FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket 02–277, and MM Dockets 01–235, 01–317, and 00–244; FCC 03–127]

Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document completes the Commission's biennial review of its broadcast ownership rules. The Commission replaces its absolute prohibition on common ownership of daily newspapers and broadcast outlets in the same market and its restrictions on common ownership of radio and television outlets in the same market with Cross Media Limits. The Commission also revises the market definition and the way it counts stations for purposes of the local radio rule, revises the local television multiple ownership rule, modifies the national television ownership cap from a 35% national audience reach limit to a 45% reach limit, and retains the dual network rule. The action is taken in response to section 202(h) of the Telecommunications Act of 1996, which requires the Commission to review its broadcast ownership rules on a biennial basis to determine whether the rules remain ''necessary in the public interest.'' The action is necessary to comply with this legislative mandate.

DATES: Effective September 4, 2003, except for §§ 73.3555 and 73.3613 which contains information collection requirements that are not effective until approved by the Office of Management and Budget. The Commission will publish a document in the **Federal Register** announcing the effective date of these sections. A separate notice will be published in the **Federal Register** soliciting public and agency comments on the information collections, and establishing a deadline for accepting such comments.

FOR FURTHER INFORMATION CONTACT: Mania Baghdadi, Deputy Division Chief, Industry Analysis Division, Media Bureau, 202–418–2133. For further information concerning the information collection requirements contained in this Report and Order, contact Les Smith, Federal Communications Commission, 202–418–0217, or via the Internet at *Leslie.Smith@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order (R&O) in MB Docket No. 02–277 and MM Docket Nos. 01–235, 01–317, and 00–244; FCC 03–127, adopted June 2, 2003, and released July 2, 2003. The complete text of the R&O and the Final Regulatory Flexibility Analysis is available on the Commission's Internet site, at *www.fcc.gov.,* and is also available for inspection and copying during normal business hours in the FCC Reference Information Center, Courtyard Level, 445 12th Street, SW., Washington, DC. The text may also be purchased from the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW., CY–B4202, Washington, DC 20554 (telephone 202–863–2893).

Synopsis of the Report and Order

1. This R&O brings to completion the Commission's third biennial ownership review of all six broadcast ownership rules. The Commission addresses these rules in light of the mandate of section 202(h) of the Telecommunications Act of 1996 (1996 Act), which requires the Commission to reassess and recalibrate its broadcast ownership rules every two years. (Telecommunications Act of 1996, Public Law 104–104, 110 Stat. 56 (1996).)

2. The *Notice of Proposed Rulemaking* (NPRM) in this proceeding (67 FR 65751, October 28, 2002), initiated review of four ownership rules: the national television multiple ownership rule;[1] the local television multiple ownership rule;[2] the radio-television cross-ownership rule; [3] and the dual network rule.[4] The first two rules have been reviewed and the proceedings remanded to the Commission by the U.S. Court of Appeals for the District of Columbia Circuit. (*Fox Television Stations, Inc.* v. *FCC,* 280 F.3d 1027, 1044 (D.C. Cir. 2002) (Fox Television), *rehearing granted,* 293 F. 3d 537 (D.C. Cir. 2002) (Fox Television Re-Hearing) addressing the national TV ownership rule, and *Sinclair Broadcast Group, Inc.* v. *FCC,* 284 F.3d 148 (DC Cir. 2002), (Sinclair) addressing the local TV ownership rule.) After the Commission issued the NPRM, the Commission issued 12 Media Ownership Working Group (MOWG) studies for public comment. A summary of the studies, a public notice, and the text of the studies may be found at *www.fcc.gov/ownership.*

[1] 47 CFR 73.3555(e).

[2] 47 CFR 73.3555(b).

[3] 47 CFR 73.3555(c).

[4] 47 CFR 73.658(g).

3. In this R&O, the Commission examines the legal context within which this review is conducted, identifies and describes the public interest policy goals that guide our decision, assesses changes in the media marketplace over time, repeals some rules, modifies others, and adopts some new rules. In consideration of the record and our statutory charge, the Commission concludes that neither an absolute prohibition on common ownership of daily newspapers and broadcast outlets in the same market (the newspaper/broadcast cross-ownership rule) nor a cross-service restriction on common ownership of radio and television outlets in the same market (the radio-television cross-ownership rule) remains necessary in the public interest. With respect to both of these rules, the Commission finds that the ends sought can be achieved with more precision and with greater deference to First Amendment interests through our modified Cross Media Limits (CML). The Commission also revises the market definition and the way it counts stations for purposes of the local radio rule, revises the local television multiple ownership rule, modifies the national television ownership cap, and retains the dual network rule.

4. The Commission, in the R&O, adopts limits both for local radio and local television station ownership. Both of these rules are premised on well-established competition theory and are intended to preserve a healthy and robust competition among broadcasters in each service. As explained in the R&O, however, because markets defined for competition purposes are generally more narrow than markets defined for diversity purposes, the Commission's ownership limits on radio and television ownership also serve our diversity goal. By ensuring that several competitors remain within each of the radio and television services, the Commission also ensures that a number of independent outlets for viewpoint will remain in every local market, thereby protecting diversity. Further, though, because local television and radio ownership limits cannot protect against losses in diversity that might result from combinations of different types of media within a local market, the Commission adopts a set of specific cross-media limits.

5. Similarly, by virtue of the staff's extensive information gathering efforts and the voluminous record assembled in this rulemaking docket, the Commission has, for the first time substantial evidence regarding the localism effects of our national broadcast ownership rules. The

Commission can, therefore, with more confidence than ever, establish a reasonable limit on the national station ownership reach of broadcast networks. In addition, under our dual network rule, the Commission continues to prohibit a combination between two of the largest four networks primarily on competition grounds, but the beneficial effects of this restriction also protect localism. In combination, the Commission's new national broadcast ownership reach cap and our ''dual network'' prohibition will ensure that local television stations remain responsive to their local communities.

I. Legal Framework

6. The Commission conducts this biennial ownership review within the framework established by section 202(h) of the 1996 Act, which provides: ''The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 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.'' 1996 Act, section 202(h).

7. Two aspects of this statutory language are particularly noteworthy. First, as the court recognized in both *Fox Television* and *Sinclair,* ''Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules.'' That is, Section 202(h) appears to upend the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule. Second, Section 202(h) requires the Commission to determine whether its rules remain ''necessary in the public interest.''

8. The Commission concludes that in its current form only the dual network rule remains necessary in the public interest as a result of competition. The Commission also concludes that the other ownership rules should be modified as described in the R&O.

9. The ownership rules adopted in the R&O must be consistent not only with the legal standard in section 202(h), but also with the First Amendment rights of affected media companies and consumers. The Commission concludes, based on the decisions in the *Fox Television* and *Sinclair* cases, that the rational basis standard is the correct First Amendment standard to apply to the broadcast ownership rules.

10. The Commission rejects, as did the court, the application of the intermediate scrutiny (*O'Brien*) standard applicable to cable operators or the strict scrutiny standard applicable to the print media and to content-based regulations. Under *O'Brien,* government regulation of speech will be upheld only if: (1) It furthers an important or substantial governmental interest; (2) the interest is unrelated to the suppression of free expression; and (3) the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. In general, ownership limits on cable operators have been subject to the *O'Brien* test. The Supreme Court has determined that ''promoting the widespread dissemination of information from a multiplicity of sources'' is a government interest that is not only important, but is of the ''highest order'' and is unrelated to the suppression of free speech. *Turner Broadcasting System, Inc.* v. *FCC,* 512 U.S. 622, 662–63 (1984); *Turner Broadcasting System* v. *FCC,* 520 U.S. 180 (1997). On the other hand, the Commission may not burden cable operators' speech with ''illimitable restrictions in the name of diversity.''

11. Strict scrutiny First Amendment analysis would require the Commission to demonstrate that its rules are the ''least restrictive means available of achieving a compelling state interest.''

12. Under the rational basis standard, the Commission's broadcast regulations satisfy the First Amendment if they are ''a reasonable means of promoting the public interest in diversified mass communications.'' *FCC* v. *National Citizens Committee for Broadcasting,* 436 U.S. 775, 802 (1978) (*NCCB*). As the court has noted, there is no unabridgeable First Amendment right to hold a broadcast license; would-be broadcasters must satisfy the public interest by meeting the Commission criteria for licensing, including demonstrating compliance with any applicable ownership limitations.

13. In applying the rational basis test, the *Fox* and *Sinclair* courts relied on longstanding Supreme Court precedent which also supports our decision. *NCCB,* 436 U.S. at 802. In *NCCB,* the Supreme Court applied the rational basis test to the Commission's newspaper/broadcast cross-ownership rules, finding that they ''are a reasonable means of promoting the public interest in diversified mass communications; thus they do not violate the First Amendment rights of those who will be denied broadcast licenses pursuant to them.'' The *NCCB* Court explained that the rational basis test is the appropriate standard to govern our broadcast ownership regulations because spectrum scarcity requires ''Government allocation and regulation of broadcast frequencies'' and because these regulations are not content related. The rational basis standard therefore governs the Commission's broadcast ownership regulations, whether they govern those that own only broadcast outlets or those that might seek to combine ownership of a broadcast outlet with a newspaper.

14. First Amendment interests are implicated by any regulation of media outlets, including broadcast media. The Commission endeavors to be sensitive to those interests and to minimize the impact of our rules on the right of speakers to disseminate a message. As discussed below, our decision today to eliminate the newspaper/broadcast cross-ownership rule and the radio-television cross-ownership rule, and to modify our other local ownership rules and our national audience reach cap, turns in part on our determination that these rules in their current form are not a reasonable means to accomplish the public interest purposes to which they are directed. The Commission turns next to identifying the policy goals that will inform this determination.

II. Policy Goals

15. The Commission, in the NPRM, identified diversity, competition and localism as longstanding goals that would continue to be core agency objectives that would guide its actions in regulating media ownership. To fulfill our biennial review obligation, the Commission will first define our goals and the ways it will measure them. The Commission can then assess whether our current broadcast ownership rules are necessary to achieve these goals.

A. Diversity

16. There are five types of diversity pertinent to media ownership policy: viewpoint, outlet, program, source, and minority and female ownership diversity.

17. *Viewpoint Diversity.* Viewpoint diversity refers to the availability of media content reflecting a variety of perspectives. A diverse and robust marketplace of ideas is the foundation of our democracy. Consequently, ''it has been a basic tenant of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'' This policy is given effect, in part, through regulation of broadcast ownership. Because outlet owners select the content to be disseminated, the Commission has traditionally assumed that there is a positive correlation

between viewpoints expressed and ownership of an outlet. The Commission has sought, therefore, to diffuse ownership of media outlets among multiple firms in order to diversify the viewpoints available to the public. Prior Commission decisions limiting broadcast ownership concluded that a larger total number of outlet owners increased the probability that their independent content selection decisions would collectively promote a diverse array of media content. The Commission sought comment on whether this longstanding presumed link between ownership and viewpoint could be established empirically. After reviewing studies and comments, the Commission adheres to its longstanding determination that the policy of limiting common ownership of multiple media outlets is the most reliable means of promoting viewpoint diversity. The balance of evidence, although not conclusive, appears to support the Commission's conclusion that outlet ownership can be presumed to affect the viewpoints expressed on an outlet. The Commission therefore continues to believe that broadcast ownership limits are necessary to preserve and promote viewpoint diversity. A larger number of independent owners will tend to generate a wider array of viewpoints in the media than would a comparatively smaller number of owners.

18. Further, owners of media outlets clearly have the ability to affect public discourse, including political and governmental affairs, through their coverage of news and public affairs. Even if the Commission's inquiry were to find that media outlets exhibited no apparent ''slant'' or viewpoint in their news coverage, media outlets possess significant potential power in our system of government. The Commission believes sound public policy requires it to assume that power is being, or could be, exercised.

19. The Commission does not pass judgment on the desirability of owners using their outlets for the expression of particular viewpoints. Indeed, the Commission has always proceeded from the assumption that they do so and that its rules should encourage diverse ownership precisely because it is likely to result in the expression of a wide range of diverse and antagonistic viewpoints. The Commission merely observes here that evidence from a variety of researchers and organizations appears to disclose a meaningful connection between the identity of the outlet owner and the content delivered via its outlet(s). This evidence provides an additional basis to reaffirm the Commission's longstanding conclusion that regulating ownership is an appropriate means to promote viewpoint diversity.

20. The Commission's conclusion also should not be read to suggest that each and every incremental increase in the number of different outlet owners can be justified as necessary in the public interest. To the contrary, there certainly are points of diminishing returns in incremental increases in diversity. Moreover, such increases may, in some instances, harm the public interest in localism and competition. The balancing of these interests are addressed in the sections below dealing with individual rules.

21. *Measuring viewpoint diversity.* Viewpoint diversity is a paramount objective of this Commission because the free flow of ideas under-girds and sustains our system of government. Although all content in visual and aural media have the potential to express viewpoints, the Commission finds that viewpoint diversity is most easily measured through news and public affairs programming. Not only is news programming more easily measured than other types of content containing viewpoints, but it relates most directly to the Commission's core policy objective of facilitating robust democratic discourse in the media. Accordingly, the Commission has sought in this proceeding to measure how certain ownership structures affect news output.

22. Nonetheless, the Commission agrees with Fox and CFA that content other than traditional newscasts also contributes to a diversity of viewpoints. Television shows such as 60 Minutes, Dateline NBC, and other newsmagazine programs routinely address matters of public concern. In addition, as Fox points out, entertainment programming such as Will & Grace, Ellen, The Cosby Show, and All in the Family all involved characters and storylines that addressed racial and sexual stereotypes. In so doing, they contributed to a national dialogue on important social issues.

23. Although the Commission agrees that entertainment programs can contribute to its goal of viewpoint diversity, it will focus on the news component of viewpoint diversity where the record permits it to do so. The Commission's objective of promoting program diversity in this proceeding subsumes the viewpoint diversity contained within entertainment programming. Finally, the Commission concludes that the diversity of viewpoints by national media on national issues is greater than that regarding local issues. This is principally due to the vast array of national news sources available on the Internet, cable television and DBS.

24. *Program Diversity.* The Commission concludes that program diversity is a policy goal of broadcast ownership regulation. Program diversity refers to a variety of programming formats and content. With respect to television, this includes dramas, situation comedies, reality shows, and newsmagazines, as well as targeted programming channels such as food, health, music, travel, and sports. With respect to radio, program diversity would be reflected in a variety of music formats such as jazz, rock, and classical as well as all-sports and all-news formats. Programming aimed at various minority and ethnic groups is an important component of program diversity for both television and radio. In general, the Commission finds that program diversity is best achieved by reliance on competition among delivery systems rather than by government regulation. The rules adopted in this proceeding will ensure competition in the delivered video and radio programming markets.

25. *Outlet Diversity.* Outlet diversity means that, in a given market, there are multiple independently-owned firms. The Commission has previously found that outlet diversity has not been viewed as an end in itself, but a means through which the Commission seeks to achieve our goal of viewpoint diversity. The Commission finds that independent ownership of outlets by multiple entities in a market contributes to our goal of promoting viewpoints.

26. The Commission's review of the record persuades us that outlet diversity within radio broadcasting continues to be an important aspect of the public interest that the Commission should seek to promote. The Commission is committed to establishing a regulatory framework that promotes innovation in the field of broadcasting. Because new entrants are often a potent source of innovation, the Commission seeks to preserve opportunities for new entry in radio which remains one of the most affordable means for entering the media business.

27. The Commission believes that one benefit of outlet diversity is the promotion of public safety. In an emergency, the separation of broadcast facilities and personnel among multiple independent broadcast companies in a given market will avoid any possibility that the failure of one broadcast company to transmit critical public safety information will not leave that area without other broadcast owners to perform that service.

28. *Source Diversity.* Source diversity refers to the availability of media content from a variety of content producers. The record before us does not support a conclusion that source diversity should be an objective of the Commission's broadcast ownership policies. In light of dramatic changes in the television market, including the significant increase in the number of channels available to most households today, the Commission finds no basis in the record to conclude that government regulation is necessary to promote source diversity. Given the explosion of programming channels now available in the vast majority of homes today, and in the absence of evidence to the contrary, the Commission cannot conclude that source diversity should be a policy goal of our broadcast ownership rules.

29. *Minority and Female Ownership Diversity.* Encouraging minority and female ownership historically has been an important Commission objective, and the Commission reaffirms that goal here. NABOB recommends that the Commission should maintain our current ownership rules; use Arbitron markets to define radio markets; give greater consideration to the promotion of viewpoint diversity and minority ownership when the Commission reviews assignment of license and transfer of control applications; eliminate our policy of granting temporary waivers of our multiple ownership rules (which allow merging broadcasters 6–24 months to come into compliance with the rules); adopt a bright-line test to limit radio ownership consolidation; and urge Congress to reinstate the minority tax certificate policy.

30. IPI argues that maintenance of broadcast ownership caps will best serve the distinct programming preferences of minority groups. AWRT asks us to include the goal of increasing the number of female-owned broadcast businesses as the Commission considers changes to its broadcast ownership rules. UCC urges the Commission to ''explicitly advance through its ownership rules'' the policy goal of promoting broadcast ownership opportunities for women, minorities and small businesses.

31. MMTC proposes business and regulatory initiatives that ''would go a long way toward increasing entry into the communications industry by minorities.'' MMTC's initiatives include: (1) Equity for specific and contemplated future acquisitions; (2) enhanced outreach and access to debt financing by major financial institutions; (3) investments in institutions specializing in minority and small business financing; (4) cash and in-kind assistance to programs that train future minority media owners; (5) creation of a business planning center that would work one-on-one with minority entrepreneurs as they develop business plans and strategies, seek financing, and pursue acquisitions; (6) executive loans, and engineers on loan, to minority owned companies and applicants; (7) enhanced access to broadcast transactions through sellers undertaking early solicitations of qualified minority new entrants and affording them the same opportunities to perform early due diligence as the sellers afford to established non-minority owned companies; (8) nondiscrimination provisions in advertising sales contracts; (9) incubation and mentoring of future minority owners; (10) enactment of tax deferral legislation designed to foster minority ownership; (11) examination of how to promote minority ownership as an integral part of all FCC general media rulemaking proceedings; and (12) ongoing longitudinal research on minority ownership trends, conducted by the FCC, NTIA, or both; (13) sales to certain minority or small businesses as alternatives to divestitures. The Commission has received many creative proposals to advance minority and female ownership. Clearly, a more thorough exploration of these issues, which will allow us to craft specifically tailored rules that will withstand judicial scrutiny, is warranted. The Commission will issue a Notice of Proposed Rulemaking to address these issues and incorporate comments on these issues received in this proceeding into that proceeding.

32. The Commission sees significant immediate merit in one commenter's proposal regarding the transfer of media properties that collectively exceed our radio ownership cap. Minority Media & Telecommunications Council (MMTC) recommends that the Commission generally forbid the wholesale transfer of media outlets that exceed our ownership rules except where the purchaser qualifies as a ''socially and economically disadvantaged business.'' The Commission agrees with MMTC that a limited exception to a ''no transfer'' policy for above-cap combinations would serve the public interest. The Commission also agrees with MMTC that the benefits to competition and diversity of a limited exception allowing entities to sell above-cap combinations to eligible small entities outweigh the potential harms of allowing the above-cap combination to remain intact.

33. The Commission intends to refer the question of how best to ensure that interested buyers are aware of broadcast properties for sale to the Advisory Committee on Diversity for further inquiry and will carefully review any recommendations this Committee may proffer. As soon as the Commission receives authorization to form this committee it will ask it to make consideration of this issue among its top priorities.

B. Competition

34. From its inception, the Commission has sought to ensure that transfers and assignments of station licenses remain consistent with the policy of free competition embodied in the Communications Act. The Commission sees nothing in the 1996 Act that signifies a retreat from our deep and abiding interest in promoting and preserving competition in broadcasting. It is clear that competition is a policy that is intimately tied to our public interest responsibilities and one that the Commission has a statutory obligation to pursue. The Commission affirms our longstanding commitment to promoting competition by ensuring pro-competitive market structures. Consumers receive more choice, lower prices, and more innovative services in competitive markets than they do in markets where one or more firms exercises market power. These benefits of competition can be achieved when regulators accurately identify market structures that will permit vigorous competition.

35. In limiting broadcast ownership to promote economic competition, the Commission also takes major strides toward protecting and promoting its separate policy goal of protecting competition in the marketplace of ideas. In many markets, the record evidence shows that the Commission's competition-based ownership limits more than adequately protect viewpoint diversity in a large number of markets. Nonetheless, the Commission's analysis of the record leads it to conclude that preserving competitive markets will not, in all cases, adequately protect viewpoint diversity. The Commission finds that certain combinations in smaller markets would unreasonably threaten viewpoint diversity even if they would not result in competitive harms.

36. *Measurement of competition.* Historically the Commission has relied on assessments of competition in advertising markets as a proxy for consumer welfare in media markets.

37. Although advertising markets continue to be a reasonable basis on

which to evaluate competition among media companies, in this R&O the Commission will rely more heavily on other metrics. In the past, television stations generally faced economic competition from other television stations, and radio stations from other radio stations. The television and radio markets relied principally on advertising revenues to fund their businesses. Today, a large portion of the revenue in the television business consists of direct payment by consumers. Eighty-five percent of American households subscribe to television programming supplied by cable or direct broadcast satellite. Therefore, in analyzing markets comprised of both free over-the-air broadcasters as well as subscription delivery systems, the Commission will look to audience share as one metric for assessing the state of competition. The Commission will not discard advertising market analysis where appropriate, but it limits its reliance to discrete markets where it believes the foregoing analysis is inapplicable.

38. The Commission's public interest focus must be first and foremost on the interest, the convenience, and the necessity of the public, and not on the interest, convenience, or necessity of the individual broadcaster, or the advertiser. Thus, in evaluating the Commission's interest in preserving competitive broadcast markets, it will consider the ultimate effect that a diminution in competition would have on the consuming public. The Commission has a public interest responsibility to ensure that broadcasting markets remain competitive so that all the benefits of competition—including more innovation and improved service—are made available to the public. In setting its local television and local radio ownership caps, the Commission will rely, where possible, on measures other than shares of advertising markets in order to reflect the decreasing relevance of advertising market shares as a barometer of competition.

39. *Innovation.* The Commission concludes that it should seek to promote innovation through its broadcast ownership limits. Where a market such as broadcasting is characterized by a significant degree of non-price competition, it may be particularly important for the Commission to focus on how its ownership rules affect innovation incentives. Innovation, over longer periods of time, may represent a critical driver of consumer welfare.

40. The transition from analog to digital services by broadcasters represents a potentially significant enhancement to consumer welfare. Digital transmission of video and audio programming by television and radio stations may facilitate new services for consumers by permitting more efficient bandwidth utilization. With respect to local televisions stations, this additional bandwidth could be used to transmit high-definition programming; to transmit one or more additional program streams; or to deliver entirely new services. NAB/NASA has argued that local television ownership structures are very likely to affect stations' ability to proceed with the ongoing digital transition. NAB contends that the fixed costs associated with digital television equipment upgrades fall disproportionately on stations in smaller markets and that station combinations will speed the transition. In addition, the introduction of digital transmission by radio stations may permit greater competition and innovation in radio markets by facilitating improved signal quality and by permitting stations to deliver data along with audio to users' receivers.

41. In sum, the Commission concludes that it should seek to promote innovation through its broadcast ownership limits. Consumer welfare is likely to be enhanced when, all else being equal, the Commission permits broadcast market structures that encourage innovation. The Commission agree with IPI, however, that multiple factors influence the pace of innovation, only one of which is market structure. The Commission will therefore make ownership decisions that promote innovation in media markets based principally on evidence that particular market structures or firm characteristics tend to encourage innovation.

C. Localism

42. The Commission agrees that localism continues to be an important policy objective. Localism is rooted in Congressional directives to this Commission and has been affirmed as a valid regulatory objective many times by the courts. The Commission hereby reaffirms its commitment to promoting localism in the broadcast media. Today, the Commission seeks to promote localism to the greatest extent possible through market structure that take advantage of media companies' incentive to serve local communities.

43. Federal regulation of broadcasting has historically placed significant emphasis on ensuring that local television and radio stations are responsive to the needs and interests of their local communities. In the Communications Act of 1934, Congress directed the Commission to "make such distribution of licenses, frequencies, hours of operation, and power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." In the legislative history of the 1996 Act, Congress strongly reaffirmed the importance of localism.

44. The courts too have long viewed localism as an important public interest objective of broadcast regulation. In *NBC* v. *United States,* the Supreme Court wrote: "Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community." Last year the DC Circuit affirmed the legitimacy of Commission regulation to preserve localism, stating: "[T]he public interest has historically embraced diversity (as well as localism) * * * and nothing in section 202(h) signals a departure from that historic scope."

45. *Measurement of Localism.* The Commission remains firmly committed to the policy of promoting localism among broadcast outlets. Today the Commission seeks to promote localism to the greatest extent possible through market structures that take advantage of media companies' incentives to serve local communities. In addition, the Commission seeks to identify characteristics of those broadcasters that have demonstrated effective service to individual local communities and to encourage their entry into markets currently prohibited by our existing rules. To measure localism in broadcasting markets, the Commission will rely on two measures: the selection of programming responsive to local needs and interests, and local news and public affairs programming quantity and quality. The Commission decided long ago that local station licensees have a responsibility to air programming that is suited to the tastes and needs of their community and that the station licensee, not a network or any other party, must decide what programming will best serve those needs. Program selection, then, is a means by which local stations respond to local community interests, and the Commission will use it as one measure of localism. Its second measure of localism can serve as a useful measure of a station's effectiveness in serving the needs of its community. As discussed below, this measure of service to local markets is relevant to the Commission's consideration of both the national television cap and its local broadcast rules.

D. Regulatory Certainty

46. The Commission considered both a case-by-case analysis and bright line rules to determine the particular regulatory framework that would best achieve our policy goals. Based on the record and our own experience administering structural ownership rules, the Commission concludes that the adoption of bright line rules, on balance, continue to play a valuable role in implementing the Commission's goals. The Commission has also decided to retain our existing framework of targeted, outlet-specific, multiple ownership rules, that cover the various media and perceived areas of potential competition and diversity concerns rather than adopting a single rule to cover all media.

47. The Commission is required to examine any proposed transfer of a broadcast license and must affirmatively find that the transfer is in the public interest. In the context of broadcast transactions, the Commission's analysis is simplified by the extensive body of structural rules it adopts herein. Thus, the extensive rulemaking proceeding used to develop these broadcast ownership rules takes full account of the Commission's public policy goals of diversity, competition, and localism. These rules squarely embody the Commission's public interest goals of limiting the effect of market power and promoting localism and viewpoint diversity.

48. The bright line rules the Commission establishes in this Order will protect diversity, competition, and localism while providing greater regulatory certainty for the affected companies than would a case-by-case review. Any benefit to precision of a case-by-case review is outweighed, in the Commission's view, by the harm caused by a lack of regulatory certainty to the affected firms and to the capital markets that fund the growth and innovation in the media industry. Companies seeking to enter or exit the media market or seeking to grow larger or smaller will all benefit from clear rules in making business plans and investment decisions. Clear structural rules permit planning of financial transactions, ease application processing, and minimize regulatory costs.

49. The Commission recognizes that bright line rules preclude a certain amount of flexibility. A case-by-case analysis would allow the Commission to reach decisions by taking into account particular circumstances of every case. For instance, bright line rules may be over-inclusive, by preventing transactions that would result in increased efficiencies, or under-inclusive, by allowing transactions that would raise concerns, if the circumstances of the case were reviewed. However, the Commission's experience with the current case-by-case analysis used for radio transactions leads it to believe that this approach in the area of media ownership is fraught with administrative problems. Currently, any radio transaction that proposes a radio station combination that would provide one station group with a 50% share of the advertising revenue in the local radio market, or the two station groups with a 70% advertising revenue, undergoes additional public interest analysis. For each of these transactions, the staff conducts an individual competitive analysis and may request additional information from the parties if it is necessary in order to reach a decision on a particular transaction. The administrative time and resources required for such an undertaking are considerable. Moreover, such an approach hinders business planning and industry investment for all radio firms falling within the ambit of our case-by-case review. The Commission is not persuaded that this approach is necessary in order to administer its ownership rules effectively.

50. The bright line rules adopted today have been developed based upon the Commission's review of the media marketplace and our assessment of what ownership limits are necessary in order to promote our goals in applying ownership rules. The Commission is confident that the modified rules will reduce the chances of precluding transactions that are in the public interest or, alternatively, permitting transactions that are not in the public interest. In addition, the Commission has discretion to review particular cases, and the Commission is obligated to give a hard look both to waiver requests, where a bright line ownership limit would proscribe a particular transaction, as well as petitions to deny.

III. Modern Media Marketplace

A. Introduction—The Evolution of Media

51. Today's media marketplace is characterized by abundance. Traditional modes of media have greatly evolved since the Commission first adopted media ownership rules in 1941, and new modes of media have transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history. In short, the number of outlets for national and local news, information, and entertainment is large and growing.[5]

52. Section 202 (h) requires the Commission to consider whether any of its broadcast ownership rules are ''necessary in the public interest as a result of competition.'' This R&O confronts that challenge by determining the appropriate regulatory framework for broadcast ownership in a world characterized not by information scarcity, but by media abundance. This section tracks the history of the modern media marketplace to illustrate the rapid evolution of media outlets over the past sixty years.

B. History of the Modern Media Marketplace

53. *The Age of Radio.* At the time commercial broadcast radio was introduced during the early 1920s, newspapers were the primary source of news and information, with circulation reaching nearly 28 million readers. By 1926, just six years after the first official commercial broadcasts, there were 528 stations and 5.7 million radio sets, generating a weekly radio audience of 23 million listeners. Unlike today's targeted, niche programming, however, a typical radio station's programming in the early 1930's was largely ''variety'' format, including a small amount of many different types of programming. Notable and newsworthy events were, of course, the exception to the variety format. During World War II, radio proved a vital asset in the dissemination of news and public-service messages, and it boosted the morale of those remaining on the home-front.

54. *The Introduction of Television.* Although General Electric began regular television broadcasting in 1928, it was not until 1941 that the first commercial television station was introduced. In addition to a proliferation of new programming, many radio stars began to move their acts to television in the late 1940's. With World War II over, and the Depression behind them, Americans began to accept television as a cogent means of receiving information and entertainment. In 1951, just ten years after television's introduction to the public, there were more than 108 stations on the air and more than 15 million households with television sets.

55. *The Multimedia Landscape I—1960's.* By 1960, a multi-media landscape began to form, though media at that time was still dominated by broadcast radio and television. Forty

[5] Today, there are more than 308 non-broadcast networks available for carriage by cable systems, whereas ten years ago in 1993, there were only 106 non-broadcast programming services available for carriage.

years after the introduction of commercial broadcast radio, and 19 years after the introduction of commercial broadcast television, there were 4,086 radio stations and 573 television stations. Approximately 45 million homes had a television in 1960, and about six million of those had more than one television. Relatively few markets had cable systems in 1960, and nationwide there were only about 750,000 cable subscribers. There were approximately 1,700 daily newspapers in 1960 with a total circulation of about 58 million readers. According to MOWG Study No. 1, the number of outlets per market in 1960 varied largely by size of the market.[6] The smallest markets had few choices, while large markets had comparatively more outlets for news, information, and entertainment.

56. An informal analysis [7] of the news and public interest programming available to the public over television in 1960, revealed that, in most markets, there was less than one-hour of national news programming broadcast daily by all the stations combined in a given market. Programming characterized as ''public interest programming'' [8] on average was aired for about two to three hours per-station, per-day (or approximately six to nine hours of public interest programming produced per-day by all stations combined in the markets it reviewed).

57. *Television Evolves.* Between 1960 and 1963, several historical events were broadcast over television, changing the very medium itself and its role in society. The use of television by John F. Kennedy and Richard M. Nixon during the Presidential election of 1960, ushered in a new era in American politics and a new era for television as an important medium of communications. Television coverage of Martin Luther King Jr.'s ''I Have a Dream'' speech provided activists nationwide the information and the inspiration on which to mobilize America into one of the most turbulent and progressive eras in its history. And when word of President Kennedy's assassination was announced in 1963, an estimated 180 million Americans watched their television sets almost continuously for four days, witnessing the same tragic event in unison.

58. *The Introduction of Non-Broadcast Networks.* From its beginnings in 1948, through the late 1960's, cable television extended the reach of broadcast television. Early cable systems were born out of the need to carry television signals into areas where over-the-air reception was either non-existent or of poor quality because of interference. The creation of nationally distributed, non-broadcast cable programming enabled cable to become a competitive medium for the dissemination of news, information, and entertainment. Unlike the general interest, ''variety'' programming of the broadcast television networks, many non-broadcast basic cable networks provided highly specialized programming and provided it on a 24-hour basis. Thus, the inclusion of non-broadcast networks in the array of media choices gave the public continuous access to national news, information, and entertainment.

59. In 1980, with the addition of numerous pay-TV and basic cable networks, there were more than 19.2 million subscribers, an increase of 95.3%. But as a competitor to broadcast radio and television, cable's appeal was primarily national in orientation. Although some regional and local non-broadcast networks were distributed during the 1970's and 1980's, the banner offerings of cable systems during that period were nationally-distributed networks.

60. *The Introduction of Home-Use Satellite Television Technology.* Home satellite dish (''HSD'') technology was based on the same system used by cable operators to receive network signals from satellites for delivery over their terrestrial cable systems. HSD systems could gain access to hundreds of channels of programming further enhancing consumer access to non-broadcast television programming, much the same way cable served to enhance broadcast television service in its early years.

61. *The Multimedia Landscape II—1980's.* By 1980, traditional media still dominated mainstream use, but the public did have other options. Many could now choose among both broadcast and non-broadcast television programming to access news, information and entertainment. In addition to the traditional broadcast television stations offered over-the-air and via cable systems, there were also approximately 20 nationally-distributed non-broadcast networks available to the public nationwide and an unknown number of regionally distributed non-broadcast networks. The number of media outlets per market varied in 1980 based on market size, as they had in 1960. Overall, however, most markets seemed to have at least doubled the number of television stations and station owners than they had in 1960.

62. The Commission's informal analysis of the news and public interest programming available to the public via television revealed that, on average, most television stations in the markets it reviewed were airing more local news programming in1980 than they did in 1960, though some small market stations were airing less local news programming. In addition, in the large market that the Commission studied, New York, there were more television broadcast stations available to the public than there were in 1960, resulting in a greater total amount of local news produced in these markets, on a given day. In addition, a non-broadcast television network, CNN, aired national news programming for 24-hours per day, and was available to all those with access to cable or HSD systems. More broadcast television stations aired public interest programming in 1980 than in 1960, particularly in large and medium-sized markets In addition, there were several new non-broadcast television networks providing public interest programming on a 24-hour basis. In short, the addition of nationally distributed non-broadcast television networks, an increase in the number independent and affiliate broadcast television stations and in the number of hours broadcast per station, resulted in an increase in the news and public interest programming available in markets of all sizes between 1960 and 1980.

63. *Competitive Pressure Builds: A Crowded Programming Market.* The amount of competitive programming available on cable continued to increase during the eighties and into the nineties. The concise format of a majority of non-broadcast programming networks was attractive to audiences who were developing a preference for scanning quickly through the many new channel offerings available to them. While some non-broadcast networks were providing general interest fare in the mold of the traditional broadcast networks, many

[6] This market definition is not necessarily consistent with the market definition of the Commission's rules.

[7] In this analysis, Commission staff examined current and historic *TV Guide* magazines to determine the amount of differing types of programming (local news, national news and public interest programming) provided by stations in markets of differing sizes. The study examined the amount of programming available in a sample day in three cities, New York, Little Rock, and Terre Haute, selected from the larger group of ten cities represented in MOWG Study No. 1. The three cities chosen for this particular informal study were each chosen to respectively represent small, medium, and large television markets. Programming schedules for between the hours of 6 am and midnight on July 1st of the given year were examined for each city to determine how much of each type of programming was available to consumers in the selected market. (''Three City Study'').

[8] Public Interest Programming is defined for these purposes as programming of cultural, civic, children's, family, public affairs and educational interest.

provided programming geared towards a particular audience interest. Regionally distributed non-broadcast networks also flourished in the 1980's through the 1990's. Some provided regional sports, while others provided regional and local news or general regional-interest programming.

64. When the Fox broadcast network launched as a challenger to the ''Big Three'' networks in 1985, it entered the market building on the niche concept employed by the non-broadcast networks. Fox provided general interest fare, like its broadcast competitors, but targeted its programming to the teenage demographic. Later, in January 1995, Paramount and Warner Brothers launched the UPN and WB networks, respectively, both building on similar demographics on which Fox had initially entered the market.

65. *Significant Technological Advances: Recorded Media, Digital Compression, and the Internet.* Several significant advances in technology during the 1980's and 1990's supplied the footing for increased competitive pressure on the media marketplace. The video-cassette recorder (''VCR'') empowered the public with the ability to stray from the pre-set video programming schedule inherent in broadcast television content. Furthermore, content not available over other video media, or content which had been previously available over broadcast television was created specifically for VCR consumption. By 1986, more than 13 million VCRs had been sold in the United States.

66. Digital technology was used in the development of advanced satellite distribution systems. Direct broadcast satellite systems (''DBS'') provided an all-digital transmission of video programming, employing a small satellite dish, practical for both rural and urban deployment. DBS provides more than 200 channels of video programming to subscribers. The presence of DBS in the market for the delivery of subscription video programming has expanded the market, such that now almost all televisions households have access to subscription video. In addition, the competitive presence of DBS has forced cable television services to expand channel capacity and service options. At the end of 1994, DBS services had approximately 600,000 subscribers. Today there are more than 18 million subscribers.

67. As a result of the widespread acceptance of DBS, cable television operators began replacing much of their original infrastructure, and began employing digital technology to transmit high-quality video signals to their customers. Digital technology also expanded the channel capacity of the networks, enabling cable operators to provide vastly more channels of video programming, and furthered the ability of cable operators to implement advanced two-way services.

68. Digital versatile disc (''DVD'') players were introduced in 1997, and the personal video recorder (''PVR'') was introduced in 1999. PVR's use a hard disk drive, software, and other technology to digitally record and access programming. In addition to these other significant technological advancements of the 1980's and 1990's, the Internet has spawned an entirely new way of looking at media. Today the Internet affects every aspect of media, from video and audio, to print and personal communications. Whereas other forms of media allow for only a finite number of voices and editorially-controlled viewpoints, the Internet provides the forum for an unlimited number of voices, independently administered. Furthermore, content on the Web is multi-media; it can be read, viewed, and heard simultaneously. Since Web pages are stored on Web-hosting file servers, accessing Web content is a highly individualized activity, and any individual with access to a Web browser can access all available Web content 24-hours a day throughout the world.

69. Virtually every major media company has a corresponding Web site, today, and any individual with access to a Web-hosting file server can create a Web site for public access. As such, the Web provides an unrestrained forum for the dissemination and consumption of ideas. News and information are available on the Internet like they have never been available to the public before. Internet users can view the news source of their own choosing, or can use a news gathering service which presents information culled from thousands of news sources worldwide. Furthermore, Internet users can access content that may have appeared in print or on broadcast television at an earlier time, giving them greater control over traditionally available content.

70. *The Multimedia Landscape III—2000.* Since the 1960's, there has been tremendous growth in the media market. By 2000, American consumers had access to a multitude of media outlets, hundreds of channels of video programming, and enormous amounts of content not available just twenty, or even ten years earlier. There were more than 12,615 radio stations in 2000, and 1,616 broadcast television stations.

71. Approximately 100.8 million homes had a television in 2000 and 76.2 million of those had more than one television. There were 68.5 million cable subscribers in 2000, approximately 14.8 million DBS subscribers and 1.2 million HSD subscribers. There also were 1,480 daily newspapers in 2000 with a total circulation of 55.8 million readers. In addition to the traditional broadcast television stations offered over-the-air and via cable systems, there were 281 nationally-distributed non-broadcast networks available in 2000 and 80 regional non-broadcast networks. Approximately 42.5 million households subscribed to an Internet access provider in 2000.

72. The number of outlets per market also grew significantly between 1960 and 2000. The number of radio outlets grew by 142% from 1960 to 2000 and the number of independent radio station owners grew by 74% in that same time period. The number of television outlets grew by 217% from 1960 to 2000 and the number of independent television station owners grew by 150% in that same time period. The number of daily newspapers declined by 9% from 1960 to 2000 and the number of newspaper owners was the same in 2000 as it was in 1960.

73. The number of hours of news and public interest programming has also grown significantly since 1980. Although in most markets, only a few stations increased the amount of national news programming available from 1980, when national news was aired for about thirty to forty five minutes per station per day, there were more broadcast stations airing national news in 2003, and several non-broadcast news networks airing national news programming on a 24-hour a day basis. Public interest programming also has proliferated. Although television broadcast stations in various markets were airing about the same amount of public interest programming per-station in 2003 as they were in 1980, in 2003, there are more television broadcast stations per-market and numerous new non-broadcast networks providing such programming.

74. *The Current Competitive Landscape and Developments Since 2000.* Non-broadcast television programming continues to proliferate. We are moving to a system served by literally hundreds of networks serving all conceivable interests. Today, there are more than 308 satellite-delivered national non-broadcast television networks available for carriage over cable, DBS and other multichannel video program distribution (''MVPD'')

systems. Of the 102 channels received by the average viewing home, the four largest broadcast networks have an ownership interest in approximately 25% of those channels.

75. Since its inception, non-broadcast programming has gained significantly in popularity as compared with broadcast programming. In 2002, for the first time, cable television collectively had more primetime viewers on average over the course of the year than broadcast programming. In June 2002, cable networks for the very first time collectively exceeded a 50% share for the month, while the broadcast networks collectively registered a 38% primetime share.

76. Broadcasters are currently experimenting with, and beginning to commercially deploy, digital and high-definition television (''DTV'' and ''HDTV''). Digital television offers improved picture quality, the ability to provide such additional enhancements as HTDV, multicasting, and interactivity. Cable operators and DBS service providers are also beginning to provide DTV and HDTV options.

77. Today's media marketplace also provides choices to the public on an entirely new, personal level. In addition to the Web, for example, video-on-demand (''VOD'') is the newest technology being developed and deployed by cable and DBS operators. VOD services provide advertising-free material on a program-by-program basis. In addition, satellite radio became available in 2001, providing subscribers over 100 channels of commercial-free, digital audio.

78. In short, there are far more types of media available today, far more outlets per-type of media today, and far more news and public interest programming options available to the public today than ever before. Although many of these new outlets are subscription-based the competitive pressure placed upon free, over-the-air media has led to better quality and in some cases, an increase in the quantity of some types of content. In the next five to ten years, it expects more free, over-the-air content to become available as new technologies are applied to these traditional media.

IV. Local and National Framework

79. The Commission, in the R&O, adopts limits both for local radio and local television ownership. Both of these rules are premised on well-established competition theory and are intended to preserve a healthy and robust competition among broadcasters in each service. As explained in the R&O, however, because markets defined for competition purposes are generally more narrow than markets defined for diversity purposes, the Commission's limits on radio and television ownership also serve our diversity goal. By ensuring that several competitors remain within each of the radio and television services, the Commission also ensures that a number of independent outlets for viewpoint will remain in every local market, thereby ensuring that our diversity goal will be promoted. Further, though, because local television and radio ownership limits cannot protect against losses in diversity that might result from combinations of different types of media within a local market, the Commission adopts a set of specific cross-media limits.

80. Similarly, by virtue of the staff's extensive information gathering efforts and the voluminous record assembled in this rulemaking docket, the Commission has, for the first time substantial evidence regarding the localism effects of our national broadcast ownership rules. The Commission can, therefore, with more confidence than ever, establish a reasonable limit on the national station ownership reach of broadcast networks. The Commission continues to prohibit a combination between two of the largest four networks primarily on competition grounds, but the beneficial effects of this restriction also protect our interest in preserving localism. In combination, the Commission's new national broadcast ownership reaches cap and our ''dual network'' prohibition will ensure that local television stations remain responsive to their local communities. In sum, the modified broadcast ownership structure the Commission adopts in the R&O will serve our traditional goals of promoting competition, diversity, and localism in broadcast services. The new rules are not blind to the world around them, but reflective of it; they are, to borrow from our governing statute, necessary in the public interest.

V. Local Ownership Rules

A. Local TV Multiple Ownership Rule

81. The current local TV ownership rule allows an entity to own two television stations in the same DMA, provided: (1) The Grade B contours of the stations do not overlap; or (2)(a) at least one of the stations is not ranked among the four highest-ranked stations in the DMA, and (b) at least eight independently owned and operating commercial or non-commercial full-power broadcast television stations would remain in the DMA after the proposed combination (''top four-ranked/eight voices test''). Only those stations whose Grade B signal contours overlap with the Grade B contour of at least one of the stations in the proposed combination are counted as voices under the rule.

82. Having examined the competitive impact of other video programming outlets on television broadcast stations, the Commission concludes, in light of the myriad sources of competition to local television broadcast stations, that our current local TV ownership rule is not necessary in the public interest to promote competition. The Commission also concludes that media other than television broadcast stations contribute to viewpoint diversity in local markets. Because our current local TV ownership rule is premised on the notion that only local TV stations contribute to viewpoint diversity and does not account for the contributions of other media, the Commission concludes the current rule is not the best means to promote our diversity goal. Moreover, the Commission concludes that retaining our current rule does not promote, and may even hinder, program diversity and localism. However, the Commission finds that some limitations on local television ownership are necessary to promote competition. Accordingly, the Commission modifies our local TV ownership rule.

83. The Commission's modified local TV ownership rule will permit an entity to have an attributable interest in two television broadcast stations in markets with 17 or fewer television stations; and up to three stations in markets with 18 or more television stations. To further ensure that no single entity possesses excessive market power, however, the Commission will prohibit combinations which would result in a single entity acquiring more than one station that is ranked among the top four stations in the market based on audience share. As a result, no combinations will be permitted in markets with fewer than five television stations. Because the Commission has determined that Nielsen DMAs are the relevant geographic market, common ownership of stations in the same market will be subject to this standard without regard to whether the affected stations have overlapping contours, and the Commission eliminated the provision of its local TV ownership rule that permits same-market combinations where there is no Grade B contour overlap. The Commission also modifies our existing standard for waiver of the local TV ownership rule.

84. *The Current Rule Cannot Be Justified Under Section 202(h).* Under Section 202(h), the Commission

considers whether the local TV ownership rule continues to be ''necessary in the public interest as a result of competition.''

85. *Competition.* The Commission concludes that the current local TV ownership rule is not necessary to protect competition. By limiting common ownership of television stations in local markets where at least eight independently owned TV stations would remain post-merger, the current rule prohibits mergers that would increase efficiency in small and mid-sized markets—mergers that would thereby promote competition. In addition, by limiting common ownership to no more than two television stations, the current rule prohibits efficiency enhancing mergers in the largest markets. The current rule also prohibits mergers among the top four-ranked stations.[9] After reviewing all of the record evidence, the Commission concludes that this restriction remains necessary to promote competition, so it is retaining a prohibition on mergers of the top four-ranked stations in the modified local TV ownership rule adopted in the R&O.

86. The NPRM requested comment on the definition of the product and geographic markets in which broadcast television stations compete. Based on the record, the Commission concludes that broadcast television stations operate in three product markets: a market for delivered video programming (''DVP''); a video advertising market; and a video program production market. Although each of these markets is discussed in the R&O, the Commission's primary concern is promoting competition for viewers. Therefore, the Commission will focus on competition in the DVP market. It is this market that directly affects viewers. The advertising market and the program production market are of concern to the Commission only to the extent that protecting competition in these markets may add an extra level of protection for the public and enable all television broadcasters to compete fairly for advertising revenue and programming. What is critical to our competition policy goals, however, is the assurance of a sufficient number of strong rivals actively engaged in competition for viewing audiences. As long as there are numerous rival firms in the DVP market, viewers' interests will be advanced. The Commission first analyzes the DVP market.

87. *The DVP Market.* The evidence in the record suggests that television viewers do not consider non-video entertainment alternatives and non-delivered video to be good substitutes for watching television. In defining the market, the Commission asks whether the availability of entertainment alternatives is sufficient to prevent a significant and non-transitory increase in price. If they were good substitutes to watching television, relative changes in prices or other competitive variables should change household consumption of television. The record evidence suggests, however, that, while the price of subscribing to cable and DBS has increased faster than the rate of inflation, these price increases have not resulted in households dropping their subscriptions to cable and DBS, or reducing the amount of time households spend watching television. Thus, DVP providers have indeed been able to impose non-transitory price increases. This suggests that the relevant product market is no broader than DVP and should not include all entertainment activities.

88. For most viewers the programming choices offered by local broadcast television stations and cable networks represent good alternatives for one another. Most households subscribe to cable or DBS and receive DVP from cable networks and local broadcast television stations. These viewers need only touch their remote control to switch between the programming offered by cable networks and that of local broadcast television stations. The ease of switching from broadcast to cable networks for these households provides strong incentives for cable networks and local broadcast television stations to provide programs that attract viewers. The Commission thus finds that all the broadcast television stations and cable networks available to a significant number of cable subscribers in a DMA should be included as participants in the market for DVP.

89. The programming quality delivered to the minority of households that do not subscribe to cable or DBS is protected by the majority of households that do subscribe. Although non-subscribing households have fewer program choices than subscribing households, broadcasters cannot reduce the viewer appeal of their programming to non-subscribing households, without also reducing the viewer appeal of their programming to subscribing households. Broadcasters deliver the same programming to both subscribing and non-subscribing households. Thus, the majority of households that subscribe to cable or DBS assure that non-subscribing households receive appealing programming.

90. Although viewers easily switch between the programming offered by broadcast television stations and the programming offered by cable networks, broadcast television stations and cable networks may respond differently to changes in local market concentration. Therefore, in formulating our revised local broadcast television ownership rules, the Commission continues to draw a distinction between television broadcast stations and cable networks. It is unlikely that mergers between broadcast television stations in any local market would alter the competitive strategy of a national cable network. In contrast, local broadcast television stations offer a mix of national programming and local programming in a geographic area typically no larger than a DMA. As such, local broadcast television stations have incentives to respond to conditions in local markets. It is the unilateral and coordinated responses of local broadcast television stations to mergers between local broadcast television stations that may result in potential competitive harms. Thus, the Commission focuses on ownership of television broadcast stations, not cable networks, to promote competition in local television markets.

91. *Geographic Market for DVP.* As the Commission evaluates the competitive effects of mergers between local broadcast television stations, it must define the relevant geographic market for the DVP market. Generally, cable systems carry all the broadcast stations assigned to the DMA in which they are located, pursuant to the Commission's must-carry/retransmission consent requirements. Cable systems providing service to the majority of households also carry most major cable networks. As such, the relevant geographic market for DVP is the DMA for most mergers between local broadcast television stations.

92. *Efficiencies of Common Ownership of Television Broadcast Stations in DVP Markets.* The Commission recognizes that common ownership of stations may result in consumer welfare enhancing efficiencies. First, common ownership of broadcast television stations in a local market can facilitate efficiencies and cost savings. Joint operations can eliminate redundant studio and office space, equipment, and personnel, and increase opportunities for cross-promotion and counter-programming. The Commission's current rule hinders

[9] ''The 'top four-ranked station' component of this standard is designed to ensure that the largest stations in the market do not combine and create potential competition concerns. These stations generally have a large share of the audience and advertising market in their area, and requiring them to operate independently will promote competition.''

the realization of efficiencies by prohibiting common ownership of television stations in most DMAs. To enhance the ability of broadcast television to compete with cable and DBS in more DMAs, the Commission believes that the potential efficiencies and cost savings of multiple station ownership should be available to stations in a larger number of DMAs than permitted by our current rule.

93. Common ownership of broadcast television stations in a local market may also spur the transition to digital television. In developing DTV build-out rules for broadcast stations, the Commission has recognized the particular financial challenges faced by stations in smaller markets. Nevertheless, many DTV construction costs do not vary with market size and thus it still may be relatively more difficult for stations in these markets to finance the transition to DTV.

94. The Commission believes that our modified rule, which permits the common ownership of at least two television stations in most markets, will have a beneficial impact on the DTV transition. One study shows that stations that are commonly owned and stations involved in joint operating arrangements are further along in the DTV transition. Common ownership could facilitate cost savings by sharing DTV equipment. Common ownership would also allow the expertise gained in transitioning one station to DTV to be transferred to other commonly owned stations.

95. The Commission's competition goal seeks to ensure that for each television market, numerous strong rivals are actively engaged in competition for viewing audiences. Although mergers among participants in the DVP market would not affect the number of delivered video program streams, they might adversely affect the types or characteristics of the programming offered by the merged entities to the detriment of viewers. The evidence for common ownership of two television stations, however, suggests that more viewers prefer the post-merger programming. The Commission therefore concludes that our current rule, which prohibits common ownership of broadcast television stations in most markets, is overly restrictive. Because some relaxation of the current rule to permit additional consolidation in local television markets would facilitate efficiencies and likely result in the delivery of programming preferred by viewers, the Commission concludes that our current rule cannot be justified on grounds of competition in the market for DVP.

96. *Video Advertising Market.* The Commission concludes that the current rule is not necessary to promote competition in the video advertising mark. The Commission concludes that our local TV ownership rule restricts many broadcasters to suboptimal size and, therefore, hinders their ability to compete with other media for advertising revenue. That said, competitive broadcast television advertising markets may require a larger number of owners of DVP than are necessary to protect competition in the DVP market. As such, assuring competition in video advertising markets may provide the public with an added level of protection. A larger number of television station owners in a local television market may also lower the potential for the exercise of market power by any one broadcaster and, therefore, help smaller or non-consolidating broadcasters compete for advertising revenue.

97. The Commission has determined that broadcast television advertising is a relevant product market. Advertisers differ in their ability to substitute between alternative media. Although some advertisers that use broadcast television stations may consider cable networks or the advertising time sold by local cable operators to be good substitutes, other advertisers may not consider these alternatives to be good substitutes. In addition, most advertisers that use broadcast television stations do not consider radio, newspapers, and other non-video delivery media to be good substitutes.

98. Our experience suggests that common ownership of two local broadcast television stations has produced efficiencies without facilitating the exercise of market power in the broadcast television advertising market. In light of evidence detailed in the R&O, that the current rule prohibits some consumer welfare enhancing combinations, the Commission concludes that the current rule is overly restrictive and not necessary to protect competition in the broadcast television advertising market.

99. *Video Program Production Market.* The Commission concludes that the current rule is not needed to protect competition in the video program production market. Broadcast television stations, along with TV networks, cable networks, program syndicators, and cable and DBS operators purchase or barter for video programming. The channel capacity of today's cable operators and DBS operators provides many more opportunities for sellers of existing and new video programming, compared with 20 years ago. Many of the programs sold today are specifically targeted to the niche audiences available on cable networks. In addition, many video programs initially sold to TV networks migrate to cable networks, and a few programs initially sold to cable networks migrate to local broadcast television stations. Same-market combinations are only of concern to the few program syndicators that sell their programming directly to individual local television stations. These program syndicators would not consider sales to group owners of television stations in multiple markets, TV networks, and cable networks to be good substitutes for the sale of programming to individual stations. These program syndicators play one television broadcast station against another in the same market to sell their programming. By precluding common ownership of broadcast television stations in most markets, our current rule provides for more owners of television broadcast stations in most markets than are necessary to assure that program syndicators receive a fair price for their programming.[10] The Commission concludes, therefore, that the current rule is not necessary to protect competition in the video program production market.

100. *Localism.* The adoption of the local TV ownership rule was not predicated on promoting localism. To the contrary, the Commission has previously recognized that relaxation of the rule was likely to promote localism. The primary evidence of ''programming and service'' benefits was anecdotal evidence of increases in the amount of local news and public affairs programming aired by stations participating in LMAs.

101. The Commission concludes that our current local TV ownership rule poses a potential threat to local programming, and that modification of the rule is likely to result in efficiencies that will better enable local television stations to acquire content desired by their local audiences.

102. *Local Programming Quantity and Quality.* On balance, evidence presented by commenters concerning the amount and quality of local news and public affairs programming suggests that owners/operators of same-market combinations have the ability and incentive to offer more programming responsive to the needs and interests of their communities and that in many cases, that is what they do. Thus, modifications to the rule that will allow

[10] The current rule ensures that there are at least eight independent owners in all markets with eight or more stations.

for greater common ownership are likely to advance our localism goal.

103. *Effect of Local Market Consolidation on Local Control Over Content.* Contrary to views expressed by some commenters, the Commission has no record evidence linking relaxation of our local ownership rule to a reduction in local control over content. The Commission also has no means of measuring the extent to which news professionals' fear of retribution by their employers is reducing the ability of television broadcast stations to offer news focused on the needs and interests of their local communities, nor can it connect such concerns to its local ownership rules.

104. *News Programming Costs and Viability of Local News Operations.* Several commenters contend that the rising cost of producing news and public affairs programming is forcing broadcasters to reduce news production and that relaxation of the local TV ownership rule would allow broadcasters to invest in new local news and public affairs programming, or at least to maintain existing programming. The Commission finds that the current local TV ownership rule is not necessary in the public interest to promote localism. More likely, the current rule is hindering our efforts to promote localism. Anecdotal and empirical evidence in the record demonstrates post-combination increases in the amount of local news and public affairs programming offered by commonly owned stations. Moreover, rising news production costs and other factors may cause broadcasters to turn to less costly programming options. Having found that there is a positive correlation between same-market combinations and the offering of local news, the Commission further agrees with those commenters who contend that modifying the local TV rule is likely to yield efficiencies that will allow broadcasters to invest in new local news and public affairs programming, or at least to maintain existing local programming.

105. *Diversity.* Section 202(h) requires that the Commission consider whether the local TV ownership rule is necessary in the public interest to promote our diversity goal. The current rule measures viewpoint diversity largely through its voice test, which ensures that all television markets have at least eight independent broadcast television voices. The Commission finds that multiple media owners are more likely to present divergent viewpoints. Upon review of the record in this proceeding as well as its own analysis of local media markets, the Commission finds that media other than television broadcast stations contribute to viewpoint diversity in local markets. The data in the record indicate that the majority of markets have an abundance of viewpoint diversity. The Commission therefore concludes that its existing local TV ownership rule is not necessary to achieve its diversity goal. In order to promote viewpoint diversity, the Commission will rely on a combination of its cross media limits as well as revised local television and local radio ownership caps. The Commission also concludes that the current rule is not necessary to promote program diversity.

106. *Viewpoint Diversity.* The Commission recognizes that a single media owner may elect to present a range of different perspectives on a particular political or social issue. It may also be accurate that a single owner of multiple media outlets in a local market may have a greater incentive to appeal to more viewers by presenting more perspectives than do multiple owners of single outlets. Even if a single owner of multiple television stations in the same market has an enhanced ability and incentive to present a broader range of viewpoints, that single owner still retains ''ultimate control over programming content, who is hired to make programming decisions, what news stories are covered, and how they are covered.'' The Commission concludes that it cannot rely exclusively on the economic incentives that may or may not be created by ownership of multiple television stations to ensure viewpoint diversity. However, because the Commission finds that other media contribute to viewpoint diversity in local markets, it concludes that the existing local TV ownership rule is not necessary to achieve its diversity goal.

107. *Contribution of Other Media to Viewpoint Diversity in Local Markets.* The local television ownership rule has traditionally focused only on the contribution of television broadcast stations to diversity in local markets. Based on the evidence in the record, including our own evaluation of the media marketplace, the Commission finds that media outlets other than television stations contribute significantly to viewpoint diversity in local markets, and that our current rule fails to account for this diversity.

108. The Commission finds that television broadcast stations are not the only media outlets contributing to viewpoint diversity in local markets. The market for viewpoint diversity and the expression of ideas is, therefore, much broader than the economic markets in which broadcast stations compete. In particular, in focusing on the delivered video market alone, the Commission would ignore countless other sources of news and information available to the public. As a corollary, however, limits imposed on television station combinations designed to protect competition in local delivered video markets necessarily also protect diversity; indeed they are more protective of competition in the broader marketplace of ideas given the difference in market definition.

109. The Commission does not, therefore, necessarily disagree with those commenters who maintain that a local television ownership cap can help to protect the public's First Amendment interest in a robust marketplace of ideas. We disagree, however, to the extent that they advocate a diversity-based rule that looks to broadcast-only television voices. Accepting this narrowly-defined view would result in a rule that is overly restrictive both for competition and diversity purposes, because it would fail to include other participants in some relevant product markets and in the marketplace of ideas. Such an approach cannot be squared with our statutory mandate under section 202(h) or our desire to minimize the impact of our rules on the rights of speakers to disseminate messages.

110. Accordingly, by setting our local television ownership caps only so high as necessary to protect competition in the delivered video market, the Commission will achieve necessary protection for diversity purposes without unduly limiting speech. The current rule is not necessary to protect competition and, indeed, may be harming competition in the delivered video market. It likewise cannot be justified on diversity grounds as it is overly restrictive. The Commission's modifications to the rule remedy that failing.

111. *Program Diversity.* The local TV ownership rule has not traditionally been justified on program diversity grounds. However, the NPRM sought comment on whether common ownership of multiple stations promotes program diversity, and if so, how this affects the need for the current local TV ownership rule.

112. The Commission finds that modification of the current local TV ownership rule may enhance program diversity. Program diversity is best achieved by reliance on competition among delivery systems rather than by government regulation. The Commission's local TV ownership rule will ensure robust competition in local DVP markets. As long as these markets

remain competitive, the Commission expects program diversity to be achieved through media companies' responses to consumer preferences. Nothing in the record seriously calls that conclusion into question.

113. The Commission shares the concern of Children Now that the diversity of children's educational and informational programming could be reduced if commonly owned stations in the same market air the same children's programming. The Commission therefore clarifies that where two or more stations in a market are commonly owned and air the same children's educational and informational program, only one of the stations may count the program toward the three-hour processing guideline set forth in 47 CFR 73.761.

114. *Modification of the Local Television Ownership Rule.* Based on the Commission's section 202(h) determination that the current local TV rule is no longer necessary in the public interest to promote competition and diversity, as well as our finding that the current rule may hinder achievement of our localism policy goal, the Commission must either eliminate or modify our local TV ownership restrictions. The Commission concludes that elimination of the rule would result in harm to competition in local DVP markets, thereby harming the public interest. Elimination of the rule also would adversely affect competition in the advertising and program production markets. Accordingly, the Commission modifies the rule.

115. The Commission's modified local TV ownership rule will allow ownership combinations that satisfy a two-part test: a numerical outlet cap and a top four-ranked standard. Our outlet cap will allow common ownership of no more than two television stations in markets with 17 or fewer television stations; and up to three stations in markets with 18 or more television stations. In counting television stations for purposes of this outlet cap, the Commission will include full-power commercial and noncommercial television broadcast stations assigned by Nielsen to a given DMA. For purposes of counting the television broadcast stations in the market, the Commission will include only full power authorizations (*i.e.*, it will not include Class A TV, LPTV stations or TV translators). The Commission also will exclude from our count any non-operational or dark stations. Newly constructed television stations that have commenced broadcast operations pursuant to program test authority will be included in the DMA count. Television satellite stations will be excluded from our count of full power television stations in the DMA where the satellite and parent stations are both assigned by Nielsen to the same DMA. A satellite station assigned to a DMA different from that of its parent, however, will be included in the TV station count for that DMA. DTV stations will be included in our count only if they are operating and are not paired with an analog station in the market. For purposes of our local TV ownership rule, a station will be considered to be ''within'' a given DMA if it is assigned to that DMA by Nielsen, even if that station's community of license is physically located outside the DMA. For purposes of our local TV ownership rule, geographic areas that are not assigned a DMA by Nielsen (*i.e.*, Puerto Rico, Guam, and the U.S. Virgin Islands) each will be considered a single market. Our current local TV multiple ownership rule does not restrict the number of noncommercial television stations that can be owned by one entity. Consistent with past practice, our modified rule also will not affect ownership of noncommercial television stations. The Commission's top four-ranked standard will prohibit combinations which would result in a single entity owning more than one station that is ranked among the top four stations in the market based on audience share. Hence, same-market combinations will not be permitted in markets with fewer than five television stations. For purposes of applying the top four-ranked standard, a station's rank will be determined using the station's most recent all-day audience share, as measured by Nielsen or by any comparable professional and accepted rating service, at the time an application for transfer or assignment of license is filed, the same method as under our current rule.

116. The contour overlap provision of the rule will be eliminated, and the modified rule will be applied without regard to Grade B contour overlap among stations. Thus, if two stations in a market do not have overlapping contours, they still cannot be combined unless there are five or more stations in the market and at least one station in the combination is not among the top four. The Commission has determined that, because of mandatory carriage requirements, the DMA—not the area within a particular station's Grade B contour—is the geographic market in which DVP providers compete. Therefore, permitting station combinations solely on grounds that they do not have overlapping contours would be inconsistent with our market definition. The majority of viewers—including those who reside in geographically large DMAs—have access to television broadcast stations that they could not view over-the-air because they can view the stations via cable. Increasingly, local stations also are available via DBS. To avoid imposing an unfair hardship on parties that currently own combinations that do not comply with the modified rule, the Commission will grandfather existing combinations. In addition, because the Commission's assumption regarding DMA-wide carriage is not universally true, and in recognition of the signal propagation limitations of UHF signals, the Commission adopts a waiver standard that will permit common ownership of stations where a waiver applicant can show that the stations have no Grade B overlap and that the stations are not carried by any MVPD to the same geographic area.

117. The public is best served when numerous rivals compete for viewing audiences. In the DVP market, rivals profit by attracting new audiences and by attracting existing audiences away from competitors' programs. The additional incentives facing competitive rivals are more likely to improve program quality and create programming preferred by existing viewers. The R&O discusses how the Commission's analysis of competition in local DVP markets supports the modified rule.

118. *Evaluating Potential Competitive Harms Within Local DVP Markets.* Consistent with the Commission's competition policy goal, our local television ownership rule seeks to preserve a healthy level of competition in the market for DVP. The state of competition in this market affects the quality and diversity of programming content and therefore the overall welfare of DVP viewers. In formulating our local TV multiple ownership rule, the Commission must assess the nature of this competition and weigh the potential benefits and anticompetitive harms that may arise from the increase in market concentration that results from a single firm owning multiple broadcast stations in a market.

119. There are two potential competitive harms that may be caused by a single firm owning multiple television stations in a market. First, ownership of multiple stations may result in ''unilateral effects,'' *i.e.*, the firm acquiring multiple licenses may find it profitable to alter its competitive behavior unilaterally to the detriment of viewers. An example of such an effect would be the decision to cancel local

news programming on one of the commonly-owned channels. Second, the acquisition of multiple licenses in a local market by a single firm may lead to ''coordinated effects.'' That is, the increase in concentration may induce a joint change in competitive behavior of all the market participants in a manner that harms viewers.

120. The Commission recognizes the importance of competition from cable networks in the market for DVP. Nevertheless, in formulating our revised ownership rules, the Commission continues to draw a distinction between television broadcast stations and non-broadcast DVP outlets. This is because television broadcast stations and cable programming networks have different incentives to react to a change in local market concentration, which suggest differing levels of unilateral and coordinated effects. In particular, cable networks are almost exclusively offering national or broadly defined regional programming. Therefore, the profit-maximizing decisions of a national cable programmer reflect conditions in the national market. It is improbable that a change in concentration in any single local market would affect the competitive strategy of a national cable network. In contrast, the Commission needs to consider the possible competitive responses from other DVP outlets in local markets, which are almost exclusively television broadcast stations. Because of the differing footprints of cable networks and television broadcast stations, any possible competitive harms are more likely to arise from changes in the behavior of stations. Thus, the Commission's rules to promote local television competition are focused on ownership of television broadcast stations.

121. *Welfare Enhancing Mergers in Local Delivered Video Markets.* The standard approach to evaluating the competitive harms of an increase in horizontal market concentration is outlined in the DOJ/FTC Merger Guidelines. The DOJ/FTC Merger Guidelines recognize the HHI level of 1800 as the maximum level of ''moderate concentration.'' The Commission chooses this threshold rather than the lower limit of 1000 because it recognizes the competitive pressures exerted by the cable networks. The 1800 threshold corresponds to having six equal-sized competitors in a given market. The DOJ/FTC Merger Guidelines however, are written not for a specific industry, but rather as guidelines intended for application across all industries. The Commission's rules are formulated for a specific market-the delivery of video programming- and are based on an extensive record on the extent of competition in this market and the effect of our current local TV ownership rule. This record allows the Commission to craft a more finely-tuned rule for this industry.

122. First, the nature of the DVP market is such that there is constant product innovation with new program choices each season. In such a market, a firm's market share is more fluid and subject to change than in other industries. Hence a firm's ''capacity'' to deliver programming can be as important a factor in measuring the competitive structure of the market as is its current market share. Second, as each broadcast station requires a license, the number of licenses that a firm controls in a market is the measure of its capacity to deliver programming. Therefore, as a starting point, a simple application of the DOJ/FTC Merger Guidelines six-firm threshold suggests that, a single firm holding three licenses in a market with 18 or more licenses, or a firm holding two licenses in a market with 12 or more licenses, would not raise competitive concerns. However, given the structure of the DVP market, a strict, overly simplistic application of the DOJ/FTC Merger Guidelines would potentially prohibit some welfare enhancing mergers and allow some anticompetitive mergers.

123. In local markets, there is a general separation between the audience shares of the top four-ranked stations and the audience shares of other stations in the market. A review of the audience shares of stations in every market with five or more commercial television stations (*i.e.*, 120 markets) indicates that in two-thirds of the markets, the fourth-ranked station was at least two percentage points ahead of the fifth-ranked station. Two percentage points represents a significant difference in audience share because for a station to jump from, for example, an eight share to a ten share, it would have to increase its audience share by 25%. Thus, although the audience share rank of the top four-ranked stations is subject to change and the top four sometimes swap positions with each other, a cushion of audience share percentage points separates the top four and the remaining stations, providing some stability among the top four-ranked firms in the market. Nationally, the Big Four networks each garner a season to date prime time audience share of between ten and 13 percent, while the fifth and sixth ranked networks each earn a four percent share. While there is variation in audience shares within local markets, these national audience statistics are generally reflected in the local market station rankings. The gap between the fourth-ranked national network and the fifth-ranked national network represents a 60% drop in audience share (from a ten share to a four share), a significant breakpoint upon which the Commission bases the rule.

124. The Commission's analysis of the top four local stations is related to its analysis of the four leading broadcast networks in connection with the dual network rule. There the Commission concludes that Big Four networks continue to comprise a ''strategic group'' within the national television advertising market. That is due largely to those networks' continued ability to attract mass audiences. It is this network programming that explains a significant portion of continued market leadership of the top four local stations in virtually all local markets. Thus the continued need for the Dual Network rule to protect competition at the network level also supports our decision to separate ownership of local stations carrying the programming of Big Four networks.[11]

125. Permitting mergers among top four-ranked stations also would generally lead to large increases in the HHI. Although the Commission believes that mechanical application of the *DOJ/FTC Merger Guidelines* may provide misleading answers to competitive issues in the context of local broadcast transactions, as a general matter, sufficiently large HHIs establish a *prima*

[11] The local television ownership rule is consistent with a key aspect of the Commission's national television ownership rule in recognizing competitive disparities among stations. The national television ownership cap recognizes competitive disparities between stations through use of the UHF discount, while the local television ownership cap recognizes competitive disparities between stations by prohibiting mergers of the top four-ranked stations in the market. The national ownership rule is an audience reach limitation, so it makes sense to adjust that limitation based on the diminished coverage of UHF stations. The local ownership rule, on the other hand, places a limitation on the number of stations that one entity may own in a market. Thus, that rule limits mergers of the top four-ranked stations in a market. Furthermore, in the local television ownership rule, we take account of a station's UHF status in considering certain waiver requests, as discussed further below. Finally, the Commission notes that the top-four merger restriction in the local television ownership rule and the UHF discount in the national television ownership rule, while analogous, are not identical and do not serve exactly the same purpose. The UHF discount is premised, in part, on promoting the development of new and emerging networks. This rationale does not apply in the local television ownership context because ownership of multiple stations in a market does not promote development of new networks. The top-four limitation in the local television ownership rule, in contrast, is premised on competition theory, which is not the basis for the national television ownership rule.

facie case in antitrust suits. By allowing firms to own multiple stations, but prohibiting combinations among the top four-ranked stations, the Commission enables the market to realize efficiency gains and improve the quality of product in the video programming market while mitigating the risk of harmful coordinated or unilateral competitive harms.

126. One reason that combinations involving top four-ranked stations are less likely to yield public interest benefits such as new or expanded local news programming is that such stations generally are already originating local news. Some commenters contend that the Commission has never demonstrated that top four-ranked stations are generally the market's news providers. Yet the data provided by some of these very commenters confirms that this is the case. Further, the Commission has determined that, because there are less than four stations in some markets, the total number of top four-ranked stations is 779. Therefore, fully 85% of top four-ranked stations offer local news. Because top four-ranked stations already provide local news programming, a combination involving more than one top four-ranked station is less likely to result in a new or enhanced local news offering than would a combination involving only one top four-ranked station.

127. The Commission has also determined that same-market combinations yield efficiencies that may expedite a station's transition to DTV. However, combinations involving more than one top four-ranked station also are less likely to provide public interest benefits in the form of new DTV service. The financial position of top four-ranked stations makes the transition to DTV more affordable for these stations. Top four-ranked stations also are more likely to have made the transition to DTV than other stations. The Commission therefore concludes that it is less likely that allowing same-market combinations involving more than one top four-ranked station will expedite the provision of DTV service to the public.

128. Permitting combinations among the top four would reduce incentives to improve programming that appeals to mass audiences. The strongest rival to a top four-ranked station is another top four-ranked station. Because top four-ranked stations typically offer programming designed to attract mass audiences, as opposed to niche audiences, a new popular program offered by one top four-ranked station will have a substantial negative impact on the audience shares of the other top four-ranked stations. The enormous potential gains associated with new popular programs provide strong incentives for top four-ranked stations to develop programming that is more appealing to viewers than the programming of their closest rivals. The large number of viewers looking for new programs with mass audience appeal are the direct beneficiaries of this rivalry. When formerly strong rivals merge, they have incentives to coordinate their programming to minimize competition between the merged stations. Such mergers harm viewers.

129. The Commission's decision to allow common ownership of two television stations in markets with fewer than twelve television stations will result in levels of concentration above our 1800 HHI benchmark in markets with fewer than 12 television stations. The Commission permits this additional concentration because the economics of local broadcast stations justify graduated increases in market concentration as markets get smaller.[12] The record demonstrates that owners of television stations in small and mid-sized markets are experiencing greater competitive difficulty than stations in larger markets. Moreover, Congress and the Commission previously have allowed greater concentration of broadcast properties in smaller markets than in larger markets precisely because the fixed costs of the broadcasting business are spread over fewer potential viewers. The limits the Commission adopts in the R&O for local television ownership replicate this graduated tradeoff between optimal competition in the delivered video market (six station owners) and recognition of the challenging nature of broadcast economics in small to mid-sized markets.

130. Thus, the Commission must avoid an oversimplified application of the DOJ/FTC Merger Guidelines. In particular, the analysis suggests that anticompetitive harms may result from allowing the largest firms to merge, and that the Commission might lose welfare enhancing efficiency gains by disallowing mergers between stations with large audience shares and stations with small audience shares. To allow the market to realize these efficiency gains and prevent potential harms from undue increases in concentration, the Commission therefore allow combinations of two stations provided they are not both among the top four-ranked broadcast stations in the local market. In markets with at least 18 television stations, the Commission further allows a firm to own up to three stations (thus ensuring a minimum of six owners) provided that only one of them is ranked among the top four.

131. *Proposals to Retain the Existing Rule in its Current Form or With Minor Modifications.* A number of commenters urge the Commission to retain the existing rule, or make minor modifications. Children Now proposes that the Commission modify the existing rule by prohibiting common ownership of television stations with overlapping Grade B contours in the same market, as it did prior to its 1999 revisions to the rule. Other commenters urge the Commission to retain the existing rule, but to count only those voices that actually provide local programming. Children Now, among others, states that if the Commission chooses to revise the current rule by expanding the types of media voices that are considered for purposes of the local television ownership rule, it should raise the threshold voice count required to form a same-market combination.

132. The Commission has determined that retaining our current rule does not comport with our statutory mandate under section 202(h) on competition, diversity, or localism grounds. For the same reasons, the Commission disagrees with commenters who contend that an equally restrictive or more restrictive ownership rule is necessary in the public interest. Although our modified rule does not rely upon a ''voice test,'' it calculates the number of stations one can own in a market based, in part, on the number of stations within that market. However, our decision to ''count'' only broadcast television stations is based on the likely responses of participants in the DVP market to changes in local market concentration, and is aimed at achieving competition in local markets.

133. Another commenter proposes that if the Commission relaxes the rule, it should prohibit common ownership of more than one station affiliated with a top four network. The Commission's revised rule prohibits common ownership of stations that are among the top four in terms of audience share. Although such stations are often

[12] For purposes of applying the Commission's cross media limits, which are diversity based, it found that markets with nine or more television stations have a sufficiently large number of media outlets that viewpoint diversity will be protected by its caps on local television and local radio ownership. Measuring the extent of diversity in a market is a separate question from measuring the extent of competition among a particular class of outlets, such as local television stations. Thus, a market with ten television stations can be characterized as ''large'' from a viewpoint diversity standpoint because of the substantial number of media outlets available in such markets, but ''small to mid-sized'' when considering solely competition in the delivered video market (which excludes outlets such as radio, newspaper, and the Internet).

affiliated with top four networks, the Commission concludes that audience share rank is a more accurate measure of market power than network affiliation. Therefore, the Commission does not adopt the proposal to prohibit common ownership of more than one station affiliated with a top four network.

134. Another commenter asserts that while the Commission has ample justification for retaining the current rule, if it chooses to revise the rule, it should apply an ''HHI-adjusted voice count'' to local TV ownership. Under this proposal, the Commission would calculate the market shares of television broadcast stations in the relevant geographic market, which would be either the DMA or a ''weighted average DMA,'' calculated to account for the fact that certain stations do not have cable carriage throughout the market. This commenter proposes that the Commission define highly concentrated markets as those with fewer than six equal-sized voices or a four-firm concentration ratio above 60%. Moderately concentrated markets would be those with between six and ten equal-sized voices or a four-firm concentration ratio of 40–60%. They further urge the Commission to prohibit any combination that would result in a highly concentrated market. Where a combination would result in moderate concentration, the commenter proposes that the Commission permit the combination only if it finds that the merger will serve the public interest and if the owner of the merging stations agrees to retain separate news and editorial departments in different subsidiaries of the merged entity.

135. The Commission's modified local TV ownership rule will ensure that there are at least six firms in significant number of markets (*i.e.*, all markets with 12 or more television stations), much like the commenter's proposal. The proposal does not, however, adequately address record evidence of differences in the economics of broadcast stations in smaller markets. Much like the strict application of the DOJ/FTC Merger Guidelines, the proposed test would prohibit certain mergers that will result in welfare enhancing efficiencies. Accordingly, the Commission declines to adopt this proposal. With regard to the commenter's waiver proposal, the Commission does not agree that conditioning assignments/transfers on retention of separate news departments within separate subsidiaries of a merged entity is necessary to advance our diversity, competition or localism goals. Requiring compliance with our rules, rather than conducting case-by-case evaluations or imposing merger conditions, is a more effective way to achieve these goals.

136. Entravision does not take a position on whether the rule should be relaxed, but proposes that if the rule is relaxed, the Commission should require periodic certification by owners of same-market combinations that they are not engaged in certain types of anticompetitive conduct that would adversely affect smaller broadcasters in their markets. The Commission does not agree with Entravision that modifying the local TV ownership rule will increase the likelihood of anticompetitive conduct by broadcasters that own more than one station in a market, or that a certification requirement is necessary to protect against such conduct. Certainly, if broadcasters engage in anticompetitive conduct that is illegal under antitrust statutes, remedies are available pursuant to those statutes. In addition, an antitrust law violation by a licensee would be considered as part of our character qualifications review in connection with any renewal, assignment, or transfer of a license.

137. *Proposals to Eliminate or Substantially Modify the Rule.* Several commenters propose that the Commission eliminate the current rule or substantially modify the rule in order to permit more same-market combinations. Among these are a proposal to allow common ownership of two television stations in all markets with four or more stations, a proposal to eliminate the top four-ranked standard, a proposal to eliminate the voice test provision of the rule but to retain the top four-ranked restriction, NAB's proposed ''10/10'' standard, and Hearst-Argyle's AMI proposal.

138. The Commission does not agree with commenters who propose that it eliminate all local television ownership restrictions. The Commission believes that the public is best served when numerous rivals compete for viewing audiences. In the DVP market, rivals profit by attracting new audiences and by attracting existing audiences away from competitors' programs. Monopolists, on the other hand, profit only by attracting new audiences; they do not profit by attracting existing audiences away from their other programs. The additional incentives facing competitive rivals are more likely to improve program quality and create programming preferred by viewers. Most commenters proposing elimination of the rule believe that antitrust authorities will protect against any public interest harms that may result from combined ownership of multiple television stations in a market. The Commission does not agree with commenters who urge us to eliminate our rules and defer all competition concerns to the antitrust authorities.

139. The Commission concludes that, as compared to the modified rule, the rule modification proposals advanced by commenters are more likely to result in anomalies and inconsistencies, or will otherwise fail to serve our policy goals. For example, by proposing that the Commission permit common ownership of two television stations in all markets with four or more stations, Nexstar attempts to account for the differing economics of stations in small markets. However, unlike our modified rule, the Nexstar proposal does not protect against combinations of the market participants with the largest audience shares, combinations that are more likely to cause competitive harms. It also permits extremely high concentration levels in the very smallest markets—there could be as few as two competitors in markets with four television stations. The Commission finds that the levels of concentration permitted by the Nexstar proposal are likely to result in harm to competition in local DVP markets.

140. Similar competitive harms would result if the Commission were to adopt proposals to eliminate or modify the top four-ranked standard. Several commenters claim that the top four-ranked standard cannot be justified on diversity or competition grounds. The Commission is not relying on the top four-ranked provision of our modified local TV ownership rule to promote diversity, although the Commission recognizes that because the marketplace for ideas is broader than the DVP market, rules intended to promote competition also will promote diversity. The Commission disagrees with commenters' claims that the top four-ranked standard is not justified on competition grounds. At the time of our last review of the local TV ownership rule, the Commission lacked sufficient record data concerning competitors to local television stations. In the instant proceeding, the Commission faces no such shortage of evidence concerning which media compete with local TV. Having determined that television competes with all providers of DVP, the Commission has crafted a rule that appropriately takes account of competition from other sources of DVP, and will ensure competition in local DVP markets. The Commission does not agree that elimination of our top four-ranked standard, use of a top three-ranked standard, or use of a tiered system that would ban mergers among

top four-ranked stations only in the largest markets and permit certain top four-ranked combinations in smaller markets, would serve the public interest. The top four-ranked combinations are likely to harm competition in the DVP market, and are less likely to produce offsetting public interest benefits.

141. The Commission believes that a more targeted approach to account for possible harms of application of the top four-ranked restriction is to establish a waiver standard tailored to the top four-ranked restriction. This approach will preserve competition in the DVP market while accommodating those instances where application of the top four-ranked restriction would harm the public interest.

142. Belo takes a nearly opposite approach, proposing that the Commission permit same-market combinations provided that they satisfy our top four-ranked standard, but eliminate our voice test. The Commission agrees that, as it is used in our modified rule, a top four-ranked prohibition is an appropriate means of protecting against combinations that would have an enhanced ability or incentive to engage in anticompetitive conduct.

143. NAB proposes that the Commission permit combinations where at least one of the stations has had, on average over the course of a year, an all day audience share of ten or less (the ''10/10'' proposal). NAB asserts that the audience share data used for this calculation should include viewing of out-of-market broadcast stations and cable networks, to account for competition from these sources. NAB proposes that the Commission treat the 10/10 standard as a presumption, and urges us to consider proposed combinations that do not meet this standard (including same-market combinations of three stations) on a case-by-case basis, considering factors which the Commission discusses along with other waiver proposals. NAB urges the Commission to allow broadcasters to transfer combinations created pursuant to the 10/10 standard even if one or both stations has increased its viewing share above the ten threshold at the time of such transfer. NAB asserts that requiring licensees to find separate purchasers will be disruptive and will tend to discourage investment in broadcast stations. Of the commenters who support the 10/10 proposal, some support the proposal as advanced by NAB; others support it with modifications; others suggest it be used only as a safe harbor, allowing for many other types of combinations.

144. The record in this proceeding supports a rule that will allow financially weak stations to combine with each other or with stronger stations in order to realize efficiencies. The 10/10 proposal, however, would permit mergers between financially strong stations, including top four-ranked stations, in a significant number of markets. Neither the record nor standard competitive analysis justifies a rule that will permit such mergers. The Commission's analysis suggests that combinations among the top four rated broadcast stations would create welfare harms. The Commission also finds that the proposal does not adequately justify the use of ten as a threshold. The record demonstrates that in many markets ten is the average share for any given station, sometimes even the very highest rated stations, in the market. In addition, the proposal provides no clear rationale to justify why, for example, a combination involving two stations with respective audience shares of 25 and 9 should be permitted, although a combination involving two stations with respective audience shares of 12 and 11 should be prohibited. For these reasons, the Commission rejects the 10/10 approach.

145. Hearst-Argyle advances an alternative proposal that would permit common ownership of any number of television stations in the same market provided that the stations' combined audience share does not exceed 30%. Combinations that would result in an audience share above 30% would be subject to an Audience Market Index (''AMI'') cap that is calculated in a manner similar to an HHI, but uses audience share data rather than advertising share data. If a combination would result in AMI below 1000, the combination would be permitted, regardless of the increase in concentration. A combination resulting in an AMI between 1000 and 1800 would be permitted if the increase in AMI is less than 100 points, and a combination resulting in an AMI above 1800 would be permitted only if it increases AMI by less than 50 points. Hearst-Argyle asserts that by using an audience share metric, its proposal objectively measures and protects both diversity and competition. Hearst-Argyle contends that its proposal also is likely to survive judicial scrutiny because its 30% hard cap and AMI analysis are both based on antitrust law and analysis. In addition, Hearst-Argyle contends that its proposal avoids several pitfalls of the NAB 10/10 proposal.

146. The Commission does not agree with Hearst-Argyle that simply because courts have accepted presumptions of 30% market share as demonstrating market power in the context of the antitrust statutes, it should establish a presumption that 30% is an appropriate audience share limit. The Hearst-Argyle proposal does not place specific limits on the number of broadcast television stations an entity could own in a local market. An entity could acquire any combination of stations in a local market as long as its audience share is 30 percent or less, and the AMI cap is satisfied. In many markets, this approach would permit an entity to own four, five, six or more stations. The Commission does not believe that consolidation in a market of a large number of stations with low audience share is in the public interest. Although an individual station may currently have a small audience share in the DVP market, each station's audience share has the potential to change over time. The number of stations a firm owns is a measure of its capacity to deliver programming. This capacity can be as important a factor in measuring the competitive structure of the market as is its current audience share. Moreover, much like the 10/10 proposal, the AMI test will frequently result in common ownership of stations ranked among the top four in the market. It will also permit common ownership of three stations in many more markets than will our modified rule—including some very small markets. As shown by one of Hearst-Argyle's own examples, under certain circumstances, the AMI test would even permit common ownership of three of the top four-ranked stations in a market with just five full-power television stations. Because of the anticompetitive harms that would result from combinations allowed by the AMI test, the Commission will not adopt Hearst-Argyle's AMI proposal.

147. NAB proposes an alternative that would combine the 30% audience share cap of the AMI test with a ban on common ownership of more than three stations in any market, and a ban on common ownership of more than two top four-ranked stations in the same market. For similar reasons, the Commission does not accept this proposal. The Commission believes that (1) a ban on combinations among the top four-ranked stations is necessary to promote competition; (2) a 30% share cap would permit combinations that undermine that goal; and (3) ownership of three television stations in markets with fewer than 18 stations would harm competition by consolidating capacity in the hands of too few owners. The Commission's modified rule better

effectuates our goal of promoting competition in local DVP markets.

148. *Waiver Standard.* In the Commission's Local TV Ownership Report and Order, it established a waiver standard for purposes of our local TV ownership rule. The standard permits a waiver of the current rule where a proposed combination involves at least one station that is failed, failing, or unbuilt. The Commission defines a ''failed station'' as one that has been dark for at least four months or is involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings. The Commission's ''failing'' station standard provides that it will presume a waiver is in the public interest if the applicant satisfies each of the following criteria: (1) One of the merging stations has had low all-day audience share (*i.e.*, 4% or lower); (2) the financial condition of one of the merging stations is poor; and (3) the merger will produce public interest benefits. The Commission's unbuilt station waiver standard presumes a waiver is in the public interest if an applicant meets each of the following criteria: (1) The combination will result in the construction of an authorized but as yet unbuilt station; and (2) the permittee has made reasonable efforts to construct, and has been unable to do so. For each type of waiver, the Commission also requires that the waiver applicant demonstrate that the ''in-market'' buyer is the only reasonably available entity willing and able to operate the subject station, and that selling the station to an out-of-market buyer would result in an artificially depressed price for the station. Any combination formed as a result of a failed, failing, or unbuilt station waiver may be transferred together only if the combination meets our local TV ownership rules or one of our three waiver standards at the time of transfer.

149. The Commission's rationale for adopting these waiver criteria was that failed, failing and unbuilt stations could not contribute to competition or diversity in local markets, and that the public interest benefits of activating a dark or unbuilt station, or preventing a failing station from going dark, outweighed any potential harm to competition or diversity. Most commenters addressing the waiver standard urge us to relax or eliminate the standard.

150. The Commission concludes that tightening our waiver standard would not promote our public interest goals. Moreover, the Commission agrees with the NAB and other commenters who urge us to expand our waiver standard to include consideration of combinations that will yield other public interest benefits. The Commission's treatment of waivers will follow the competition principles established in the DOJ/FTC Merger Guidelines, with a specific focus on the industry at hand. In particular, as in the DOJ/FTC Merger Guidelines, the Commission will consider combinations that involve firms that are not failing but that could better serve the public interest through a merger not otherwise permitted by our rules. The Commission also will consider a waiver of our local TV ownership rule where a proposed combination involves stations that do not engage in head-to-head competition because they do not have overlapping Grade B contours and are not carried by MVPDs in the same geographic areas.

151. First, for failed, failing, and unbuilt stations, the Commission retains the existing waiver standard with one exception. We remove the requirement that a waiver applicant demonstrate that it has tried and failed to secure an out-of-market buyer for the subject station. In many cases, the buyer most likely to deliver public interest benefits by using the failed, failing, or unbuilt station will be the owner of another station in the same market. The Commission believes that the efficiencies associated with operation of two same-market stations, absent unusual circumstances, will always result in the buyer being the owner of another station in that market.

152. Otherwise, however, a failed, failing, or unbuilt station clearly cannot contribute to localism, competition or diversity in local markets. Nothing in the record in the instant proceeding leads us to find otherwise. The Commission concludes that the public interest benefits of activating a dark or unbuilt station outweigh the potential harm to competition or diversity. Therefore, if it can be shown that, absent the transfer, the licensee's assets will exit the market, then the transfer is not likely to either enhance market power or facilitate its exercise. In such cases, the granting of a waiver would not be inconsistent with our competition goal.

153. The record also suggests that local television stations outside the largest markets may, in some cases, better serve the public interest through station combinations not permitted by our local television ownership rules. The Commission's new rules allow one company to own two stations in a market provided both are not ranked in the top four in ratings. This top four-ranked prohibition promotes competition by preventing the strongest competitors in each market from combining. The top four restriction is premised on evidence that the four leading stations in each market are already the strongest competitors and that combinations among them would harm the public interest by diminishing competition in the DVP market. However, NAB data shows that, as a class, smaller market stations (including both top four and other stations) are less effective competitors in the DVP market relative to stations in large markets. Therefore, the Commission allowed station combinations that would not be permitted in larger markets. However, our concern for the economics of broadcast television in small markets does not lead us to relax the top four prohibition generally because the Commission concluded that this restriction remains necessary to promote competition in the DVP market. Nonetheless, the Commission does recognize that there may be instances where application of this top four restriction will disserve the public interest by preventing marginal—but not yet ''failing''—stations from effectively serving the needs of their communities. Such stations may not be financially capable of producing the amount of news and local affairs programming that they would like to provide their communities, which in turn may make them less competitive in the local marketplace. Accordingly, in order to effectuate our goals of diversity, localism, and competition, the Commission will consider waivers of the top four-ranked restriction in markets with 11 or fewer television stations. Those are the markets in which the Commission has already recognized that the economics of broadcast television justify relatively greater levels of station consolidation and better serve the public interest.

154. In considering waivers of our top four-ranked restriction, the Commission will consider a number of factors. For instance, mergers between stations that reduce a significant competitive disparity between the merging stations and the dominant station in the marketplace are particularly likely to be pro-competitive. Accordingly, waiver applicants should supply television ratings information for the four most recent ratings periods for all local stations so that the Commission may assess the competitive effect of the merger.

155. Second, the Commission also will evaluate the effect of the proposed merger on the stations' ability to complete the transition to digital television. Waiver applicants claiming that the merger is needed to facilitate

the digital transition should provide data supporting this assertion.

156. The Commission also will consider the effect of the proposed merger on localism and viewpoint diversity. Waiver applicants should submit information about current local news production for all stations in the local market and the effect of the proposed merger on local news and public affairs programming for the affected stations. Applicants stating that the merger is needed to preserve a local newscast should document the financial performance of the affected news division. Applicants for waiver of our top four-ranked restriction must demonstrate that the proposed combination will produce public interest benefits. As in the context of failing station waivers, the Commission will require that, at the end of the merged stations' license terms, the owner of the merged stations must certify to the Commission that the public interest benefits of the merger are being fulfilled. This certification must include a specific, factual showing of the program-related benefits that have accrued to the public. Cost savings or other efficiencies, standing alone, will not constitute a sufficient showing. Finally, the Commission's review of waiver requests will account for the diminished reach of UHF stations. As discussed in our national television ownership rule section, UHF stations reach fewer households than VHF stations because of UHF stations' weaker broadcast signals. Reduced audience reach diminishes UHF stations' impact on diversity and competition in local markets. Accordingly, the Commission will consider whether one or both stations sought to be merged are UHF stations.

157. The revised local TV ownership rule no longer permits combinations involving stations that do not have overlapping Grade B contours, on grounds that, because of statutory mandatory carriage requirements, most stations compete with each other on a DMA-wide basis. However, the Commission recognizes that certain stations are not carried throughout their assigned DMAs, and thus do not compete with each other within their assigned markets. Accordingly, the Commission will consider waivers of our local TV ownership rule where a party can demonstrate that the signals of the stations in a proposed combination: (a) Do not have overlapping Grade B contours; and (b) have not been carried, via DBS or cable, to any of the same geographic areas within the past year.

158. With respect to a licensee's ability to transfer or assign a combination involving a station acquired pursuant to a waiver, the Commission does not find support in the record for permitting such transfers where they do not comply with our rules. The transfer or assignment of such a combination must comply with our rules or waiver standards at the time an application to transfer or assign the station is filed.

159. *Satellite Stations.* Television satellite stations retransmit all or a substantial part of the programming of a commonly owned parent station. Satellite stations are generally exempt from the Commission's broadcast ownership restrictions. The Commission believes that continued exemption of satellite stations from the local TV ownership rule is appropriate. Our satellite station policy rests on such factors as the questionable financial viability of the satellite as a stand-alone facility, and establishment of service to underserved areas. By adding stations to local television markets where stations otherwise would not have been established, the policy advances the same goals as those underlying our local TV ownership restrictions. Since these stations are licensed only if they cannot survive as standalone, independently operated stations, the Commission finds that exempting them from the local TV ownership rule will not harm competition or diversity.

160. *Transferability of Combinations Under Modified Rule.* If an entity acquires a second or third station that complies with the Commission's modified rule, it will not later be required to divest if the number of stations in the market subsequently declines below the level consistent with our outlet cap, or if more than one commonly owned station subsequently becomes a top four-ranked station in the market. The impact of such a ''springing'' rule would be highly disruptive to the market. Like our other rules, however, the Commission will not ignore the public interest underpinnings at the time of a subsequent sale of the combination. Thus, absent a waiver, a combination may not be assigned or transferred to a new owner if the combination does not satisfy our local TV ownership cap at the time of the proposed assignment or transfer.

B. Local Radio Ownership Rule

161. The local radio ownership rule limits the number of commercial radio stations overall and the number of commercial radio stations in a service (AM or FM) that a party may own in a local market. In the 1996 Act, Congress directed the Commission to revise those limits to provide that: (1) In a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM); (2) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM); (3) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and (4) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.

162. The Commission concludes that the numerical limits in the local radio ownership rule are ''necessary in the public interest'' to protect competition in local radio markets. The Commission concludes, however, that the rule in its current form does not promote the public interest as it relates to competition because (1) its current contour-overlap methodology for defining radio markets and counting stations in the market is flawed as a means to protect competition in local radio markets, and (2) the current rule improperly ignores competition from noncommercial radio stations in local radio markets. To address those concerns, the Commission modifies the rule to replace the contour-overlap market definition with an Arbitron Metro market and to count noncommercial stations in the radio market; and the Commission initiates a new rulemaking proceeding as part of this item to define markets for areas of the country where Arbitron Metros are not defined. Although the Commission primarily relies on competition to justify the rule, the Commission recognizes that localism and diversity are fostered when there are multiple, independently owned radio stations competing in the same market; its competition-based rule, therefore, will also promote those public interest objectives. The Commission also conclude that, consistent with our focus on competition, joint sales agreements (''JSAs'') will result in attribution of the brokered station to the brokering party under certain conditions.

163. *Section 202(h) Determination.* Under section 202(h), the Commission considers whether the local radio

ownership rule continues to be ''necessary in the public interest as a result of competition.'' In determining whether the rule meets that standard, the Commission considers whether the rule serves the public interest, which, in radio broadcasting, traditionally has encompassed competition, localism, and diversity. The Commission examines each of these public interest objectives in turn.

164. *Competition.* In the Policy Goals section, the Commission explained how the public interest is served by preserving competition in relevant media markets. Although limits on local radio ownership are generally necessary to serve the public interest, the Commission concludes that the current local radio ownership rule does not serve the public interest as it relates to competition for two reasons. First, the current rule uses a methodology for defining radio markets and counting the number of radio stations in a market that has not protected against undue concentration in local radio markets. Second, the current rule fails to account for the competitive presence of noncommercial stations in a market. Accordingly, the Commission modifies the rule to address these concerns.

165. *The Product Market Definition.* To measure the state of competition in radio broadcasting, the Commission first must determine the relevant product markets in which radio stations compete and the other media, if any, that compete in those markets. The Commission concludes that radio broadcasters operate in three relevant markets: radio advertising, radio listening, and radio program production.

166. *The Radio Advertising Market.* The Commission concludes that advertisers do not view radio stations, newspapers, and television stations as substitutes. A number of commenters have argued that there is little substitution between advertising on broadcast TV and newspapers. Further, empirical studies confirm that advertisers do not view ads in newspapers and broadcast radio as substitutes. The Commission acknowledges that the studies discussed in the full text of the R&O focus on national advertising markets. Nothing has been submitted in the record, however, that suggests that local advertisers are better able to substitute between radio and other media than are national advertisers, and the studies' results are consistent with the results of MOWG Study No. 10, which did examine local advertisers.

167. *The Radio Listening Market.* The Commission concludes that radio listening is a relevant product market. There is no evidence that radio listeners consider non-audio entertainment alternatives to be good substitutes for listening to the radio. The Commission therefore disagrees with commenters who argue that the relevant market should be broadened from radio listening to include non-audio entertainment options. The Commission also disagrees with commenters who argue that the relevant product market should be broadened to include other delivered audio media, such as Internet audio streaming and satellite radio. Internet audio streaming may be a substitute for broadcast radio when listening takes place while working on a computer or in a small office environment. A significant portion of audio listening, however, occurs while driving or otherwise outside of the office or home. Since most people do not access Internet audio from a mobile location, the Commission concludes that Internet audio streaming is not a substitute for broadcast radio for a significant portion of audio listening. Similarly, satellite radio may be a substitute for broadcast radio for the fewer than 600,000 people that subscribe to satellite radio. But the vast majority of the population does not subscribe to a satellite radio service. Accordingly, the Commission concludes that satellite radio is not yet a good substitute for broadcast radio for most listeners.

168. Preserving competition for listeners is of paramount concern in the Commission's public interest analysis. Although competition in the radio advertising market and the radio program production market indirectly affects listeners by enabling radio broadcasters to compete fairly for advertising revenue and programming—critical inputs to broadcasters' ability to provide service to the public—it is the state of competition in the listening market that most directly affects the public. When that market is competitive, rivals profit by attracting new audiences and by attracting existing audiences away from competitors' programs. Monopolists, on the other hand, profit only by attracting new audiences; they do not profit by attracting existing audiences away from their other programs. Because the additional incentives facing competitive rivals are more likely to improve program quality and create programming preferred by existing listeners, it is critical to the Commission's competition policy goals that a sufficient number of rivals are actively engaged in competition for listening audiences. Limits on local radio ownership promote competition in the radio listening market by assuring that numerous rivals are contending for the attention of listeners.

169. *Radio Program Production Market.* Radio stations seek to acquire audio programming from a variety of audio program producers. Many sellers of audio programming do not have adequate substitutes for local radio stations. The record indicates that radio stations are an important mechanism by which the American public is made aware of new music. Moreover, the record suggests no reasonable alternative available to producers of radio talk shows—a type of radio programming that has become increasingly popular in the last decade. To the extent that the radio stations in a local community are owned by one or a few firms, those firms could constitute a bottleneck that would impede the ability of radio programming producers to make their programming available to consumers in that community. Accordingly, the Commission concludes that radio programming constitutes a separate relevant product market.

170. *Geographic Market Definition.* There is no serious dispute that the relevant geographic market for the product markets in which radio stations compete is local. The parameters of the local market, however, have been a source of considerable debate and controversy. The Commission currently uses a contour-overlap methodology for defining radio markets and determining the number of radio stations that are in those markets. That methodology has been subject to intense criticism for producing unrealistic and irrational results. Based on the record and our own experience, the Commission now concludes that the contour-overlap system should be replaced by a more rational and coherent methodology based on geographically-determined markets to promote more effectively our competition policy goals.

171. *Problems with the Existing Radio Market Definition and Counting Methodologies.* The Commission currently relies on the principal community contours of the commercial radio stations that are proposed to be commonly owned to determine the relevant radio market in which those stations participate and to count the other radio stations that are in the market. We first consider whether an area of overlap exists among the principal community contours of all of the stations proposed to be commonly owned. If no such overlap area exists, then the radio stations involved are presumed to be in separate radio

markets, and the local radio ownership rule is not triggered. If one or more areas of contour overlap exist, however, the rule is triggered, and the Commission must determine whether the proposed combination complies with the limits specified in the rule.

172. The Commission first asks how many stations a party would own in the relevant radio market (*i.e.*, the ''numerator'' of the fraction upon which the numerical limits in the local radio ownership rule are based). Under our current methodology, the Commission deems the radio stations whose principal community contours mutually overlap to be in the same market, and it deems those stations to be the only stations owned by the common owner in that market. In some instances, a radio station's principal community contour will overlap some, but not all, of the principal community contours of other commonly owned radio stations. In those cases, separate radio markets will be formed from the mutual contour overlaps of different subsets of commonly owned radio stations. We nevertheless apply the same rule: In each of those separate markets, it deems the radio stations whose principal community contours mutually overlap to be in the same market, and it deems those stations to be the only stations owned by the common owner in that market.

173. After calculating the numerator for a particular radio market, the Commission next determines the size of the market. To do this, the Commission again relies on principal community contours. The Commission counts as being in the relevant radio market the radio stations that are included in the numerator. We add to this number every other commercial radio stations whose principal community contour overlaps the principal community contour of at least one of the stations counted in the numerator. The total represents the size of the market against which the number of commonly owned stations is evaluated to determine whether the proposed combination complies with the local radio ownership rule.

174. One significant problem with the current contour-overlap system is what is known as the ''Pine Bluff'' problem, or the ''numerator-denominator'' inconsistency. A party is deemed to own only those stations that are represented in the numerator. In calculating the denominator, however, any radio station whose principal community contour overlaps the principal community contour of at least one of the radio stations in the numerator is counted as being in the market, regardless of who owns that station. As a result, the denominator may include radio stations that are owned by the same party that owns the radio stations represented in the numerator. Because those stations are counted in the denominator, they are by definition ''in'' the market, but they would not count against the party's ownership limit in that market unless their principal community contours overlap the principal community contours of all of the radio stations in the numerator.

175. The numerator-denominator inconsistency has two potential and interrelated effects that highlight the problems with our current methodology. First, by counting commonly owned stations in the denominator that are not counted in the numerator, a party may be able to use its own radio stations to increase the size of the radio market and thereby ''bump'' itself into a higher ownership tier. Second (and more commonly), the inconsistency enables a party to own radio stations that are in the relevant radio market (as determined by our rules) without having those stations count against the party's ownership limit in that market. The current system of counting radio stations thus enables a party, by taking advantage of the effects of the numerator-denominator inconsistency, to circumvent our limits on radio station ownership, which are intended to protect against excessive concentration levels in local radio markets.

176. The Commission cannot fix the problems associated with our current methodology merely by excluding commonly owned stations from the denominator or including those stations in the numerator. If the Commission excludes commonly owned stations from the denominator, then it would be determining which radio stations are in the market based on who owns those stations, a distinction that would be both unprincipled and unprecedented in the history of competition analysis. If the Commission includes in the numerator commonly owned stations represented in the denominator, a party's ownership level in a particular market may be overly inflated by outlying stations far from the area of concentration. Each of these proposals thus would create new ''reverse'' anomalies to cancel out the effects of the numerator-denominator inconsistency.

177. The Commission's experience with the current contour-overlap methodology leads us to the conclusion that it is flawed as a means to preserve competition in local radio markets, and that the Commission should take an entirely new approach to market definition. As is clear from our description of the current market definition and counting methodologies, the size of a radio market under our current system is unique to the proposed combination being evaluated. A different combination of radio stations, or the addition or subtraction of a radio station from the combination, has the potential to change the area covered by the principal community contours of the combination and, thus, to change the number of commercial radio stations that are counted as being in the market. This is a singular and unusual method for determining the size of a market. Under traditional antitrust principles, the ''relevant geographic market'' is used to identify the parties that compete in that market. Our contour-overlap methodology, in contrast, uses the outlets of one party—commonly owned stations with mutually overlapping principal community contours—to define the local radio market and identify other market participants. This is an inherent aspect of the contour-overlap methodology that is not in line with coherent and accepted methods for delineating geographic markets for purposes of competition analysis.

178. The conceptual problems with the contour-overlap methodology have significant implications for our ability to guard against undue concentration in local radio markets. Because radio stations with larger signal contours are more likely to reach a wider audience, consolidation of these radio stations in the hands of one or a few owners increases the potential for market power in local radio markets. Yet the contour-overlap system actually encourages consolidation of powerful radio stations because stations with larger signal contours are more likely to create larger radio markets, which make it more likely that a party would be able to acquire additional radio stations in that market. Thus, by creating this perverse incentive, the contour-overlap methodology may undermine the primary public interest rationale for the local radio ownership rule.

179. Other aspects of our contour-overlap methodology also limit its usefulness in protecting and promoting competition. The method for determining which stations are in a market often does not reflect the area of true competition among radio stations. The Commission currently counts a radio station as being a competitor in a radio market if its principal community contour overlaps any one of the principal community contours that form the market boundary. Those radio stations may be too distant to serve effectively either the listeners or the

advertisers in the geographic area in which concentration is occurring, but they are included in the market because of the happenstance of the size, shape, or location of one or more of the principal community contours of the radio stations involved.

180. The contour-overlap methodology also makes it difficult to measure concentration levels in local radio markets accurately. As currently implemented, the methodology does *not* examine the number of radio station owners in a market; it only considers how many radio station signals cross the market boundary created by the principal community contours of commonly owned stations with mutually overlapping contours. Those signals may be owned by only one other party; indeed, because of the numerator-denominator inconsistency, those radio stations may be owned by the same party. The current methodology simply does not take ownership into account, which makes an accurate measure of local radio concentration difficult to achieve.

181. Consistency suffers as well. Under the contour-overlap methodology, every combination operates in a radio market that is unique to that combination. Thus, there is no common metric that the Commission can use to compare the effect of two different combinations on competition. In fact, the Commission cannot even rationally evaluate the effect that adding a new radio station to an existing combination would have on competition because the relevant radio markets before and after the acquisition may be completely different, depending on the vagaries of the contour overlaps.

182. The Commission does not agree that it must demonstrate actual harm to move from an irrational market definition to a rational one. Any analysis of the potential harms of concentration should be focused on the limits on how many stations a party may own in a market, rather than on whether a distorted methodology for defining radio markets and counting radio stations should be preserved.

183. In short, the Commission's experience with the contour-overlap system leads it to believe that it is ineffective as a means to measure competition in local radio markets, and that a different method of defining the market will more effectively serve its goals. The Commission sees scant evidence in the record to lead it to a different conclusion. Some commenters correctly note that any methodology the Commission develops may create anomalous situations in certain instances. But the Commission cannot agree that its inability to achieve perfection in every instance justifies maintaining the current system. The Commission concludes that its methodology for defining radio markets and counting market participants must be changed.

184. *Statutory Authority.* Before explaining our modified market definition and counting methodologies, the Commission addresses arguments that it lacks the statutory authority to revise those methodologies in a way that would prohibit radio station combinations that are permissible under the current framework. After reviewing the relevant statutory provisions, the Commission finds that argument to be without merit. The Communications Act grants us the authority to ''[m]ake such rules and regulations, .not inconsistent with law, as may be necessary to carry out the provisions of'' the Act. 47 U.S.C. 303(r). The Commission is also authorized to ''make such rules and regulations * * * not inconsistent with [the] Act, as may be necessary in the execution of [our] functions.'' *Id.* section 154(i). The Supreme Court has held that these broad grants of rulemaking power authorize us to adopt rules to ensure that broadcast station ownership is consistent with the public interest. The Commission finds nothing in the 1996 Act or its legislative history that diminishes that authority. To the contrary, section 202(b) contemplated that the Commission would exercise our rulemaking authority to make the revisions to the rule that Congress required, and section 202(h) contemplates that it will exercise our rulemaking authority to repeal or modify ownership rules that it determines are no longer in the public interest. The Commission accordingly finds that it has the authority to revise the local radio ownership rule in a manner that serves the public interest.

185. Some commenters nevertheless argue that the 1996 Act restricts how the Commission may define the ''public interest.'' The Commission finds that argument flawed. In *Fox Television*, 280 F.3d at 1043, the court held, in the context of the national television ownership cap, that the numbers Congress selected ''determined only the starting point'' for analysis and instructed us not ''to defer to the Congress's choice'' of numbers in our analysis. Thus, even if Congress believed in 1996 that section 202(b) set the appropriate radio station ownership levels, *Fox* holds that the Commission retain the authority—indeed, the obligation—to determine ourselves whether a change in the rules would serve the public interest.

186. The Commission recognizes that the section 202(h) presumption requires it to justify a decision to retain the rule. The purpose of the presumption is thus to shift the traditional administrative law burden from those seeking to modify or eliminate the rule to those seeking to retain it. It would be a substantial leap, however, to read this presumption as having the additional effect of limiting the types of changes that we may conclude are in the public interest. The Commission sees no basis for such a view. Had Congress intended to curtail the Commission's regulatory powers so drastically, it would have done so in more express terms.

187. Invocation of the ratification, or reenactment, doctrine does not alter the analysis. The Commission finds nothing in the 1996 Act or in its legislative history that evidences a congressional intent to adopt the market definition and counting methodologies that the Commission adopted in 1992. Even if the ratification doctrine could be invoked, moreover, that would not ''preclude [an] agency, in the exercise of its rulemaking authority, from later adopting some other reasonable and lawful interpretation of the statute.'' *McCoy* v. *United States*, 802 F.2d 762, 766 (4th Cir. 1986). The ratification doctrine ''does not mean that the prior construction has become so embedded in the law that only Congress can effect a change,'' but permits changes ''through exercise by the administrative agency of its continuing rule-making power.'' *Helvering* v. *Reynolds*, 313 U.S. 428, 432 (1941). Because Congress has left the Commission's general rulemaking powers intact, the ratification doctrine—even if properly invoked—would not bar us from exercising those powers to change the method used to define local radio markets and count radio stations for purposes of the local radio ownership rule.

188. *Geography-Based Radio Markets.* The Commission concludes that a local radio market that is objectively determined, *i.e.* that is independent of the radio stations involved in a particular transaction, presents the most rational basis for defining radio markets. As explained below, the Commission will rely on the Arbitron Metro Survey Area (Arbitron Metro) as the presumptive market. The Commission also establishes a methodology for counting the number of radio stations that participate in a radio market. The Commission initiates below a new rulemaking proceeding to define radio markets for areas of the country not located in an Arbitron Metro, and adopts a modified contour-overlap

approach to ensure the orderly processing of radio station applications pending completion of that rulemaking proceeding.

189. Applicants will be required to demonstrate compliance with the rule when filing applications to obtain a new construction permit or license, to assign or transfer an existing permit or license, or to make certain modifications, such as a change in the community of license of a radio station. The Commission makes clear that any radio station that is included in the radio market under our methodology will also be counted against a station owner's ownership limit in such market.

190. *Arbitron Metro Survey Areas.* Where a commercially accepted and recognized definition of a radio market exists, it seems sensible to the Commission to rely on that market definition for purposes of applying the local radio ownership rule. Arbitron, as the principal radio rating service in the country, has defined radio markets for most of the more populated urban areas of the country. The record shows that Arbitron's market definitions are an industry standard and represent a reasonable geographic market delineation within which radio stations compete. Indeed, the DOJ consistently has treated Arbitron Metros as the relevant geographic market for antitrust purposes. As NABOB succinctly states, ''Radio stations compete in Arbitron markets.'' Given the long-standing industry recognition of the value of Arbitron's service, we believe there is strong reason to adopt a local radio market definition that is based on this established industry standard.

191. Although Arbitron Metro boundaries do occasionally change, the Commission is not convinced that such changes occur with such frequency, or that they are so drastic, that we must reject reliance on those boundaries in defining the relevant radio markets. The Commission believes, moreover, that we can establish safeguards to deter parties from attempting to manipulate Arbitron market definitions for purposes of circumventing the local radio ownership rule. Specifically, the Commission will not allow a party to receive the benefit of a change in Arbitron Metro boundaries unless that change has been in place for at least two years. This safeguard includes both enlarging the Metro (to make a market larger) and shrinking the Metro (to split a party's non-compliant station holdings into separate markets). Similarly, a station combination that does not comply with the rule cannot rely on a change in Arbitron Metro definitions to show compliance and thereby avoid the transfer restrictions outlined in the grandfathering section of the R&O, unless that change has been in effect for two years. The Commission also will not allow a party to receive the benefit of the inclusion of a radio station as ''home'' to a Metro unless such station's community of license is located within the Metro or such station has been considered home to that Metro for at least two years. A party also may not receive the benefit of changing the home status of its own station if such change occurred within the two years prior to the filing of an application. The Commission believes these safeguards will ensure that changes in Arbitron Metro boundaries and home market designations will be made to reflect actual market conditions and not to circumvent the local radio ownership rule. To the extent, of course, that the Commission determines that, despite these safeguards, an Arbitron Metro boundary has been altered to circumvent the local radio ownership rule, we can and will consider that fact in evaluating whether a radio station combination complies with the rule's numerical limits.

192. *Counting Methodology.* For each Arbitron Metro, Arbitron lists the commercial radio stations that obtain a minimum audience share in the Metro. Some of these stations are designated by Arbitron as ''home'' to the Metro. These ''home'' radio stations usually are either licensed to a community within the Arbitron Metro or are determined by Arbitron to compete with the radio stations located in the Metro. These radio stations are also known as ''above-the-line'' stations because, in ratings reports, Arbitron uses a dotted line to separate these stations from other radio stations—known as ''below-the-line'' stations—that have historically received a minimum listening share in a Metro.

193. The Commission traditionally has relied on BIA's Media Access Pro database to obtain information about particular Arbitron Metros. The BIA database relies on Arbitron's market definitions and builds upon Arbitron's data to provide greater detail about the competitive realities in Metro markets. Given our experience with the BIA database and its acceptance in the industry, we will count as being in an Arbitron Metro above-the-line radio stations (*i.e.*, stations that are listed as ''home'' to that Metro), as determined by BIA. The Commission also will include in the market any other licensed full power commercial or noncommercial radio station whose community of license is located within the Metro's geographic boundary. A radio station located outside of a Metro occasionally may be included as home to that Metro. In such cases, the Commission will count that station as participating in the radio market in which its community of license is located in addition to the Metro. The Commission believes this simple rule will help prevent odd results in cases where a station requests ''home'' status in order to be viewed as a participant in another (usually larger) Metro. With these rules, our counting methodology will reflect more accurately the competitive reality recognized by the radio broadcasting industry.

194. The Commission rejects arguments that we should count below-the-line stations in determining the size of a Metro's radio market. Below-the-line stations can be a considerable distance from the Metro, and in many cases serve different population centers, if not altogether different Metros, from radio stations located in the market. Although the Commission recognizes that, in certain instances, certain below-the-line radio station may have a competitive impact in the market for radio listening, we believe that, on balance, counting every below-the-line radio station would produce a distorted picture of the state of competition in a particular Metro.

195. *Areas Not Located in an Arbitron Metro.* Arbitron Metros do not cover the entire country. The Commission accordingly will develop radio market definitions for non-Metro areas through the rulemaking process. The Commission initiates in a separate notice, published elsewhere in the **Federal Register**, a new rulemaking proceeding to seek comment on that issue.

196. While that rulemaking proceeding is pending, the Commission will need to process applications proposing radio station combinations in non-Metro areas and determine whether such combinations comply with the local radio ownership rule. Although we find the contour-overlap methodology problematic for the reasons stated above, we conclude that its temporary use during the pendency of the rulemaking proceeding cannot be avoided. The contour-overlap methodology is, at a minimum, well understood, and continuing its use for a few additional months would allow for the orderly processing of radio station applications.

197. Although the Commission finds it necessary to maintain the contour-overlap market definition for an additional period of time, we will make certain adjustments to minimize the more problematic aspects of that system. Specifically, the Commission adopts

NAB's proposal to exclude from the market radio stations that are commonly owned with the stations in the numerator. This will prevent a party from ''piggy-backing'' on its own stations to bump into a higher ownership tier. The Commission also will adopt NAB's suggestion that we exclude from the market any radio station whose transmitter site is more than 92 kilometers (58 miles) from the perimeter of the mutual overlap area. This will alleviate some of the gross distortions in market size that can occur when a large signal contour that is part of a proposed combination overlaps the contours of distant radio stations and thereby brings them into the market.

198. The Commission will require parties proposing a radio station combination involving one or more stations whose communities of license are not located within an Arbitron Metro boundary to show compliance with the local radio ownership rule using the interim contour-overlap methodology. The interim methodology will be triggered even if a radio station is ''home'' to an Arbitron Metro, as long as its community of license is located outside of the Metro. In making that showing, parties should include in the numerator and denominator radio stations that meet the criteria for inclusion under that methodology (as modified by the preceding paragraph) regardless of whether they are included in Arbitron Metros. The Commission emphasizes, however, that the interim contour-overlap methodology may not be used to justify radio station combinations in Arbitron Metros that exceed the numerical limits of the local radio ownership rule; in all cases, parties must demonstrate—using the standards for Arbitron Metros described above—that they comply with those limits in each Metro implicated by the proposed combination.

199. *Modification to The Local Radio Ownership Rule.* Having discussed the relevant product and geographic markets for radio, the Commission now undertakes its obligation under Section 202(h) to determine whether the current limits on radio station ownership are necessary to promote the public interest in competition. With respect to the ownership tiers, the Commission concludes that the current rule meets that standard. The Commission finds, however, that the rule improperly fails to consider the effect that noncommercial stations can have on competition in the local radio market. Accordingly, the Commission modifies the rule to count noncommercial radio stations in determining the size of the radio market.

200. The Commission concludes that the ownership tiers in the current rule represent a reasonable means for promoting the public interest as it relates to competition. In radio markets, barriers to entry are high because virtually all available radio spectrum has been licensed. Radio broadcasting is thus a closed entry market, *i.e.*, new entry generally can occur only through the acquisition of spectrum inputs from existing radio broadcasters. The closed entry nature of radio suggests that the extent of capacity that is available for new entry plays a significant role in determining whether market power can develop in radio broadcasting. Numerical limits on radio station ownership help to keep the available capacity from becoming ''locked-up'' in the hands of one or a few owners, and thus help prevent the formation of market power in local radio markets.

201. Although competition theory does not provide a hard-and-fast rule on the number of equally sized competitors that are necessary to ensure that the full benefits of competition are realized, both economic theory and empirical studies suggest that a market that has five or more relatively equally sized firms can achieve a level of market performance comparable to a fragmented, structurally competitive market. The current tiers ensure that, in markets with between 27 and 51 radio stations, there will be approximately five or six radio station firms of roughly equal size. An analysis of the top 100 Metro markets indicates that many of them fall within this range.

202. The Commission finds that the concentration levels permitted by the current rule represent a reasonable and necessary balance for radio broadcasting that comports with general competition theory, and we decline to relax the rule to permit greater consolidation in local radio markets. The Commission acknowledges that many radio markets currently have more than 6 radio station firms. The Commission also considers, however, that radio stations are not all equal in terms of their technical capabilities (*i.e.*, each radio station covers a population with varying levels of signal quality), and that the technical differences among stations can cause radio stations groups with similar numbers of radio stations to have vastly different levels of market power. Thus, although the top 50 Metros have an average of 19.9 owners, the top station group in each of those Metros has, on average, 35.2% of the revenue share, and the top four groups receive, on average, 86.1% of the revenue share. The top four firms also dominate audience share. According to the Future of Music Coalition, the top four firms receive 77.1% of the audience share in the top 10 Metros, 84.7% in Metros 11 to 25, and 85.8% in Metros 26–50. Bear Stearns' analysis also shows that, in the top 100 radio markets, the top three radio groups receive a median of 82.9% of the revenue share and 58.9% of the audience share. And MOWG Study No. 4 indicates that the increase in concentration in radio markets has resulted in an appreciable, albeit small, increase in advertising rates. This data suggests that the current numerical limits are not unduly restrictive. The Commission sees no significant benefit in tinkering with the basic structure of the tiers.

203. For markets with more than 51 radio stations, the number of radio station firms ensured by the rule increases as the size of the market increases. Because of this, some parties argue that we should raise the numerical limits to permit common ownership of more than eight radio stations in larger markets. The Commission rejects that argument. There is no evidence in the record that indicates that the efficiencies of consolidating radio stations increase appreciably for combinations involving more than eight radio stations. On the other hand, extremely large radio markets tend to cover a large area geographically and also tend to be more ''crowded'' in terms of radio signals. As a result, large markets may include a greater number of extremely small radio stations, as well as radio stations that are a significant distance from each other. Both of these phenomena may make a large market appear more competitive than it actually is. By capping the numerical limit at eight stations, we seek to guard against consolidation of the strongest stations in a market in the hands of too few owners and to ensure a market structure that fosters opportunities for new entry into radio broadcasting.

204. The Commission also declines to make the numerical limits more restrictive. In the smallest radio markets, the current rule provides that one entity may own up to half of the commercial radio stations in a market. Although this would be considered highly concentrated from a competitive point of view, greater levels of concentration may be needed to ensure the potential for viability of radio stations in smaller markets. Given these concerns, we find it reasonable to allow greater levels of concentration in smaller radio markets, but to require more independent radio station owners as the size of the market increases and viability concerns become less acute.

205. The Commission also reaffirms the AM and FM ownership limits in the current rule. Eliminating the service limits would improperly ignore the significant technical and marketplace differences between AM and FM stations. AM stations have significantly less bandwidth than FM stations, and the fidelity of their audio signal is inferior to that of FM stations. Unlike FM stations, moreover, AM signal propagation also varies with time of day. During the day, AM signals travel through ground currents for between 50 to 200 miles; at night, AM signals travel further because they are reflected from the upper atmosphere. As a result, many AM stations are required to cease operation at sunset. These and other technical differences have an effect on radio listenership patterns. Radio formats also can be affected. In Los Angeles, for example, our analysis indicates that many of the AM stations have a news/talk/sports or ethnic format, while music formats are more likely on commercial FM stations. The Commission cannot agree, therefore, that eliminating the service caps and treating AM and FM radio stations equally for purposes of the overall station limit is consistent with our interest in protecting competition in local radio markets.

206. Although the Commission reaffirms the ownership tiers in the local radio ownership rule, we conclude that it is not necessary in the public interest to exclude noncommercial radio stations in determining the size of the radio market. Although noncommercial stations do not compete in the radio advertising market, they compete with other radio stations in the radio listening and program production markets. Indeed, noncommercial stations can receive a significant listening share in their respective markets. Their presence in the market therefore exerts competitive pressure on all other radio stations in the market seeking to attract the attention of the same body of potential listeners. In television, the Commission has recognized the contribution that noncommercial stations can make to competition by counting noncommercial stations in determining the size of the television market. The Commission sees no reason to treat noncommercial radio stations differently.

207. *Rejection of Repeal and Other Modifications.* The Commission rejects arguments that we should repeal the local radio ownership rule. We see nothing in the record that persuades us that the acquisition of market power in radio broadcasting serves the public interest. Competition breeds innovation in programming and creates incentives to continually improve program quality. Because competition—and the benefits that flow from it—is lessened when the market is dominated by one or a few players, the Commission seeks through its rules to prevent that type of market structure from developing.

208. Without some check, a party could acquire all or a significant portion of the limited number of broadcast radio channels in a local community, leaving listeners, advertisers, and program producers with fewer substitutes. That situation also would raise the cost of entry into the market by new entrants because there would be fewer radio stations available from which a party could construct a competing station group. Because the most potent sources of innovation often arise from new entrants, a market structure that significantly raises the costs of entry leads to less-than-optimal results in terms of innovation and program quality and thereby harms the public interest. It is therefore necessary for us to impose limits on the number of radio stations a party may own in a local market to preserve competition in the relevant markets in which radio stations compete.

209. The Commission does not dispute that a certain level of consolidation of radio stations can improve the ability of a group owner to make investments that benefit the public. Our responsibility under the statute, however, is to determine the level at which the harms of consolidation outweigh its benefits, and to establish rules to prevent that situation from developing. Several commenters express concern that, in markets with a high level of concentration, small radio firms may be forced to ''sell out'' to group owners. Specifically, the concern is that, in a concentrated market, dominant radio station groups can exercise market power to attract revenue at the expense of the small owner. As a result, the small owner has greater difficulty obtaining the revenue it needs to develop and broadcast attractive programming and to compete generally against the dominant station groups. The concerns raised by these commenters comport with the competition analysis that underlies this order and supports our decision not to repeal the local radio ownership rule.

210. The Commission also rejects arguments that we incorporate a market share analysis into the local radio ownership rule or that we continue to ''flag'' applications that propose radio station combinations above a certain market share. The Commission recognizes that competition analysis generally looks to market share as the primary indicator of market power. Market share, however, must be considered in conjunction with the overall structure of the industry in determining whether market power is present. In radio, the availability of a sufficient number of radio channels is of particular importance in ensuring that competition can flourish in local radio markets. The numerical caps and the AM/FM service limits are designed to address that interest, and in our judgment, establishing an inflexible market share limit in our bright-line rule would add little, if any, benefit. The Commission does not seek to discourage radio firms from earning market share through investment in quality programming that listeners prefer; our objective is to prevent firms from gaining market dominance through the consolidation of a significant number of key broadcast facilities. The Commission does not believe that developing a market share limit would significantly advance that objective.

211. The Commission recognizes that its conclusion differs from the Commission's view in 1992 that an audience share cap was necessary ''to prevent consolidation of the top stations in a particular local market.'' But the audience share cap was never intended to be more than a ''backstop'' to the new numerical limits the Commission had established, which for the first time allowed a party to own multiple radio stations in a local market. The audience share cap was eliminated as a result of the revisions to the local radio ownership rule that Congress mandated in the 1996 Act, which left only the numerical caps in place. But because of the problems associated with the contour-overlap market definition and counting methodologies, the Commission could not rely with confidence on those numerical limits to protect against undue concentration in local markets. As a result, the Commission began looking at revenue share in our ''flagging'' process and the interim policy that we established in the *Local Radio Ownership NPRM.* Now that the Commission has established a rational system for defining radio markets and counting market participants, it believes that the numerical limits will be better able to protect against harmful concentration levels in local radio markets that might otherwise threaten the public interest. To the extent an interested party believes this not to be the case, it has a statutory right to file a petition to deny

a specific radio station application and present evidence that makes the necessary *prima facie* showing that a proposed combination is contrary to the public interest.

212. *Localism.* The Commission's localism goal stems from our interest in ensuring that licensed broadcast facilities serve and are responsive to the needs and interests of the communities to which they are licensed. In a competitive market, the efficiencies arising out of consolidation will be passed on to listeners through greater innovation and improved service quality, which in this context contemplates programming that is responsive to the needs and interests of the local community. In a concentrated market, radio station firms have diminished incentive to compete vigorously. Smaller firms, moreover, may have insufficient resources to compete aggressively with the dominant firms in the market, which makes smaller firms less effective in meeting the needs and interests of their local communities. Thus, by preserving a healthy, competitive local radio market, the local radio ownership rule also helps promote our interest in localism.

213. Aside from the positive effect on localism that ensues from a competitive radio market, we see little to indicate that the local radio ownership rule significantly advances our interest in localism. In prior rulemaking proceedings, the Commission has not emphasized localism as one of the justifications for the local radio ownership rule, and the record suggests no reason for adopting a different view here. Although some parties suggest that localism has suffered as a result of consolidation, the source of the alleged harm appears to be the overall *national* size of the radio station group owner rather than the number of radio stations commonly owned in a local market. National radio ownership limits are outside the scope of this proceeding.

214. *Viewpoint Diversity.* Viewpoint diversity "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press* v. *United States,* 326 U.S. 1 (1945). Many outlets contribute to the dissemination of diverse viewpoints, and provide news and public affairs programming to the public. Elsewhere in the R&O, the Commission discusses in exacting detail the various sources of local news and information that are available to the public. Here, it is sufficient to say that media other than radio play an important role in the dissemination of local news and public affairs information.

215. That, of course, does not mean that radio broadcasting is irrelevant to viewpoint diversity. The Commission recognizes that radio can reach specific demographic groups more easily than other forms of mass media. Because of this, and because of its relative affordability compared to other mass media, radio remains a likely avenue for new entry into the media business, particularly by small businesses, women, minorities, and other entrepreneurs seeking to meet a market demand or provide programming to underserved communities. Our competition-based limits on local radio ownership thus promote viewpoint diversity, not only by ensuring a sufficient number of independent radio voices, but also by preserving a market structure that facilitates and encourages entry into the local media market by new and underrepresented parties.

216. *Programming Diversity.* In theory, program diversity promotes the public interest by affording consumers access to a greater array of programming choices. The difficulty is in finding a way to measure program diversity in a coherent and consistent manner so that we can determine how it is affected by concentration. The record indicates that different measures of format diversity produce strikingly different results. Overall, the results suggest that consolidation in the radio industry neither helped nor hindered playlist diversity between radio stations.

217. The studies on program diversity also do not draw a sufficiently reliable causal link between ownership concentration and the purported increase in format diversity. After a careful review of the economic literature, however, the Commission cannot confidently adopt the view that we should encourage more consolidation in order to achieve greater format diversity.

218. In light of this record, the Commission cannot conclude that radio ownership concentration has any effect on format diversity, either harmful or beneficial. Accordingly, we do not rely on it to justify the local radio ownership rule.

219. *Attribution of Joint Sales Agreements.* A typical radio Joint Sales Agreements (JSAs) authorizes the broker to sell advertising time for the brokered station in return for a fee paid to the licensee. Because the broker normally assumes much of the market risk with respect to the station it brokers, JSAs generally give the broker authority to hire a sales force for the brokered station, set advertising prices, and make other decisions regarding the sale of advertising time, subject to the licensee's preemptive right to reject the advertising. Currently, JSAs are not attributable under the Commission's attribution rules. Therefore, radio stations subject to JSAs do not count toward the number of stations the brokering licensee may own in a local market.

220. Based on the record in this proceeding, and on its experience with JSAs and local radio ownership rules, the Commission will now count the brokered station toward the brokering licensee's permissible ownership totals under the revised local ownership rules. Where an entity owns or has an attributable interest in one or more stations in a local radio market, joint advertising sales of another station in that market for more than 15 percent of the brokered station's advertising time per week will result in counting the brokered station toward the brokering licensee's ownership caps. The Commission does not believe that out-of-market JSAs pose the same economic concerns. Therefore, JSAs will not be attributable when a party does not own any stations or have an attributable interest in stations in the local market in which the brokered station is located.

221. In considering revisions to our attribution rules, the Commission has always sought to identify and include those positional and ownership interests that convey a degree of influence or control to their holder sufficient to warrant limitation under our ownership rules. The Commission finds that the use of in-market JSAs may undermine its continuing interest in broadcast competition sufficiently to warrant limitation under the multiple ownership rules.

222. The Commission finds that where one station owner controls a large percentage of the advertising time in a particular market, it has the ability potentially to exercise market power. Many times, the broker will sell advertising packages for the group of stations, offer substantial discounts and create incentives not available to other broadcasters in the market. In any given radio market, a broker may own or have an ownership interest in stations, operate stations pursuant to a local marketing agreement, or sell advertising time for stations pursuant to a JSA. Control over spot sales by one station affords significant power over the other. Thus, JSAs raise concerns regarding the ability of smaller broadcasters to compete, and may negatively affect the health of the local radio industry generally. JSAs put pricing and output decisions in the hands of a single firm.

Instead of stations competing against one another, a single firm sells packages of time for all stations, eliminating competition in the market.

223. The Commission has not previously attributed JSAs based on its earlier conclusion that JSAs do not convey sufficient influence or control over a station's core operations to be considered attributable. Upon reexamination of the attribution issue, the Commission finds that, because the broker controls the advertising revenue of the brokered station, JSAs convey sufficient influence over core operations of a station to raise significant competition concerns warranting attribution. Licensees of stations subject to JSAs typically receive a monthly fee regardless of the advertising sales or audience share of the station. Therefore, licensees of stations subject to JSAs have less incentive to maintain or attain significant competitive standing in the market.

224. Although the Commission continues to believe that JSAs may have some positive effects on the local radio industry, it finds that the threat to competition and the potential impact on the influence over the brokered station outweighs any potential benefits and requires attribution. The Commission finds that modification of its regulation also is warranted given the need for attribution rules to reflect accurately competitive conditions of today's local radio markets. It would be inconsistent with its rules to allow a local station owner to substantially broker a station that it could not own under the local radio ownership limits.

225. The Commission believes that a 15 percent advertising time threshold will identify the level of control or influence that would realistically allow holders of such influence to affect core operating functions of a station, and give them an incentive to do so. At the same time, a 15 percent threshold will allow a station the flexibility to broker a small amount of advertising time through a JSA with another station in the same market without that brokerage rising to an attributable level of influence. The Commission believes that the 15 percent threshold (which is the same threshold used for determining attribution of radio and television LMAs) balances these interests.

226. Under the Commission's modified rules, JSAs currently in existence will be attributable. Parties with existing, attributable JSAs in Arbitron Metros under the new rules will be required to file a copy of the JSA with the Commission within 60 days of the effective date of this R&O. Both the licensee and the broker should submit copies of their JSAs as supplements to their Ownership Reports on file at the Commission. For JSAs involving stations located outside of Arbitron Metros, the Commission will require such JSAs to be filed within 60 days of the effective date of our decision in Docket No. 03–130, unless a different date is announced in that decision. In addition, the Commission is modifying FCC Application Forms 314 and 315 to require applicants to file attributable JSAs at the time an application is filed, regardless of whether the markets implicated by the application are located in Arbitron Metros.

227. *Existing JSAs.* The Commission is aware that attribution of in-market radio JSAs may affect licensees' compliance with the modified local radio ownership rules. In addition, the Commission does not want to unnecessarily adversely affect current business arrangements between licensees and brokers. Therefore, the Commission will give licensees sufficient time to make alternative business arrangements where they have in-market JSAs entered into prior to the adoption date of this R&O that would cause them to exceed relevant ownership limits. In such situations, parties will have 2 years from the effective date of this R&O to terminate agreements, or otherwise come into compliance with the local radio ownership rules adopted herein. However, if a party sells an existing combination of stations within the 2-year grace period, it may not sell or assign the JSA to the new owner if the JSA causes the new owner to exceed any of our ownership limits; the JSA must be terminated at the time of the sale of the stations. JSAs that do not cause a party to exceed the modified local radio rules may continue in full force and effect and may be transferred or assigned to third parties. Finally, parties are prohibited from entering a new JSA or renewing an existing JSA that would cause the broker of the station to exceed our media ownership limits.

228. *Waiver Standards.* The Commission declines at this time to adopt any specific waiver criteria relating to radio station ownership. Parties who believe that the particular facts of their case warrant a waiver of the local radio ownership rule may seek a waiver under the general ''good cause'' waiver standard in our rules.

C. Cross Ownership

229. In this section the Commission addresses (1) the newspaper/broadcast cross-ownership rule and (2) the radio-television cross-ownership rule to determine whether they are necessary in the public interest pursuant to section 202(h). Based on the record in this proceeding, the Commission finds that neither its current nation-wide prohibition on common ownership of daily newspapers and broadcast outlets in the same market nor its cross-service restriction on commonly owned radio and television outlets in the same market, is necessary in the public interest. With respect to both rules, the Commission concludes that the ends sought can be achieved with more precision and with greater deference to First Amendment interests by modifying the rules into a single set of cross-media limits.

230. *Newspaper/Broadcast Cross-Ownership Rule.* Adopted in 1975, the newspaper/broadcast cross-ownership rule prohibits in absolute terms common ownership of a full-service broadcast station and a daily newspaper when the broadcast station's service contour encompasses the newspaper's city of publication.[13] The rule was intended to promote media competition and diversity. Upon review, the Commission now concludes that (1) the rule cannot be sustained on competitive grounds, (2) the rule is not necessary to promote localism (and may in fact harm localism), and (3) most media markets are diverse, obviating a blanket prophylactic ban on newspaper-broadcast combinations in all markets. Instead, the Commission will review proposed license transfers and renewals involving the combination of daily newspapers and broadcast properties only to the extent that they would implicate the cross-media limits.

231. *Competition.* The Commission first defines the relevant product and geographic markets in which broadcasters and newspapers compete, and then assess whether the rule is necessary to promote competition in these markets. As the Commission noted in the newspaper/broadcast proceeding, its focus is on the primary economic market in which broadcast stations and newspapers compete: advertising. The Commission concludes, based on the record in this proceeding, that most advertisers do not view newspapers, television stations, and radio stations as close substitutes. The Department of Justice and several federal courts have concluded that the local newspaper market is distinct from the local

[13] For AM radio stations, the service contour is the 2mV/m contour, 47 CFR 73.3555(d)(1); for FM radio stations, the service contour is the 1mV/m contour, 47 CFR 73.3555(d)(2); for TV stations, the service contour is the Grade A contour, 47 CFR 73.3555(d)(3). A daily newspaper is one that is published in the English language four or more times per week. 47 CFR 73.3555 n.6.

broadcast market. This conclusion is supported by a number of commenters and MOWG Study No. 10. Some commenters criticize MOWG Study No. 10 and argue that radio, TV, and newspapers, compete vigorously for advertising dollars.

232. Although the overall evidence appears to suggest little substitution between newspapers, broadcast TV, and radio, the Commission agrees that there may be a small group of advertisers that benefit from using various media to advertise their products.[14] These advertisers could be harmed if owners of newspaper/broadcast combinations can identify this group and price discriminate. These advertisers, however, are not without remedy. The Department of Justice, the Federal Trade Commission, as well as state attorney generals, review mergers generally and are concerned about the effects in the advertising market. Further, both federal and state antitrust laws allow private suits to be brought. In any event, even if the Commission were to focus exclusively on the advertising markets alone, the potential for harm to advertisers who substitute between various media outlets would be greatest if one entity owned all the newspapers and all the broadcast facilities. Through the constraining effect of the Commission's local radio and TV ownership rules, the Commission expects that the majority of the potential newspaper/broadcast combinations would continue to face competition from separately owned media outlets in the local market.

233. *Localism.* The record indicates that the newspaper/broadcast cross-ownership prohibition is not necessary to promote broadcasters' provision of local news and information programming. Indeed, evidence suggests that the rule actually works to inhibit such programming. Many newspapers provide local content that far exceeds that provided by local broadcast outlets. Newspapers and broadcast stations—particularly television stations—continue to be the dominant sources, in terms of consumer use, for news and information to local communities. The Commission's rules should promote the ability of newspapers, television stations, and all other sources of local news and information to serve their communities.

[14] There is nothing in the record regarding the number of advertisers that may be targeted for such price discrimination, nor the magnitude of the potential price increases. The Commission believes however, that the number of advertisers that may be potential targets of price discrimination would be very small for most newspaper/broadcast combinations.

234. While eliminating the rule may not be essential to achieve the efficiencies of common ownership—because the rule prohibits only ownership of newspapers and broadcast stations serving the same market—the breadth and depth of news coverage can be enhanced by collocation and the rule's elimination will increase the opportunities to realize these benefits by permitting combinations in areas where the rule currently prohibits them.

235. Specifically, MOWG Study No. 7 found that newspaper-owned affiliated stations provide almost 50% more local news and public affairs programming than do non-network owned network affiliated stations. In addition, the study found that the average number of hours of local news and public affairs programming provided by the same-market cross-owned television-newspaper combinations was 25.6 hours per week, compared to 16.3 hours per week for the sample of television stations owned by a newspaper that is not in the same market as the station. For each quality and quantity measure in the Commission's analysis, the newspaper network-affiliated stations exceed the performance of other, non-newspaper-owned network affiliates.

236. The benefits of combined ownership are not likely to be achieved through joint ventures as opposed to combined ownership. Many commenters illustrate how combining a newspaper's local news-gathering resources with a broadcast platform contributes to, rather than detracts from, the production of local news programming that serves the community. These results follow from the particular journalistic experience associated with local daily newspapers, as well as the tangible economic efficiencies, such as sharing of technical support staff, which can be realized through common ownership of two media outlets. There are several anecdotes in the record that illustrate how efficiencies resulting from cross-ownership translate into better local service. Efficiencies not involving the sharing of news staffs may also be realized through cross-ownership.

237. Although the Commission's conclusions pertain to markets of all sizes, newspaper-broadcast combinations may produce tangible public benefits in smaller markets in particular. In this regard, West Virginia Media argues that the rule may have the unintended effect of stifling local news by prohibiting efficient combinations that would produce better output. We assume that the benefits cited by West Virginia Media can benefit small businesses with respect to the production of news and public affairs programming.

238. The Commission disagrees with those who argue that the relaxation or elimination of the newspaper/broadcast cross-ownership rule will create additional pressures on local news editors and directors to curtail coverage of public interest news. Also, the Commission does not find it troubling that newspaper owners use their media properties to express or advocate a viewpoint. To the contrary, since the beginning of the Republic, media outlets have been used by their owners to give voice to, among others, opinions unpopular or revolutionary, to advocate particular positions, or to defend, sometimes stridently, social or governmental institutions. The Commission's broadcast ownership rules may not and should not discourage such activity. Nor is it particularly troubling that media properties do not always, or even frequently, avail themselves to others who may hold contrary opinions. Nothing requires them to do so. The media are not common carriers of speech. Nor is it troubling that media properties may allow their news and editorial decisions to be driven by ''the bottom line.'' Again, the need and desire to produce revenue, to control costs, to survive and thrive in the marketplace is a time honored tradition in the American media. In short, to assert that cross-owned properties will be engaged in profit maximizing behavior or that they will provide an outlet for viewpoints reflective of their owner's interests is merely to state truisms, neither of which warrants government intrusion into precious territory bounded off by the First Amendment.

239. *Diversity.* The Commission adopted the newspaper/broadcast cross-ownership rule because it believed that diversification of ownership would promote diversification of viewpoint. This proposition has been both defended and called into question. Although the Commission continues to believe that diversity of ownership can advance the Commission's goal of diversity of viewpoint, the local rules that it is adopting herein will sufficiently protect diversity of viewpoint while permitting efficiencies that can ultimately improve the quality and quantity of news and informational programming. Accordingly, the Commission will eliminate the newspaper/broadcast cross-ownership prohibition and consider any such proposed merger in light of the Commission's new rules.

240. The record indicates that cross-ownership of newspapers and broadcast

outlets creates efficiencies and synergies that enhance the quality and viability of media outlets, thus enhancing the flow of news and information to the public. Relaxing the cross-ownership rule could lead to an increase in the number of newspapers in some markets and foster the development of important new sources of local news and information.

241. Evidence that common ownership can enhance the flow of news and information to the public can be found in grandfathered newspaper-television combinations of which there are 21. The Commission's review of the record indicates that such combinations often serve the public interest by adding information outlets and creating high quality news product. Empirical research confirms that newspaper/television combinations frequently do a superior job of providing news and informational programming. MOWG Study No. 7 found that network affiliated TV stations that are co-owned with a newspaper ''experience noticeably greater success under our measures of quality and quantity of local news programming than other network affiliates.''

242. The newspaper/broadcast cross-ownership rule may be preventing efficient combinations that would allow for the production of high quality news coverage and broadcast programming, including coverage of local issues, thereby harming diversity. Newspapers and local over-the-air television broadcasters alike have suffered audience declines in recent years. Given the decline in newspaper readership and broadcast viewership/listenership, both newspaper and broadcast outlets may find that the efficiencies to be realized from common ownership will have a positive impact on their ability to provide news and coverage of local issues. The Commission must consider the impact of the Commission's rules on the strength of media outlets, particularly those that are primary sources of local news and information, as well as on the number of independently owned outlets.

243. As suggested by MOWG Study No. 2, authored by David Pritchard, commonly-owned newspapers and broadcast stations do not necessarily speak with a single, monolithic voice. Several parties, however, assert that ownership affects editorial decisions and, ultimately, viewpoints expressed by media outlets. Although there is evidence to suggest that ownership influences viewpoint, the degree to which it does so cannot be established with any certitude. In order to sustain a blanket prohibition on cross-ownership, the Commission would need, among other things, a high degree of confidence that cross-owned properties were likely to demonstrate uniform bias. The record does not support such a conclusion. Indeed, as the market becomes more fragmented and competitive, media owners face increasing pressure to differentiate their products, including by means of differing viewpoints. While such differentiation may occur, however, the Commission's analysis does not turn on that premise, and it is not determinative of our decision with respect to our current newspaper/broadcast cross-ownership rule. The Commission's analysis turns, rather, on the availability of other news and informational outlets. Thus, while the Commission does not dispute that a particular outlet may betray some bias, particularly in matters that may affect the private or pecuniary interest of its corporate parent such anecdotes do not show a pattern of bias in the vast majority of news comment and coverage where such self-interest is not implicated. Nor, moreover, do such incidents mean that the public was left uninformed about the situation by other available media.

244. The record in this proceeding provides ample evidence that competing media outlets abound in markets of all sizes—each providing a platform for civic discourse. Television and radio stations, both commercial and noncommercial, are important media for news, information, entertainment, and political speech. Cable television systems, which originated as passive conduits of broadcast programming, have expanded to carry national satellite-delivered networks. Many also carry local public, educational, and governmental channels. Cable systems in larger markets are now evolving into platforms for original local news and public affairs programming. Daily newspapers, while declining in number, continue to provide an important outlet for local and national news and expression. The Internet, too, is becoming a commonly-used source for news, commentary, community affairs, and national/international information.

245. The Commission disagrees with parties that assert that there is little diversity in media markets. The average American has a far richer and more varied range of media voices from which to choose today than at any time in history. Given the growth in available media outlets, the influence of any single viewpoint source is sharply attenuated. The Commission concludes that its new local rules will protect the diversity of voices essential to achieving its policy objectives. A blanket prohibition on newspaper-broadcast combinations, however, can no longer be sustained.

246. In short, the magnitude of the growth in local media voices shows that there will be a plethora of voices in most or all markets absent the rule. Indeed, the question confronting media companies today is not whether they will be able to dominate the distribution of news and information in any market, but whether they will be able to be heard at all among the cacophony of voices vying for the attention of Americans. The Commission's rules should account for these changes and promote, rather than inhibit, the ability of media outlets to survive and thrive in this evolving media landscape. They must ''give recognition to the changes which have taken place and to see to it that [they] adequately reflect the situation as it is, not was.''

247. *Conclusion.* The Commission finds that a newspaper-broadcast combination cannot adversely affect competition in any relevant product market and, thus, the Commission cannot conclude that the current newspaper-broadcast cross-ownership rule is necessary to promote competition.

248. Similarly, the Commission concludes that the evidence in the record of this proceeding demonstrates that combinations can promote the public interest by producing more and better overall local news coverage and that the current rule is thus not necessary to promote its localism goal. Instead, the Commission finds that it, in fact, is likely to hinder its attainment. Finally, the record does not contain data or other information demonstrating that common ownership of broadcast stations and daily newspapers in the same community poses a widespread threat to diversity of viewpoint or programming. The Commission concludes, therefore, that the current rule is no longer necessary in the public interest.[15]

249. *Radio/Television Cross-Ownership Rule.* The radio/television cross-ownership rule limits the number of commercial radio and television stations an entity may own in a local market. Currently, the rule allows a party to own up to two television stations (provided it is permitted under the television duopoly rule) and up to

[15] On March 11, 2003, Media General, Inc., filed a ''Motion to Bifurcate and Repeal.'' That Motion asked the Commission to break the newspaper/broadcast cross-ownership rule out of the biennial review, and repeal the rule, if it could not act in the biennial review in the spring of 2003. Because the Commission is acting in the biennial review in the spring of 2003 and is repealing the subject rule, the Commission dismisses Media General's Motion as moot.

six radio stations (to the extent permitted under the local radio ownership rule) in a market where at least 20 independently owned media voices would remain post-merger. Where parties may own a combination of two television stations and six radio stations, the rule allows a party alternatively to own one television station and seven radio stations. A party may own up to two television stations (as permitted under the current television duopoly rule) and up to four radio stations (as permitted under the local radio ownership rule) in markets where, post-merger, at least ten independently owned media voices would remain. A combination of one television station and one radio station is allowed regardless of the number of voices remaining in the market.

250. Based on the record in this proceeding, the Commission does not find that the radio/television cross-ownership rule remains necessary in the public interest to ensure competition, diversity or localism. The Commission's decision reflects the substantial growth and availability of media outlets in local markets, as well as the potential for significant efficiencies and public interest benefits to be realized through joint ownership. The Commission finds that its diversity and competition goals will be adequately protected by the local ownership rules adopted herein.

251. In 1970, the Commission restricted the combined ownership of radio and television stations in local markets. The purpose of the rule (originally referred to as the one-to-a-market rule) was twofold: (1) To foster maximum competition in broadcasting, and (2) to promote diversification of programming sources and viewpoints. In 1995, the Commission requested comment to determine whether the cross-ownership limitations were still warranted in light of the then current market conditions. Before the Commission issued a decision, Congress passed the 1996 Act. Section 202(d) of the 1996 Act required the Commission to extend the radio-television cross-ownership presumptive waiver policy to the top 50 television markets ''consistent with the public interest, convenience and necessity.'' Prior to implementing the statutory change, the Commission issued a Second Further Notice of Proposed Rulemaking (61 FR 66978, December 19, 1996) requesting comment on whether modification of the rule was warranted beyond the Section 202(d) requirements. In 1999, the Commission modified the rule to its current form.

252. Under the Commission's statutory mandate pursuant to section 202(h) of the 1996 Act, the Commission is required to consider biennially whether ''to 'repeal or modify' any rule that is not 'necessary in the public interest.' '' In determining whether the rule meets this standard, the Commission considers whether it is necessary to promote any of its public interest objectives. With respect to cross-ownership of radio and television stations in the same market, the Commission reexamines the impact of the rule on competition, localism and diversity.

253. *Competition.* To assess the competitive impact of its radio/television cross-ownership rule, the Commission needs to determine whether radio and television stations compete for sources of revenue generation—in this case, advertising.[16] If the Commission finds that they do, *i.e.,* that a significant number of advertisers consider radio and television to be good substitutes, then its concern would be that elimination or relaxation of the cross-ownership restrictions may enable a single firm to acquire sufficient market power to hinder small and independent broadcasters' efforts to generate revenue, and thereby put their continued viability at risk. However, if radio and television are not in the same product market, then the Commission would have little concern that elimination or relaxation of the rule would have any negative effects on competition.

254. The Commission concludes that most advertisers do not consider radio and television stations to be good substitutes for advertising and, therefore, that generally combinations of these two types of media outlets likely would not result in competitive harm. In MOWG Study No. 10, Anthony Bush found weak substitutability between local media, including radio and television. Other studies confirm Bush's conclusion that advertisers do not consider radio and television to be good substitutes. In addition to the empirical evidence, differences between radio and television programming and formats suggest that they do not compete in the same product market. Radio and television broadcast distinct programming. Video is not suitable for radio and vice versa. The difference is important for viewers and advertisers alike. The essential nature of each medium determines, in large measure, the type of programming each will broadcast. Thus, some advertisers may prefer, while others avoid, the radio listener as a significant audience to target. Additionally, television advertisements typically are more expensive than radio ads. In sum, television and radio stations neither compete in the same product market nor do they bear any vertical relation to one another.[17] A television-radio combination, therefore, cannot adversely affect competition in any relevant product market. Accordingly, the Commission cannot conclude that the current television-radio cross-ownership rule is necessary to promote competition.

255. *Localism.* The NPRM sought comment on how cross-ownership limitations affect localism, as measured by the quantity and quality of news and public affairs programming that stations provide to local communities. The NPRM sought comment on the quantities of local news and public affairs programming provided by radio and television combinations as opposed to stand-alone stations in the same markets. The NPRM asked whether radio and television combinations produce more, less, or the same amount of news programming than stand-alone stations. The NPRM also asked commenters to address the implications of any such differences. The Commission finds that by prohibiting combinations of news gathering resources between radio and television stations, the current rule prohibits owners from maximizing local news and information production, which would benefit consumers.

256. There is no compelling or substantial evidence in the record that the rule is necessary to protect localism. The record in this proceeding includes evidence to the contrary that efficiencies and cost savings realized from joint ownership may allow radio and television stations to offer more news reporting generally, and more local news reporting specifically, than otherwise may be possible. The record in this proceeding suggests that station

[16] The competitive analysis for both the local radio and the local television ownership rules focuses on two additional markets, delivered programming and programming production. However, in analyzing the effects of combined ownership of radio and television stations in a local market, neither of the latter product markets is relevant. Radio and television broadcasting are distinct programming markets with little overlap. The bulk of video entertainment and news programming available on commercial television is not suitable for radio. Similarly, audio radio programming, which is predominately music and talk show formats, cannot be replicated on television. Thus, because the essential nature of each medium determines the type of programming each medium broadcasts, the content is not interchangeable.

[17] Generally we identify both the product and the geographic markets. Because we find that radio and television advertising are separate product markets, it is not necessary to define the geographic market for these purposes.

owners will use additional revenue and resource savings from television-radio combinations to provide new and innovative programming, provide more in-depth local interest programming, and provide better service to the public, including locally oriented services.

257. The parties arguing to retain the current rule have failed to show that the rule remains necessary in the public interest. First, isolated anecdotes of changes in news programming schedules following a transaction do not provide the kind of systematic empirical evidence necessary to support a general allegation that cross-owned stations produce lesser quantities of news, or news of lower quality, than do non-cross-owned stations. Second, shared support staff and conservation of resources does not necessarily mean a reduction in local news. The efficiencies derived from some of these practices may in fact, increase the amount of diverse, competitive news and local information available to the public. Thus, the record does not demonstrate that the current rule specifically promotes localism, or that elimination of the rule would harm it.

258. *Diversity.* The NPRM asked whether the cross-ownership rule is necessary to foster viewpoint diversity in today's media marketplace. The NPRM sought comment on the types of media that contribute to viewpoint diversity and how the cross-ownership rule affects viewpoint diversity. The NPRM noted that the current rule counts as a media voice commercial and non-commercial broadcast television and radio stations, certain daily newspapers, and cable systems. The NPRM asked whether additional types of media should also be counted as contributing to viewpoint diversity, such as the Internet, DBS, cable overbuilders, individual cable networks, magazines, and weekly newspapers.

259. The Commission has previously concluded that ''the information market relevant to diversity includes not only television and radio outlets, but cable, other video media and numerous print media as well.'' Not only has the Commission seen an increase in the types of outlets available, but local markets have also experienced enormous growth in broadcast outlets. The record shows that in local broadcast markets of all sizes the numbers of radio and television stations have increased over the years.

260. The Commission concludes that the current television/radio cross-ownership rule is not necessary to ensure viewpoint diversity. The Commission agrees with the commenters that argue that a cross-ownership rule applicable only to radio and television is ''inequitable and outdated.'' Although several commenters argue that retention of the radio/television cross-ownership rule is necessary to protect the availability of diverse views, information, and local programming, the Commission believes that a rule limited to just radio and television fails to take into account all of the other relevant media in local markets available to consumers.

261. The Commission agrees with the commenters, however, that fostering the availability of diverse viewpoints remains an important policy goal, and that diversity of ownership promotes diversity of viewpoints. The Commission is adopting modified service-specific local ownership rules that will protect and promote competition in the local television and radio markets and, as a result, will also protect and preserve viewpoint diversity within those services. In addition, the Commission is adopting a new cross-media limit rule, described below, that is specifically designed to protect diversity of viewpoint in those markets in which the Commission believes consolidation of media ownership could jeopardize such diversity.

262. *Conclusion.* The Commission does not have evidence in the record sufficient to support retention of the current radio/television cross-ownership rule. From a competitive perspective, radio and television are not good substitutes for the same revenue producing opportunities, and thus, cannot be regarded as competing in the same product market. There is little evidence that the current rule promotes localism and, to the contrary, the record indicates that combined station groups may be able to achieve cost savings that may accrue to the benefit of listeners and viewers. Finally, radio and television stations compete with many other electronic and print media in providing programming and information to the public, and the targeted cross-media limits adopted herein are therefore better designed to achieve the Commission's diversity goal in markets where diversity could be jeopardized by cross-ownership than the stand-alone radio/television cross-ownership rule. In addition, the Commission's local television and local radio ownership rules, which are designed to preserve competition in those markets, will also foster diversity of voices. The Commission now turns to a discussion of the Diversity Index, which is intended to help us analyze outlets that contribute to viewpoint diversity in local markets.

263. *The Diversity Index.* In order to provide its media ownership framework with an empirical footing, the Commission has developed a method for analyzing and measuring the availability of outlets that contribute to viewpoint diversity in local media markets. The measure the Commission is using, the Diversity Index or DI, accounts for certain, but not all media outlets (newspapers, broadcast, television, radio, and the Internet) in local markets available to consumers, the relative importance of these media as a source of local news, and ownership concentration across these media. The DI builds on the Commission's previous approach to the diversity goal: The Commission retains the principle that structural regulation is an appropriate and effective alternative to direct content regulation; the Commission retains the principle that viewpoint diversity is fostered when there are multiple independently-owned media outlets in a market; the Commission retains its emphasis on the citizen/viewer/listener and on ensuring that viewpoint proponents have opportunities to reach the citizen/viewer/listener. What the Commission adds is a method, based on citizen/viewer/listener behavior, of characterizing the structure of the ''market'' for viewpoint diversity. The Commission uses the DI as a tool to inform its judgments about the need for ownership limits. This section explains the rationale for the diversity index and discusses calculation methodology.

264. The DI is based partly on the results of a consumer survey, which the Commission acknowledges is not without flaws, and partly on its expert judgment and analysis of the local viewpoint diversity marketplace. While the Diversity Index is not perfect, nor absolutely precise, it is certainly a useful tool to inform the Commission's judgment and decision-making. It provides us with guidance, informing us about the marketplace and giving us a sense of relative weights of different media. It informs, but does not replace, the Commission's judgment in establishing rules of general applicability that determine where the Commission should draw lines between diverse and concentrated markets.

265. Because of the limitations in the Nielsen survey, and the specific assumptions underlying the DI, it is a useful tool only in the aggregate. It cannot, and will not, be applied by the Commission to measure diversity in specific markets. Indeed, it could not be used on a particularized basis to review the diversity available in a specific market. For example, in determining the

appropriate weights to apply to the various media, the Commission has decided to give no weight to cable television or magazines as sources of local news, notwithstanding the results in the Nielsen survey to the contrary. The Commission recognizes that consumers in certain markets do have access to local news from local magazines, local cable news channels, and PEG channels, but the Commission believes that the Nielsen survey overstates this influence. On a national basis, the Commission believes most consumers either do not have access to such sources (such as a local news magazine) or rely very little on them (such as PEG channels). In sum, excluding these sources or factors from the DI does not undermine the general conclusions the Commission reaches about market concentration because the DI is not capable of capturing particularized market characteristics; it is intended to capture generalized, typical market structures and identify trends.

266. *Rationale for the Diversity Index.* Fostering diversity is one of the principal goals of the Commission's media broadcast ownership rules. In the past, the Commission has described its diversity goal as fostering ''competition in the marketplace of ideas.'' Viewpoint diversity refers to availability of a wide range of information and political perspectives on important issues. Information and political viewpoints are crucial inputs that help citizens discharge the obligations of citizenship in a democracy. The Commission recognizes that the number of political viewpoints or the number of perspectives on a particular issue may be greater than the number of media outlets in a market. And the Commission recognizes that, in an effort to cater to viewer/listener/reader preferences any single outlet may choose to present multiple viewpoints on an issue. However, the Commission does not expect every outlet to present every perspective on every issue. The competition analogy suggests that having multiple independent decision-makers (*i.e.*, owners of media outlets) ensures that a wide range of viewpoints will be made available in the marketplace.

267. News and public affairs programming is the clearest example of programming that can provide viewpoint diversity. The Commission regards viewpoint diversity to be at the core of its public interest responsibility, and recognizes that it is a product that can be delivered by multiple media. Hence, in contrast to the Commission's competition-based rules, diversity issues require cross-media analysis. Because what ultimately matters here is the range of choices available to the public, the Commission believes that the appropriate geographic market for viewpoint diversity is local, *i.e.*, people generally have access to only media available in their home market. To assist in its analysis of existing media diversity, and to help us determine whether any cross-media restrictions are necessary in the public interest, the Commission uses a summary index that reflects the general or overall structure of the market for diverse viewpoints. By analogy with competition analysis, the diversity index is inspired by the Herfindahl-Hirschmann Index (HHI) formulation, calculating the sum of squared market shares of relevant providers in each local market. The HHI measure, however, is particularly attractive for two reasons. First, its mathematical properties correspond to the Commission's beliefs about the effects a merger would cause. Each possible measure of market concentration has benefits and weakness that can be captured by the list of mathematical properties, or axioms, that that particular measure satisfies. In the case of measuring market concentration, a list of reasonable requirements or axioms limit us to the choice of few mathematical formulas. Within this class of admissible indices, the HHI can be thought of as a very conservative choice in the following sense. If the Commission asks ''what is the loss of competition from a merger,'' known as the ''delta'' in the antitrust field, the HHI measure reflects the assumptions that: (i) An acquisition of a firm with given size will lead to a larger harm the larger the acquiring firm, and (ii) this harm is proportional to the size of both the merging parties.

268. Applying a similar analysis to the Diversity Index, the Index reflects the assumptions that if newspapers have twice the diversity importance of television, a newspaper's acquisition of a broadcast television station will cause twice the loss of diversity as will a merger of two broadcast television stations. Conversely, if radio has less diversity weight than television, then a merger of a television and a radio station will cause less of a loss of diversity than will a merger of two television stations. In contrast, if the Commission were to adopt a simple ''voice test,'' for example, then it would be assuming that the loss of voice due to a merger is independent of the diversity importance of either party. Similarly, if the Commission were to adopt a concentration ratio measure, then it would implicitly be assuming that the loss of diversity is independent of the size of the larger firm in the transaction. It is in this sense—that the size of the diversity loss increases as does the diversity importance of either merging party—that the Diversity Index developed here is a conservative measure, and one which the Commission adopts in the interest of prudence. Moreover, the HHI, from which the Commission's chosen measure derives, is widely used in economics and in antitrust. Thus, the Commission can draw on its experience with the HHI in competition policy to determine threshold values for the Diversity Index.

269. The Commission assigns market shares to these providers based in part on the results of responses to the Nielsen survey described in MOWG Study No. 8. The Diversity Index itself, however, is a blunt tool capable only of capturing and measuring large effects or trends in typical markets. Thus, the DI change from a particular transaction in a particular market might be more or less than the Commission anticipates, or that it might result in a market DI higher or lower than that suggested by the Commission's examples. This is of no moment as the DI is a tool useful only in the aggregate and will not—and cannot in its current form—be applied on a particularized basis.

270. There are several conservative assumptions in the Commission's analysis of viewpoint concentration. First, the Commission premises its analysis on people's actual usage patterns across media today. The Commission's method for measuring viewpoint diversity weights outlets based on the way people actually use them rather than what is actually available as a local news source. The Commission adopts this approach out of an abundance of caution because the Commission is protecting its core policy objective of viewpoint diversity. Second, the Commission's diversity analysis is based on preserving viewpoint diversity among local, not national, news sources. The effect is that the Commission excludes, for purposes of measuring viewpoint concentration, the large number of national news sources such as all-news cable channels and news sources on the Internet and instead focus exclusively on the smaller set of outlets that people rely on for local news. Excluding those national sources thus leaves us with a smaller set of ''market participants'' that the Commission regulates to protect local news diversity in a way that might be unnecessary to protect diversity among

national news sources. Third, the Commission does not include low power television and low power radio stations in measuring viewpoint diversity. These stations are often operated with the express purpose of serving niche audiences with ethnic or political content that larger media outlets do not address. These low power outlets promote viewpoint diversity in a way that the Commission has not addressed because of their more limited reach, but collectively they enhance viewpoint diversity beyond the levels that are reflected in the Diversity Index measurements.

271. The Commission concludes that each of these judgments that inform its viewpoint diversity analysis are sound, but in each case the Commission makes the most conservative assumption possible. Thus, the results of the Commission's diversity index analysis can fairly be said to understate the true level of viewpoint diversity in any given market.

272. *Choice of Media.* The Commission has determined which media to include in the Diversity Index based on the survey information derived from the ''Consumer Survey on Media Usage'' prepared by Nielsen Media Research (FCC MOWG Study No. 8). This survey tells us how consumers perceive the various media as sources of news and information. The key threshold implication of this study is that consumers use multiple media as sources of news and current affairs, and hence that different media can be substitutes in providing viewpoint diversity.

273. FCC MOWG Study No. 8 asked respondents to identify the sources, if any, ''used in the past 7 days for local news and current affairs.'' The same question was posed for national news and current affairs. The choices offered were television, newspaper, radio, Internet, magazines, friends/family, other, none, don't know, and refuse. The survey then asked follow-up questions regarding the first five choices. For each one of the five sources, respondents who did not mention a source were asked specifically if they used that source for local news and current affairs. The survey posed analogous questions with regard to national news and current affairs. Based on the initial and follow-up questions, the survey presents ''summary data'' on sources of local and of national news and current affairs information.

274. In an *ex parte* communication filed May 28, 2003, Media General submitted a critique of MOWG Study No. 8 by Prof. Jerry A. Hausman. Hausman argues that the Nielsen Survey has a number of serious flaws and questions its usefulness in any rulemaking concerning cross-ownership of newspapers and broadcast stations. The Commission recognizes Professor Hausman's concerns, but the Commission believes that the Nielsen survey sample of 3,136 households provides us with useful information. In addition, Professor Hausman provides no evidence that the sample is, in fact, biased. Concerning Hausman's second point, the Commission agrees that answers to hypothetical questions are less useful than information about actual behavior. MOWG Study No. 8 provides a substantial amount of information on reported actual behavior. It is this information, not the hypotheticals, on which the Commission relies to conclude that media can be substitutes in providing viewpoint diversity and to construct its Diversity Index. Regarding Hausman's third point, although the Nielsen survey may not directly ask respondents for their views concerning specific cross-ownership scenarios, the Commission finds that the results of the survey are useful in a number of areas, such as which forms of media are most heavily used for news. While questions could have been posed that contained more specificity concerning cross-ownership rules, the Commission understands that such complexities could have made the survey design more difficult, as well as possibly lowered the response rate. Overall, while Hausman claims that the Nielsen survey does not ''provide a basis for the measurements necessary for the specification of policy,'' the survey does, in fact, help us establish an ''exchange rate'' for converting newspaper, television, radio, and other media into common units so the Commission can measure the extent of concentration in the ''market of ideas.'' Finally, the Commission emphasizes that it has not relied solely on the results of the Nielsen survey, but has used a number of studies and its own expert judgment on media in reaching its decision.

275. The data in the Nielsen study indicate that television, newspapers, radio, Internet, and magazines are the leading sources of news and current affairs programming. Based on the initial question, the average respondent uses two of the five major sources for news and current affairs, whether the category is local or national. Taking account of the follow-up questions, the average respondent uses three of the five major sources for news and current affairs, again regardless of whether the category is national or local. These data strongly suggest that citizens do use multiple media as sources of viewpoint diversity, and that media can be viable substitutes for one another for the dissemination of news, information and viewpoint expression. On the basis of this finding, the Commission proceeds to an analysis of local media markets and whether there are particular kinds of cross-media transactions in particular kinds of markets that would likely result in high levels of concentration. To assist in making that determination, the Commission relies in part on its Diversity Index.

276. The Commission's Diversity Index focuses on availability of sources of local news and current affairs. As the Commission explained in the policy goals section of the R&O, it is concerned with promoting viewpoint diversity in local media markets. Owners of media outlets clearly have the ability to affect public discourse. Consumers have numerous sources of national news and information available to them. Therefore the Commission does not believe that governmental regulation is needed to preserve access to multiple sources of national news and public affairs information.

277. The Diversity Index incorporates information on respondents' usage of television, newspapers, radio, and the Internet. Respondents also reported getting local news and information from magazines. The Commission excludes magazines, however, from its Diversity Index. First, as the description above makes clear, most (but not all) news magazines have a national rather than a local focus. Nonetheless, the decision to exclude magazines will be re-examined in the next biennial review, and the Commission will take the opportunity to gather additional survey data at that time on magazine usage.

278. For similar reasons, the Commission also excludes cable from its Diversity Index. The Commission is concerned that some consumers may have confused broadcast and cable television. Thus, the Commission believes some consumers who replied that they receive their local news from cable may have been viewing broadcast channels over the cable platform. The Commission also recognizes, however, that cable systems do provide local news and current affairs information through PEG channels and, in some markets, local news channels. However, the Commission does not have accurate data for this measure. Because the Commission does not have reliable data

on this point, it excludes cable from the DI to simplify its general analysis.[18]

279. *Weighting Different Media.* The Commission has concluded that various media are substitutes in providing viewpoint diversity, but the Commission has no reason to believe that all media are of equal importance. Indeed the responses to the survey make it clear that some media are more important than others, suggesting a need to assign relative weights to the various media. In view of the Commission's focus on local news and current affairs, it chooses to base its weights on survey responses to the question asking respondents to identify the sources, if any, ''used in the past 7 days for local news and current affairs.'' The Commission recognizes that this is not a perfect measure, and that it requires some adjustment. The Commission justifies these adjustments and assumptions, however, by emphasizing that it is using the DI only to inform itself of general market trends, not for precise measurements.

280. The average respondent uses three different media for local news and current affairs information. It is likely that, for a given respondent, the three are not all of equal importance. If media differ in importance systematically across respondents then it would be misleading to weight all responses equally. Unfortunately, the Commission does not have data on this question specifically with regard to local news and current affairs. The available ''primary source'' data address local and national news together and do show that different media have different importance, in the sense that primary usage differs across media. Because ''primary source'' data are not available for local news and current affairs alone, the Commission uses the data identifying sources of local news and public affairs programming to weight the various media to reflect relative usage. This leads to lower shares for television and higher shares for radio than the ''primary source'' shares reflect.

281. The local response summary data, Table 97 of MOWG Study No. 8, include five categories of media—Internet, magazines, radio, newspaper, television. Magazines account for 6.8% of responses to the questions on source of local news and current affairs. We exclude magazines as explained above and normalize the shares of the four remaining media to sum to 100%. The resulting weights are television (33.8%), newspapers (28.8%), radio (24.9%), and Internet (12.5%).[19] The local response summary data do not break down the television responses between broadcast television and cable/satellite television. Nor do these data separate out usage of daily and weekly newspapers. We make use of other FCC MOWG Study No. 8 questions to apportion the newspaper shares further.

282. Although the responses to one question in MOWG Study No. 8 suggests that cable is a significant source of local news and current affairs, other data from the study casts some doubt on this result. The following discussion explains the reasoning that leads us to exclude cable/satellite television from the current analysis of local news and current affairs for diversity purposes. DBS currently provides little or no local nonbroadcast content. The Commission will review the status of cable as a local news provider in the 2004 biennial review. The Commission's review will include a follow-up to MOWG Study No. 8, which will include more detailed questions regarding the use of nonbroadcast video media for local news and current affairs.

283. With regard to newspapers, MOWG Study No. 8 indicates that 61.5% of those who cite newspapers as a source of local news and current affairs acquire that information from dailies only, 10.2% from local weeklies only, and 27.3% from both. The next biennial review will provide the Commission with an opportunity for re-examination of the role of weekly newspapers. Accounting for the additional information on newspapers results in a revised set of weights. They are: broadcast television 33.8%, daily newspapers 20.2%, weekly newspapers 8.6%, radio 24.9%, and Internet 12.5%.

284. The most detailed analysis of MOWG Study No. 8 comes from the Consumer Federation of America (CFA). CFA agrees that citizens get viewpoint diversity from multiple media. Their comments refer to the ''two dominant political media—daily newspapers and television,'' although CFA asserts that these media ''appear to play very different roles.'' Television has the largest weight in the DI (33.8%) and daily newspapers also loom large at 20.2%. Although the radio weight is somewhat higher at 24.9%, the fact that markets generally have far more radio stations than daily newspapers make the Commission's weights consistent with CFA's conclusion that newspapers are among the two most influential media. CFA finds that the Internet plays a small but growing role in citizen acquisition of news and information, a finding not inconsistent with the relatively low weight of Internet in the Commission's DI. CFA quotes statistics on daily use of television, newspapers, radio, and Internet that yield usage shares not too different from the Commission's DI weights. Drawing on two surveys, CFA suggests that people spend 4 minutes per day on average gathering news from the Internet, 25 minutes reading newspapers, 15 minutes listening to radio news, and ''over half an hour'' watching television news. Ascribing half an hour to television leads to shares of 40.5% for television, 33.8% for newspapers, 20.3% for radio, and 5.4% for Internet. These are fairly close to the Commission's DI weights of 33.8%, 28.8%, 24.9%, and 12.5% for television, newspapers, radio, and Internet, respectively.

285. Although CFA does not dispute the proposition that different media address the same issues and stories, it asserts that they do so in different ways, suggesting, *inter alia*, that television is ''the primary source for breaking news,'' that newspapers have a larger role in ''the follow-up function,'' and that talk shows are a new and significant element of radio's role in disseminating viewpoints. Although CFA does not discuss the role of radio as a source of breaking news, the Commission acknowledges that different media do present information in different ways. Thus, CFA appears to conclude that media are substitutes for some citizens and complements for others.

286. The Commission disagrees with CFA's conclusion that the DI is invalid because some citizens may consider certain media outlets complements rather than substitutes. In the technical economic sense, two goods are substitutes if an increase in the price of good A (which leads to a decrease in consumption of good A) leads to an increase in the consumption of good B. In the context of the Commission's diversity goal, the Commission is concerned with the question of what happens when one or more media outlets refuses to transmit a particular viewpoint. If most citizens accessed only one type of outlet, *e.g.*, radio but not newspapers or television, then its diversity goal would prompt us to analyze separately the structure of the ''radio marketplace of ideas.'' If, on the other hand, most citizens access multiple media, then the Commission can rely on the reasonable probability that, if, *e.g.*, the local newspaper refused

[18] As with magazines, we will review this issue in the next biennial review, and may collect at that time more accurate survey data on consumers' use of cable for local news and current affairs.

[19] The ''primary use'' weights, excluding magazines, are television (57.8%), newspapers (25.8%), radio (10.3%), and Internet (6.1%). When magazines are included their weight is 0.6%.

to cover a particular story, citizens would be exposed to that story via independently-owned other media, such as radio or television. In other words, evidence that media are complements in the sense that, for at least some citizens, there is a positive correlation between use of one medium and use of another, does not invalidate the premise underlying the DI.

287. *Weighting Outlets Within the Same Medium.* Having decided on relative weights for the various media, the Commission next confronts whether and how to weight different media outlets within each category. The decision of whether to do weighting turns on whether the Commission's focus is on the availability of outlets as a measure of potential voices or whether it is on usage (*i.e.*, which outlets are currently being used by consumers for news and information). The Commission has chosen the availability measure, which is implemented by counting the number of independent outlets available for a particular medium and assuming that all outlets within a medium have equal shares. In the context of evaluating viewpoint diversity, this approach reflects a measure of the likelihood that some particular viewpoint might be censored or foreclosed, *i.e.*, blocked from transmission to the public. The case for a usage measure is that it reflects actual behavior. However, current behavior is not necessarily an accurate predictor of future behavior. Moreover, in order to implement a usage measure accurately, it would be necessary for us to define which content should be considered local news and current affairs. Current behavior, *e.g.*, viewing or listening to a broadcast station, is based on the content provided by the station in question. However, media outlets can change the amount of news and current affairs that they offer, perhaps in response to competitive conditions in the ''viewpoint diversity'' marketplace. Such changes are unpredictable, so current market shares (*e.g.*, of viewing or listening) may not be good predictors of future behavior.

288. If the Commission were to adopt a usage measure designed to reflect its concern with local news and current affairs, it would need information on viewing/listening/reading of local news and current affairs material. To implement this procedure, it would be necessary first to determine which programming constituted news and current affairs. The Commission believes that this type of content analysis would present both legal/Constitutional and data collection problems. News and current affairs content is not necessarily limited to regularly-scheduled news programs. So the Commission could be faced with deciding which other programs were news and current affairs, whether some portion of a program not primarily news should count as news, and, indeed, whether portions of a news report devoted, *e.g.*, to movie reviews should count as news. Ultimately, the Commission's goal is not to prescribe what content citizens access, but to ensure that a wide range of viewpoints have an opportunity to reach the public. This goal, the limitations of current usage as a predictor of future usage, and the content classification requirements for implementing a usage measure all lead us to adopt an ''equal share'' approach to weighting outlets within the same medium.

289. The Commission deviates from this approach only in the case of the Internet. The Commission used subscription shares to divide the Internet category among the two current significant sources of Internet access—telephone companies and cable companies. The Commission thinks it prudent to use subscriber figures to calculate how to divide the Internet category between cable and telephone companies.

290. Table 78 of FCC MOWG Study No. 8 provides information on Internet access. If the Commission takes the 99.7 percent of respondents who picked cable, DSL, or telephone line as the base, and if the Commission combines telephone and DSL, the resulting shares are 19 percent cable and 81 percent telephone. The Commission recognizes that, given the relatively small share of Internet in the total diversity market (12.5% weight), using subscriber shares rather than equal availability for Internet providers has a very small impact on its Diversity Index calculation.[20] In this regard, however, the Commission rejects the argument made by some commenters that the Commission should not include the Internet at all because people only utilize the Internet to access their newspapers' and local broadcast stations' Web sites and, therefore, the Internet does not add to diversity. Although many local newspapers and broadcast stations maintain Web sites with news content, that does not begin to plumb the extent of news sources on the Internet.

291. *Calculation Methodology.* The Diversity Index is structured like an HHI, *i.e.*, it is simply the sum of squared market shares. As explained above, squaring market shares, unlike measures based on the ''raw'' market shares, permits construction of an index that takes account of the market shares of all providers in the ''market'' for viewpoint diversity. As noted above, the geographic market the Commission is using is local. The Commission currently defines television markets in terms of the Nielsen DMA. DMAs are exhaustive classifications, covering the entire United States, and it is straightforward to count the number of television stations in a DMA. The Commission is including public as well as commercial stations. The Commission chooses not to include television stations from outside the DMA in question, even if they obtain a measurable audience share in the DMA. The Commission's focus is on local news and current affairs and it is not reasonable to assume that stations outside of the DMA in question will devote significant resources to news and current affairs programming targeted to that DMA. The Commission's cable television signal carriage rules generally permit a television broadcast station within a DMA to obtain cable carriage throughout the DMA, and its DBS signal carriage rules generally ensure that all television stations within a DMA are treated the same with respect to satellite retransmission. For this reason, the Commission assumes that all television broadcast stations in a DMA are available throughout the DMA. Each broadcast television station receives an equal share of the broadcast television weight.

292. The Commission combines the television stations in each DMA with the radio stations in the Arbitron radio metro with which the DMA is paired. There are 287 Arbitron radio metros in the country. Each one is smaller than the DMA within which it lies.[21] Arbitron radio metros do not cover the entire country. More sparsely populated areas are not included in radio metros; approximately one-half of radio stations are not in a metro market. As explained below in the cross-media limits section

[20] As explained in the section Calculation Methodology of the R&O, the diversity index is calculated by squaring relevant market shares. If the Commission assumes that the two Internet sources have equal shares, the contribution to the index of Internet would be 78 points. The assumption leads to a contribution to the index of 109 points. We do not attribute common ownership to Internet Service Providers. We will assume (subject to examination at the next biennial review and to future findings), that ISPs do not restrict subscriber access to Internet content based on the identity of the content provider. The Commission is looking at the availability of news and information sources generally—and Web sites particularly—not their popularity.

[21] Most radio metros lie wholly within a single DMA; virtually all of the others are predominantly within a single DMA.

of this Order, the Commission uses the Diversity Index to help it identify markets that are ''at risk'' for excessive concentration in the ''viewpoint diversity market.'' Once those markets have been identified, and cross-media limits imposed, the actual implementation of the cross-media diversity limits will not require information on a local radio market, only on the television market (DMA) within which the radio stations are located that are part of a proposed merger. As detailed in the cross-media limits section, the analysis that the Commission uses to identify at-risk markets is based on examination of a substantial sample of the 287 Arbitron radio metro markets.

293. Daily newspaper publication and circulation data are not collected based on Arbitron radio metros. A different market concept, developed by the Department of Commerce, is used by the industry. The basic building block is the ''Metropolitan Statistical Area,'' or ''MSA.'' The Department of Commerce recognizes 318 metropolitan areas, which include 248 MSAs, 58 ''PMSAs'' (primary metropolitan statistical areas), and 12 ''NECMAs (''New England county metropolitan statistical areas''). For Diversity Index calculation purposes, these areas are matched to Arbitron radio metros. Each daily newspaper that is locally published in the metropolitan area is included in the market. The daily newspaper share of the Diversity Index is divided evenly among all daily newspapers included in the market. In the absence of market-specific information on weekly newspaper availability, the Commission makes the most conservative assumption that there is one independently-owned weekly newspaper in each local market, and assign to it the entire weekly newspaper share.

294. In terms of calculating the Index, within each medium the Commission combines commonly-owned outlets and calculate each owner's share of the total availability of that medium. The Commission then multiplies that share by the share of the medium in question in the total media universe (television plus newspaper plus radio plus Internet). Once these shares in the overall ''diversity market'' have been calculated, the Commission adds together the shares of properties that are commonly-owned (for example, a newspaper and a television station), square the resultant shares, and sum them to get the base Diversity Index for the market in question.

295. *Cross-Media Limits.* The Commission modifies its rules by adopting a new set of cross-media limits (''CML'') in lieu of the Commission's former newspaper/broadcast and television/radio cross-ownership rules. The CML have been designed specifically to check the acquisition by any single entity of a dominant position in local media markets—not in economic terms, but in the sense of being able to dominate public debate—through combinations of cross-media properties. Because the Commission has traditionally relied upon blanket prohibitions on certain cross-media combinations, it has never before had to confront head-on the challenge of identifying specifically which types of markets give us the greatest cause for concern in terms of preserving diversity of viewpoint, and which types of transactions are most problematic in this regard. This effort is complicated by the nature of the public interest the Commission are seeking to protect—diversity—which is as elusive as it is cherished.

296. The Commission's modification of the newspaper/broadcast and television/radio cross ownership rules into a set of cross-media limits or CML is the Commission's first comprehensive attempt to answer this difficult and complex set of questions. The CML derives from data in the record regarding the relative reliance by consumers of various types of media outlets for news and information. To help us analyze that data, the Commission uses a methodological tool—a diversity index or ''DI''—that allows us to measure the degree to which any local market could be regarded as concentrated for purposes of diversity. Based on an analysis of a large sample of markets of various sizes, the diversity index suggests that the vast majority of local media markets are healthy, well-functioning, and diverse.

297. Moreover, because the Commission is adopting herein intra-service competition caps for radio and television properties, those caps will ensure that local markets will continue to be served by a diversity of voices within each of these respective services. By the nature of the exercise, markets defined for competition purposes are no broader than, and generally are narrower than, markets defined for diversity purposes. Thus, the Commission's radio and television competition caps will not only serve to promote and protect competition within the radio and television services, they will also be protective of diversity interests when television-only or radio-only transactions are at issue. For example, in a market with 12 TV stations, the Commission's intra-service caps guarantee at least six different owners of television stations. If there are forty radio stations in the market, the Commission's radio cap will ensure at least six different owners of radio properties.

298. The Commission recognizes, however, that its intra-service caps will not address diversity concerns that may result from cross-media combinations. Although the Commission's local radio and television caps will ensure a significant number of independent voices in larger markets, cross-media combinations in very small markets might result in problematical levels of concentration for diversity purposes. Accordingly, the Commission supplements its two intra-service local rules with a narrowly drawn set of cross-media limits to reach those combinations that are not already prohibited by its television or radio caps, but which would give rise to serious diversity concerns. The cross-media limits are based on a set of assumptions drawn directly from the record evidence in this proceeding and premises that are consistent with past Commission policy and practice. Although the Commission relies in part on its data analysis to help define the CML, it clearly respects that diversity is inherently subjective and cannot be reduced to scientific formula. The CML, therefore, ultimately rests on the Commission's independent judgments about the kinds of markets that are most at-risk for viewpoint concentration, and the kinds of transactions that pose the greatest threat to diversity.

299. *Competition Caps Protect Diversity.* The Commission has adopted a cap both on the number of television stations that any one owner may hold in a market, and on the number of radio stations that any one owner may hold in a market. These caps were designed to promote and protect competition within these two distinct services. The caps are, therefore, based on product market definitions that consider only those products or services that may be regarded as reasonable substitutes for competition purposes. The Commission recognizes, however, that although radio and television outlets may not compete in economic terms with other types of speech outlets, *e.g.*, newspapers, they all inhabit the mass media landscape that Americans turn to for news and information. In that sense, whatever the confines of their markets for competition purposes, many different outlets serve core democratic functions as purveyors of ideas, outlets for opinion, and distributors of news.

300. The data in the record evidence this difference. Radio and television

compete in economic terms in separate and distinct product markets. Both radio and television outlets, however, inhabit the larger speech market, as do several other types of entities. For example, MOWG Study No. 8, a consumer survey on media usage, reveals that, when asked to identify their primary source of all news and information—both local and national—approximately 40% of Americans responded that broadcast television was their primary source and approximately 10% of Americans responded that radio was their primary source. However, nearly 24% of respondents identified daily newspapers as their primary source of news and information, 18% identified cable news networks, 6% identified the Internet, and 2% identified weekly newspapers or magazines. Other studies confirm that, today, Americans substitute among and between many different sources for news and information on a regular basis. The record reflects, in short, that the ''viewpoint'' market in which television and radio stations participate is broader than the economic product markets, as defined by standard competition theory, in which either competes. As a result, intra-service caps designed to ameliorate competition concerns necessarily also will protect against undue concentration of speech outlets for diversity purposes.

301. The Commission's diversity index helps to illustrate this point. Pursuant to the Commission's new local radio rule, no single owner, even in the smallest markets, will own more than 50% of the radio outlets. In larger markets, the percentage of radio outlets that can be held by any one entity is considerably smaller. Thus, using the most extreme set of facts, and using Altoona, Pennsylvania, as the Commission's test case, the diversity index focused on local news and information alone (again, the most conservative assumption) reveals a relatively minimal impact on viewpoint diversity even should the radio outlets become split between only two owners. The current base case DI for local news and information for Altoona is 960. If the local radio market were to become restructured into a duopoly, the DI would rise to only 1,156. This hypothetical posits the most extreme restructuring of radio outlets in the smallest market among those in the Commission's test cases. The change in the diversity index will be far smaller as a result of radio transactions in larger markets or where the restructuring is less extreme.

302. Similarly, pursuant to the Commission's new local television rule, no single owner will be permitted to own more than two television outlets in most markets. Using a set of randomly sampled markets of varying sizes, the average change in DI as a result of an owner of one television property buying another to create a television duopoly in a small market with only five licensed television stations is 91. In markets with twenty licensed television stations the change in DI as a result of the creation of a television duopoly is only six.[22] Thus, although the Commission's intra-service television and radio caps are designed to protect and promote competition, they have a corollary benefit of also guarding against concentration in the viewpoint markets, at least with respect to intra-service combinations.

303. The Commission recognizes, however, that cross-media combinations that may impact the range and diversity of voices in local markets will not be captured by its television and radio caps. The Commission therefore adopts new cross-media limits targeted specifically and solely at the types of transactions that would give it the most concern and which are not already prohibited by its intra-service caps.

304. *Foundations of the Cross-Media Limits.* The Commission begins with the proposition that, because this rule will limit the speech opportunities not only for broadcasters, but also for other entities that may seek to own and operate broadcast outlets (including those with the fullest First Amendment protection—newspapers), the Commission should draw the rule as narrowly as possible in order to serve its public interest goals while imposing the least possible burden on the freedom of expression. The Commission also recognizes that the tools that the Commission is using to evaluate market diversity involve as much art as science. ''Diversity'' is not susceptible to microscopic examination; it cannot be mapped with any known formal system or reduced to mathematical equations. Although the Commission attempts to measure it and assign some quantitative value to it in order to understand relative diversity of different types of markets, it recognizes that this process is inherently approximate.[23] The Commission must exercise great care, therefore, before categorically prohibiting any particular transaction or set of transactions as a prophylactic matter.

305. Nonetheless, it is apparent, based on the record in this proceeding, that certain types of transactions in certain markets present an elevated risk of harm to the range and breadth of viewpoints that may be available to the public. Using the Commission's diversity index analysis and its independent judgment regarding desired levels of diversity, the Commission first identifies ''at-risk'' markets that might already be thought to be moderately concentrated for diversity purposes. It then identifies the types of transactions that pose the greatest risk to diversity, and imposes specific limits on those transactions in at-risk markets. Finally, because certain transactions in less concentrated markets pose a high risk of rapid concentration, the Commission imposes separate restrictions on transactions outside of the at-risk markets.

306. *Identifying At-Risk Local Markets.* The Commission begins by identifying those markets most susceptible to high levels of viewpoint concentration; *i.e.*, those markets where its diversity concerns cut most deeply. At the outset, consistent with the Commission's past practice and precedent, the Commission focuses in this regard on local, not national, viewpoint market(s). Evidence in the record before us supports the conclusion that the number of outlets for national news and information is large and growing, and that government regulation is thus unnecessary to protect it.

307. With respect to local markets, the Commission's ten city study and its DI test cases reveal that most local markets today are well-functioning, healthy markets for speech. Not all voices, however, speak with the same volume. Using its Diversity Index, the Commission has examined the concentration of media outlets in the ten markets that were the subject of its Ten City Study using weighted voices. New York has a base DI for local news and information of 373; Lancaster, Pennsylvania, has a DI of 939; and Myrtle Beach, South Carolina, has a DI of 989. Indeed, the average DI for all ten markets, which range from the largest to near the smallest, is 758. A DI of 758 is the equivalent of 13 equally-sized firms.

[22] The local television ownership cap includes a prohibition on top-four combinations. This will have the effect of prohibiting combinations of the local television stations most likely to produce and carry significant local news programming. Thus, although the top-four restriction is based on competition theory, the rule will also have beneficial effects on local diversity.

[23] Using the Diversity Index allows the Commission to see different market characteristics in markets of different sizes. It has also found, however, that differentiating markets by the number of newspapers present is too blunt while differentiating markets by the number of radio stations is too fine. Therefore, the Commission uses the number of television stations as an identifier of market size.

308. Moreover, to ensure that the results of its ten city study were not anomalous, the Commission has calculated the average DI for a different set of randomly selected markets, both large and small. The average DI for markets in which there are 20 television stations is 612; the average DI for markets in which there are 15 television stations is 595; the average DI for markets in which there are 10 television stations is 635; and the average DI for markets in which there are 5 television stations is 911—all well below the point at which one would characterize them as highly concentrated if one were using the analogous HHI to measure competition in the market.

309. The Commission believes the analogy to the HHI is apt. The HHI is an indicator of economic concentration; it provides an analytical framework for determining when and if an entity or group of entities is likely to wield market power in an economic market. The Commission's DI, which was inspired by and modeled after the HHI, similarly is an indicator of viewpoint concentration. Using the DI as an analytical tool, the Commission can assign approximate weights to different types of media outlets, account for the diversity effects of commonly-owned properties, and measure relative concentration between and among markets. The DI can help the Commission, therefore, identify the point at which an entity or group of entities is likely to wield inordinate power in the marketplace of ideas.

310. Although competition theory does not provide a hard-and-fast rule on the number of competitors necessary to ensure that the benefits of competition are realized, a market that has ten or more equally-sized firms normally can be considered fully competitive.[24] A 1000 DI correlates to market in which there are roughly ten firms with approximately equal market power. An 1800 DI would correspond to a market with six roughly equal voices. Using the Commission's DI analysis of sample markets, it notes that it is not until it reaches markets with three or fewer licensed television stations that the average DI exceeds 1000, the point at which the market normally would be characterized as moderately concentrated for competition purposes.[25]

311. The Commission's DI analysis of these sample markets, however, is not the end of its inquiry. Because of the importance the Commission associates with maintaining diversity among the three principal platforms—newspaper, radio and television—for the expression of viewpoint at the local level, and because these same three outlets produce a large share of local news content, the Commission previously has used a ''voice test'' focused on one or more of these outlets for measuring diversity. In larger markets, the Commission expects that the number of distribution outlets for local news content will be larger, and that consumers will have greater access to secondary outlets for news and information.

312. Finally, the Commission is concerned not merely with the absolute level of diversity that might already exist in any market or type of market, but also with the degree to which diversity might be sacrificed as a result of likely transactions. Accordingly, in defining ''at-risk'' markets, the Commission has used its DI and sampled the effect of transactions, in large and small markets, involving heavily used sources of local news and information. In so doing, the Commission has focused on the types of transactions that most likely will lead to large DI changes and rapid concentration. The Commission's line-drawing effort is informed by the approach the DOJ has taken in assessing competition issues. Although DOJ policy is to review any transaction in a moderately concentrated market that would result in a change in HHI of 100 points or more, the Commission has found no case in many years in which DOJ has filed suit to block a merger that produced less than a 400 or more point HHI change. Based on the Commission's analysis, cross-media combinations involving newspaper and television, newspaper and radio, or radio and television properties do not produce a change in the DI of anything even approaching that magnitude other than in markets with three or fewer television stations.

313. These changes, of course, reflect approximations based upon sample data and are provided only to be illustrative of the diversity losses that can occur as a result of cross-media combinations in small markets. Nonetheless, based on all of the foregoing, the Commission concludes that a market with the equivalent of ten or more equally-sized firms cannot be regarded as even moderately concentrated for diversity purposes. In light of that conclusion, and in consideration of the properties of small markets and on its analysis of potential transactional impacts in those markets, the Commission concludes that markets with three or fewer licensed television stations should be regarded as ''at-risk'' markets for purposes of diversity concentration. Markets of that size, the Commission expects, will be moderately concentrated and subject to rapid concentration if cross-media combinations are created involving radio, television and/or newspaper properties.[26] Accordingly, the Commission will prohibit certain cross-media combinations involving those properties in markets with three or fewer television stations.

314. *Local Cross-Media Limits in At-Risk Markets.* With respect to the limits themselves, the Commission treads lightly in view of the sensitive First Amendment interests at stake and the deregulatory purpose of Section 202(h). The Commission's intent is to draw its rules narrowly, focusing on those transactions that are likely to have a substantial impact on the diversity of voices available in the market. The record shows that broadcast television, daily newspapers, and broadcast radio are the three media platforms that Americans turn to most often for local news and information. They are, accordingly, the focus of the Commission's diversity concerns, and the Commission declines to impose any cross-media limit on transactions involving media properties other than radio, television, and newspaper outlets.

315. Further, the Commission is establishing rules of nationwide applicability. The Commission desires, therefore, to provide the industry and the public with clear, easy to administer rules reflective of common market trends and characteristics. The Commission recognizes that, in any given market, the lines the Commission draws here may appear under- or over-inclusive. Again, although they have a methodological foundation in the DI, these judgments are based on agency expertise and experience dealing with broadcast markets and the media

[24] A market with 10 or more equally-sized firms has an HHI of 1000 or less. DOJ/FTC regards markets in this region to be unconcentrated. Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis.

[25] The average DI for markets with three television stations is 1027; the average DI for markets with two television stations is 1316; and the average DI for markets with a single television station is 1707.

[26] A market with an HHI of more than 1800 is regarded as highly concentrated. We noted above that a DI of 1800 would correspond to six equally-sized ''voices.'' Because of the amorphous nature of diversity as an interest and the difficulty of measuring it with precision, we decline to draw an absolute line prohibiting transactions that would take a market beyond the 1800 DI (*i.e.,* six voice) level. The rules we are adopting herein, however, are intended to protect against markets becoming highly concentrated—in a qualitative sense—for diversity purposes.

industries generally. Accordingly, except as specifically prohibited herein, cross-media combinations will not be subject to anything other than routine Commission review, *i.e.*, unless the transaction is barred by the CML or the Commission's other ownership rules, the combination is permissible under the Commission's rules, and the Commission will not apply the DI to it.[27]

316. Combinations of daily newspaper and broadcast properties in at-risk markets present a serious threat to local viewpoint diversity. The Commission therefore, adopts a rule prohibiting common ownership of broadcast stations and daily newspapers, and TV/radio combinations, in markets with three or fewer television stations. In order to determine which markets have 3 or fewer broadcast television stations, the Commission will rely on Nielsen television Designated Market Areas (DMAs). The Commission includes for these purposes, commercial and noncommercial television stations assigned to the DMA.

317. A number of parties have questioned whether a cross-ownership rule applicable to entities other than broadcasters, *e.g.*, newspaper owners, would be constitutional. The Commission continues to believe that a narrowly-drawn rule prohibiting or limiting common ownership of broadcast properties and daily newspapers is consistent with its constitutional framework. The Commission's current newspaper/broadcast cross-ownership rule has been upheld by the Supreme Court against constitutional challenge and, as discussed above, broadcast/newspaper and radio/television cross-ownership rules, like broadcast ownership rules, are reviewed under the rational basis standard. The Commission believes that its new cross-media limits satisfy this standard because they are ''a reasonable means of promoting the public interest in diversified mass communications,'' and they are founded on a substantial record.

318. *Television-Newspaper.* Nielsen survey data reveal that daily newspapers and broadcast television remain the two most important sources of local news and information. The importance of these outlets is reflected in the Commission's DI. A combination of a daily newspaper and a television station in a market with only three television stations leads to an average DI change of 331 points. These combinations in markets with only two or one television station lead to DI changes of 731 and 910 DI points, respectively. In these at-risk markets, a single combination of a daily newspaper and a television station could quickly jeopardize the range of viewpoints available to consumers in the market. The Commission therefore, adopts a rule prohibiting the combination of a daily newspaper and a broadcast television facility in any market with three or fewer television properties. To trigger the rule, the Commission will count all television stations assigned to the DMA that contains the newspaper's community of publication. The Commission presumes that broadcast television stations are generally carried throughout the DMA to which the station is assigned. The Commission's rules will not, however, bar a broadcast television station in such a market from starting a new newspaper, as that would expand, not decrease, diversity.

319. One additional issue in the cross-interest context is the definition of ''daily newspaper'' for the purposes of newspaper/broadcast cross-ownership. Currently, Note 6 to the multiple ownership rule defines a daily newspaper as ''one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication.'' The exclusion of non-English language daily newspapers in areas where the dominant language of the market is not English creates a discrepancy in treatment that must be ended. Since the definition of a daily newspaper was adopted in 1975, the percentage of households in which Spanish was spoken has approximately doubled. It is appropriate, therefore, at this point in time, that the Commission applies the CML to non-English daily papers in markets in which the language that they are printed in is the dominant language of their market.[28]

320. *Radio-Newspaper.* Although broadcast radio generally has less of an impact on local diversity than broadcast television, according to the results of the Nielsen survey, in at-risk markets the combination of a daily newspaper with one or more broadcast radio facilities can nonetheless have significant negative implications for the range of viewpoints available. Indeed, markets with three or fewer television stations have, on average, only 21 radio stations. Under the Commission's radio cap, a single owner in a market with 21 stations could own six stations, or 29% of all the radio outlets in the market. Combining such a station group with, perhaps, the only daily newspaper could, therefore, seriously impair the range of independent viewpoints available in the market. The Commission therefore, adopts a rule prohibiting the combination of a daily newspaper and a broadcast radio facility in any market with three or fewer television properties. To trigger the rule for newspaper/radio combinations the Commission will retain its current standard. That standard requires complete encompassment of the newspaper's community of publication by the requisite signal strength contour of the commonly owned radio station(s).[29]

321. *Television-Radio.* Combinations involving daily newspapers and broadcast properties are not the only cross-media combinations that present diversity concerns in at-risk markets. Approximately one-fourth of Americans rely on radio as a source of local news and information, and one-third use broadcast television for this purpose.

[27] Bright lines provide the certainty and predictability needed for companies to make business plans and for capital markets to make investments in the growth and innovation in media markets. Conversely, case-by-case review of even below-cap mergers on diversity grounds would lead to uncertainty and undermine our efforts to encourage growth in broadcast services. Accordingly, petitioners should not use the petition to deny process to relitigate the issues resolved in this proceeding.

[28] To trigger the rule, the Commission will count all television stations assigned to the DMA that contains the newspaper's community of publication. For the purposes of evaluating whether the non-English daily is printed in the primary language of the ''market,'' however, the market shall be defined as the newspaper's community of publication.

[29] For AM radio stations that standard is complete encompassment of the newspaper's community of publication by the predicted or measured 2mV/m contour computed in accordance with Section 73.183 or Section 73.186 of the Commission's Rules. For FM radio stations the standard is complete encompassment of the newspaper's community of publication by the 1 mV/m contour computed in accordance with Section 73.313 of the Commission's Rules. Previously, we discussed the inherent flaws in defining radio markets using a contour-based definition, and decided to move to a geographic based definition. Specifically, we found that a contour based definition for defining radio markets can create inconsistencies in counting stations that comprise a market, counting stations that an entity owns in a market, and determining a radio market's size and geographic area. *See* Local Radio/Problems with the Existing Radio Market Definition and Counting Methodologies, Section VI(B)(1)(a)(ii)(a) of the R&O. However, such problems do not arise in the context of using contours to determine whether the cross-media limits rule is triggered. Here, we are concerned with the physical proximity of the broadcast station and the newspaper's community of publication, or in the case of radio/television cross-ownership, we are concerned with the relative distance between two specific stations. Because the cross-media rule relies, in part, on a geographic location, *i.e.* the community of publication or the communities of license, parties cannot take advantage of such discussed inconsistencies to circumvent the rules. Moreover, we are not relying on a contour-based definition to define a cross-media market; we are only using it to determine whether the rule is triggered.

Cross-media combinations involving television and radio properties also, therefore, are likely to give rise to systematic diversity concerns in at-risk markets. The Commission's DI analysis confirms this fact. The Commission therefore adopts a rule prohibiting the combination of broadcast radio and broadcast television facilities in any market with three or fewer television properties. The television/radio cross-ownership rule is triggered when the radio station's community of license is in the commonly owned television station's DMA. Similar to requests for waiver of the newspaper/broadcast cross-ownership rule, parties seeking waiver of the television/radio cross-ownership rule can rebut this by showing that the stations' signals do not overlap and the television station is not carried on cable systems in the radio station's market.

322. *Additional Cross-Media Limits in Small to Medium-Size Markets.* Although markets with four or more licensed television stations do not qualify, in the Commission's judgment, as at-risk markets, a combination of a daily newspaper with a television duopoly and a significant radio presence can, in small to medium-size markets result in substantial changes in the level of diversity. The potential for rapid concentration that may result from a combination of a newspaper with a television duopoly in markets with between four and eight licensed television stations leads the Commission to conclude that it would be prudent, in these markets, to impose additional local ownership restrictions as part of its CML.

323. The Commission is cognizant, however, of the fact that substantial public interest benefits may flow from broadcast/newspaper combinations. Television stations that are co-owned with daily newspapers tend to produce more, and arguably better, local news and public affairs programming than stations that have no newspaper affiliation. Because of the news resources available to local newspapers, the Commission expects similar benefits to be associated with newspaper ownership of radio stations (*e.g.*, radio stations affiliated with a local newspaper may have an enhanced ability to produce local, all-news radio programming and to cover local political and cultural events in greater depth than stations unaffiliated with a newspaper). Accordingly, the Commission is not inclined to prohibit outright newspaper/ broadcast combinations in markets with 4–8 television stations (referred to below as ''small to medium size markets'').

324. Balancing these interests, the Commission believes it appropriate, in small to medium size markets (those with between four and eight television stations) to allow the following: (1) One entity may own a combination that includes radio, television and newspaper properties, but the entity may not exceed 50% of either of the applicable local radio or the local television caps in the market; (2) a radio station group owner that also owns a newspaper in the market, but which does not own any television properties in the market, may acquire radio stations up to 100% of the applicable radio cap. In these small to medium size markets, therefore, the Commission will prohibit: television broadcasters that also own a daily newspaper in the market from having a television duopoly in that market; a broadcaster with a duopoly from obtaining a daily newspaper in the same DMA; a newspaper owner from purchasing more than a single television station within the DMA; and a radio station owner that also owns a daily newspaper and a television station in the market from exceeding 50% of the applicable radio cap for the market.[30]

325. Although there may be economic benefits to the owner from more extensive combinations, it is not as clear that those benefits will accrue to the public in any meaningful way; at least the public interest component of these benefits is likely to decline incrementally as the number of stations increases. Given that no owner will be permitted, in accordance with the Commission's local television cap, to hold more than two television stations in a small to medium size market, a limit of one station in these markets for owners of local newspapers will maximize the public interest benefits, while reducing any loss of diversity. Although the loss of diversity that might result were that owner to add a significant radio presence in the market warrants a further 50% limit in the number of radio properties that owner might hold, such is not the case if the combination does not include any television properties.

[30] For these purposes, the Commission uses the Arbitron or contour-overlap market definitions discussed above in determining whether the newspaper and a radio station serve the same market. We are not imposing a limitation that would preclude a top four television stations in a market from being combined in common with a newspaper or radio station similar to the restriction imposed in the local television rule context. The top four restriction imposed under the local TV ownership rule is specifically designed to protection competition, as fully discussed in that section. The cross-media limit, on the other hand, is designed to protect viewpoint diversity, not economic competition.

326. The Commission has engaged in this analysis using its DI and a randomly selected sample of markets not with the idea of slavishly following the numbers that the index generated, but to confirm and support the judgments the Commission makes regarding the kinds of markets that are most susceptible to viewpoint concentration, and the kinds of transactions that are most likely to have a significant impact on the level of diversity available in any given market. The Commission does not believe that markets with between four and eight television stations can be regarded as moderately concentrated for viewpoint purposes or otherwise ''at risk.'' The Commission does, however, believe, and the DI confirms, that these markets are approaching a level of viewpoint concentration that the Commission would regard as moderate, and it is concerned that some combinations involving the three major sources of local news and public affairs information in these markets would lead to inordinate diversity losses. Accordingly, the Commission will permit television/radio combinations in small to medium size markets, provided they comply with the local radio and television rules.

327. With respect to markets with nine or more TV stations (''large markets''), the Commission imposes no cross-media restrictions. To begin with, markets of this size today tend to have robust media cultures characterized by a large number of outlets and a wide variety of owners. New York City, for instance, which has 23 licensed television stations, 61 radio stations, and 21 daily newspapers, had 61 different owners of broadcast stations and daily newspapers as of November 2002. Using the Commission's diversity index as a measure, New York City today has a base DI of only 373. More striking, perhaps, is the example provided by Kansas City, Missouri, which has only nine licensed television stations. The Commission's Ten City Study reveals that Kansas City had 35 different owners and the Commission's Diversity Index analysis shows that Kansas City has a base DI today of only 509.

328. Again, to ensure that the results of the Commission's Ten City Study were not anomalous, the Commission conducted a DI analysis on a random sample of markets of various sizes, including markets with nine licensed television stations, markets with ten television stations, markets with fifteen television stations, and markets with twenty television stations. Among the Commission's sample markets, the

average DI for those with nine television stations is 705; the average DI for those with ten television stations is 635; the average for those with fifteen television stations is 595; and the average DI for those with twenty television stations is 612. That is, markets with nine or more television stations today are very much un-concentrated.

329. Beginning in markets with nine licensed television stations, the Commission sees that, on average, the change in DI that would result from a television owner acquiring a radio group consisting of the maximum number of radio stations permissible under the Commission's local radio rule is only 64 points. If instead it were the owner of a daily newspaper acquiring that radio group, the DI change would be 198 points, leaving the market below 1000 DI. If the owner of a daily newspaper were to purchase a television station instead of a large radio group in a market of this size, the DI would increase only 86 points. Indeed, the largest combination possible in the market—a combination that would include a daily newspaper, a television duopoly, and a large radio group—would result in a DI increase of 473 points, taking the average nine television market to a base DI of under 1200 points, only marginally in the range that the Commission would consider moderately concentrated.

330. This analysis is premised on the creation of very large combinations of media properties at the local level. Even so, the results show that markets with nine or more television stations are un-concentrated today and are unlikely to become highly concentrated even in the absence of cross-media limits. Section 202(h) requires that the Commission justify broadcast ownership limits on more than supposition or inchoate fears; the Commission's governing law requires that the Commission targets its structural limits at real and demonstrable harms. Based on the foregoing, the Commission cannot, therefore, justify cross-media restrictions in markets with nine or more licensed television stations.

331. The tiers adopted in the R&O, ''at-risk'' markets, ''small to medium size'' markets, and ''large'' markets—are derived from the Commission's DI analysis and our independent judgment regarding market operation and the effect of various combinations on diversity. The Commission's diversity concerns are greatest in at-risk markets and the Commission has accordingly prohibited all forms of cross-media combinations in those markets. In small to medium markets the Commission has imposed specific limitations on particular kinds of combinations that would, in its estimation, most likely result in unacceptable harm to viewpoint diversity. In large markets, the Commission's analysis indicates that no cross-media limit is necessary, nor can one be justified, given the large number of outlets and owners that typify these markets and the operation of its intra-service television and radio caps.

332. *Conclusion.* Although the Commission generally prohibits television-radio, and newspaper-broadcast, cross-ownership in at-risk markets, and the Commission limits newspaper-broadcast combinations in small to medium size markets, the Commission recognizes that special circumstances may render these cross-media limits unnecessary or counter-productive in particular markets. Accordingly, the Commission will continue to entertain requests for waiver of these cross-media limits and, in particular, will give special consideration to waiver requests demonstrating that an otherwise prohibited combination would, in fact, enhance the quality and quantity of broadcast news available in the market.[31] In addition, of course, the Commission will review its entire local broadcast ownership framework, including its new cross-media limits, beginning next year, in the 2004 biennial review. The Commission will not, however, permit collateral attack upon its rules in individual cases on diversity grounds based upon more particularized showings using the DI in a given market. The rules adopted in the R&O are rules of general applicability. The lines that have been drawn and the judgments that have been made reflect the Commission's conclusions regarding the probable effects of given transactions in the run of cases. Those conclusions necessarily rely upon generalizations, approximations, and assumptions that will not hold true in every case. Indeed, many of these assumptions would not be true in a particular context or specific market. The Diversity Index itself is a blunt tool capable only of capturing and measuring large effects and general trends in typical markets. It is of no use, therefore, for parties to attempt to apply the DI to a particular transaction in a particular market.

[31] As is the case with our new local television ownership rules, we will require that a licensee who obtains a waiver of our cross-media limits show at renewal time the benefits that have accrued to the public as a consequence of the waiver. At the end of the broadcast station's (or stations') license term(s), the licensee of the station(s) must certify to the Commission that the public interest benefits of the Commission's grant of the waiver are being fulfilled. This certification must include a specific, factual showing of the program-related benefits that have accrued to the public. Cost savings or other efficiencies, standing alone, will not constitute a sufficient showing.

D. Grandfathering and Transition Procedures

333. *Grandfathering Provisions.* There may be some existing combinations of broadcast stations that exceed the new ownership limits due to the modifications of both the local TV and the local radio ownership rules. In addition, there may be instances in which a party currently owns a radio/television combination that may not comply with the new cross-media limits.[32]

334. The Commission is persuaded by the record to grandfather existing combinations of radio stations, existing combinations of television stations, and existing combinations of radio/television stations. The Commission will not require entities to divest their current interests in stations in order to come into compliance with the new ownership rules. As suggested by commenters, doing so would unfairly penalize parties who bought stations in good faith in accordance with the Commission's rules. Also, the Commission is also sensitive to commenters' concerns that licensees of current combinations should be afforded an opportunity to retain the value of their investments made in reliance on our rules and orders. The Commission also agrees with the commenters that argue that compulsory divestiture would be too disruptive to the industry. On balance, any benefit to competition from forcing divestitures is likely to be outweighed by these countervailing considerations.

335. While commenters overwhelmingly support grandfathering existing combinations, many nonetheless argue that grandfathering will create competitive imbalances which favor existing group owners—those that assembled combinations under the current rules—and disfavor those that cannot assemble competing combinations because of new ownership restrictions. Like all grandfathering decisions, some disparity will exist between grandfathered owners and non-grandfathered owners. The Commission does not believe this fact outweighs the

[32] While we are not aware of any existing newspaper/broadcast combinations that have been previously grandfathered or approved by the Commission that would be barred under the new rules, to the extent such combinations do exist, they will be subject to the grandfathering and transferability provisions described in this section.

equitable considerations that persuade us to grandfather existing combinations.

336. *Transferability.* In general, the Commission will prohibit the sale of existing combinations that violate the modified local radio ownership rule, the local television ownership rule, or the cross media limits. Parties must comply with the new ownership rules in place at the time a transfer of control or assignment application is filed. However, in order to help promote diversity of ownership, the Commission will allow sales of grandfathered combinations to and by certain ''eligible entities.'' The Commission does not agree with commenters that advocate allowing grandfathered combinations to be freely transferable in perpetuity, irrespective of whether the combination complies with our adopted rules. Such an approach would hinder our efforts to promote and ensure competitive markets. Unlike our decision not to require existing station owners to divest stations, here, the threat to competition is not outweighed by countervailing considerations. Buyers will be on notice that ownership combinations must comply at the time of the acquisition of the stations. Thus, they do not have the same expectations as present owners who acquired stations under the current ownership rules. Because of the limited number of broadcast licenses available, station spin-offs that would be required upon sales of stations in a grandfathered group could afford new entrants the opportunity to enter the media marketplace. They could also give smaller station owners already in the market the opportunity to acquire more stations and take advantage of the benefits of combined operations. Because divestitures are not required until a sale of the station groups, owners have sufficient time to minimize any specific complications due to joint operations. Therefore, the Commission rejects the argument that prohibiting transfers of station groups that exceed the new ownership limits would be unacceptably disruptive or would negatively impact the availability of bank financing, as some commenters suggest. Requiring future assignments and transfers to comply with our ownership rules upon sale is consistent with Commission precedent. The prohibition on the transfer of grandfathered stations will not apply to pro-forma changes in ownership or to involuntary changes of ownership due to a death or legal disability of the licensee.

337. *Eligible Transfer.* The Commission is adopting an exception to its prohibition on the transfer of grandfathered combinations in violation of the new rules. This exception applies to grandfathered radio and television combinations that exceed the ownership limits adopted in this R&O, cross-media combinations in at-risk markets, and cross-media combinations in small to medium sized markets that exceed the ownership limits adopted in this R&O. Entities may transfer control of or assign a grandfathered combination to ''eligible entities'' as defined herein.[33] In addition, ''eligible entities'' may sell existing grandfathered combinations without restriction. As the Commission defines in greater detail below, it limits ''eligible entities'' to small business entities, which often include businesses owned by women and minorities.

338. The Commission defines an ''eligible entity'' as an entity that would qualify as a small business consistent with SBA standards for its industry grouping. For example, the SBA small business size standard for radio stations is $6 million or less in annual revenue. For TV stations the limit is $12 million. The Commission will further require that any transaction pursuant to this exception may not result in a new violation of the rules. Control of the eligible entity purchasing the grandfathered combination must meet one of the following control tests. The eligible entity must hold (1) 30% or more of the stock/partnership shares of the corporation/partnership, and more than 50% voting power, (2) 15% or more of the stock/partnership shares of the corporation/partnership, and more than 50% voting power, and no other person or entity controls more than 25% of the outstanding stock, or (3) if the purchasing entity is a publicly traded company, more than 50% of the voting power.

339. The Commission will allow entities that meet the definition of ''eligible entity'' to transfer any existing grandfathered combination generally without restriction. The Commission believes that small businesses that qualify as eligible entities require greater flexibility than do larger entities for the disposition of assets. Restrictions on the sale of assets could disproportionately harm the financial stability of smaller firms compared to that of larger firms, which have additional revenue streams. However, an eligible entity may not transfer a grandfathered combination acquired after the adoption date of this R&O to an entity other than another eligible entity unless it has held the combination for a minimum of three years. The Commission will prohibit eligible entities from granting options to purchase, or rights of first refusal to prevent non-eligible entities from financing an acquisition in exchange for an option to purchase the combination at a later date. Any transaction pursuant to this policy may not result in a new violation of the rules.

340. *Radio LMA Combinations.* The Commission will give licensees two years from the effective date of this R&O to terminate any LMAs that result in a violation of the new ownership limits, or otherwise come into compliance with the new rules. If the licensee sells an existing combination of stations within the two year grace period, it may not sell or assign the LMA to the buyer if the LMA causes the buyer to exceed the ownership limits adopted in this R&O. Parties are prohibited from entering into an LMA or renewing an existing LMA that would cause the broker of the station to exceed the ownership limits.

341. *TV LMA Combinations.* In our Local TV Ownership Report and Order, the Commission grandfathered LMA combinations that were entered into prior to November 5, 1996, through the end of our 2004 biennial review. The Commission does not alter this policy. These LMAs are not affected by the grandfathering policy adopted in the R&O.

342. *TV Temporary Waivers.* A few licensees have been granted temporary waivers of our local TV ownership rule, and some have filed requests for an extension of waivers that are currently pending, or have sought permanent waivers. Any licensee with a temporary waiver, pending waiver request, or waiver extension request must, no later than 60 days after the effective date of this R&O or the date on which the waiver expires, whichever is later, file one of the following: (i) A statement describing how ownership of the subject station complies with the modified local TV ownership rule; or (ii) an application for transfer or assignment of license of those stations necessary to bring the applicant into compliance with the new rules.

343. *Cross-Media Conditional Waivers.* A few licensees have been granted conditional waivers of the previous one-to-a-market rule. Parties that currently have conditional waivers for radio/television combinations must submit a statement to indicate whether the combination they hold: (1) Is located in an at-risk market, (2) is located in a small to medium size market, and (3) is

[33] We are not grandfathering existing combinations of stations that exceed the ownership limits because of an attributable interest in a station pursuant to an LMA or JSA. Existing LMAs and JSAs that result in a combination of stations exceeding the ownership limits must be terminated at the time of the sale or within two years, whichever comes first.

in compliance with the cross-media limits. For the combinations that comply with the cross-media limits adopted herein, the Commission will issue a letter replacing the conditional grant with permanent approval. For any combinations that violate the cross-media limits, the Commission will issue a letter indicating that the combination will continue to be grandfathered until a decision in the 2004 Biennial Review is final. As part of the 2004 Biennial Review, the Commission will review and reevaluate the status of such grandfathered combinations to determine whether they should continue to be grandfathered. On a case-by-case basis, the Commission will consider the competition, diversity, equity, and public interest factors the combinations may raise.

344. *Other Cross-Media Waivers.* The Commission's cross-media limits are founded on the presumption that, by reason of cable carriage, television stations are available throughout the DMA to which they are assigned. The Commission recognizes, however, that this may not be true in every case. Accordingly, those requesting waiver of our cross-media limits may attempt to rebut this presumption in individual cases

345. *Elimination of Flagging and Interim Policy.* In August 1998, the Commission began ''flagging'' public notices of radio station transactions. Under this policy, the Commission flagged proposed transactions that would result in one entity controlling 50% or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70% or more of the advertising revenues in that market.

346. The Commission believes that the changes made today to the market definition will address many of the market concentration concerns that led the Commission to begin flagging radio station transactions. Accordingly, effective upon adoption of this R&O, the Commission will no longer flag radio sales transactions or apply the interim policy procedures adopted in the Local Radio Ownership NPRM in processing them.

347. *Processing of Pending and New Assignment and Transfer of Control Applications.* The processing guidelines below will govern pending and new commercial broadcast applications for the assignment or transfer of control of television and radio authorizations commencing as of the adoption date of this R&O. These guidelines also cover pending and new modification applications that implicate our multiple ownership rules. Applications filed on or after the effective date of this R&O as well as applications that are still pending as of such effective date will be processed under the new multiple ownership rules, including, where applicable, the interim methodology for defining radio markets as adopted in the R&O.

348. *New Application.* The Commission has established a freeze on the filing of all commercial radio and television transfer of control and assignment applications that require the use of FCC Form 314 or 315 (''New Applications''). The Commission will revise application Forms 301, 314 and 315 to reflect the new rules adopted in the R&O. The freeze will be in effect starting with the R&O's adoption date until notice has been published by the Commission in the **Federal Register** that OMB has approved the revised forms. Upon such publication, parties may file New Applications, but only if they demonstrate compliance with the new multiple ownership rules adopted in the R&O, including where applicable, the interim methodology for defining radio markets outside Arbitron metros, or submit a complete and adequate showing that a waiver of the new rules is warranted. The Commission will continue to allow the filing of short-form (FCC Form 316) applications at any time and will process them in due course.

349. *Pending Applications.* Applicants with long-form assignment or transfer of control applications (FCC Form 314 or 315) or with modification applications (FCC Form 301) that are pending as of adoption of the R&O (''Pending Applications'') may amend those applications by submitting new multiple ownership showings to demonstrate compliance with the ownership rules adopted in the R&O, including where applicable, the interim methodology for defining radio markets outside of Arbitron metros, or by submitting a request for waiver of the new rules. Parties may file such amendments once notice has been published by the Commission in the **Federal Register** that OMB has approved the information collection requirements contained in such amendments. Pending Applications that are still pending as of the effective date of the new rules will be processed under the new rules. Applications proposing pro forma assignments and transfers (FCC Form 316) will be processed in the normal course.

350. *Pending Petitions and Objections.* Petitions to deny and informal objections that were submitted to the Commission prior to the adoption date of the R&O and that raise issues unrelated to competition against Pending Applications will be addressed with respect to those issues at the time the Commission acts on such Applications. Petitions and informal objections that were submitted to the Commission prior to the adoption date of the R&O and that contest Pending Applications solely on grounds of competition pursuant to the interim policy will be dismissed as moot.

VI. National Ownership Rules

351. The Commission considers the national TV ownership rule and the dual network rule. The Commission concludes that it should modify the former by raising the cap to 45%, and the Commission retains the latter.

A. National TV Ownership Rule

352. The current national TV ownership rule prohibits any entity from owning televisions stations that in the aggregate reach more than 35% of the country's television households. 47 CFR 73.3555(e)(1). The Commission concludes that the current rule cannot be justified and it raises the cap to 45% and retains the UHF discount.

353. In the *1984 Multiple Ownership Report and Order,* the Commission determined that repealing the national TV ownership rule would not harm competition or diversity. Consistent with the decision in 1984, the Commission finds that restricting national station ownership is not necessary to promote either of those policy objectives. It departs, however, from the 1984 decision to repeal the rule because evidence in the record demonstrates that the national television cap serves localism. The localism rationale for retaining the national television cap was articulated in the *1998 Biennial Review Report.* In that decision the Commission explained that preserving a balance of power between the networks and their affiliates serves local needs and interests by ensuring that affiliates can play a meaningful role in selecting programming suitable for their communities. The Commission continues to believe that to be the case and, consequently, that a national cap is necessary to limit the percentage of television households that a broadcast network may reach through the stations it owns. Although the record supports retention of a national ownership cap, it does not support a cap of 35%. The evidence shows that the cap at the current level is not necessary to preserve the balance of bargaining power between networks and affiliates. The record also indicates that the cap appears to have other drawbacks. Most importantly, the cap restrains some of

the largest group owners—broadcast networks—from serving additional communities with local news and public affairs programming that is of greater quantity and at least equal, if not superior, quality than that of affiliates. Moreover, the Commission believes that a modest relaxation of the cap will help networks compete more effectively with cable and DBS operators and will promote free, over-the-air television by deterring migration of expensive programming to cable networks. Balancing these competing interests, the Commission raises the national cap from 35% to 45%.

354. *Background.* Since 1941, the Commission has limited the national ownership reach of television broadcast stations. The Commission has modified the restriction several times to keep pace with the changing marketplace. In 1984, the Commission repealed the rule, concluding that it was not necessary to promote competition or diversity, and instituted a six-year transitional ownership limit of twelve television stations nationwide. On reconsideration, the Commission affirmed its underlying conclusions, but it eliminated the sunset provision out of a concern that repealing the rule would create a disruptive restructuring of the national broadcasting industry. The Commission retained the twelve station limit and, in addition, prohibited an entity from reaching more than 25% of the country's television households through the stations it owned.

355. In 1996, the Commission adopted the current 35% cap in response to the Congress' directive to raise the cap (from 25% to 35%) and to eliminate the rule that an entity could not own more than twelve stations nationwide. The Commission subsequently affirmed the 35% cap as part of its 1998 biennial review of media ownership regulations. In affirming the cap, the Commission reasoned that it would be premature to institute revisions to the national TV ownership limit before fully observing the effects of changes to the local TV ownership rules and the effects of raising the cap from 25% to 35%. The Commission also concluded that the national TV ownership rule helps promote better service to local communities by preserving the power of affiliates to negotiate with the networks and to make independent programming decisions. In addition, the Commission concluded that the national TV ownership rule facilitates competition in the program production market and in the national advertising market.

356. Several broadcast networks challenged the Commission's decision to retain the national TV ownership rule. In *Fox Television Stations, Inc.* v. *FCC,* 280 F.2d 1027 (D.C. Cir. 2002), the U.S. Court of Appeals for the District of Columbia Circuit found that the Commission's 1998 decision to retain the rule was arbitrary and capricious, and it remanded the rule for further consideration. The court rejected the Commission's ''wait-and-see'' approach on the grounds that it was inconsistent with the Commission's statutory mandate to determine on a biennial basis whether its rules are necessary in the public interest. The court also held that the Commission failed to demonstrate that the national cap advanced competition, diversity, or localism.

357. With respect to competition, in its *1998 Biennial Review Report,* the Commission provided a study and a table showing that large group owners of television stations had acquired additional stations and increased their audience reach since the 1996 Act's passage. The court was not persuaded by the Commission's evidence that large group owners have undue market power, and it agreed with the networks that the figures alone, absent evidence of an adverse effect on the market, were insufficient to support retention of the rule. The court also found unsupported the Commission's statement in the *1998 Biennial Review Report* that the national cap is necessary to safeguard competition in the national advertising or program production markets. The court concluded that the Commission's analysis of the state of competition in the television industry was incomplete and did not satisfy the requirement under section 202(h) to show that the rule is necessary in the public interest as the result of competition.

358. The court held that diversity and localism are valid public interest goals within the context of broadcast regulation and made it clear that the Commission could determine that the national TV ownership rule was necessary in the public interest under section 202(h) if it served either interest. The court, however, ruled that the Commission had not provided sufficient evidence that either one of these goals was served. The court noted that the Commission, in its *1998 Biennial Review Report,* ''mentioned national diversity as a justification for retaining the [national TV ownership rule], but did not elaborate upon the point.'' The court found the Commission's statement did not explain why the rule is necessary to further national diversity. The court also found that the Commission failed to justify its departure in the 1998 decision from its 1984 decision, in which the Commission concluded that the national TV ownership restriction should be phased out after six years because: (1) The rule no longer was necessary for national diversity given the abundance of media outlets and (2) a national rule was irrelevant to local diversity. In addition, the court held that the Commission did not adequately demonstrate that the rule strengthens the bargaining power of independently-owned affiliates and thereby promotes program diversity, particularly in light of its 1984 conclusion that no evidence suggested that stations that are not group-owned responded better to community needs or spent proportionately more revenue on local programming. However, the court acknowledged the Commission's right to reverse course, provided the reversal is supported by a reasoned analysis. Recognizing that sufficient evidence may exist to justify the national TV ownership rule, the court determined that the appropriate remedy was to remand, rather than to vacate, the rule. The Commission now considers whether the current rule can be justified as necessary to promote competition, diversity or localism.

359. *The Current National TV Ownership Rule Cannot Be Justified.* Under section 202(h), the Commission must evaluate whether the national TV ownership rule continues to be ''necessary in the public interest as the result of competition.'' To make this determination, it considers whether the rule serves the public interest by furthering its policy goals of competition, localism, or diversity. The evidence demonstrates that a national TV ownership limit is necessary to promote localism by preserving the bargaining power of affiliates and ensuring their ability to select programming responsive to tastes and needs of their local communities. However, the evidence also demonstrates that the current cap of 35% is not necessary to preserve that balance.

360. *Competition.* In analyzing whether the current rule is necessary to protect competition, the Commission focuses on whether and to what extent market power exists in any relevant market, and what effect the rule has on the existence and exercise of this market power. In the 1984 decision to eliminate the national ownership cap, the Commission limited its competition analysis to the national television advertising market. In this decision, the Commission expands its competition review to include the national program acquisition market. The national cap affects economic concentration in

national markets by limiting the size of group owners of television stations, but does not affect concentration in the local video delivery market, and thus does not raise competition concerns that were discussed in the local ownership rule sections above. The national cap limits the ability of group owners to purchase television stations in individual local markets. The effect of this ownership restriction on station performance in the video delivery market is discussed elsewhere in this summary.

361. Based on its analysis of the relevant markets, the Commission finds that the current rule is not necessary to maintain competition in the three economic markets it examines. As the record indicates, the media marketplace is undergoing unprecedented change. Broadcast stations are subject to competition from cable and DBS, and they face increased competition for viewers, advertising revenues, station network affiliations, and programming. The Commission concludes that the 35% cap is no longer necessary to protect competition in the media marketplace and unnecessarily constrains the organization of, and investment in, free, over-the-air (*i.e.*, non-subscription) broadcast television.

362. *Broadcast competition framework.* The evolution of non-price competition in television has implications for the economic organization of broadcast television networks. Higher channel capacity cable systems and the growth in the number of cable networks, together with the programming options offered by DBS, have intensified the competitive pressure on broadcast television networks to slow the erosion of viewer market share and to build strong network brand identity reflecting program focus, quality and reputation.

363. Two broadcast television network organizational changes, which are viewed as responses to the growth in viewer options, are noteworthy, namely, (1) the extensive backward integration into program supply, and (2) the desire to increase the extent of forward vertical integration through ownership of additional local television stations. Transaction cost economics suggests that such organizational integration induced by increased rivalry within the media industry may improve economic efficiency.

364. Transaction cost economics adopts a contractual approach in understanding the economic organization of firms. The transaction—the exchange of goods or services for money or other goods between parties—is the focal point of economic analysis. Determining the governance structure that minimizes the economic cost of effectuating a particular type of transaction is a central objective of a transaction cost analysis. Transaction cost economics identifies three, discrete governance structures, namely, (1) the market; (2) hybrid contracting; and (3) hierarchy, where transactions are placed under unified ownership in a firm subject to administrative controls and management. Whether it is economically efficient (cost minimizing) to effectuate exchange using market contracting or through hierarchy (vertical integration) depends on certain behavioral assumptions, and key attributes of any given transaction.

365. In general, ordinary market contracting is an efficient governance structure for transactions supported by general purpose assets not dedicated to the specific output demand of a given customer. As asset specificity deepens, market contracting as a governance structure gives way to either hybrid structures or hierarchy (vertical integration) as the least costly to organize transactions. The pervasiveness of asset specificity in the program production industry suggests that complex contracts between broadcast television networks and program suppliers may not be the least costly governance structure for effectuating transactions.

366. Broadcast television networks have a single, strategic focus, namely, the maximization of the number of television viewers that are attracted to mass audience and niche audience programming. This strategic focus is crucial to broadcast television networks, since the sale of audiences to national advertisers provides their only stream of revenue from broadcast operations in contrast to cable networks which may receive both advertiser and subscriber revenue. By contrast, local broadcast television stations pursue a more complex business strategy as licensed broadcast facilities. First, the local station seeks to maximize the size of the audience it attracts within its local television market. If the local station is a network affiliate, then the local station will promote the network's program schedule together with syndicated programming the station may acquire to help fill out its daily program schedule. Second, the local station will also promote its own locally-produced programming, such as news and public affairs programming, that it believes is responsive to issues or viewer preferences in the communities served by the station. Station management may vary the allocation of time devoted to any particular type of programming, including network programming, to respond to emerging preferences or news events in the communities located in its local television market. As the networks have lost viewer market share over the last decade in response to the growth in cable and DBS, the traditional contractual relationship between a television network and a local station affiliate may be a less efficient governance structure. From a transaction cost perspective, television networks view their massive sunk investments in network programming as increasingly risky assets as non-broadcast program options proliferate.

367. With respect to contractual safeguards, the networks have attempted to negotiate substantial penalties for failure to clear a full schedule of network programming. With respect to changes in governance structure, the broadcast television networks have argued for elimination of the national ownership cap, which would permit the networks to substitute hierarchy (vertical integration) for the current contractual relationship with independently-owned station affiliates. Presumably, the networks believe, consistent with transaction cost logic, that conflicts in strategic focus between stations and the network respecting programming decisions can be resolved more efficiently, *i.e.*, at minimal transaction cost, if hierarchy, *i.e.*, forward vertical integration, replaces market contracting as the governance structure.

368. Thus, the Commission's transaction cost analysis suggests that the national ownership cap probably restricts the full transition to the least costly way for organizing transactions between television networks and local television stations, *i.e.*, forward vertical integration, assuming that realization of a network's singular strategic focus on mass or niche audience size is the preferred policy objective. If, however, locally produced programming and ultimate program selection authority are a higher policy priority, then the Commission's transaction cost economic framework identifies the relevant policy trade-off, namely, the incremental social benefit of local programming viewed as a component of the Commission's localism policy goal versus the increased social and private costs of inefficient contracting.

369. *Program Production and Acquisition Market.* Competition in the program production and acquisition market is important because networks and owners of individual television stations compete with each other, as well as with cable television networks, to acquire programming that will

continue to attract viewers to their channels. Although television station owners as a group are relatively significant purchasers of programming, the Commission has no evidence that they exercise market power in the program production market.

370. In considering the effect of the national television cap on competition in the program acquisition market, the Commission first must identify the market participants. The broadcast networks contend that the following categories of firms compete in the program acquisition market: broadcast television networks, individual television stations (and group owners thereof), non-broadcast program networks (*i.e.* cable networks), syndicators, pay-per-view systems, VHS and DVD rental stores. The affiliates counter that major broadcast networks are a discrete sub-market, or ''strategic group,'' within the program purchasing market. The Commission generally agrees with the networks' definition of the relevant market participants, although it excludes video sales and rental stores. It disagrees with the networks' contention that such outlets are clearly a substitute for the delivered video programming of broadcast channels and cable channels. Those channels are the most conventional form of television viewing that can be substituted among by viewers almost instantly. It is possible to analyze the impact on the program acquisition market of relaxing the national television ownership cap by examining company expenditure shares. The following describes estimates of expenditure shares and calculation of a hypothetical HHI. The analysis assumes that the buyers in this market are broadcast networks, broadcast stations, and cable networks.[34] OPP Working Paper 37 (Table 32) provides estimates for the year 2000 of programming expenditures by the Big Four commercial networks and by television stations.

371. The table included in this summary provides program expenditure data for the year 2000 for the Big Four broadcast networks in column 2 and for eight firms that own cable networks in column 4. The eight firms include the top four broadcast networks, the two biggest cable network owners that do not own television stations, and the two companies with the biggest cable network shares that also own television stations. There is also a residual category that includes all other cable network expenditures as ''Other.''

372. Column 3 includes some hypothetical broadcast station owner shares. The Commission does not know exactly how station expenditures are divided up among companies that own television stations. The numbers in this column represent a ''worst case scenario'' of what could happen if the national television cap were eliminated. In 2000 there were 1248 commercial television stations on the air. The Commission knows that the major commercial networks each reach virtually 100% of U.S. television households and that each network has roughly 200 affiliated stations. If stations were distributed evenly across markets, then there would be room for six television station companies each reaching all U.S. television households.

373. However, stations are not evenly distributed across markets. There are 50 Nielsen DMAs with fewer than four commercial stations, but they account for only 4.6% of U.S. television households, so, from the point of view of station programming expenditures, it is reasonable to assume that each of the top four broadcast networks could achieve 100% coverage of U.S. television households. However, there are 120 markets with fewer than six commercial television stations, and those markets account for 19.7% of U.S. television households. So it is reasonable to assume that two additional station groups could grow to 80% coverage. This analysis assumes that television station program expenditures are divided among six firms: the four networks with 100% coverage, and Cox and Hearst, each with 80% coverage. The Commission assumes that expenditures are proportionate to coverage. The resulting expenditure estimates are in column 3. These estimates reflect a level of concentration that is higher than the true level. There are 63 markets with more than six commercial stations in them. Adding up the excess over six stations in each market yields a total of 259 stations. The Commission knows that a single company can own multiple stations in the same market, but it is likely that even with more companies owning two stations in a market that there will still be more than six station owners in some markets.

374. Column 5 contains hypothetical total programming expenditures for the eight firms, aggregating across broadcast network, broadcast station, and cable network categories, and using the hypothetical consolidated television station ownership pattern described above. Column 6 shows market shares and column 7 implements the HHI calculation by squaring and summing the market shares. The resulting ''worst case'' HHI of 1535 is in the moderately concentrated range. Even with the highly unrealistic assumption of a 100% national reach by four companies, and an 80% reach by two companies, these levels of market share provide us with no basis to conclude that the current 35% cap on national television ownership is needed to protect competition in the program acquisition market.

HYPOTHETICAL HHI FOR PROGRAM ACQUISITION

[Data are year 2000 in millions of $]

	Broadcast network	Broadcast station	Cable network	Total	Market share	Market share squared
Cox	0	969.5	139.4	1,108.9	4.37	19.13502
Hearst	0	969.5	530.0	1,499.5	5.92	34.98944
ABC	2,581.75	1,212.0	1,276.7	5,070.45	20.00	400.071
Fox	2,581.75	1,212.0	521.8	4,315.55	17.02	289.812
GE	2,581.75	1,212.0	300.0	4,093.75	16.15	260.7875
Viacom	2,581.75	1,212.0	1,466.4	5,260.15	20.75	430.5666
Time Warner	0	0	2,162.9	2,162.9	8.53	72.79758
Liberty Media	0	0	786.3	786.3	3.10	9.621009
Other	0	0	1,052.5	1,052.5	4.15	17.23806

[34] Our market definition includes pay cable networks as well as pay-per-view networks, but in the absence of data, they are excluded from this analysis

HYPOTHETICAL HHI FOR PROGRAM ACQUISITION—Continued

[Data are year 2000 in millions of $]

	Broadcast network	Broadcast station	Cable network	Total	Market share	Market share squared
Total	10,327	6,787	8,236.0	25,350	100.00	1,535.018

375. *National Advertising Market.* The Commission's focus is not on advertisers, but on the ability of broadcasters to compete for advertising revenues. Broadcast networks compete for advertising dollars by creating national audiences for their programming. If the networks cannot generate national audiences, their ability to compete for advertising revenues will decline, thereby diminishing their ability to invest in innovative programming. As a result, viewers will experience a decrease in programming choices and quality.

376. In its 1984 decision, the Commission determined that elimination of the national cap would not harm competition in the national advertising market. The Commission found that the number of firms in the market would ensure continued vigorous competition in that market. In the NPRM, the Commission sought information on whether the conclusion reached in 1984 continues to be valid. To analyze competition in this market, the Commission sought comment on the firms that compete in the national television advertising market, including the extent to which national spot advertisements and/or syndicated programming are fungible with network television advertising from the perspective of advertisers.[35] The national television advertising market brings together those advertisers wishing to reach a national audience with television networks that provide national exposure. Broadcast television networks are the leading suppliers of national television advertising.

377. The affiliates claim the record demonstrates that national spot advertising is competitive with national advertising. National advertisers can purchase advertising on a collection of local television stations that can approximate a national advertisement on a single network. Local television stations sell national spot advertising through advertising agencies, which aggregate the available advertising on local stations for national spot buyers. The affiliates contend that when demand for national advertising on a particular network show exceeds the available supply of national network advertising time, advertisers turn to the national spot advertising market to reach viewers. Television stations rely in part on the national spot advertising market for a portion of their advertising revenue. The affiliates argue that if the ownership cap is raised, the broadcast networks will increase their ownership of television stations and decrease the national spot availabilities to such an extent that the viability of the national spot market will be impaired. Specifically, the affiliates contend that a network-owned station will not compete against its network for national (spot) advertising revenue. The result, according to the affiliates, is that competition in the national advertising market will be diminished by the decreased viability of national spot advertising as a substitute for network advertising. The affiliates assert that the resulting loss of revenue to local stations will harm their ability to compete with other delivered video providers.

378. *Discussion.* The Commission agrees that a strong national spot advertisement market is an important component of the financial stability and competitiveness of television station owners. The Commission finds, however, that the increase in the cap from 25% to 35% has not harmed national spot advertising revenues. Its analysis of advertising revenue data indicates that despite increases in ownership of stations by CBS, NBC and Fox since 1996, there has been no diminution in the national spot advertising market that can be reliably associated with an increase in network station ownership. With the exception of 2001, national spot advertising has experienced a relatively consistent growth.

379. Although the Commission agrees with the affiliates that network-owned stations have less incentive to compete directly with an affiliated broadcast network in the national advertising markets, it cannot agree that such competition in fact would not occur. If national advertisers are willing to pay a higher per-spot price to network-owned stations than are local advertisers, network-owned stations might well accept the higher priced advertising. Thus, the profit-maximizing behavior of the network-owned stations might well serve as a substitute for national advertisers seeking to purchase national spot advertising. Such a response by network-owned stations would maintain the viability of national spot advertising as an option for national advertising regardless of the level of the national television cap. Moreover, even if the top four networks were to acquire additional local stations and declined to use the national spot advertising availabilities to compete with their own network's advertising availabilities, there is every reason to think the network-owned stations would seek to take national advertising dollars away from other broadcast networks. That is, even if an NBC-owned station sought not to compete with the NBC network for advertising dollars, the NBC-owned stations have incentives to compete in the national spot market for advertising dollars that might otherwise go to the CBS, ABC, and Fox networks. Consequently, the Commission cannot say that the national cap is necessary to protect competition in the national advertising market.

380. *Innovation.* In the NPRM, the Commission asked whether the national ownership cap promotes or hinders innovation in the media marketplace. Affiliates argue that non-network owners encourage innovation because affiliates provide a competitive outlet for innovative programming. The affiliates provide nine examples of innovation by non-network group owners, such as satellite newsgathering encouraged by affiliates to improve upon network-delivered news; the development of the local newsmagazine format; all-news cable channels developed for cable carriage; digital TV experiments such as the multicasting by several affiliates of the NCAA tournament; the delivery of local news in HDTV format; and the creation of iBlast, a joint venture between affiliates and an outside firm to develop new uses for digital spectrum.

381. Taking an opposing view, the networks contend that the cap limits networks' investment in innovative

[35] National spot advertising time is sold by stations to national advertisers, which aggregate national or regional coverage by purchasing advertising spots from stations in multiple markets. Syndication refers to advertisements sold in syndicated programs.

programming by ''inhibiting economic efficiencies'' that come with a larger number of owned and operated stations. As evidence, the networks refer to a study concluding that, by inhibiting the potential economic efficiencies available to group owners, the rule artificially raises the cost of operating television stations and limits the return that group owners can realize on their programming investments. The study argues that the rule drives group owners to direct more of their resources away from free television and toward alternative means of distributing programming content, such as subscription-based cable channels.

382. *Discussion.* The current national ownership cap appears to encourage innovation in broadcast television by preserving a number of separately-owned station groups, including non-network owned station groups. The current number of station group owners has led to innovation in ways that benefit the public. Those developments include the creation of local all-news channels in partnership with local cable companies, the implementation of program formats such as local newsmagazines, and, importantly, experimentation with the spectrum allocated to local broadcasters for digital television. The transition to digital television represents a critical evolutionary step in broadcast television. The Commission is committed to ensuring the rapid completion of that transition in a way that delivers the greatest possible benefits to the viewing public. It believes that the broadcast industry is more likely to rapidly address the technical and marketplace issues associated with digital television if there are a variety of group owners exploring ways to use the spectrum. The record shows that non-network owners of television stations are actively exploring different ways of using digital spectrum. It is also important to have group owners with potentially different economic incentives in this area examining transition mechanisms to digital television. Because of networks' ongoing investment in programming, it is possible that networks may have incentives to use digital spectrum differently from affiliates. The Fox television network, for instance, has indicated its interest in using the spectrum of its owned stations as well as its affiliates for future services. Therefore, the Commission concludes that a national television cap is necessary to preserve a number of separately-owned television station groups, including non-network groups, that will increase the types of digital transition experiments and ultimately facilitate a rapid and efficient transition to digital broadcast television.

383. *Diversity.* The *1984 Multiple Ownership Report and Order* concluded that the local community is the relevant market for evaluating viewpoint diversity and that, therefore, the national TV ownership rule is not needed to promote viewpoint diversity. The *1984 Multiple Ownership Report and Order* also stated that the national market is not relevant for evaluating viewpoint diversity, but even if it were, the proliferation of media outlets renders the national ownership restrictions unnecessary. In the *1998 Biennial Review Report*, the Commission did not analyze the rule's effects on viewpoint diversity and merely stated, without evidentiary support, that the rule promotes diversity of programming. In remanding the national TV ownership rule, the court in *Fox Television* found that the Commission had failed to support its 1998 conclusion that the rule is necessary to strengthen affiliates' bargaining power and had neglected to address its 1984 determination that the national market is not the relevant geographic area to consider when evaluating diversity. The Commission addresses the issue of affiliates' bargaining power elsewhere in this summary and addresses diversity here.

384. In the NPRM, the Commission observed that the national TV ownership rule does not appear to be relevant to the goal of promoting viewpoint diversity because people gather news and information from sources available in their local market and that the relevant geographic market for viewpoint sources is local, not national. It also noted that the viewpoints aired by television stations in one city do not seem to have a meaningful impact on the viewpoints available in other cities. Commenters do not provide evidence that persuades the Commission to alter those views, and it affirms the 1984 conclusion that the national TV ownership rule is not necessary to promote diversity.

385. *Discussion.* The Commission concludes that the national television cap is not necessary to promote viewpoint diversity. Americans use media outlets available in their local communities as sources of information. The national television cap, by contrast, ensures a larger total number of station owners nationwide, but it has no meaningful impact on viewpoint diversity within local markets. It is possible, of course, that the replacement of one station owner by another could in fact reduce the number of independently-owned television stations in that market. If the acquiring firm already owned one station in that market and the seller was selling its only station in that market, there would be one less independently-owned station in that market. The impact of such a transaction on viewpoint diversity would be accounted for under the diversity component of the Commission's local rules. Therefore, the Commission affirms its 1984 decision that the national television ownership limit is not necessary to promote viewpoint diversity. It also affirms its decision that the market for viewpoint diversity is local, not national. And it reiterates its 1984 statement that even if the national market were the relevant area to consider, the proliferation of media outlets nationwide renders the current rule unnecessary.

386. Although proponents of the current rule assert that the increased uniformity imposed by the networks' national distribution agenda limits the number of viewpoints available to the public, the Commission does not find convincing evidence in the record indicating that raising the current national TV ownership limit would harm viewpoint diversity. Affiliates assert that maintaining a diversity of ownership across local markets is beneficial because viewers may become aware of investigative news stories presented by stations in other markets, particularly those of strong stations. They argue that ''this type of cross-fertilization is less likely to occur in the absence of the national TV ownership rule.'' For this cross-fertilization to be a plausible scenario, the following minimum conditions must occur: (1) The national cap prevents a station from being acquired by a broadcast network; (2) the non-acquired station produces content that by some measure is meaningfully different (and significant from a viewpoint perspective) from what the network-owned station would have aired; and (3) the airing of that different content becomes known to consumers in other localities. The national cap cannot be justified by reference to such a hypothetical scenario as this.

387. Commenters discussing types of diversity other than viewpoint diversity do not provide an evidentiary basis for retaining the current cap. The *1998 Biennial Review Report* stated that ''[i]ndependent ownership of stations also increases the diversity of programming by providing an outlet for non-network programming.'' In this R&O, however, the Commission has concluded that it can and should rely on

the marketplace, rather than regulation, to foster program diversity. Further, the record in this proceeding does not contain evidence that affiliates air programming that is more diverse than programming aired by network-owned stations. Therefore, the Commission cannot affirm its earlier determination regarding program diversity, and it does not find that the cap is necessary to foster program diversity.

388. *Localism.* The Commission's decision in the *1984 Multiple Ownership Report and Order* did not address whether the national TV ownership rule advances its goal of localism. In the *1998 Biennial Review Report*, however, the Commission did address its localism goal, declining to modify the national TV ownership restriction in part because affiliates ''play a valuable counterbalancing role'' to network programming decisions by exercising their independent programming discretion regarding what programs best serve the needs and interests of their local communities. In *Fox Television*, the court stated that, although the Commission had failed to present evidence that the cap in fact promoted localism, localism was a legitimate basis for imposing a national ownership cap.

389. Based on its analysis of the extensive record in this proceeding, the Commission concludes that a national television ownership limit is necessary to promote localism on broadcast television. The evidence suggests, however, that the current 35% cap is not needed to protect localism, and may in fact be hindering public benefits that are expected to follow from an increase in the cap. The Commission concludes that a national cap of 45% fairly balances the competing public interest values affected by this rule. It recognizes that its decision to retain a national ownership cap is contrary to its conclusion in 1984. The Commission reaches this different conclusion principally because it finds that a cap is necessary to protect localism by preserving a balance of power between networks and affiliates, a policy objective that was not considered in the 1984 decision. In this section, the Commission details the localism analysis, and then discusses the modified rule.

390. *Whether a National Cap Promotes Localism.* The Commission examines the effect of a national television cap on the economic incentives for locally responsive programming by television stations. It also considers evidence that a national cap results in behavior by network-affiliated stations that is responsive to the needs and tastes of a station's local community.

391. *Economic Incentives for Localism.* The affiliates contend that the current national cap is needed to preserve their bargaining power with their networks. The affiliates explain that limiting the national audience that networks can reach through their owned stations promotes a balance of power between networks and their affiliates. The affiliates also claim that the cap is necessary to counteract the networks' strong financial incentive to promote the widest distribution across the nation of network programming irrespective of the tastes of one or more particular local cities. The widest possible distribution of programming, according to the affiliates, increases viewership of network programming, which maximizes network advertising revenues. According to the affiliates, maximum national exposure of programming also improves the likelihood that the program owner will realize additional revenues in the program syndication market. The affiliates contend that as broadcast networks have ownership stakes in a larger percentage of their prime time programming, their incentive to create programs with syndication value—and their incentive to stifle local preemption—increases.

392. The affiliates argue that the incentive of independently-owned affiliates, in contrast to network-owned stations, is to make programming decisions that are more closely aligned with the needs and tastes of their communities of license. A network derives its income from the programming that the network produces (and the syndication revenue the programs might generate) as well as from its local stations. A local station maximizes its income by providing programming desired by its local community irrespective of national programming preferences. Therefore, the programming interests are not always the same.

393. *Evidence of Localism by Affiliate.* The affiliates contend that the national cap is needed to preserve a body of network affiliates not owned by the network that can influence network programming so that it is more suited to the tastes and needs of the affiliates' communities. In support of this argument, the affiliates submitted several examples of the influence independent affiliates can have on network programming:

- When NBC aired a special edition of *Fear Factor*, featuring Playboy bunnies, during halftime of the Superbowl (airing on Fox), affiliates objected to the network promos, which ran during all hours of the day, and included tag lines such as ''who needs football when we've got bunnies?''
- When NBC began a trial program to accept liquor advertisements, so many affiliates opted out of airing the ads due to local concerns that NBC dropped the program.
- CBS had scheduled the *Victoria's Secret Fashion Show* for 8 p.m. The affiliates objected to the early showing and urged that the program be moved to the 10 p.m. time slot. In response, CBS moved the show to 9 P.M., although some affiliates nonetheless preempted the show as having inappropriate content for their service areas.
- Promotional ads for NBC's *Dog Eat Dog* included shots of nude contestants promoting the program's challenges such as ''strip football'' and ''strip golf.'' When affiliates objected to the explicitness of the promos and their airing at all times of day, NBC agreed to eliminate strip stunts from future episodes.
- *NYPD Blue* was originally designed to include more nudity and graphic language than is currently aired, but after ABC affiliates objected, the amount of nudity and graphic language in the show was reduced. Even so, a number of affiliates initially refused to carry the show.
- Affiliates expressed concerns about the violent and mature content of the series *Kingpin*, which concerns the life of a drug lord. In response, NBC agreed to allow affiliates to review episodes in advance to ensure the content is appropriate for their local communities.
- In 2002, CBS worked with affiliates to reformat its morning news program, *The Early Show.* One key issue of affiliate concern was whether they would be permitted to provide local news content during the two-hour time block used by the program, as they had with CBS' prior show, *CBS This Morning.* Although some local affiliates are permitted to use the blended format with *The Early Show*, CBS has refused to permit other affiliates to move to the blended local-network news program format.
- NBC affiliates objected to NBC's intention to broadcast the 2002 Olympic Games live, which would have preempted the evening news on the west coast. After initially resisting the requests of the west coast affiliates to air a delayed broadcast during prime time, the network conducted a viewer survey. Results of the survey, however, substantiated the affiliates' assertion that west coast viewers preferred to watch the games during prime time, and the networks complied.

• NBC affiliates initially objected to NBC's decision to require live broadcasting of the XFL games. On the west coast, games substantially preempted both the affiliates' early evening local news and the national network news. In other parts of the country, overruns of the game preempted the late night local news. When affiliates raised similar concerns about Arena Football, claiming that overruns would preempt the 6 p.m. local newscasts on the east coast, the network agreed to work with the sports league to ensure the games do not run over.

• KYTV in Springfield, Missouri, preempted a January 6, 2003 episode of NBC's *Fear Factor*, which airs at 7 p.m. Central Time, that involved contestants eating horse rectums because it found the material inappropriate for its community.

394. Separate from this ''collective negotiation'' type of localism, parties also submitted evidence regarding the frequency of station-by-station preemptions for affiliates versus network-owned stations. Preemptions are instances in which local stations, whether they are owned and operated by networks or independently owned but affiliated with these networks, choose to air a program other than the program the network distributes to the station. Affiliates described numerous examples of individual station preemptions of network programming. WRAZ–TV in Raleigh, North Carolina, chose to stop airing *Temptation Island* after Fox revealed that one of the participating couples had a child because ''WRAZ will not support a program that could potentially break up the parents of a young child.'' WFAA–TV in Dallas did not carry the entire first season of *NYPD Blue* because it found the material and language inappropriate for programming scheduled to air at 9 p.m. in that community. KNDX in Bismarck, N.D., refused to clear the Fox network's broadcast of the movie *Scream*, which is targeted to young viewers, because of its graphic and disturbing portrayal of teenage murders. WFAA–TV, an ABC affiliate in Dallas, was denied permission to preempt *Monday Night Football's* half-time show on November 12, 2001 to cover an American Airlines plane crash. American Airlines is based in Dallas. According to the affiliates, ABC permitted two O&Os to preempt the same half-time show to air news covering the same crash. (In this R&O, the Commission uses the terms ''network-owned'' stations and ''O&O'' (*i.e.* owned and operated) stations interchangeably.) CBS did not permit WTSP–TV in Tampa Bay to air a debate between Jeb Bush and Bill McBride during the Florida gubernatorial debate because the affiliate would have preempted the season premiere of *48 Hours.* WTSP–TV was a co-sponsor of the debate. A Raleigh North Carolina Fox affiliate refused to air *Who Wants to Marry a Multimillionaire?* because it ''felt it was demeaning to women and made a mockery of the institution of marriage.'' WANE–TV, the Fort Wayne, Indiana CBS affiliate, sought to preempt network programming to air a half-hour, early morning local news program geared toward the agricultural community. Although this was initially denied, CBS ultimately relented and granted permission.

395. The networks submitted data comparing prime time preemption rates of network-owned stations versus affiliates for 2001. That data showed that affiliates preempted an average of 9.5 hours of prime time programming per year compared with 6.8 hours per year for network-owned stations. The networks claim that this difference is inconsequential and does not justify retention of a national ownership cap. Affiliates assert that even this hand-picked data by networks confirms that affiliates preempt more than network-owned stations and that a national cap is needed to protect localism.

396. Affiliates seek to explain low preemption rates by arguing that networks have increasingly restricted preemption through their network-affiliate contracts. Affiliates complain that they are subject to preemption caps involving financial penalties or loss of affiliation if they exceed the number of network-authorized preemptions, while affiliates' local programs are often ''preempted'' by network overruns (*e.g.*, network sports overrunning local news). According to the affiliates, Fox allows only two preemptions per year, and NBC allows only five hours of prime-time preemptions per year. Affiliates that exceed their allowable preemption ''basket'' may be subject to financial penalties or even loss of affiliation. Thus, while a majority of affiliates did not exceed their permitted preemptions, affiliates argue that there are good reasons for that result. In addition, affiliates note that they often maintain a ''cushion'' of unused preemption time in case it is needed, requiring them to exercise discretion in ''spending'' their preemption time during the year to avoid contractual financial penalties associated with excessive preemption.

397. *Discussion.* The Commission finds that a national television ownership cap is necessary to promote localism. The evidence demonstrates both that network affiliates have economic incentives more oriented towards localism than do network-owned stations, and that affiliates act on those incentives in ways that result in networks delivering programming more responsive to their local communities (in the judgment of the affiliate) than they otherwise would. In order for affiliates to continue to serve local community tastes and needs in this way, a national cap is needed to preserve a body of independently-owned affiliates. The two ways in which affiliates can promote localism are by collective negotiation to influence the programming that the networks provide and by preemption by an individual station owner to provide programming better suited to its community.

398. The record shows that network-owned stations and affiliates have different economic incentives regarding the programming aired by local stations. The Commission agrees with the affiliates that they have an economic incentive to target their local audience by offering programs suited to local tastes. In so doing, affiliates have an incentive to tailor their programming schedule to meet local preferences. Localism is fostered by the affiliates' efforts to promote their own economic interest of maximizing the value of their stations by offering programming that local viewers will prefer to watch, even if the programming replaces the network's nationally scheduled programming.

399. The 2001 preemption data comparing network and affiliate preemption rates also supports retention of a national cap. The record shows that in 2001, affiliates preempted 9.5 hours per year of prime time programming versus 6.8 hours per year for network-owned stations. This data bolsters the Commission's conclusion that affiliates act on their economic incentives to preempt network programming with measurably greater frequency than do network-owned stations. Although the Commission agrees with the networks that the total number of hours preempted by both types of station owners in this comparison is relatively small, these data are for the prime time viewing period, when the vast majority of television viewing occurs. In the Commission's view, the practical effect of prime time preemption is far greater than that of preemption during other dayparts.

400. The Commission does not believe that network-owned stations provide the same localism value that independently-owned affiliates do. The networks argue that they listen to the management of network-owned stations

as well as to the management of affiliates. They claim that managers of O&Os participate during the networks' program development process and provide more credible input than the management of affiliate stations. They also assert that affiliates have an ''inherent economic conflict'' with the network regarding the distribution of profits, have no influence in the development of new programs, and learn of the new programs at the same time as do advertisers.

401. The Commission agrees that affiliates have an inherent economic conflict with networks. However, the Commission believes that affiliates' economic incentives actually help explain why affiliates regularly raise programming concerns with networks and why affiliates preempt more network programming, on average, than do network-owned stations. In the Commission's view, affiliates' economic incentives to maximize local viewership works to promote localism. In addition, the networks' claim of minimal affiliate influence over programming is overcome by evidence that affiliates regularly raise programming concerns with networks and frequently succeed in altering network programming in ways that protect local interests. These numerous instances of the collective influence brought to bear by affiliates on network programming decisions represent a powerful force for the protection of local viewing interests. They represent empirical evidence that affiliates collectively serve as an important counterweight to network programming decisions by influencing networks to deliver programming responsive to local tastes. In sum, the Commission believes that this affiliate/network dynamic is beneficial to viewers and should be preserved. It concludes that eliminating the cap altogether would shift the balance of power with respect to programming decisions toward the national broadcast networks in a way that would disserve its localism policy.

402. *Appropriate Level of the Cap.* The Commission has found that a national television ownership cap continues to be necessary to promote localism because the record demonstrates that affiliates affect network programming in ways that respond to viewer preferences in affiliates' local communities. In this section, the Commission examines the specific effects of the current 35% cap and whether this particular level achieves its localism objectives.

403. *Preemptions.* Affiliates argue that the networks have limited their ability to preempt network programming in order to provide programming more geared to local needs and interests, and that these limits have become more formidable as the networks have extended their ownership of stations. Affiliates argue that an increase in the national cap reduces affiliates' ability to resist network pressure not to preempt. The affiliates point to a decline in affiliate preemptions following the 1996 increase in the cap from 25% to 35%. The affiliates' submission indicates that, with respect to all dayparts (as opposed to prime time-only), affiliates preempted, on average, 48 hours per year between 1991 to 1995 and 36 hours per year between 1996 to 2001. It also shows that, in the year 1995, the year before the cap was increased to 35%, there were, on average, 46 hours of programming preempted, but by the year 2001 the average had declined to 33 hours.

404. The networks offer two responses to the affiliates' data. First, the networks submit preemption data that, according to the networks, shows that the 35% cap has no effect on bargaining power between networks and affiliates. The networks contend that if higher levels of network station ownership actually increased networks' leverage over their affiliates, affiliates of the largest network station owners would be expected to preempt less (because of their diminished bargaining power) than affiliates of a network that had significantly less station ownership. The networks' data shows that affiliates of the largest network-owners (CBS and Fox, at 39% and 38% national reach respectively) preempt to an equal or greater extent than do affiliates of ABC, with a national reach of 23%. The networks assert that this data proves that the 35% cap has no effect on bargaining leverage between networks and affiliates.[36]

405. Second, the networks argue that affiliate preemptions often are not for programming that is of greater public interest, but for syndicated programs. The data Disney submits suggests that more affiliates preempted ABC programming in favor of syndicated programming than for local specials. In addition, Disney states that very few half hours of affiliate prime-time preemptions were for news, political, or public affairs programming. Disney's data, however, is countered by the affiliates' survey of affiliated stations, in which respondents reported preempting network programming for: local breaking news (83% of respondents); local news (71% of respondents); local emergencies (70% of respondents); local political programming (74% of respondents); local sports (75% of respondents); religious programming (47% of respondents); ''other'' programming (*e.g.*, parades, telethons, syndicated programming, movies) (34% of respondents).

406. Apart from contractual restrictions, a majority of affiliates responding to an affiliate survey—68%—report that they have ''experienced pressure from [their] network to not preempt programming.'' The record provides several instances of increased network resistance when affiliates attempted to air programs deemed to be of greater local interest than the network programming. For example, Belo's ABC affiliate in Dallas, the headquarters of American Airlines failed to get the network's permission to preempt the November 12, 2001, Monday Night Football halftime show for local news updates on the American Airlines jet crash in New York that morning.

407. *Discussion.* Although the Commission has concluded that a national cap is needed to balance power between networks and affiliates, the record suggests that maintaining the cap at 35% is not necessary to preserve the balance of bargaining power between networks and affiliates. In reaching this conclusion, the Commission relies principally on the evidence showing that the largest network station owners possess no greater bargaining power—as measured by prime time preemptions—than the smallest network station owner. This evidence is persuasive because it directly compares the extent to which different levels of network ownership of stations actually affect the level of preemption by those networks' affiliates. Implicit in this analysis is an assumption that that data, although not a perfect proxy, is a reliable indicator of relative bargaining power between networks and affiliates. Preemption of network programming by an affiliate has negative consequences to the network, and networks by all accounts seek to avoid preemption by affiliates. So the

[36] In a motion filed May 28, 2003, NAB/NASA asked the Commission to disregard certain portions of network submissions concerning preemption and local news quantity because the networks have not provided the data underlying those submissions. Alternatively, NAB/NASA asked the Commission to infer that the underlying data would not favor the networks' positions on preemption and news quantity of O&O versus affiliate stations. The portions of the network filings the Commission is asked to disregard include, *inter alia,* EI Study G and Disney Exhibit G, relating to preemptions, and EI Study H, relating to local news quantity. Fox opposed the motion on May 29, 2003. The Commission will afford the record evidence the appropriate weight in light of all circumstances, including the extent to which it believes the underlying data is necessary to make an informed decision about the showing.

ability of an affiliate to preempt in the face of networks' incentives to prevent preemption appears to be a reasonable measure of relative bargaining power between networks and affiliates.

408. The Commission is not persuaded by the affiliates' argument that the 35% cap is needed to protect localism because the most recent national cap increase resulted in fewer affiliate preemptions. The principal deficiency in this argument is that it does not control for other plausible causes of the decline in affiliate preemptions. Although the affiliates suggest that the 1996 increase in the national cap reduced affiliates' bargaining power, the affiliates themselves identify other factors occurring in the same timeframe as the national cap increase that they claim have further eroded affiliate bargaining power. The affiliates assert that the Commission's repeal of its financial interest and syndication rules in the early 1990s gave networks an additional financial incentive (in addition to their incentive to avoid preemption to maximize advertising rates) to discourage affiliate preemption. The affiliates contend that vertical integration, including program ownership and syndication by broadcast networks and the trend toward ''repurposing'' of network programming on affiliated non-broadcast channels have helped increase the networks' leverage over affiliates. To the extent these additional factors actually enhance network bargaining leverage, they undercut the affiliates' argument that it was specifically the 1996 increase in the national cap that caused affiliates to reduce their preemption of network programming.

409. A more accurate assessment of the impact of the 1996 national cap increase on network-affiliate bargaining leverage could be made if affiliate preemption rates from 1991 through 2001 could be compared to the preemption rates of network-owned stations during that same period. If preemption rates on network-owned stations were similar to affiliate preemption rates over that same period, there might be shown a more certain—and completely different—explanation for the decline. Networks might well have persuaded the Commission that the uniform decline in preemptions by O&Os and affiliates was caused by some plausible reason unrelated to the change in the national cap. On the other hand, if the data had shown preemption rates on network-owned stations remaining steady while affiliate preemptions declined sharply after 1996, then the affiliates' explanation for the decline (*i.e.* increase in the national cap) would carry more weight.

410. The foregoing analysis of preemption data excludes consideration of the content of the programming substituted by the local station for the network programming. Other than its interest in promoting market structures that encourage local news production, the Commission seeks to avoid resting broadcast ownership policies on subjective judgments about the public policy value of different types of locally-substituted programming. The Commission agrees with the affiliates that it is enough, for purposes of assessing stations' responsiveness to local communities, that they preempted network programming. The judgment of when to preempt and what to substitute are uniquely within the judgment—and responsibility—of the station.

411. Thus, the Commission reaffirms its conclusion, in the *1998 Biennial Review Report*, that independently-owned affiliates play a valuable role by ''counterbalancing'' the networks' economic incentive to broadcast their own programming ''because they have the right * * * to air instead'' programming more responsive to local concerns. But, the evidence suggests that the current limit of 35% is overly restrictive and that the cap may safely be raised and the benefits of wider network station ownership achieved without disturbing either this balance or affiliates' ability to preempt network programming.

412. *Other Effects of the Current 35% Cap.* The Commission, thus far in the R&O, examined two measures of localism—collective affiliate influence on network programming and specific preemption levels by affiliates versus network-owned stations. In this section it considers a third measure—the effect of the national cap on the quantity and quality of local news and public affairs programming. The Commission examines this area because local news and public affairs programming can play an important role in citizen participation in local and state government affairs. Thus it seeks market structures among broadcasters that encourage stations to produce local news and public affairs programming and thereby contribute to an informed citizenry.

413. In its 1984 decision, the Commission compared the quality and diversity of programming by stations owned by group owners—both network and non-network owners—with that of singly owned stations. It concluded that there was no evidence that group owners provided less or lower quality news and public affairs programming than single owners. The *Fox* court criticized the Commission for failing to explain in the *1998 Biennial Review Report* why it departed from this conclusion. With the decline in the number of individually owned stations, an increase has occurred in the number of stations sharing common ownership. The Commission sought in this biennial review to understand whether the national TV ownership rule, by preserving a class of affiliates, affects localism by comparing the local news and public affairs programming of network owned and operated stations to that of non-network owned affiliates. It discusses the evidence and its conclusions in this summary.

414. *Quantity of local news and public affairs programming.* In the NPRM, the Commission requested evidence regarding any clear relationship between the ownership of stations and the quantity and quality of local news and public affairs programming produced by those stations. A study conducted by Commission staff, MOWG Study No. 7, concluded that network-owned stations produced more local news and public affairs programming than affiliates and received local news excellence awards more frequently than affiliates. Responding to that study, the affiliates submitted a study indicating that many of the results of MOWG Study No. 7 changed when data pertaining to stations belonging to Fox were not used. Another study, submitted by Dr. Michael Baumann of Economists Inc., demonstrates that no defensible reason exists for deleting the Fox station data. Dr. Baumann's study provides analysis purporting to demonstrate that network-owned stations, on average, produce more local news than do affiliates across all-sized markets, with an even greater difference in the amount of news offered by network-owned stations in smaller markets.

415. The results of MOWG Study No. 7 show that network-owned stations air 23% more local news and public affairs programming per week than affiliates (22.8 hours versus 18.5 hours). Only MOWG Study No. 7 examined newspaper-owned affiliates separately from the other affiliates. It showed that, on average, newspaper-owned affiliates provided more hours per week of local news and public affairs (about 22 hours) than did the other affiliates (approximately 15 hours). The study also showed that network O&Os provided the most local news of all (almost 23 hours).

416. In response to MOWG Study No. 7, the affiliates conducted a study that revealed no statistically significant

difference between hours of local news aired by affiliates and O&O stations. Unlike MOWG Study No. 7, the affiliates' study included data on ABC, NBC and CBS, but did not include data on Fox Television. Disney argues that there is no policy-based rationale for excluding Fox stations. Using the affiliates' data, but accounting for all four of the networks, Dr. Baumann determined that network-owned stations on average provide more local news—about 4.2 hours per week—than do affiliates in all markets. In markets outside the top 25 markets, network-owned stations provide almost eight more hours of local news each week than affiliates do. Inside the top 25 markets, Disney agrees with the affiliates' study results that the difference between network-owned stations and affiliates was not statistically significant.

417. In Dr. Baumann's study, a third data set was used in analyzing local news and public affairs programming on network-owned and affiliate stations. Results, however, were similar to the first two studies: network-owned stations produce about 6.4 more hours per week of local news than affiliates in all markets tested. As with the modified affiliate data, in markets outside the top 25 markets, network-owned stations provide about 9 hours additional local news each week. This study agrees with the affiliates' results that the difference between network-owned stations and affiliate stations in news provided was not statistically significant in markets inside the top 25 markets.

418. *Local News Quality.* Although the Commission does not regulate programming quality, it has attempted to strengthen the ability of local stations to serve their communities through news and public affairs programming. In the NPRM, it sought to understand whether the national TV ownership rule may have the effect of increasing or decreasing the quantity and/or quality of local news and public affairs programming. Studies discussing programming quality were submitted in the record.

419. MOWG Study No. 7, for example, finds that network O&O stations win more awards for local news programming than non-O&O affiliates. In evaluating the quality of local news programming, the authors used three measures: (1) Ratings received for local evening news; (2) awards from the Radio and Television News Directors Association (RTNDA); and (3) the local television recipients of the Silver Baton of the A.I. Dupont Awards. The ratings of network-owned stations and affiliates were virtually identical during the period tested. However, with respect to the receipt of RTNDA awards for news excellence, network-owned stations received those awards at a rate of 126% of the national average and affiliates received them at 96% of the national average. The study found, with respect to the DuPont awards, network-owned stations received awards at 337% of the national average, while affiliates received awards at 77% of the national average.

420. The results of a second study, however, indicate that quality differences between network-owned stations and affiliates are virtually nonexistent. In comparing the record of network-owned stations and affiliates' news operations, a study by Economists Inc. on behalf of the networks focused on the RTNDA awards, one of the awards used in MOWG Study No. 7. It reasoned that, because a larger number of RTNDA awards are given out each year, they are more likely to offer a better measure of news quality than the DuPont awards. The study examined the RTNDA awards from two perspectives, first analyzing the awards bestowed in the top 10 markets, and then the top 50 markets. The study concludes that, in either setting, ''there is no discernible difference between network-owned stations and affiliates with respect to RTNDA awards.'' Neither this study nor MOWG Study No. 7 suggests that affiliates provide higher quality local news and public affairs programming than network-owned stations. Thus, the studies provide evidence that a national limit of 35% is not necessary to preserve a class of affiliates in order to maintain high quality local news and public programming.

421. One commenter argues that the number of awards received by stations is not a reliable measure of quality because the awards are not equally available to both network stations and affiliates. It argues that stations must apply for awards and pay entry fees to be considered. Moreover, it argues, networks generally have promotion and publicity departments that handle award entries, while local stations do not. While the Commission agrees that factors unrelated to quality programming can affect the number of awards received, there is no evidence that these factors had any measurable effect on the conclusion that network-owned stations' news programming is at least equivalent in quality to that of affiliates.

422. A third study finds that smaller station groups tend to produce higher quality newscasts than larger groups. In that study, affiliates generally had higher quality scores than network-owned stations. Sixteen percent of affiliate stations earned ''A's'' in programming quality versus 11% of network-owned stations. According to the study's survey results, affiliates generally demonstrate somewhat more enterprise, cite more sources, tend to be more local, and are more likely to air stories that affect the community. Network-owned stations, on the other hand, are more likely to air national stories with no local connection, although they tend to air more points of view and score better in finding the larger implications of a story. The study also shows that only 22% of stations owned by the 25 largest group owners earned ''A'' grades for quality, compared with 48% of midsize and small groups. It acknowledges, however, that ratings for local news programming are growing more rapidly at larger group-owned stations than at smaller ones. Results of this study suggest that being a network-owned station does not ''improve the kind of local news that citizens see.''

423. A critique prepared by Economists Inc. asserts that the principal findings of this third study are statistically insignificant. In addition, they contend the study relies on subjective measures of newscast quality, and does not account for other factors affecting news quality, such as geographic differences. In the critique, Economists Inc. states that the underlying data will not be available for analysis and review within the time frame of this proceeding; thus only limited information is available for use in determining the validity of the study's results. The authors of this third study respond that the point of its survey was to identify patterns and trends in news quality. It asserts that it was not trying to prove a particular theory of cause and effect with its research, and states it has no financial stake in the outcome. Whether or not the study is unbiased, its results appear statistically insignificant, the underlying data have not been made available, and therefore it cannot be considered reliable or convincing evidence.

424. The affiliates argue, however, that localism cannot be limited to local news and public affairs; rather, it is a rich mix of programming, and that the Commission itself has previously identified other elements, such as opportunities for local self-expression, development and use of local talent, weather and market reports, and sports and entertainment programming as necessary and desirable in serving the broadcast needs and interests of local communities. As the Commission said in the *NPRM*, stations may fulfill their obligation to serve the needs and

interests of their communities by presenting local news and public affairs programming and by selecting other programming based on the particular needs and interests of the station's community. Thus, the Commission acknowledges that other kinds of programming are important in serving local needs. However, the Commission must rely on the data in the record, which focuses on two aspects of localism—program selection decisions by affiliates (preemption/collective negotiation) and the quality and quantity of local news and public affairs programming. From the data, it concludes that network-owned stations provide local news and public affairs programming that is at least equal, and may be superior, to that of affiliates.

425. *Discussion.* The Commission concludes that the national cap is not necessary to encourage local stations to air local news and public affairs programming. The record actually suggests that the national cap diminishes localism by restraining the most effective purveyors of local news from using their resources in additional markets. The studies in the record show that network-owned stations air, on average, more local news and public affairs programming than affiliates overall. MOWG Study No. 7 found that network-owned stations aired 4.3 hours more local news per week than did affiliates. The Baumann study concluded that the differential was 6.4 hours per week. The principal objection to the findings of these two studies was the affiliates' criticism that exclusion of the Fox stations from those two studies would nullify the differential between the two groups of stations. The Commission agrees with the networks that no valid reason exists for excluding the Fox stations.

426. The record also shows that local news on network-owned stations appears to be of higher quality than news on affiliate stations. MOWG Study No. 7 found that network-owned stations received local news excellence awards at a significantly higher rate than did affiliates. For the DuPont awards, networks received 337% of the national average compared with 77% for affiliates. For the RTNDA awards, networks received 126% to affiliates' 96%. (A score of 100% for a station group would indicate that the stations in that group won precisely the number of awards that would be expected given the number of stations in that group relative to the total number of stations in the U.S.). The Commission disagrees with commenters that smaller group owners tend to produce higher quality local news. It agrees with the networks that the study's findings are statistically insignificant. In other words, according to widely-accepted scientific standards, there is an unacceptably large risk that the findings are attributable to random noise in the data. The study reports the differences in percentages of newscasts that received a particular grade, but fails to provide any statistical testing on these results. The networks conducted these statistical tests and determined that the differences in news quality were not large enough to conclude that the probability of a newscast getting a particular grade was dependent on the ownership group that aired the newscast. In sum, the record shows that the national cap is not necessary to promote high quality, or relatively larger amounts of, local news programming. The record suggests the opposite—that the current cap prevents networks from acquiring more stations and providing enhanced local news operations.

427. *Modification of the National Television Ownership Rule.* The Commission has concluded that an audience reach cap of 35% is not necessary to promote diversity or competition in any relevant market. It is persuaded, however, that a national cap at some level is needed to promote localism by preserving the balance of power between networks and affiliates. The Commission found that affiliates' incentives are more attuned to their local communities than are those of networks, which seek to assure that the largest audiences possible are watching their programming at the same time. It concludes from the record that preserving a balance of power between a network and its affiliates promotes localism, and accordingly, it will continue to restrict the national audience reach of station owners.

428. Given the benefits to innovation that derive from having a number of separately-owned station groups, the Commission believes the national ownership cap should continue to apply to all station owners, including those that are not networks. The record shows that there have been a number of instances where having a variety of owners has led to innovative programming formats and technical advances, and the Commission believes that applying the national ownership cap to all station owners will continue to spur innovation, which the Commission believes will be particularly valuable in transitioning to digital television. In addition, applying the cap to all station owners adheres to our longstanding policy of refusing to differentiate among different categories of station owners for purposes of the national TV ownership rule.

429. The next task is to determine what the ownership limit should be. As the court in *Sinclair* recognized, the Commission has wide discretion when drawing administrative lines. Having found that 35% is too low and 100% (or no limit) is too high, after considering the evidence in the record, the Commission applies its discretion and raises the national ownership cap to 45%. This modification, fundamentally, is a line-drawing exercise in which it attempts to balance the benefits of a television ownership cap against the factors favoring an incremental increase. Finding a point between 35% and 100% is a matter of judgment falling within the particular expertise of the Commission.

430. The Commission has decided to modify the national cap by raising it 10 percentage points for three primary reasons. First, while affiliates argue that it is necessary to preserve a balance of power between networks and affiliates so that affiliates can maintain adequate preemption rights, it is evident that networks can exceed a nationwide audience reach of 35% without harming affiliates' abilities to preempt network programming. Affiliates of networks with a national reach of greater than 35% seem to have no less bargaining power than affiliates of networks with less than 35% national reach. In accordance with section 202(h), therefore, the cap must be modified upward. The record does not, unfortunately, help to identify with any precision the point at which a network audience reach would be so large that affiliate bargaining power would be substantially undermined. Given that the Commission is interested in finding a point at which the balance of power between networks and affiliates is roughly equal, however, it believes that a national audience reach cap of approximately half of all homes would be appropriate.

431. Second, the Commission is mindful of the predictive nature of this line-drawing exercise, and has some concern about allowing significant new aggregation of network power absent more compelling evidence regarding the possible effects of that aggregation above current limits. Accordingly, and in light of the fact that Congress raised the ownership cap by ten percentage points in 1996, from 25% to 35%, the Commission is inclined to take a similarly incremental approach and increase the cap by an additional 10 percentage points. Although a cap of 45% does not equate to a precisely equal degree of national reach for networks and their affiliates, a 45% limit ensures that networks will not

obtain a greater national audience reach than their affiliates collectively will have.

432. Finally, the Commission believes that the cap should accommodate all existing broadcast combinations and permit some additional room for growth. A 45% cap will allow some, but not unconstrained, growth for each of the top four network owners. Under the current rule, ABC owns ten stations reaching 23.6% of the national audience; CBS owns 39 stations reaching 39% of the national audience (these stations include the CBS as well as the UPN owned and operated stations, including 3 satellite stations); Fox owns 37 stations reaching 37.8% of the national audience (includes two satellite stations); and NBC owns 29 stations reaching 33.6% of the national television audience (these stations include the NBC as well as the Telemundo owned and operated stations, as well as a station located in Puerto Rico). There are currently 1,340 commercial television stations licensed by the Commission. The percentage of these television stations owned by each of these networks is as follows: ABC owns less than 1%; CBS owns approximately 3%; Fox owns approximately 3%; and NBC owns approximately 2%.

433. Broadcast networks have lost market share in recent years to cable and DBS, and allowing them to achieve better economies of scale and scope may help them remain competitive in the marketplace. Further, given the rise in programming costs and increasing competition from non-broadcast national media, the economies of scale and scope made possible by network expansion of station ownership will contribute to the preservation of over-the-air television by deterring the migration of expensive programming, such as sports programming, to cable networks. Accordingly, the Commission modifies the national audience reach rule to impose a 45% cap.

434. Although the Commission affirms the finding in the *1984 Multiple Ownership Report and Order* that increased network ownership of stations will not harm either competition or diversity, the Commission's decision to retain a national ownership cap is a departure from its conclusion in 1984 that the national TV ownership rule should be repealed. In 1984, the Commission gave very limited consideration to the potential effects of the cap on localism. That attention was devoted to the quality and quantity of news and public affairs programming on group-owned versus individually-owned stations. In this R&O, by contrast, the Commission expanded its ''localism'' measures to include the important consideration of program selection by local stations. The 1984 decision did not address the balance of power between networks and affiliates and how that affects program selection. It is this factor that is the central factor in our decision to retain a national cap.

435. *UHF Discount.* In the NPRM, the Commission invited comment on the relevance and continued efficacy of the 50% UHF discount, which is intended to recognize the deficiencies in over-the-air UHF reception in comparison to VHF reception. The NPRM explained that the discount was enacted because UHF stations were competitively disadvantaged by weaker signals and smaller household reach than VHF stations. In light of greater carriage of UHF stations on MVPDs since enactment of the UHF discount in 1985, the Commission sought comment on the continued need for the UHF discount.

436. The Commission concludes that the UHF discount continues to be necessary to promote entry and competition among broadcast networks. VHF signals typically reach between 72 and 76 miles, while UHF signals reach approximately 44 miles. This signal disparity results in a significantly smaller household reach of UHF signals compared with VHF signals. Fox, NBC and Viacom submitted data showing that, in markets where they own both a UHF and a VHF station, the UHF station reaches between 56% and 61% of the service area of their VHF stations. Similarly, Paxson Communications states that in eight cities where it owns UHF stations, its stations reach between 35.7% and 78.2% of the homes reached by VHF stations in those markets.

437. This diminished UHF signal area coverage affects UHF stations' ability to compete with VHF stations in two ways. First, although cable and DBS operators serve 86% of U.S. households, the Commission recently determined that roughly 30% of television sets are not connected to MVPD service and receive exclusively over-the-air broadcast stations. UHF stations reach far fewer of these broadcast-only viewers as VHF stations. Second, weaker UHF signals make it more difficult for a UHF station to qualify for cable and DBS carriage. Commission regulations require a local television station to place a Grade B signal over the cable or DBS headend in order to qualify for carriage. Alternatively, if a station does not place a Grade B signal over the headend, it may pay for an alternative method of delivering its signal to the headend, such as a fiber optic connection. Non-carriage on a cable system will, as a practical matter, make the UHF station unavailable to homes in the MVPD's service area.

438. In addition to diminished signal coverage, UHF stations require between 1.5 and 3 times greater electricity costs to operate than VHF stations. UHF stations also require more expensive transmitters than VHF stations. These factors, along with the signal coverage disparity, appear to diminish the ability of UHF stations to compete in the delivered video programming market. According to a 1997 study provided by Paxson Communications, VHF affiliates of the top four broadcast networks had approximately 50% higher ratings than UHF affiliates of the top four networks. Paxson then replicated this study with 2002 ratings information and determined that the ratings disparity between UHF and VHF stations had actually *increased* between 1997 and 2002. Paxson's filing shows that, in November of 2002, network-affiliated VHF stations received approximately 57% higher ratings than network-affiliated UHF stations, compared with 50% in 1997. Thus, even after controlling for factors such as programming and market size, UHF stations continue to experience a competitive handicap compared with VHF stations. This disparity translates into reduced advertising revenues for UHF stations. Thus, the Commission does not believe that the UHF handicap has largely been eliminated by greater cable and DBS carriage of UHF signals.

439. In addition to strengthening competition between UHF and VHF stations, the UHF discount promotes entry by new broadcast networks. Paxson asserts that UHF discount enhanced its ability to launch a new broadcast network because it could own more UHF stations than VHF stations. Paxson states that the additional ownership of stations permitted by the UHF discount provides a significant financial incentive for new networks to enter and compete with established networks. This is because ownership of stations, as opposed to affiliation with separately-owned stations, enables a network such as Paxson's to earn both national and local advertising revenues. Univision Communications also states that the UHF discount has enabled it to enter the market with programming tailored to Hispanic audiences. Univision explains that its entry as a broadcast network is particularly beneficial to Hispanic audiences because they rely disproportionately on over-the-air broadcast channels.

440. Finally, the Commission observes that the established broadcast networks generally have not sought to

take advantage of the UHF discount to gain greater national reach through local stations. The four most established broadcast networks collectively own 67 stations, 12 of which are UHF stations. Instead of replacing their VHF stations with UHF stations and owning up to 70% national coverage, they have retained their VHF stations and sought elimination of the national ownership cap. By contrast, Paxson, a recent entrant into the broadcast network business, owns 61 stations, all of which are UHF. Absent the UHF discount, Paxson's audience reach would be 61.8% of the nation's television households. This data indicates that the UHF discount plays a meaningful role in encouraging entry of new broadcast networks into the market. For these reasons, the Commission retains the UHF discount.

441. The Commission has previously said it will issue a notice of proposed rulemaking proposing a phased-in elimination of the discount when DTV transition is near completion. At this point, however, it is clear that the digital transition will largely eliminate the technical basis for the UHF discount because UHF and VHF signals will be substantially equalized. Therefore, the Commission will sunset the application of the UHF discount for the stations owned by the top four broadcast networks (*i.e.,* CBS, NBC, ABC and Fox) as the digital transition is completed on a market by market basis. This sunset will apply unless, prior to that time, the Commission makes an affirmative determination that the public interest would be served by continuation of the discount beyond the digital transition. For all other networks and station group owners, it will continue to examine the extent of competitive disparity between UHF and VHF stations as well as the impact on the entry and viability of new broadcast networks. In a subsequent biennial review, the Commission will determine whether to include stations owned by these other networks and station group owners in the sunset provision it has established for stations owned by the top four broadcast networks.

B. Dual Network Rule

442. The dual network rule provides: ''A television broadcast station may affiliate with a person or entity that maintains two or more networks of television broadcast stations unless such dual or multiple networks are composed of two or more persons or entities that, on February 8, 1996, were 'networks' as defined in § 73.3613(a)(1) of the Commission's regulations (that is, ABC, CBS, Fox, and NBC).'' 47 CFR 73.658(g). Thus, the rule permits common ownership of multiple broadcast networks, but prohibits a merger between or among the ''top-four'' networks, *i.e.,* ABC, CBS, Fox, and NBC. In the R&O, the Commission concludes that the dual network rule is necessary in the public interest to promote competition and localism.

443. The original dual network rule, which prohibited any entity from maintaining more than a single radio network, was adopted over sixty years ago. The rule was later extended to television networks. The Commission believed that an entity that operated more than one network might preclude new networks from developing and affiliating with desirable stations because those stations might already be affiliated with the more powerful network entity. In addition, the Commission expressed concern that ownership of more than one network could give the owner too much market power. The rule, therefore, was intended to serve the Commission's competition and diversity goals.

444. In the 1996 Act, Congress directed the Commission to amend the rule, which it did, to permit common ownership of two or more broadcast networks, but not a merger among ABC, CBS, Fox, or NBC, or between one of these top-four networks and UPN or WB. In 2001, the Commission further modified the rule to permit a top-four network to merge with or acquire UPN or WB. The Commission found that: (1) Competition in the national advertising market would not be harmed; (2) greater vertical integration was potentially an efficient, pro-competitive response to increasing competition in the video market; and (3) program diversity would not be harmed because the two combined networks would have economic incentives to diversify their program offerings.

445. The restrictions in the current rule apply only to combinations of the top-four networks. All existing network organizations, and all new network organizations, may create and maintain multiple broadcast networks. Thus, the current rule permits common ownership of multiple broadcast networks created through internal growth and new entry.

446. Under section 202(h), the Commission considers whether the dual network rule continues to be ''necessary in the public interest as the result of competition.'' In determining whether the rule meets this standard, the R&O addresses whether the rule promotes competition, localism, and diversity.

447. *Competition.* The R&O summarizes the complex roles played by broadcast networks. Broadcast networks acquire a collection of programs from program producers. The programs are selected based on their ability to attract audiences that can be sold to advertisers. These programs—with advertisements embedded—are then made available to television audiences through the broadcast network's owned and operated broadcast television stations (''O&Os''), and also through contractual arrangements with affiliated broadcast television stations. Thus, a broadcast network serves many roles. It is an intermediary between local broadcast stations and advertisers and program producers. Because the top-four broadcast networks are participants in the program acquisition market and the national advertising market, mergers among them can affect competition in each of these markets.

448. Given the level of vertical integration of each of the top-four networks, as well as their continued operation as a ''strategic group'' in the national advertising market, a top-four network merger would give rise to competitive concerns that the merged firm would be able to reduce its program purchases and/or the price it pays for programming. As a result, the Commission concludes that the dual network rule remains necessary in the public interest to foster competition.

449. *Program Acquisition Market.* The top-four networks are the broadcasting components of vertically-integrated firms, which compete against each other to acquire programming that will attract the largest national audiences. Competition in the program acquisition market is important because networks compete with each other to acquire new, diverse, and innovative programming. A top-four network merger would give rise to competitive concerns that the merged firm would restrict the consumption of programming by using its market power to limit competitors' access to sources of programming. In addition, the merged network could use its market power to control the price it pays for programming or to raise competitors' costs of acquiring programming. In concentrated markets, viewers have access to fewer programming choices if the number of national, independent purchasers of programming decreases due to limited access to programming and higher programming costs.

450. NASA argues that a merger of two or more of the top-four networks would result in a less competitive program acquisition market, evidenced by lower output, fewer choices, and less technological progress. CCC argues that the top-four networks represent a distinct and important resource for

viewers because only they are able to consistently distribute both news and entertainment programming to a mass audience, using their cable subsidiaries and local broadcast affiliates. Fox, on the other hand, argues that the rule actually undermines the Commission's competition policy by discouraging broadcast investment to the detriment of consumers of free over-the-air television. Fox also argues that the program acquisition market is only moderately concentrated, having an HHI of approximately 1120. In support of this argument, Fox asserts that the program acquisition market is characterized by a large number of purchasers of exhibition rights, including broadcast networks, broadcast stations, cable networks, DBS operators, premium cable networks, pay-per-view providers, and distributors of video cassettes and DVDs. NASA counters that the major broadcast networks do not compete with the cable networks for mass-audience, prime-time programs, and that the only avenue of distribution for such programs is the television broadcast networks. By NASA's estimate, which is based on an analysis of Fox's Economic Study E, Table E2, the top-four networks account for over 87 percent of programming expenditures by broadcasting networks, and the video entertainment program acquisition market has an HHI of approximately 2100, a result considered ''highly concentrated'' under the DOJ/FTC Merger Guidelines. NASA therefore asserts that only the major broadcasting networks should be considered in an analysis of concentration in the purchase of national video programming.

451. The Commission agrees with Fox and NASA that the context for analyzing the program acquisition market is to consider the shares of expenditures on video entertainment programming. The Commission concludes, however, that a more accurate assay of the market includes the shares of broadcast networks, broadcast stations, basic cable networks, pay cable networks, and pay-per-view networks. The Commission rejects NASA's narrow definition because it provides no evidentiary reason to exclude other video programming purchasers and it dismisses the range of programming choices available to viewers over the air, via cable and via satellite. The Commission does not agree with Fox's more expansive definition, specifically the inclusion of home video, as that requires additional action on the part of individual viewers, such as purchasing a DVD player, driving to a video rental store, and renting a DVD. The Commission concludes that using broadcast networks, broadcast stations, basic cable networks, pay cable networks, and pay-per-view networks in its analysis accurately represents the market participants, and their role in delivering programming to large, passive audiences. In order to examine the effect of mergers among broadcast television networks subject to this rule, the Commission constructs hypothetical merger scenarios, building on the scenario developed in the national cap section. In the absence of actual figures for the network companies' broadcast station expenditures, the Commission examines the effects of mergers amongst the networks (*i.e.,* without their complement of O&Os, but including the cable networks they own). For the same reason, the Commission can only calculate the change in the HHI, not the ''base level'' HHI. So, for example, if Fox merged with GE and Disney merged with Viacom, the HHI would increase by almost 767 points. Then, if these two companies merged with each other, the HHI would increase by 2,246 points. Either of these changes in the HHI would be scrutinized under DOJ Merger Guidelines. Since these networks own television stations, the change in the HHI would actually be higher than in these examples.

452. Accordingly, the Commission concludes that a merger between or among any of the top-four networks would harm competition in the program acquisition market. As noted, the Commission determines in its analysis of the national ownership cap that an increase in the cap would not harm the program acquisition market, principally because networks would be enhancing their owned and operated distribution base. The Commission's analysis of a merger between two or more of the top-four broadcast networks, however, indicates a significant potential for harm to this market. In addition to acquiring an entire group of owned and operated stations and all of the affiliation agreements of the stations aligned with the network, a merger would also entail the acquisition of significant program purchasing power by the vertically integrated merging networks. The vertically integrated networks would limit competitors' access to programming by denying remaining networks access to the production output of the merged network. Currently, one network studio may produce programming that is ultimately purchased by another network. In addition the merged firm can raise the price paid by those competitors for programming created and produced by the merged network's program production assets. The rule, therefore, remains necessary to promote competition in the program acquisition market.

453. *National Advertising Market.* Networks sell national advertising by creating large national audiences for their programming and delivering those audiences to advertisers. Sellers in the national advertising market include national broadcast networks, cable networks, and syndicators. Network O&Os, network-affiliated stations, and independent stations sell national spot advertising time, which is advertising sold on a market-by-market basis to national advertisers. National spot advertising time provides a competitive alternative to national advertising time to a certain extent. These sellers compete against each other not only based on the price they charge for advertising spots, but also based on their ability to deliver the largest number of viewers to their advertisers. If a merger were to reduce competition for advertising dollars, networks would have less incentive to compete against each other for viewers, which would lead them to pay less attention to viewers' needs and to produce less varied, lower quality, and less innovative programming.

454. In the discussion above of the necessity of maintaining the national TV ownership rule, the Commission concludes that the networks compete with each other and with cable networks for national advertising revenues and that the current ownership cap was not necessary to ensure competition in the national advertising market. However, while the Commission finds that the top-four networks do not possess market power today, that would change if two or more of them were to merge with each other. Moreover, as explained in the *Dual Network Order,* the top-four networks comprise a ''strategic group'' within the national advertising market. A strategic group refers to a cluster of independent firms within an industry that pursue similar business strategies. For example, the top-four networks supply their affiliated local stations with programming intended to attract mass audiences and advertisers that want to reach such large, nationwide audiences. By contrast, the emerging networks target more specialized, niche audiences similar to cable television networks. When properly applied, the concept of a strategic group ordinarily implies that only a relatively few firms will be included within its boundaries so that competitive rivalry will be oligopolistic

in nature, although the number of firms actually populating the industry aggregated over all strategic groups may be quite numerous. The top-four networks compete largely among themselves for advertisers that seek to reach large, national, mass audiences—a significant portion of the national advertising market that provides the top-four networks with a significant portion of their profits. The Commission therefore concludes that a merger of two or more of the top-four networks would substantially lessen competition in the national advertising market, especially within the strategic group, with the concomitant harm to viewers described above. The Commission's analysis suggests that economic concentration within the strategic group for 2001, as measured by the HHI, is 2646. This is based on advertising revenue and on shares of the top-four broadcast networks.

455. The recent growth of cable and DBS does not alter this conclusion. Despite that growth, the top-four networks continue to provide the greatest reach of any medium of mass communications. The top-four networks attract much larger prime-time audiences in relation to advertisement-supported cable networks. For example, during the month of February, 2003 (1/27/03–2/23/03), CBS, NBC, ABC, and Fox delivered prime-time household ratings of 8.9, 8.1, 6.7, and 6.7, respectively, as compared to the top advertiser-supported cable network, TNT, which garnered a 1.8 share rating. (A rating point is equal to 1.067 million households.) Broadcasting's percentage share of advertising revenue continues to exceed its percentage share of viewing. Broadcasting's share of advertising revenue in 2001 was 71.5% whereas its audience share stood at 53.7%. In addition, the networks have been able to increase the quantity of advertising availabilities for sale by adding more commercial minutes per hour. Moreover, despite a decrease in audience share, the top-four networks continue to command increases in advertising rates, a further testament to the strength of broadcasting television as an advertising medium. The networks have raised prices for advertising on a cost per thousand (''CPM'') viewers basis steadily. Prime-time broadcast network CPMs have increased from $9.74 in 1990 to $13.42 in 2000, an average annual growth rate of 3.8%.

456. The Commission agrees with NASA that despite the emergence of new media on cable, DBS, and the Internet, the top-four broadcast networks still have the largest concentration of viewers and television economic power. A recent survey shows that each of the top twenty-five prime-time broadcast programs during the week of December 9–15, 2002, all of which were aired by CBS, ABC, NBC, or Fox, achieved considerably higher household ratings than any of the 25 highest ranked cable programs. The highest-ranked broadcast program had a rating larger than the top five cable programs' ratings combined. The Commission also agrees that as it becomes more difficult to reach a large number of viewers, television broadcasters that can still deliver a mass audience become more valuable.

457. The Commission further concludes, as it did in the *Dual Network Order,* that obtaining a sufficient number of affiliated stations remains a major obstacle to developing a new broadcast network capable of attracting national advertisers seeking to reach a mass audience. As long as mobility barriers (*i.e.* barriers to entry that deter the movement of a firm *within* a given industry from shifting from one strategic group to another) deter entry into the major network strategic group, the pricing of network advertising will be sensitive to the number of network competitors. The Commission therefore concludes that the current dual network rule is necessary to maintain competition in national advertising market.

458. *Localism.* The Commission concludes that the dual network rule also is necessary to retain the balance of bargaining power between the top-four networks and their affiliates. As noted in the national TV ownership rule section, the Commission concludes that affiliates play an important role in assuring that the needs and tastes of local viewers are served. Elimination of the dual network rule would harm localism by providing the top-four networks with increased economic leverage over their affiliates, thereby diminishing the ability of the affiliates to serve their communities.

459. The top-four networks have an economic incentive to promote the widest distribution nationwide of the programming that they produce and to assure that it is carried simultaneously across the country. To reach the most viewers, the top-four networks acquire their own stations (''O&Os''), usually in the largest television markets, and enter into affiliation agreements with station owners throughout the remainder of the country. Through affiliation, the networks benefit from the wide-area delivery of their programming. Network affiliates benefit, in turn, by gaining access to high-quality programming.

460. Affiliates have an economic incentive to tailor their programming to their local audiences. Affiliates can influence network programming decisions by joining forces with other network affiliates in collective negotiations to ensure that the programming provided by the network serves local needs and interests. The strength of an affiliate's influence with its network lies in its power as part of a ''critical mass'' to join forces with other network affiliates in collective negotiations to try to influence network programming. On an individual basis, affiliates may also decide to preempt network programming if other programming is available that better suits local needs.

461. As noted by NASA, because of the costs of programming and promotional expenses, network affiliation remains critical for the economic survival of most local television stations. NASA argues that if the dual network rule were eliminated, a top-four network merger would result in the networks gaining an unfair advantage over their affiliates, noting that a merger would reduce alternative choices of program providers for affiliates as the number of network owners decreases. As an example, NASA notes that if NBC and CBS were permitted to merge, a terminated CBS affiliate would no longer be able to turn to NBC for affiliation. The harm would be exacerbated if more than two of the top-four networks were to combine.

462. The Commission agrees with NASA that a top-four network merger would harm localism by providing the networks with undue economic leverage over their affiliates. While a top-four network merger may not result in fewer networks, it would result in fewer network owners. The Commission concludes that a top-four network merger would reduce the ability of affiliates to bargain with their network for favorable terms of affiliation, and would result in less influence of affiliates on network programming. As the number of network owners declines, affiliates lose the ability to use the availability of other top independently-owned networks as a bargaining tool with their own networks. In the same way, a combined top-four network's increased leverage could be used to overwhelm affiliate bargaining power with respect to programming issues. A top-four network merger would lead to fewer alternatives for affiliates, which would lead to reduced bargaining power of affiliates, and less influence of affiliates on network programming, including the ability to preempt network programming that affiliates find

to not serve their local communities. The Commission therefore concludes that the dual network rule remains necessary to foster localism.

463. *Diversity.* In the *NPRM,* the Commission sought comment on the dual network rule's effect on program diversity and viewpoint diversity. As noted in the national TV ownership rule section, the Commission concludes that the market for diversity is local, not national. As also noted, the Commission concludes that viewpoint diversity is the most pertinent aspect of diversity for purposes of our ownership rules. Nevertheless, since several commenters argue that elimination of the dual network rule would result in a diminution of program diversity, the R&O addresses their arguments.

464. Several commenters argue that elimination of the dual network rule would result in less diverse programming and that national viewpoints in news reporting would be diminished. AFL-CIO and AFTRA argue that recent mergers and consolidation in the industry have resulted in instances of reduced viewpoint diversity and program diversity in local markets. AFTRA also argues that elimination of the rule will quell new voices and diverse viewpoints, ''as emerging networks are quashed in favor of more 'cost-effective' means of delivering content.'' CCC argues that because CBS is ''repurposing'' its original programming on UPN, diversity between the two networks is reduced. CCC also argues that WB, UPN, and the cable networks do not have the audience reach or the resources to fill the diversity void created if the national networks were reduced by elimination of the rule. Fox disagrees, arguing that the vast array of other media outlets will provide the public with sufficiently diverse information and views.

465. UCC argues that despite recent gains in the popularity of other forms of media, national broadcast television continues to be the public's most important source for national and international news. UCC argues that the average weekday reach of the evening newscasts of ABC, CBS and NBC is about 10 times the combined reach at 6:30 p.m. for Fox, CNN, CNN Headline News, MSNBC, and CNBC. Because network news on broadcast television is expensive to produce, UCC argues, a top-four network merger would result in the consolidation of news departments in order to achieve economic efficiency.

466. In the *Dual Network Order,* the Commission found that program diversity at the national level would not likely be harmed by the combination of an emerging network (*i.e.*, UPN or WB) with one of the top-four networks. The Commission found it likely that a common owner would have strong incentives to produce a diverse schedule of programming for each set of local TV outlets in the same market. In this proceeding, the Commission addresses possible combinations among only the top-four networks, which are distinct from combinations between a top-four network and an emerging network. Also, the Commission finds in this proceeding that the market for diversity is local, not national. Further, as noted in the Policy Goals section above, the Commission finds that program diversity is best achieved by reliance on competition among delivery systems rather than by government regulation.

467. The Commission is unable to conclude that the dual network rule can be justified on program diversity or viewpoint diversity grounds. Although the Commission received conjectural statements regarding the repurposing of some programming, and stories of news operations being shared in a few markets, these reports do not evidence a systematic reduction in diversity as a result of media mergers. The record provides no evidence that, because some stations share news operations, viewpoint diversity is diminished. Further, even if a merger among ABC, CBS, or NBC would result in the loss of one weekday evening newscast, a substantial number of outlets that report national/international news would remain to provide diverse viewpoints throughout the day to the public. Finally, to the extent that the Commission considers programming diversity an issue, the record provides no evidence that the repurposing of programming on different networks results in a diminution of program diversity. In fact, the Commission found in the Dual Network Order that the repurposing of programming between two merged networks was likely to produce net benefits to viewers of network television.

468. Given the level of vertical integration of each of the top-four networks, as well as their continued operation as a ''strategic group'' in the national advertising market, a top-four network merger would give rise to competitive concerns that the merged firm would be able to reduce its program purchases and/or the price it pays for programming. These competitive harms would, in turn, harm viewers through reductions in program output, program choices, program quality, and innovation. The Commission further concludes that a top-four network merger would harm localism by providing the networks with undue economic leverage over their affiliates, reducing the ability of affiliates to bargain with their network for favorable terms of affiliation, giving the networks greater power in program selection, and diminishing alternative choices of programming for affiliates. As a result, the Commission concludes that the dual network rule remains necessary in the public interest to foster competition and localism.

VII. Miscellaneous Requests

469. Numerous parties submitted comments on issues not specifically raised in the NPRM. The Commission dismisses most of these requests on procedural grounds because they fall outside the scope of this proceeding. The Commission does not review the merits of these requests. To the extent appropriate, parties are free to re-file these requests as petitions for rulemakings. The Commission denies others for the reasons discussed in this summary.

470. *Proposed Behavioral Rules.* Several parties ask that the Commission impose behavioral rules to achieve a number of alleged public interest goals. The Commission invited comment in the NPRM as to whether behavioral rules might render structural rules unnecessary to achieve our public interest goals of diversity, competition, and localism. The following proposals, however, relate to policy goals that are unrelated to those served by our structural rules and are therefore outside the scope of the NPRM.

471. *TV Viewing.* TV Turnoff Network requests that the Commission require all broadcast stations to run announcements reminding the viewing public that: (1) Excessive television viewing has negative health, academic, and other consequences for children; and (2) parents and guardians retain and should exercise their First Amendment right and ability to turn off their television sets and limit their children's viewing time. The Commission dismisses this request because it is outside the scope of this proceeding, which reviews our structural broadcast ownership rules pursuant to section 202(h). Indeed, the goals sought to be advanced by the proposal bear no relation to diversity, competition, or localism.

472. *PEG.* Alliance requests that the Commission promulgate behavioral regulations that guarantee public, educational, and governmental (''PEG'') access on cable and direct broadcast satellite (''DBS'') to ensure diversity of voices. Alliance argues that such federal regulations are necessary because PEG

access is not mandated by federal legislation, but rather derives from a statute that allows local communities to regulate it. The Commission dismisses Alliance's request as outside the scope of this proceeding and our authority, generally. The Commission once had access requirements of the type suggested by Alliance, but the Supreme Court struck them down as beyond our statutory authority. Congress did not authorize the Commission, however, to implement, enforce, or oversee the broad local access requirements advocated by Alliance. Although DBS is required to set aside 4% of capacity for public interest (''non-commercial, educational, and informational'') programming pursuant to section 335 of the Act, the Commission does not have authority to adopt the broader rights advocated. The Commission notes, however, that noncommercial educational television stations may request mandatory carriage on cable systems and also have satellite carriage rights in markets where DBS provides local-into-local service pursuant to the ''carry-one-carry-all'' requirements under section 338 of the Act.

473. *Payola.* Future of Music Coalition alleges that a new form of payola exists in which record companies pay independent promoters to ensure that the companies' records are played on the radio. The independent promoters, Future of Music Coalition alleges, then establish exclusive relationships with radio stations and pay these radio stations a large portion of the money received from the record companies in the form of ''promotional expenses.'' Future of Music Coalition asks that the Commission ban this practice, thereby promoting diversity in radio programming. The Commission dismisses Future of Music Coalition's request because it is outside the scope of this proceeding.

474. *Ownership Issues Outside the Scope of the Proceeding.* Some parties request action regarding ownership or attribution issues that were not raised in the NPRM and that are therefore outside the scope of the proceeding. The Commission dismisses these requests.

475. *Alien Ownership.* CanWest suggests that the Commission's biennial review of media ownership rules and the multilateral trade in services negotiations underway in the World Trade Organization provide a timely occasion to review foreign ownership rules for broadcasting. The Commission declines to undertake such a review because it would be outside the scope of this proceeding. Moreover, to the extent that our foreign ownership regulations are statutorily based, 47 U.S.C. 310, the Commission does not have the discretion to modify or repeal them in the biennial review process, pursuant to section 202(h).

476. *Attribution.* MMTC asks us to expand this proceeding to include review of the attribution rules. The Commission denies this request because the attribution limits are not properly reviewed in the biennial review process, except for review of radio joint sales agreements (''JSAs''), which the Commission addresses in the Local Radio Ownership section of the R&O. The attribution rules do not themselves prohibit or restrict ownership of interests in any entity, but rather determine what interests are cognizable under the ownership rules. The focus of the biennial review process is whether the ownership rules are necessary in the public interest as a result of competition. The attribution limits are set at the level the Commission believes conveys influence or control and, as these limits are not related to any changes in competitive forces, they are not reviewed biennially.

477. *LPFM.* REC Networks requests that the Commission refrain from changing our Low Power FM (''LPFM'') rules relating to ownership caps and assignment of stations because these rules are consistent with our intentions in establishing LPFM. LPFM ownership and assignment rules are addressed in §§ 73.855, 73.858, 73.860, and 73.865 of the Commission's rules, and are not addressed in the context of this proceeding. These are non-commercial stations and therefore a consideration of ownership limits for these stations is outside the scope of this proceeding. REC also asks that the Commission impose new ownership restrictions on non-commercial educational stations. The Commission dismisses that request as such limits are outside the scope of this proceeding.

478. *Broadcast Auction Process.* Hodson recommends that the Commission modify the new entrant bidding credit in the broadcast auction process from the current percentages of 25 percent and 35 percent to 30 percent and 45 percent. Hodson also recommends, in its proposed 30 percent tier, that the Commission allow an attributable interest in five mass media facilities nationwide instead of the current three, with the condition that the winning bidder has no attributable interest in a broadcast presence already in the market the proposed broadcast station intends to serve. Finally, for entities eligible for Hodson's proposed 45 percent tier, Hodson recommends that the Commission establish a relaxed payment plan for the winning bid balance that would include an extended payment schedule. Hodson's proposals go to the Commission's broadcast auction rules and process, not our ownership rules. These proposals are outside the scope of this proceeding. The Commission addressed the broadcast auction process in a prior rulemaking proceeding. In 1998, the Commission determined that it would fulfill its obligations under section 309(j) of the Communications Act of 1934, 47 U.S.C 309(j)(3)(B), to promote economic opportunity and competition for designated entities, including small businesses, by providing new entrant bidding credits. Changes to these bidding credits would require a separate rule making.

479. *Translator/Spectrum Issues Outside the Scope.* REC also makes other requests involving the Commission's rules applying to use of translators. REC claims that the current rules allow distant translators and discourage establishment of new local LPFM stations. Nickolas Leggett asks that the Commission provide alternative opportunities to small broadcasters including: (1) A frequency band for manually operated low-power commercial broadcasters; (2) a citizens broadcasting band; and (3) open-microphone neighborhood broadcasting supported by the consolidated broadcasters. The Commission denies requests to change its translator rules or afford spectrum to small broadcasters because they are outside the scope of the proceeding.

480. *Cable Ownership.* CCC requests that the Commission retain our 30% national cable system ownership limits. The Commission dismisses CCC's request because it is outside the scope of this proceeding and it relates to an issue that is the subject of a separate rulemaking.

481. *DTV.* USCCB asks the Commission to promulgate regulations that define digital television (''DTV'') broadcasters' public interest obligations. The Commission dismisses USCCB's request because it is outside the scope of this proceeding. CST requests that the Commission amend or eliminate any of our rules that hinder the digital conversion of broadcasters, cable systems, and telephone systems, and that the Commission establish regulatory policies to encourage the introduction of digital technologies. The Commission dismisses CST's requests because they are outside the scope of this proceeding.

482. Further, CST proposes that all broadcast licensees and cable systems that expand their operations as a result

of rule relaxations be required to loan a percentage of their expansion revenues to a Digital Conversion Fund. The Commission declines to adopt CST's proposal because there is no basis for the Commission to directly fund industry's transition to digital television. When Congress established the framework for the digital television transition in the Telecommunications Act of 1996, it gave no indication that the Commission should directly fund industry transition costs for digital television. Even if CST's proposal fell within Congress's directives, the establishment of such a fund raises extraordinarily complex and controversial issues such as the measurement by the Commission of 'merger efficiencies' and how the fund would be administered. CST provides us with no meaningful basis to assess the viability or effectiveness of such a program. Finally, the Commission already has considered the relationship between local television consolidation and the transition to digital television. The Commission determined that the efficiencies from relaxing the local television ownership limit would likely promote the transition to digital television.

483. Some parties ask the Commission to undertake additional studies or delay taking action until after some future events. MMTC filed a motion requesting that the Commission postpone its vote on this R&O. MMTC argues that because our Electronic Comment Filing System (''ECFS'') was overloaded with filings immediately prior to our June 2, 2003 vote, the record does not accurately reflect all comments received in this proceeding and, therefore, parties are unable to respond to the complete record. MMTC Motion for a Brief Postponement of the Vote (May 31, 2003). The Commission denies the motion. The reply comment period closed Feb. 3, 2003, more than four months ago. Nonetheless, in the interests of assembling a full record, the Commission has continued to accept comments, and more than 500,000 comments were filed in this proceeding, many of which were filed at the last minute. Given the large volume of last minute filings, it is inevitable that a small percentage would not be placed on our ECFS system or be available in the public reference room in sufficient time for replies. Nonetheless, the record is complete, and MMTC's failure to file its comments or requests in a timely fashion is no excuse to delay the proceeding. Nickolas Leggett asks us to engage in detailed political science analysis of the impact of removal of ownership caps on the legitimacy of government and business. The Commission denies this request because it is unclear and declines to delay action in this proceeding. The Commission's statutory obligation is to review the rules biennially; it has no discretion to willfully deviate from that schedule.

484. *IBOC–DAB.* VCPP requests that there be no relaxation on ownership restrictions until several years after 100% rollout of In Band On Channel Digital Audio Broadcasting (''IBOC–DAB''), arguing that this technology will destroy competition. The Commission denies VCPP's request. The courts require the Commission to base our ownership decisions on today's marketplace and the facts presently before it. It is not free to adopt a ''wait and see'' approach. The impact of IBOC–DAB on diversity, competition, and localism in local media markets will be accounted for in future biennial reviews.

485. SBA asks the Commission to issue a Further Notice of Proposed Rulemaking in this proceeding, claiming the NPRM is not specific enough to comply with the Administrative Procedure Act or the Regulatory Flexibility Act. The Commission disagrees with SBA and denies its request. Contrary to the implication of SBA, the actual rules at issue in this proceeding are specifically identified in the NPRM and well known to all interested parties—they are our current broadcast ownership rules. Congress has directed us to review those rules every two years to determine whether those exact rules remain necessary in the public interest. That the Commission has done in this proceeding in accordance with the NPRM. Further, Congress directed the Commission to eliminate or modify any of its broadcast ownership rules that no longer are necessary. Again, it was explicit in the NPRM that we might eliminate any rule that could not be justified in light of the current media marketplace. To the extent that the Commission has eliminated rules in this R&O, therefore, there has been no failure of notice. With respect to those rules that, having been found unnecessary, have been modified herein, the question is the familiar one—were the modifications a ''logical outgrowth'' of the issues identified in the NPRM. The Commission concludes that this R&O and its accompanying rules are a logical outgrowth of the questions posed in the NPRM. The modifications made herein are consistent with the issues and questions posed in the NPRM, and take account of the full record in this proceeding. Finally, we take seriously the mandate of Section 202(h) to review our broadcast ownership rules every two years. It would be impractical to complete such a Herculean task, in this case, to review six different rules, and to complete that review in time to start another review, if we issued a separate notice detailing modifications to rules and initiated another comment period.

486. Children Now asks that the Commission reserve our decision-making on media ownership until its research on the effects of media consolidation on children is complete and can be incorporated into our record. Laura Smith requests that we expand the scope of our public hearings on media ownership and that we conduct additional research before concluding this proceeding. The Commission declines to further delay this proceeding. The public, industry, and government agencies alike have an interest in finality, economy, and the avoidance of unnecessary delay. The public is not served by bureaucratic inaction; industries suffer when rules that restrain behavior without cause continue in force; and agencies fail in their responsibility when they commit public resources to meaningless exercises of no decisional significance. As a corollary, agencies should not refrain from acting on an issue once a robust record has been developed. It is the agency's responsibility, in the first instance, to determine when that point has been reached. *United States* v. *FCC,* 652 F.2d 72, 90–91 (D.C. Cir. 1980) (en banc).

487. In this case, the Commission sees no overriding need to augment the record, nor do we believe that the expenditure of additional time and resources in an effort to do so will provide us with a significantly more accurate or current assessment of the media markets. To the contrary, the record in the current proceeding is one of the most factually complete and thorough ever assembled in a Commission rulemaking. In addition, the court in *Fox Television* made it quite clear that regulatory delay in the biennial ownership review process is causing hardship to the parties and should not be tolerated. Accordingly, the Commission denies the requests of Children Now and Laura Smith.

488. *Independent Production Rules.* The Coalition for Program Diversity (''CPD'') asks the Commission to take ''content neutral action'' by ''adopting a 25% Independent Producer Rule that will insure [sic] that the prime time programming aired by the four networks is as diverse as possible.'' In a similar vein, the Writers' Guild of America (''WGA'') proposes a requirement that

broadcast and cable national program services purchase at least 50 percent of the entertainment for their prime time schedules from independent producers. In essence, CPD and WGA ask us to re-impose some version of our prior financial interest/syndication rules, first adopted by the Commission in 1970. The Commission rejects these requests (collectively, the ''Fin/Syn Proposals'').

489. To begin with, there is substantial doubt as to whether we have adequate notice to adopt the Fin/Syn Proposals. In the *NPRM,* the Commission invited comment on, among other issues, whether diversity could be better promoted by alternatives to structural regulation, such as behavioral requirements and, if so, what behavioral requirements would be recommended. The Commission also sought comment on whether ''the effects of the 1996 change in the national ownership cap [can] be separated from the effects of the repeal of the fin/syn and [prime time access] rules?'' The Commission asked commenters to identify those effects.

490. Although the Commission invited comment as to whether we should, in lieu of structural rules, adopt behavioral rules to serve our public interest goals, we did not propose a re-imposition of the fin/syn rules, or anything related. The Fin/Syn Proposals, therefore, are not squarely within the four corners of our NPRM. Moreover, to the extent that we asked general questions about the effect of the repeal of our former fin/syn rules, or whether some behavioral rules might obviate structural regulation, we did not intend, nor do we think the NPRM can be fairly read to suggest, that a fin/syn overlay would or could substitute for structural regulation as a means of protecting our desiderata—localism, competition, and diversity. Accordingly, the Commission does not believe that the Fin/Syn Proposals are responsive to the NPRM, or that the adoption of such rules could be thought to be a logical outgrowth of the NPRM.

491. In any event, the Commission is not inclined to adopt the Fyn/Syn Proposals. The original fin/syn rules prohibited a television network (defined at the time to include only ABC, NBC, and CBS) from syndicating television programming in the U.S., or from syndicating outside the U.S. programming for which it was not the sole producer, or from having any option or right to share in the revenues from domestic or foreign syndication. These rules also prohibited a network from acquiring any financial or proprietary right or interest in the exhibition, distribution, or other commercial use of television programming produced by someone other than the network for distribution on non-network stations. In 1983, the Commission proposed repealing the rules based on, *inter alia:* (i) A 44% increase in the number of TV stations available to the average viewer since 1970; (ii) the dramatic increase in the availability of cable television; and (iii) evidence of vigorous competition among the television networks.

492. In 1991, however, the Commission opted not to repeal the rules, but instead modified them. Among other things, the Commission imposed a new restriction on networks, which provided that ''no more than 40 percent of a network's own prime-time entertainment schedule may consist of programs produced by the network itself.'' In 1992, the U.S. Court of Appeals for the Seventh Circuit vacated the rules. The Court criticized the Commission for not addressing earlier Commission findings, in 1983, that the networks lacked significant market power. The Court found that the development of cable, video recorders, and the advent of the Fox network buttressed the earlier findings.

493. In the proceedings on remand, the Commission decided to repeal, on a graduated basis, most of its fin/syn rules. In repealing the 40 percent cap, the Commission observed that the cap does not necessarily foster diversity. The Commission also noted that ''the decline in network audience share, which largely explained the rule's relaxation in 1991, has continued unabated.'' On appeal, the Seventh Circuit affirmed that decision, stating that if the Commission ever decided to re-impose similar fin/syn restrictions on the networks, ''it had better have an excellent, a compelling reason'' to do so.

494. In 1995, the Commission removed the remaining fin/syn restrictions, finding that there was no ''clear trend toward increased network ownership of [prime time entertainment programming] that is attributable to the relaxation of our fin/syn rules or that constitutes a cause for concern from a public interest standpoint.'' At the time, independent producers provided 80.97% of the prime time programming hours for ABC, CBS and NBC. Although there had been a decline in the number of packagers of programming included in the prime time schedules for ABC, CBS and NBC, the Commission believed that the decline could not be attributed to elimination of the fin/syn rules, but was ''instead attributable to the inherent riskiness of prime time programming.'' Moreover, ABC, CBS, and NBC faced more, rather than less, competition in broadcast television due to the emergence of FOX and two additional broadcast networks (United Paramount and Warner Brothers). The Commission also reaffirmed its finding in 1993 that alternative video delivery systems, such as DBS and wireless cable, provided sufficient competition to the broadcast networks to obviate fin/syn restrictions.

495. CPD now argues that, despite the growth of cable and DBS providers in the video programming distribution market, there still is a strong public interest supporting limitations on network programming because 43 million consumers receive only broadcast network television. CPD also points out that in 1992, 66.4 percent of the networks' prime time schedule consisted of programs produced and owned by independent producers. Today, they argue, only 24 percent of the four largest networks' prime time schedule is supplied by independent producers. CPD argues that the Commission should preserve 25 percent of the networks' prime time schedule for independent producers.

496. WGA asks that the Commission ''adopt measures designed to insure [*sic*] that national program services on broadcast and cable television purchase at least 50% of their prime time programming from independent producers.'' WGA contends that consolidation in the market for video programming makes any appearance of diversity a mirage. Although there are 230 national cable programming networks, according to WGA, there are just 91 networks that can be considered major networks (defined by WGA as available in more than 16 million homes). Of these 91 networks, 80 percent (73) are owned or co-owned by 6 entities: AOL Time Warner, Viacom, Liberty Media, NBC, Disney and News Corporation.

497. Four major networks (ABC, CBS, FOX, and NBC, collectively the ''Networks'') filed a joint ex parte pleading opposing any cap on the amount of network programming a network may air during prime time. The Networks invoke much of the rationale that the Seventh Circuit used when it vacated the Commission's prior fin/syn rules. To those arguments, the Networks add that the broadcast networks' prime time audience share has dropped from 72 percent in 1993–1994 to 58.9 in 2001–2002. The Networks assert that CPD's argument ignores the fact that, whereas there were only three broadcast networks in 1970 when the Commission first adopted the fin/syn rules, there are now seven networks providing English language programming. The Networks also argue that the growth in use of the

DVD player, personal video recorder, and the Internet continues to add to the diversity in video programming and continues to undermine any rationale for fin/syn rules. Even accepting WGA's assertion that six companies own many of the major cable networks, the Networks argue that the market for video programming is more diverse today because six is double the number of companies that owned broadcast networks when the fin/syn rules were adopted.

498. Although CPD and WGA appear to be correct that fewer of the programs in the Networks' prime-time lineup are produced by independent producers than at times in the past, the evidence in the record does not address whether the decline in the number of independently-produced programs is attributable to changes in the regulatory environment (*i.e.*, the elimination of the fin/syn rules) or to other changes that have taken place in the media business in the intervening years that have increased the risk of producing prime time programming. ''Whatever the pros and cons of the original financial interest and syndication rules, in the years since they were promulgated the structure of the television industry has changed profoundly.'' The Commission previously has questioned whether changes in the mix of programming on the prime time lineup can be attributed to regulatory changes or to business considerations.

499. Moreover, the reduction in independently produced prime time programming on a small subset of television networks is not, by itself, a public interest harm. Our concern is to promote the interests of consumers and viewers, not to protect the financial interests of independent producers. The record does not demonstrate that consumers and viewers are harmed as a result of network financial interests in the programming they carry, particularly in light of the quantity and variety of media outlets for programming in today's media marketplace.

500. In particular, the record does not convince us that an ''access'' rule for independent producers will advance viewpoint diversity. CPD's argument, for example, is premised on the notion that the Networks are gatekeepers; if they are not, there are other outlets for independently-produced fare and no basis to impose fin/syn restrictions. To the extent that the Networks actually are gatekeepers, however, fin/syn rules cannot logically advance viewpoint diversity because the Networks, as gatekeepers, can filter messages at the distribution stage just as they can at the production stage. Adopting the Fin/Syn Proposals, therefore, is not likely to promote viewpoint diversity.

501. Even if the Commission were to adopt a broader definition of ''diversity'' to include general entertainment programming, a gatekeeper at distribution still may filter unwanted programming whether or not the programming is produced in-house. For example, if a network were to decide that its prime time lineup should consist only of ''reality programming,'' or that it should target a particular audience demographic, there is no reason to believe that it could not give effect to those plans with independently-produced programming as easily as it could with programming produced by itself or an affiliated company—it simply would make known its programming intent and allow independent producers to fill the void. The Fin/Syn Proposals, therefore, cannot be justified on grounds of programming diversity.

502. Both CPD and WGA also fail to justify their definitions of the relevant market for purposes of their proposals. CPD, for example, has targeted its proposal only at the four major broadcast networks, and only at their prime time schedule. However, aside from conclusory allegations that ''the prime time television programming marketplace is a narrow, unique market,'' CPD has provided no reason to exclude other video programming outlets and other day-times, were we inclined to adopt a fin/syn-like rule. Viewers today have more programming choices available to them over-the-air, through cable, satellite, or home video, than ever before. Indeed, WGA considers a much larger market for these purposes (although it, too, provides little in the way of support for its market definition), and other commenters have suggested that non-prime time broadcast hours should be included in any analysis relating to programming diversity. Lacking the foundation of a sustainable market definition, the Fin/Syn Proposals cannot stand.

503. Finally, to the extent that the Fin/Syn Proposals are based on an assertion that the quality of independently-produced entertainment programming is superior to that of the Networks, we find the record devoid of evidence to that effect. *Cf.* MOWG Study No. 5, Program Diversity and the Program Selection Process on Broadcast Network Television by Mara Einstein (Sept. 2002). The Commission has no means or methodology to measure the quality of entertainment programming, and were we to favor one type or genre of programming over another, we would run squarely into the teeth of the First Amendment. To be considered content-neutral, regulations must have neutral means and ends. It is up to consumers and viewers to determine what programming they want to watch, and networks, as they compete for viewers, must be responsive to those demands. It is not for this agency to intervene in the decisions that determine the content of programming (absent obscenity or indecency concerns).

504. When the Seventh Circuit affirmed the Commission's decision repealing all of the fin/syn rules, it questioned whether the rules ''ever had much basis'' and cautioned that, if the Commission ever decided to re-impose similar restrictions, ''it had better have an excellent, a compelling reason'' to do so. *Capital Cities/ABC, Inc.* v. *FCC,* 29 F.3d 309, 316 (7th Cir. 1994). None appears on this record. Accordingly, the Commission rejects the Fin/Syn Proposals. Aside from these reasons, we reject WGA's proposal because it is far from clear that the Commission has jurisdiction over the programming carried on cable networks.

Administrative Matters

505. *Paperwork Reduction Act of 1995 Analysis.* This R&O contains new and modified information collections. The Commission, as part of its continuing effort to reduce paperwork burdens, will publish, as required by the Paperwork Reduction Act of 1995, Public Law 104–13, a separate notice in the **Federal Register** inviting the general public to comment on the information collections contained in this R&O and establishing a timeframe for accepting such comment.

506. As required by the Regulatory Flexibility Act (RFA), the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the estimated significant economic impact on small entities of the policies and rules adopted in the R&O. The analysis may be found in Appendix G of the full text of the R&O. This is a summary of the full FRFA. An Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (NPRM) initiating this proceeding. This present FRFA conforms to the RFA.

A. Need for, and Objectives of the Report and Order (R&O)

507. The R&O is the culmination of the Commission's third biennial ownership review and addresses all six broadcast ownership rules. This review is undertaken pursuant to section 202(h) of the Telecommunications Act of 1996, which requires the Commission to

review its broadcast ownership rules every two years. The NPRM initiated review of four ownership rules; the national television multiple ownership rule, the local television multiple ownership rule, the radio television cross-ownership rule; and the dual network rule. The R&O: (1) Replaces the newspaper/broadcast and radio/television cross/ownership rules with a set of cross-media limits; (2) modifies the local television multiple ownership rule; (3) modifies the local radio ownership rule and its market definition; (4) modifies the national TV ownership rule by changing the 35% limit in the current rule to 45%; and (5) retains the current dual network rule. The Commission believes these actions are necessary not only to comply with its section 202(h) obligation, but to protect the Commission's chief goals in effectively regulating broadcasting, to promote diversity, localism, and competition.

508. The changes adopted in the R&O provide a new, comprehensive framework for broadcast ownership regulation. The march of technology has brought to homes, schools, and places of employment across America unprecedented access to information and programming, while the Commission's broadcast ownership rules continue to restrict who may hold radio and television licenses. The current rules inadequately account for the competition presence of cable, ignore the diversity-enhancing value of the Internet, and lack any sound basis for a national audience reach cap. Our current rules are, in short, a patchwork of unenforceable and indefensible restrictions that, while laudable in principle, do not serve the interests they purport to serve.

509. The adoption of the R&O is critical to the realization of the Commission's public interest goals in that it puts an end to any uncertainty regarding the scope and effect of our structural broadcast ownership rules. Most importantly, the rules discussed and adopted in the R&O serve the Commission's competition, diversity and localism goals in highly targeted ways and, working together, form a comprehensive framework that is responsive to today's media environment.

B. Legal Basis

510. This R&O is adopted pursuant to §§ 1, 2(a), 4(j), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, and 310, and section 202(h) of the Telecommunications Act of 1996.

C. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

511. In addition to comments filed in direct response to the IRFA, the Commission received hundreds of thousands of comments, some of which concerned matters of particular interest to small entities. These comments are discussed in the section of this FRFA discussing the steps taken to minimize significant impact on small entities, and the significant alternatives considered. The Small Business Administration (SBA) filed comments in response to the IRFA in the NPRM and also in response to the IRFAs in Dockets 01–317 and 00–244. In both letters, SBA argues that the Notices of Proposed Rulemaking were not specific enough to comply with the Administrative Procedure Act or the Regulatory Flexibility Act., and that the IRFA did not fully discuss the possible impact of the proposed actions on small entities or offer alternatives that could minimize that impact. SBA contends that the general nature of the decisions made it difficult for small entities to file meaningful comments and so ''frustrates the spirit of the RFA.'' Therefore, SBA asks us to issue a Further Notice of Proposed Rulemaking in this proceeding. We disagree with SBA and deny its request. Contrary to the implication of SBA, the actual rules at issue in this proceeding are specifically identified in the NPRM and are well-known by interested parties—they are our current broadcast ownership rules. Congress has directed us to review those rules every two years to determine whether those exact rules remain necessary in the public interest. That we have done in this proceeding and in accordance with the NPRM. Further, Congress has directed the Commission to eliminate or modify any of its broadcast ownership rules that no longer are necessary. Again, it was explicit in the NPRM that we might eliminate any rule that could not be justified in light of the current media marketplace. To the extent that we have eliminated rules in the Order, there has been no failure of notice. With respect to those rules that, having been found unnecessary, have been modified in the Order, the question is the familiar one—were the modifications a ''logical outgrowth'' of the issues identified in the NPRM. The Commission concludes that the R&O and its accompanying rules are a logical outgrowth of the questions posed in the NPRM. The modifications made in the R&O are consistent with the issues and questions posed in the NPRM, and take account of the full record in this proceeding. The Commission takes seriously the mandate of section 202(h) to review our broadcast ownership rules every two years. It would be impractical to complete such a Herculean task, in this case, to review six different rules, and to complete that review in time to start another review, if we issued a separate notice detailing modifications to rules and initiated another comment period.

512. SBA's contentions that the general nature of the IRFA in the NPRM made it financially and practically difficult for small entities to file meaningful comments and that small entities have not had an opportunity to comment on the potential impact of the actions adopted in the R&O are belied by the hundreds of thousands of comments filed in this proceeding. Additionally, public hearings were conducted.

513. Hodson Broadcasting filed comments and reply comments in MM Dockets 01–317 and 00–244, recommending that the Commission modify the new entrant bidding credit in the broadcast auction process from the current percentages of 25 percent and 35 percent to 30 percent and 45 percent. Hodson also recommends, in its proposed 30 percent tier, that we allow an attributable interest in five mass media facilities nationwide instead of the current three, with the condition that the winning bidder has no attributable interest in a broadcast presence already in the market the proposed broadcast station intends to serve. Finally, for entities eligible for Hodson's proposed 45 percent tier, Hodson recommends that we establish a relaxed payment plan for the winning bid balance that would include an extended payment schedule. Hodson claims that its proposals would benefit small entities. Hodson's proposals go to our broadcast auction rules and process, not our ownership rules. These proposals are not a logical outgrowth of the NPRM and they are therefore outside the scope of this proceeding.

D. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

514. The RFA directs agencies to provide a description of and, where feasible, an estimate of, the number of entities that will be affected by the rules. The RFA defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act, unless the Commission has developed one or

more definitions that are appropriate to its activities. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

515. In this context, the application of the statutory definition to television stations is of concern. An element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimates that follow of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. An additional element of the definition of ''small business'' is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

516. *Television Broadcasting.* The Small Business Administration defines a television broadcasting station that has no more than $12 million in annual receipts as a small business. Business concerns included in this industry are those ''primarily engaged in broadcasting images together with sound.'' According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database as of May 16, 2003, about 814 of the 1,220 commercial television stations in the United States have revenues of $12 million or less. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations [37] must be included. Our estimates, therefore, likely overstate the number of small entities that might be affected by any changes to the ownership rules, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

517. *Radio Broadcasting.* The SBA defines a radio broadcast entity that has $6 million or less in annual receipts as a small business. Business concerns included in this industry are those ''primarily engaged in broadcasting aural programs by radio to the public. According to Commission staff review of the BIA Publications, Inc., Master Access Radio Analyzer Database, as of May 16, 2003, about 10,427 of the 10,945 commercial radio stations in the United States have revenue of $6 million or less. We note, however, that many radio stations are affiliated with much larger corporations with much higher revenue, and that in assessing whether a business concern qualifies as small under the above definition, such business (control) affiliations [38] are included.[39] Our estimate, therefore likely overstates the number of small businesses that might be affected by any changes to the ownership rules.

518. *Daily Newspapers.* The SBA defines a newspaper publisher with no more than 500 employees as a small business. According to the 1997 Economic Census, 8,620 of 8,758 newspaper publishers had less than 500 employees. The data does not distinguish between newspaper publishers that publish daily and those that publish less frequently, and the latter are more likely to be small businesses than the former because of the greater expense to publish daily. The new cross ownership limits apply only to daily newspapers. It is likely that not all of the 8,620 small newspaper publishers are affected by the current rule.

E. Description of Projected Reporting, Recordkeeping, Other Compliance Requirements

519. The R&O generally relaxes or retains the existing broadcast ownership rules. The R&O does, however, adopt a paperwork and compliance requirement in connection with the local radio ownership rules. The R&O requires that parties with existing attributable Joint Sales Agreements (JSAs) covering radio stations located in Arbitron Metros file a copy of the JSA with the Commission within 60 days of the effective date of the R&O. Parties with JSAs for radio stations not located in Arbitron Metros will have to file JSAs within 60 days of the effective date of the Order. Additionally, we are modifying FCC Application Forms 314 and 315 to require applicants to file attributable JSAs at the time an application is filed. In addition, parties may be required to file a copy of Local Marketing Agreements (LMAs) that have become attributable because of the decision to modify the market definition for radio stations.

520. Further, in connection with the local TV ownership rule, the R&O states that any licensee with a temporary waiver or pending waiver extension request must, by no later than 60 days after the effective date of the R&O, file either a statement describing how ownership of the subject station complies with the local TV ownership rule or an application for transfer or assignment of license for one of the stations that is subject of the waiver.

521. The R&O modifies the standards for rule waiver requests involving failed, failing, and unbuilt local television stations by removing the requirement to demonstrate that there is no reasonably available out-of-market buyer. It also provides guidelines for waiver of the top four-ranked restriction in markets of certain sizes, and addresses existing combinations that may not comply with the modified local television ownership rule. The R&O indicates that waiver applicants should supply: television ratings information for all the television stations in the market for the four most recent ratings periods; and information about current local news production for all stations in the local market and the effect of the proposed merger on local news and public affairs programming for the affected stations. Waiver applicants claiming that the merger is needed to facilitate the digital transition should provide data supporting this assertion. Applicants stating that the merger is needed to preserve a local newscast should document the financial performance of the affected news division. Applicants for waiver of our top four-ranked restriction must demonstrate that the proposed combination will produce public interest benefits. As in the context of the failing station waiver, the Commission will require that, at the end of the merged stations' license term, the owner of the merged stations must certify to the Commission that the public interest benefits of the merger are being fulfilled. This certification must include a specific factual showing of the program-related benefits that have accrued to the public. The Commission will consider waivers of our local TV ownership rule where a party can demonstrate that the signals of the stations in a proposed combination do not have overlapping Grade B contours and have not been carried, via DBS or cable, to any of the same geographic areas within the past year. The R&O also adopts a paperwork and compliance requirement in connection with parties who have a

[37] Concerns are affiliates of each other when one concern controls or has the power to control the other or a third party or parties control or has to power to control both. 13 CFR 121.103(a)(1).

[38] Concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both. 13 CFR 121.103(a)(1).

[39] SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit, in determining the concern's size. 13 CFR 121(a)(4).

conditional waiver or a pending waiver request concerning newspaper/broadcast or television/radio cross-ownership situations. These parties must notify the Commission as to whether or not the combinations are in at-risk markets or whether the combinations would otherwise be prohibited pursuant to the Commission's Cross-Media Limits.

522. The R&O addresses issues relating to existing combinations that may not comply with the modified rules. The R&O grandfathers existing holdings. The R&O requires that parties come into compliance with the modified rules upon sale of the grandfathered combination, except when such transfers are made to, or by, ''eligible entities.'' The R&O defines an eligible entity as a small business consistent with SBA standards for industry groupings. The R&O prohibits an eligible entity from selling a grandfathered combination acquired after the adoption date of the R&O unless it has held the combination for a minimum of three years. The R&O adopts processing guidelines for pending broadcast assignment and transfer of control applications. Applicants with pending long-form applications (FCC Forms 314 and 315) that require a multiple ownership showing may amend applications by submitting a new multiple ownership showing demonstrating compliance with the rules adopted in the R&O. Applicants may begin filing such amendments once notice has been published by the Commission in the **Federal Register** that OMB has approved the information collection requirements contained in such amendments. Applications pending as of the effective date of the rules adopted in the R&O will be processed under the new rules.

523. Finally, the R&O establishes a freeze on the filing of new broadcast assignment and transfer of control applications that require the use of FCC Form 314 or 315.

524. The freeze began on the adoption date of the R&O and ends on the date that notice has been published by the Commission in the **Federal Register** that OMB has approved the revised forms. The Commission will continue to process short-form (FCC 316) applications. The Commission is modifying and releasing revised forms 301, 314, and 315 based on the changes in the R&O, and these revised forms will be effective upon OMB approval.

F. Steps Taken To Minimize Significant Impact on Small Entities and Significant Alternatives Considered

525. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

526. Any discussion of alternatives which were available to the Commission in reviewing these broadcast ownership rules must begin with an understanding that section 202(h) mandates that the Commission review these rules to determine whether they remain ''necessary in the public interest.'' Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules if the Commission finds the rules are not ''necessary in the public interest.'' Thus, the Commission has three chief alternatives available in analyzing each of these rules—to eliminate the rule, modify it, or, if the Commission determines that the rule is ''necessary in the public interest,'' retain the rule. As discussed in paragraphs 10–16 of the R&O, the Commission in reviewing the broadcast ownership rules is acting under its legislative mandate and, guided by recent court decisions, finds that section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules. Given these limitations, the Commission is limited in the relief it can offer small entities.

527. The Commission received more than 500,000 brief comments and form letters from individual citizens. These commenters expressed general concerns about the potential consequences of media consolidation, including concerns that such consolidation would result in a significant loss of viewpoint diversity, and affect competition from all entities, including small entities. The Commission shares these concerns and believes that the rules adopted in the R&O serve our public interest goals, take account of and protect the vibrant media marketplace, including the continued viability of small entities, and comply with our statutory responsibilities and limits.

528. The decisions made in the R&O reduce or remove regulatory restrictions for all entities, including small entities. The Commission also adopts waiver processes that will enable licensees to seek relief from the impact of the rules in appropriate circumstances. Additionally, we are grandfathering existing combinations, both intra- and inter-media, that would not comply with the new regulations. This will prevent the harmful economic impact of forced divesture at fire-sale prices that would have been burdensome to all affected licensees, including small entities. Also, the Commission generally elects to establish bright-line ownership rules rather than case-by-case determinations. This will reduce the delay, cost, and uncertainty that sometimes accompanies case-by-case reviews. This is of special interest to small entities as such costs could weigh disproportionately on small businesses if the subject matter of the proposed transaction is a substantial portion of the small business's total assets. Generally speaking, by adopting bright-line rules rather than a case-by-case approach, the Commission takes action that will benefit small businesses by lowering transaction costs and increasing regulatory certainty.

529. *Local TV Multiple Ownership Rule (Paragraphs 132–234).* The R&O modifies the current local TV multiple ownership rule to permit an entity to have an attributable interest in two television stations in markets with 17 or fewer stations; and up to three stations in markets with 18 or more stations, provided that no more than one of the stations in the combination is ranked among the top four in terms of audience share. As a result of the top four-ranked standard, combinations in markets with fewer than five stations are not permitted. The R&O eliminates the provision of the current rule that permits combinations of two television stations that do not have overlapping signal contours. Because of mandatory carriage of television broadcast stations by multichannel video programming distributors, the geographic market in which a station competes is generally its Nielsen Designated Market Area (DMA), rather than its over-the-air service area. Therefore all proposed stations combinations will be subject to the restrictions described above, without regard to contour overlap.

530. Commenters proposing elimination or relaxation of the local TV multiple ownership rule argue that the rule is no longer ''necessary in the public interest'' because it prevents broadcasters from achieving efficiencies that will allow them to compete more

effectively with other media outlets and to provide improved services to the public. Several commenters contend that this is especially true for broadcasters in small and mid-sized markets. The Commission agrees that, by limiting common ownership of television stations in local markets where at least eight independently owned TV stations would remain post merger, the current rule prohibits mergers that would result in efficiencies that will benefit the public interest, especially mergers in small and mid-sized markets. The modifications to the rule adopted in the Order will permit broadcasters in more small and mid-sized markets, including small entities, to combine and thereby achieve such efficiencies. The modified rule accounts for the competitive realities faced by broadcasters in small and medium markets. Although the modified rule ensures that there will be at least six competitors in markets with 12 or more television stations, in markets with 11 or fewer television stations the R&O permits higher levels of concentration in light of the differences in the economics of broadcasting in smaller markets. The top four—ranked restriction of the modified local TV ownership rule also protects small entities by preventing the largest firms in a given local market from combining to achieve excessive market power. By prohibiting combinations involving stations with the largest audience shares, the restriction protects against potential harm to broadcasters with smaller market shares, including small entities.

531. The R&O also addresses competitive challenges faced by broadcasters in small markets through modified waiver standards. The R&O modifies the standards for rule waiver requests involving failed, failing, and unbuilt local television stations by removing the requirement to demonstrate that there is no reasonably available out-of-market buyer. The R&O further adopts two additional waiver standards. First, it provides for consideration of requests for waiver of the top four-ranked prohibition of the local TV ownership rule in markets with 11 or fewer TV stations where an applicant can show that the public interest benefits of a proposed combination outweigh potential harms to competition, diversity, and localism. In evaluating such waiver requests, the Commission also will account for the diminished reach of UHF stations by considering whether the proposed combination involves a UHF station. Reduced audience reach diminishes UHF stations' impact on diversity and competition in local markets. Because this standard applies only in smaller markets, it may benefit smaller entities that would otherwise be unable to combine under the current rule. In addition, because it will account for competitive disparities faced by UHF stations, it will benefit small entities that may own such stations. The Order also provides guidelines for waivers for combinations involving stations that do not have overlapping signal contours and are not carried in the same geographic area by MVPDs.

532. The Commission received a proposal that, if the local TV multiple ownership rule is relaxed, the Commission require periodic certification by owners of same-market combinations that they are not engaged in certain types of anticompetitive conduct that would adversely affect smaller broadcasters in their markets. The Commission denies this proposal, on grounds that the modified local television ownership rule does not increase the likelihood that broadcasters will engage in anticompetitive conduct. The R&O notes that, if broadcasters engage in anticompetitive conduct that is illegal under antitrust statutes, remedies are available pursuant to those statutes. In addition, an antitrust law violation would be considered as part of the Commission's character qualifications review in connection with any renewal, assignment, or transfer of a license.

533. The Commission, as discussed in paragraphs 209–220 of the R&O, received several suggestions for modifying the local TV multiple ownership rule, but concludes that, as compared to the modified rule, the proposals advanced by commenters are more likely to result in anomalies and inconsistencies or will otherwise fail to serve our policy goals. Examining each proposal in turn, the R&O concludes that these proposals would permit unacceptable levels of concentration in local markets or would permit combinations among top four-ranked stations, which are likely to result in competitive harm, with no offsetting public interest benefits. One commenter, the National Association of Broadcasters (NAB) proposes a ''10/10'' alternative that would permit combinations where at least one of the stations has had, on average over the course of the year, an all-day audience share of 10 or less. NAB maintains that its proposal would provided needed financial relief for struggling stations in small and medium markets and those that are lower rated, and, by prohibiting combinations of leading stations, would effectuate the Commission's diversity and competition goals. The Commission dismisses this proposal, finding that the proposal would permit mergers between financially strong stations, including top four-ranked stations, in a significant number of markets, and offers no justification for using 10 as a threshold. The R&O finds that, rather than allowing combinations involving top four-ranked stations as a general rule, consideration of waivers of the top four-ranked restriction in smaller markets on a case-by-case basis, as described above, will better effectuate its policy goals, and will address the concerns of broadcasters in smaller markets, including small entities operating in such markets.

534. *Local Radio Ownership Rule (Paragraphs 235–326).* The local radio ownership rule limits the number of commercial radio stations overall and the number of commercial radio stations in a service (AM or FM) that a party may own in a local market. The Commission finds that the numerical limits in the current rule are ''necessary in the public interest,'' but finds that the rule must be modified to change the method for defining radio markets and to count noncommercial stations in the market. The R&O thus modifies the rule by adopting a market definition that reflects more accurately the competitive impact of proposed radio station combinations, and by providing that the Commission will count non-commercial radio stations in calculating market size. The R&O also makes joint sales agreements (JSAs) attributable for purposes of determining compliance with the local radio ownership rule and adopts ''grandfathering'' rules and procedures to address any existing station ownership patterns or JSAs that may cause a party to be out of compliance with the modified rule. The Commission dismisses requests to repeal the local radio ownership rule. Commenters favoring repeal argue that, for example, the rule is unjustified because consolidation has resulted in efficiencies and has produced significant public interest benefits. While the Commission does not dispute that a certain level of consolidation of radio stations can improve the ability of a group owner to make investments that benefit the public, we seek to ensure that radio stations outside of the dominant groups, including small entities can remain viable and, beyond that, can prosper. Other commenters dispute these contentions, expressing concern that, in a concentrated market, dominant radio station groups can exercise market power to attract revenue at the expense of the small owner. As a

result, they argue, the small owner has greater difficulty obtaining the revenue it needs to develop and broadcast attractive programming and to compete generally against the dominant station groups. Although the Commission declines to pass on the competitive situation in any particular radio market in the context of this proceeding, the concerns raised by the latter commenters comport with the competition analysis that underlies this R&O and supports our decision not to repeal the local radio ownership rule.

535. The Commission decides not to require divestiture of existing combinations of broadcast stations that violate the modified multiple ownership rules adopted in the Order. The Commission determined that the alternative, requiring divestiture, would be too disruptive on the broadcast industry, which includes small broadcast owners. However, the Commission will require that combinations comply with the modified multiple ownership rules upon the assignment or transfer of control of the station group. The Commission rejected the alternative, allowing grandfathered combinations to be sold in perpetuity, because such a decision would disserve our competition goals discussed in the Order. Any spin-offs that would be required upon sales of stations in a grandfathered group could afford new entrants the opportunity to enter the media marketplace. It could also give small station owners already in the market the opportunity to acquire more stations and take advantage of the benefits of combined ownership.

536. The Commission adopts an exception to the prohibition on the transfer of grandfathered combinations that violate the new rules. The Commission will allow transfers to ''eligible entities.'' The Commission defines an eligible entity as a small business consistent with SBA standards for industry groupings. This exception was adopted to facilitate new entry by, and growth of, small businesses in the broadcast industry, and thereby further our goals of diversity of ownership, competition, and localism. The Commission will allow eligible entities to sell grandfathered combinations generally without restriction. The Commission believes that small businesses require greater flexibility than do larger entities for the disposition of assets. Restrictions on the sale of assets could disproportionately harm the financial stability of smaller firms, compared to that of larger firms that have other revenue streams. To prevent abuse of the policy, the Commission prohibits eligible entities from selling grandfathered combinations acquired after adoption date of the Order unless it has held the combination for a minimum of three years.

537. Paragraphs 316–325 of the R&O discuss attribution of JSAs. In this regard, the Commission has the option, supported by some commenters, of maintaining its current policy of that JSAs are not attributable under the Commission's rules. Commenters supporting retention of this exemption argue that JSAs produce a public interest benefit. Although the Commission continues to believe that JSAs may have some positive effects on the local radio industry, the threat to competition and the potential impact on the influence over the brokered stations and requires attribution. As indicated in paragraph 319 of the R&O, the Commission recognizes that JSAs raise concerns regarding the ability of smaller broadcasters to compete, and may negatively affect the health of the local radio industry generally. Therefore, the R&O states that the Commission will now count such brokered stations toward the brokering licensee's attributable interest in one or more stations in a local radio market.

538. *Newspaper/Broadcast and Radio/Television Cross Ownership Rules. (Paragraphs 327–481).* Based on the extensive record in this proceeding, the Commission finds that neither the current nationwide prohibition on common ownership of daily newspapers and broadcast outlets in the same market, nor our cross-service restriction on commonly owned radio and television outlets in the same market, is ''necessary in the public interest.'' With respect to both rules, the Commission concludes that the ends sought can be achieved with more precision and with greater deference to First Amendment interests by modifying the rules into a single set of cross media limits. The modified rules adopted in the R&O are, in sum, designed to protect against markets becoming highly concentrated, in a qualitative sense, for diversity purposes.

539. Although our conclusions pertain to markets of all sizes, newspaper-broadcaster combinations may produce tangible public benefits in smaller markets in particular. In this regard, West Virginia Media contends that the cross-ownership restriction impairs coverage of local news and public affairs in small markets by prohibiting combinations that would produce efficiencies and synergies particularly necessary in smaller markets. It argues that the rule may have the unintended effect of stifling local news by prohibiting efficient combinations that would produce better output. We assume that the efficiencies cited by West Virginia Media can benefit small businesses with respect to the production of news and public affairs programming.

540. *National Ownership Rules (Paragraphs 499–621).* The R&O modifies the national TV ownership rule by raising the audience cap from 35% of the country's television households to 45%. The Commission received a significant amount of public comment in this regard and, based on the record, finds that, although retention of a national cap is necessary to limit the percentage of television households that an entity may reach through the station it owns, a cap of 35% is not necessary to preserve the balance of bargaining power between networks and affiliates and may have other drawbacks. The Commission believes that the current affiliate/network dynamic is beneficial to viewers and should be preserved and that eliminating the cap altogether would shift the balance of power with respect to programming decisions toward the national broadcast networks in a way that would disserve the Commission's localism policy. But the evidence suggests that 35% is overly restrictive and that the cap may safely be raised and the benefits of wider network station ownership achieved without disturbing either this balance or affiliates' ability to preempt network programming.

541. The R&O cites three primary reasons for settling on the 45% cap: (1) Given that the Commission is interested in finding a point at which the balance of bargaining power between networks and affiliates is roughly equal, a national audience reach cap of approximately half of all homes is appropriate; (2) because the Commission has some concern about allowing significant new aggregation of network power absent more compelling evidence regarding the possible effects of that aggregation above current limits and in light of the fact that Congress raised the ownership cap by ten percentage points in 1996, the Commission is inclined to take a similarly incremental approach; and (3) a 45% cap will allow some, but not unconstrained, growth for each of the top largest network owners. Permitting the networks a modest amount of growth will enable them to compete more effectively with cable and DBS operators and may help preserve free, over-the-air television by reducing the likelihood that networks will migrate expensive programming to their cable

networks. The R&O retains the 50% UHF discount when calculating a television station owner's national reach, which could benefit small businesses by encouraging the emergence of new broadcast networks. The R&O sunsets the application of the UHF discount for the stations owned by the top four broadcast networks when the digital transition is completed on a market by market basis.

542. The Commission retains the dual network rule, which permits common ownership of multiple broadcast networks, but prohibits a merger between or among the ''top-four'' networks, finding that the rule is ''necessary in the public interest'' to promote competition and localism. The R&O concludes that a top-four network merger would give rise to competitive concerns that the merged firm would be able to reduce its program purchases and/or the price it pays for programming, and that this would in turn harm viewers through reduction in program output, program choices, program quality, and innovation. Further, a top-four network merger would harm localism by providing the networks with undue economic leverage over their affiliates.

543. *Minority and Women Proposals (Paragraphs 46–52).* MMTC proposes a dozen business and regulatory initiatives that ''would go a long way toward increasing entry into the communications industry by minorities.'' MMTC's initiatives include: (1) Equity for specific and contemplated future acquisitions; (2) enhanced outreach and access to debt financing by major financial institutions; (3) investments in institutions specializing in minority and small business financing; (4) cash and in-kind assistance to programs that train future minority media owners; (5) creation of a business planning center that would work one-on-one with minority entrepreneurs as they develop business plans and strategies, seek financing, and pursue acquisitions; (6) executive loans, and engineers on loan, to minority owned companies and applicants; (7) enhanced access to broadcast transactions through sellers undertaking early solicitations of qualified minority new entrants and affording them the same opportunities to perform early due diligence as the sellers afford to established non-minority owned companies; (8) nondiscrimination provisions in advertising sales contracts; (9) incubation and mentoring of future minority owners; (10) enactment of tax deferral legislation designed to foster minority ownership; (11) examination of how to promote minority ownership as an integral part of all FCC general media rulemaking proceedings; and (12) ongoing longitudinal research on minority ownership trends, conducted by the FCC, NTIA, or both; (13) sales to certain minority or small businesses as alternatives to divestitures.

544. These comments contain many creative proposals to advance minority and female ownership. Clearly, a more thorough exploration of these issues, which will allow us to craft specifically tailored rules that will withstand judicial scrutiny, is warranted. Therefore, we will issue a Notice of Proposed Rulemaking to address these issues and incorporate comments on these issues received in this proceeding into that proceeding.

545. We do, however, see significant immediate merit in MMTC's proposal regarding the transfer of media properties that collectively exceed our radio ownership cap. MMTC recommends that the Commission generally forbid the wholesale transfer of media outlets that exceed our ownership rules except where the purchaser qualifies as a ''socially and economically disadvantaged business (SDB).'' MMTC defines SDBs as the definition contained in legislation recently introduced by U.S. Senator John McCain. We agree with MMTC that the limited exception to a ''no transfer'' policy for above-cap combinations would serve the public interest. We agree with MMTC that the benefits to competition and diversity of a limited exception allowing entities to sell above-cap combinations to eligible small entities outweigh the potential harms of allowing the above-cap combination to remain intact. Greater participation in communications markets by small businesses, including those owned by minorities and women, has the potential to strengthen competition and diversity in those markets. It will expand the pool of potential competitors in media markets and should bring new competitive strategies and approaches by broadcast station owners in ways that benefit consumers in those markets.

546. In addition, MMTC proposes that we adopt an ''equal transactional opportunity'' rule similar in some respects to our EEO requirements. While such a rule is worthy of further exploration, we decline to adopt a rule without further consideration of its efficacy as well as any direct or inadvertent effects on the value and alienability of broadcast licenses. We see merit in encouraging transparency in dealmaking and transaction brokerage, consistent with business realities. We also reiterate that discriminatory actions in this, and any other context, are contrary to the public interest. For these reasons, we intend to refer the question of how best to ensure that interested buyers are aware of broadcast properties for sale to the Advisory Committee on Diversity for further inquiry and will carefully review any recommendations this Committee may proffer. As soon as the Commission receives authorization to form this committee we will ask it to make consideration of this issue among its top priorities.

547. Report to Congress. The Commission will send a copy of the R&O, including this FRFA, in a report to be sent to Congress pursuant to the SBREFA. In addition, the Commission will send a copy of the Order, including the FRFA, to the Chief Counsel for Advocacy of the SBA.

Document Availability

548. This document is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.* This document is available in accessible formats (computer diskettes, large print, audio recording, and Braille) to persons with disabilities by contacting Brian Millin in the Consumer & Governmental Affairs Bureau at 202–418–7426, TTY 202–418–7365, or at *bmillin@fcc.gov.*

Ordering Clauses

549. Pursuant to the authority contained in §§ 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, and 310 and section 202(h) of the Telecommunications Act of 1996, this *Report and Order* in MB Docket No. 02–277 and MM Docket Nos. 01–235, 01–317, and 00–244 is adopted.

550. Part 73 of the Commission's rules is amended.

551. The Interim Policy set forth in the R&O is adopted.

552. The Motion for Revision of Procedural Dates, Expansion of the Scope of the Proceeding, and Inclusion of Additional Studies in the Record, filed on October 9, 2002 by Minority Media and Telecommunications Council and National Association of Black Owned Broadcasters, is denied in

part and granted in part to the extent described provided in the R&O; the Motion to Bifurcate and Repeal, filed on March 11, 2003 by Media General, Inc., is dismissed, and the Motion to Postpone, filed on May 31, 2003 by the Diversity and Competition Supporters, *et al.*, is denied.

553. Pursuant to the authority contained in §§ 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, and 310 and section 202(h) of the Telecommunications Act of 1996, that the ownership requirements and rules adopted in this R&O shall become effective September 4, 2003, except for §§ 73.3555 and 73.3613 which contains information collection requirements that are not effective until approved by the Office of Management and Budget. The Commission will publish a document in the **Federal Register** announcing the effective date. A separate notice will be published in the **Federal Register** soliciting public and agency comment on the information collections, and establishing a deadline for accepting such comment.

554. This action is taken pursuant to the authority contained in §§ 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, and 310 and section 202(h) of the Telecommunications Act of 1996. If any section, subsection, paragraph, sentence, clause or phrase of this R&O or the rules adopted in the R&O is declared invalid for any reason, the remaining portions of the R&O and the rules adopted in the R&O shall be severable from the invalid part and shall remain in full force and effect.

555. The proceedings in MB Docket No. 02–277, MM Docket No. 01–235, MM Docket No. 01–317, and MM Docket No. 00–244 are terminated.

556. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of the Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 73

Radio, Reporting and recordkeeping requirements, Television.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

Rule Changes

■ For the reasons discussed in the preamble the FCC amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

§ 73.3555 [Amended]

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, and 336.

■ 2. Amend § 73.3555 as follows;
■ a. Revise paragraphs (a) through (c);
■ b. Remove paragraph (d);
■ c. Redesignate paragraphs (e) and (f) as paragraphs (d) and (e);
■ d. Revise newly redesignated paragraph (d);
■ e. Revise Note 1 to § 73.3555;
■ f. Revise Note 2 to § 73.3555;
■ g. Revise Notes 4 through 7 to § 73.3555; and
■ h. Add Notes 11 and 12 to § 73.3555.

§ 73.3555 Multiple ownership.

(a)(1) *Local radio ownership rule.* A person or single entity (or entities under common control) may have a cognizable interest in licenses for AM or FM radio broadcast stations in accordance with the following limits:

(i) In a radio market with 45 or more full-power, commercial and noncommercial radio stations, not more than 8 commercial radio stations in total and not more than 5 commercial stations in the same service (AM or FM);

(ii) In a radio market with between 30 and 44 (inclusive) full-power, commercial and noncommercial radio stations, not more than 7 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM);

(iii) In a radio market with between 15 and 29 (inclusive) full-power, commercial and noncommercial radio stations, not more than 6 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM);

(iv) In a radio market with 14 or fewer full-power, commercial and noncommercial radio stations, not more than 5 commercial radio stations in total and not more than 3 commercial stations in the same service (AM or FM); provided, however, that no person or single entity (or entities under common control) may have a cognizable interest in more than 50% of the full-power, commercial and noncommercial radio stations in such market unless the combination of stations comprises not more than one AM and one FM station.

(2) [Reserved]

(b) *Local television multiple ownership rule.* (1) For purposes of this section, a television station's market shall be defined as the Designated Market Area (DMA) to which it is assigned by Nielsen Media Research or any successor entity at the time the application to acquire or construct the station(s) is filed. Puerto Rico, Guam, and the U.S. Virgin Islands each will be considered a single market.

(2) An entity may have a cognizable interest in more than one full-power commercial television broadcast station in the same DMA in accordance with the following conditions and limits:

(i) At the time the application to acquire or construct the station(s) is filed, no more than one of the stations that will be attributed to such entity is ranked among the top four stations in the DMA, based on the most recent all-day (9 a.m.–midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and

(ii) (A) Subject to paragraph (b)(2)(i) of this section, in a DMA with 17 or fewer full-power commercial and noncommercial television broadcast stations, an entity may have a cognizable interest in no more than 2 commercial television broadcast stations; or

(B) Subject to paragraph (b)(2)(i) of this section, in a DMA with 18 or more full-power commercial and noncommercial television broadcast stations, an entity may have a cognizable interest in no more than 3 commercial television broadcast stations.

(c) *Cross-Media Limits.* Cross-ownership of a daily newspaper and commercial broadcast stations, or of commercial broadcast radio and television stations, is permitted without limitation except as follows:

(1) In Nielsen Designated Market Areas (DMAs) to which three or fewer full-power commercial and noncommercial educational television stations are assigned, no newspaper/broadcast or radio/television cross-ownership is permitted.

(2) In DMAs to which at least four but not more than eight full-power commercial and noncommercial educational television stations are assigned, an entity that directly or indirectly owns, operates or controls a daily newspaper may have a cognizable interest in either:

(i) One, but not more than one, commercial television station in combination with radio stations up to 50% of the applicable local radio limit for the market; or,

(ii) Radio stations up to 100% of the applicable local radio limit if it does not have a cognizable interest in a television station in the market.

(3) The foregoing limits on newspaper/broadcast cross-ownership do not apply to any new daily

newspaper inaugurated by a broadcaster.

(d) *National television multiple ownership rule.* (1) No license for a commercial television broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors having a cognizable interest in television stations which have an aggregate national audience reach exceeding forty-five (45) percent.

(2) For purposes of this paragraph (d):

(i) *National audience reach* means the total number of television households in the Nielsen Designated Market Areas (DMAs) in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license. For purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their DMA market.

(ii) No market shall be counted more than once in making this calculation.

* * * * *

Note 1 to § 73.3555: The words ''cognizable interest'' as used herein include any interest, direct or indirect, that allows a person or entity to own, operate or control, or that otherwise provides an attributable interest in, a broadcast station.

Note 2 to § 73.3555: In applying the provisions of this section, ownership and other interests in broadcast licensees, cable television systems and daily newspapers will be attributed to their holders and deemed cognizable pursuant to the following criteria

(a) Except as otherwise provided herein, partnership and direct ownership interests and any voting stock interest amounting to 5% or more of the outstanding voting stock of a corporate broadcast licensee, cable television system or daily newspaper will be cognizable;

(b) Investment companies, as defined in 15 U.S.C. 80a–3, insurance companies and banks holding stock through their trust departments in trust accounts will be considered to have a cognizable interest only if they hold 20% or more of the outstanding voting stock of a corporate broadcast licensee, cable television system or daily newspaper, or if any of the officers or directors of the broadcast licensee, cable television system or daily newspaper are representatives of the investment company, insurance company or bank concerned. Holdings by a bank or insurance company will be aggregated if the bank or insurance company has any right to determine how the stock will be voted. Holdings by investment companies will be aggregated if under common management.

(c) Attribution of ownership interests in a broadcast licensee, cable television system or daily newspaper that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. For purposes of paragraph (i) of this note, attribution of ownership interests in a broadcast licensee, cable television system or daily newspaper that are held indirectly by any party through one or more intervening organizations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, and the ownership percentage for any link in the chain that exceeds 50% shall be included for purposes of this multiplication. [For example, except for purposes of paragraph (i) of this note, if A owns 10% of company X, which owns 60% of company Y, which owns 25% of ''Licensee,'' then X's interest in ''Licensee'' would be 25% (the same as Y's interest because X's interest in Y exceeds 50%), and A's interest in ''Licensee'' would be 2.5% (0.1 x 0.25). Under the 5% attribution benchmark, X's interest in ''Licensee'' would be cognizable, while A's interest would not be cognizable. For purposes of paragraph (i) of this note, X's interest in ''Licensee'' would be 15% (0.6 x 0.25) and A's interest in ''Licensee'' would be 1.5% (0.1 x 0.6 x 0.25). Neither interest would be attributed under paragraph (i) of this note.]

(d) Voting stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust. An otherwise qualified trust will be ineffective to insulate the grantor or beneficiary from attribution with the trust's assets unless all voting stock interests held by the grantor or beneficiary in the relevant broadcast licensee, cable television system or daily newspaper are subject to said trust.

(e) Subject to paragraph (i) of this note, holders of non-voting stock shall not be attributed an interest in the issuing entity. Subject to paragraph (i) of this note, holders of debt and instruments such as warrants, convertible debentures, options or other non-voting interests with rights of conversion to voting interests shall not be attributed unless and until conversion is effected.

(f)(1) A limited partnership interest shall be attributed to a limited partner unless that partner is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the licensee or system so certifies. An interest in a Limited Liability Company (''LLC'') or Registered Limited Liability Partnership (''RLLP'') shall be attributed to the interest holder unless that interest holder is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the licensee or system so certifies.

(2) For a licensee or system that is a limited partnership to make the certification set forth in paragraph (f)(1) of this note, it must verify that the partnership agreement or certificate of limited partnership, with respect to the particular limited partner exempt from attribution, establishes that the exempt limited partner has no material involvement, directly or indirectly, in the management or operation of the media activities of the partnership. For a licensee or system that is an LLC or RLLP to make the certification set forth in paragraph (f)(1) of this note, it must verify that the organizational document, with respect to the particular interest holder exempt from attribution, establishes that the exempt interest holder has no material involvement, directly or indirectly, in the management or operation of the media activities of the LLC or RLLP. The criteria which would assume adequate insulation for purposes of this certification are described in the Memorandum Opinion and Order in MM Docket No. 83–46, FCC 85–252 (released June 24, 1985), as modified on reconsideration in the Memorandum Opinion and Order in MM Docket No. 83–46, FCC 86–410 (released November 28, 1986). Irrespective of the terms of the certificate of limited partnership or partnership agreement, or other organizational document in the case of an LLC or RLLP, however, no such certification shall be made if the individual or entity making the certification has actual knowledge of any material involvement of the limited partners, or other interest holders in the case of an LLC or RLLP, in the management or operation of the media-related businesses of the partnership or LLC or RLLP.

(3) In the case of an LLC or RLLP, the licensee or system seeking insulation shall certify, in addition, that the relevant state statute authorizing LLCs permits an LLC member to insulate itself as required by our criteria.

(g) Officers and directors of a broadcast licensee, cable television system or daily newspaper are considered to have a cognizable interest in the entity with which they are so associated. If any such entity engages in businesses in addition to its primary business of broadcasting, cable television service or newspaper publication, it may request the Commission to waive attribution for any officer or director whose duties and responsibilities are wholly unrelated to its primary business. The officers and directors of a parent company of a broadcast licensee, cable television system or daily newspaper, with an attributable interest in any such subsidiary entity, shall be deemed to have a cognizable interest in the subsidiary unless the duties and responsibilities of the officer or director involved are wholly unrelated to the broadcast licensee, cable television system or daily newspaper subsidiary, and a statement properly documenting this fact is submitted to the Commission. [This statement may be included on the appropriate Ownership Report.] The officers and directors of a sister corporation of a broadcast licensee, cable television system or daily newspaper shall not be attributed with ownership of these entities by virtue of such status.

(h) Discrete ownership interests will be aggregated in determining whether or not an interest is cognizable under this section. An individual or entity will be deemed to have a cognizable investment if:

(1) The sum of the interests held by or through ''passive investors'' is equal to or exceeds 20 percent; or

(2) The sum of the interests other than those held by or through ''passive investors'' is equal to or exceeds 5 percent; or

(3) The sum of the interests computed under paragraph (h)(1) of this note plus the sum of the interests computed under paragraph (h)(2) of this note is equal to or exceeds 20 percent.

(i) Notwithstanding paragraphs (e) and (f) of this note, the holder of an equity or debt interest or interests in a broadcast licensee, cable television system, daily newspaper, or other media outlet subject to the broadcast multiple ownership or cross-ownership rules (''interest holder'') shall have that interest attributed if:

(1) The equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed 33 percent of the total asset value, defined as the aggregate of all equity plus all debt, of that media outlet; and

(2)(i) The interest holder also holds an interest in a broadcast licensee, cable television system, newspaper, or other media outlet operating in the same market that is subject to the broadcast multiple ownership or cross-ownership rules and is attributable under paragraphs of this note other than this paragraph (i); or

(ii) The interest holder supplies over fifteen percent of the total weekly broadcast programming hours of the station in which the interest is held. For purposes of applying this paragraph, the term, ''market,'' will be defined as it is defined under the specific multiple ownership rule or cross-media limit that is being applied, except that for television stations, the term ''market,'' will be defined by reference to the definition contained in the local television multiple ownership rule contained in paragraph (b) of this section.

(j) ''Time brokerage'' (also known as ''local marketing'') is the sale by a licensee of discrete blocks of time to a ''broker'' that supplies the programming to fill that time and sells the commercial spot announcements in it.

(1) Where two radio stations are both located in the same market, as defined for purposes of the local radio ownership rule contained in paragraph (a) of this section, and a party (including all parties under common control) with a cognizable interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (a) and (c) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

(2) Where two television stations are both located in the same market, as defined in the local television ownership rule contained in paragraph (b) of this section, and a party (including all parties under common control) with a cognizable interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (b) and (c) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

(3) Every time brokerage agreement of the type described in this Note shall be undertaken only pursuant to a signed written agreement that shall contain a certification by the licensee or permittee of the brokered station verifying that it maintains ultimate control over the station's facilities including, specifically, control over station finances, personnel and programming, and by the brokering station that the agreement complies with the provisions of paragraphs (b) and (c) of this section if the brokering station is a television station or with paragraphs (a) and (c) if the brokering station is a radio station.

(k) ''Joint Sales Agreement'' is an agreement with a licensee of a ''brokered station'' that authorizes a ''broker'' to sell advertising time for the ''brokered station.''

(1) Where two radio stations are both located in the same market, as defined for purposes of the local radio ownership rule contained in paragraph (a) of this section, and a party (including all parties under common control) with a cognizable interest in one such station sells more than 15 percent of the advertising time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (a) and (c) of this section.

(2) Every joint sales agreement of the type described in this Note shall be undertaken only pursuant to a signed written agreement that shall contain a certification by the licensee or permittee of the brokered station verifying that it maintains ultimate control over the station's facilities, including, specifically, control over station finances, personnel and programming, and by the brokering station that the agreement complies with the limitations set forth in paragraphs (a) and (c) of this section.

* * * * *

Note 4 to § 73.3555: Paragraphs (a) through (c) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities, and will not apply to applications for assignment of license or transfer of control filed in accordance with § 73.3540(f) or § 73.3541(b), or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy, if no new or increased concentration of ownership would be created among commonly owned, operated or controlled media properties. Paragraphs (a) through (c) will apply to all applications for new stations, to all other applications for assignment or transfer, to all applications for major changes to existing stations, and to applications for minor changes to existing stations that implement an approved change in an FM radio station's community of license or create new or increased concentration of ownership among commonly owned, operated or controlled media properties. Commonly owned, operated or controlled media properties that do not comply with paragraphs (a) through (c) of this section may not be assigned or transferred to a single person, group or entity, except as provided in this Note or in the *Report and Order* in Docket No. 02–277, released July 2, 2003 (FCC 02–127).

Note 5 to § 73.3555: Paragraphs (b) and (c) of this section will not be applied to cases involving television stations that are ''satellite'' operations. Such cases will be considered in accordance with the analysis set forth in the *Report and Order* in MM Docket No. 87–8, FCC 91–182 (released July 8, 1991) in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. An authorized and operating ''satellite'' television station may subsequently become a ''non-satellite'' station under the circumstances described in the aforementioned *Report and Order* in MM Docket No. 87–8. A cognizable interest in such ''non-satellite'' television stations may be retained by the existing interest-holder even if that interest would be impermissible under § 73.3555(b) or (c). However, such ''non-satellite'' station may not be transferred or assigned to a single person, group, or entity except as provided for by § 73.3555(b) and (c).

Note 6 to § 73.3555: For purposes of paragraph (c) of this section a daily newspaper is one that is published four or more days per week, is in the dominant language of the market in which it is published, and is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.

Note 7 to § 73.3555: The Commission will entertain applications to waive the restrictions in paragraph (b) of this section (the local television multiple ownership rule) on a case-by-case basis. We will entertain waiver requests as follows:

(1) If one of the broadcast stations involved is a ''failed'' station that has not been in operation due to financial distress for at least four consecutive months immediately prior to the application, or is a debtor in an involuntary bankruptcy or insolvency proceeding at the time of the application.

(2) If one of the television stations involved is a ''failing'' station that has an all-day audience share of no more than four percent; the station has had negative cash flow for three consecutive years immediately prior to the application; and consolidation of the two stations would result in tangible and verifiable public interest benefits that outweigh any harm to competition and diversity.

(3) If the combination will result in the construction of an unbuilt station. The permittee of the unbuilt station must demonstrate that it has made reasonable

efforts to construct but has been unable to do so.

(4) If the signals of the stations in a proposed combination: (a) do not have overlapping Grade B contours; and (b) have not been carried, via DBS or cable, to any of the same geographic areas within the past year.

(5) For paragraph (b)(2)(i) of this section only (the top four-ranked restriction), if the stations in a proposed combination are in a market with 11 or fewer full-power television stations, we will consider waivers pursuant to criteria described in the *Report and Order* in MB Docket No. 02–277, released July 2, 2003 (FCC 03–127).

* * * * *

Note 11 to § 73.3555: For purposes of paragraph (c) of this section: (1) For radio/newspaper combinations, the Cross-Media Limit is triggered when the newspaper's community of publication is completely encompassed by: (i) for AM radio stations, the predicted or measured 2mV/m contour computed in accordance with § 73.183 or § 73.186 of the Commission's rules; (ii) for FM stations, the predicted 1 mV/m contour computed in accordance with § 73.313 of the Commission's rules; and (2) for television/newspaper combinations, the Cross-Media Limit is triggered when the newspaper's community of publication is located within the same Nielsen Designated Market Area to which the television station is assigned.

Note 12 to § 73.3555: For purposes of paragraph (c) of this section, for television/radio combinations, the rule is triggered when the radio station's community of license is located within the Nielsen Designated Market Area to which the television station is assigned.

■ 3. Section 73.3613 is amended by revising paragraphs (d) and (e) to read as follows:

§ 73.3613 Filing of contracts.

* * * * *

(d)(1) *Time brokerage agreements (also known as local marketing agreements):* Time brokerage agreements involving radio stations where the licensee (including all parties under common ownership) is the brokering entity, the brokering and brokered stations are both in the same market as defined in the local radio multiple ownership rule contained in § 73.3555(a), and more than 15 percent of the time of the brokered station, on a weekly basis is brokered by that licensee; time brokerage agreements involving television stations where the licensee (including all parties under common control) is the brokering entity, the brokering and brokered stations are both licensed to the same market as defined in the local television multiple ownership rule contained in § 73.3555(b), and more than 15 percent of the time of the brokered station, on a weekly basis, is brokered by that licensee; time brokerage agreements involving radio or television stations that would be attributable to the licensee under § 73.3555 Note 2, paragraph (i). Confidential or proprietary information may be redacted where appropriate but such information shall be made available for inspection upon request by the FCC.

(d)(2) *Joint sales agreements:* Joint sales agreements involving radio stations where the licensee (including all parties under common control) is the brokering entity, the brokering and brokered stations are both in the same market as defined in the local radio multiple ownership rule contained in § 73.3555(a), and more than 15 percent of the advertising time of the brokered station on a weekly basis is brokered by that licensee. Confidential or proprietary information may be redacted where appropriate but such information shall be made available for inspection upon request by the FCC.

(e) The following contracts, agreements or understandings need not be filed but shall be kept at the station and made available for inspection upon request by the FCC; subchannel leasing agreements for Subsidiary Communications Authorization operation; franchise/leasing agreements for operation of telecommunications services on the television vertical blanking interval and in the visual signal; time sales contracts with the same sponsor for 4 or more hours per day, except where the length of the events (such as athletic contests, musical programs and special events) broadcast pursuant to the contract is not under control of the station; and contracts with chief operators.

■ 4. Section 73.5007 is amended by revising paragraphs (b)(2)(i), (b)(2)(ii), (b)(2)(iii), and (b)(3)(i), (b)(3)(ii), and (b)(3)(iv) to read as follows:

§ 73.5007 Designated entity provisions.

* * * * *

(b) * * *

(2) * * *

(i) AM broadcast station—principal community contour (*see* § 73.24(i));

(ii) FM Broadcast station—principal community contour (*see* § 73.315(a));

(iii) Television broadcast station—television Grade B or equivalent contour (*see* § 73.683(a) for analog TV and § 73.622(e) for DTV);

* * * * *

(3) * * *

(i) AM broadcast station—principal community contour (*see* § 73.24(i));

(ii) FM broadcast station—principal community contour (*see* § 73.315(a));

* * * * *

(iv) Television broadcast station—television Grade B or equivalent contour (*see* § 73.683(a) for analog TV and § 73.622(e) for DTV).

* * * * *

[FR Doc. 03–19106 Filed 7–29–03; 12:43 pm]
BILLING CODE 6712–01–P