internet_Advertising_Revenue_Report_FY_2013.pdf.

[126] SNL Kagan predicts that online ad revenue for newspapers will increase from $3.32 billion in 2012 to a projected $4.97B in 2021. 10-Year Newspaper Projects, SNL Kagan, 2012.

advertising.[127] This means, obviously, that digital ad revenue is not fully replacing the income from older advertising formats that have paid for business expenses such as local newsroom salaries and costly digital and high definition equipment. In short, the digital revolution has changed the economics of news production forever.

IV. THE COMMISSION SHOULD MODIFY THE LOCAL TELEVISION OWNERSHIP RULE TO ENSURE COMPETITIVE FAIRNESS IN THE MEDIA MARKETPLACE

It is arbitrary and capricious to retain a local television ownership rule based on an assumption that broadcasters operate in a vacuum, unaffected by the impact of a massive and concentrated pay television industry, the precipitous rise of IP-delivered video services and an unprecedented information ecosystem available through the Internet. Not only is such an assumption contrary to overwhelming evidence and inconsistent with the FCC's obligations under Section 202(h), it actively undermines the goal of promoting localism. Broadcasters must be allowed to achieve vital economies of scale and scope and to provide quality programming to their communities.

Reforming the local TV ownership limits will benefit the public, especially in small and medium-sized markets where the advertising base cannot support a large number of independently owned TV stations providing local news and public affairs programming. As the Commission has acknowledged, quality local news production –

[127] PEW RESEARCH CENTER, NEWS VIDEO ON THE WEB: A GROWING, IF UNCERTAIN, PART OF NEWS 11 (2014). The Newspaper Association of America recently reported that daily newspapers' total revenue in 2013, including their online platforms, fell 2.6 per cent from 2012 levels -- with print income sliding 8 percent. See NAA Study. Circulation for both digital and bundled print/digital publications rose, but that subscription revenue did not make up for the profits formerly generated by print advertisements. *See id*.

including the costs of equipment, staff, production and more – is expensive.[128] Allowing broadcasters to create more efficient combinations will benefit the public through increases in quality local programming. It will also help ensure better access to a full complement of national network programming and increase the availability of high-definition local programming, especially in small markets. The Commission should allow the common ownership of two television stations more freely in markets of all sizes, given the "tangible public interest benefits for viewers" that duopolies "have created" in markets where they are allowed.[129]

Both the existing top-four prohibition and the arbitrary "eight voices test" operate as barriers to a more efficient and competitively equitable marketplace. Neither aspect of the local TV rule is supported by current empirical evidence in the record. Both should be modified in a manner that accurately reflects the realities of today's video programming market and the needs of local audiences.

A. THE COMMISSION HAS FAILED TO RATIONALLY DEFINE "COMPETITION" FOR PURPOSES OF THE LOCAL TV OWNERSHIP RULES

In the Notice (at ¶ 15), the Commission again asserts that the local TV ownership rule is "competition-based," and tentatively concludes that the rule remains necessary to "promote competition."[130] Despite these assertions, and after two decades of reviewing

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[128] *See* 2010 Quadrennial Regulatory Review, Notice of Inquiry, in MB Docket 09-182, at ¶ 29 n.67, quoting H. Rep. No. 104-104 (1996) at 221 (internal citations omitted)("2010 NOI"). NAB submitted extensive evidence in the 2010 quadrennial review demonstrating the high level of resources necessary to maintain local news operations and provide local journalism and emergency information. *See* NAB Comments, MB Docket No. 09-182 (July 12, 2010), at Attachment B, The Economic Realities of Local Television News – 2010.

[129] Notice at ¶ 39.

[130] Notice at ¶ 20.

the broadcast ownership rules within the defining parameters of Section 202(h), there is no plainly understandable – and perhaps more important, an accurately measurable – definition of competition. Competition has become an empty construct, lacking any kind of rigorous analysis. Instead, the term "competition" and its more prophylactic cousin "to promote competition" have become talismans incanted to maintain the status quo despite clear evidence of a need for change.

Significantly, in its inquiry opening the 2010 review that is now part of this 2014 review, the Commission asked how it should define and measure competition in "today's media marketplace" and what "analytical approaches" it should employ to determine the effects of common ownership on competition.[131] Recognizing that "[t]elevision stations are facing more competition for viewers from a greater variety of sources than ever before," the NOI asked how "marketplace changes should affect [its] competition analysis,"[132] and "whether promoting competition in advertising markets should be one of the goals of [its] ownership rules."[133] Unfortunately, the rulemaking notice for the 2010 quadrennial did not build on this inquiry, but simply stated that the Commission "strives to set ownership rules that create a marketplace in which broadcast programming meets the needs of consumers, and we believe competition is a key means to that end."[134]

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[131] 2010 Quadrennial Review NOI at ¶¶ 31-53.

[132] *Id.* at ¶ 45.

[133] *Id.* at ¶ 39.

[134] 2010 Quadrennial Review NPRM at ¶ 12.

The present Notice's discussion of the local TV ownership rule is replete with generic references to "competition." Repeating previous conclusions that both the top-four prohibition and the "eight-voices test" remain necessary "to promote competition" in "local television markets,"[135] the Notice, however, contains almost no analysis of the current state of competition facing local TV broadcasters.

Without a clear standard for "competition," the Commission's decision to maintain both the top-four merger restriction and the eight-voices test is increasingly arbitrary in light of obvious and, in many cases, overwhelming market changes. To ensure compliance with Section 202(h), the Commission must modernize its analysis with a more measurable and accurate standard to evaluate competition in today's marketplace and adjust the ownership rules accordingly.

B. THE COMMISSION CAN NO LONGER RATIONALLY CONCLUDE THAT BROADCASTERS ONLY COMPETE AGAINST OTHER BROADCASTERS

The existing TV ownership rule is premised on the outdated notion that local broadcasters compete only against each other in their specific geographic markets. The Antitrust Division of the Department of Justice (DOJ) in particular has argued, and the Commission has agreed, that local broadcast television stations are a distinct relevant antitrust "product market" not constrained by cable and other advertising options when they set their advertising rates.[136]

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[135] Notice at ¶¶ 41, 51.

[136] *See, e.g.*, Ex Parte Submission of the United States Department of Justice, 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 (Feb. 20, 2014) (hereinafter "DOJ Submission"), available at http://www.justice.gov/atr/public/comments/303880.pdf; *Competitive Impact Statement, U.S. v. Gannett Co., Inc.,* No. 13-01984 (D.D.C. Dec. 16, 2013) [hereafter *Gannett CIS*], at 5.

Notably, however, the DOJ has supported its claim that local broadcast television advertising is a relevant product market with only general narrative descriptions of basic distinctions between local broadcast television stations and other types of media. Absent from the DOJ's public statements are the types of empirical data work and detailed analysis of specific "market facts" that the DOJ's Merger Guidelines provide that the DOJ should analyze when defining relevant markets.[137] Indeed, the DOJ's public statements do not indicate that it has conducted any detailed empirical inquiry into the dramatic changes over the last twenty years in the competitive landscape facing local television stations.

Today, NAB seeks to help to fill the gap in the economic analysis of the substantial competition faced by television broadcasters by submitting an economic study conducted by Hal J. Singer and Kevin W. Caves of Economists Incorporated. Drs. Singer and Caves performed an econometric analysis designed to test the DOJ's position that local broadcast television advertising is a relevant product market. Using a large data set, they found no empirical evidence to support the DOJ's narrow market definition. Instead, the results indicate that a properly defined relevant product market includes non-broadcast alternatives such as cable. Specifically, Drs. Singer and Caves found no empirical evidence that local television broadcasters charge higher advertising prices in markets where there are JSAs or duopoly ownership arrangements (i.e., markets in which two broadcast stations have a common owner). Similarly, they found no evidence that increases in concentration among local broadcasters are associated with increases in

[137] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (August 19, 2010) §§ 2 & 4.

local advertising prices. Both findings are in direct conflict with the DOJ's position that there is a narrow antitrust product market that consists only of local broadcast television advertising.

Drs. Singer and Caves analyzed 2004-2013 pricing data from 210 local markets, obtained from the market research firm SQAD,[138] and market and station-level and transaction data from 2004 to the present from the market research firm BIA/Kelsey. The data covered a wide range of markets, including those that the DOJ would consider to be highly concentrated. The study involved the use of standard statistical and econometric techniques that were designed to determine whether there is any indication that markets with duopoly ownership arrangements and market structures with a small number of television broadcast stations, as well as the use of JSAs or SSAs, raise prices. If the DOJ's theory were correct, then more concentrated markets, and markets with JSAs and SSAs, would generally have local television broadcast stations that charge higher advertising prices (after controlling for other relevant factors – e.g., income).

The results of the analyses performed by Drs. Singer and Caves indicate that, contrary to the DOJ's position, local television broadcast stations face substantial competition from other advertising channels. Their results showed that:

- Markets with a duopoly television broadcast station owner do not have higher broadcast television advertising prices than markets without duopoly owners.
- The presence of JSAs and SSAs is not statistically associated with increased advertising prices in local markets. There is even some evidence that markets

[138] The SQAD pricing data measure average advertising prices based on actual transactions between advertising agencies and television stations in a given market and year. SQAD reports two different pricing metrics.

with JSAs and SSAs have prices approximately 16 percent lower than other markets, suggesting that these arrangements benefit consumers by lowering costs.

- Increases in local television broadcast station concentration do not appear to have any effect on the advertising rates that broadcasters are able to charge.

Each of these results is inconsistent with the DOJ's position that local broadcasters face little competition from cable television and other non-broadcast media alternatives. In short, Drs. Singer and Caves found "no empirical evidence" to support the DOJ's long-standing position. Instead, they determined that a "properly defined relevant product would need to be broadened to include non-broadcast alternatives," such as cable.

It is also significant that the present Notice, while acknowledging "the growing popularity of video programming delivered via MVPDs and the Internet," argues that competition from these outlets is "of limited relevance" to its analysis.[139] This argument is premised on the erroneous assumption that because non-broadcast video programmers may not modify their programming decisions based on competitive conditions in local markets, those programmers (and the pay TV operators in local markets that carry hundreds of non-broadcast programming channels) have no significant competitive effect on local broadcast stations.[140] As explained above, that is wrong.

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[139] Notice at ¶ 23.

[140] *Id.*

The two most obvious ways to measure competition to local broadcasting are by analyzing viewership and advertising. We addressed these metrics globally in Section III and discuss both more specifically now.

First, there is a clear and undeniable trend toward increased audience share for cable and IP-delivered video. Despite price increases that have outpaced inflation for years, the considerable majority of American households continue to subscribe to some kind of pay TV service, and pay TV operators are increasingly consolidated nationally and are regionally and locally clustered.[141] Likewise, the rise of IP-only distribution networks like Netflix, which have witnessed explosive growth over the past five years, signals yet another strong – and rapidly growing – competitor for television viewers.[142]

In fact, viewers have been migrating from broadcast television to pay TV networks since the 1980s. This chart highlights the strength of that trend:

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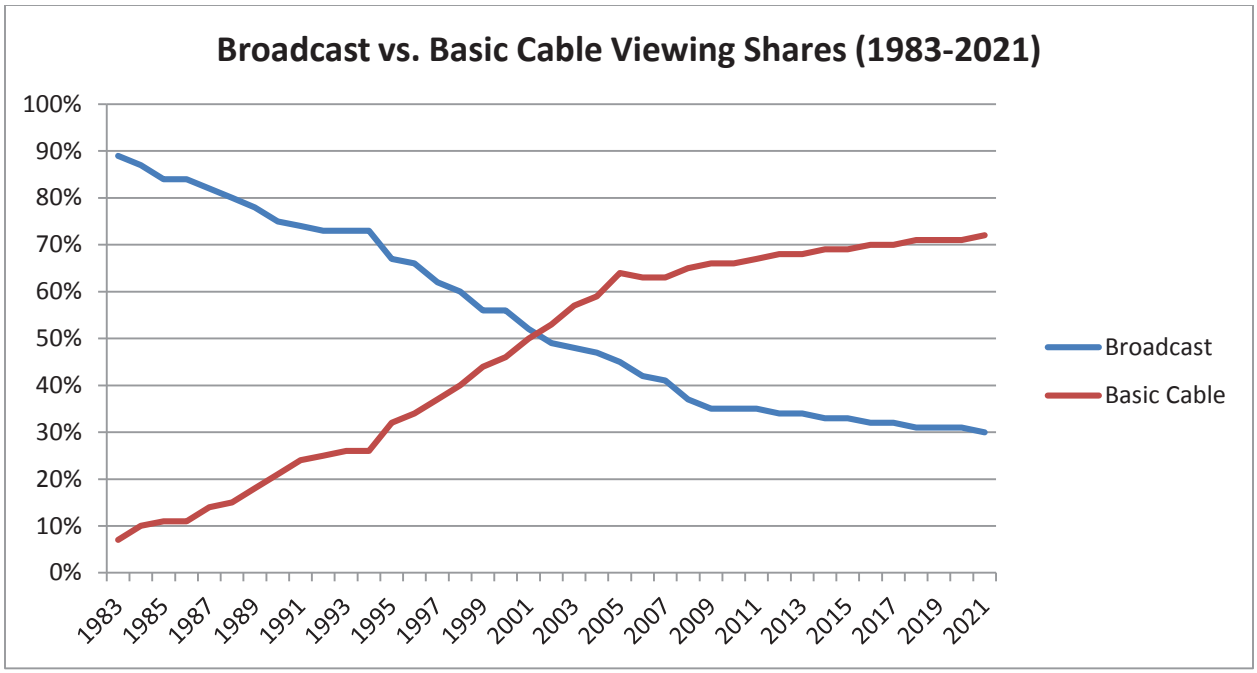
[141] *See* Comments of NAB, MB Docket No. 14-16 (Mar. 21, 2014).

[142] *See* John Kell and Amol Sharma, "Netflix Reports Strong Subscriber Growth," The Wall Street Journal, Jan. 22, 2014, *available at*: http://online.wsj.com/news/articles/SB10001424052702303947904579336820835982270. Netflix added 2.33 million subscribers in the fourth quarter of 2014 alone, raising its domestic total to nearly 32 million subscribers, more than any another pay network, including HBO. *See also* Section III., discussing growth of the online medium in detail.



Source: SNL Kagan

Although broadcast television remains home to many of the most popular programs, it is simply undeniable – as this chart illustrates – that programming available on MVPDs is siphoning millions of viewers from local TV stations. Generations of young adults have never experienced life without pay television, and increasingly few understand the difference between a local TV station and a cable network.[143] For them, substitutability is as simple as hitting the remote – and broadcast TV audiences are

[143] *See, e.g.,* James Poniewozik, "Cable TV's Better! No Broadcast TV's Better!" Time Magazine (June 15, 2011) ("Maybe the biggest question, though, is: does "broadcast vs. cable" mean anything anymore? It may be at once needlessly compartmentalizing and not compartmentalizing enough. On the one hand, between DVRs, DVDs and online streaming, the audience of people who know or care if a show is on broadcast or cable is shrinking. On the other hand, there is so much high-profile cable programming compared to a decade ago, that "cable" itself should probably now be subdivided: there are big differences between subscription channels (HBO, Showtime), channels seeking a "quality TV audience" (FX, AMC), basic-cable giants (USA, TNT) and reality-heavy channels like Bravo. The business model distinction still affects what kind of shows get made where, but it arguably matters less.").

dispersed as easily. Obviously, competition from "non-broadcast video alternatives" is real, not merely "purported," as the Notice erroneously contends.[144]

As discussed in more detail in Section III, moreover, the argument that "alternative video programmers do not generate significant amounts of original local content" is irrelevant to the Commission's required analysis under Section 202(h).[145] The competitive impact on local TV stations of "alternative video programmers" – whether their content is local, regional, national or international – that have diverted the majority of viewers to non-broadcast programming cannot be denied or ignored.

Predictably, advertisers are following viewers. While we agree with the Notice that local broadcasters still hold a strong position in the local advertising market, the assertion that broadcasting is so dominant that advertisers do not have "meaningful substitutes [to local TV] in local television markets," is wholly controverted by the data.[146] As shown below, local broadcasting is just one of many available options for local advertisers.

While television station advertising revenues are not projected to reach, even by 2019, the level of ad revenues earned in 2000,[147] Internet, mobile, cable TV and telco local advertising are all projected to see substantial growth in the next 10 years; as a result, broadcast television's share of local advertising will continue to decline.[148] In

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[144] Notice at n. 108.

[145] Notice at n. 60.

[146] Notice at ¶ 24.

[147] *See* Section III, Television Station Advertising Revenues (Local Spot + National Spots), 2000-2019.

[148] *See* Derek Baine, Ad market decelerates in 2013, projected to be up 1.4% to $223B, SNL Kagan Economics of Advertising (Dec. 17, 2013).

2012, cable providers alone earned over $1.7 billion in local ad revenues in the top 10 DMAs – the equivalent of having more than three additional broadcast television stations in each of the top 10 markets, based on BIA's 2012 average station advertising revenues in those markets. In DMAs 11-25, local cable's ad revenues were the equivalent of having more than two additional broadcast TV stations in each of those markets, and nearly two additional local TV stations in markets 26-50.[149] The Commission found, even seven years ago, that "broadcasters face increasing competition from cable operators for advertising dollars."[150]

In addition, according to SNL Kagan, local advertising on the Internet passed local spot TV advertising in 2011 and 2012 – the latter notably a major election year. Local Internet advertising, which is expected to see a 4.2% compound annual growth rate (CAGR) through 2022, will maintain and grow its market share lead over local TV over the next decade. Meanwhile, local advertising on mobile, which barely registered as a category three years ago, is projected to see an astonishing 22.5 CAGR over the next decade, and, according to SNL Kagan, will pass local TV's advertising market share by 2019. Likewise, local advertising on cable TV, telcos and increasingly popular regional sports networks, are all projected to increase their local advertising market

[149] These are based on estimates from Bond & Pecaro, *The Television Industry: A Market-by-Market Review* (2014).

[150] Third Report and Order and Third Further Notice of Proposed Rulemaking, CS Docket No. 98-120, FCC 07-170 (Nov. 30, 2007) at ¶ 55 n. 192.

share at the expense of local TV.[151] Projections by BIA/Kelsey confirm the rapid growth of mobile and social media (including local) advertising over the next few years.[152]

The Commission's very limited analysis of the local advertising market appears to rest on the argument that because local television broadcasters have not yet lost significant market share,[153] the market has not changed or grown more competitive. The data tell another story. A decade ago, local advertising was dominated by four outlets – newspapers, local TV, local radio, and the yellow pages. In that time, both newspapers and the yellow pages have seen steep declines, which are expected to continue, largely as a result of the rise of the Internet and cable TV.[154] For 2014, SNL Kagan projects that the Internet will pass daily newspapers as the top outlet for local advertisers. With the combined and concurrent increase in mobile, social and cable TV local advertising market shares, competition for local advertising is now both more intense and more diverse and will become more so in the next decade. Furthermore, advertisers are no longer making their buying decisions in the silos of print (newspapers), video (local TV), and audio (radio). They now have multiple options for

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[151] *See* Baine, SNL Kagan, Economics of Advertising.

[152] *See* BIA/Kelsey, Press Release, U.S. Mobile Local Ad Revenues to Reach $4.5 Billion in 2014 (Apr. 10, 2014) (total mobile ad spending will grow from $11.4 billion in 2014 to $30.3 billion in 2018, with mobile local ad revenues rising from $2.9 billion in 2013 to $15.7 billion in 2018); BIA/Kelsey, Press Release, U.S. Social Media Advertising to Reach $15B by 2018 (May 15, 2014) (total U.S. social media ad revenues will grow from $5.1 billion in 2013 to $15 billion in 2018, representing a CAGR of 24 percent, while locally targeted social advertising is projected to grow at a 31.6 percent CAGR, from $1.3 billion in 2013 to $5.2 billion in 2018).

[153] We note that the *Notice's* brief discussion of local advertising is based on outdated data and projections. *See* Notice at notes 57 and 58 (citing data from 2008-2011).

[154] *See* Baine, SNL Kagan, Economics of Advertising. Local "Yellow Pages" are expected to all but disappear over the next decade.

each format. Broadcasters face competition for video advertising from pay TV, the Internet and, increasingly, mobile and social.

If audiences and advertisers no longer draw clear distinctions between local broadcast TV and other media, as the data demonstrate, the Commission should not either. A failure to properly evaluate marketplace competition for viewers and advertisers is inconsistent with the FCC's obligations under Section 202(h).[155] This failure will also undermine the FCC's localism goal, if it continues to maintain, based on a wholly unrealistic view of competition, disparate and competitively harmful ownership restrictions on the remaining locally-oriented outlets.

C. THE TOP-FOUR RESTRICTION AGAINST MERGERS IN LOCAL TV MARKETS CAN NO LONGER BE JUSTIFIED BY THE FACTS

If the Commission considers broadcast competitors including pay TV and the Internet in its review of the local TV ownership rule, as it should, then it cannot rationally retain the existing restriction against mergers among the top four stations in every market. Even absent such a change in analytical method, however, it is still arbitrary to maintain the top-four restriction for every market in the country.

In the Notice, the Commission again tentatively concludes that the market has not changed sufficiently for it to alter or eliminate its existing top-four restriction. With little supporting new evidence, the Notice states that mergers among the top-four rated stations in any given market would be "deleterious to competition" because top-four combinations would result in one firm have a "significantly larger market share than

[155] *See* Sections II and III.

other firms in the market" and "could create welfare harms."[156] As shown above, this analysis is faulty because it is based on a 20th century view of the video marketplace that ignores competition from numerous sources.

The Notice's rationale for retaining the top-four restriction is also based on an incorrect belief that a "cushion," or natural break, exists between the 4th and 5th ranked stations in the market. As NAB has shown in previous filings, this notion of a natural break is not supported by the facts, and is certainly not common enough throughout all markets to justify an across-the-board rule. NAB has previously submitted empirical evidence showing that, particularly in small to medium-sized markets, the top one or two stations often earn significantly higher revenue than other stations in the market, and that a more significant break or "cushion" in many of those markets exists between either the first and second ranked stations, the second and third ranked stations, or the third and fourth ranked stations.[157]

The Notice improperly dismissed this previously submitted evidence with the comment that it "evaluates revenue share" and thus "does not disturb the Commission's previous determination that audience share is the appropriate metric for purposes of the top-four prohibition," citing a footnote in the 2002 Biennial Review Order.[158] As an initial matter, we observe that the footnote cited by the Notice as support for disregarding

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[156] Notice at ¶ 44 (citing 2002 Biennial Review Order and 2006 Quadrennial Review Order for support).

[157] *See* NAB Comments, MB Docket No. 09-182 (Mar. 5, 2012) (NAB 2012 Ownership Comments) at 22-23; NAB Reply Comments, MB Docket No. 09-182 (Apr. 17, 2012) (NAB 2012 Ownership Reply Comments), at 11-14 and Attachment A, BIA/Kelsey, Reforming Local Ownership Rules: Station and Market Analyses (Apr. 17, 2012).

[158] Notice at n. 103.

NAB's revenue analysis contains no discussion of station revenue evidence or the relative merits of ratings versus revenue as an analytical tool.[159] Revenue data, in fact, are highly relevant to competition analyses; such data show the financial soundness of television stations and their prospects for competitive viability. Banks and investors look to revenue and related cash flow and profit data to make decisions about loans and investments.

In any event, updated ratings and revenue analyses are consistent and again demonstrate that in many markets, especially smaller ones, one or two television stations far outpace the others and that lower rated and lower earning stations could combine and not equal the audience share or revenues of the top stations. Specifically, NAB examined the 140 markets that have at least four full-power commercial television stations and in which, according to Nielsen, the top 4 stations in terms of audience share are full-power stations. In 69 of these 140 markets, the combination of the all day audience share of the third and fourth rated stations is less than the top rated station. Three quarters of these 69 markets are small (DMAs 70-210).[160]

Unsurprisingly, an examination of the advertising revenue shares of all commercial television stations reveals a similar pattern. For 2013, in 64 of same 140

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[159] Footnote 407 of the 2002 Biennial Review Order merely rejects a claim by one commenter that audience share rank is problematic in evaluating local ownership because rank varies from quarter to quarter.

[160] NAB analysis of Nielsen Media Research data for November 2013. We also examined the 157 markets that have at least four full-power commercial television stations, but, in a limited number of which, a low power or Class A station or a multicast stream is in the top 4 in terms of audience share. In 80 of these 157 markets that have four or more full-power commercial stations (including those where a low power, Class A or multicast stream is among the top four rated), the combination of the all-day audience share of the third and fourth rated stations is less than the top rated station.

markets discussed above, the combination of the revenue shares of the third and fourth ranked stations is less than the revenue share of the leading station, often by a very substantial amount – as much as 30-40 percentage points in some markets. The vast majority of these 64 markets are mid-sized or small (DMAs 50+) – only four markets in the top 50 are among them.[161]

A closer analysis of advertising revenue data shows many markets with significant break points other than between the fourth and fifth ranked stations. In 35 of these same 140 markets (25% of the markets), the revenue share of the second ranked station is ten or more percentage points higher than the third ranked station; only one of these 35 markets is among top 50 DMAs. In 46 of the 140 markets (33%), the revenue share of the highest ranked station is ten or more percentage points higher than the second ranked station; only four of these 46 markets are among the top 50 DMAs.[162]

The very small revenue shares of many fourth ranked stations also should be noted. For example, the revenue share of the fourth ranked station in Lafayette, LA (DMA 122) is only 1.4% -- and we stress that is the station's share of the revenues of only the commercial broadcast television stations in the market.[163]

The fourth ranked station in a number of other markets earns ten percent or less of the broadcast TV ad revenues in the market and an even more negligible share of total local ad revenues. For example, the fourth ranked TV station in Eureka, CA (DMA

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[161] *See* Attachment B, Mark R. Fratrik, Ph.D., BIA/Kelsey, Local Television Station Revenue Share Analysis: An Update (July 23, 2014) at 10-11.

[162] *Id.* at 5-7.

[163] *Id*. at 9.

195) earns only 9.8% of the broadcast TV station ad revenues in that market, and its share of total local ad revenues in the market is a miniscule 0.92%.[164]

NAB's updated revenue and audience share analyses significantly undercut the claim that a combination of two top 4 stations would create a locally-dominate station that would harm competition in the market. On the contrary, as the evidence makes clear, in many cases, a combination of two of the top 4 rated or earning stations would likely enhance competition, especially in small and medium-sized markets, by allowing the creation of a more viable competitor to the higher ranked stations. With new revenues gained from economies of scale and scope, a combined firm – now a more legitimate competitor to top ranked stations, MVPDs and online outlets – would be able to provide local viewers with a more appealing, and competitive, product.

NAB has also already refuted the contention that a combination of two top 4 stations in the same market would "reduce incentives for local stations to improve their programming."[165] This claim is illogical on its face, as it assumes that an owner of two TV stations somehow has less incentive to maximize its audiences and, thus, less incentive to maximize its advertising revenues and profits than the owner of a single station.[166] As the D.C. Circuit Court of Appeals has explained, "the use to which an asset," including a spectrum license, "is put is based" on "what it will return to its owner in the future."[167] There is no rational basis for the Commission to conclude that an

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[164] *Id.*

[165] Notice at ¶ 44.

[166] *See* NAB 2012 Ownership Comments at 23-24.

[167] *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d.965, 969 (D.C. Cir. 1999) (finding FCC's analysis of economic incentives of radio spectrum licensees to be arbitrary and capricious).

owner of two TV stations in the same market will have any "reduced incentives" to provide quality programming to attract audiences and advertisers.

For all these reasons, the Commission should eliminate the top four restriction, or at least modify the rule to account for substantial market variability and the uncompetitive position of many stations ranked among the top four in their markets.

D. THE EIGHT-VOICES TEST DOES NOT REFLECT THE REALITIES OF THE LOCAL TV MARKETPLACE AND IS AN IMPEDIMENT TO ROBUST COMPETITION IN LOCAL MARKETS

The other piece of the local television rule, the "eight-voices" test, similarly and erroneously assumes that broadcast TV stations exist in a separate competitive universe that lacks MVPDs, the Internet and online video services. Indeed, ignoring the competitive realities described at length in Sections III. and IV.B is the only possible way to justify counting only broadcast TV stations as "voices."

Even on its own terms, however, the eight-voices standard makes no sense. The Notice tentatively concludes, with no analysis and no supporting evidence, to retain the eight-voices test as a means to "ensure robust competition among local television stations."[168] This test is designed to ensure that each market should have a minimum of four stations affiliated with the Big Four networks and four independently owned and operated stations unaffiliated with these major networks before the Commission will allow in-market common ownership of more than one station.[169]

This standard is wholly unrealistic. A number of small markets do not have stations affiliated with all four major networks, let alone any additional stations; in these

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[168] Notice at ¶ 54.

[169] *See* Notice at ¶ 54.

smaller markets, even those stations affiliated with major networks often struggle to maintain profitability, but cannot form efficient ownership structures due to the eight-voices test.[170] The Commission offers no real rationale for its assertion that four independent stations (rather than one, two or three) are essential to maintaining competition. And, it is simply a fiction to assert that a crop of independent stations throughout the nation is effectively competing with – and putting any significant competitive pressures upon – major network affiliated stations in the market.[171] The Commission has previously recognized that the "economic health of independent broadcasters" is "particularly tenuous," even in the top 25 markets.[172]

The Commission also has acknowledged the "hardship" for "broadcasters in smaller markets, who generally have more restricted revenue opportunities."[173] As this chart makes clear, stations in small and medium sized markets compete for a much smaller pie of available broadcast television advertising revenue than stations in larger markets:

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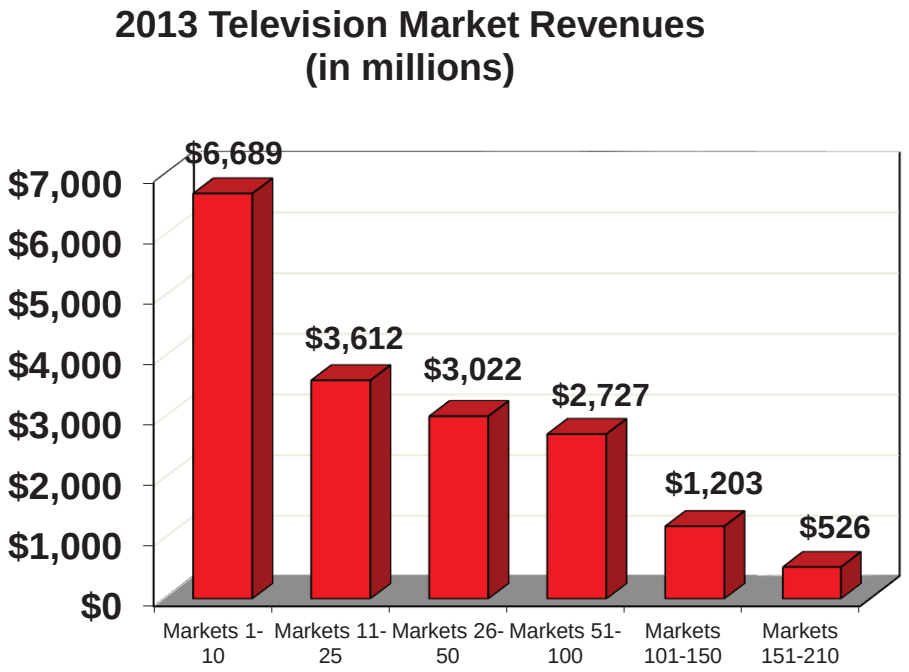
[170] *See* NAB Comments, MB Docket No. 09-182 (July 12, 2010) (NAB 2010 Ownership Comments) at 78-81, and Attachment C; NAB 2012 Ownership Comments at Attachment B.

[171] *See* NAB 2012 Ownership Comments at 27.

[172] Third Report and Order and Third Further Notice of Proposed Rulemaking, CS Docket No. 98-120, FCC 07-170 (Nov. 30, 2007) at ¶ 55 n. 192.

[173] *Id*. *Accord* 2002 Biennial Review Order at ¶ 201.



Source: BIA Media Access Pro.

Average advertising revenue per station falls from $45,502,000 in the top ten markets to only $3,208,000 per station in markets 151-210. Overall, stations in the top ten DMAs receive 38 percent of television ad revenues across all markets, while stations in the smallest 110 DMAs (ranked 101-210) receive only ten percent of all advertising dollars.[174]

Given the economic hardship facing independent stations (even in large markets) and many network affiliated stations in small markets (especially the third and fourth ranked stations), relatively few have the wherewithal to produce local news and public affairs programming.[175] This problem will only worsen due to the FCC's recent action

[174] *See* Attachment C.

[175] *See* NAB 2012 Ownership Comments at 27-29. NAB discussed the economics of local news production in smaller markets in detail in a filing in March. *See Ex Parte* Submission of NAB, MB Docket No. 09-182 (Mar. 21, 2014) at 6-10 (NAB Mar. 21 *Ex Parte*).

effectively preventing stations from forming joint sales agreements. The Commission in fact previously observed that smaller markets are less able to support local television news operations.[176] Allowing stations to combine more freely and take advantage of economies of scale and scope can directly assist in local news production,[177] improve the technical capabilities of stations, including upgrades to high-definition local broadcasts and the acquisition of improved weather radar equipment, and enable the acquisition of more costly programming.[178] Allowing additional station combinations also should not impair – and indeed may well promote – viewpoint diversity.[179]

Retaining the "eight voices test" in today's marketplace acts as an impediment to effective competition and a more level competitive playing field for local TV stations -- and, thus, will impede better service to local communities. The Commission cannot justify its retention by noting "consisten[cy]" with the 2006 Quadrennial Review Order

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[176] *See 2010 Quadrennial Regulatory Review*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489 at ¶ 53 (2011) (2011 NPRM) (citing FCC staff analysis which found that, in nearly ninety percent of markets with seven or more stations, at least four of the stations provide at least thirty minutes of local news per day, as compared to only 22.5 percent of markets with six or fewer stations).

[177] *See* NAB March 21 *Ex Parte* at 6-10.

[178] *See* NAB March 21 *Ex Parte* at 11-16.

[179] *See* Attachment D. Illustrative Studies Showing That Factors Other Than Separate Ownership Drive Viewpoint/Content Diversity on Media Outlets; *see also* Lisa M. George and Felix Oberholzer-Gee, Diversity in Local Television News (2011) at 18 (finding that "greater concentration increases the number of politicians covered in local news"); Adam Rennhoff and Kenneth Wilbur, Local Media Ownership and Viewpoint Diversity in Local Television News (Dec. 2012 update) (concluding that viewpoint diversity is positively associated with increases in the number of co-owned television stations within a market); Matthew Spitzer, *Television Mergers and Diversity in Small Markets*, 6 J. Competition L. & Econ. 705 (2010) (concluding that allowing jointly owned TV stations in small markets will produce viewpoint diversity in local news and public affairs programming).

and "pruden[ce]."[180] Such justifications in no way satisfy the demands of Section 202(h).[181]

E. AT THE VERY LEAST, THE COMMISSION SHOULD STREAMLINE THE FAILING STATION WAIVER STANDARD

The Notice (at ¶ 60) seeks comment on possible changes or alternatives to the existing failed/failing station waiver.[182] If the Commission is unwilling to reform the local television ownership rule to reflect current competitive conditions, it should at least revise the rule's waiver standards to ensure that financially struggling stations, including those in smaller markets, can continue to serve their audiences and maintain a significant local presence.

The problems with the existing failing station waiver standard are well known. First, it is not available where the struggling station has more than a four percent all-day audience share. Financially troubled network-affiliated stations (such as those in a number of smaller markets) usually will be unable to meet this test given the relative popularity of their network programming.[183] Second, the policy requires stations to demonstrate negative cash flow for the previous three years. In the context of an application process, this essentially amounts to a four-year wait for a decision on a waiver. It also fails to address the growing problem of distressed stations that, particularly to avoid defaults in their debt covenants, are forced to forego the investments necessary to provide high quality local news and other valued

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[180] Notice at ¶ 54.

[181] *See* Sections II and III.

[182] *See* 47 C.F.R. § 73.3555, Note 7.

[183] *See, e.g.*, Comments of Sainte Sepulveda, Inc., MB Docket No. 09-182 (July 12, 2010) at 2; Comments of NAB, MB Docket No. 09-182 (July 12, 2010) at 84-85.

programming. These concerns will only become more acute as television stations unwind long-standing joint sales agreements that provided necessary economies of scale and scope, especially in medium and small markets.

To remedy the problems identified above and streamline the current failing station waiver process, NAB proposes three changes:

First, the Commission should eliminate the four percent audience share standard, and base waiver eligibility on financial factors. In response to our inquiries, broadcast representatives reconfirmed that many stations with audience shares of more than four percent are nonetheless unprofitable. A rigid ratings threshold is not the most appropriate method for evaluating stations' economic viability and their ability to obtain needed investment.

Second, the Commission should require that applicants show one year of negative cash flow, rather than three. The current requirement helps ensure that a "failing" station will become a "failed" one. Because studies have demonstrated that valued services, including news and public affairs programming, are closely connected to station revenues and profitability,[184] it would serve the public interest for economically struggling stations to obtain relief via a waiver more quickly.

Third, the Commission should adopt a 180-day "shot clock" to complete its review of waiver requests. If the shot clock expires without the Commission approving or denying an application, the waiver would be deemed granted. Such a requirement

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[184] *See, e.g.*, Daniel Shiman, The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming (2007) at 21; Philip Napoli, *Television Station Ownership Characteristics and Local News and Public Affairs Programming: An Expanded Analysis of FCC Data*, 6 Info: The Journal of Policy, Regulation, and Strategy for Telecommunications, Information and Media 112,119 (2004).

would ensure that failing stations are granted expedited review of time-sensitive requests, which should assist struggling stations in making viable financing arrangements.

NAB strongly urges the Commission to consider these three changes to the failing station waiver process. We propose no changes to other aspects of the waiver standard, including the public interest showing or the requirement to demonstrate that the in-market buyer is the only entity ready, willing and able to operate the failing station.[185]

V. RETAINING THE LOCAL RADIO OWNERSHIP RULE UNCHANGED WOULD BE ARBITRARY AND CAPRICIOUS, AND CONTRARY TO SECTION 202(h)

NAB opposes the tentative conclusion to retain the local radio rule without modification. To justify its decision under Section 202(h), the Commission must show that competition in the audio marketplace has not changed in nearly two decades. The FCC cannot make this showing. Nor can the Commission establish that the current rule promotes localism or viewpoint diversity.

A. THE LOCAL RADIO OWNERSHIP RULE MUST CHANGE TO REFLECT CURRENT COMPETITIVE MARKETPLACE CONDITIONS AND TO SERVE THE FCC'S GOALS

In the 1996 Act, Congress directed the FCC to set the existing local ownership limits, and to review them periodically to ensure that they remain necessary in the public interest as the result of competition. NAB urges the Commission to continue the

[185] NAB additionally proposes that the "failed" station waiver standard be slightly broadened to include stations in *voluntary* bankruptcy or insolvency proceedings, not just *involuntary* proceedings as under the current rule. A bankrupt station's ability to serve its community is seriously impaired, whether the bankruptcy proceeding is voluntary or involuntary.

deregulatory process Congress began and reform the local radio restrictions in light of current competitive realities.

The audio marketplace of 2014 scarcely resembles the market of 1996. Consumers today obtain music and other audio programming via platforms and devices that did not exist 18 years ago, including satellite, online, smart phone applications, and other mobile devices. As discussed in Section III, these technologies can no longer be characterized as nascent – they are major marketplace competitors. An estimated 124 million people (47% of Americans ages 12 and older) have listened to online radio in the last month, with 94 million listening to online radio weekly.[186] An estimated 160,000,000 people (or 61% of Americans ages 12 and older) own smart phones, reflecting over 500% growth in smart phone ownership in just five years.[187] For Americans under age 55, smartphone penetration now approaches three-quarters.[188] Smartphones allow consumers to access music or information from nearly any source.[189] Pandora alone has been downloaded by 50% of smartphone owners,[190] and online radio listening in cars via mobile phones continues to increase.[191] Major companies, such as Google, Apple and Amazon, now offer competing audio services. According to estimates,

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[186] *See* The Infinite Dial 2014, at 5, 7.

[187] *Id*. at 34.

[188] *Id.* at 35.

[189] For example, about 40% of smartphone owners are "habitual" social network users (i.e., they use social networking websites/services several times a day), and 51% of audio podcast listeners now listen most often via a smartphone or tablet. *Id*. at 44, 51.

[190] *Id.* at 36.

[191] *Id*. at 10-11.

subscribers to digital music subscriptions services, led by Spotify, are expected to exceed 38 million in 2014.[192]

These rapid and significant changes in the audio marketplace will only intensify, as they are driven by younger consumers. For example, for Americans 12-24 years old, YouTube is the top source for keeping up-to-date with music, followed by Pandora and friends and family;[193] 78% of this age group own smartphones;[194] and close to two-thirds of this age group listen to online radio weekly.[195]

1. UNDER SECTION 202(h), THE FCC CANNOT IGNORE THE EMERGENCE AND GROWTH OF COMPETING TECHNOLOGIES AND SERVICES

As discussed in Section III and in connection with the local television rule in Section IV, the Commission cannot disregard or unreasonably discount the competitive impact of new platforms and services merely because not all consumers utilize them. New technologies and services need not "replace[]" broadcast radio before the FCC is obligated to consider their competitive effects.[196] Such an "impossible" standard is contrary to Section 202(h) and arbitrary and capricious.[197] As shown above, the Commission cannot rationally disregard online options when examining competition in the audio marketplace, given that 232 million Americans were using the Internet in 2013 and that only 6 percent of Americans were without access to fixed high-speed

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[192] *See* "Economics of Mobile Music," SNL Kagan (July 25, 2014) (showing that subscribers to the service Spotify grew by nearly 70 percent between 2013 and 2014).

[193] *Id*. at 54.

[194] *Id*. at 35.

[195] *Id*. at 8.

[196] Notice at n. 204 (noting that "alternate [audio] platforms, while important, have not yet replaced broadcast radio stations").

[197] *See* Section II.

broadband in 2012.[198] Indeed, to claim that "non-broadcast sources of audio programming are not yet meaningful substitutes for broadcast radio stations with respect to either listeners or advertisers,"[199] when one single online competitor (Pandora) has 76,000,000 active users and a 9.28% share of total U.S. radio listening plainly ignores reality.[200]

Tellingly, the Commission itself has concluded that the very "sustainability" of AM radio "has been threatened by the migration" of consumers, particularly younger ones, to "newer media services," including "satellite radio, personal media players, podcasts, and audio streams provided over the Internet."[201] For at least the AM radio service, the Commission thus effectively has recognized that newer media services are "meaningful substitutes" for broadcast radio; while AM radio faces greater technological challenges than FM, the Commission cannot logically contend that FM stations are somehow immune from this "migration" of listeners to new "[d]igital media sources."[202]

The Notice's effort (at ¶ 83) to discount the competitive impacts of other audio providers because they are generally "national platforms" is also misguided. As described in detail in Section III, so-called "national" platforms that are available in local markets throughout the country fragment audiences and provide viable and growing

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[198] *See* Section III.

[199] Notice at ¶ 82.

[200] *See Pandora Announces April 2014 Audience Metrics*, Pandora.com (May 6, 2014), *available at* http://investor.pandora.com/phoenix.zhtml?c=227956&p=irol-newsArticle&ID=1927379&highlight.

[201] Revitalization of the AM Radio Service, 28 FCC Rcd 15221, ¶ 4 (2013) (also discussing "steady decline in AM listenership"). *Id*. at ¶ 6.

[202] *Id*. at ¶ 4.

options for advertisers. "After less than a decade of existence, smartphones and tablets this year will draw more money from advertisers than the centuries-old newspaper industry or the nearly century-old radio sector, a sign of just how rapidly technology is transforming media habits."[203] Spending on mobile advertising "will soar 83% to nearly $18 billion in 2014."[204] Increased competition for advertising has already adversely affected radio advertising revenues. For example, SNLKagan calculated that advertising revenue for local radio had a compound annual growth rate (CAGR) of negative 3.1% from 2003-2012.[205] SNL Kagan similarly projects that local broadcast radio's market share of advertising revenue will decline, with a projected negative 3.1% CAGR from 2013-2022.[206]

The Notice presents no rational basis for ignoring these continuing changes in audio listening and advertising. Certainly the Notice's reliance on data, analyses and conclusions from eight to twelve years ago does not satisfy Section 202(h). For example, the Notice finds "appropriate" the tentative conclusion from the 2011 NPRM that the relevant market for review of the radio ownership rule should include only broadcast radio stations.[207] This tentative conclusion ignores the reality of today's market, and appears based on previous "Commission decisions not to expand the market and rule to include non-broadcast sources of audio programming" in the 2002

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[203] Steven Perlberg, *Mobile-Ad Spending Leaps, but Trails User Growth*, The Wall Street Journal (July 22, 2014).

[204] *Id.* (citing research from eMarketer).

[205] *See* Derek Baine, *Ad Market Decelerates in 2013, Projected to be up 1.4% to 223B*, SNLKagan (Dec. 17, 2013).

[206] *Id.*

[207] Notice at ¶ 79.

and 2006 ownership reviews.[208] Although the Notice recognizes that "the radio listening market broadly speaking might be defined to include satellite radio or Internet audio streaming," it nonetheless declines to broaden the market, stating that this decision is "consistent" with past FCC decisions.[209] The Commission cannot, in accordance with its statutory obligations, retain the current radio limits based on a market analysis from 2002 or 2006.[210]

2. The Notice Does Not Establish That the Existing Local Radio Limits Promote Localism or Viewpoint or Program Diversity

To attempt to justify retention of the local radio rule, the Notice generally asserts that "a competitive local radio market helps to promote localism."[211] The Notice makes this statement without citing any empirical evidence showing that the existing ownership caps promote localism. Indeed, aside from general statements about the positive effects on localism of competitive markets, the Commission "has never found that the local radio ownership rule significantly advances our interest in localism."[212] If the Commission now intends to justify retention of the existing local radio rules based on localism concerns, it must acknowledge and justify this reversal in course.[213] The empirical evidence from previous ownership reviews, however, indicates that the local

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[208] Notice at n.199.

[209] Notice at n.199.

[210] *See Prometheus I*, 373 F.3d at 391 (discussing the "fresh look" required by Section 202(h)); *Sinclair*, 284 F.3d at 164 (rejecting "wait-and-see approach" for reviewing ownership rules).

[211] Notice at ¶ 74.

[212] 2006 Quadrennial Review Order at ¶ 124 (emphasis added); *accord* 2002 Biennial Review Order at ¶ 304 ("we see little to indicate that the local radio ownership rule significantly advances our interest in localism.").

[213] *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Mountain States Telephone and Telegraph Co. v. FCC*, 939 F.2d 1021, 1034 (D.C. Cir. 1991).

radio restrictions are more likely to inhibit localism than foster it.[214] In short, localism concerns do not justify maintenance of the current radio ownership limits.

Similarly, the Notice states that "the radio ownership limits promote viewpoint diversity."[215] This assertion, however, is inconsistent with multiple statements made elsewhere in the Notice that the Commission has recognized "since at least 1970 that radio does not play a dominant role in promoting viewpoint diversity" and that "consumers' reliance on radio news has declined steadily over the past two decades."[216] The Commission cannot rationally claim that radio contributes to viewpoint diversity for purposes of one of its ownership rules but at the same time assert that radio lacks importance for viewpoint diversity in the context of two other ownership rules. Such inconsistency is arbitrary and capricious.[217] The Notice contains no empirical evidence supporting the claim that the current numerical caps are needed to preserve viewpoint diversity, a claim that appears inherently unlikely in the media marketplace of 2014.

At least with regard to the thousands of music-oriented radio stations, NAB also continues to believe that diversity of programming content (rather than diversity of

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[214] Studies commissioned by the FCC in 2007 demonstrated that common ownership in a local radio market increases the likelihood a station will air public affairs programming. *See* Kenneth Lynch, Ownership Structure, Market Characteristics and the Quantity of News and Public Affairs Programming: An Empirical Analysis of Radio Airplay (2007) at 27 (finding that the quantity of public affairs programming aired by a station increased by 8%-10% if the parent of that station owned another station in the market). Moreover, "[h]aving a sibling news station in the market appears to increase a [radio] station's propensity to adopt a news format by about [fifty percent]." Craig Stroup, Factors that Affect a Radio Station's Propensity to Adopt a News Format (2007) at 16.

[215] Notice at ¶ 74.

[216] Notice at ¶¶ 146-47 (discussing newspaper/radio cross-ownership)*; accord id.* at ¶¶ 212-13 (discussing radio/television cross-ownership).

[217] *See, e.g., Sinclair*, 284 F.3d at 162-65 (finding FCC's inconsistent counting of "voices" in two different local ownership rules to be arbitrary and capricious).

viewpoint) is the most important type of diversity to radio station listeners. This type of diversity is furthered by common ownership. Numerous studies, including some commissioned by the FCC, have found that common ownership of radio stations results in the offering of more diverse programming to audiences.[218] In addition to these, NAB has previously identified eight additional studies, all finding that common ownership of radio stations results in the offering of more diverse and more targeted programming to audiences.[219]

Because the Commission has not shown that the existing radio ownership caps promote localism or diversity or are necessary in light of competition in the audio marketplace of 2014, they cannot be retained without modification.

B. THE FCC ALSO SHOULD CONSIDER OTHER MEASURES TO PROVIDE BROADCASTERS MORE FLEXIBILITY TO SERVE THEIR LISTENERS

If, despite the changes in the marketplace since 1996, the Commission remains unwilling to reform the numerical radio limits, it should nonetheless consider eliminating or modifying the AM/FM subcaps. Elimination or reform of the subcaps would provide

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[218] Commission studies in the 2010 and 2006 reviews indicated that "higher concentration [of ownership in a market] promotes variety" in programming. Joel Waldfogel, Radio Station Ownership Structure and the Provision of Programming to Minority Audiences: Evidence from 2005-2009 (2011) at 25-27 (concluding that stations in large ownership groups tend to attract more listeners than do stations in smaller ownership groups and suggesting that higher concentration of ownership in a market promotes variety); *accord* Tasneem Chipty, CRA International, Inc., Station Ownership and Programming in Radio (2007) at 44-45 (finding that "more concentrated markets are associated with more, not less, program variety" and that "consolidation of radio ownership does not diminish the diversity of local format offerings").

[219] *See* NAB Comments in MB Docket No. 06-121 (filed Oct. 22, 2007), at 21-22.

increased flexibility to stations without increasing the number of stations that a single entity could own in any local market.[220]

The Commission has previously recognized "the daunting technical and competitive challenges that AM broadcasters face" and their significant declines in listenership.[221] The Commission therefore should further consider repealing or modifying the subcaps to allow owners of AM stations to form more competitively viable ownership structures. Reforming the AM subcap would further the goals of the pending proceeding to revitalize AM broadcasting.

Additionally, the Notice (at ¶ 107) requests comment on whether to adopt a specific waiver standard for radio. NAB urges the Commission to adopt a waiver standard for radio consistent with Section 202(b)(2) of the 1996 Act. That section expressly authorizes the Commission to permit common ownership of radio stations beyond the numerical limits specified in Section 202(b)(1) if such ownership would "result in an increase in the number of radio broadcast stations in operation."[222] Consistent with statutory language and Congressional intent, the Commission should make clear it will grant waivers in such circumstances to increase service to the public (e.g., where waivers would allow dark stations to return to the air, prevent a bankrupt or

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[220] Beyond determining whether to eliminate or retain the existing AM/FM subcaps, the Commission must also consider the continuing necessity of the current numerical subcap limits. For instance, in markets with 45 or more stations, the existing rules limit a single entity to owning up to eight commercial stations, but no more than five can be in the same service (AM or FM). Even if the Commission determines to retain subcaps generally, Section 202(h) requires it to explain why five is the appropriate subcap level in the largest markets (rather than, say, six or seven) and why four or three is the proper subcap in smaller markets, given the increasingly competitive audio marketplace.

[221] Revitalization of the AM Radio Service, 28 FCC Rcd 15221, ¶¶ 6, 16 (2013).

[222] Telecommunications Act of 1996, Section 202(b)(2).

financially struggling station from going off the air, or facilitate the construction of an unbuilt construction permit for a radio station). There is no reason for the Commission to decline to grant waivers in these or similar circumstances.

VI. THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE DOES NOT SERVE THE PUBLIC INTEREST AND MUST BE REPEALED

Because the newspaper/broadcast cross-ownership rule does not promote competition or diversity and harms localism it should be eliminated. Indeed, given the extensive empirical evidence and the record in FCC proceedings dating back to 1996, the rule should be long gone. Failure here to take any action is arbitrary and capricious and contrary to Section 202(h).

A. A RULE THAT MAY HAVE BEEN RATIONAL IN 1975 CANNOT BE JUSTIFIED IN 2014

Observers of the media marketplace when the newspaper/broadcast cross-ownership ban was adopted in 1975 could not have imagined the marketplace of 2014. Entirely new platforms and outlets have been created, and traditional media struggle to thrive, or even survive. Newspapers in particular are struggling like never before, as consumers obtain news and information from an ever increasing variety of sources and advertisers follow consumers' eyes and ears.[223]

The "decline of newspapers" recently hit a "stunning milestone."[224] According to April 2014 reports, print advertising revenues, after adjusting for inflation, are at their lowest level since 1950, when the newspaper industry began tracking data (and when

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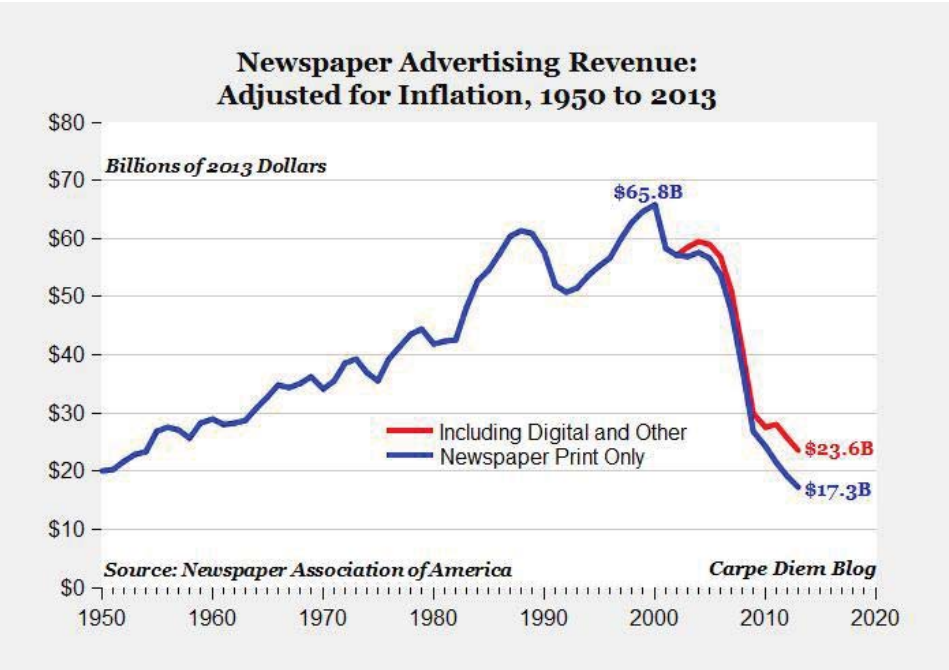
[223] *See* Section III.

[224] Jordan Weissmann, *The Decline of Newspapers Hits a Stunning Milestone*, Slate (Apr. 28, 2014).

the U.S. economy was about one-seventh its present size).[225] The sharp decline in recent years is remarkable, with print ad revenues decreasing over 50 percent just since 2008 and by nearly 70 percent since 2003.[226] Digital advertising revenues do not begin to compensate for the precipitous decline in print ad revenue; total newspaper ad revenue, including online, in 2013 was lower than the level of newspaper print advertising in 1954, after adjusting for inflation.[227] The graph below illustrates the plight of the newspaper industry today:



The "dramatic decline in newspaper ad revenues since 2000" ranks as "one of the most significant and profound" cases of "creative destruction in the last decade, maybe in a generation."[228] A rational response to these severe declines in

[225] Mark Perry, *Creative Destruction: Newspaper Ad Revenue Continued Its Precipitous Free Fall in 2013, And It's Probably Not Over Yet*, Carpe Diem, American Enterprise Institute (Apr. 25, 2014); Weissmann, *The Decline of Newspapers*.

[226] Mark Perry, *Creative Destruction*.

[227] *Id*.

[228] *Id*.

newspaper revenues, and consequent declines in news production expenditures, would be to allow owners of news outlets to take advantage of economies of scope by jointly owning newspapers and broadcast stations.[229] Because broadcasting generally, and local news production specifically, are "subject to strong economies of both scale and scope," preventing news outlets from achieving these economies will only exacerbate their struggles to invest in news production and even to survive as viable competitors in today's marketplace.[230] A rule that contributes to challenges in local news production – which the Commission insists that it values – must be reformed.

The 1998 biennial review report observed that the newspaper cross-ownership prohibition might not be necessary to achieve its intended public interest benefits, and the Commission commenced a review of the rule in 2001.[231] The 2002 biennial review decision acknowledged that the media marketplace had undergone significant changes, and recognized that the newspaper cross-ownership rule should be modified.[232] The Third Circuit Court of Appeals upheld the FCC's "determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest."[233] The 2006 ownership review again concluded that a ban on newspaper cross-ownership "is not necessary in the public interest."[234]

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[229] *See* Adam D. Rennhoff and Kenneth C. Wilbur, Local Media Ownership and Media Quality (2011) at 15 (FCC-commissioned study questioning basis for keeping newspaper/broadcast cross-ownership rule).

[230] Jeffrey A. Eisenach and Kevin W. Caves, The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting (June 2011), at 2-3, Attachment to NAB Reply Comments, MB Docket No. 10-71 (June 27, 2011) (incorporating in MB Docket No. 14-50 by reference).

[231] *See* Notice of Proposed Rulemaking, 16 FCC Rcd 17283 (2001).

[232] *See* 2002 Biennial Review Order at ¶¶ 86-128; 327.

[233] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 398 (3d Cir. 2004).

[234] 2006 Quadrennial Review Order at ¶ 19.

Yet, despite the FCC's previous conclusions, the court approval, and the continuing rapid changes in the market marketplace as a whole and in the newspaper industry specifically, the absolute prohibition on cross-ownership still remains. Especially in light of the lengthy record showing that the current ban "is not necessary in the public interest," the Commission's failure here to "determine" whether the rule remains in the public interest and to "repeal or modify" it if not, is contrary to Section 202(h) of the 1996 Act and administrative law principles, as discussed in Section II.

B. THE CROSS-OWNERSHIP RULE DOES NOT FURTHER COMPETITION, AND HARMS LOCALISM

The Commission has already determined on multiple occasions that the newspaper/broadcast cross-ownership rule is not necessary to promote competition.[235] The Commission also has concluded in multiple decisions that cross ownership "may enable commonly owned properties to produce and disseminate more and sometimes better local news," thereby benefiting localism.[236] Indeed, the Commission previously found that cross-ownership restrictions "may in fact harm localism."[237] The current Notice, however, attempts to discount the harms to localism resulting from continuing restrictions by asserting that "localism benefits are not guaranteed" by cross-ownership.[238] As shown above, the Commission cannot, consistent with Section 202(h)

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[235] *See* Notice at ¶ 141; 2011 NPRM at ¶ 89; 2006 Quadrennial Review Order at ¶ 39 n.131; 2002 Biennial Review Order at ¶ 330.

[236] Notice at ¶ 135; *accord* 2011 NPRM at ¶ 98; 2006 Quadrennial Review Order at ¶ 42; 2002 Biennial Review Order at ¶¶ 342-54.

[237] 2002 Biennial Review Order at ¶ 330.

[238] Notice at ¶ 135; *see also id*. at ¶ 137 (claiming that benefits for local news production are not "assured" from cross-ownership).

and administrative law requirements, employ such an "impossible" standard for its review of the ownership rules.

In any event, extensive empirical evidence shows that permitting newspaper cross-ownership is close to a virtual guarantee of local programming benefits, including increased and higher quality local news. NAB has compiled from the record in previous proceedings a non-exhaustive list of studies finding that cross-ownership promotes production of local programming, especially news, valued by viewers. This research by FCC staff, academics, industry analysts and others provides the requisite "assurance" for the Commission to promote localism by repealing the cross-ownership rule. The relevant studies include:

- A FCC study concluding that newspaper-owned TV stations offered 6% more local news, 9% more local non-entertainment programming and 12% more local programming than other stations.[239]
- A paper determining that cross-ownership results in higher expenditures for TV news programming.[240]
- Research finding a significant, positive relationship between local TV news ratings and cross-ownership by a local newspaper.[241]
- A report stating that "television stations co-owned with a daily newspaper in the same local market broadcast 41 minutes more of local programming" in a composite week than non-cross-owned TV stations.[242]

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[239] 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, 50 FCC 2d 1046 (1975), Appendix C.

[240] John C. Busterna, *Ownership, CATV and Expenditures for Local Television News*, 57 Journalism Quarterly 287, 289 (1980).

[241] Allen M. Parkman, *The Effect of Television Station Ownership on Local News Ratings*, 64 Rev. Econ & Stat. 289 (1982).

[242] John C. Busterna, *Television Station Ownership Effects on Programming and Idea Diversity: Baseline Data*, 1 J. Med. Econ. 63, 65-66 (Fall 1988).

- Research showing that a cross-owned station TV aired 61 hours of non-entertainment programming, far more than other network affiliates in the Dallas, TX market.[243]
- A study comparing DMAs with a newspaper/television combination with the immediately higher-ranked DMA and finding that five of the six DMAs with cross-owned combinations aired more non-entertainment programming than their paired DMA.[244]
- A study determining that newspaper-owned TV stations lead the early news day part ratings and delivered 43% and 193% more audience share than the second-ranked stations and the third-ranked stations, respectively.[245]
- A FCC study finding that TV stations in intramarket newspaper combinations garnered higher ratings and tallied more industry awards than non-combined stations.[246]
- A news programming quality analysis finding a link between newspaper cross-ownership and higher quality television news.[247]
- A study concluding that newspaper ownership is positively related to the provision of local news programming on TV stations.[248]
- An update to a previous study showing that DMAs with newspaper/TV combinations continue to provide more non-entertainment TV programming than similar DMAs without cross-owned stations.[249]

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[243] *See* Comments of Belo, MM Docket No. 98-35 (filed July 21, 1998) at Appendix C.

[244] *See* Comments of Media General, MM Docket No. 01-235 (Dec. 3, 2001) at Appendix 5 (analysis of Dr. Samuel Lichter).

[245] Comments of Victor B. Miller & Kevin B. Grunech of Bear, Stearns & Co., MM Docket No. 01-235 (Dec. 3, 2001).

[246] Thomas C. Spavins *et al.*, The Measurement of Local Television News and Public Affairs, MOWG Study No. 7 (Sept. 2002).

[247] Project for Excellence in Journalism, Does Ownership Matter in Local Television News: A Five-Year Study of Ownership and Quality (Apr. 2003) at 1, 5.

[248] Philip Napoli, *Television Station Ownership Characteristics and Local News and Public Affairs Programming: An Expanded Analysis of FCC Data*, 6 Info: The Journal of Policy, Regulation, and Strategy for Telecommunications, Information, and Media 112, 119 (2004).

[249] Comments of Media General, MB Docket No. 06-121 at Appendix 5 (Michael G. Baumann, Review of the Increase in Non-Entertainment Programming Provided in Markets with Newspaper-Owned Television Stations: An Update (Oct. 2006)).

- A 2007 study finding that newspaper cross-owned TV stations supply about 7%-10% more local news coverage and, on average, about 25% more coverage of state and local politics and candidates than non-cross owned stations.[250]
- Another 2007 study finding that television stations owned by a parent that also owns a newspaper in same area offer more local news programming.[251]
- Yet another 2007 study determining that TV stations provided 11% more news programming generally if they were cross-owned with a newspaper.[252]
- A 2011 study determining that newspaper cross-owned TV stations produced more news than comparable non-cross owned stations. Specifically, the study showed that cross-owned stations provide nearly 50% more news than the average station (or 47 more minutes per day).[253]

Given the overwhelming evidence in the record showing the local programming benefits of cross-ownership of newspapers and broadcast stations,[254] the Commission's "belie[f]" that elimination of the rule would not "necessarily result in benefits to localism"[255] is arbitrary and capricious.[256] A thorough review of the full record

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[250] Jeffrey Milyo, The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News (2007) at 29.

[251] Gregory Crawford, Television Station Ownership Structure and the Quantity and Quality of TV Programming (2007) at 23, 26.

[252] Daniel Shiman, The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming (2007) at 21-22.

[253] Jack Erb, Local Information Programming and the Structure of Television Markets (2011) at 27-28 (also finding that '[s]tations that are cross-owned with newspapers are about [eleven percent] more likely to have local news programming than a comparable, non-cross-owned station").

[254] Section VI.D below discusses studies relating to newspaper/radio specifically.

[255] Notice at ¶ 138.

[256] *See, e.g., American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 241 (D.C. Cir. 2008) (faulting FCC for dismissing "empirical data" and failing to "grapple[]" with studies).

demonstrates that retention of cross-ownership restrictions will continue to harm localism.

C. THE 40-YEAR OLD CROSS-OWNERSHIP BAN IS NOT NEEDED TO PROMOTE VIEWPOINT DIVERSITY

Because the FCC cannot rely upon competition or localism as the basis for retaining cross-ownership restrictions, the Notice insists that the rule "remains necessary to preserve and promote viewpoint diversity."[257] The two main bases for this position are fundamentally flawed.

First, as discussed in detail in Section III, the Notice appears wedded to the by-gone era of "domination" by traditional professional media, namely newspapers and television stations.[258] This refusal to come to terms with changes in media consumption and how consumers today obtain information important to them cannot justify retention of newspaper/broadcast restrictions adopted decades ago. As a result of the digital communications revolution, consumers now have control over the information sources they choose to access and, increasingly, these include non-professional ones.[259] Consumers may choose to avoid the intermediation of "the media," whether traditional or non-traditional, and obtain information directly from "the source," including government agencies, political campaigns and candidates, educational entities or health

[257] Notice at ¶ 143.

[258] *See generally* Notice at ¶¶ 128-133.

[259] See Section III.

and safety organizations.[260] In this environment, past concerns about traditional media agenda-setting or gatekeeping are no longer relevant.[261]

As noted above, failing to take proper account of the vast array of diverse online information sources (many of which are, in fact, locally-oriented), is irrational, particularly given the FCC's recognition elsewhere that the Internet has "changed everything."[262] The Commission cannot disregard or unreasonably discount the Internet's role in exponentially increasing access to diverse sources of information and opinion because all Americans do not use the Internet.[263] It is not rational decision-making to ignore or discount the profound effects on competition or diversity from a platform utilized by 232 million Americans and that has transformed the entire media marketplace and the competitive position of traditional outlets. [264]

In sum, the Notice's blinkered focus on two types of traditional media as essentially the only sources of "true" viewpoint diversity is arbitrary and capricious, especially if the Commission wants to encourage the continued competitive viability of the traditional outlets whose services it claims to value. Confusion on this last point

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[260] See Section III.

[261] *Id.* Moreover, online sources of news and information do not need to "supplant[]" or replace traditional outlets before the Commission must consider their effects on diversity and competition, as directed by Section 202(h). Notice at ¶ 130.

[262] Section III.

[263] *See, e.g., Notice* at ¶ 129 n.340 (discounting Pew Research Center Study finding that almost 80% of Americans who use the Internet visit websites unaffiliated with traditional media sources as their first or second choice to obtain information about 15 of the 16 topics identified for the study). In fact, according to Pew's 2014 State of the News Media report, the "vast majority of Americans" today "get news in some digital format," with 82% of Americans obtaining news via a desktop or laptop and 54% using a mobile device, such as a tablet or cell phone). Pew Research Journalism Project, "Key Indicators in Media & News" (March 16, 2014).

[264] *See* Section III.

abounds. For example, the Notice cites commenters who complain that online news aggregators do not provide the type of original reporting done by professional journalists but recognize that they nonetheless "undercut the ability of traditional media to provide professional journalism."[265] But the proposals in the Notice do not logically address this problem. Maintaining cross-ownership and local television restrictions only serve to further "undercut the ability of traditional media to provide" the costly "professional journalism" that these commenters purportedly want to preserve.

As the second basis for maintaining cross-ownership restrictions, the Notice cites fears about the "potential loss of an independently owned voice" as the result of a combination, "[e]ven if cross-media owners do not exercise [their] power" to influence viewpoint "frequently."[266] Indeed, the Notice refuses to contemplate elimination of cross-ownership restrictions because those arguing for reform have not established that "a connection" between ownership and viewpoint "never exists."[267] As described in Section II, the Commission cannot, consistent with congressional intent, apply such an "impossible" standard for review of its rules under Section 202(h).

Moreover, the Notice improperly discounts the very substantial empirical and theoretical evidence demonstrating that factors other than separate ownership drive viewpoint diversity, particularly in today's extraordinarily competitive media marketplace. Attachment C provides an updated, non-exhaustive list of 15 empirical and theoretical studies from economists, political scientists, communications scholars and others

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[265] Notice at ¶ 131 n. 357.

[266] Notice at ¶ 127 (emphasis added).

[267] Notice at ¶ 126 (emphasis added).

showing that market forces – above all, consumer preferences – drive "media plurality."[268] Empirical studies from highly respected economists have found "little" or "no evidence" that "variation in slant has an ownership component"; rather, "variation in slant across newspapers is strongly related to the political makeup of their potential readers."[269] Given the competitive struggles of traditional media in the 21st century marketplace, it is hardly surprising that the evidence shows that newspapers and other outlets have an "economic incentive" to "tailor their slant to the ideological predispositions of consumers."[270] If viewpoint diversity is not driven by ownership, as these and additional studies identified in Attachment C show, then the Commission cannot simply presume that viewpoint diversity will suffer from combinations of a newspaper with a broadcast outlet.[271] Indeed, a number of studies, including ones

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[268] Armando Garcia Pires, *Media Plurality and the Intensity of Readers' Political Preferences*, 26 J. Med. Econ. 41, 43 (2013). NAB provided a similar list in Attachment A to its comments in MB Docket No. 09-182 (filed Mar. 5, 2012).

[269] Matthew Gentzkow and Jesse Shapiro, *What Drives Media Slant? Evidence from U.S. Daily Newspapers*, 78 Econometrica 35, 38, 64 (2010). *Accord* Jeffrey Milyo, The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News (2007), at 28-29 (finding no consistent or significant differences in partisan slant of newspaper cross-owned television stations and other television stations in the same market, and concluding that "partisan slant in local television news coverage is determined at least in part by market forces," specifically the "partisan voting preferences in the local market"); David Pritchard, *One Owner, One Voice? Testing a Central Premise of Newspaper-Broadcast Cross-Ownership Policy*, 13 Comm. L. & Pol'y 1, 22-24 (2008) (noting the "growing body of research" connecting "audience preferences" and other economic factors, such as cost of production, to the content of news).

[270] Gentzkow and Shapiro, *What Drives Media Slant?*, at 38, 64. *Accord* Pires, *Media Plurality* at 43 (the "intensity of readers' political preferences seems to be fundamental for media plurality"); Sendhil Mullainathan and Andrei Shleifer, *The Market for News*, 95 Am. Econ. Rev. 1031 (2005) (finding that newspapers cater to their readers' biases and that diversity in media coverage arises from readers, not owners).

[271] *See* Daniel Ho and Kevin Quinn, *Viewpoint Diversity and Media Consolidation: An Empirical Study*, 61 Stanford L. Rev. 781, 786, 860 (2009) (empirical study of newspaper mergers did not support assumption that common ownership automatically reduces viewpoint diversity, thus challenging "one of the basic assumptions of federal media ownership regulations"); Adam Rennhoff and Kenneth Wilbur, Local Media Ownership and Viewpoint Diversity in Local

commissioned by the FCC, have found that common ownership in fact increases diversity and does not harm other values, such as consumers' civic or political engagement or knowledge.[272]

The Notice ignores most of the studies described above and in Attachment C and visibly strains to discount others. For example, the Notice rejects one of the FCC's commissioned studies as a basis for assessing effects of newspaper cross-ownership on viewpoint diversity because that study, while it found that increases in radio/television cross-ownership and television station concentration increased diversity, it did not examine newspaper cross-ownership specifically[273]; however, in the very same sentence, the Notice also rejects another FCC-commissioned study that

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Television News (2011) at 22 (associations between several ownership variables, including newspaper/television cross-ownership, and viewpoint diversity found to be "statistically indistinguishable from zero").

[272] *See, e.g.*, Lisa M. George and Felix Oberholzer-Gee, Diversity in Local Television News (2011) at 18 ("increases in ownership concentration often encourage diversity"; most notably . . . greater concentration increases the number of politicians that are covered in local news"); Adam Rennhoff and Kenneth Wilbur, Local Media Ownership and Viewpoint Diversity in Local Television News (2011) (in a 2012 update to this study, the authors concluded that viewpoint diversity is positively associated with increases in the number of co-owned television stations in a market); Matthew L. Spitzer, *Television Mergers and Diversity in Small Markets,* 6 J. Competition L. & Econ. 705 (2010) (concluding that allowing jointly owned television stations in small markets will produce viewpoint diversity in local news and public affairs programming); Lisa M. George, *What's Fit to Print: The Effect of Ownership Concentration on Product Variety in Daily Newspaper Markets*, 19 Information Econ. and Pol'y 285, 286 (2007) (concluding that decreases in the number of newspaper owners in a market lead to increases in differentiation between products and increases in content variety); Lynn Vavreck, Simon Jackman, and Jeffrey B. Lewis, How the Ownership Structure of Media Markets Affects Civic Engagement and Political Knowledge, 2006-2008 (2011) at 2 (the ownership structure variables examined, including newspaper/broadcast cross-ownership, had no impact on consumers' civic or political engagement or knowledge).

[273] The authors of this study examining the effects of ownership concentration stated that they did not include newspaper/television cross-ownership because that variable did "not change in our sample over time." Lisa M. George and Felix Oberholzer-Gee, Diversity in Local Television News (2011) at 10.

"examined only newspaper television cross-ownership."[274] That is illogical on its face, as is the complaint that the data for the study of newspaper/television cross-ownership was "limited."[275] Obviously, the data for any study of newspaper/television or newspaper/radio cross-ownership will be quite limited because the rules have banned such cross-ownership for nearly 40 years.

Significantly, the only study cited in the Notice to support the proposition that "ownership concentration may adversely affect viewpoint diversity" does not examine any actual instances of newspaper/broadcast cross-ownership because it is a wholly theoretical analysis.[276] Other commenters, moreover, have noted the biased nature of this theoretical study, as it assumes that media owners have preferences over policy outcomes that will be reflected in the information collected and aired by their outlets.[277] But, it is that very assumption that the empirical (and theoretical) studies described above and in Attachment C have disproven, as they have found that media slant is fundamentally driven by consumers' preferences, not owners.

Given the lack of empirical evidence showing real-world harm to diversity from cross-ownership, the Notice has provided no basis for retaining newspaper cross-

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[274] Notice at ¶ 127.

[275] Notice at ¶ 127. If the *Notice* is complaining that this study did not also examine newspaper/radio cross-ownership specifically, that was not the intent of the study, which focused on local television news. Adam Rennhoff and Kenneth Wilbur, Local Media Ownership and Viewpoint Diversity in Local Television News (2011).

[276] Notice at ¶ 127, *citing* Isabelle Brocas, Juan D. Carrillo, and Simon Wilkie, A Theoretical Analysis of the Impact of Local Market Structure on the Range of Viewpoints Supplied (June 2011).

[277] Notice at ¶ 127 n. 326 (citing comments of Tribune); *see* Brocas, Carrillo and Wilkie, A Theoretical Analysis at 2 (defining a "media viewpoint" as the "media owner having a preference over the policy outcome" and stating that "a media firm with a viewpoint may specialize in collecting and disseminating information from a set of sources aligned with that viewpoint").

ownership restrictions, particularly in light of these restrictions' demonstrated harms to localism. The Commission cannot, consistent with Section 202(h) and administrative law precepts, retain outdated rules based on "its own broadly stated fears" about viewpoint diversity.[278]

D. THE BAN ON NEWSPAPER/RADIO CROSS-OWNERSHIP DOES NOT SERVE LOCALISM, COMPETITION OR DIVERSITY AND SHOULD ALREADY HAVE BEEN REPEALED

The Notice acknowledges that "the Commission has found repeatedly" that the newspaper/radio ban "does not promote its localism or competition goals."[279] In fact, the ban harms localism. Previous FCC studies found that radio stations cross-owned with newspapers were significantly more likely to air news and aired significantly more public affairs programming,[280] and were 4-5 times more likely to have a news format than a non-cross-owned station.[281]

The Commission also has recognized "since at least 1970 that radio does not play a dominant role in promoting viewpoint diversity," and additionally cites evidence showing that "consumers' reliance on radio news has declined steadily over the past two decades."[282] The Notice does not refer to any evidence indicating that repeal of the newspaper/radio prohibition would harm viewpoint diversity. In fact, the only study cited

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[278] *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 764 (6th Cir. 1995) (finding FCC restrictions arbitrary because they lacked an "economic rationale" and "documentary support").

[279] Notice at ¶ 145, *citing* 2006 Quadrennial Review Order and 2002 Biennial Review Order.

[280] Kenneth Lynch, Ownership Structure, Market Characteristics and the Quantity of News and Public Affairs Programming: An Empirical Analysis of Radio Airplay (2007) at 18, 23.

[281] Craig Stroup, Factors that Affect a Radio Station's Propensity to Adopt a News Format (2007) at 14-15.

[282] Notice at ¶¶ 146-47.

in the Notice found that newspaper/radio cross-ownership had "no statistically significant relationship to available [news] variety nor listening."[283] And, in light of the vast array of multichannel and online information sources now available, the possibility that common ownership of a newspaper and radio station(s) could impact viewpoint diversity appears infinitely remote today. Because the cross-ownership rule is "no longer necessary to support . . . viewpoint diversity," the restriction is "left without a public interest rationale."[284]

Given the dearth of evidence demonstrating that the newspaper/radio cross-ownership rule serves the public interest, the failure to repeal it is arbitrary and capricious and inconsistent with Section 202(h) of the Telecommunications Act. After nearly 40 years of "experience" with the rule, the Commission should have "accumulated . . . evidence to indicate that it achieves" the Commission's goals.[285] Asking yet again for more comment about the newspaper/radio rule – particularly when the Commission already has a record of comments and studies stretching over an 18-year period – also does not satisfy its obligation under Section 202(h) to make a determination about the rule and to "repeal or modify" it if "no longer in the public interest." The Commission must act now to eliminate this unjustifiable restriction.

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[283] Joel Waldfogel, Station Ownership and the Provision and Consumption of Radio News (2011) at 17.

[284] Notice at ¶ 145.

[285] *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993) (finding a 28 year-old broadcast policy arbitrary and capricious because FCC had "no evidence" showing that it achieved any of the "benefits" attributed to it).

VII. THE RADIO/TELEVISION CROSS-OWNERSHIP RULE DOES NOT SERVE THE PUBLIC INTEREST AND MUST BE ELIMINATED

Because the radio/television cross-ownership rule does not promote the Commission's localism, competition or diversity goals it should be eliminated. Indeed, given the FCC's previous findings and tentative conclusions and the record in this proceeding, the Commission should have already determined to eliminate this rule, and its failure to do so is arbitrary and capricious and contrary to Section 202(h).

A. THE RECORD SHOWS THAT THE RULE DOES NOT FURTHER COMPETITION, LOCALISM OR DIVERSITY

The Commission tentatively concluded over two and a half years ago to repeal the radio/television cross-ownership rule because it was no longer "necessary to promote the public interest."[286] As NAB has long pointed out, and the Commission has recognized, elimination of the rule would not harm competition, given its limited effects and the existence of separate local radio and local television ownership caps,[287] as well as the explosion of multichannel, online and mobile options for viewers, listeners and advertisers since the cross-ownership rule was reformed 15 years ago.[288]

In addition, the rule does not promote – and in fact harms – localism.[289] Multiple FCC studies have found that cross-ownership of radio and television stations produce

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[286] 2011 NPRM at ¶ 119.

[287] *See* 2011 NPRM at ¶ 126; Notice at ¶ 218. *See also* NAB NOI Comments at 76 (explaining that rule already permits common ownership of one or two television stations with up to six or seven radio stations; thus, repeal of the rule would only permit the common ownership of one or two additional radio stations, in conjunction with a television station, in the largest markets).

[288] *See* Section III (describing in detail the myriad audio and video options available today).

[289] *See* Notice at ¶ 219 (tentatively finding that cross-ownership rule "is not necessary to promote localism").

public benefits, including greater amounts of news and public affairs programming.[290] As the Notice recognizes (at ¶ 220), additional recent FCC-commissioned studies similarly concluded that "radio-television cross-ownership . . . has a positive and statistically significant correlation with a television stations' local news minutes. In addition, there appear to be economies of scale as the television stations show further increases in news minutes for each additional radio station they own within a market."[291] Empirical evidence from the last two quadrennial reviews thus demonstrates that elimination of the cross-ownership rule "is likely to result in benefits to localism in the form of improved or expanded programming."[292]

Over two and a half years ago, the Commission additionally tentatively concluded that the radio/television cross-ownership rule is no longer needed to promote its goal of viewpoint diversity.[293] The Notice here recognizes that radio stations are not the "primary" outlets contributing to viewpoint diversity, a fact that the Commission has

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[290] Daniel Shiman, The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming (2007) at 24 (while other ownership characteristics did not have a statistically significant impact on the quantity of public affairs programming, cross-ownership with radio stations was associated with a 15 percent increase in public affairs programming on television stations). Other Commission studies found that cross-ownership with a television station in the same market (1) significantly increased the likelihood that a radio station will be a news-formatted station, and (2) increased the quantity of news programming on the commonly-owned radio station. *See* Craig Stroup, Factors that Affect a Radio Station's Propensity to Adopt a News Format (2007) at 15; Kenneth Lynch, Ownership Structure, Market Characteristics and the Quantity of News and Public Affairs Programming: An Empirical Analysis of Radio Airplay (2007) at 19.

[291] Jack Erb, Local Information Programing and the Structure of Television Markets (2011) at 48-49. *See also* Adam Rennhoff and Kenneth Wilbur, Local Media Ownership and Media Quality (2011) at 15 (finding that radio/television cross-ownership is "associated with higher levels of local television news provision within a market").

[292] Notice at ¶ 219.

[293] 2011 NPRM at ¶ 131.

repeatedly acknowledged since the 1970s.[294] The Notice (at ¶ 211) also acknowledges that "no studies were submitted" in the 2010 review demonstrating that the "rule supports viewpoint diversity or that repeal of the rule would cause a decrease in viewpoint diversity." In fact, available evidence indicates that radio/television cross-ownership either has no effect on or actually promotes diversity. One of the FCC's recent studies found that "[f]or the majority of topics for which [radio/television] cross-ownership is statistically significant, increases in cross-ownership are associated with greater diversity."[295] And as discussed in Section III, the rapid growth of multichannel and online audio and video options has greatly increased the number of diverse sources of information, including local information, available to consumers. Because the cross-ownership rule does not further viewpoint diversity or competition, and affirmatively harms localism, NAB urges the Commission to eliminate it.

B. THE COMMISSION'S FAILURE TO REPEAL THE RADIO/TELEVISION CROSS-OWNERSHIP RULE IS CONTRARY TO LAW

Not only must the Commission now act expeditiously to repeal the rule, given the record compiled in the 2006 and 2010 quadrennial reviews, the Commission already should have eliminated it. According to the Commission, "no commenter" to the 2011 NPRM "presented empirical data or other analyses that established that repeal of this rule would harm competition, localism, or viewpoint diversity in local markets."[296] Yet

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[294] Notice at ¶¶ 212-13, *citing, inter alia*, Second Report and Order, 50 FCC 2d 1046, 1083 (1975).

[295] Lisa M. George and Felix Oberholzer-Gee, Diversity in Local Television News (2011) at 15. *See also* Adam D. Rennhoff and Kenneth C. Wilbur, Local Media Ownership and Viewpoint Diversity in Local Television News (2011) at 22 (finding the associations between viewpoint diversity and several ownership variables, including radio/television cross-ownership, to be "statistically indistinguishable from zero").

[296] Notice at ¶ 223.

despite the lack of evidence showing any harm from elimination of the rule – and additional evidence, as discussed above, showing local benefits from permitting cross-ownership – the Commission did not repeal the restriction. It is arbitrary and capricious for the Commission to retain a regulation shown not to serve the public interest. "The Commission's general rulemaking power is expressly confined to promulgation of regulations that serve the public interest."[297]

The Commission also violated Section 202(h) of the Telecommunications Act by failing to "determine" whether the cross-ownership rule remained "necessary in the public interest as the result of competition."[298] This failure to act is particularly egregious, given the FCC's tentative conclusion in 2011 that the cross-ownership rule was no longer "necessary to promote the public interest."[299] Merely asking for yet more comment does not satisfy Section 202(h)'s requirement that the Commission make a determination about its ownership rules and "repeal or modify" those "no longer in the public interest." A "desire to preserve the status quo," however strong, cannot justify a failure to meet statutory obligations.[300]

VIII. THE BROADCAST OWNERSHIP LIMITS DO NOT EFFECTIVELY PROMOTE OWNERSHIP BY MINORITIES AND WOMEN

NAB continues to believe that incentives-based, race-neutral measures which relax certain licensing, auction, transaction, and construction policies are the surest path

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[297] *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) (vacating FCC order and stating that "[e]ven assuming that the rules in question initially were justified . . . it is plain that that justification has long since evaporated.").

[298] *See* Section II.

[299] 2011 NPRM at ¶ 119.

[300] Notice at ¶ 213 n.633 (stating that FCC's decision in 2006 quadrennial review to retain radio/television cross-ownership rule "was based, in part, on its desire to preserve the *status quo*").

to increase minority and female ownership in the broadcasting industry. Improving access to capital by reducing regulatory burdens and barriers to entry will lead to more ownership opportunity. In contrast, continued reliance on the structural ownership limits, which has proven over an extended period of time to be an ineffective mechanism for improving access for potential female and minority station owners, is arbitrary and capricious.

NAB fully agrees with the Commission that increasing broadcast ownership opportunities for minorities and women is an important public policy goal.[301] We disagree, however with the contention that retaining current structural ownership limits advances this policy. One need only observe that although structural rules have been in place for more than 70 years, women and minorities remain under-represented among broadcast owners. And, declines continue even though the current rules have not changed meaningfully since 1998. Only last month, the Commission issued its most recent report on the comprehensive data collected using FCC Form 323 (Ownership Report for Commercial Broadcast Stations), which indicates ownership interests in commercial broadcast stations as of October 1, 2013.[302] The report reveals a drop in the number and percentage of full-power commercial television stations that are majority owned by women since the previous data snapshot as of October 1, 2011. During that period, the number of women-owned full-power commercial television

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[301] *See, e.g., Statement of Policy on Minority Ownership of Broadcast Facilities,* 68 F.C.C.2d 979 (1978); *Amendment of Section* 73.3555 *of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations,* Memorandum Opinion and Order, 100 FCC 2d 74 (1985).

[302] *Report on Ownership of Commercial Broadcast Stations*, MB Docket Nos. 14-50, 09-182, and 07-294 (*rel*. June 27, 2014) (2014 Form 323 Report).

stations dropped from 91 to 87, and the number of stations owned by African-Americans dropped from 11 to nine.[303] Moreover, since October 1, 2013, the number of commercial television stations licensed to African Americans has dropped even more to only four.

With respect to radio, the report indicates that the number of women-owned AM stations rose slightly from 300 to 310 during that period, and women-owned FM stations rose from 323 to 383, which represented an overall increase of one percent of the universe of FM stations. However, the number of commercial AM stations owned by racial minorities dropped from 237 stations to 225, and the number of commercial FM stations owned by racial minorities dropped from 196 stations to 169 stations.[304]

Simply put, it is indisputable that women and minorities own broadcast stations in disproportionally small numbers, despite continued application of structural ownership regulation. In fact, a case can be made that the ownership limits have contributed to the most recent declines. The limits artificially depress the value of existing broadcast stations and in turn, the borrowing capabilities of owners. Without capital, licensees' ability to improve content or make other investments in their stations is constrained. In the increasingly competitive media environment, limits on licensees' ability to invest in content can to lead to failure. This impact will be felt most by new entrants with fewer

[303] 2013 Form 323 Report at ¶ 1

[304] *Id.*

resources, such as small businesses and women and minorities, for whom ownership may be a greater financial risk.[305]

New entry for minorities and women is similarly impacted by the ownership limits. As many parties have consistently recognized, the biggest obstacle to expanding female and minority ownership remains access to capital.[306] According to the GAO,[307] one particular lack of capital problem created by the FCC's ownership rules, occurs when sellers cannot help finance a new entrant. Specifically the seller cannot retain any equity in the station because it would be considered attributable interest under the Commission's rules. Such an interest could be barred outright, or reduce other ownership opportunities for the seller. In either case, the opportunity for new entry that could increase ownership diversity is lost.

The most effective way to enhance minority and female broadcast ownership is the adoption of incentives-based measures that reduce barriers to entry into broadcasting for all small businesses. NAB has long supported a variety of industry-based,[308] legislative, and regulatory initiatives designed to expand women and minority

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[305] Opposition of the National Association of Broadcasters to Petition for Reconsideration, MB Docket No. 06-21 (filed May 6, 2008), at 23-24.

[306] MMTC 2012 Comments at 9-11; NAMB 2012 Comments at 2-4.

[307] U.S. Government Accountability Office, GAO-08-383, *Media Ownership: Economic Factors Influence the Number of Minorities and Women Appears Limited and is Difficult to Assess* (2008) ("GAO Report").

[308] For almost fifteen years, the NAB Education Foundation (NABEF) and the Broadcast Education Association (BEA) have sponsored and organized a range of programs to provide professionals and students with access to employment opportunities in the broadcasting industry, and the training and other tools needed to succeed in broadcast management and ownership. NAB 2010 NOI Comments, Attachment D. NABEF's Broadcast Leadership Training program offers MBA-style executive training for station managers and others who seek to advance to senior management or own stations. To date, 43 graduates have owned or currently

ownership of broadcast assets. Specifically, for almost twenty years, NAB has advocated for reinstitution of the incentive-based tax certificate policy which previously provided tax incentives to entities that sold broadcast properties to minority owners, and encouraged the Commission likewise in its Congressional dealings.[309] The FCC has also supported reinstatement.[310] The tax certificate policy had a clear and positive impact on minority ownership.[311] NAB will continue to work with the Commission to encourage Congress to bring it back.

NAB will also continue to support race-neutral, incentive-based approaches that reduce barriers to entry for all prospective owners. NAB specifically urges the Commission to reexamine and test an overcoming disadvantages preference (ODP) by applying it in the context of an incubator program as MMTC has proposed.[312] The Commission expresses concern that an incubation program that allows blanket waivers of the local radio caps could create a loophole to the current rules, resulting in more

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own stations and almost 100 others have been promoted one or more times or are in various stages of station acquisitions.

[309] *See, e.g.*, NAB 2012 Comments at 9.

[310] Notice at ¶ 311.

[311] GAO Report at 25-26 (discussing the importance of the tax certificate policy expressed in reports sponsored by both the Commission and NTIA). The tax certificate policy exemplified the success of incentives-based mechanisms in creating opportunities and diversity. *See, e.g.,* Erwin Krasnow & Lisa Fowkles, *The FCC's Minority Tax Certificate Program: A Proposal for Life After Death*, 51 Fed. Comm. L.J. 665, 670 (1999) ("Prior to the adoption of the minority tax certificate policy in 1978, minorities owned only 40 out of 8,500 broadcast stations. During the more than fifteen years of the policy's existence, the issuance of minority tax certificates resulted in the acquisition of 288 radio stations, 43 television stations, and 31 cable systems.").

[312] The ODP standard is a race- and gender-neutral definition that targets those who have overcome substantial disadvantages. Use of an ODP standard was proposed in 2010 by the Commission's Diversity Committee.

consolidation than allowed under the existing caps.[313] The Commission also warns that implementing a process for determining and monitoring the activities of eligible entities would "pose substantial legal, administrative, and practical challenges," and tentatively declines to adopt an incubation program in the Notice.[314] Despite these perceived obstacles, NAB respectfully urges the Commission to remain open to proposals for a voluntary incubation program that reasonably defines eligibility to participate, while also ensuring that such arrangements continue to serve the public interest in protecting both competition and new entry. NAB remains willing to participate in discussions with the Commission and other parties about the practical steps relevant to implementation of such a program.[315]

NAB has also repeatedly urged the Commission to undertake a series of other specific incentive-based approaches:

- Sponsor primers on investment and financing of broadcast properties for smaller and regional lenders.
- Adopt an incubator program that provides broadcasters incentives to finance qualifying businesses.
- Modify its rules to permit sellers to hold a revisionary interest in broadcast licenses pursuant to certain guidelines to foster the financing of stations purchased by a new owner who could retain the ability to reacquire the station in the event of a default.

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[313] *Notice* at ¶ 313.

[314] *Id*. at ¶¶ 313-315.

[315] *Ex Parte* Letter from David Honig, President, MMTC, and Jane E. Mago, Executive Vice President & General Counsel, NAB, to Ms. Marlene Dortch, Secretary, FCC, MB Docket Nos. 09-182, 07-294 (Jan. 30, 2013).

- Reinstate a relaxed attribution standard for qualifying businesses to improve their ability to secure financing.

- Reinstate the policy that allowed the transfer of grandfathered radio station combinations to any entity provided the buyer assigns the excess station to a qualifying business.[316]

We also support certain proposals offered by other parties designed to lower barrier to entry for all prospective broadcast owners, including female and minority-led businesses, including (a) offering structural waivers for financing construction of a qualifying entity's unbuilt station; (b) developing an online resource directory to enhance recruitment, advancement, and diversity efforts; and (c) considering proposals for legislative recommendations to establish targeted loan programs.[317] We have also endorsed certain technical rules changes proposed by MMTC that would generally reduce barriers to entry and promote efficiencies for all existing broadcast stations, including those owned by minorities, women and small entities.[318]

Incentives-based mechanisms like those described above can foster a more diverse and competitive broadcasting industry, as opposed to overly restrictive

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[316] NAB Comments on 2012 Form 323 Report Public Notice at 8.

[317] *See, e.g.*, NAB 2013 Comments on MMTC Study, MB Dockets Nos. 09-182 and 07-294 (filed July 22, 2013), at 9-10 citing NAB Reply Comments in MB Docket Nos. 09-182 and 07-294 at 3-4 (filed Jan. 4, 2013), *citing* Supplemental Comments of DCS in MB Docket Nos. 09-182 and 07-294 at 26, 74, 89-90 (filed Apr. 3, 2012). *See also* Comments of NAB in MB Docket No. 13-50 (filed Apr. 15, 2013); Reply Comments of NAB in MB Docket No. 13-50 (filed Apr. 30, 2013).

[318] NAB 2012 Comments on Form 323 Report PN at 8-9 *citing* NAB Reply Comments in MB Docket No. 09-182 at 33. *See also* NAB Comments in MB Docket No. 09-52 (filed Oct. 23, 2009) (supporting MMTC proposals to remove the nighttime coverage rules from section 73.24(i); modify the principal community coverage rules for commercial stations; replace the minimum efficiency standard for AM stations with a "minimum radiation" standard; allow FM applicants to specify Class C, C0, C1, C2 and C3 facilities in Zones 1 and 1A; remove non-viable FM allotments; relax the limit of four contingent applications; relax the main studio rule; conduct tutorials on the radio engineering rules; and appoint a public engineer).

ownership limits that depress investment in broadcasting and harm the ability of all existing and prospective owners to secure capital.

IX. THE PROPOSED DEFINITION OF SHARED SERVICES AGREEMENTS IS OVERBROAD, AND THE ASSOCIATED DISCLOSURE REQUIREMENT IS NOT RELATED TO A VALID REGULATORY PURPOSE

The Notice seeks comment on the Commission's proposal to expressly define Shared Services Agreements (SSAs) "broadly" and to require public disclosure of all SSAs.[319] While NAB does not oppose appropriate disclosure of sharing agreements where such transparency would promote competition, localism and diversity, we are concerned that the proposed disclosure does not advance these goals. In fact, it may detract from them because it is excessively broad.

The proposed definition of SSAs subject to mandatory disclosure would encompass an almost limitless range of agreements that have little, if anything, to do with stations' core broadcasting operations and could have a considerable chilling effect. To the extent that broadcasting stations avoid otherwise beneficial — and permissible — cost-saving, resource-sharing arrangements, such a result could decrease the funds available for local programming and station investment and thus undermine the goal of promoting localism, as discussed above. Accordingly, NAB urges the Commission to limit any required disclosure.

A. THE PROPOSED DEFINITION OF SSAS IS EXCESSIVELY BROAD, AND IS NOT RATIONALLY CONNECTED TO ANY IDENTIFIABLE REGULATORY PROBLEM

The Commission's proposed definition of SSAs subject to mandatory public disclosure is unwarrantedly broad. The Commission proposes to define an SSA as "any

[319] *See Notice* ¶¶ 333, 335.

agreement or series of agreements, whether written or oral, in which (1) a station … provides any station-related services … or (2) stations … collaborate to provide or enable the provision of station-related services."[320] As the Commission concedes, the definition sweeps in "all types of resource sharing and collaboration that may take place between stations."[321] Because this expansive definition lacks the requisite nexus to a station's core operations and is not reasonably related to any identified regulatory concern, it must be refined.

The proposed mandate is plainly unnecessary as to at least two categories of SSAs — agreements already subject to the Commission's regulation and agreements that raise no attribution concerns. With regard to the latter category, for example, agreements concerned with provision of back-office or other administrative support do not have the potential to convey influence over core operations and do not transfer control or diminish licensee authority or incentives. Nothing in the Notice suggests differently, nor does it cite *any* evidence that such administrative arrangements allow circumvention of the local television ownership rule.[322] Thus, there is no rational

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[320] *Notice* ¶ 330.

[321] *Id.* ¶ 329.

[322] The Commission relies on the assertions made by some commenters that undifferentiated sharing agreements could be used to circumvent the common ownership rule. *See id.* ¶ 323 & n.1006 (citing comments). Many of these comments, however, concerned only sharing agreements related to the coordination of retransmission rights and do not appear to articulate harms for the Commission to regulate in this context. *See* ACA NPRM Comments at 23 (ACA's comments "focus … solely on [sharing] agreements to the extent they facilitate the coordinated negotiation of retransmission consent"); ITTA NPRM Comments at 3-4 (discussing "coordination of operational activities through negotiation of retransmission consent agreements"); TWC NPRM Comments at 5-7 (discussing sharing agreements that allow broadcasters "to coordinate their retransmission consent negotiations"); TWC NPRM Reply at 9 (same). This form of agreement is radically different from the agreements providing for administrative or logistical support, and the Commission has issued a decision regulating the negotiation of retransmission consent agreements. *Amendment of the Commission's Rules Related to Retransmission*

purpose to require disclosure and the Commission should be clear that such agreements need not be included.

It is particularly significant that the proposed definition is not tied to any industry problem or regulatory need. The Commission's only asserted justification for this broad definition is the desire "to capture all types of" resource-sharing agreements in order to obtain "comprehensive data or information" about sharing agreements.[323] But the collection of information in itself, without any identified problem that the agency is seeking to solve, is not an appropriate use of regulatory authority. An agency must "establish a basis to determine the relevance of the information to agency action and the reasonableness of the agency request. . . . [R]epeated assertions of a 'need to know,' with little more, cannot suffice."[324]

Naturally, NAB supports the Commission's goal of greater transparency, and we recognize that the Commission can properly solicit information from private parties in order better fulfill its statutory mandate. But the broad-ranging nature of the information that the Commission seeks to collect here is not tied to any statutory mandate or existing problem. Nor is the information tied to a potential regulatory action. Rather, this is a fishing expedition that *might* lead to some unspecified "regulation" in the

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Consent, Report and Order and Further *Notice* of Proposed Rulemaking, 29 FCC Rcd 3351 (Mar. 31, 2014). The Commission also cites some commenters' claims that resource-sharing under SSAs may result in workforce reductions. *See Notice* ¶ 323 & n.1007 (citing comments). But even if these assertions are correct, neither the commenters nor the Commission indicate how such reductions impact the goals of competition, localism, and diversity. Moreover, the Commission already has rules that provide a framework for maintaining sufficient licensee control with respect to the sharing of personnel and equipment resources.

[323] *Notice* ¶¶ 327, 329.

[324] *Trailer Marine Transport. Corp. v. Fed. Mar. Comm'n*, 602 F.2d 379, 398 (D.C. Cir. 1979).

future.[325] The Commission cannot even say whether this hypothetical regulation will pertain to all SSAs or only "particular categories of SSAs," and it does not give any indication what such categories may be or how or why they would be formulated.[326]

In fact, as the Commission acknowledges, it has not found any problem requiring regulation in the SSAs that it has reviewed (in the form of the SSAs filed with the Commission in connection with applications for assignment or transfer of control of broadcast licenses, which are subject to Commission review and approval).[327] On the contrary, the Commission observes that there are valid arguments that the SSAs "do not provide the ability to influence or control a station's core operating functions," and, in fact, promote localism by "offering more communities access to more local news content than could otherwise be achieved."[328] And, while the Commission quotes some commenters' assertions that SSAs *could* be used to circumvent the common ownership rule,[329] the Commission does not state that it agrees with these comments or that their assertions have any evidentiary support.[330]

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[325] *Id.* ¶ 329.

[326] *Id.* To the extent the Commission believes it needs information with respect to specific category of SSAs where it has perceived a regulatory problem, it is incumbent upon the Commission to identify that category and explain how additional information will enable the Commission to remedy the perceived problem and to devise a better regulatory regime for that category.

[327] *See, e.g.*, *id.*, ¶ 327; NAB NPRM Comments at 64 & n.243 (citing FCC decisions), 68.

[328] *Notice* ¶ 324; *see also id.* ¶ 325.

[329] *Id.* ¶ 323 & n.1006.

[330] As already explained, many of these comments address the specific context of retransmission consent agreements, which the Commission has independently decided to regulate. *See supra* at n. 315. The Commission cannot reasonably extrapolate from this specific subset of shared agreements to the entirety of SSAs.

Thus, the proposed overbroad definition, and the concomitant disclosure requirement, are not only unsupported by evidence, but in fact "run counter to the evidence before the agency."[331] The Commission's assertion that it must mandate broad disclosure *before* determining whether there is some need for additional regulation turns the regulatory process on its head. The disclosure requirement should be calibrated to an actual potential problem.

In proposing the expansive definition of SSAs, the Commission has not articulated any harm to be remedied, nor has it tied a putative harm to any specific element of an SSA or the categories of parties that enter into the SSAs. NAB submits that the Commission should reexamine and refine its information request.

B. THE PROPOSED DEFINITION IS OVERBROAD AND UNNECESSARY BECAUSE IT OVERLAPS WITH CONTRACTUAL CATEGORIES COVERED BY EXISTING REGULATIONS

The proposed SSA definition is also unwarrantedly overbroad because it overlaps with categories of arrangements that are subject to the Commission's existing rules. In fact, all purported problems that the Commission cited in the Notice as the basis for its proposed definition and the disclosure requirement are *already* covered by existing regulations:

- As the FCC acknowledges, it has promulgated special rules requiring disclosure and attribution of specific subsets of resource-sharing agreements where evidence (in the Commission's view) indicated a need for regulatory action. Thus, the Commission's rules expressly define LMAs and JSAs,[332] determine

[331] *Motor Vehicle Mfrs. Ass'n v. State Farm. Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[332] 47 C.F.R. §§ 73.3555, note 1(j) (defining "time brokerage"); *id.* Note (k) (defining "joint sales agreement"); *see also Notice* ¶ 329 ("LMAs and JSAs are two types of sharing agreements that are defined in the Commission's rules").

that they are attributable, and require that they be filed and/or disclosed with the Commission.[333]

- With respect to SSAs that include a programming element, the Commission rules already specify the level at which programming services will give rise to attribution. The Commission's media ownership rules provide that provision of programming amounting to less than 15% of the station's weekly broadcast hours does not give rise to attribution.[334] Thus, this possible subset of SSAs is already subject to the attribution standard.

- The Commission also already has rules that provide a framework for maintaining sufficient licensee control with respect to the sharing of personnel and equipment resources. This is a specific category of SSAs that the Commission identified, on the basis of some commenters' assertions, as the ground for adopting a broad definition of SSAs subject to disclosure.[335] The Commission's "main studio" rule, 47 C.F.R. § 73.1125, set out the requirements by which a licensee must maintain a distinct physical presence in the market and what functions must be maintained at that site.[336] Under the main studio rule, a broadcast licensee must also maintain a sufficient number and type of personnel under its direct employment.[337]

- Finally, the Commission has in place *de facto* control standards that provide a mechanism for regulating any arrangements, whether by contract or practice, in which the scope of services or the manner in which a station is operated could suggest an abdication of control by the licensee.[338] Some commenters have asserted that "broadcasters continue to use sharing agreements to grant *de facto* control to another broadcaster."[339] To the extent the Commission relied on these

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[333] *Notice* ¶¶ 320; *see also id.* ¶¶ 340-365.

[334] 47 C.F.R. § 73.3555, n.2(j)(2).

[335] *See Notice* ¶ 323 & n.1007 (citing comments).

[336] *See* 47 C.F.R. § 73.1125 (main studio rule); *id.* § 73.3526 (local public inspection files for commercial stations).

[337] *See, e.g.*, *J.M.J. Radio, Inc.*, Forfeiture Order, 28 FCC Rcd. 14688, 14689-90 (2013) (under the main studio rule, licensees must maintain a "meaningful presence" at a station's main studio, and "meaningful presence" is defined as full-time management and full-time staff personnel).

[338] *See Sweetwater Broadcasting Company*, 20 FCC Rcd 13034, 13038 (citing *WHDH, Inc.*, 17 FCC 2d 856 (1969), *aff'd sub nom*, *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied* 403 U.S. 923 (1971)) (stating that in assessing allegations of *de facto* control, the "Commission focuses its review on whether the entity in question makes policies and decision in three main areas of station operation: programming, personnel and finances").

[339] TWC NPRM Comments at 5.

assertions when proposing its broad definition,[340] any purported problem is already addressed by the Commission's *de facto* control standards.

In sum, the Commission does not identify any issue *not already covered* by existing regulations for which additional regulation is needed.[341] In the absence of a "reasoned explanation" as to why these existing regulations are inadequate, the Commission lacks the requisite factual basis for its proposed overbroad definition of SSAs.[342]

C. THE PROPOSED REGULATION RAISES SIGNIFICANT CONCERNS ABOUT THE COMMISSION'S AUTHORITY TO MANDATE BROAD DISCLOSURE

The Commission has requested comment on whether its proposal raises legal or Constitutional concerns.[343] NAB submits that, in addition to being unnecessary, the proposed regulation rests on a weak and questionable legal footing. In support of its proposal, the Commission relies on its authority to conduct investigations and to mandate record-keeping.[344] But the Commission's authority to require appropriate

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[340] *See Notice* ¶ 323 n.1006 (citing TWC NPRM Comments at 5).

[341] The Commission notes that SSAs are often executed in conjunction with a contingent interest agreement, such as "an option, right of first refusal, put/call arrangement, or other similar contingent interest, or a loan guarantee." *Notice* ¶ 320. The Commission does not explain why this observation would support its proposed definition or disclosure requirement, nor is it apparent why that would be the case. As the Commission acknowledges, these continent interest agreements are filed with the Commission as part of assignments/transfer of control of station licenses and otherwise. *Id.* 320 n.997. The Commission has not indicated in the course of that review that any such contingent interest agreement is inconsistent with the public interest.

[342] *See FCC v. Fox Televisions Stations, Inc.*, 556 U.S. 502, 516 (2009).

[343] *See Notice* ¶ 334.

[344] *See id.* ¶ 336 n.1030.

record-keeping,[345] by itself, does not confer the authority to impose a broad reporting requirement that is otherwise not supported by a valid regulatory rationale. The Commission also relies on the District of Columbia Circuit's decision in *Stahlman* for the proposition that it has authority to "require regulated entities to disclose information that the Commission deems necessary to carry out its duties under the Communications Act."[346] While *Stahlman* upheld the Commission's authority to compel testimony in the course of conducting "an investigation aimed at the prevention or disclosure of practices contrary to public interest," the D.C. Circuit cautioned that the Commission was not authorized to require representatives of regulated companies "to bare their records, relevant or irrelevant, in the hope that something will turn up."[347] Yet, that is precisely what the Commission is seeking to do here by adopting an overbroad definition of SSAs and then imposing an onerous disclosure requirement on broadcasting stations without having identified any need for additional regulation.

Although an agency's investigative authority is broad, the agency must identify some indication that the law has been violated,[348] and the agency's information demand must not be "too indefinite."[349] Here, the Commission has not identified any violation; on the contrary, the Commission's review of SSAs disclosed to it in the transactional context indicates that these agreements are not in any way inconsistent with the public interest. The information sought is also virtually unlimited, especially when combined

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[345] *See* 47 U.S.C. § 303(j); *see also Office of Commc'n of United Church of Christ v. FCC*, 779 F.2d 702, 707 (D.C. Cir. 1985).

[346] *Notice* ¶ 336 n.1030 (citing *Stahlman v. FCC*, 126 F.2d 124, 127-28 (D.C. Cir. 1942).

[347] 126 F.2d at 127, 128.

[348] *See RNR Enterprises, Inc. v. SEC*, 122 F.3d 93, 97-98 (2d Cir.1997).

[349] *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

with the FCC's all-encompassing definition of what constitutes an SSA. The Commission's disclosure requirement is not an investigative request, supported by evidence of actual or potential wrong-doing, but a regulation of general applicability that must be justified by sufficient evidence and measured against the asserted regulatory purpose of safeguarding competition, localism, and diversity.

In addition, the Commission should be cautious about immersing itself in broadcasting stations' day-to-day operations. As the Supreme Court explained, "the First Amendment must inform and give shape to the manner in which "Congress exercises its regulatory power" in the broadcast area.[350] Regulatory intervention into the details of stations' daily operations and their newsgathering activities raises potential First Amendment concerns.[351] Moreover, a regulation that requires a business to disclose factual information must be justified by a showing of "a substantial government interest" that is "directly and materially advanced by the restriction" and "that the restriction is narrowly tailored" to the achievement of that interest.[352] Given the incongruity between the breadth of the proposed SSA definition and any identified need for the massive information to be produced under that definition, it is doubtful whether the proposed regulation would satisfy this demanding standard.

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[350] *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378 (1984).

[351] *See CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 120-21 (1973) (rejecting a requirement that would have resulted in the Government "oversee[ing] far more of the day-to-day operations of broadcasters' conduct").

[352] *Nat'l Ass'n of Mfgs. v. SEC*, --- F.3d ----, 2014 WL 1408274, at *10 (D.C. Cir. Apr. 14, 2014) (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564-66 (1980)).

D. THE PROPOSED REGULATION WILL HAVE SERIOUS NEGATIVE CONSEQUENCES, AND THE COMMISSION FAILED TO ADEQUATELY CONSIDER THE AVAILABLE ALTERNATIVES

The Commission also overlooks potential serious negative consequences of its proposed regulation. The Commission's proposal will tend to have a chilling effect on beneficial — and otherwise benign — resource-sharing arrangements. Broadcasters may simply avoid entering into such arrangements in order to avoid the sheer cost of complying with the proposed overbroad requirement or the revelation of confidential business terms and arrangements.

More importantly, the mandatory disclosure would risk revealing the broadcasting stations' competitive information to the marketplace. While the Commission holds out the prospect of permitting stations to redact confidential or proprietary information,[353] such redactions would be an inadequate safeguard and will not fully protect confidential business strategies that may be embedded in an agreement. The very existence of an agreement, the nature of the agreement, or its scope — irrespective of specific financial terms — will provide valuable and sensitive business information to a station's competitor, to the detriment of the broadcaster.

By impeding stations' access to cost-saving and efficiency-enhancing measures afforded by the SSAs, the proposed broad disclosure requirement would ultimately impact localism, as money spent on duplicating the resources of another station is money that cannot be spent on local programming. The effect on localism could be

[353] *Notice* at ¶ 339.

particularly acute in small and mid-sized markets, where stations tend to be even more sensitive to changes in costs.

The Commission must consider alternatives to its proposed regulation.[354] For instance, the Commission should assess whether the alternative of requiring stations to submit an aggregate list of their SSAs (broken down by categories) in a station's biennial ownership report, where the Commission already requires broadcasters to provide a list of network affiliation agreements, LMAs and radio JSAs.[355] With such information, the Commission would then be able to evaluate, over time, whether the SSAs have any negative impact on the Commission's public interest objectives.

Finally, the Commission has not inquired whether the benefits of additional public scrutiny will outweigh the costs on broadcasters. Given the breadth of the proposed disclosure requirement, these costs will be considerable. The Commission's reasoning that the disclosure requirement will not have a significant impact, because it targets only commercial television stations and because the SSAs are typically of multi-year duration,[356] is an inadequate consideration of the cost-benefit trade-off. The Commission articulates a vague and theoretical perception of harm for which it advances no evidence in support, despite its deep familiarity with the agreements in question. By avoiding a discussion of alternatives and turning its eye from the substantial negative impact of its proposed actions, the Commission risks overreaching in a manner that would harm broadcasters while generating few, if any, public benefits.

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[354] *See State Farm*, 463 U.S. at 43.

[355] *See* 47 C.F.R. § 73.3615; FCC Form 323, Ownership Report for Commercial Broadcast Stations, *available at* http://transition.fcc.gov/Forms/Form323/323.pdf.

[356] *See Notice*, App. D, ¶ 62.

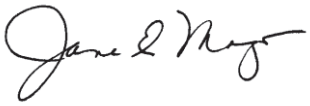
X. CONCLUSION

The Commission must comply with its statutory obligation in Section 202(h) by altering, relaxing, or removing outdated broadcast ownership regulations that apply solely to broadcasters. As demonstrated by the record, and these comments, the current regulatory restrictions are not necessary given the current intense competitive media landscape. Broadcasters must be able to compete with pay-TV and the Internet on a level-playing ground using the same economically-beneficial ownership structures employed by our competitors.

The FCC's stated regulatory goals of competition, diversity, and localism do not support retaining the rules as currently applied. The Commission has recognized the important role public interest role that local broadcast stations serve in individual communities. By ignoring market realities and continuing to limit broadcasters' flexibility in embracing economic ownership structures the Commission is putting local broadcasting at risk. A fresh, open-minded and new review, without past preconceptions, of the 2014 media landscape is necessary to ensure the vibrant local broadcasting industry continues.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS



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August 6, 2014

ATTACHMENT A

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

In the Matter of	)	
	)	
2014 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. 14-50
	)	
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
	)	
Promoting Diversification of Ownership in the Broadcasting Services	)	MB Docket No. 07-294
	)	
Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets	)	MB Docket No. 04-256

Competition in Local Broadcast Television Advertising Markets

Kevin Caves and Hal Singer

August 6, 2014

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Introduction

1. We have been asked by the National Association of Broadcasters ("NAB") to provide an economic analysis of the nature of competition in local broadcast television advertising markets, and its implications for (a) policies advocated by the Department of Justice ("DOJ") in its *ex parte* submission on ownership-attribution rules for television joint-sales agreements ("JSAs") or shared-services agreements ("SSAs"),[1] and (b) the Commission's Further Notice of Proposed Rulemaking ("FNPRM") and the accompanying Report and Order, which proposes and adopts policies consistent with the DOJ's key recommendations.[2]

2. In this study, we empirically evaluate the DOJ's position that local broadcast television advertising is a relevant antitrust product market, which implies that arrangements such as JSAs and so-called "duopoly" ownership (in which two or more broadcast stations have a common owner in a given local market) are likely to generate anticompetitive effects.

3. To evaluate the DOJ's position, we have performed several empirical analyses of the determinants of local advertising prices. The results are inconsistent with the DOJ's view of competition in local advertising markets, but are consistent with the position of NAB and other broadcasters that local broadcasting prices are affected and disciplined by cable television and other advertising alternatives. In particular, we find no empirical evidence that JSAs or duopoly ownership arrangements are associated with higher advertising prices, and some evidence that they

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[1] *Ex Parte* Submission of the United States Department of Justice, *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* (Feb. 20, 2014) [hereafter *DOJ Ex Parte*], *available at* http://www.justice.gov/atr/public/comments/303880.pdf, at 2.

[2] *Federal Communications Commission, 2014 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 14-50, *Further Notice of Proposed Rulemaking and Report and Order* (Mar. 31, 2014), [hereafter *FNPRM/R&O*], ¶1 ("[W]e determine that certain television joint sales agreements ("JSAs") are attributable").

are associated with lower prices. Moreover, we find no evidence that increases in concentration among local broadcasters are associated with statistically significant increases in local advertising prices. We conclude that the DOJ's definition of the relevant antitrust product market as limited to local broadcast television advertising is not supported by the available evidence, and that a properly defined relevant product would need to include non-broadcast alternatives such as cable television.

I. Background

4. In this section, we describe the DOJ's position on the degree of competition between broadcast stations and cable and other advertising media.

A. The DOJ Asserts That Local Broadcast Television Advertising Is a Relevant Antitrust Product Market

5. The DOJ has asserted in public statements and in court filings that local broadcast is a relevant antitrust product market, noting that "[s]ince different programming and forms of media attract distinct audiences and have unique advantages and disadvantages for conveying various messages, advertising on two different forms of media may or may not be substitutes."[3] The DOJ maintains that local broadcast advertising is a distinct product market because "broadcast television spot advertising has no close substitute for a significant number of advertisers."[4]

6. The DOJ's *Horizontal Merger Guidelines* provide that a candidate market can be considered a relevant antitrust product market only if it includes a sufficiently broad set of substitute products such that a hypothetical monopolist over all products in the candidate market could impose at least a small but significant and non-transitory increase in price ("SSNIP"),

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[3] *DOJ Ex Parte* at 8.

[4] *Competitive Impact Statement, U.S. v. Gannett Co., Inc.*, No. 13-01984 (D.D.C. Dec. 16, 2013) [hereafter *Gannett CIS*], at 5.

without losing so many sales to render the price increase unprofitable.[5] Accordingly, under standard principles of antitrust, the sale of local broadcast advertising can be considered a relevant antitrust product market only if a hypothetical entity with ownership of all broadcast stations in a given local market could raise prices to advertisers without losing a sufficient amount of sales to other advertising media to make the price increase unprofitable. Thus, the issue of whether non-broadcast advertising media belong in the relevant product market is an empirical question, which turns on the degree to which advertisers, in the aggregate, would shift their advertising dollars to cable and other media if broadcast station owners raised their prices by small but significant amounts.

B. The DOJ's Position Lacks Empirical Support

7. The DOJ claims to have resolved the empirical question of the degree of substitutability between broadcast and non-broadcast media, noting that "the Department has repeatedly concluded that the purchase of broadcast television spot advertising constitutes a relevant antitrust product,"[6] based on the claim that "advertisers view spot advertising on broadcast television stations as sufficiently distinct from advertising on other media."[7] However, examination of the DOJ's public statements and court filings reveals that the DOJ has not produced a supporting empirical foundation for its definition of the relevant product market. For example, in *U.S. v. Gannett Co.*, the DOJ challenged Gannett's acquisition of Belo Corporation, requiring that Gannet divest KMOV-TV to "eliminate the anticompetitive effects of the Transaction in the

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[5] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (August 19, 2010) [hereafter *Merger Guidelines*], §4.1.1

[6] *DOJ Ex Parte* at 8.

[7] *Id*. (emphasis added).

St. Louis DMA."[8] In the *Competitive Impact Statement* that the DOJ filed with the Court describing the bases for the settlement, the DOJ did not provide any empirical support for its broadcast-only product market definition, but instead listed subjective product characteristics that, it claims, differentiate broadcasters from other advertising media:

> Broadcast television spot advertising possesses a unique combination of attributes that sets it apart from advertising using other types of media. Television combines sight, sound, and motion, thereby creating a more memorable advertisement. Broadcast television spot advertising reaches the largest percentage of potential customers in a targeted geographic market and is therefore especially effective in introducing and establishing a product's image.
>
> Because of this unique combination of attributes, broadcast television spot advertising has no close substitute for a significant number of advertisers. Cable television spot advertising and Internet-based video advertising lack the same reach; radio spots lack the visual impact; and newspaper and billboard ads lack sound and motion, as do many internet search engine and website banner ads . . . Consequently, a small but significant increase in the price of broadcast television spot advertising is unlikely to cause enough advertising customers to switch enough advertising purchases to other media to make the price increase unprofitable.[9]

8. The DOJ's statements above are best characterized as a subjective narrative unsupported by the standard forms of empirical analysis that economists use to inform the definition of the relevant antitrust product market. The DOJ provides no empirical assessment of the supposed limitations of cable television spot advertising, Internet advertising, radio spots, and newspaper and billboard advertising, nor does it attempt to determine whether advertisers would substitute towards some combination of non-broadcast media in response to a SSNIP. The DOJ references the possibility that advertisers with "strong preferences"[10] for broadcast advertising may exist, but provides no evidence that such advertisers make up any economically significant fraction of the marketplace, let alone any evidence that their preferences are sufficiently strong to relegate

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[8] *Gannett CIS* at 9.

[9] *Id*. at 4-5.

[10] *Id*.

broadcast advertising to its own antitrust product market. The DOJ also does not attempt to analyze the possibility that local advertisers may be concerned primarily with reaching a given number of potential customers, regardless of the media through which it is reached. For example, if a furniture dealer has a fixed advertising budget for a given month, there is, in theory, nothing to prevent the dealer from allocating its budget across broadcast, cable, and other media—or from re-allocating the budget shares in response to a change in relative prices.

II. Empirical Evidence Is Inconsistent with the DOJ's Definition of the Relevant Product Market

9. To analyze the validity of the DOJ's position, we have conducted several econometric analyses of the determinants of local advertising prices at the level of the individual local advertising market, in addition to examining long-term trends in the aggregate data. As explained below, we find no evidence that JSAs or duopoly ownership arrangements are associated with higher advertising prices, and some evidence that they are associated with lower prices. More broadly, we find no evidence that increases in concentration among local broadcasters are associated with statistically significant increases in local advertising prices. These results are inconsistent with the DOJ's position that local broadcast television advertising is a relevant product market, and consistent with the conclusion that local broadcasting prices are disciplined by non-broadcast alternatives, and are subject to efficiencies that correlate with modest increases in local market concentration.

A. Robust Long-Term Trends Show That Broadcast Television Advertising Faces Increasing Competition From Non-Broadcast Media

10. Broadcast television's share of both viewing audiences and advertising dollars has experienced substantial and persistent declines for decades, while non-broadcast alternatives such as cable and Internet have experienced substantial growth. This is a clear empirical indicator of

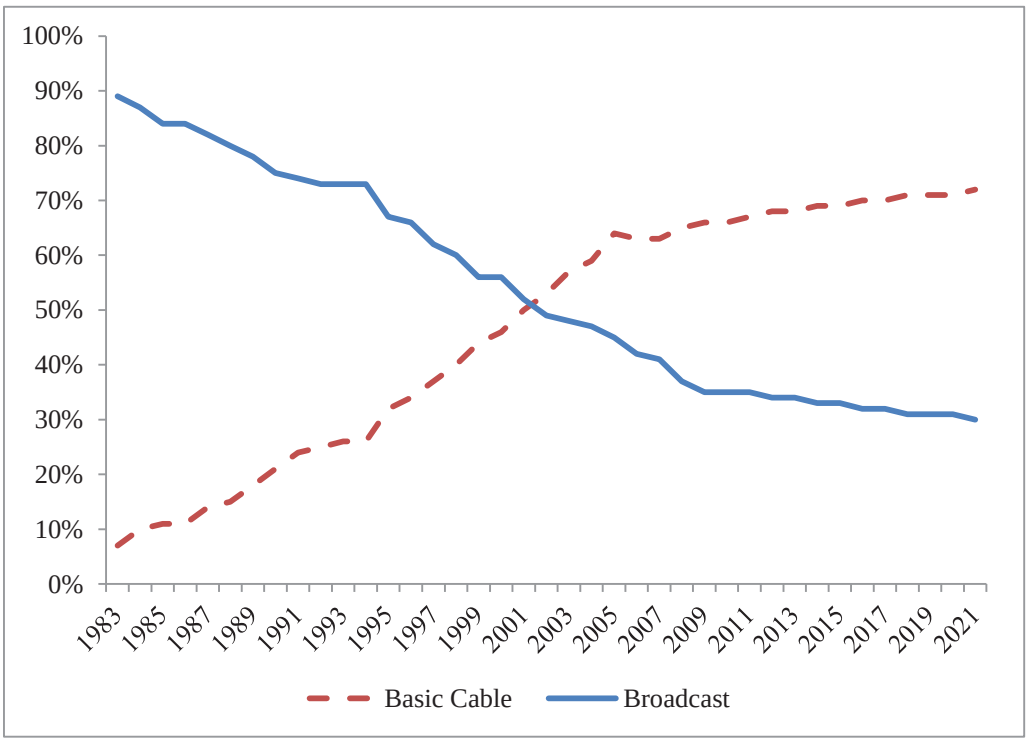
substantial and increasing competition between broadcast and other advertising media, because it demonstrates both viewers' and advertisers' willingness to substitute away from broadcast and towards non-broadcast alternatives in large numbers.

11. As seen in ACCORDING to SNL Kagan, local cable advertisers earned approximately $5.0 billion in local advertising revenue in 2012, compared with $11.7 billion for local broadcast stations.

FIGURE 1, according to SNL Kagan, basic cable has captured a larger viewing share than broadcast television since 2002. In the early 1980s, broadcast's viewing share was close to 90 percent. Yet as of 2012, basic cable's viewing share had risen to 67 percent, nearly twice that of broadcast. Broadcast television's viewing share is not expected to recover; instead, SNL Kagan projects that broadcast will capture less than one third of the viewing audience in the years ahead. According to SNL Kagan, local cable advertisers earned approximately $5.0 billion in local advertising revenue in 2012, compared with $11.7 billion for local broadcast stations.[11]

[11] *See* Baine, Derek, *Ad market decelerates in 2013, projected to be up 1.4% to $223B,* SNL Kagan (Dec. 17, 2013. *See also* Bond & Pecaro, *The Television Industry: A Market-by-Market Review* (2014).

FIGURE 1: BROADCAST VS. BASIC CABLE VIEWING SHARES



Source: SNL Kagan, Cable/Broadcast TV Advertising Billings Database (2012). Post-2012 data are projections.

12. Cable providers and other multichannel video programming distributors ("MVPDs") also compete for and earn additional local advertising dollars via so-called "interconnects," which allow advertisers to expand their reach within a given local market by purchasing local advertising from multiple MVPDs through a single contract. Interconnects combine the platforms of multiple cable operators, satellite providers, and incumbent local exchange carriers. For example, NCC Media, which is jointly owned by Comcast, Cox, and Time Warner Cable,[12] describes itself as "an advertising sales, marketing, and technology company that harnesses the enormous reach and consumer power of cable television programming,"[13] and

[12] *See* http://nccmedia.com/about/owners-affiliates/.

[13] *See* http://nccmedia.com/about/.

reports that it has formed "alliances" involving "cable operators and satellite and telco programming distributors, including DIRECTV, AT&T U-verse and VERIZON FiOS."[14]

13. There is also evidence of robust and rapidly expanding competition from Internet-based advertising.[15] According to the Interactive Advertising Bureau, Internet advertising has grown faster than any other media category since 2005, recently surpassing both cable and broadcast.[16] As seen in Figure 2, broadcast television advertising revenue has been essentially flat since 2005, and was surpassed by Internet advertising in 2013, with cable advertising rapidly closing the gap as well. If current trends continue, broadcast advertising will soon be only the third largest advertising medium, behind both cable and Internet.

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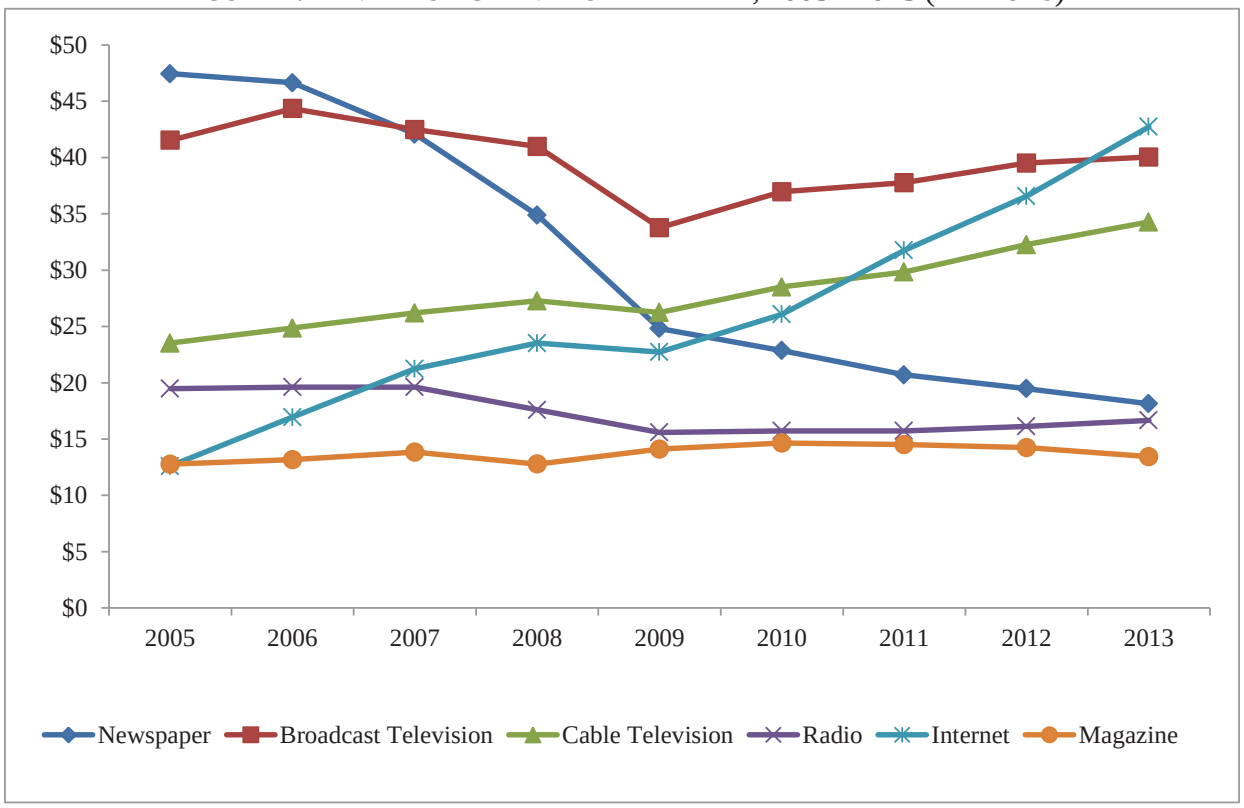
[14] *See The Essential Guide to NCC Media: Planning & Buying Local Market Cable Television & Digital Media* (Sept. 2011) at 2.

[15] *See* BIA Kelsey, *BIA/Kelsey Forecasts Overall U.S. Local Media Ad Revenues to Reach $151.5B in 2017, Lifted by Faster Growth in Online/Digital*, (Nov. 19 2013), available at http://www.biakelsey.com/Company/Press-Releases/131119-Overall-U.S.-Local-Media-Ad-Revenues-to-Reach-$151.5B-in-2017.asp ("Faster growth in online/digital advertising revenues will drive…faster overall growth, increasing at a 13.8 percent CAGR from $26.5 billion in 2013 to $44.5 billion in 2017. That compares with a CAGR of 0.1 percent during the same period for traditional advertising revenues, which will remain flat, growing slightly from $106.4 billion in 2013 to $107 billion in 2017. Location targeted mobile advertising revenues, which are growing at a faster pace than overall mobile advertising, will increase from $2.9 billion in 2013 to $10.8 billion in 2017, accounting for 52 percent of overall U.S. mobile ad spending in 2017.").

[16] Interactive Advertising Bureau, "IAB internet advertising revenue report: 2013 full year results," (April 2014), [hereafter *IAB Report*], available at: http://www.iab.net/media/file/IAB_Internet_Advertising_Revenue_Report_FY_2013.pdf, at 20.

FIGURE 2: ADVERTISING REVENUE BY MEDIA, 2005 - 2013 (BILLIONS)



Source: *IAB Report* at 20. Broadcast Television includes Network, Syndicated and Spot television advertising revenue. Cable Television includes National Cable Networks and Local Cable television advertising revenue.

14. Analysts at SNL Kagan encountered similar trends when examining local advertising specifically, finding that both Internet and cable advertising have grown at a faster rate than local broadcast advertising revenues, which actually declined somewhat between 2003 and 2012, while being surpassed by Internet advertising.[17] Over this interval, local spot television advertising revenues declined from $11.8 billion to $11.7 billion, while local cable television advertising revenue grew at a constant annual growth rate of 4.8 percent, from $3.3 billion to $5.0 billion.[18] Local Internet advertising revenues also grew very rapidly, from just $1.8 billion in 2003 to $13.1 billion in 2012, for a constant annual growth rate of 24.7 percent.[19]

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[17] Baine, *supra*.

[18] *Id.*

[19] *Id.*

B. Econometric Tests of the DOJ's Market Definition

15. To further evaluate the relevant antitrust product market, we compiled and analyzed a ten-year panel data set spanning 210 Designated Market Areas ("DMAs") that includes (a) local broadcast advertising prices by market; (b) indicators for duopoly status and JSA/SSA status by market; (c) local broadcaster concentration; and (d) various market-level control variables. As explained below, the DOJ's assertion that local broadcast stations are a relevant antitrust product market is inconsistent with the results of the econometric analysis.

1. Regression Data Set and Summary Statistics

16. Annual broadcast advertising prices for 210 local markets were obtained from the market research firm SQAD for the ten-year period from 2004 to 2013. The SQAD pricing data measure average advertising prices based on actual transactions between advertising agencies and television stations in a given market and year. SQAD reports two different pricing metrics. The CPM (cost per-thousand) reflects the cost of reaching one thousand viewers, and is also used to price advertising for non-broadcast media (e.g., Internet). The CPP (cost per ratings point) reflects the cost of reaching one percent of the target population in a given market. Therefore, CPM is invariant across markets and advertising platforms, but CPP is not. Although CPP is still commonly used to price local broadcast advertising, CPM has already been adopted by some industry participants, and may be adopted throughout the industry in the future.[20] For analytical purposes, CPM is the more meaningful metric for cross-market comparisons, and has been used

[20] *See, e.g.*, Kevin Downey, "Is TV Ready To Move From CPP To CPM?," *TVNewsCheck* (November 13, 2013), *available at* http://www.tvnewscheck.com/article/71924/is-tv-ready-to-move-from-cpp-to-cpm; *see also* Erwin Ephron, "The Numbers Game," *AdWeek* (April 27, 2009), available at http://www.adweek.com/news/advertising-branding/numbers-game-99057

by academic researchers for this purpose.[21] In any case, as explained below, the conclusions emerging from the analysis remain the same, regardless of which of the two metrics is used.

17. Market and station-level data, including information on local market demographics, income, and advertising revenue by broadcast station, were obtained from the market research firm BIA/Kelsey.[22] We used BIA's advertising revenue data to calculate the HHI for each local broadcast market in each year. BIA also provided detailed station-level ownership and transactional information from 2004 onward, which we used to generate an indicator variable for duopoly status (common ownership of two stations in the same market).[23]

18. JSAs and SSAs are private contracts between two stations authorizing one station to sell advertising time on behalf of the other in the same market, as well as the sharing of operating expenses and assets. Unlike the formation of a duopoly, which involves a transaction that must be approved by the FCC and can be ascertained based on public sources, the creation of a JSA/SSA is a private arrangement. Although some stations disclose their JSA/SSAs to the FCC when they are related to a transfer of control of a broadcast licensee or the assignment of a broadcast license, these disclosures often do not reveal the point in time at which the JSA/SSA first went into effect. We nonetheless were able to obtain substantial information on JSA/SSA status from the following sources: (a) JSA/SSAs disclosed as part of larger TV station transactions that must be approved

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[21] *See* Keith Brown & Peter Alexander, *Market Structure, Viewer Welfare, and Advertising Rates in Local Broadcast Television Markets*, 86 ECONOMICS LETTERS (2005) 331-337, at 334 [hereafter *Brown & Alexander*].

[22] The data set was limited to full power broadcast television stations.

[23] The BIA transactional data include a field indicating the date (month and year) when a given station was acquired by its current owner. To create an annual duopoly variable, transactions occurring in the first half of the year (June or earlier) were counted as applying to that year. Transactions that did not occur until in July or later were counted as applying to the following year. Transactions labeled as merely "Proposed" were not used for purposes of determining duopoly status.

by the FCC; (b) JSA/SSAs made public in SEC filings; and (c) JSA/SSAs disclosed by NAB members.[24] The second and third sources both identify the date upon which each agreement was initiated, but the first source does not. Therefore, the first source was used as an approximate cross-sectional indicator of JSA/SSA status, while we combined the second and third sources to create a panel containing within-market variation in JSA/SSA status over time.

19. Table 1 reports summary statistics for the variables used in the regression analyses. Statistics are reported for the data set as a whole, as well as for markets with and without duopolies or JSAs. In general, non-duopoly markets tend to be the most concentrated. This is consistent with the FCC's ownership rules, which tend to prevent duopolies from forming in markets with relatively high levels of concentration.[25] In contrast, JSA markets have similar levels of concentration compared with non-JSA markets, presumably reflecting the fact that JSA/SSAs have not been subject to the same ownership rules as duopolies.

[24] We agreed not to disclose the identity of the NAB members that provided information about their JSAs.

[25] *See* Part II.C, *infra.*

TABLE 1: SUMMARY STATISTICS

Variable	Obs.	Mean	Std. Dev.	Min	Max
Overall					
CPM	2,099	54.29	78.02	15.38	1,599.75
CPP	2,099	274.20	620.19	7.25	8,519.50
Duopoly Indicator	2,099	0.32	0.47	0.00	1.00
Market HHI	2,099	3,563	2,112	1,082	10,000
JSA Indicator (Cross-Section)	210	0.20	0.40	0.00	1.00
JSA Indicator (Panel)	550	0.35	0.48	0.00	1.00
Population (000s)	2,099	1,453	2,346	10	21,207
TPI per Capita ($ 000s)	2,099	24.91	7.83	9.33	58.00
% Market Population Black	2,099	10.56%	11.52%	0.10%	64.10%
% Market Population Hispanic	2,099	10.90%	15.57%	0.50%	95.70%
% Population 18-44	2,099	36.46%	2.62%	25.39%	49.86%
Non-Duopoly Markets					
CPM	1,429	61.91	92.96	15.38	1,599.75
CPP	1,429	114.86	125.99	7.25	1,317.75
Market HHI	1,429	4,220	2,240	1,604	10,000
JSA Indicator (Cross-Section)	139	0.20	0.40	0.00	1.00
JSA Indicator (Panel)	411	0.41	0.49	0.00	1.00
Population (000s)	1,429	664	686	10	5,867
TPI per Capita ($ 000s)	1,429	24.03	7.47	9.33	49.51
% Market Population Black	1,429	10%	12%	0%	64%
% Market Population Hispanic	1,429	9.50%	15.52%	0.50%	95.70%
% Population 18-44	1,429	36.26%	2.79%	25.39%	49.86%
Duopoly Markets					
CPM	670	38.02	15.87	16.32	145.63
CPP	670	614.04	1,001.23	22.00	8,519.50
Market HHI	670	2,162	621	1,082	4,701
JSA Indicator (Cross-Section)	71	0.21	0.41	0.00	1.00
JSA Indicator (Panel)	139	0.17	0.37	0.00	1.00
Population (000s)	670	3,136	3,477	133	21,207
TPI per Capita ($ 000s)	670	26.79	8.25	12.09	58.00
% Market Population Black	670	12%	10%	0%	48%
% Market Population Hispanic	670	13.88%	15.27%	0.70%	79.50%
% Population 18-44	670	36.88%	2.16%	29.88%	43.98%
Non-JSA Markets					
CPM	359	44.31	33.64	16.32	269.48
CPP	359	171.23	240.19	26.25	1,743.25
Market HHI	359	3,384	1,680	1,664	10,000
Duopoly Indicator	359	0.32	0.47	0.00	1.00
Population (000s)	359	1,094	1,085	122	6,705
TPI per Capita ($ 000s)	359	24,154.08	7,727.52	12,289.00	55,169.00
% Market Population Black	359	10.21%	10.63%	0.60%	42.70%
% Market Population Hispanic	359	9.63%	12.92%	0.70%	54.70%
% Population 18-44	359	36.63%	2.47%	30.47%	45.02%
JSA Markets					
CPM	191	41.90	16.87	17.70	104.98
CPP	191	87.61	40.65	26.50	219.00
Market HHI	191	3,330	710	2,270	5,638
Duopoly Indicator	191	0.12	0.33	0.00	1.00
Population (000s)	191	602	360	139	1,542
TPI per Capita ($ 000s)	191	24,850.72	7,319.51	13,766.00	41,695.00
% Market Population Black	191	7.98%	8.89%	0.30%	36.60%
% Market Population Hispanic	191	10.41%	11.63%	1.10%	39.80%
% Population 18-44	191	35.73%	1.89%	30.82%	39.80%

Notes: CPM and CPP reflect market average prices for target population of adults 18-49, during prime daypart, as reported by SQAD. Share of population aged 18-44 computed using BIA data to match the SQAD target population as closely as possible.

2. Duopoly Status Is Not Statistically Associated With Higher Advertising Prices

20. We analyze the relationship between pricing and duopoly status using panel regressions with fixed effects by market. The use of fixed effects controls for all market-specific characteristics that are invariant over time, and identifies the effect of duopoly status based on within-market changes over time. The fixed effect methodology is superior to the cross-sectional approach implemented in prior work, because it controls for a broader range of market-specific traits, and captures market-level variation over a long period of time.[26] As in prior work, we also include controls for income, population, and demographics.[27]

[26] *See Brown & Alexander* at 334 (noting that the authors observe advertising prices for a single quarter in 1998).

[27] *Id*.

TABLE 2: DUOPOLY PANEL REGRESSIONS WITH MARKET FIXED EFFECTS

Variables	Dep. Var. = *ln*(CPM)	Dep. Var. = *ln*(CPP)
Duopoly Indicator	-0.0248	-0.0218
	(-0.89)	(-0.78)
ln(Income per Capita)	0.2948***	0.2743***
	(4.75)	(4.46)
ln(Population)	-0.3244	0.3080
	(-1.32)	(1.42)
ln(Pct. Hispanic)	0.0389	-0.0002
	(0.39)	(-0.00)
ln(Pct. Black)	0.0070	-0.0203
	(0.29)	(-0.88)
ln(Pct. 18-44)	0.2538	0.7345*
	(0.57)	(1.70)
Time Trend	0.0113*	0.0111*
	(1.78)	(1.77)
Constant	5.3142***	2.6073
	(2.67)	(1.47)
Observations	2,099	2,099
R-squared	0.899	0.972

Robust t-statistics in parentheses. *** p<0.01, ** p<0.05, * p<0.10. Market fixed effects for 210 DMAs not shown.

21. As shown in Table 2, the dependent variable is measured as the natural log of either CPM or CPP. The key independent variable of interest is the Duopoly Indicator, which is set equal to one for markets that contain two or more stations under common ownership in a given year, and zero otherwise. In addition, each regression includes 210 DMA-level fixed effects (not shown). These variables collectively explain a high proportion (90 to 97 percent) of the variation in local advertising prices.

22. As seen above, the Duopoly Indicator is negative and statistically insignificant in both columns.[28] Therefore, the data provide no evidence that duopoly markets have higher local

[28] The coefficients on the Duopoly Indicator are nearly the same in both regressions, because CPM and CPP differ only to the extent that local populations differ: CPM = (CPP x 100) / (Population / 1000).

advertising rates than non-duopoly markets after controlling for other factors. In fact, the data indicate that prices are approximately two percent lower in duopoly markets (although the difference is not statistically significant). These results are inconsistent with the DOJ's view, which would predict that broadcast station duopolies would, all else equal, lead to higher advertising prices.

23. According to the FCC's ownership rules, a single entity may own two television stations in a local market if "at least one of the stations is not ranked among the top four stations in the DMA (based on market share), and at least eight independently owned TV stations would remain in the market after the proposed combination."[29] To the extent that the ownership rules dictate that duopoly status is granted only in markets with numerous TV stations and relatively low levels of concentration, where price effects are unlikely, the coefficient on the Duopoly Indicator might fail to fully reflect the effect that would be observed if duopolies were formed in the absence of the ownership rules. To verify the robustness of our results, we estimated alternate regressions specifications that control for both duopoly status and the local Herfindahl–Hirschman Index ("HHI"). In these regressions, the Duopoly Indicator remains statistically insignificant (as does the HHI).[30] The robustness of the results above are also confirmed by the results reported below, showing that JSA status is not statistically associated with higher prices—despite the fact that television stations have been able to form JSAs (and SSAs) in markets where the Commission's ownership rules prevent the formation of duopolies.[31]

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[29] *See* http://www.fcc.gov/guides/review-broadcast-ownership-rules.

[30] *See* Appendix 3.

[31] The JSA regression results, like the duopoly results, also continue to hold when HHI is added to the list of control variables. *Id*.

3. JSA/SSA Status Is Not Statistically Associated With Higher Advertising Prices

24. We next analyze the relationship between pricing and JSA/SSA status using (a) a rough cross-sectional indicator of JSA/SSA status, which incorporates all 210 DMAs; and (b) a more precise metric that captures within-market variation in JSA/SSA status over time for a smaller set of markets. As explained below, holding other factors constant, the data provide no evidence that JSA/SSAs tend to increase advertising prices in local markets. To the contrary, there is evidence that JSA/SSAs are associated with lower local advertising prices. These results are again inconsistent with DOJ's hypothesis local broadcast advertising is a relevant product market and that JSA/SSAs may have anticompetitive effects, and consistent with the view that (a) broadcast stations engage in substantial competition with cable and other non-broadcast media; (b) broadcasting is subject to economies of scale and scope, and (c) that JSA/SSAs yield procompetitive efficiency gains.

a. Cross-Sectional Regressions

25. The first set of JSA/SSA regressions uses the full set of 210 local markets to examine the cross-sectional relationship between pricing in JSA/SSA markets versus pricing in non-JSA/SSA markets, subject to the caveat that JSA/SSA status is measured imperfectly, as noted above. As before, the dependent variable is measured as the natural log of either CPM or CPP. The key independent variable of interest is now the JSA/SSA Indicator, set equal to one in markets for which a JSA/SSA agreement can be identified, and zero otherwise. As before, we include controls for income, population, and demographics.

TABLE 3: CROSS-SECTIONAL JSA/SSA REGRESSIONS

Variables	**Dep. Var. = *ln*(CPM)**	**Dep. Var. = *ln*(CPP)**
JSA Indicator	-0.1564**	-0.1652**
	(-2.29)	(-2.43)
ln(Income per Capita)	0.6224**	0.6341**
	(2.43)	(2.42)
ln(Population)	-0.3367***	0.6812***
	(-6.45)	(12.98)
ln(Pct. Hispanic)	0.1322***	0.1323***
	(3.41)	(3.32)
ln(Pct. Black)	0.0557*	0.0622*
	(1.69)	(1.85)
ln(Pct. 18-44)	-0.7018	-0.1817
	(-1.23)	(-0.31)
Constant	3.7505***	-1.4179
	(3.66)	(-1.35)
Observations	210	210
R-squared	0.341	0.783

Robust t-statistics in parentheses. *** p<0.01, ** p<0.05, * p<0.10.

26. The results of the cross-sectional regressions are displayed in Table 3. As seen above, the variables included in the regression collectively explain between 34 and 78 percent of the variation in local advertising prices. The coefficient on the JSA/SSA indicator is negative and statistically significant both columns, indicating that markets with such agreements have prices approximately 16 percent *lower* than markets without JSAs/SSAs.

b. Panel Regressions

27. Due to the fact that JSAs/SSAs are private contracts, it is not generally possible to identify the point in time when a JSA/SSA agreement was first put into place.[32] Accordingly, for purposes of the panel regressions, the sample was restricted to the set of markets for which changes

[32] *Id*.

in JSA/SSA status over time could be identified. This yields a sample of 55 markets for which changes in JSA/SSA status can be observed from 2004 to 2013. Although this is a smaller sample than the full panel of 210 markets, it still provides more than enough observations to estimate panel regressions with market fixed effects.

TABLE 4: JSA/SSA PANEL REGRESSIONS WITH MARKET FIXED EFFECTS

Variables	**Dep. Var. = *ln*(CPM)**	**Dep. Var. = *ln*(CPP)**
JSA/SSA Indicator	0.0532	0.0437
	(0.89)	(0.72)
ln(Income per Capita)	0.2030**	0.1796**
	(2.53)	(2.31)
ln(Population)	-0.3924	0.1812
	(-1.10)	(0.71)
ln(Pct. Hispanic)	-0.0318	-0.0242
	(-0.31)	(-0.25)
ln(Pct. Black)	0.0877*	0.0534
	(1.86)	(1.05)
ln(Pct. 18-44)	1.0430**	1.6681***
	(2.02)	(3.34)
Time Trend	0.0192*	0.0190**
	(1.89)	(2.09)
Constant	4.9976*	3.1892
	(1.87)	(1.66)
Observations	550	550
R-squared	0.895	0.954

Robust t-statistics in parentheses. *** p<0.01, ** p<0.05, * p<0.10. Market fixed effects for 55 DMAs not shown.

28. The results of the panel fixed-effects regressions are shown in Table 4. These variables collectively explain a high proportion (90 to 95 percent) of the variation in local advertising prices. Most significantly for present purposes, the JSA Indicator is not statistically different from zero.

4. Local Broadcaster Concentration Is Not Statistically Associated with Higher Local Advertising Prices

29. If the DOJ were correct in asserting that local broadcast is a relevant antitrust product market, then increases in local broadcaster concentration should be associated with higher advertising prices. In contrast, if the market is defined too narrowly, then changes in concentration should not be associated with higher prices. Accordingly, we have analyzed the relationship between pricing and the HHI, DOJ's preferred concentration metric,[33] again using panel regressions with fixed effects by market.

TABLE 5: HHI PANEL REGRESSIONS WITH MARKET FIXED EFFECTS

Variables	**Dep. Var. = *ln*(CPM)**	**Dep. Var. = *ln*(CPP)**
ln(HHI)	0.0860	0.0490
	(0.93)	(0.51)
ln(Income per Capita)	0.2933***	0.2730***
	(4.73)	(4.44)
ln(Population)	-0.3153	0.3132
	(-1.29)	(1.43)
ln(Pct. Hispanic)	0.0398	0.0006
	(0.40)	(0.01)
ln(Pct. Black)	0.0054	-0.0214
	(0.22)	(-0.92)
ln(Pct. 18-34)	0.2509	0.7367*
	(0.56)	(1.69)
Time Trend	0.0114*	0.0112*
	(1.79)	(1.78)
Constant	4.5534**	2.1766
	(2.09)	(1.09)
Observations	2,099	2,099
R-squared	0.899	0.972

Robust t-statistics in parentheses. *** p<0.01, ** p<0.05, * p<0.10. Market fixed effects for 210 DMAs not shown.

30. The results of the HHI panel fixed-effects regressions are shown in Table 5. As shown above, the variables included in the regression (including 210 market fixed effects)

[33] *Merger Guidelines*, §5.3.

collectively explain a high proportion (90 to 97 percent) of the variation in local advertising prices. Most importantly, the coefficient on HHI is statistically indistinguishable from zero. In other words, the data do not support the hypothesis that increases in local broadcaster concentration has any effect on the prices that broadcasters are able to charge, a result that is inconsistent with the DOJ's assertion that local broadcasting is relevant antitrust product market.

C. Empirical Evidence Is Consistent with Significant Economies of Scale and Scope

31. There is also evidence that broadcasting is subject to economies of scale and scope, which implies that broadcasting is characterized by efficiencies that correlate with increases in local market concentration. In the presence of competition from non-broadcast media, broadcasters that enter into duopolies or JSAs in pursuit of these efficiencies should be obliged to pass on a portion of the cost savings in the form of lower advertising rates. This is consistent with our empirical findings above, showing no empirical evidence that JSAs or duopoly ownership arrangements are associated with higher advertising prices, and some evidence that they are associated with lower prices.

32. Scale economies arise from the need to make large capital investments that are largely invariant to output levels, such as broadcasting equipment, production facilities, and spectrum licenses; it also arises from the fact that "first copy" of broadcast content is relatively expensive to produce, but the marginal cost of distributing the content to additional users is essentially zero.[34] Scope economies are present when a single firm can produce multiple forms of

[34] Jeffrey Eisenach and Kevin Caves, The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting, (June 2011) at 2 [hereafter *Scale/Scope Economies*], Attachment A to Reply Declaration of Jeffrey Eisenach and Kevin Caves in NAB Reply Comments in MB Docket No. 10-71, at Appendix A (June 27, 2011), incorporated in MB Docket 09-182 by reference in NAB Comments in that docket, filed Mar. 12, 2012.

output more efficiently than if the same outputs were produced by multiple firms. Economies of scope exploit the ability of a single asset (or collection of firm-specific assets) to produce more than one type of output. For example, a single transmitter and antenna tower might be used to broadcast multiple digital video streams over a single six MHz television channel.[35]

33. There is empirical evidence that local broadcasting is characterized by these types of efficiencies. For example, broadcasters' real net revenue per full-time employee is highly correlated with station size, which indicates that stations with larger operations generate more output per unit of labor.[36] Larger broadcast stations also generate more profit per unit of output, which indicates that this increased output per worker is associated with greater efficiencies, as opposed to (say) an increase in the intensity of other inputs, and/or a decrease in input costs.[37] Finally, several econometric studies have found evidence of scope economies for the joint production of television and radio content, as well as for television and newspapers.[38]

Conclusions

34. Although the DOJ has asserted that local broadcast advertising is a relevant antitrust product market, the DOJ has not produced empirical evidence consistent with this hypothesis. In this study, we have evaluated the DOJ's position through several empirical analyses. In the aggregate, the data show clearly that broadcast television's share of both viewing audiences and

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[35] *Id. See also* Declaration of Mark Israel and Allan Shampine, Appendix B to Comments Of The National Association Of Broadcasters, MB Docket No. 10-71 (June 26, 2014).

[36] *Scale/Scope Economies* at 9-12.

[37] *Id*.

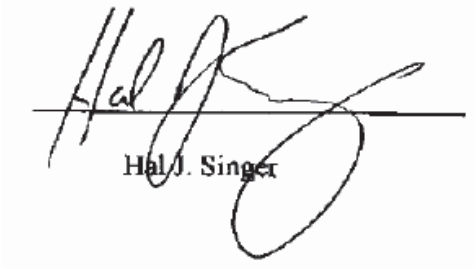
[38] A review of the literature concluded in 2011 that "the existing body of empirical work provides substantial support for the proposition that the amount of local news programming is positively associated with newspaper cross-ownership." *See Scale/Scope Economies* at 44. *See also* Sumiko Asai, *Scale Economies and Scope Economies in the Japanese Broadcasting Market*, 18 INFORMATION ECONOMICS AND POLICY (2006) 321–331, at 321; *see also* Daniel Shiman, "The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming," FCC Media Study 4 (July 2007).

advertising dollars has experienced substantial and persistent declines for decades, while non-broadcast alternatives such as cable and Internet have experienced substantial growth. This constitutes clear evidence of both viewers' and advertisers' willingness to substitute away from broadcast and towards non-broadcast alternatives in large numbers.

35. At a more granular level, we have performed several econometric analyses of the determinants of local advertising prices. The results are inconsistent with the DOJ's position, and consistent with the position that local broadcasting prices are disciplined by offerings from cable television and other non-broadcast media alternatives: We find no empirical evidence that JSA/SSAs or duopoly ownership arrangements are associated with higher advertising prices, and some evidence that they are associated with lower prices. Further, we find no evidence that increases in concentration among local broadcasters are associated with increases in local advertising prices. We conclude that the DOJ's definition of the relevant antitrust product market is not supported by the available evidence, and that a properly defined relevant product would need to be broadened to include non-broadcast alternatives.

◆ ◆ ◆

Kevin W. Caves



August 4, 2014

APPENDIX 1: CURRICULUM VITAE OF KEVIN CAVES

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Life After Comcast: The Economist's Obligation to Decompose Damages Across Theories of Harm, 28 ANTITRUST (Spring 2014), co-authored with Hal J. Singer.

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Mobile Wireless Performance in the EU & the US (prepared with support from GSMA, co-authored with Erik Bohlin and Jeffrey A. Eisenach, May 2013).

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Bundles in the Pharmaceutical Industry: A Case Study of Pediatric Vaccines (prepared with support from Novartis, co-authored with Hal J. Singer, July 2011).

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The Benefits and Costs of I-File (prepared with support from The Computer & Communications Industry Association, co-authored with Jeffrey A. Eisenach & Robert E. Litan, April 2008).

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Speaking Engagements

Competition and Monopsony In Labor Markets: Theory, Evidence, and Antitrust Implications, New York State Bar Association, Antitrust Law Section, New York, NY (April 23, 2014).

Econometric Tests of Common Impact, Covington & Burling LLP, Washington, DC., (May 23, 2013).

Vertical Integration in Cable Networks: A Study of Regional Sports Networks,
Federal Communications Commission (May 21, 2013).

Regression Methods: Theory and Applications of Fixed-Effects Models, O'Melveny & Myers LLP, Washington, DC., (July 16, 2012).

Regression Methods: Theory and Applications, Antitrust Practice Group, Cohen Milstein Sellers & Toll PLLC, Washington, DC., (June 4, 2012).

Using Regression in Antitrust Cases, University of Pennsylvania Law School, Philadelphia, PA., (April 12, 2012).

Interview with IT Business Edge on Rural Utilities Service Broadband Subsidies (May 17, 2011).

Reviewer

Review of Network Economics

International Journal of the Economics of Business

Honors and Awards

Howard Fellowship for Excellence in Teaching, University of California at Los Angeles, Spring 2005.

Graduate Fellowship, University of California at Los Angeles, 2000 – 2004.

Departmental Honors in Economics, Haverford College, May 1998.

Phi Beta Kappa Society, elected May 1998

APPENDIX 2: CURRICULUM VITAE OF HAL SINGER

HAL J. SINGER

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Education

Ph.D., The John Hopkins University, 1999; M.A. 1996, Economics

B.S., Tulane University, magna cum laude, 1994, Economics. Dean's Honor Scholar (full academic scholarship). Senior Scholar Prize in Economics, 1994.

Current Position

ECONOMISTS INCORPORATED, Washington, D.C.: Principal 2014-present.

PROGRESSIVE POLICY INSTITUTE, Washington, D.C.: Senior Fellow, 2013-present.

Employment History

NAVIGANT ECONOMICS, Washington, D.C.: Managing Director, 2010-2013.

GEORGETOWN UNIVERSITY, MCDONOUGH SCHOOL OF BUSINESS, Washington, D.C.: Adjunct Professor, 2010, 2014.

EMPIRIS, L.L.C., Washington, D.C.: Managing Partner and President, 2008-2010.

CRITERION ECONOMICS, L.L.C., Washington, D.C.: President, 2004-2008. Senior Vice President, 1999-2004.

LECG, INC., Washington, D.C.: Senior Economist, 1998-99.

U.S. SECURITIES AND EXCHANGE COMMISSION, OFFICE OF ECONOMIC ANALYSIS, Washington, D.C.: Staff Economist, 1997-98.

THE JOHNS HOPKINS UNIVERSITY, ECONOMICS DEPARTMENT, Baltimore: Teaching Assistant, 1996-98.

Authored Books and Book Chapters

THE NEED FOR SPEED: A NEW FRAMEWORK FOR TELECOMMUNICATIONS POLICY FOR THE 21ST CENTURY, co- authored with Robert Litan (Brookings Press 2013).

Net Neutrality Is Bad Broadband Regulation, co-authored with Robert Litan, in THE ECONOMISTS' VOICE 2.0: THE FINANCIAL CRISIS, HEALTH CARE REFORM AND MORE (Aaron Edlin and Joseph Stiglitz, eds., Columbia University Press 2012).

Valuing Life Settlements as a Real Option, co-authored with Joseph R. Mason, in LONGEVITY TRADING AND LIFE SETTLEMENTS (Vishaal Bhuyan ed., John Wiley & Sons 2009).

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Why the iPhone Won't Last Forever and What the Government Should Do to Promote its Successor, 8 JOURNAL ON TELECOMMUNICATIONS AND HIGH TECHNOLOGY LAW 313 (2010), co-authored with Robert W. Hahn.

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Expert Testimony Since 2005

Gnanh Nora Krouch v. Wal-Mart Stores, Inc., Case No. CV-12-2217 (N.D. Ca.).

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Karen Ann Ishee Parsons et al. v. Bright House Networks, Case No. CV-09-B-0267-S (N.D. Al.).

In Re Cox Enterprises, Inc. Set-Top: Cable Television Box Antitrust Litigation, Case No. 5:09-ML-02048-C (W.D.Ok.).

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DISH Network L.L.C., v. Comcast Corporation, Comcast SportsNet California, Inc., Case No. 16 472 E 00211 10 (American Arbitration Association).

In Re Airline Baggage Fee Antitrust Litigation, Civil Action No. 1:09-Md-2089-Tcb (N.D. Ga.).

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Metlife Insurance Company of Connecticut and General American Life Insurance Company v. Thomas Petracek, Minnesota Estate Service, Inc., Michael J. Antonello, and Michael J. Antonenllo & Associates, Ltd., No. 08-CV-06095 DSD-FLN (D. Minn).

Tennis Channel, Inc. v. Comcast Cable Communications, LLC, File No. CSR-8258 (Federal Communications Commission).

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NFL Enterprises LLC. v. Comcast Cable Communications, LLC, File No. CSR-7876-P (Federal Communications Commission).

Medical Mutual of Ohio Inc. v. GlaxoSmithKline PLC and SmithKline Beecham Corporation, Civil Action No. 05-396 (E.D. Pa.).

TCR Sports Broadcasting Holding, L.L.P., D/B/A Mid-Atlantic Sports Network v. Time Warner Cable Inc., American Arbitration Association, Case No. 12 494 E 000326 07 (Federal Communications Commission).

Coors Brewing Company v. Hipal Partners Ltd., Case No. 71 155 00358 07 (American Arbitration Association).

Natchitoches Parish Hosp. Serv. Dist., et al. v. Tyco Int'l, Ltd. et al., Civil Action No. 05-12024 (D. Mass.).

Ralph O. Stalsberg, et al. v. New York Life Insurance Company, New York Life Insurance and Annuity Corporation, Case No. 2:07-Cv-29-Bj (D. Utah).

In Re Tricor Indirect Purchaser Antitrust Litigation, C.A. No. 05-360 (KAJ) (D. Del.).

White Papers

The Consumer Benefits of Efficient Mobile Number Portability Administration (prepared for Neustar) (Mar. 8, 2013).

Economic Analysis of the Implications of Implementing EPA's Tier 3 Rules (prepared for Emissions Control Technology Association), co-authored with George Schink (June 14, 2012).

Are Google's Search Results Unfair or Deceptive Under Section 5 of the FTC Act? (prepared for Google), co- authored with Robert Litan (May 1, 2012).

Bundles in the Pharmaceutical Industry: A Case Study of Pediatric Vaccines (prepared for Novartis), co-authored with Kevin Caves (July 13, 2011).

Are U.S. Wireless Markets Effectively Competitive? A Critique of the FCC's 14th and 15th Annual Wireless Competition Reports (prepared for AT&T), co-authored with Gerald R. Faulhaber, Robert W. Hahn (July 11, 2011).

Do Group Purchasing Organizations Achieve the Best Prices for Member Hospitals? An Empirical Analysis of Aftermarket Transactions (prepared for Medical Device Manufacturers Association), co-authored with Robert Litan (Oct. 6, 2010).

The Economic Impact of Broadband Investment (prepared for Broadband for America), co-authored with Robert Crandall (Feb. 23, 2010).

Why the iPhone Won't Last Forever and What the Government Should Do to Promote Its Successor (prepared for Mobile Future), co-authored with Robert Hahn (Sept. 21, 2009).

The Economic Impact of Eliminating Preemption of State Consumer Protection Laws (prepared for the American Bankers' Association), co-authored with Joseph R. Mason (Aug. 21, 2009).

Economic Effects of Tax Incentives for Broadband Infrastructure Deployment (prepared for the Fiber to the Home Council), co-authored with Jeffrey Eisenach and Jeffrey West (Dec. 23, 2008).

The Effect of Brokered Deposits and Asset Growth on the Likelihood of Failure (prepared for Morgan Stanley, Citigroup, and UBS), co-authored with Joseph Mason and Jeffrey West (Dec. 17, 2008).

Estimating the Benefits and Costs of M2Z's Proposal: Reply to Wilkie's Spectrum Auctions Are Not a Panacea (prepared for CTIA), co-authored with Robert W. Hahn, Allan T. Ingraham and J. Gregory Sidak (July 23, 2008).

Irrational Expectations: Can a Regulator Credibly Commit to Removing an Unbundling Obligation? AEI-Brookings Related Publication No. 07-28, co-authored with Jeffrey Eisenach (Dec. 30, 2007)

Is Greater Price Transparency Needed in The Medical Device Industry? (prepared for Advanced Medical Technology Association), co-authored with Robert W. Hahn (Nov. 30, 2007).

Should the FCC Depart from More than a Decade of Market-Oriented Spectrum Policy? Reply to Skrzypacz and Wilson (prepared for CTIA), co-authored with Gerald Faulhaber and Robert W. Hahn (Jun. 18, 2007).

Improving Public Safety Communications: An Analysis of Alternative Approaches (prepared for the Consumer Electronics Association and the High Tech DTV

Coalition), co-authored with Peter Cramton, Thomas S. Dombrowsky, Jr., Jeffrey A. Eisenach, and Allan Ingraham (Feb. 6, 2007).

The Budgetary Impact of Eliminating the GPOs' Safe Harbor Exemption from the Anti-Kickback Statute of the Social Security Act (prepared for the Medical Device Manufacturers Association) (Dec. 20, 2005).

Reply to "The Life Settlements Market: An Actuarial Perspective on Consumer Economic Value" (prepared for Coventry First), co-authored with Eric Stallard (Nov. 15, 2005).

The Competitive Effects of Telephone Entry into Video Markets (prepared for the Internet Innovation Alliance), co-authored with Robert W. Crandall and J. Gregory Sidak (Nov. 9, 2005).

How Do Consumers and the Auto Industry Respond to Changes in Exhaust Emission and Fuel Economy Standards? A Critique of Burke, Abeles, and Chen (prepared for General Motors Corp.), co-authored with Robert W. Crandall and Allan T. Ingraham (Sept. 21, 2004).

Inter-City Competition for Retail Trade in North Texas: Can a TIF Generate Incremental Tax Receipts for the City of Dallas? (prepared for Harvest Partners), co-authored with Thomas G. Thibodeau and Allan T. Ingraham (July 16, 2004).

An Accurate Scorecard of the Telecommunications Act of 1996: Rejoinder to the Phoenix Center Study No. 7 (prepared for BellSouth), co-authored with Robert Crandall (Jan. 6, 2004).

Competition in Broadband Provision and Implications for Regulatory Policy (prepared for the Alcatel, British Telecom, Deutsche Telekom, Ericsson, France Telecom, Siemens, Telefónica de España, and Telecom Italia), co- authored with Dan Maldoom, Richard Marsden, and Gregory Sidak (Oct. 15, 2003).

The Effect of Ubiquitous Broadband Adoption on Investment, Jobs, and the U.S. Economy (prepared for Verizon), co-authored with Robert W. Crandall (Sept. 17, 2003).

The Deleterious Effect of Extending the Unbundling Regime on Telecommunications Investment (prepared for BellSouth), co-authored with Robert W. Crandall (July 10, 2003).

Letter Concerning Spectrum Auction 35 to the Honorable Michael K. Powell, Chairman, Federal Communications Commission, from Peter C. Cramton, Robert W. Crandall, Robert W. Hahn, Robert G. Harris, Jerry A. Hausman, Thomas W. Hazlett, Douglas G. Lichtman, Paul W. MacAvoy, Paul R. Milgrom, Richard

Schmalensee, J. Gregory Sidak, Hal J. Singer, Vernon L. Smith, William Taylor, and David J. Teece (Aug. 16, 2002).

Speaking Engagements

New Principles for a Progressive Broadband Policy, PROGRESSIVE POLICY INSTITUTE, Washington, D.C. Mar. 13, 2014.

The Open Internet: Where Do We Go From Here? PROGRESSIVE POLICY INSTITUTE, Washington, D.C. Jan. 29, 2014.

Does Platform Competition Render Common Carriage Irrelevant in an IP world? PROGRESSIVE POLICY INSTITUTE, Washington, D.C. Nov. 20, 2013.

The 41st Research Conference on Communication, Information and Internet Policy, TELECOMMUNICATIONS POLICY RESEARCH CONFERENCE, George Mason University School of Law, Arlington, VA, September 27, 2013.

The Broadband Technology Explosion: Rethinking Communications Policy for a Mobile Broadband World, Pepperdine School of Public Policy, Menlo Park, CA. June 20, 2013.

Net Neutrality: Government Overreach or the Key to Innovation?, NORTHWESTERN JOURNAL OF TECHNOLOGY AND INTELLECTUAL PROPERTY EIGHTH ANNUAL SYMPOSIUM, Chicago, IL., Mar. 8, 2013.

Internet Everywhere: Broadband as a Catalyst for the Digital Economy, The Brookings Institution, Washington, D.C., Nov. 27, 2012.

Can Broadband Power an Economic Recovery?, Advanced Communications Law & Policy Institute at New York Law School, Washington, D.C., July 10, 2012.

Using Regression in Antitrust Cases, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, Philadelphia, PA., April 12, 2012.

Mergers: The Road to Duopoly or Path to Competitive Panacea? NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, Los Angeles, CA., July 20, 2011.

State of the Mobile Net, CONGRESSIONAL INTERNET CAUCUS, Washington, D.C., May 27, 2011.

Waves of Innovation: Spectrum Allocation in the Age of the Mobile Internet, INFORMATION TECHNOLOGY & INNOVATION FOUNDATION, Washington D.C., May 17, 2011.

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4th Annual Future of Private Antitrust Enforcement Conference, AMERICAN ANTITRUST INSTITUTE, Washington, D.C., Dec. 7, 2010.

Jobs and Technology, NEW DEMOCRATIC LEADERSHIP COUNCIL, Washington, D.C., Sept. 22, 2010.

Regulation and Broadband, ADVANCED COMMUNICATIONS LAW & POLICY INSTITUTE, NEW YORK LAW SCHOOL, New York, N.Y., July 14, 2010.

13th Annual Symposium on Antitrust, GEORGE MASON LAW REVIEW, Washington, D.C., Feb. 4, 2010.

Broadband Infrastructure and Net Neutrality, ADVISORY COMMITTEE TO THE CONGRESSIONAL INTERNET CAUCUS' STATE OF THE NET, Washington, D.C., Jan. 22, 2010.

The Consequences of Net Neutrality Regulations, AMERICAN CONSUMER INSTITUTE CENTER FOR CITIZEN RESEARCH, Washington, D.C., Nov. 19, 2009.

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Second Life Settlements & Longevity Summit, INSURANCE-LINKED SECURITIES & LIFE SETTLEMENTS, New York, N.Y., Sept. 30, 2009.

Perspectives on Investment and a National Broadband Plan, AMERICAN CONSUMER INSTITUTE, Washington, D.C., Sept. 4, 2009.

Markets and Regulation: How Do We Best Serve Customers?, Wireless U. Communications Policy Seminar, UNIVERSITY OF FLORIDA PUBLIC UTILITY RESEARCH CENTER, Tampa, FL., Nov. 13, 2008.

The Price Of Medical Technology: Are We Getting What We Pay For? HEALTH AFFAIRS BRIEFING, Washington, D.C., Nov. 10, 2008.

Standard Setting and Patent Pools, LAW SEMINARS INTERNATIONAL, Arlington, VA., Oct. 3, 2008.

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Reviewer

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Journal of Competition Law and Economics

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Telecommunications Policy

APPENDIX 3: ADDITIONAL REGRESSION RESULTS

In this Appendix, we report the results of panel regressions that include both concentration and duopoly or JSA status. As seen below, neither the Duopoly Indictor nor the JSA Indicator nor the HHI have a statistically significant effect on local advertising prices.

TABLE A1: DUOPOLY AND HHI PANEL REGRESSIONS WITH MARKET FIXED EFFECTS

Variables	Dep. Var. = ln(CPM)	Dep. Var. = ln(CPP)
Duopoly Indicator	-0.0233	-0.0209
	(-0.84)	(-0.75)
ln(HHI)	0.0824	0.0458
	(0.89)	(0.48)
ln(Income per Capita)	0.2945***	0.2742***
	(4.76)	(4.46)
ln(Population)	-0.3156	0.3129
	(-1.29)	(1.43)
ln(Pct. Hispanic)	0.0391	-0.0001
	(0.39)	(-0.00)
ln(Pct. Black)	0.0059	-0.0210
	(0.24)	(-0.90)
ln(Pct. 18-44)	0.2397	0.7267*
	(0.53)	(1.67)
Linear Time Trend	0.0114*	0.0111*
	(1.78)	(1.77)
Constant	4.5766**	2.1975
	(2.09)	(1.09)
Observations	2,099	2,099
R-squared	0.900	0.972

Robust t-statistics in parentheses. *** p<0.01, ** p<0.05, * p<0.10.
Market fixed effects for 210 DMAs not shown.

TABLE A2: JSA/SSA AND HHI PANEL REGRESSIONS WITH MARKET FIXED EFFECTS

Variables	Dep. Var. = ln(CPM)	Dep. Var. = ln(CPP)
JSA Indicator	0.0543	0.0450
	(0.92)	(0.76)
ln(HHI)	-0.1354	-0.1602
	(-0.89)	(-1.08)
ln(Income per Capita)	0.2048**	0.1817**
	(2.53)	(2.31)
ln(Population)	-0.4181	0.1508
	(-1.16)	(0.60)
ln(Pct. Hispanic)	-0.0319	-0.0243
	(-0.32)	(-0.25)
ln(Pct. Black)	0.0895*	0.0555
	(1.89)	(1.09)
ln(Pct. 18-44)	1.0437**	1.6689***
	(2.04)	(3.37)
Linear Time Trend	0.0189*	0.0186**
	(1.85)	(2.02)
Constant	6.2373**	4.6553**
	(2.09)	(2.14)
Observations	550	550
R-squared	0.895	0.955

Robust t-statistics in parentheses. *** p<0.01, ** p<0.05, * p<0.10.
Market fixed effects for 55 DMAs not shown.

ATTACHMENT B

LOCAL TELEVISION STATION REVENUE SHARE ANALYSIS: AN UPDATE

July 23, 2014

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INTRODUCTION

Under the local television ownership rule, the Federal Communications Commission prohibits any combination of the top four rated local television stations in terms of audience share in the same local market. This prohibition is uniform across all 210 television markets no matter the competitive situation for local stations in any particular market. For example, even if one local station earned 75% of the total local broadcast television advertising revenues in a market with only four stations, none of the other three stations are allowed to combine, even if a combination would produce a more viable competitor.

In an earlier paper, we examined the prevalence of television markets with notable competitive disparities among stations. That analysis showed there are many local markets in which the revenues of the top one or two television stations far outpace the other stations in the market, and that in many cases combinations of lower performing stations (particularly the 3rd and 4th ranked stations in terms of revenue) would enhance competition.[395] This paper will update that revenue analysis by examining stations' shares of total broadcast television advertising revenues in local television markets for 2013. Examining revenue shares of local television stations shows how competitive stations are in their respective markets, how financially sound these stations are, and importantly, how able they are to continue providing service to their local communities.

[395] *See* Mark R. Fratrik, BIA/Kelsey, Ph.D., Reforming Local Ownership Rules: Station and Market Analyses (Apr. 17, 2012), Attachment A to NAB Reply Comments in MB Docket No. 09-182 (Apr. 17, 2012) (Local TV Revenue Report).

After analyzing these updated results, it is again clear that in many local television markets, allowing the 3rd and 4th earning stations to combine would create a much stronger competitor to the leading station(s) in the market – and a competitor with increased resources likely better able to serve viewers. These results suggest that the Commission may want to consider relaxation of the local television ownership rule, or at the very least, provide a more liberal waiver policy that takes into consideration the differing competitive positions of local television stations, both within their local markets and among markets of varying size.

LOCAL TELEVISION REVENUE SHARES ANALYSIS

A. Top-Four Prohibition

The Commission continues to prohibit combinations among the top four rated full-power television stations in all local markets.[396] To support that retention, the Commission continues to rely on its earlier finding "that a significant 'cushion' of audience share" separates "the top-four stations from the fifth-ranked station."[397]

While there are markets with a clear competitive gap between the fourth and fifth ranked stations, there are many markets with very substantial gaps between the third and fourth ranked stations, between the second and third ranked stations, and between

[396] This prohibition among the top four full-power local television stations are based on the ratings shares of the local television stations as measured by Nielsen Media Research.

[397] 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 and Promoting Diversification of Ownership in the Broadcasting Services, MB Docket No. 07-294, Dec. 22, 2011, para. 40, pp. 15-16. *Accord* In the Matter of 2014 Quadrennial 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. 14-50, Apr. 15, 2014, para. 44, p. 20.

the first and second ranked stations. We previously analyzed these markets by examining the 2010 revenue shares of all commercial television stations.[398] In this update we once again examine the revenue shares of the 1st, 2nd, 3rd and 4th ranked stations in order to see the magnitudes of the differences in revenue between stations in the same market.[399]

There are 140 markets that have at least four commercial full-power television stations and in which, according to Nielsen Media Research, the top 4 stations in terms of audience shares are full power stations.[400] In 2013, there were 14 markets out of these 140 markets in which the 3rd ranked station's revenue share is ten or more points higher than the 4th ranked station.[401] The ten percent threshold was selected as the basis of analysis because such a significant difference clearly demonstrates the weaker competitive position of the lower ranked station in the local television market. Table 1 lists those markets and includes the difference in the market share percentages between the 3rd and 4th ranked stations.

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398 *See* Local TV Revenue Report.

399 These data comes from Media Access Pro™, a database maintained by BIA/Kelsey that includes information on all commercial and non-commercial local radio and television stations, as well as all daily and weekly newspapers. As of the date of this paper, 2013 is the most recent year for which revenue estimates are available for local commercial television stations. The revenue shares for some of these stations may include revenues associated with multicast programming streams originating from the same station facilities.

400 There are 157 markets that have at least four full power commercial television stations, but, in a limited number of these markets, a low power or Class A station or a multicast stream is in the top 4 in terms of audience share, according to Nielsen.

401 This comparison does not include Puerto Rico, which is not measured by Nielsen Media Research. BIA/Kelsey does estimate the local commercial television stations in Puerto Rico, and the 3rd ranked station's revenue share is over 30 percentage points higher than the fourth ranked station there.

Table 1 – Markets with Differences of Ten Percent or More Between the Revenue Shares of the Third and Fourth Ranked Stations in 2013

Market Rank	Market	Difference
149	Erie, PA	18.3%
46	Greensboro-High Point-Winston Salem, NC	18.0%
185	Grand Junction-Montrose, CO	14.4%
21	St. Louis, MO	12.9%
11	Detroit, MI	12.8%
122	Lafayette, LA	12.6%
37	Greenville-Spartanburg, SC-Asheville, NC	12.2%
50	Memphis, TN	11.4%
78	Rochester, NY	11.2%
115	Lansing, MI	11.2%
99	Greenville-New Bern-Washington, NC	11.0%
70	Green Bay-Appleton, WI	11.0%
135	Wausau-Rhinelander, WI	10.9%
59	Mobile, AL-Pensacola, FL	10.3%

In these markets the 4th ranked station offers little competition to other local stations due to its weaker financial position, as compared to markets where the revenue differences are narrower. Remember that the differences noted in Table 1 are only between the 3rd and 4th ranked stations—the 4th ranked station in these markets have revenues very much lower than the 1st and 2nd ranked stations. In addition, the table shows that these revenue disparities are much more common in small and mid-size markets in than in large. In 2013 only four of the 14 markets showing these significant competitive disparities were larger than market 50.[402]

[402] Similarly, when examining the 157 markets with at least four full power commercial stations (*see* note 6, above), there were 19 markets in 2013 in which the 3rd ranked station's revenue share is ten or more points higher than the 4th ranked station. Only four of these 19 markets showing significant competitive disparities were larger than market 50.

Significant differences in revenue shares are additionally quite common between the 2nd and 3rd ranked stations and between the 1st and 2nd ranked stations in local markets. For 2013, in 35 of these same 140 markets (25% of the markets), the revenue share of the 2nd ranked station is ten (or more) percentage points higher than the 3rd ranked station. Table 2 shows those markets and the differences between the 2nd and 3rd ranked stations. Of those 35 markets, all but one is ranked 50 or smaller.

Table 2 – Markets with Differences of Ten Percent or More Between the Revenue Shares of the Second and Third Ranked Stations in 2013

Market Rank	Market	Difference
145	Minot-Bismarck-Dickinson, ND	25.74%
168	Billings, MT	24.05%
122	Lafayette, LA	22.71%
103	Johnstown-Altoona, PA	22.47%
97	Tri-Cities, TN-VA	21.82%
120	Montgomery, AL	18.92%
101	Ft. Smith-Fayetteville-Springdale-Rogers,	18.64%
100	Davenport, IA-Rock Island-Moline, IL	17.05%
90	Cedar Rapids-Waterloo-Iowa City-Dubuque,	16.93%
92	Savannah, GA	16.81%
72	Des Moines-Ames, IA	16.18%
98	Burlington, VT-Plattsburgh, NY	16.01%
112	Augusta, GA	15.55%
126	Columbus, GA	14.79%
119	Traverse City-Cadillac, MI	14.61%
79	Huntsville-Decatur-Florence, AL	14.29%
27	Baltimore, MD	14.07%
62	Ft. Myers-Naples, FL	13.93%
76	Toledo, OH	13.79%
93	Baton Rouge, LA	12.33%
130	Amarillo, TX	12.28%
129	Corpus Christi, TX	12.07%
75	Springfield, MO	11.90%
117	Peoria-Bloomington, IL	11.51%
115	Lansing, MI	11.49%
63	Lexington, KY	11.40%
173	Rapid City, SD	11.21%
87	Chattanooga, TN	11.10%
109	Ft. Wayne, IN	10.70%
69	Honolulu, HI	10.62%

144	Wichita Falls, TX -Lawton, OK	10.59%
95	Charleston, SC	10.36%
77	Columbia, SC	10.32%
82	Shreveport, LA	10.25%
111	Sioux Falls-Mitchell, SD	10.16%

Furthermore, in 46 of these same 140 markets (33% of these markets), the revenue share of the highest ranked station is ten (or more) percentage points higher than the 2nd ranked station. Table 3 shows these markets and the differences between the 1st and 2nd ranked stations. Once again, this list is heavily dominated by smaller markets with only four of the 46 markets ranked 50 or higher. Clearly, in a very substantial number of television markets the top earning station far outpaces all other stations in the market. Overall, these data show that many markets, especially medium and small ones, have significant break points between stations other than the 4th and 5th ranked stations, as presumed under the FCC's existing local television ownership rule.

Table 3 – Markets with Differences of Ten Percent or More Between the Revenue Shares of the First and Second Ranked Stations in 2013

Market Rank	Market	Difference
163	Gainesville, FL	46.54%
106	Tallahassee, FL-Thomasville, GA	37.69%
137	Monroe, LA-El Dorado, AR	36.16%
54	Wilkes Barre-Scranton, PA	33.52%
117	Peoria-Bloomington, IL	32.81%
111	Sioux Falls-Mitchell, SD	32.66%
64	Dayton, OH	29.89%
108	Tyler-Longview, TX	29.33%
102	Myrtle Beach-Florence, SC	29.04%
110	Boise, ID	28.48%
65	Charleston-Huntington, WV	28.37%
143	Lubbock, TX	25.51%
112	Augusta, GA	23.91%
93	Baton Rouge, LA	23.74%
197	Casper, WY	23.60%
75	Springfield, MO	21.96%
150	Odessa-Midland, TX	20.14%
195	Eureka, CA	19.57%
120	Montgomery, AL	18.85%
146	Anchorage, AK	18.38%
53	Providence, RI-New Bedford, MA	18.18%
129	Corpus Christi, TX	18.04%
152	Joplin, MO-Pittsburg, KS	17.43%
168	Billings, MT	16.98%
43	Harrisburg-Lancaster-Lebanon-York, PA	16.04%
165	Abilene-Sweetwater, TX	15.88%
60	Tulsa, OK	15.86%
77	Columbia, SC	14.09%
105	Lincoln-Hastings-Kearney, NE	14.09%
119	Traverse City-Cadillac, MI	13.64%
90	Cedar Rapids-Waterloo-Iowa City-Dubuque,	13.49%
145	Minot-Bismarck-Dickinson, ND	13.12%
61	Knoxville, TN	12.91%
109	Ft. Wayne, IN	12.62%
173	Rapid City, SD	12.50%
92	Savannah, GA	12.45%
80	Portland-Auburn, ME	11.95%
67	Wichita - Hutchinson, KS	11.85%
72	Des Moines-Ames, IA	11.71%
81	Paducah-Cape Girardeau-Harrisburg-Mt	11.38%
139	Duluth, MN-Superior, WI	11.09%
17	Denver, CO	10.90%
104	Evansville, IN	10.83%
140	Medford-Klamath Falls, OR	10.53%
30	Hartford-New Haven, CT	10.45%
29	Nashville, TN	10.16%

B. Potential for Revenue Share Waivers

The Commission has previously recognized that television stations in smaller markets experience greater economic challenges.[403] Given the present market conditions facing local television stations, it seems that increased flexibility in ownership combinations should be permitted. Specifically, the Commission should consider the relative competitive position of stations, especially in mid-sized and small markets, in order to assess whether a combination among weaker stations would enhance competition.

In the 140 markets in which there are at least four commercial, full-power television stations rated in the top 4 in terms of audience share, the 4th earning station is often financially very weak, and unlikely to provide a significant competitive presence. In 2013, there were 19 markets out of the 140 in which the 4th ranked station's revenue share is ten percent or less of the total broadcast television advertising revenues in the market. Table 4 shows those markets along with the revenue share of the 4th ranked station. Note again that 17 of these 19 markets with clearly struggling 4th ranked stations are mid-sized or small markets (DMAs 50+), in which duopolies generally cannot be formed under the FCC's local television ownership rule.[404]

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[403] *See, e.g.*, In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13697-98, ¶ 201 (2003) (recognizing that the economics of station ownership depend on market size, as small market stations compete for disproportionately smaller revenues than stations in large markets).

[404] Similarly, of the 157 markets with four or more commercial full-power television stations (*see* note 6, above), there were 26 markets in which the 4th ranked station's revenue share is ten percent or less of total broadcast television ad revenues in the market. Twenty-four of these 26 markets are mid-sized or small.

Table 4 – Markets with
Fourth Ranked Station's Revenue Share 10% or Less in 2013

Rank	Market	4th Ranked Station Share
122	Lafayette, LA	1.4%
145	Minot-Bismarck-Dickinson, ND	4.1%
111	Sioux Falls-Mitchell, SD	6.6%
46	Greensboro-High Point-Winston Salem, NC	6.6%
97	Tri-Cities, TN-VA	6.6%
112	Augusta, GA	7.0%
117	Peoria-Bloomington, IL	7.4%
163	Gainesville, FL	7.6%
120	Montgomery, AL	8.3%
168	Billings, MT	8.4%
21	St. Louis, MO	8.5%
105	Lincoln-Hastings-Kearney, NE	8.6%
98	Burlington, VT-Plattsburgh, NY	8.8%
185	Grand Junction-Montrose, CO	9.4%
115	Lansing, MI	9.5%
53	Providence, RI-New Bedford, MA	9.6%
149	Erie, PA	9.6%
103	Johnstown-Altoona, PA	9.7%
195	Eureka, CA	9.8%

It is also important to note that these 4th ranked stations' very small revenue shares are only shares of the advertising revenues generated by local commercial television stations, not these stations' shares of total local advertising market revenues, which include other advertising outlets against which local television stations compete.[405] For example, while the 4th ranked stations garner 9.7 percent and 9.8 percent, respectively, of broadcast television advertising revenues in the Johnstown-Altoona, PA and Eureka, CA markets, these stations' shares of the wider local advertising market is only 1.02% and 0.92%, respectively. It is difficult to see how

[405] Many local media look to that larger advertising market (through the use of BIA/Kelsey's Media Ad View Plus service and other similar research services) when assessing their positions and planning for the future.

allowing stations with such small shares of local advertising to combine with another station could harm competition in local television markets.

Another way of looking at potential rule changes or waivers to allow combinations of the 3rd and 4th ranked stations would be to evaluate the combined revenue shares of those stations in these 140 markets. For 2013, in 64 of these markets (or 46%), the combination of the revenue shares of the 3rd and 4th ranked stations is less than the revenue share of the leading station, often by a substantial amount. For example, in 36 of these 64 markets, the revenue share of the combined 3rd and 4th ranked stations is more than ten percentage points below the revenue share of the top ranked station. Indeed, in 26 markets, the combination of the revenue shares of the 3rd and 4th ranked stations is lower than the revenue share of even the 2nd ranked station.

Table 5 below identifies these 64 markets and the revenue shares of the combined 3rd and 4th ranked stations and the corresponding share of the top ranked station for 2013. This data shows that, in many markets, there are only one or two leading television stations and that there is a significant break point between these top stations and the 3rd and 4th ranked stations. Again, the vast majority of these 64 markets are mid-sized or small (DMAs 50+) – only four markets in the top 50 are among them.[406]

[406] When examining all 157 markets with at least four full-power commercial television stations (*see* note 6, above), a very similar pattern emerges. For 2013, in 74 of these 157 markets (47%), the combined revenues shares of the 3rd and 4th ranked stations are less than the revenue share of the leading station. Of these 74 markets, 70 of them are mid-sized or small.

Table 5 – Comparison of 3rd & 4th Ranked Stations Combined with Top Ranked Station 2013							
Rank	Market	Combined Shares of 3rd & 4th Ranked Stations	Top Ranked Station Share	Rank	Market	Combined Shares of 3rd & 4th Ranked Stations	Top Ranked Station Share
163	Gainesville, FL	21.0%	62.2%	146	Anchorage, AK	29.6%	41.4%
117	Peoria-Bloomington, IL	20.9%	62.2%	150	Odessa-Midland, TX	29.1%	40.3%
111	Sioux Falls-Mitchell, SD	18.9%	55.8%	98	Burlington, VT-Plattsburgh, NY	27.1%	38.0%
145	Minot-Bismarck-Dickinson, ND	19.4%	55.6%	100	Davenport, IA-Rock Island-Moline, IL	28.0%	38.3%
168	Billings, MT	14.2%	49.0%	139	Duluth, MN-Superior, WI	30.5%	40.2%
112	Augusta, GA	17.2%	49.8%	173	Rapid City, SD	30.2%	39.7%
122	Lafayette, LA	19.4%	51.8%	77	Columbia, SC	30.6%	39.9%
120	Montgomery, AL	15.4%	46.0%	101	Ft. Smith-Fayetteville-Springdale-Rogers, AR	27.2%	36.2%
137	Monroe, LA-El Dorado, AR	18.3%	47.8%	76	Toledo, OH	29.7%	38.4%
106	Tallahassee, FL-Thomasville, GA	27.1%	54.0%	144	Wichita Falls, TX - Lawton, OK	29.8%	38.0%
93	Baton Rouge, LA	27.9%	53.5%	60	Tulsa, OK	28.6%	34.8%
75	Springfield, MO	23.1%	47.9%	63	Lexington, KY	27.6%	33.7%
102	Myrtle Beach-Florence, SC	22.4%	45.9%	80	Portland-Auburn, ME	32.2%	37.8%
97	Tri-Cities, TN-VA	25.9%	49.2%	115	Lansing, MI	30.3%	35.8%
54	Wilkes Barre-Scranton, PA	19.9%	42.7%	43	Harrisburg-Lancaster-Lebanon-York, PA	32.6%	37.9%
64	Dayton, OH	28.5%	50.1%	81	Paducah-Cape Girardeau-Harrisburg-Mt Vernon	32.5%	36.8%

Table 5 – Comparison of 3rd & 4th Ranked Stations Combined with Top Ranked Station 2013							
Rank	Market	Combined Shares of 3rd & 4th Ranked Stations	Top Ranked Station Share	Rank	Market	Combined Shares of 3rd & 4th Ranked Stations	Top Ranked Station Share
90	Cedar Rapids-Waterloo-Iowa City-Dubuque, IA	27.1%	47.7%	147	Sioux City, IA	33.7%	37.8%
92	Savannah, GA	23.5%	43.6%	82	Shreveport, LA	30.7%	34.6%
108	Tyler-Longview, TX	23.7%	42.8%	62	Ft. Myers-Naples, FL	27.5%	31.3%
129	Corpus Christi, TX	26.5%	45.0%	94	Jackson, MS	32.3%	35.5%
195	Eureka, CA	24.5%	42.8%	27	Baltimore, MD	28.5%	31.6%
53	Providence, RI-New Bedford, MA	26.1%	44.0%	130	Amarillo, TX	30.5%	33.6%
103	Johnstown-Altoona, PA	26.1%	42.5%	126	Columbus, GA	32.5%	35.1%
72	Des Moines-Ames, IA	23.5%	39.9%	104	Evansville, IN	35.0%	37.5%
110	Boise, ID	25.2%	41.4%	21	St. Louis, MO	30.0%	31.6%
197	Casper, WY	28.6%	44.5%	99	Greenville-New Bern-Washington, NC	32.8%	34.0%
119	Traverse City-Cadillac, MI	30.1%	45.4%	61	Knoxville, TN	34.9%	35.4%
165	Abilene-Sweetwater, TX	28.2%	42.4%	74	Omaha, NE	33.5%	34.0%
65	Charleston-Huntington, WV	28.0%	41.8%	185	Grand Junction-Montrose, CO	33.3%	33.6%
109	Ft. Wayne, IN	33.4%	47.0%	79	Huntsville-Decatur-Florence, AL	32.9%	33.0%
105	Lincoln-Hastings-Kearney, NE	28.4%	41.1%	28	San Diego, CA	24.9%	25.0%
143	Lubbock, TX	27.0%	39.5%	67	Wichita - Hutchinson, KS	34.6%	34.6%

There is no question that in these markets the financial positions of the 3rd and 4th ranked stations severely disadvantage them against higher ranked stations. These

lower earning stations find it extremely difficult to be effective competitors in the marketplace, and are likely to lack the resources to serve their local audiences as effectively as better performing stations. The vast disparities that exist in many markets demonstrate this. In a number of small markets, the 3rd and 4th ranked stations combined earn as little as 14 or 15 percent of the total broadcast television station ad revenues, while the top station alone earns 50 or even 60 percent of those revenues. Perhaps by allowing lower earning stations to combine and to realize scale and scope efficiencies, these stations would be able to make the necessary investments to compete more effectively against the stronger television stations in their local markets, as well as improve their service to viewers. Without any relief, these stations may likely remain as struggling ineffective competitors. For these reasons, reform of the local television ownership rule, or at least a more liberal waiver policy, will promote more effective competition between local television stations and between local stations and other competitors in the video marketplace.

Conclusion

Local television stations continue to face increased competition every day from new video entertainment and information sources (for viewers) and new media (for advertisers). Given this competition, a number of stations, particularly in mid-sized and small markets, find it very challenging to make the needed investments to compete effectively. Certain combinations of these stations, which may lead to generating sufficient revenues to make necessary investments, are prohibited by the FCC under the present local ownership rules and waiver policies.

As shown in this paper and an earlier analysis of the revenue shares of local television stations, allowing combinations between the 3rd and 4th ranked stations in a market could easily lead to more effective competitors. Especially in smaller markets, where there are limited advertising revenues, these combinations may invigorate competition in local television markets where there have long been one or two leading stations. Consumers and advertisers will benefit from this added competition.

ATTACHMENT C

ILLUSTRATIVE STUDIES SHOWING THAT FACTORS OTHER THAN SEPARATE OWNERSHIP DRIVE VIEWPOINT/CONTENT DIVERSITY ON MEDIA OUTLETS

1. Armando Garcia Pires, Media Plurality and the Intensity of Readers' Political Preferences, 26 J. Med. Econ. 41, 43 (2013) (in analyzing the factors that influence media firms' decisions to voice different political views, article found that the amount of diversity each firm selects depends on intensity of the preferences of readers, concluding that "the intensity of readers' political preferences seems to be fundamental for media plurality").

2. Adam D. Rennhoff and Kenneth C. Wilbur, Local Media Ownership and Viewpoint Diversity in Local Television News 22 (2011) (FCC-commissioned study examining impacts of ownership on viewpoint diversity in local television news found that the associations between various ownership variables (including local ownership and newspaper/television and radio/television cross-ownership) and diversity to be "statistically indistinguishable from zero"). A 2012 update found that viewpoint diversity is positively associated with increases in the number of co-owned television stations within a market.

3. Lisa M. George and Felix Oberholzer-Gee, Diversity in Local Television News (2011) 18 (FCC-commissioned study found that "increases in ownership concentration often encourage diversity"; "most notably. . . greater concentration increases the number of politicians that are covered in local news").

4. Matthew Gentzkow and Jesse M. Shapiro, What Drives Media Slant? Evidence from U.S. Daily Newspapers, 78 Econometrica 35, 38, 64 (2010) (finding "little" or "no evidence" that "variation in slant has an ownership component"; rather, "[v]ariation in slant across newspapers is strongly related to the political makeup of their potential readers," implying that newspapers have an "economic incentive" to "tailor their slant to the ideological predispositions of consumers").

5. Matthew L. Spitzer, Television Mergers and Diversity in Small Markets, 6 J. Competition L. & Econ. 705 (2010) (concluding that allowing jointly owned television stations in small markets will produce viewpoint diversity in local news and public affairs programming).

6. Daniel Ho and Kevin Quinn, Viewpoint Diversity and Media Consolidation: An Empirical Study, 61 Stanford L. Rev. 781, 786, 860 (2009) (empirical study of newspaper mergers did not support assumption that common

ownership automatically reduces viewpoint diversity, thus challenging "one of the basic assumptions of federal media ownership regulations").

7. David Pritchard, One Owner, One Voice? Testing a Central Premise of Newspaper-Broadcast Cross-Ownership Policy, 13 Comm. L. & Pol'y 1, 22-24 (2008) (reviewing media slant during 2004 presidential campaign and finding it "difficult, if not impossible, to distinguish between cross-owned and similar non-cross-owned media outlets . . . merely by looking at the slant of their coverage," and also noting the "growing body of research" connecting "audience preferences" and other economic factors, such as cost of production, to the content of news).

8. Jeffrey Milyo, The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News 28-29 (2007) (FCC-commissioned study concluding that "there is little consistent and significant difference in the partisan slant of [newspaper] cross-owned stations and other major network-affiliated stations in the same market," and also finding evidence that "partisan slant in local television news coverage is determined at least in part by market forces," specifically the "partisan voting preferences in the local market").

9. Lisa M. George, What's Fit to Print: The Effect of Ownership Concentration on Product Variety in Daily Newspaper Markets, 19 Information Econ. and Pol'y 285, 286 (2007) (examining degree of differentiation in coverage among newspapers and concluding that decreases in the number of owners in a market lead to increases in separation between products and increases in content variety).

10. Sendhil Mullainathan and Andrei Shleifer, The Market for News, 95 Am. Econ. Rev. 1031 (2005) (finding that newspapers cater to their readers' biases and that diversity in media coverage arises from readers, not owners).

11. Mara Einstein, The Financial Interest and Syndication Rules and Changes in Program Diversity, 17 J. Media Econ. 1, 16 (2004) (concluding that structural regulation of television industry "is ineffective in producing diversity" and suggesting that "economic factors" may determine the diversity of programming product).

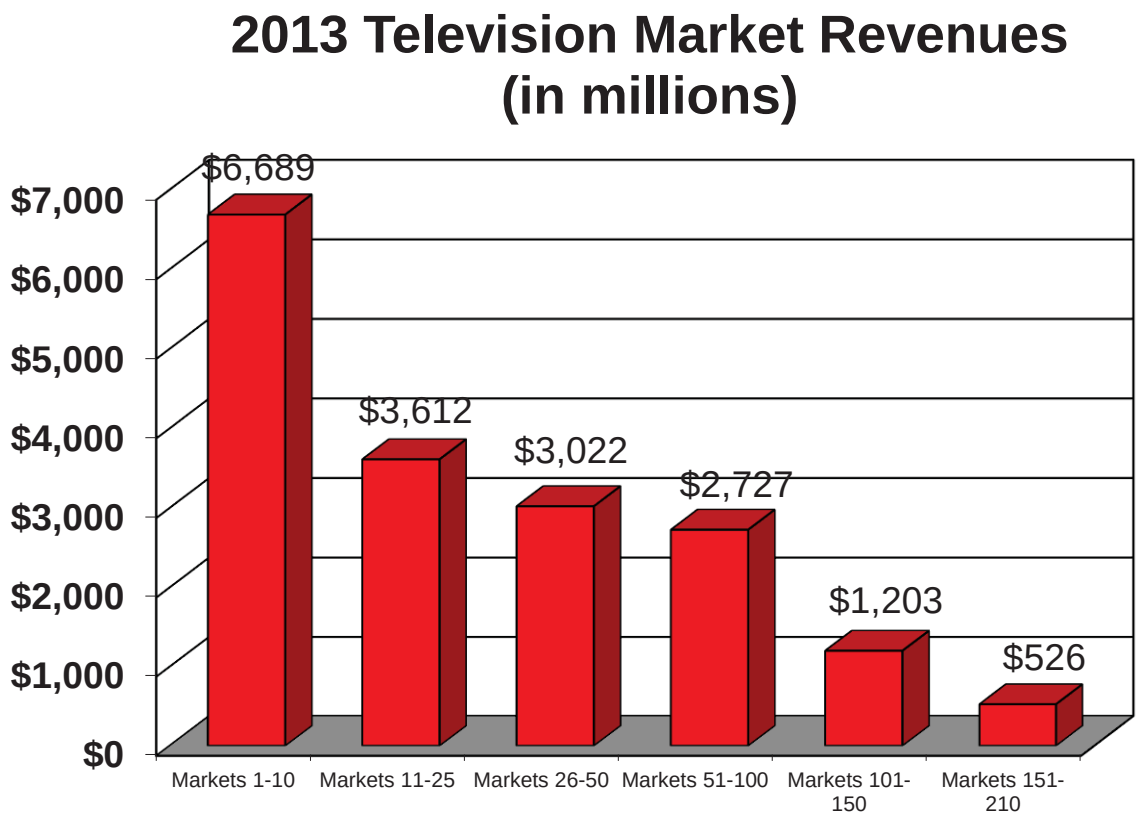
12. David Pritchard, Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign (2002) (FCC-commissioned study finding that common ownership of a newspaper and a television station in a community did "not result in a predictable pattern of news coverage and commentary on important political events between the commonly-owned outlets").

13. David Pritchard, A Tale of Three Cities: ‘Diverse and Antagonistic’ Information in Situations of Local Newspaper/Broadcast Cross-Ownership, 54 Fed. Comm. L.J. 31 (2001) (studying Presidential campaign coverage in 2000 and finding “substantial diversity in the news and commentary offered by each of the three newspaper/broadcast combinations” under consideration and finding “no evidence of ownership influence on, or control of, news coverage” by the cross-owned media properties in the three markets).

14. Benjamin M. Compaine, The Impact of Ownership on Content: Does It Matter?, 13 Cardozo Arts & Ent. L.J. 755, 770-71 (1995) (surveying literature and scholarship and finding no evidence of positive correlation between ownership limits and diverse content, including “issue” diversity).

15. Ronald Hicks and James Featherston, Duplication of Newspaper Content in Contrasting Ownership Situations, 55 Journalism Q. 549, 550-51, 553 (1978) (study comparing content of commonly owned newspapers found no duplication in “opinion content” among the papers and concluded that it was possible “to have real competition in a local, jointly owned situation”).

ATTACHMENT D



Source: BIA Media Access Pro.

	Markets 1-10	Markets 11-25	Markets 26-50	Markets 51-100	Markets 101-150	Markets 151-210
Number of Commercial Stations	147	157	206	328	230	164
Avg. Revenue per Station (000)	$45,502	$23,004	$14,672	$8,313	$5,228	$3,208
Avg. Revenue per TV HH in Market	$192	$158	$141	$123	$108	$101

THE RELATIONSHIP BETWEEN MARKET SIZE AND ADVERTISING

REVENUE PER TVHH

The chart above illustrates the importance of market size to the ability of television stations to attract advertising revenues. As numbers of households go down, so does the advertising value of TV households in those markets. For example, stations in the top ten DMAs contain 34.9 million TV households. Each of these TV households was worth $192 in advertising revenues in 2013. Markets in the top ten DMAs include New York, Los Angeles, Chicago, Philadelphia, Dallas-Fort Worth, San Francisco, Boston, Washington, D.C., Atlanta and Houston. Stations in markets ranked 11-25 represent 22.9 million TV households worth an average of $158 per household. Stations in markets ranked 26-50 represent 21.4 million TV households worth an average of only $141 per household. Stations in markets ranked 51-100 represent 22.1 million TV households valued at an average of $123 per household. Stations in markets ranked 101-150 represent 11.2 million TV households with an average advertising value of just $108. Stations in the smallest markets ranked 151-210 represent 5.2 million TV households that are worth an average of only $101 per household. Stations in the top ten DMAs receive 38 percent of all market advertising dollars. Stations in the smallest 110 DMAs (ranked 101-210) receive only ten percent of all advertising dollars. In other words, not only are smaller TV markets more challenged in the advertising marketplace simply because they have fewer eyeballs to sell to prospective advertisers, but also, the viewers they do have are valued less by advertisers on a per household basis than are those in larger markets.