

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

In the Matter of	)	
	)	
2010 Quadrennial Regulatory Review --	)	MB Docket No. 09-182
Review of the Commission's Broadcast	)	
Ownership Rules and Other Rules Adopted	)	
Pursuant to Section 202 of the	)	
Telecommunications Act of 1996	)	
	)	MB Docket No. 07-294
Promoting Diversification of	)	
Ownership in the Broadcasting Services	)	

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

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April 17, 2012

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EXECUTIVE SUMMARY

The record in this proceeding examining the broadcast ownership rules of the Federal Communications Commission (“FCC” or Commission”) demonstrates not only that the current rules are unnecessary under section 202(h) of the 1996 Telecommunications Act, but also that they actually undermine the FCC’s competition, localism, and diversity goals. Abundant evidence shows that the digital and mobile revolutions have produced unprecedented levels of competition in the media marketplace and that broadcast stations compete intensely against each other and against myriad other platforms for audiences and vital advertising revenues. In this marketplace, the broadcast ownership restrictions disadvantage local stations vis-à-vis their competitors and threaten broadcasters’ competitive viability, especially in small and mid-sized markets.

The record is similarly void of evidence showing that the broadcast ownership rules remain necessary to promote localism. Rather, the record (including recent empirical studies) demonstrates that the current regulatory regime hinders localism by preventing stations from taking advantage of important economies of scale and scope, which ultimately constricts the resources that broadcasters can devote to local services, including news. Commenters also provided numerous real-world examples, to supplement the empirical evidence already on record, showing how common and cross-ownership of broadcast stations promote local service to communities.

Finally, the record demonstrates that the ownership rules do not enhance diversity, as marketplace forces and economic factors, not the ownership structure of a station or set of stations, drive diversity of content and viewpoint and directly affect what types of programming are aired. Because the current broadcast ownership restrictions

do not promote any of the FCC's stated goals, they no longer are necessary in the public interest and must be repealed or substantially relaxed.

Local Television "Duopoly" Ownership. The record overwhelmingly demonstrates that local television stations compete against a multitude of non-broadcast media outlets, and it would be plainly incorrect under section 202(h) not to give significant weight to these competitive alternatives. The financial stresses resulting from increased competition for viewers and advertisers are substantial for stations in all markets, but especially for stations in small and mid-sized markets that have disproportionately smaller revenue bases. Television broadcasters also provided substantial evidence that these financial stresses hinder their continued ability to serve local communities with high quality programming, including local news, and that relaxation of the duopoly rule would enhance localism, as local news production is subject to strong economies of scale and scope. For these reasons, many commenters agree that restrictions on local television ownership should be reformed to allow duopolies more freely in markets of all sizes.

The record lacks evidence justifying the retention of the duopoly rule's top-four restriction or eight-voices test. Instead, commenters identified the flaws inherent in the rationales underlying these rules—namely, that the top-four restriction is based on arbitrary distinctions and does not guarantee four independent newscasts in local markets and that the eight-voices test does not promote diversity (as the Commission and the D.C. Circuit have previously recognized). A new study examining the revenue shares of local stations shows that, in many television markets (especially smaller ones), significant break-points occur between the first- and second-ranked stations,

between the second- and third-ranked stations, and/or between the third- and fourth-ranked stations, contrary to the presumption of the existing top-four prohibition that the only significant break-point is between the fourth- and fifth-ranked stations.

There is no basis for restricting duopolies based on the technical ability of digital television stations to multicast. There is no evidence showing that multicasting replicates the legal or economic benefits of common ownership of an additional station, or negatively impacts competition, localism, or diversity. To the contrary, multicasting provides significant public interest benefits, including additional and enhanced local and diverse programming, particularly ethnic-oriented and foreign language programming.

Local Radio Ownership. Retention of local radio ownership limits established in 1996 in a much less competitive and diverse audio marketplace can no longer be justified. Ample record evidence demonstrates that consumers enjoy a multitude of audio options and increasingly turn to new media to access audio programming. It is illogical and arbitrary to consider only broadcast radio stations in defining the relevant market, particularly because radio stations compete directly with these alternatives for audience share and advertising revenues in local markets. The record moreover lacks any evidence of concrete harms that are ameliorated by the existing local radio caps. Instead, numerous studies, including those commissioned by the FCC, have shown that higher levels of common ownership in local radio markets promote diversity. In any event, claims about the extent of ownership concentration in the radio industry are almost invariably overstated. As shown in a new study, fully thirty percent of all commercial radio stations in Arbitron markets are either the sole station owned within its market by its station owner or are part of a two-station duopoly in a market.

There also is no evidence justifying the retention of the current AM/FM subcaps. Rather, the record demonstrates that the AM/FM subcaps are based on arbitrary distinctions, can adversely impact competition, do not promote localism, and may hinder the FCC's diversity goal.

Cross-Ownership. The record lacks evidence to support the retention of the current newspaper/broadcast and radio/television cross-ownership restrictions in light of the intense competition in the multi-platform media marketplace and section 202(h)'s mandate. Overwhelming empirical evidence demonstrates that the newspaper/broadcast cross-ownership restrictions do not advance the Commission's goals, and no commenter has provided concrete evidence of any harm to competition, localism, or diversity that the restrictions serve to prevent. In contrast, the record incorporates numerous studies, and many commenters' specific examples, establishing that newspaper/broadcast cross-ownership results in tangible benefits to local communities in the form of enhanced news services.

The record also overwhelmingly supports the proposal to eliminate the radio/television cross-ownership rule. Commenters agree with the Commission that repeal of the rule is unlikely to result in increased consolidation of broadcast facilities and that the rule is not necessary to promote localism or diversity.

Diversity of Ownership. The record supports the adoption of a variety of flexible, incentive-based programs to encourage media ownership by women and minorities, including: (i) tax-incentives; (ii) waiver/exception programs; (iii) establishment of reversionary rights for certain sales; (iv) subchannel licensing programs; (v) primers on investment and financing in broadcast enterprises; (vi) reinstatement of the eligible

entity standard and related measures; and (vii) modification of certain radio operation technical rules to reduce entry barriers and promote efficiencies. As NAB has previously explained, ownership restrictions reduce economic incentives to invest in broadcasting, making it more difficult for all broadcasters to raise capital. Rather than retaining existing barriers, the Commission should focus on expanding opportunities.

Attribution Matters. The record contains no basis for treating sharing arrangements as attributable or for requiring their increased disclosure. Sharing arrangements allow broadcasters to better serve their local communities, and the record contains numerous examples showing how the cost savings from these arrangements allow broadcasters to provide services that would not otherwise be possible, including the production of local news. Restricting sharing arrangements would be bad public policy and may exceed the FCC's statutory and constitutional authority, if regulations are imposed affecting how broadcast stations cover newsworthy events, obtain news content, and/or present news programming.

The record further shows that sharing arrangements do not impact licensee control over operations or programming decisions and that joint negotiation of retransmission consent agreements do not implicate control over core operating functions. The Commission should reject efforts by self-interested multichannel video programming distributors to further constrain broadcasters in their efforts to compete for audiences and advertising revenues and to negotiate for retransmission consent. The focus of this proceeding should remain on the directive of section 202(h) to review the broadcast ownership restrictions in light of the ever-increasing competition in the video and audio marketplaces.

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**REPLY COMMENTS OF THE
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The National Association of Broadcasters ("NAB")¹ submits this reply to certain comments on the *Notice of Proposed Rulemaking* ("NPRM") released by the Commission in the above-referenced proceeding. In the *NPRM*, the Commission sought comment generally on whether its broadcast ownership rules remain "necessary in the public interest as the result of competition,"² as well as on specific proposals to modify these rules. In response to the *NPRM*, numerous commenters, including broadcasters large and small, newspaper publishers, and trade associations, submitted comments strongly supporting reform of the antiquated and arbitrary broadcast-only ownership restrictions.

¹ The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² *In the Matter of 2010 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket Nos. 09-182, 07-294, Notice of Proposed Rulemaking ¶ 1 (rel. Dec. 22, 2011) ("NPRM").

Pursuant to section 202(h) of the Telecommunications Act of 1996, the Commission must demonstrate with empirical evidence that the broadcast ownership rules continue to serve its stated public interest goals of competition, localism, and diversity.³ The Commission cannot rely on speculation, assumptions, or unverified predictions to retain the rules unchanged.⁴ As many commenters demonstrated, there is no basis for retaining the current, broadcast-only local ownership limitations in a marketplace characterized by ever-increasing competition for audiences and advertisers. Those commenters calling for retention, or even tightening, of the existing restrictions remain willfully ignorant of the sweeping changes that have taken place in the media marketplace, including the proliferation of new media platforms, and the wealth of evidence demonstrating that the rules do not serve—but in fact undermine—competition, localism, and diversity.

I. THE RECORD EVIDENCE DEMONSTRATES THAT THE CURRENT BROADCAST OWNERSHIP RULES ARE ANTITHETICAL TO THE COMMISSION'S COMPETITION, LOCALISM AND DIVERSITY GOALS AND MUST BE REFORMED PURSUANT TO SECTION 202(H).

The Commission and those parties opposing reform of the broadcast ownership rules cannot ignore the express statutory language of section 202(h) or the stark reality that local broadcasters are competing intensely not only amongst each other, but against a multitude of other platforms, especially the Internet, for audiences and

³ See Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996) ("1996 Act").

⁴ See *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993) (invalidating FCC criterion for licensing broadcast applicants because, after twenty-eight "years of experience with the policy," the FCC had "no evidence to indicate that it achieve[d]" the "benefits that the Commission attribute[d] to it," and the agency could no longer rely on "unverified predictions"); *HBO v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (per curiam) (stating that a regulation perfectly reasonable and appropriate in the face of a given problem is highly capricious if that problem does not exist).

advertising. As contemplated by section 202(h), these dramatic changes in the media marketplace have rendered the existing broadcast ownership rules obsolete. Because the current restrictions do not serve any of the Commission's stated goals of competition, localism, or diversity, they must be repealed or modified.⁵

Competition in local markets is fierce.⁶ Multichannel video programming distributors ("MVPDs") have become formidable competitors, customizing their programming to viewers in local markets and garnering significant shares of broadcasters' advertising revenues.⁷ Subscription-based outlets and other new media platforms are targeting and reaching the audiences on which broadcasters have traditionally relied.⁸ Most importantly, the Internet has fundamentally altered the media landscape, revolutionizing the manner in which news and local content are both

⁵ See 1996 Act, § 202(h); see also 47 U.S.C. § 161 (2006) (directing the Commission to "repeal or modify any regulation it determines to be no longer necessary in the public interest"); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 395 (D.C. Cir. 2004) ("*Prometheus I*") ("A regulation deemed useful when promulgated must remain so. If not, it must be vacated or modified.").

⁶ See NAB Comments to *Notice of Proposed Rulemaking* in MB Docket 09-182, at 6-8 (filed Mar. 5, 2012) ("NAB Comments") (describing the competition to broadcast outlets in today's media marketplace).

⁷ See *id.* at Attachment C (demonstrating the ongoing erosion of advertising market share from local broadcast stations by local cable operators in recent years); see also Sinclair Broadcast Group, Inc. Comments to *Notice of Proposed Rulemaking* in MB Docket 09-182, at 9-10 (filed Mar. 5, 2012) ("Sinclair Comments") (highlighting that "[c]able now offers channels that are solely devoted to weather coverage, and include regular and frequent coverage of local weather conditions and forecasts"); Deborah Yao, *Cable TV expands local coverage*, USA Today.com, May 13, 2007 (describing how cable operators have expanded their local news coverage by offering free "local on demand" channels, which provide coverage of community events "from high school sports and small-town parades to middle-school dance contests and community politics").

⁸ See, e.g., Pew Research Center, Project for Excellence in Journalism, 2011 State of the News Media, at Local TV Essay, available at <http://stateofthemedias.org/2011> ("2011 State of the Media Report") (indicating that satellite company DirecTV announced that it would start selling local spots for the first time in 2011); *id.*, at Special Reports: Survey: Mobile News & Paying Online (stating that "[l]ocal news is going mobile" and finding that nearly half of all adults report getting at least some local news and information on cellphones or tablets); see also *infra* Part IIIA.

consumed and produced,⁹ and providing yet another alternative for audiences and advertisers.¹⁰ And now, according to the Pew Research Center's recently released 2012 State of the News Media report, the "digital revolution" has "entered a new era"—the "age of mobile," in which "a growing number of Americans are becoming multiplatform digital news consumers."¹¹

Broadcasters are expending substantial revenues to keep pace with the product offerings of these competitors, such as the twenty-four-hour news cycles of cable news

⁹ See, e.g., Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 7 (filed Mar. 5, 2012) ("Fox Comments") (stating that "the Internet dwarfs every previous media technology in its ability to both empower individual users to speak *and* to enable masses of consumers to freely receive information"); Morris Communications Company, LLC Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 7-8 (filed Mar. 5, 2012) ("Morris Comments") (citing Commission studies and statements regarding the growing importance of the Internet); Tribune Company, Debtor-in-Possession Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 34-44 (filed Mar. 5, 2012) ("Tribune Comments") (demonstrating the uniquely pervasive and accessible nature of the Internet and how it allows users to "sort, select, and share content based on their specific interests" or "contribute their own information, commentary, opinion, photos, videos and similar material previously provided uniquely by traditional media").

¹⁰ See New Vision Television, LLC and TTBG, LLC Joint Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 6 (filed Mar. 5, 2012) ("New Vision/TTBG Comments") (highlighting the expanding number of local information sources, including cable television, live streaming, blogs, websites, Yelp.com, Zagat.com, OpenTable.com, FourSquare, and Facebook); Nexstar Broadcasting, Inc. Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 5-8 (filed Mar. 5, 2012) (stating that "[t]oday's consumers live in a time where they can find news and information from numerous sources . . . in a variety of formats . . . at virtually any time").

¹¹ Pew Research Center, Project for Excellence in Journalism, 2012 State of the News Media, at Overview, available at <http://stateofthemedias.org/2012> ("2012 State of the Media Report"). A new survey of more than 3000 adults by the Pew Research Center found that "nearly a quarter of U.S. adults" now access "news on at least two devices," and a "majority of Americans now get news through at least one digital, web-based device." *Id.* at Special Reports: Mobile Devices and News Consumption: Some Good Signs for Journalism. As of February 2012, "[n]early half" of American adults "are smartphone owners." Pew Research Center, Pew Internet & American Life Project, 46% of American adults are smartphone owners 2 (2012). More than six in ten Americans age twelve and over own a portable digital media device (e.g., smartphone, tablet or portable MP3 player). See Arbitron Inc. & Edison Research, The Infinite Dial 2012: Navigating Digital Platforms (2012).

channels and the online streaming of independent online news websites.¹² At the same time, and often as a result, broadcasters are losing significant audience share and substantial amounts of advertising revenue to these competitors.¹³ These losses are causing significant financial stresses for broadcasters, particularly those in small and mid-sized markets where advertising revenues are disproportionately smaller than those in larger markets. The existing ownership rules also arbitrarily place broadcasters at a disadvantage vis-à-vis their competitors and thereby hinder their ability to maintain a strong local presence.

The record developed in this proceeding shows that relaxation of the rules would promote localism and allow stations to operate more efficiently, especially with regard to local news production, which is subject to particularly strong economies of both scale

¹² See LIN Television Corporation Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 7 (filed Mar. 5, 2012) (“LIN Comments”) (explaining that LIN Television Corporation (“LIN”) recently invested in the installation of an online streaming platform to stream live breaking news and weather to its apps); Sinclair Comments, *supra* note 7, at 9 (explaining that “[v]iewers are no longer willing to wait” for traditional broadcast news, which forces “broadcasters to spend additional money to provide breaking news coverage via station websites and social media”); Steven Waldman & the Working Group on Information Needs of Communities, FCC, *The Information Needs of Communities: The changing media landscape in a broadband age* 13 (2011) (“Information Needs of Communities Report”) (reporting that local television news stations have been “creative in using new technology—from citizens’ cell phone photos to eyewitness Twitter reports—to improve the quality of their offerings”).

¹³ See NAB Comments, *supra* note 6, at Attachment C; Press Release, BIA/Kelsey, U.S. Local Digital Ad Revenues Remain Strong, Bolstering Slower Growth in Local Media Market, According to BIA/Kelsey (Mar. 20, 2012) (local online/interactive/digital ad revenues forecast to climb from \$21.2 billion in 2011 to \$38.5 billion by 2016, a compound annual growth rate of 12.7 percent); 2012 State of the Media Report, *supra* note 11, at Overview (“Online advertising overall shot up [twenty-three percent] in 2011 compared to 2010.”); Press Release, BIA/Kelsey, BIA/Kelsey Forecasts U.S. Social Local Advertising Revenues to Reach \$2.3 Billion in 2015 (Nov. 14, 2011); Press Release, BIA/Kelsey, Digital Advertising, Performance and Retention Solutions Will Be 70% of SMB Marketing Budgets by 2015, According to BIA/Kelsey (Aug. 30, 2011); Press Release, BIA/Kelsey, U.S. Local Digital Advertising Revenues Continue Upward in 2011 Despite Slow-Growth Economy, According to BIA/Kelsey (Nov. 7, 2011); Press Release, BIA/Kelsey, U.S. Mobile Local Ad Revenues to Grow From \$404 Million in 2010 to \$2.8 Billion in 2015, According to BIA/Kelsey (June 23, 2011).

and scope.¹⁴ As the Information Needs of Communities report expressly stated, “it might be better to have nine TV stations in a market than [ten], if consolidation leads the remaining stations to be economically healthier and therefore more able to invest in local journalism.”¹⁵

The broadcast ownership rules do not, and indeed cannot, require that broadcasters provide more diverse or local programming, however defined; they simply limit who can provide that programming and at what cost. As NAB and others have demonstrated time and time again,¹⁶ it is the market, not the ownership structure of a station or set of station clusters, which determines what is broadcast.¹⁷ Broadcasters provide programming responsive to community needs, not because they are locally-owned, but based on audience needs and interests.¹⁸ Further, a diverse array of

¹⁴ See LIN Comments, *supra* note 12, at Attachment 1 (explaining that LIN provides 479 hours per week of local programming across twenty-three stations in the ten markets where LIN has a duopoly or attributable local marketing agreement (“LMA”)); NAB Comments, *supra* note 6, at 18-21, 33-37 (describing how common ownership promotes the Commission’s public interest goals); Nexstar Comments, *supra* note 10, at 18, 22-23 (providing examples of how common ownership has enabled the provision of enhanced local programming); see also Jeffrey A. Eisenach & Kevin W. Caves, The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting 1-2 (2011) (“Economies of Scale Report”), Attachment A to Reply Declaration of Jeffrey A. Eisenach and Kevin W. Caves (June 27, 2011), in NAB Reply Comments to *Notice of Proposed Rulemaking* in MB Docket No. 10-71, at Appendix A (filed June 27, 2011) (“Eisenach Reply Declaration”).

¹⁵ Information Needs of Communities Report, *supra* note 12, at 25.

¹⁶ See NAB Comments, *supra* note 6, at Attachment A.

¹⁷ For example, one commenter noted that the Los Angeles, California market is both “renowned . . . for its rich cultural diversity” and “extremely consolidated.” National Hispanic Media Coalition (NHMC), Center for Rural Strategies, & Center for Media Justice Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 6-7 (filed Mar. 5, 2012) (“NHMC Comments”). Yet, despite the purported “extreme” concentration in the Los Angeles market, there are multiple Spanish-language stations and multiple Spanish-language newspapers in the market. See *id.* at 7-9. Moreover, Clear Channel Communications, Inc. (“Clear Channel”) owns several of the highest rated radio stations in Los Angeles, no doubt because it has diversified its programming to serve the large Latino population there.

¹⁸ See *Bechtel*, 10 F.3d at 877, 879-80 (finding arbitrary and capricious an FCC preference for applicants who intended to manage and operate proposed broadcast stations

sources is simply that: a large number of sources. It does not necessarily follow that programming, including news output, will be enhanced. As noted in the Information Needs of Communities Report, “a media market can simultaneously have a diversity of voices and opinions and yet a scarcity of journalism.”¹⁹ Because the current restrictions, as shown in more detail below, do not promote any of the Commission’s goals, they are no longer necessary in the public interest.

II. THE RECORD LACKS EVIDENCE THAT THE LOCAL TELEVISION OWNERSHIP RULE REMAINS NECESSARY.

The record developed in this proceeding does not support the retention of the current local television ownership rule. Commenters have demonstrated that duopolies enable television stations to better serve their local communities in today’s competitive media marketplace. The Commission need not “take on faith”²⁰ that efficiencies resulting from combinations among television stations will lead to increased news programming, as the record, in this and past proceedings, overwhelmingly demonstrates the public interest benefits of duopolies. The record establishes that duopolies have resulted in improved programming services, including more local news

personally, primarily due to lack of evidence that the preference results in licensees more responsive to community needs); *Office of Commc’n of the United Church of Christ v. FCC*, 707 F.2d 1413, 1430 (D.C. Cir. 1983) (stating that 47 U.S.C. § 307(b) is satisfied “as long as the Commission requires licensees to provide programming—whatever its source—that is responsive to their communities”); see also *Main Studio and Program Origination Rules*, Report and Order, 2 FCC Rcd 3215, 3218 ¶ 30 (1987) (determining that “locally-originated” programming does not necessarily equate to programming that is responsive to community needs).

¹⁹ Information Needs of Communities Report, *supra* note 12, at 25.

²⁰ See Writers Guild of America, West, Inc. Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 4-5 (filed Mar. 5, 2012) (“WGAW Comments”); see also Free Press Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 48 (filed Mar. 5, 2012) (“Free Press Comments”) (arguing that “there is no guarantee that stations’ increasing bottom lines will result in more news”).

and political information,²¹ the initiation of daily newscasts,²² the use of “time diversity” (such that different dayparts can be filled with news on different stations),²³ and increases in program diversity.²⁴ Opponents of reform ignore not only these real-world examples, but also the extensive empirical evidence that permeates the record (including evidence from the FCC’s own studies conducted for this and previous reviews), demonstrating that local combinations help promote competition, localism, and diversity.²⁵ To disregard this substantial body of evidence or the realities of the marketplace would contravene not only the directive of section 202(h), but also general principles of administrative law.²⁶

²¹ See LIN Comments, *supra* note 12, at 5-6 & Attachment 1; Nexstar Comments, *supra* note 10, at 18, 22-23 (explaining that Nexstar broadcasts local news on its MyNetwork affiliates and has “added additional local sports programming because it is able to do so economically as a result of its ownership of another station in each market”).

²² See Belo Corp. Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 8 (filed Mar. 5, 2012) (“Belo Corp. Comments”) (stating that “[t]he efficiencies and cost-savings that can be achieved through duopolies also enable Belo stations to continue to provide more comprehensive coverage of local and regional politics, more local public affairs programming, and a variety of cross-media offerings”).

²³ See 2011 State of the Media Report, *supra* note 8, at Local TV Essay (highlighting the growth of early morning news in 2010 and noting that the number of markets with newscasts starting at 4:30 a.m. more than doubled from the year before); see also LIN Comments, *supra* note 12, at 5-6.

²⁴ See Nexstar Comments, *supra* note 10, at 14-15 (providing examples of the different programming Nexstar provides in the markets where it owns two stations and explaining that co-owned stations will provide different programming, “otherwise the second station may as well just be a satellite of the first”).

²⁵ See, e.g., Economies of Scale Report, *supra* note 14, at 1-3; Lisa M. George and Felix Oberholzer-Gee, Diversity in Local Television News, 14-15 (2011) (“Media Ownership Study 8B”); see also NAB Comments, *supra* note 6, at n.79 (citing list of studies from past proceedings that demonstrate the public interest benefits of duopolies).

²⁶ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (stating that an agency rule would be arbitrary and capricious if the agency “offer[s] an explanation for its decision that runs counter to the evidence before the agency”).

A. Opponents Of Reform Ignore The Competition In Local Television Markets—Competition That Directly Impacts Broadcasters’ Ability To Serve Their Local Markets.

Numerous commenters demonstrated that there are a multitude of non-broadcast media outlets with which local television stations now compete for audiences and advertisers alike.²⁷ Not to give credence to these competitive alternatives, as certain commenters suggest,²⁸ would be plainly incorrect in light of section 202(h)’s directive.²⁹ Today’s information market is broader and more varied than ever before, and consumers utilize alternatives to local television to obtain news and information, as well as for entertainment purposes. For example, MVPDs have local weather channels, twenty-four-hour news channels (including for local news),³⁰ and “local on-demand” channels free with their subscriptions;³¹ the Internet surpasses almost all other platforms as a source of news and information, including local;³² and social media

²⁷ See, e.g., CBS Corporation Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 1011 (filed Mar. 5, 2012) (“CBS Comments”); LIN Comments, *supra* note 12, at 3-8; NAB Comments, *supra* note 6, at 12-16.

²⁸ See, e.g., WGAW Comments, *supra* note 20, at 2-3 (contending that “the existence of alternatives does not automatically enlarge the number of competitors in the market”).

²⁹ See H.R. Conf. Rep. No. 104-458 (1996) (describing the periodic reviews as an “ongoing mechanism to ensure that the Commission’s regulatory framework would keep pace with the competitive changes in the marketplace”).

³⁰ See, e.g., Steve Safran, *Austin’s YNN covers local news differently for cable viewers*, The Digital Texan, Mar. 21, 2012 (reporting that YNN (Your News Now), Time Warner Cable’s local news service for subscribers, is “one of [twelve] local news channels nationwide that operates around the clock, seven days a week”).

³¹ See Sinclair Comments, *supra* note 7, at 9-10; Yao, *supra* note 7 (explaining that local on demand channels are some of the most popular free on demand channels).

³² See Pew Research Center, Project for Excellence in Journalism, *How People Learn About Their Local Community* 22 (2011) (“Local Community Study”) (finding that the Internet is the first or second most important source of local news and information for fifteen of the sixteen local subject matters examined); see also Pew Research Center for the People and the Press, *Internet Gains on Television as Public’s Main News Source* 2 (2011) (finding that the

creates a hyper-local platform from which consumers can both produce and consume local news and information, as well as political information.³³

As discussed in detail in the attached BIA/Kelsey report, the financial stresses caused by these competitors are significant in every television market, but are especially severe in small and mid-sized markets, which have disproportionately smaller revenue bases and are therefore more vulnerable to this intense competition.³⁴ Relief from the duopoly rule is most needed in these small and mid-sized markets where the economic challenges are only likely to increase. Although Free Press asserts that broadcasters' revenues are up and that the presidential election will provide an additional surge in advertising revenues,³⁵ this temporary hike will not address the structural changes that have taken place in the market, as new media continue to cut significantly into local stations' advertising revenues.³⁶

Internet has surpassed the newspaper and is "slowly closing in on television" as Americans' number one preferred news source).

³³ See Pew Research Center, Pew Internet & American Life Project, Social networking sites and politics 2 (2012) ("Social Networking and Politics Study") (finding that "[eighty percent] of adults use the internet and [sixty-six percent] of those online Americans use social networking sites" while "[s]ome [seventy-five percent]" of social networking site "users say their friends post at least some content related to politics and [thirty-seven percent]" of these "users post political material at least occasionally"); Pew Research Center, Project for Excellence in Journalism & Pew Internet & American Life Project, Understanding the Participatory News Consumer 2 (2010) ("Participatory News Consumer Study") (finding that thirty-seven percent of Internet users have used social media sites like Facebook or Twitter to contribute to the creation of, comment about, or disseminate news); Pew Research Center, Pew Internet & American Life Project, 22% of online Americans used social networking or Twitter for politics in 2010 campaign (2011).

³⁴ See Attachment A, BIA/Kelsey, Reforming Local Ownership Rules: Station and Market Analyses i, 10-12 (2012) (showing that revenues in smaller television markets are substantially lower than in larger markets, both in absolute terms and when analyzed as revenues per household). *Accord* NAB Comments, *supra* note 6, at Attachment D.

³⁵ See Free Press Comments, *supra* note 20, at 47-48.

³⁶ See, e.g., *supra* note 13 and accompanying text. To this end, it is notable that even with the revenues from the 2012 presidential, state, and local elections, advertising revenues this year and next are not expected to reach the levels of 2006. See SNL Kagan, TV

B. No Commenter Has Provided Evidence Supporting Retention Of The Top-Four Restriction.

The record contains no evidence supporting the retention of the top-four restriction. Although one commenter asserts without support that “[n]othing has changed in the marketplace to render [the FCC’s conclusion that mergers among top-four stations would be the most deleterious to competition] any less true today,”³⁷ other commenters have demonstrated that this conclusion was in fact never true.³⁸ Rather, the top-four restriction is based on arbitrary distinctions that do not reflect marketplace realities. For instance, as NAB and others demonstrated in earlier comments, there is not a natural break-point between the audience shares of the top-four ranked stations and the audience shares of other stations in many markets.³⁹ The audience share disparity between the first- or second-ranked stations and all other stations in most small to mid-sized markets is so great that even if the third- and fourth-ranked stations were allowed to combine, these stations’ combined viewing shares would still be less than or equal to the audience share of the top-ranked station in about eighty percent of these markets.⁴⁰

Station Ad Revenue Projections (2010); see also 2012 State of the Media Report, *supra* note 11, at Key Findings (reporting that the estimated on-air ad revenue for local television stations in 2011 “was [ten percent] less than what local stations got in 2007, the last non-election year before the recession”); 2011 State of the Media Report, *supra* note 8, at Local TV Essay (“When adjusted for inflation, average station revenue has dropped by almost half in the past nine years . . . Put another way, stations made almost [twenty percent] less in 2010 than in 2006, the last midterm election year, and almost [nine percent] less than in the presidential election year of 2008.”).

³⁷ American Cable Association Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 12 (filed Mar. 5, 2012) (“ACA Comments”).

³⁸ See NAB Comments, *supra* note 6, at 23-24; Nexstar Comments, *supra* note 10, at 16-19; Sinclair Comments, *supra* note 7, at 16-17.

³⁹ See, e.g., NAB Comments, *supra* note 6, at 22-23.

⁴⁰ See *id.* at 23 & n.88. The experiences of the Sinclair Broadcast Group (“Sinclair”) are illustrative in this regard: In four of the six markets where Sinclair has grandfathered

A recent analysis of the revenue shares of television stations in local markets confirms these earlier findings. In Attachment A, BIA/Kelsey examined the 2010 revenue shares of commercial television stations, finding many markets with substantial gaps in revenue shares between the third- and fourth-ranked stations, between the second- and third-ranked stations, and between the first- and second-ranked stations. For example, in nearly forty-five percent of the markets with at least two commercial full-power stations, the revenue share of the highest-ranked station is *ten or more* percentage points higher than the second-ranked station's share.⁴¹

Due to these large revenue disparities among top-four earning stations, even the *combination* of the revenues of the third- and fourth-ranked stations is less, often very substantially less, than the revenue of the top-ranked station in eighty-two of the 159 markets with at least four commercial full-power television stations.⁴² The vast majority

arrangements involving two of the top-four stations (either pursuant to an LMA or a shared services agreement ("SSA")), Sinclair's combined stations have a smaller market share than the market leader. See Sinclair Comments, *supra* note 7, at 14. In the other two markets, although the combined market share of Sinclair's stations is larger than the single market share of any one other station, this combined share is only slightly larger than the individual market shares of the remaining two largest broadcast competitors in the market. See *id.*

⁴¹ See Attachment A, *supra* note 34, at i, 3-5. In eighty-nine out of the 201 markets with at least two commercial full-power stations, the revenue share of the first-ranked television station is ten (or more) percentage points higher than the second-ranked station's share. In forty-seven out of the 183 markets with at least three commercial full-power stations, the revenue share of the second-ranked station is ten (or more) percentage points higher than the third-ranked station's share. In twenty-four television markets (out of the 159 markets with at least four commercial full-power television stations) the gap in revenue share between the third- and fourth-ranked stations is ten percent or greater.

⁴² See *id.* at 7-9. For example, in forty-two of these eighty-two markets, the revenue share of the combined third- and fourth-ranked stations is more than ten percentage points below the revenue share of the top-ranked station. In thirty markets, the combination of the revenue shares of the third- and fourth-ranked stations is lower than the revenue share of even the second-ranked station. *Id.* at 8. And in thirty-three of these 159 markets, the fourth-ranked station is so competitively weak that it earns ten percent or less of the total advertising revenues generated by all the local commercial television stations in the market. See *id.* at 6-7.

of these eighty-two markets are mid-sized or small markets where duopolies are generally prohibited—only six markets of the eighty-two are among the fifty largest.

Clearly, many television markets (especially smaller ones) have significant break points between stations other than just between the fourth- and fifth-ranked stations, contrary to the presumption of the existing top-four prohibition. Given the obvious disparities between the financial position of the third- and fourth-ranked stations and higher-ranked stations in numerous markets, these lesser performing stations are highly unlikely to be effective competitors in local markets and are likely to lack the resources to serve their local audiences effectively. Under the current duopoly rule's top-four restriction, these third- and fourth-ranked stations may be relegated to their lower ranks indefinitely, struggling to compete for years to come. A rule change—or at the very least a reformed waiver policy—is warranted to promote effective competition in local television markets and to ensure the continued vibrancy (or even viability) of many stations, including those within the top-four in their local markets.⁴³

NAB also emphasizes that the top-four restriction does not guarantee four independent newscasts in a market. As the record reflects, it is extremely difficult from a financial perspective to support four independent television news voices in each market, especially in small and mid-sized markets where the top-four restriction

⁴³ See *id.* at 10. BIA/Kelsey further explains that struggling fourth-ranked stations with limited shares of local broadcast television advertising revenues have even smaller shares of the broader advertising marketplace (which includes print, local cable, radio, online, etc.). For example, in three markets where the fourth-ranked television station earns just ten percent of the broadcast television advertising revenues, the fourth ranked station's shares of the wider local advertising market are only 1.03 percent, 1.9 percent, and 0.92 percent. *Id.* at 6.

effectively prohibits duopolies.⁴⁴ The Commission's own data show that in nearly forty-two percent of the nation's television markets, there are not four or more stations providing at least thirty minutes of news each day;⁴⁵ in fact, many small and mid-sized markets have only one to three newscasts.⁴⁶ Clearly, the top-four prohibition is not enhancing localism by ensuring the presence of four independent newscasts in a market. Accordingly, its retention cannot be justified.⁴⁷

C. The Record Is Void Of Evidence Supporting Retention Of The Eight-Voices Test, Particularly In Light Of The Previous Determinations Of The Commission And The D.C. Circuit.

The assumptions on which the eight-voices test is based are inherently flawed, as the Commission and the D.C. Circuit have previously recognized.⁴⁸ First, by counting only in-market full power television stations, the eight-voices test ignores the competition faced by local broadcasters from other media outlets, such as cable operators. Despite the fact that the D.C. Circuit already once rejected the Commission's

⁴⁴ See Coalition to Preserve Local TV Broadcasting Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at App. A (filed Mar. 5, 2012) ("Local TV Coalition Comments") (confirming that "the relatively low revenue base in many small and mid-sized markets simply does not permit four independent television news operations"); see also NAB Comments, *supra* note 6, at 23-24; *supra* Part II.A.

⁴⁵ See NAB Comments, *supra* note 6, at 23-24.

⁴⁶ See *id.*

⁴⁷ Likewise, Free Press's suggestion that the FCC return to the "one-to-a-market" approach cannot be justified, as it would require evidence that the media marketplace is less competitive and diverse today than it was in 1999. This position is untenable. Compare Free Press Comments, *supra* note 20, at 44.

⁴⁸ See *Sinclair Broad. Grp. v. FCC*, 284 F.3d 148, 165 (D.C. Cir. 2002) (holding that the Commission had failed to demonstrate that its exclusion of non-broadcast media from the eight-voices exception was necessary in the public interest under section 202(h)); *In the Matter of 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order 18 FCC Rcd 13620, 13668 ¶ 132 (2003) (concluding that the "rule does not promote, and may even hinder, program diversity and localism").

deficient reasoning for doing so, the Commission inexplicably continues to exclude non-broadcast media from the eight-voices test.⁴⁹

Second, contrary to the implications of those opposing reform, the eight-voices test is premised only on the *number* of full-power stations in the market and does not (and cannot) ensure that each of the “voices” provide distinct programming or diverse viewpoints.⁵⁰ It is the marketplace, not the eight-voices test that encourages stations to diversify their programming, as they must to be competitively viable in a market regardless of their ownership structure.⁵¹ The eight-voices test requires only that a market first have eight separate entities capable of supporting a full-power television station before any one station owner can own two. These eight separate entities simply do not exist in over half of the nation’s markets,⁵² effectively prohibiting duopolies without any countervailing public interest benefit.

For the reasons discussed above, NAB urges the Commission to reform its rules to permit duopolies more freely in markets of all sizes. Short of such reforms, however, NAB agrees that liberalized waiver standards would be an appropriate step, given the

⁴⁹ See *Sinclair Broad. Grp.*, 284 F.3d at 165 (stating that it was “not readily apparent” why the Commission would include other media in defining “voices” for the purpose of radio/television cross-ownership, but not local television ownership).

⁵⁰ Compare WGAW Comments, *supra* note 20, at 3-5.

⁵¹ See NAB Comments, *supra* note 6, at Attachment A (identifying eleven studies cited in previous ownership proceedings demonstrating that market forces drive diversity, including viewpoint diversity).

⁵² For instance, even in Baltimore, MD, the twenty-sixth largest DMA, there are not enough broadcast television stations to allow for even one duopoly. As a result, Sinclair, the owner of the Fox affiliate in Baltimore, has been unable to acquire Baltimore’s CW affiliate, despite the fact that the combined market share of both the Fox and CW stations in 2010 was smaller than the individual market shares of either the first- or second-ranked stations. See Sinclair Comments, *supra* note 7, at 15.

economic constraints in smaller markets and the documented shortcomings of the current failed and failing station waiver standards.⁵³

To the extent that the duopoly rule is retained, NAB reiterates its support for the application of the Noise Limited Service Contour standard in the post-digital transition era.⁵⁴ If, however, the FCC decides to eliminate the contour overlap approach in favor of a different approach for determining whether to allow common ownership of television stations, NAB strongly supports the grandfathering of existing station combinations. As the Commission appropriately recognized, compulsory divestiture of existing combinations is disruptive to the industry and a hardship for individual owners.⁵⁵ Further, the proposal for a rule adjustment stems from a technical development—the transition from analog to digital broadcasting. Station owners who have relied upon the contour-based rule should not be penalized by a rule revision reflecting the change to digital broadcasting and not directly relating to the promotion of competition, localism, or diversity.

Additionally, these grandfathered combinations should be freely transferrable. First, as one commenter observed, station values drop when they are not allowed to be

⁵³ See LIN Comments, *supra* note 12, at 21-23; New Vision/TTBG Comments, *supra* note 10, at 13-17. As NAB previously explained, the years-long wait for a failing station waiver erases the benefit of such a waiver, and many financially troubled local stations cannot meet the audience share standard in any event given the relative popularity of their network programming. See NAB Comments to *Notice of Inquiry* in MB Docket 09-182, at 84-85 (filed July 12, 2010) (“NAB NOI Comments”). And to NAB’s knowledge, no failed station waiver has ever been granted, likely because of the requirement for *involuntary* bankruptcy or cessation of station operations for an extended period.

⁵⁴ See NAB Comments, *supra* note 6, at 29-30.

⁵⁵ See NPRM ¶¶ 37, 114.

sold intact.⁵⁶ Second, forcing divestiture at the point of sale would require many licensees to unwind successful operations to facilitate a sale, creating the real risk of causing these operations to be severely compromised by the loss of joint efficiencies.⁵⁷

D. Broadcasters' Ability To Multicast Provides No Basis For Retaining Existing Limits or Further Restricting Local Television Ownership.

The ability to multicast allows broadcasters to be more competitive in, and to provide enhanced services to, their local markets. As the broadcast ownership rules are intended to promote competition and diversity, the Commission must refrain from further restricting the formation of duopolies based on stations' technological capability to multicast, because multicasting does not replicate the benefits of common ownership or obviate the need for relief from anti-competitive restrictions.⁵⁸ Assertions to the contrary ignore the limitations of multicasting.⁵⁹ First, multicasting involves a trade-off for broadcasters, as they must choose between the ability to provide a robust HD signal, additional program streams, and/or mobile DTV.⁶⁰ In addition, and importantly, these assertions ignore the legal limitations of multicasting, as multicast stations do not have

⁵⁶ See Grant Group, Inc. Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 10-14 (filed Mar. 5, 2012) ("Grant Comments").

⁵⁷ *Id.*

⁵⁸ See, e.g., Belo Corp. Comments, *supra* note 22, at 10-11; Gray Television, Inc. Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 12 (filed Mar. 5, 2012) ("Gray Comments"); New Vision/TTBG Comments, *supra* note 10, at 17.

⁵⁹ See, e.g., Communications Workers of America, The Newspaper Guild-CWA, & National Association of Broadcast Employees and Technicians-CWA Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 4 (filed Mar. 5, 2012) ("CWA Comments"); Free Press, *supra* note 20, at 44-45; Mediacom Communications Corporation and Cequel Communications LLC D/B/A Suddenlink Communications Joint Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 18-20 (filed Mar. 5, 2012); The Office of Communication of the United Church of Christ, Inc., National Organization for Women, Media Alliance, Common Cause, & Benton Foundation Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 24-25 (filed Mar. 5, 2012) ("UCC Comments").

⁶⁰ See Belo Corp. Comments, *supra* note 22, at 11-12; LIN Comments, *supra* note 12, at 18-19.

independent mandatory carriage rights. For this and other reasons, advertising revenue from these multicast stations is a fraction of that on primary stations and broadcasters face considerably greater risk when investing in new programming for a multicast channel.⁶¹

Second, contrary to the assertion of one commenter,⁶² broadcasters do use their multicast channels to increase news and information for their communities. For instance, the record demonstrates that multicasting enables the provision of major network programming (including news) in “short” markets,⁶³ programming that would otherwise be unavailable, including ethnic and religious programming,⁶⁴ coverage of important community events⁶⁵ and local high school and college sporting events,⁶⁶ comprehensive weather coverage,⁶⁷ and broadcast news at “non-traditional” times to allow viewers to watch local news outside of primetime hours.⁶⁸ Because multicasting allows stations to better serve their communities, results in significant public interest

⁶¹ See Gray Comments, *supra* note 58, at 13-14 (stating that advertisers choose to spend their dollars elsewhere because multicast programming is not guaranteed to reach its target audience); NAB Comments, *supra* note 6, at Attachment F (demonstrating that multicast revenues constitute only 0.4 percent of stations’ net revenue on average); see also New Vision/TTBG Comments, *supra* note 10, at 18 (stating that multicast streams still face a disadvantage with regard to consumer acceptance).

⁶² See CWA Comments, *supra* note 59, at 4.

⁶³ See NAB Comments, *supra* note 6, at Attachment E.

⁶⁴ See Gray Comments, *supra* note 58, at 13; NAB Comments, *supra* note 6, at 30-31; New Vision/TTBG Comments, *supra* note 10, at 18-19.

⁶⁵ See Gray Comments, *supra* note 58, at 12.

⁶⁶ See Gray Comments, *supra* note 58, at 12; New Vision/TTBG Comments, *supra* note 10, at 18-19.

⁶⁷ See Gray Comments, *supra* note 58, at 13; see also New Vision/TTBG Comments, *supra* note 10, at 18-19 (providing twenty-four hour weather coverage).

⁶⁸ See Gray Comments, *supra* note 58, at 13.

benefits, and serves the Commission's goals of competition, localism, and diversity,⁶⁹ calls for restricting the duopoly rule based on the ability to multicast must be disregarded.

III. THE COMMISSION MUST CONTINUE ITS REFORM OF THE LOCAL RADIO OWNERSHIP LIMITS AND ELIMINATE THE AM/FM SUBCAPS.

Retention of the current local radio ownership caps cannot be justified under section 202(h). Local radio stations are competing against a multitude of audio platforms for audiences and advertising revenues and this competition is only increasing.⁷⁰ Because competition in the local audio marketplace is robust and the existing restrictions do not serve the Commission's competition, localism, or diversity goals,⁷¹ the rules must be repealed or modified.

A. The Record Lacks Any Evidence That The Current Local Radio Ownership Limits Remain Necessary In The Public Interest.

The record contains no evidence that justifies retention of the local radio ownership rules in their current form, consistent with section 202(h) or otherwise.⁷² As

⁶⁹ See NAB Comments, *supra* note 6, at 30-31 (highlighting the number of new programming networks that have been introduced and the increase in ethnic and foreign-language programming that has occurred as a result of multicasting). Recently, WVUE in New Orleans hired a general manager specifically for its Bounce TV subchannel. M. Malone, *WVUE Hires GM for Bounce TV Subchannel*, Broadcasting & Cable, Mar. 21, 2012 (noting early ratings success of Bounce TV, a new African-American targeted network, in New Orleans).

⁷⁰ See NAB Comments, *supra* note 6, at 32-33.

⁷¹ See *id.* at 32-39.

⁷² See *Prometheus I*, 373 F.3d at 395 (explaining that section 202(h) extends the reasoned analysis requirement that ordinarily applies when an agency promulgates, modifies or repeals regulations to the Commission's decisions to retain its existing regulations); see also *State Farm*, 463 U.S. at 43 (stating that "the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made'" (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962))).

One commenter attempts to tie the breakdown of discussions regarding performance royalties into alleged harms caused by radio ownership consolidation to creators and

an initial matter, the *NPRM*'s narrow definition of the radio market is flawed as it fails to take into account the relevant audio technologies and platforms with which radio broadcasters compete. Given the growth of Internet-based audio platforms, podcasting, satellite radio, and various mobile audio devices, it is illogical and arbitrary to consider only radio broadcast stations in defining the relevant market, particularly because radio broadcasters compete with these alternatives for audience share and advertising revenues in local markets.

For instance, the Pew Research Center's 2011 State of the Media Report found that from 2006 to 2010, the number of Americans who listen to AM/FM radio on their computers by streaming a station's regular programming fell by eight percentage points.⁷³ The recent 2012 State of the Media Report concluded that likely "the biggest development in the audio landscape in 2011 came in the growth of people listening on digital mobile devices."⁷⁴ Significantly, the number of Americans who say they are interested in online radio in their cars has more than doubled in a short time.⁷⁵ Consistent with this increased interest, more manufacturers are announcing developments to give drivers the ability to access their phones, music collections, and Internet radio in their cars, an area that has traditionally served as a bulwark for radio

distributors of recorded music. See musicFIRST Coalition Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 4 (filed Mar. 5, 2012) ("musicFIRST Comments"). This claim is not only unsubstantiated, but is outside both the scope of this proceeding and the jurisdiction of the Commission.

⁷³ See 2011 State of the Media Report, *supra* note 8, at Audio Essay. Fully forty-eight percent of online listeners were streaming traditional radio in 2006. *Id.* This number fell to forty percent in 2010, according to Arbitron. *Id.* More online listeners also now report listening to online-only audio (e.g., Pandora) than to the streams of radio stations. *Id.*

⁷⁴ 2012 State of the Media Report, *supra* note 11, at Audio Essay.

⁷⁵ See 2011 State of the Media Report, *supra* note 8, at Audio Essay (finding that this number increased from ten percent to twenty-seven percent).

broadcasters.⁷⁶ Thus, despite the assertions of the American Association of Independent Music, new radio technologies do not reach different audiences than AM/FM broadcasters,⁷⁷ but rather compete directly with radio broadcasters for both audiences and advertising.

The record also lacks evidence of concrete harms in the broadcast radio market that the rules are serving to ameliorate. Bald assertions of “rampant homogenization and impoverishment of radio programming”⁷⁸ from one opponent of reform are patently false, as the record demonstrates that radio stations are playing a diverse array of programming and this diversity is only increasing.⁷⁹ Surveys have shown that radio “is the dominant source of music discovery by a wide margin; among women who buy music, radio leads three to one.”⁸⁰

Likewise, the assertion that “one can drive from New York City to Detroit to Los Angeles . . . and listen to the same ‘songs that rock’”⁸¹ ignores the important fact that the presence of similarly programmed stations in different markets does not preclude the availability of alternative stations. In each of these markets, there are a plethora of other stations with different formats to which listeners can turn, despite the fact that some stations in these various markets (unsurprisingly) air music that is the most

⁷⁶ See *id.* (stating that “[t]he Pandora announcements represent ‘a direct challenge to broadcasters of satellite and traditional radio’”) (quoting Sarah McBride of the *Wall Street Journal*); see also 2012 State of the Media Report, *supra* note 11, at Audio Essay (observing that one of “prime arenas” for listening on digital mobile devices is now in the car, “the long-established domain of AM/FM radio”).

⁷⁷ See American Association of Independent Music Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 2 (filed Mar. 5, 2012) (“AIM Comments”).

⁷⁸ musicFirst Coalition Comments, *supra* note 72, at 1.

⁷⁹ See NAB Comments, *supra* note 6, at 35-38 & Attachment G.

⁸⁰ Radio Ink, Study: Content Key for Female Listeners (2010).

⁸¹ musicFirst Coalition Comments, *supra* note 72, at 3.

popular and the most in demand. A 2010 GAO report in fact expressly refuted the idea of a “national playlist,” finding that “programming decisions are locally-based on the preferences and interests of listeners within a given market.”⁸²

In sum, the harms that the radio ownership limits seek to prevent simply do not exist,⁸³ and, ironically, the factor that certain commenters blame for the alleged lack of diverse programming—common ownership of stations—actually promotes diversity.⁸⁴ In any event, claims about the extent of ownership concentration in the radio industry are almost invariably overstated. As shown in Attachment B, fully thirty percent of all commercial radio stations in Arbitron markets are either the sole station owned within its market by its station owner or are part of a two-station duopoly in a market.⁸⁵ In other words, close to one-third of commercial radio stations in Arbitron markets are not part of large local groups and that a significant number of separate owners remain in local radio markets.

⁸² U.S. Gov’t Accountability Office, GAO-10-369, Media Programming: Factors Influencing the Availability of Independent Programming in Television and Programming Decisions in Radio 28, 33 (2010); see also NAB Comments, *supra* note 6, at 33-34.

⁸³ *Compare HBO*, 567 F.2d at 37 (finding little comfort in the Commission’s assurance that a stated harm was “real, not imagined” because the Commission had “not directed [the court’s] attention to any comments in a voluminous record which would support its statement”).

⁸⁴ See Media Ownership Study 8B, *supra* note 25, at 18 (“As in previous studies, we document that increases in ownership concentration often encourage diversity.”); see also Joel Waldfogel, Radio Station Ownership Structure and the Provision of Programming to Minority Audiences: Evidence from 2005-2009, 24 (2011) (“Stations in large groups tend to attract more listeners—overall, as well as among blacks and Hispanics—tha[n] do stations in smaller ownership groups”); NAB Comments, *supra* note 6, at 35-38.

⁸⁵ See Attachment B, Sharon Warden, Ph.D., NAB, Independent Radio Voices in Radio Markets 2-3 (2012).

B. No Commenter Provides Evidence Justifying The Retention Of The AM/FM Subcaps.

As NAB showed in its initial comments, the distinction between AM and FM stations in the context of the current local radio subcaps is arbitrary and capricious.⁸⁶ The arguments of those opposing elimination of the subcaps lack merit. For instance, the claims that without the subcaps, the FM spectrum will simply be used to rebroadcast programming⁸⁷ or that elimination of the FM radio subcap will result in a “pervasive and negative impact on access to promote localism and diversity in content in general [sic]”⁸⁸ are not only unsupported, but are refuted by the record in this and other proceedings.⁸⁹

⁸⁶ See CBS Comments, *supra* note 27, at 19; NAB Comments, *supra* note 6, at 38-39; see also M. Kent Frandsen Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 5-7 (filed Mar. 5, 2012) (“Frandsen Comments”) (supporting elimination of the subcaps because “these arbitrary distinctions ignore the marketplace realities”).

⁸⁷ See AIM Comments, *supra* note 77, at 3.

⁸⁸ *Id.*

⁸⁹ See *In the Matter of 2006 Quadrennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2077 n. 404 (“If anything, the market level analysis suggests that more concentrated markets have fewer stations with the same format categories, and therefore more format diversity. Similarly, large national radio owners offer more formats. . . . The analysis also suggests that common ownership results in more diversity in actual programs aired.”) (citing Tasneem Chipty, *Station Ownership and Programming in Radio 3* (2007)); NAB Comments, *supra* note 6, at 9-11 (demonstrating that market forces, not diffuse ownership of stations, drives diversity); *id.* at Attachment A (identifying eleven studies previously cited in this and other proceedings that show forces other than ownership structure drive diversity); NAB NOI Comments, *supra* note 53, at 87-88 (explaining that common ownership of radio stations results in the offering of more diverse programming to audiences); Clear Channel Communications, Inc. Comments to *Notice of Inquiry* in MB Docket No. 09-182, at 21-25 (filed July 12, 2010) (explaining that group owners must appeal to as many segments of the listening audience as possible to be successful and describing its real-world experience in programming its stations, all of which are programmed independently); see also Chipty, *supra*, at 44-45 (finding that “consolidation of radio ownership does not diminish the diversity of local format offerings” in a study commissioned by the FCC for its 2006 ownership review).

As NAB has previously and repeatedly stated, broadcasters have a statutory mandate to serve their local markets and have business incentives to diversify programming among commonly-owned stations.⁹⁰ Other commenters further highlighted the inherent flaws in the reasoning supporting the subcaps, stating that the subcaps “no longer make sense, if they ever did.”⁹¹ Because the arbitrary subcaps stifle competition and growth in the radio market, do not promote localism, and are affirmatively harmful to the Commission’s goal of diversity,⁹² the Commission cannot justify retention of the current AM/FM subcaps.

IV. THE RECORD IS VOID OF EVIDENCE SUPPORTING RETENTION OF EITHER THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE OR THE RADIO/TELEVISION CROSS-OWNERSHIP RULE.

The record clearly demonstrates that newspaper/broadcast cross-ownership restrictions are no longer necessary in the public interest as a result of competition and should be repealed pursuant to section 202(h). Decades of evidence submitted in this and prior proceedings demonstrate that increased cross-ownership of newspapers and broadcast outlets supports the FCC’s localism and other public interest goals.

A. The Newspaper/Broadcast Cross-Ownership Rule Is Not Necessary To Promote Competition.

Commenters in this and past proceedings have documented the dramatic changes in the media marketplace and have established that the market is highly

⁹⁰ See NAB Comments, *supra* note 6, at 8-10; see also Media Ownership Study 8B, *supra* note 25, at 14-15.

⁹¹ Frandsen Comments, *supra* note 86, at 5; see also CBS Comments, *supra* note 27, at 19.

⁹² See NAB Comments, *supra* note 6, at 39 (explaining that the elimination of the subcaps will enable the growth of financially-viable AM station clusters that could focus on serving underserved demographic groups).

competitive.⁹³ Since adoption of the newspaper cross-ownership ban, competition for the provision of news and information, including local, has increased, and empirical studies have shown that consumer reliance on new media sources to access such information is escalating at an unprecedented pace.⁹⁴ Commenters recognize that social media plays an ever-greater role in transforming the media market,⁹⁵ and that consumer behavior has shifted to such a degree that the Internet has become a mainstream news source.⁹⁶

Yet even as the evidence of greater competition in the media marketplace mounts, some groups argue to maintain or even strengthen restrictions on newspaper and broadcast combinations.⁹⁷ These groups fail to identify specific abuses or

⁹³ See A.H. Belo Corporation Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 5-6 (filed Mar. 5, 2012) (“A.H. Belo Comments”); Belo Corp. Comments, *supra* note 22, at 3-5; Cox Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 6-8 (filed Mar. 5, 2012) (“Cox Comments”); Fox Comments, *supra* note 9, at 7-9; Morris Comments, *supra* note 9, at 2-3; Newspaper Association of America Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 8-12 (filed Mar. 5, 2012) (“NAA Comments”); Tribune Comments, *supra* note 9, at 4-5; see also Grant Group, Inc. Comments to *Notice of Inquiry* in MB Docket No. 09-182, at 7-10 (filed July 12, 2010); Media General, Inc. Comments to *Notice of Inquiry* in MB Docket No. 09-182, at 13-15 (filed July 12, 2010); Media General, Inc., Comments to *Public Notice* in MB Docket No. 09-182, at App. A (filed Nov. 20, 2009); Newspaper Association of America Comments to *Notice of Inquiry* in MB Docket No. 09-182, at 20-23 (filed July 12, 2010); Tribune Company, Debtor-In-Possession Comments to *Notice of Inquiry* in MB Docket No. 09-182, at 27-28 (filed July 12, 2010).

⁹⁴ See Fox Comments, *supra* note 9, at 11 (“For younger Americans, the Internet already is the first choice for national and international news. Within a few years, it is expected to overtake television among Americans ages 30-49 as well.”) (citations omitted); see also Cox Comments, *supra* note 93, at 12-15; NAA Comments, *supra* note 93, at 8-10; NAB Comments, *supra* note 6, at 42-46 (discussing empirical evidence that consumers increasingly rely on the Internet to get information about their local communities) (citing Local Community Study, *supra* note 32, at 2); Tribune Comments, *supra* note 9, at 7-8.

⁹⁵ See Fox Comments, *supra* note 9, at 10-11.

⁹⁶ *Id.* at 11.

⁹⁷ See Association of Free Community Papers, Mid-Atlantic Community Papers Association, & the Free Community Paper Industry Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 8-9 (filed Mar. 5, 2012) (“AFCP” Comments); CWA

competitive harms arising from such combinations, but argue against “consolidation” generally despite uncontroverted evidence in the record and in empirical studies.⁹⁸ As NAB has chronicled, such harms have never been demonstrated, despite all the attempts to do so over the past several decades.⁹⁹

B. The Newspaper/Broadcast Cross-Ownership Rule Is Not Necessary To Promote Viewpoint Diversity.

The record lacks evidence to support the *NPRM*'s tentative conclusion that newspaper broadcast cross-ownership restrictions are necessary to promote viewpoint diversity. Available evidence does not demonstrate that commonly-owned broadcast stations and newspapers speak with a single editorial voice, or that such combinations harm public access to diverse news sources.¹⁰⁰ Proposed retention of the rule is based on the *possibility* that newspaper/broadcast combinations *could* harm viewpoint

Comments, *supra* note 59, at 10-11; Free Press Comments, *supra* note 20, at 27; NHMC Comments, *supra* note 17, at 4.

⁹⁸ Some commenters go so far as to suggest that FCC regulation is the grand solution to the newspaper industry's financial problems, making new proposals for micromanagement of the industry that are well beyond the scope of the FCC's jurisdiction. See AFPC Comments, *supra* note 97, at 7-8 (urging the Commission to maintain the restrictions in order to save local free newspapers, to examine newspaper industry consolidation at macro and micro levels, and to examine the role of debt following cross-media mergers); CWA Comments, *supra* note 59, at 10, 11 (suggesting that the Commission adopt a media voucher and/or tax credit program and that the Commission maintain or even strengthen ownership restrictions in order to save newsroom jobs); Free Press Comments, *supra* note 20, at 37 (encouraging the Commission to maintain the restrictions because mergers enable newspapers to pile on more debt); NHMC Comments, *supra* note 17, at 9. Because these arguments are neither germane to the Commission's task under section 202(h), nor within the Commission's jurisdiction, they do not merit a point-by-point rebuttal.

⁹⁹ See NAB Comments to *Notice of Inquiry* in MB Docket No. 01-235, at 4-7 (filed Dec. 3, 2001) (chronicling the history of newspaper/broadcast cross-ownership policy since the 1930s).

¹⁰⁰ See Cox Comments, *supra* note 93, at 8-10; Morris Comments, *supra* note 9, at 6; Tribune Comments, *supra* note 9, at 10-11, 19-20; see also NAB Comments, *supra* note 6, at 42-45.

diversity, rather than evidence of actual harm.¹⁰¹ In fact, empirical evidence submitted in the record specifically shows the opposite—that cross-ownership of broadcast outlets and newspapers does not harm viewpoint diversity.¹⁰² The Pew Local Community Study further demonstrates that consumers rely far less on newspaper or broadcast outlet websites to access local information than the Commission apparently assumes.¹⁰³ There is abundant evidence of diverse media sources and a clear trend that the number of sources is increasing at a rapid rate.¹⁰⁴ Consumers themselves now have the means to access, digitize, and disseminate abundant amounts of information, including political information, and they rely increasingly on social media for a constant stream of news feeds they may design or personalize at will.¹⁰⁵ Removal of the restrictions on

¹⁰¹ See NAA Comments, *supra* note 93, at 27. *But see Bechtel*, 10 F.3d at 880 (criticizing the FCC for its continued reliance on “predictive judgments”).

¹⁰² *Id.* at 18-20 (citing Adam D. Renhoff and Kenneth C. Wilbur, Local Media Ownership and Media Quality (2011) (“Media Ownership Study 1”), Adam D. Renhoff and Kenneth C. Wilbur, Local Media Ownership and Viewpoint Diversity in Local Television News (2011) (“Media Ownership Study 8A”), Media Ownership Study 8B, *supra* note 25, Daniel Ho and Kevin Quinn, Viewpoint Diversity and Media Consolidation: An Empirical Study, 61 Stanford L. Rev. 781 (2009), Matthew Gentzkow & Jesse M. Shapiro, What Drives Media Slant? Evidence from U.S. Daily Newspapers, 78 Econometrica 35 (2010), and David Pritchard, Viewpoint Diversity in Cross-owned Newspapers and Television Stations (2002)); *see also* Fox Comments, *supra* note 9, at 25-26 (citing Media Ownership Study 8A, *supra*; Media Ownership Study 8B, *supra* note 25, and Jeffrey Milyo, The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News (2007)).

¹⁰³ See Local Community Study, *supra* note 32, at 27 (noting that “websites of traditional local news platforms do not register at major levels on most of the subjects probed in the survey.”); *see also id.* at 1 (finding “a richer and more nuanced ecosystem of community news and information than researchers have previously identified.”).

¹⁰⁴ See, e.g., *id.*, *supra* note 32, at 29; Pew Research Center, Pew Internet & American Life Project, How Mobile Devices are Changing Community Information Environment 2 (2011) (“Mobile Devices Study”); Pew Research Center, Pew Internet & American Life Project, Politics Goes Mobile 3 (2010) (“Politics Goes Mobile Study”).

¹⁰⁵ See Diversity and Competition Supporters Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 41 (filed Mar. 5, 2012) (“DCS Comments”); Fox Comments, *supra* note 9, at 10-11; *see also* Participatory News Consumer Study, *supra* note 33, at 2-6; Social Networking and Politics Study, *supra* note 33, at 2.

newspaper-broadcast combinations poses no threat to this diverse ecosystem of information.

C. Permitting Increased Cross-Ownership Of Newspapers And Broadcast Stations Will Support The Commission's Localism Goal.

The record demonstrates that broadcast outlets cross-owned with newspapers offer greater amounts of local news and informational programming and are top performers in news and public service.¹⁰⁶ Commenters and empirical studies, including the FCC's own peer-review studies commissioned for this and previous proceedings, show substantial localism benefits resulting from such cross-ownership.¹⁰⁷ Several commenters have provided additional examples of how combinations have allowed them to provide more and better news coverage in their local communities.¹⁰⁸

Retaining these cross-ownership restrictions affirmatively harms localism by preventing broadcast outlets and newspapers from achieving important efficiencies.¹⁰⁹

The record also shows that the need to allow broadcasters and newspaper

¹⁰⁶ See, e.g., DCS Comments, *supra* note 105, at 41.

¹⁰⁷ See, e.g., NAA Comments, *supra* note 93, at 14-15, 17-18 (conveying the results of an NAA member survey conducted for this proceeding showing that nearly all cross-owned broadcast stations provide more news, public affairs, or other informational programming than competing stations in their local markets and discussing the FCC-commissioned empirical studies that show newspaper-broadcast cross-owned combinations provide more and better local news); see also NAB Comments, *supra* note 6, at 40-49.

¹⁰⁸ See, e.g., A.H. Belo Comments, *supra* note 93, at 8-10 (offering the compelling case study of *The Dallas Morning News* and WFAA-TV); Cedar Rapids Television Company Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 3-5 (filed Mar. 5, 2012) ("CRTC Comments") (demonstrating the excellent local news coverage made possible through the synergies of common ownership); Cox Comments, *supra* note 93, at 4 (describing Cox's experiences with cross-ownership in Dayton, Ohio and Atlanta, Georgia); Morris Comments, *supra* note 9, at 3-4 (providing evidence of the public interest benefits delivered by Morris's combinations in Topeka and Amarillo); Tribune Comments, *supra* note 9, at 15-17 (demonstrating how cross-ownership has substantially benefited the public in the five markets in which Tribune has newspaper-broadcast combinations).

¹⁰⁹ See, e.g., Cox Comments, *supra* note 93, at 6, 15-16; NAA Comments, *supra* note 93, at 12-20; NAB Comments, *supra* note 6, at 45-48; see also Media Ownership Study 1, *supra* note 102, at 3,15; Economies of Scale Report, *supra* note 14, at 2, 4.

organizations to realize economies of scale and scope has never been greater.¹¹⁰ Contrary to the assertions of one commenter,¹¹¹ there is extensive evidence in the record that the newspaper subscriber rates and revenues continue to decline as consumers migrate to new media sources for their news.¹¹² Indeed, “[o]f all media sectors, newspapers suffered the most in 2011.”¹¹³ The *NPRM*’s proposed retention of significant elements of the newspaper/broadcast cross-ownership restrictions only would compound these difficulties.

D. If The Commission Retains Restrictions On Newspaper/Broadcast Combinations, The Rules Should Be Modified.

If the FCC decides to modify rather than eliminate the rules, NAB supports the following specific rule changes.

1. Eliminate Restrictions on Newspaper/Radio Cross-Ownership.

Commenters argue compellingly that there is no reason to maintain the newspaper/radio cross-ownership rule.¹¹⁴ As the Commission appropriately recognizes,

¹¹⁰ See, e.g., 2011 State of the Media Report, *supra* note 8, at Key Findings (reporting continued revenue declines for newspapers and concluding that the “structural problems of the print newspaper are more severe than any other media sector”); NAA Comments, *supra* note 93, at 4-15; NAB Comments, *supra* note 6, at 41-42.

¹¹¹ See Free Press Comments, *supra* note 20, at 36 (claiming that many newspapers enjoy above average profit margins).

¹¹² See, e.g., 2011 State of the Media Report, *supra* note 8, at Newspaper Essay; Cox Comments, *supra* note 93, at 5-6; NAA Comments, *supra* note 93, at 4-12; Tribune Comments, *supra* note 9, at 45-53.

¹¹³ 2012 State of the Media Report, *supra* note 11, at Overview (noting continuing declines in print circulation and revenues, with losses in print advertising outpacing gains in digital revenue “by a factor of roughly [ten to one]”).

¹¹⁴ See NAB Comments, *supra* note 6, at 49; Bonneville International Corporation & The Scranton Times, L.P. Joint Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182 at 5, 18-22 (filed Mar. 5, 2012) (“Bonneville Comments”) (noting the Commission’s understanding that radio does not play a substantial role in the provision of local news and does not contribute much to diversity in any event); see also Cox Comments, *supra* note 93, at 21; NAA Comments, *supra* note 93, at 23-24.

consumers rely more heavily on television and newspapers than on radio for their local news and are increasingly moving toward new media as news sources.¹¹⁵ Empirical evidence further demonstrates that daily newspapers and radio stations (specifically, news/talk stations) in smaller markets serve limited populations, and thus, these news outlets have substantially lower levels of potential advertising revenues to support their operations than do outlets in larger markets.¹¹⁶ In contrast, commenters offer no evidence of harms stemming from newspaper/radio combinations or any other justification for the restrictions beyond unsubstantiated allegations that “media consolidation” is harmful.¹¹⁷ Unproven, generalized claims about “the media” are insufficient under section 202(h) to retain the newspaper/radio cross-ownership restriction or any other specific ownership limit.

2. Use Contour-Based Methods Rather Than Geographic Market Definitions. The record does not support adoption of a Nielsen DMA definition for triggering application of the rule for newspaper/television combinations,¹¹⁸ or an Arbitron definition for triggering application of the rule for newspaper/radio combinations.¹¹⁹ Many commenters agree with NAB that the proposed modification will create difficulties

¹¹⁵ See NPRM ¶ 127; see also Bonneville Comments, *supra* note 114, at 18-22; Cox Comments, *supra* note 93, at 21.

¹¹⁶ See Attachment A, *supra* note 33, at i, 12-14.

¹¹⁷ See Alliance for Women in Media Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 3 (filed Mar. 5, 2012) (“AWM Comments”); Free Press Comments, *supra* note 20, at 23; NHMC Comments, *supra* note 17, at 9; UCC Comments, *supra* note 59, at 5-7.

¹¹⁸ See A.H. Belo Comments, *supra* note 93, at 10-13; CRTC Comments, *supra* note 108, at 14-16; NAB Comments, *supra* note 6, at 47-48; Tribune Comments, *supra* note 9, at 62-63.

¹¹⁹ See Bonneville Comments, *supra* note 114, at 24-25 (providing examples where changing from a contour-based approach to market-boundary definitions would expand the geographic reach of the rule).

in application of the rule and will expand application of the rule for no public benefit,¹²⁰ and that a contour-based approach should continue to govern application of any newspaper/television cross-ownership restriction.¹²¹

E. The Record Supports The Commission's Proposal To Repeal The Radio/Television Cross-Ownership Rule.

The record overwhelmingly supports the proposal to eliminate the radio/television cross-ownership rule. Commenters agree with the Commission that repeal will not likely increase the consolidation of broadcast facilities and that the rule is not necessary to promote localism or diversity.¹²² The Commission's own media ownership studies for this proceeding, as well as its studies in past years, make clear that increased cross-ownership of radio and television stations produces significant benefits with respect to localism and diversity.¹²³ Because this rule is no longer necessary in the public interest, it should be repealed.

¹²⁰ See *supra* note 118. In its initial comments, NAB identified twenty-four instances in which an existing newspaper/broadcast combination would violate the cross-ownership ban if the proposed modifications were adopted. See NAB Comments, *supra* note 6, at 48.

¹²¹ See NAB Comments, *supra* note 6, at 48.

¹²² See NPRM ¶119; CBS Comments, *supra* note 27, at 7-10; NAB Comments, *supra* note 6, at 49-52; Tribune Comments, *supra* note 9, at 77. Only one commenter argued specifically that the radio/television cross-ownership rule should be retained, but offered no factual data or evidence of harm or legal showing that the rule remains necessary for competition. See American Federation of Television and Radio Artists Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 6-8 (filed Mar. 5, 2012) ("AFTRA Comments").

¹²³ See Jack Erb, Local Information Programming and the Structure of Television Markets 48-49 (2011) ("Media Ownership Study 4"); see also Media Ownership Study 8B, *supra* note 25, at 15; Media Ownership Study 1, *supra* note 102, at 15; Craig Stroup, Factors that Affect a Radio Station's Propensity to Adopt a News Format 15 (2007); Daniel Shiman, The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming 24 (2007); Kenneth Lynch, Ownership Structure, Market Characteristics and the Quantity of News and Public Affairs Programming: An Empirical Analysis of Radio Airplay 19 (2007).

V. THE RECORD SHOWS THAT THE COMMISSION CAN BEST IMPROVE DIVERSITY IN MEDIA OWNERSHIP BY ADOPTING FLEXIBLE, INCENTIVE-BASED PROGRAMS.

The record supports the adoption of incentive-based programs designed to encourage media ownership by women and minorities, and recognizes that access to capital remains the most significant barrier to diverse media ownership. Improved access to capital is a better catalyst for increased ownership diversity than maintaining the existing ownership restrictions, which serve to disadvantage broadcasters as a whole in today's media marketplace.

A. Commenters Support A Variety Of Incentive-Based Programs.

NAB supports the following incentive-based programs for which there is strong support in the record.

- Sponsorship of primers on investment and financing of broadcast enterprises for smaller and regional lenders so that they may be better informed about the industry and more willing to make loans to new owners.¹²⁴
- Adoption of an incubator or waiver program that would give broadcasters incentives to finance qualifying businesses and to ensure that ownership of communications outlets reflects the demographics of the audiences and communities they serve.¹²⁵
- Adoption of subchannel licensing programs that would permit the sale of broadcast subchannels to qualifying entities to facilitate better opportunities for prospective subchannel operators than LMAs or leasing arrangements by making it easier for minority broadcasters to obtaining financing.¹²⁶

¹²⁴ See AWM Comments, *supra* note 117, at 6-7.

¹²⁵ See DCS Comments, *supra* note 105, at 22-23 (noting that the proposal has been pending since 1990 (proposal #1)); NAB Comments, *supra* note 6, at 53-54; see also NAB Reply Comments to *Notice of Inquiry* in MB Docket No. 09-182, at 23 (filed July 26, 2010) ("NAB NOI Reply Comments").

¹²⁶ NAB Comments, *supra* note 6, at 54; NAB NOI Reply Comments, *supra* note 125, at 7-8, 24.

- Modification of FCC rules to allow sellers to hold a reversionary interest in broadcast licenses pursuant to certain guidelines to incentivize sellers to be more willing to finance a station purchased by a new owner by retaining the ability to reacquire the station in the event of a default.¹²⁷
- Reinstatement of the eligible entity standard and related measures as a means of promoting broadcast ownership by small entities¹²⁸ to further the goal of eliminating market barriers for entrepreneurs and small businesses,¹²⁹ consistent with the Communications Act of 1934, as amended.
- Urging Congress to provide tax incentives to station owners who sell broadcast properties to minority owners.¹³⁰
- Modification of certain technical rules governing radio operations to reduce entry barriers and promote efficiencies for existing broadcast stations owned by minorities, women and small entities.¹³¹

B. Access To Capital Remains The Most Significant Barrier To Diverse Media Ownership.

Improved access to capital will do more to promote female and minority ownership than retaining existing ownership restrictions. In fact, contrary to the claims

¹²⁷ See AWM Comments, *supra* note 117, at 6; NAB Comments, *supra* note 6, at 54; see also NAB NOI Reply Comments, *supra* note 125, at 23-24 (citing Alliance for Women in Media Comments to *Notice of Inquiry* in MB Docket No. 09-182, at 7-8 (filed July 12, 2010)).

¹²⁸ See NAB Comments, *supra* note 6, at 56.

¹²⁹ 47 U.S.C. § 257(a).

¹³⁰ This proposal has strong support in the record in this and other proceedings. NAB, in particular, has been a longtime supporter of tax certificates as they provide meaningful incentives for sellers and provide greater opportunities for media ownership by women and minorities. See NAB Comments, *supra* note 6, at 52-53; see also AWM Comments, *supra* note 117, at 7; DCS Comments, *supra* note 105, at 27 (proposal #3); NAB Comments to *Further Notice of Proposed Rulemaking* in MB Docket No. 06-121, at 3-4 (filed Oct. 1, 2007).

¹³¹ See NAB Comments to *Petition for Rulemaking* in MB Docket No. 09-52 (filed Oct. 23, 2009) (supporting Minority Media & Telecommunications Council proposals to remove the nighttime coverage rules from section 73.24(i); modify the principal community coverage rules for commercial stations; replace the minimum efficiency standard for AM stations with a “minimum radiation” standard; allow FM applicants to specify Class C, C0, C1, C2 and C3 facilities in Zones 1 and 1A; remove non-viable FM allotments; relax the limit of four contingent applications; relax the main studio rule; conduct tutorials on the radio engineering rules; and appoint a public engineer); see also DCS Comments, *supra* note 105, at 29 (public engineer proposal #7), 30 (main studio proposal #16), 31-32 (proposals # 21-25), 34 (radio engineering rules tutorial proposal #35), 38 (non-viable FM allotments proposal #38).

of several commenters, there is evidence in the record that retaining restrictions will reduce opportunities for women and minorities, not improve them.¹³² As NAB has previously explained, ownership restrictions reduce economic incentives to invest in broadcasting, in general, making it more difficult for both existing and aspiring broadcasters to raise capital.¹³³ Outdated limitations that contribute to an undercapitalized and less competitive broadcast sector do not benefit any broadcasters, including new entrants and small businesses that face increased challenges in obtaining needed investment.

VI. SHARING ARRANGEMENTS SUPPORT THE COMMISSION'S POLICY GOALS AND PROPOSALS FOR INCREASED REGULATION OF SUCH ARRANGEMENTS SHOULD BE REJECTED.

The record shows that SSAs, local news service (“LNS”) agreements, and similar sharing arrangements facilitate the production of local news and enable broadcasters to better serve their local communities while achieving economic efficiencies. As demonstrated by the record, such arrangements do not rise to impermissible levels of control or influence over core licensee operating functions. Further, there is no reliable evidence that joint negotiations of retransmission consent agreements are harmful or threaten licensee control or influence over local operating functions. Accordingly, there is no basis to treat such joint negotiations as attributable ownership interests.

¹³² See NAB Comments, *supra* note 6, at n.216 (citing NTIA, Changes, Challenges, and Charting New Courses: Minority Commercial Broadcast Ownership in the United States 38 (2000); Kofi A. Ofori, Radio Local Market Consolidation & Minority Ownership 10-12 (2002) (showing increase in the number of minority owned and controlled radio stations since 1997); Jim Tozzi/Center for Regulatory Effectiveness Reply Comments to *Further Notice of Proposed Rulemaking* in MB Docket No. 06-121, at 4 (filed Oct. 24, 2007) (finding that members of minority groups owned a *greater* number of television stations in 2006 than they did before the FCC modestly relaxed the duopoly rule in 1999)).

¹³³ See *id.* at 56-57; see also NAB Reply Comments to *Public Notice* in MB Docket No. 06-121, at 33-38 (filed Nov. 1, 2007).

A. The Record Demonstrates That The Benefits Of Sharing Arrangements Are Numerous And Substantial.

The record contains overwhelming evidence that sharing arrangements facilitate the production of local news.¹³⁴ Many broadcasters provide compelling examples of (i) how SSAs resulted in the production of additional or first time news for stations in local markets, (ii) were instrumental in achieving other positive developments that would not have otherwise been possible, or (iii) even are necessary for a station's survival in the marketplace.¹³⁵ Commenters also have noted additional public interest benefits that have been achieved through the use of sharing arrangements, including improvements

¹³⁴ The record evidence also counters the more limited findings of Professor Danilo Yanich, who reviewed a "constructed week" of newscasts of a total of thirty-five stations in eight markets, in which there was at least one SSA, LMA, or two stations under common ownership. See Danilo Yanich, *Local TV News & Service Agreements: A Critical Look* (2011) ("Yanich Study"). NAB critiqued the Yanich study in detail in its initial comments in this proceeding and exposed its limited utility in analyzing the public interest impact of SSAs and other types of sharing arrangements. See NAB Comments, *supra* note 6, at 60-64.

¹³⁵ See, e.g., Belo Corp. Comments, *supra* note 22, at 16 (noting that an SSA in Tucson with Raycom allowed a station to add a new two-hour news broadcast); Cox Comments, *supra* note 93, at 18 (noting that Cox properties in Atlanta and Palm Beach are parties to LNS agreements that have increased local news dissemination in the local markets); Entravision Holdings, LLC Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 13 (filed Mar. 5, 2012) (noting that its SSA with Schurz allowed Entravision Holdings, LLC to launch Spanish-language news on a new station in Derby, Kansas, making it the first and only Spanish-language local television news operation in Kansas); Grant Comments, *supra* note 56, at 14-15 (noting that its nightly newscast is possible because of a sharing arrangement with another station and that a morning newscast will begin soon); LIN Comments, *supra* note 12, at 9-13 (noting that it is able to offer news in Providence, Rhode Island and Austin, Texas and offer other local programming in Dayton, Ohio because of sharing arrangements); Local TV Coalition Comments, *supra* note 44, at 12-13 (providing additional examples where SSAs resulted in increased local news production and even saved a local television station); Nexstar Comments, *supra* note 10, at 29-31 (noting that several Nexstar stations operating under LNS agreements have resulted in more local programming); Sinclair Comments, *supra* note 7, at 6 (providing examples where it added news produced by others to stations in St. Louis, Missouri and Greensboro, North Carolina, where it could not profitably produce news on its own). Commenters to the Commission's *Notice of Inquiry* provided additional examples as well. See e.g., Coalition to Preserve Local TV Broadcasting Reply Comments to *Notice of Inquiry* in MB Docket No. 09-182, at 11-21 (filed July 26, 2010) ("Local TV Coalition NOI Reply Comments"); Coalition of Smaller Market Television Stations *Ex Parte* Presentation in MB Dockets 10-71 and 09-182 (filed Dec. 21, 2011)).

in emergency coverage and the purchase of better equipment to disseminate emergency information,¹³⁶ facilitation of full-service HD deployment where investment would not have been economically feasible,¹³⁷ and the creation of jobs in some local communities.¹³⁸

B. Restricting Sharing Arrangements Would Be Bad Public Policy And May Exceed The Commission's Statutory And Constitutional Authority.

Effectively prohibiting sharing arrangements by requiring their attribution would be bad public policy¹³⁹ and may also contravene the Commission's statutory mandate

¹³⁶ See New Vision/TTBG Comments, *supra* note 10, at 10.

¹³⁷ See *id.* at 11.

¹³⁸ See NAB Comments, *supra* note 6, at 59 (noting that in Burlington, Vermont, twenty-eight new jobs were created because of SSA implementation); Local TV Coalition Comments, *supra* note 44, at 13-14. While some commenters argue that SSAs and LNS agreements cause layoffs of news staff, several broadcasters in this proceeding provide examples where jobs were created because of SSAs or LNS agreements. See Local TV Coalition Comments, *supra* note 44, at 13-14; Morris Comments, *supra* note 9, at 14 (stating that station WIBW increased newsroom budget and now employs ten persons in the newsroom). The real-world evidence of public interest benefits provided in the record substantiates the empirical evidence previously submitted to demonstrate that sharing arrangements facilitate the production of local news, and that without such arrangements many stations (particularly in small or mid-sized markets) could not achieve the operational efficiencies necessary to finance their own news production. See NAB Comments, *supra* note 6, at 59 (citing Eisenach Reply Declaration, *supra* note 14, at 11-16 ¶¶ 18-27; Local TV Coalition NOI Reply Comments, *supra* note 135, at 7-10; Michael G. Baumann and Kent W. Mikkelsen, Economists Incorporated, Effect of Common Ownership or Operation on Television News Carriage: An Update, Reply Comments on FCC 2006 Studies at Attachment A, 6-7).

¹³⁹ There is no merit to allegations that sharing arrangements reduce competition or diversity. See UCC Comments, *supra* note 59, at 4-7. As commenters have explained, the media marketplace is competitive by any measure. See, e.g., NAB Comments, *supra* note 6, at 6. For many broadcasters, sharing arrangements are an economic necessity. Without sharing arrangements, such broadcasters would have to curtail local news efforts or cease news production altogether. See Gray Comments, *supra* note 52, at 9-12; LIN Comments, *supra* note 12, at 8-9; Sinclair Comments, *supra* note 7, at 6 ("Should the Commission bar news sharing arrangements, the net result will be less news available to viewers, not more."). Applying attribution rules to sharing arrangements will reduce the amount and quality of news and local public interest programming produced by broadcasters and ultimately reduce competition and diversity in local markets. See Nexstar Comments, *supra* note 10, at 31 ("Without Local Service Agreements, Nextstar's partners would have to expend millions of dollars to establish infrastructure (purchasing equipment and hiring personnel) to produce local news. These

and violate the First Amendment. The record is abundantly clear that without sharing arrangements viewers would see less local news.¹⁴⁰ Any rules that would inhibit these arrangements, such as making these agreements attributable or subject to increased disclosure requirements, would jeopardize the Commission's policy goals.

Also, as the Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. ("Fox") observed in their initial comments, regulation of LNS agreements, in particular, would contravene section 326 of the Communications Act's prohibition on interference with a licensee's programming decisions and be inconsistent with the First Amendment.¹⁴¹ Placing restrictions on voluntary arrangements for sharing of news production and related services would interfere with broadcast licensees' programming decisions, despite the clear statutory mandate, supported by ample precedent, to refrain from such regulation to preserve the editorial discretion of the licensee.¹⁴² The

expenses, in the medium and small markets in which Nextstar operates, are of a magnitude that these stations would simply be unable to provide local news absent the efficiencies that [local sharing agreements] make possible."); see *also id.* at App. A.

¹⁴⁰ See Tribune Comments, *supra* note 9, at 74-75 (noting that if SSAs become attributable, broadcasters likely will provide more syndicated programming, and less independent news); see *also supra* note 138 (demonstrating instances where SSAs have led to increased news). Some commenters argue that SSAs/LNS agreements facilitate "repurposing" of news rather than independent reporting. As shown above, such agreements generally result in the production of more news and, to the extent that news also is repurposed, this too serves the public interest because, for example, it enables news to be seen by more viewers than if the news is aired only in a single time slot on a single channel.

¹⁴¹ See Fox Comments, *supra* note 9, at 38-40; Tribune Comments, *supra* note 9, at 59-61.

¹⁴² See *American Broadcasting Companies, Inc.*, Memorandum Opinion and Order, 83 FCC 2d 302, 305 (1980) ("The choice of what is or is not going to be covered in the presentation of broadcast news is a matter to the licensee's good faith discretion . . . The Commission will not review the licensee's news judgments."); Letter to Chicago Media Action and Milwaukee Public Interest Media Coalition from Barbara Kreisman, Chief, Video Division, Media Bureau, 22 FCC Rcd 10877, 10878 (2007) ("Section 326 of the Act and the First Amendment to the Constitution prohibit any Commission actions that would improperly interfere with the programming decisions of licensees."); see *also In re Liability of NPR Phoenix, LLC*, Memorandum Opinion and Order, 13 FCC Rcd 14070, 14072 (1998).

Commission should not become involved in overseeing—let alone directly regulating—how broadcast stations cover newsworthy events, obtain news content, and present news programming.¹⁴³

C. There Is No Merit To Allegations That Sharing Arrangements Give Rise To Impermissible Levels Of Control Over Licensee Programming Or Core Operating Functions.

As NAB and other commenters have explained, sharing arrangements have been used by broadcasters for many years to advance the public interest by enabling broadcasters to better serve their local communities and produce news or other local programming in circumstances where the costs of doing so would otherwise be prohibitive.¹⁴⁴ Sharing arrangements allow stations to share administrative functions, equipment costs, and other resources without impacting a licensee's core operating functions or otherwise affecting control over, or influencing independent management by, a licensee.¹⁴⁵

¹⁴³ See, e.g., *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 126-27 (1973) (citing the "problem" of the "risk of an enlargement of Government control over the content of broadcast discussion of public issues," as "critical[ly] importan[t] to broadcast regulation and the First Amendment," and rejecting a requirement that would have resulted in the Government "oversee[ing] far more of the day-to-day operations of broadcasters' conduct"); see also *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378 (1984) (stating that "the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power" in the broadcast area, and stressing that broadcasters are "entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public [duties]." (citations and internal quotations omitted)).

¹⁴⁴ See Local TV Coalition Comments, *supra* note 44, at 8-15; NAB Comments, *supra* note 6, at 58-60; Tribune Comments, *supra* note 9, at 74-75.

¹⁴⁵ See Entravision Comments, *supra* note 135, at 12; Fox Comments, *supra* note 9, at 32-35; LIN Comments, *supra* note 12, at 8-15; Local TV Coalition Comments, *supra* note 44, at 2; NAB Comments, *supra* note 6, at 59, 64-67; Tribune Comments, *supra* note 9, at 74-75.

The record shows that sharing arrangements do not impact licensees' decisions regarding personnel or programming, which are core indicia of control.¹⁴⁶ Fox, for example, provides a useful overview of how LNS agreements typically work, explaining the process by which independently-owned stations share raw video footage of news events. In a typical LNS arrangement, although raw footage is distributed among the stations that are parties to the agreement, each station remains free to decide independently whether or not to use the footage and each uses own writers, reporters, editors and news management to craft and present any stories it deems worthy of inclusion in a newscast.¹⁴⁷ With respect to SSAs, NAB's initial comments summarize the typical provisions included in such agreements that protect against undue influence by the non-licensee party, including provisions aimed at (i) limiting the amount of provided programming to no more than fifteen percent of the licensee's weekly schedule,¹⁴⁸ (ii) restricting the non-licensee from affecting the licensee's programming decisions,¹⁴⁹ (iii) ensuring that the licensee retains financial incentives to maintain

¹⁴⁶ See *infra* Section VI.D. (discussing control of core operating functions).

¹⁴⁷ See Fox Comments, *supra* note 9, at 32-35.

¹⁴⁸ See NAB Comments, *supra* note 6, at n.250 (noting that the Commission has repeatedly held non-attributable arrangements covering no more than fifteen percent of a station's weekly broadcast programming hours) (citing *In re Shareholders of the Ackerley Group, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 10828, 10842 (2002) ("2002 Ackerley Order"); *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Report and Order, 14 FCC Rcd 12559 (1999) ("1999 Attribution Order"), recon. granted in part, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 1097 (2001), stayed, Order, 16 FCC Rcd 22310 (2001); *In re Malara Broad. Grp.*, Letter, 19 FCC Rcd 24070, 24075 (MB 2004)).

¹⁴⁹ *Id.* at n.252 (noting that the licensee remains responsible for programming decisions, including the right to supervise the production of any programming to be aired on the licensee's station, the discretion to reject any programming provided pursuant to an SSA and the right to establish policies for the content, format, length, and other specifications for such programming).

control over the station,¹⁵⁰ and (iv) ensuring the licensee's right to direct the services performed by shared personnel.¹⁵¹ These contractual arrangements have been successfully implemented consistent with FCC policies.¹⁵²

Many SSAs and LNS agreements—and the implementation thereof—have been explicitly approved by the Media Bureau as consistent with the FCC's rules.¹⁵³ SSAs and LNS agreements work within the FCC's ownership framework to allow stations to produce more news and other local programming and to improve operating efficiencies, which are especially critical for stations in small to mid-sized markets, without enabling a third party to exercise improper influence over programming or other core operating functions of a television station.¹⁵⁴ Attribution of SSAs and LNS agreements would effectively prohibit service contracts between stations that cannot be commonly owned in instances where the FCC has previously recognized beneficial arrangements.¹⁵⁵

¹⁵⁰ *Id.* at 66 (citing *2002 Ackerley Order*, 17 FCC Rcd at 10841).

¹⁵¹ *Id.* at 67 (citing *In re KHNL/KGMB License Subsidiary, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability of Forfeiture, 26 FCC Rcd 16087, 16094 (MB 2011) (stating that, with respect to the sharing arrangement at issue, “there is a permissible sharing of personnel with regards to the production of news programming”).

¹⁵² See NAB Comments, *supra* note 6, at n.243 & n.250.

¹⁵³ See *id.* Contrary to allegations that SSAs allow broadcasters to circumvent the ownership rules, as demonstrated herein, SSAs, many of which were approved by the FCC, are used by broadcasters not to evade ownership rules, but, consistent with the ownership rules and FCC policy, to achieve economic efficiencies and increases in local news programming. See Entravision Comments, *supra* note 135, at 12 (“[SSAs] are not shady pacts broadcasters enter into to evade ownership limits at the expense of localism, competition and diversity.”); Local TV Coalition Comments, *supra* note 44, at 7 (noting that SSAs “work within the framework of the Commission’s rules and more than two decades of Commission precedent to permit economic relationships between local broadcasters short of actual ownership that lead to stronger local stations and improved local service”); Sinclair Comments, *supra* note 7, at 7 (“News sharing is not a conspiracy.”).

¹⁵⁴ See Entravision Comments, *supra* note 135, at 12; Tribune Comments, *supra* note 9, at 73; see also Local TV Coalition Comments, *supra* note 44, at 9-11 (noting that without SSAs some local broadcasters would struggle to provide any news service at all).

¹⁵⁵ See LIN Comments, *supra* note 12, at 8-15.

Accordingly, the Commission should refrain from modifying its rules to deem SSAs and LNS agreements to constitute attributable interests. To this end, the Commission should reject UCC's complex proposal to impose an attribution test on all SSAs.¹⁵⁶ Beyond inhibiting the public benefits of SSAs discussed in detail above, the proposed regulation would constrain broadcasters in their ability to compete with MVPDs and other new media, which are not subject to comparable restrictions.

D. Allegations That Joint Retransmission Consent Negotiations Give Rise To Impermissible Levels Of Control Over Core Operating Functions Are Baseless.

The Commission should reject arguments by MVPDs that arrangements for joint negotiation of retransmission consent agreements by separate stations should be attributable.¹⁵⁷ Despite MVPD commenters' focus on broadcasters' financial motives in retransmission consent negotiations,¹⁵⁸ they have provided no evidence that joint negotiations have any impact on the amount of retransmission consent fees.¹⁵⁹

¹⁵⁶ The multi-part test proposed by the UCC would necessarily involve the Commission in a host of decisions concerning a licensee's day-to-day operations, would contravene decades of precedent regarding such involvement, and is divorced from the economic realities of station operations. The complexity of the proposed test also highlights why attribution issues are better addressed in a proceeding other than the quadrennial media ownership review proceeding. See UCC Comments, *supra* note 59, at 15-20.

¹⁵⁷ NAB and others have demonstrated the public benefits of such joint retransmission consent negotiations. For example, joint negotiations for separate stations provide an efficient, cost-effective means for all parties involved for reaching agreement on retransmission consent issues. Importantly, broadcasters' cost savings, and the fees they receive for retransmission of their signals, translate into benefits for consumers in the form of better and more local news. See, e.g., Eisenach Reply Declaration, *supra* note 14, at 1-10; NAB Comments to *Notice of Proposed Rulemaking* in MB Docket No. 10-71, at 7-9 (filed May 27, 2011); Sinclair Broadcast Group, Inc. Comments to *Notice of Proposed Rulemaking* in MB Docket No. 10-71, at 23-26 (filed May 27, 2011).

¹⁵⁸ See ACA Comments, *supra* note 37, at 3-6; Time Warner Cable Inc. Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 7 (filed Mar. 5, 2012) ("TWC Comments").

¹⁵⁹ Even if joint negotiations did increase retransmission consent fees—which they do not—the issue is irrelevant to the instant proceeding, which is aimed not at reducing MVPDs'

Although it claims that delegating negotiation of retransmission consent agreements implicates control matters, the MVPD industry has failed to provide any actual evidence of a station ceding control as a result of joint retransmission consent negotiations. Rather than provide factual support, one commenter offers far-fetched hypothetical examples suggesting ways in which a station may allow a third party to control its operations to an extent that would be prohibited by the Commission's rules.¹⁶⁰ None of these hypothetical examples reflect reality.

In practice, joint retransmission consent negotiations do not affect control or otherwise provide a station with undue influence over the core operating functions of another station because the terms and conditions of such agreements do not impact a licensee's programming decisions, personnel decisions or financial control.¹⁶¹ Retransmission consent agreements involve only the terms and conditions by which MVPDs may retransmit a broadcast signal and have no bearing on the selection of programming broadcast by the station, who hires and fires employees, or by whom and how station finances are controlled.¹⁶²

operating costs but determining whether the FCC's ownership rules remain necessary in the public interest. The amount of retransmission consent fees paid by MVPDs has no bearing on ownership of, or control over, a broadcast television station.

¹⁶⁰ See DIRECTV, LLC Comments to *Notice of Proposed Rulemaking* in MB Docket No. 09-182, at 4-5 (filed Mar. 5, 2012) ("DIRECTV Comments"). DIRECTV cites no instance, however, where a negotiating station acted against a delegating station's best interests, or where a negotiating station located in a separate market from a delegating station prejudiced the delegating station's interests by rejecting proposals based upon the negotiating station's interest in obtaining higher compensation in its market.

¹⁶¹ See NAB Comments, *supra* note 6, at 68-70.

¹⁶² Because joint retransmission consent negotiations do not affect or influence control over a station, the Commission should likewise reject arguments that arrangements for joint negotiation of retransmission consent agreements should be considered a transfer of control requiring prior FCC approval. See TWC Comments, *supra* note 158, at 15.

With respect to financial matters, in particular, MVPDs allege that, because retransmission fees are an important revenue stream for some broadcasters, they necessarily implicate financial control.¹⁶³ These allegations are misplaced, however, as retransmission consent fees are irrelevant to the question of whether a broadcaster retains control over financial matters, *i.e.*, the basic policies governing a station's financial operations. Even though broadcasters realize financial value from retransmission consent agreements, this consideration is not distinguishable from revenues derived from other revenue-producing contracts, such as advertising contracts. It does not create an attributable interest to permit a third party (*e.g.*, advertising agency) to negotiate advertising contracts on behalf of different stations in a market. In fact, the Commission does not consider the nature of a revenue stream in determining whether a party has financial control over a broadcast station but rather looks at whether the station exercises the power to direct its financial policies and operations.¹⁶⁴ Negotiation of retransmission consent agreements simply does not implicate the basic financial policies and operations of a station.

The Commission should refrain from expanding its statutory mandate under section 202(h)—which requires it only to review its broadcast ownership rules—to include retransmission consent negotiations that have no impact on ownership or attribution matters. The FCC already has before it in another proceeding a complete

¹⁶³ See ACA Comments, *supra* note 37, at 3-5; DIRECTV Comments, *supra* note 160, at 2-3; TWC Comments, *supra* note 158, at 4-6.

¹⁶⁴ See, *e.g.*, *In re KHNL/KGMB License Subsidiary, LLC*, 26 FCC Rcd at 16092 (explaining that, in examining questions regarding a station's control, "the Commission looks to any acts or agreements vesting in a 'new' entity the right to determine basic policies concerning the operation of the station," and concluding that a licensee maintained financial control where it retained the right to determine the basic policies governing the station's financial operations).

record on this issue and there is no need to consider the issue in this proceeding. In short, the Commission should resist efforts by MVPDs to utilize this proceeding to gain bargaining leverage against broadcasters in their market-based negotiations of retransmission consent agreements.

E. The Commission Should Reject MVPD Arguments To Impose Further Asymmetric Regulation On Broadcasters.

Throughout their comments, MVPD commenters offer predictable refrains on a familiar theme—that broadcasters should be subject to more regulation, where no comparable regulations govern the MVPDs. The Commission should reject these potentially self-serving suggestions as unnecessary and inappropriate. First, the Commission is already well-equipped to address any retransmission consent-related problems through its complaint process,¹⁶⁵ and the antitrust laws prohibit price-fixing and collusion.¹⁶⁶ If joint negotiations of retransmission consent agreements were as problematic and widespread as MVPDs suggest, such activities would be subject to existing antitrust enforcement, which obviously is not the case. Given the availability of other remedies, and the absence of concrete evidence of harm, greater FCC regulation of broadcaster participation in retransmission consent negotiations is not warranted.

¹⁶⁵ See Tribune Comments, *supra* note 9, at 75; NAB Comments, *supra* note 6, at 64-67; see also NAB, ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, & NBC Television Affiliates Reply Comments to *Petition for Rulemaking* in MB Docket No. 10-71, at 19-20 (filed June 3, 2010) (“Joint Broadcasters Retrans Comments”) (outlining FCC’s complaint process for refusals to deal in good faith in the retransmission consent context).

¹⁶⁶ See Sherman Antitrust Act, 15 U.S.C. § 1 (prohibiting contracts in restraint of trade and providing for criminal penalties); see also 47 U.S.C. § 152 note (noting that communications laws do not “modify, impair, or supersede the applicability of the antitrust laws”).

The Commission should reject the elaborate scheme proposed by the American Cable Association for imposing burdensome, asymmetric regulations on retransmission consent agreements that would severely disadvantage broadcasters in their efforts to negotiate fair agreements in good faith with their MVPD counterparts.¹⁶⁷ This proposal requests FCC intervention into a host of decisions about a broadcaster's day-to-day operations without any substantiated public interest justification for such intervention.

Despite the focus by MVPD commenters on retransmission consent issues, public concern regarding joint negotiation of retransmission consent agreements is noticeably absent from the record. One reason for the absence of any public concern over joint negotiations is because stations in joint arrangements are only about half as likely to become involved in impasses when compared with broadcast stations as a group.¹⁶⁸ Notably, MVPDs acknowledge that they are far less concerned with attribution of sharing arrangements than with enhancing their own positions in retransmission consent negotiations.¹⁶⁹ Indeed, at the same time as MVPDs call for attribution of broadcaster sharing arrangements, they seek to keep their own joint marketing and other arrangements confidential.¹⁷⁰ This is the case, even in proceedings that involve transfers of control, where broadcasters already disclose LMAs in similar proceedings.¹⁷¹

¹⁶⁷ See ACA Comments, *supra* note 37, at 26-27.

¹⁶⁸ See Eisenach Reply Declaration, *supra* note 14, at 15 ¶ 25; Sinclair Comments, *supra* note 7, at 20 (noting that MVPD shared services agreements for advertising sales are conspicuously devoid of the public interest benefits produced by broadcast-industry sharing agreements).

¹⁶⁹ See DIRECTV Comments, *supra* note 160, at 5.

¹⁷⁰ See NAB Comments, *supra* note 6, at n.266.

¹⁷¹ *Id.* at 67-68 & n.266.

VII. CONCLUSION

The Commission is compelled to modify or repeal regulations that are no longer necessary in the public interest. The record in this and past proceedings conclusively demonstrates that the existing restrictions are not necessary to promote, and in fact affirmatively undermine, the Commission's stated goals of competition, diversity, and localism. In light of the multitude of platforms that are now available to consumers, including those available as a result of the proliferation of broadband Internet, and stations' struggles to maintain strong a local presence, the Commission must reform its rules to enable broadcasters to adopt economically sustainable ownership structures. Anything less than prompt regulatory relief to that end could jeopardize the important role that broadcasters have played, and strive to continue to play, in local communities throughout the country.

Respectfully submitted,

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April 17, 2012

ATTACHMENT A

REFORMING LOCAL OWNERSHIP
RULES:
STATION AND MARKET ANALYSES

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April 17, 2012



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Executive Summary

The Federal Communications Commission has cited some data on local media markets to support their proposed local ownership rules, and have requested additional data in order to fully evaluate possible changes in those rules. This paper provides additional perspective on some of the data relied upon by the Commission and responds to certain data requests.

Specifically the paper will:

1. Review recent data on local television revenue shares in relation to the local television ownership rules.
2. Review the similarities of television markets of similar population size, as opposed to markets with similar numbers of local television stations.
3. Review the present status of news/talk radio stations and the numbers of local daily newspapers as they relate to the radio/newspaper cross-ownership rule.

After reviewing these data, we find the following:

- In many markets, there is a substantial gap between the revenue share of the 3rd ranked local television station and the 4th ranked station. In 24 television markets (out of the 159 markets with at least four commercial full-power television stations) that gap is ten percent or greater. In 47 out of the 183 markets with at least three commercial full-power television stations, the revenue share of the 2nd ranked station is ten (or more) percentage points higher than the 3rd ranked station's share. In 89 out of the 201 markets with at least two commercial full-power stations, the revenue share of the 1st ranked television station is ten (or more) percentage points higher than the 2nd ranked station's share.
- In 33 of the 159 markets with at least four television stations, the 4th ranked station earns 10% or less of the total advertising revenues generated by all the local commercial television stations in the market.
- In 82 of these 159 markets, the combination of the revenues of the 3rd and 4th ranked stations is less, often very substantially less, than the revenue of the top ranked station in those markets. The vast majority of these 82 markets are mid-sized or small markets – only six markets of the 82 are among the 50 largest.
- Revenues in smaller television markets are substantially lower than in markets of larger size, both in absolute terms and when viewed as revenues per television household in the local market. For example, average television station revenues on a per household basis falls from about \$204 in the top ten markets to less than \$120 in markets 151-210. These lower potential revenues make operating local television stations in smaller markets much more challenging.
- The average population served by news/talk radio stations and daily newspapers drops substantially in smaller markets. As a result, these news outlets have substantially lower levels of potential advertising revenues to support their operations.

After further analyzing some of the data the Commission cites and responding to certain of the Commission's data requests, one can conclude that the financial positions of local

broadcast stations and daily newspapers vary greatly across and within markets. These differences suggest that the Commission may want to consider relaxation of some of the local ownership rules, or at the very least, provide a more liberal waiver policy that takes into consideration the differing competitive positions of broadcast stations and daily newspapers, both within their local markets and among markets of varying size.

REFORMING LOCAL OWNERSHIP RULES: STATION AND MARKET ANALYSES

Introduction

In the most recent Notice of Proposed Rulemaking on local broadcast ownership issues,¹ the Federal Communications Commission cites some relevant data on the local media marketplace to support retaining its existing local ownership rules. The Commission also requests further data on local markets in order to assess whether it should change any of these rules. Obtaining relevant data on local media markets is necessary as these markets have experienced significant changes in recent years, and change will continue to occur. As a result, the bases for the local ownership rules must be reevaluated.

This paper will review certain data that the Commission relies upon and offers some related perspectives on those data. Additionally, the paper will respond to some questions posed by the Commission concerning data and information about local media markets. Specifically, the paper will:

1. Review recent data on local television revenue shares in relation to the local television ownership rules.
2. Review the similarities of television markets of equal size, as opposed to markets with similar numbers of local television stations.

¹ In the Matter of 2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to section 202 of the Telecommunications Act of 1996, MB Docket No. 09-182 and Promoting Diversification of Ownership in the Broadcasting Services, MB Docket No. 07-294, December 22, 2011 (hereafter referred to as the “NPRM”)

3. Review the present status of news/talk stations along with the numbers of local daily newspapers in relation to the radio/newspaper cross-ownership rule.

After analyzing this data, one can conclude that the financial positions of local broadcast stations and daily newspapers vary greatly across and within markets. These differences suggest that the Commission may want to consider relaxation of some of the local ownership rules, or at the very least, provide a more liberal waiver policy that takes into consideration the differing competitive positions of local broadcast stations and daily newspapers, both within their local markets and among markets of varying size.

Local Television Revenue Shares Analysis

Top-Four Prohibition

The Commission proposes retaining the prohibition on combinations among the top four television stations in any local market.² To support that retention, the Commission cites its earlier finding “that a significant ‘cushion’ of audience share continued to separate the top-four stations from the fifth-ranked station.”³

While there are markets with a clear gap between the fourth and fifth ranked stations, there are many markets with substantial gaps between the third and fourth ranked stations, between the second and third ranked stations, and between the first and second ranked stations. To analyze these markets, we examined the 2010 revenue shares of all commercial television

² NPRM, para. 40, pp. 15-16.

³ Ibid.

stations.⁴ The revenue shares of the 1st, 2nd, 3rd and 4th ranked stations were used to see the magnitudes of those differences between stations in the same market.

Across all markets where there are at least four local commercial, full-power television stations (159 markets), there are 24 markets in which the 3rd ranked station's revenue share is ten or more points higher than the 4th ranked station.⁵ The ten percent threshold was selected as the basis of analysis because such a significant difference clearly demonstrates the weaker competitive position of the lower ranked station in the local television market. Table 1 below lists those markets and includes the difference in the market share percentages between the third and fourth ranked stations.

⁴ These data comes from Media Access Pro™, a database maintained by BIA/Kelsey that includes information on all commercial and non-commercial local radio and television stations, as well as all daily and weekly newspapers. As of the date of this paper, 2010 is the most recent year for which revenue estimates are available for local commercial television stations. The revenue shares for some of these stations may include revenues associated with multicast programming streams.

⁵ This comparison does not include Puerto Rico, which is not measured by Nielsen Media Research. BIA/Kelsey does estimate the local commercial television stations in Puerto Rico, and the 3rd ranked station's revenue share is over 30 percentage points higher than the fourth ranked station there.

**Table 1 – Markets with Differences of Ten Percent or More
Between the Revenue Shares of the Third and Fourth
Ranked Stations**

Market Rank	Market	Difference
137	Columbia-Jefferson City, MO	20.6
146	Erie, PA	19.9
121	Santa Barbara-Santa Maria-San Luis Obispo, CA	15.7
46	Greensboro-High Point-Winston Salem, NC	15.6
184	Grand Junction-Montrose, CO	15.3
154	Rochester, NY	15
103	Greenville-New Bern-Washington, NC	13.7
48	Memphis, TN	13.2
70	Green Bay-Appleton, WI	13
123	Lafayette, LA	12.5
125	Bakersfield, CA	12.3
162	Idaho Falls-Pocatello, ID	12.2
11	Detroit, MI	11.6
89	South Bend-Elkhart, IN	11.5
151	Panama City, FL	11.4
133	Columbus-Tupelo-West Point, MS	11.3
106	Lincoln-Hastings-Kearney, NE	10.8
179	Alexandria, LA	10.6
90	Jackson, MS	10.5
23	Pittsburgh, PA	10.4
74	Springfield, MO	10.4
160	Gainesville, FL	10.4
188	Laredo, TX	10.4
36	Greenville-Spartanburg, SC	10

Clearly, in these markets the 4th ranked station provides very limited competition to other local stations, compared to markets where the revenue differences are much narrower.

Remember that the differences noted in Table 1 are just for the 3rd and 4th ranked station. The 4th ranked station in these markets have revenues very much lower than the 1st and 2nd ranked

stations. Also noteworthy is the fact that 19 of these 24 markets are smaller markets (DMAs 70+).

Large gaps in revenue are additionally quite common between the 2nd and 3rd ranked stations and between the 1st and 2nd ranked stations in local markets. In 47 of the 183 markets with at least three commercial full-power television stations, the revenue share of the 2nd ranked station is ten (or more) percentage points higher than the 3rd ranked station. And in 89 of the 201 markets with at least two commercial full-power stations, the revenue share of the highest ranked station is ten (or more) percentage points higher than the 2nd ranked station. Clearly, many markets have significant break points between stations other than the 4th and 5th ranked stations, as presumed under the existing top-four prohibition.

Revenue Share Waivers

The NPRM recognizes that a blanket ban on local station combinations may not promote the Commission’s policy goals in smaller markets. As a result of their significantly lower revenues, some small market stations may “be facing severe competitive pressures” but are prevented from “realizing potential efficiencies that could be achieved through allowing common ownership, even of top-rated stations.”⁶

In acknowledging the possibility that a top four combination may serve the interests of local communities, the NPRM requests comment and data on defining criteria for market size waiver standards. Specifically, the Commission asks “should one of the criteria for a waiver be

⁶ NPRM, para. 52, p. 20.

that the proposed station combination would not exceed a certain percent of the audience or revenue share in the local market?”⁷

Examining the revenue shares of the 4th ranked station in the 159 television markets in which there are at least four commercial, full-power television stations shows many situations where that 4th ranked station is competitively very weak, yet would be prevented by the current local television rule from combining with a stronger station. Out of the 159 markets with four or more stations, there are 33 markets in which the fourth ranked station’s revenue share is ten percent or less of the total broadcast television advertising revenues in the market.⁸ Table 2 shows those markets along with the revenue share of the 4th ranked station. Please note that 31 of these 33 markets with clearly struggling 4th ranked stations are mid-sized or small markets (DMAs 50+), in which duopolies generally cannot be formed due to the top-four prohibition and the eight voices test.

⁷ Ibid., para. 54, p. 21.

⁸ Note that these percentages are just percentages of the total advertising revenues generated by local commercial television stations, not the percentages of the total local advertising market revenues that include other advertising media against which local television stations compete. Many local media look to that larger advertising market (through the use of BIA/Kelsey’s Media Ad View service and other similar research services) when assessing their positions and planning for the future. For example, while the fourth ranked stations garner 10.0% of the broadcast television advertising revenues in the Johnstown-Altoona, PA, Laredo, TX, and Wilkes Barre-Scranton, PA markets, these stations’ shares of the wider local advertising market is only 1.03%, 1.9%, and 0.92%, respectively.

**Table 2 – Markets with
Fourth Ranked Station’s Share 10% or Less**

Rank	Market	4th Ranked Station Share
151	Panama City, FL	1.3
137	Columbia-Jefferson City, MO	1.4
123	Lafayette, LA	1.6
160	Gainesville, FL	1.8
180	Marquette, MI	1.9
179	Alexandria, LA	2.3
147	Albany, GA	3.5
150	Anchorage, AK	3.7
122	Macon, GA	4.2
125	Bakersfield, CA	4.6
118	Montgomery, AL	5.7
112	Boise, ID	5.7
89	South Bend-Elkhart, IN	5.8
121	Santa Barbara-Santa Maria-San Luis Obispo, CA	5.9
133	Columbus-Tupelo-West Point, MS	6.6
116	Peoria-Bloomington, IN	6.6
113	Sioux Falls-Mitchell, SD	7.0
92	Tri-Cities, VA	7.2
46	Greensboro-High Point-Winston Salem, NC	7.4
146	Erie, PA	7.5
170	Billings, MT	8.1
106	Lincoln-Hastings-Kearney, NE	8.6
115	Augusta, GA	8.7
74	Springfield, MO	8.8
42	Las Vegas, NV	8.8
195	Eureka, CA	8.9
90	Jackson, MS	9.2
184	Grand Junction-Montrose, CO	9.3
134	Wilmington, NC	9.7
198	Cheyenne, WY	9.9
101	Johnstown-Altoona, PA	10.0
188	Laredo, TX	10.0
54	Wilkes Barre-Scranton, PA	10.0

Another way of looking at potential rule changes or waivers to allow combinations of the 3rd and 4th ranked stations would be to evaluate the revenue shares of those stations in the 159 markets where there are at least four commercial television stations. In 82 of these markets, the

combination of the revenue shares of the 3rd and 4th ranked stations is lower than the revenue share of the leading station, often by a substantial amount. For example, in 42 of these 82 markets, the revenue share of the combined 3rd and 4th ranked stations is more than ten percentage points below the revenue share of the top ranked station. Indeed, in 30 markets, the combination of the revenue shares of the 3rd and 4th ranked stations is lower than the revenue share of even the 2nd ranked station.

Table 3 below identifies these 82 markets and the revenue shares of the combined 3rd and 4th ranked stations and the corresponding share of the top ranked station. This data shows that, in many markets, there are only one or two leading television stations and that there is a significant break point between these top stations and the 3rd and 4th ranked stations. Please also note that the vast majority of these 82 markets are mid-sized or small (DMAs 50+) – only six markets in the top 50 are among them.

Table 3 – Comparison of 3rd & 4th Ranked Stations Combined with Top Ranked Station

Rank	Market	Combined Shares of 3 rd & 4 th Ranked Stations	Top Ranked Station Share	Rank	Market	Combined Shares of 3 rd & 4 th Ranked Stations	Top Ranked Station Share
147	Albany, GA	14.2	69.8	73	Toledo, OH	26.0	36.7
179	Alexandria, LA	15.2	68.6	106	Lincoln-Hastings, NE	28.0	37.5
160	Gainesville, FL	14.0	65.6	149	Sioux City, IA	33.3	42.7
180	Marquette, MI	12.6	63.1	107	Ft. Wayne, IN	29.5	38.8
122	Macon, GA	16.3	61.0	139	Duluth, MN-Superior, WI	31.3	40.1
118	Montgomery, AL	15.0	58.4	100	Ft. Smith-Fayetteville, AR	26.1	34.6
105	Tallahassee, FL	21.6	62.2	145	Wichita Falls, TX	30.8	38.8
116	Peoria-Bloomington, IL	15.6	56.0	99	Charleston, SC	30.1	37.7
151	Panama City, FL	14.0	51.3	77	Portland-Auburn, ME	30.4	38.0
198	Cheyenne, WY	20.9	57.6	162	Idaho Falls-Pocatello, ID	33.0	40.6
110	Tyler-Longview, TX	24.1	60.7	97	Davenport, IA	32.1	39.6
170	Billings, MT	18.4	51.8	125	Bakersfield, CA	21.5	28.6
136	Monroe, LA	25.7	56.4	114	Lansing, MI	28.4	35.5
113	Sioux Falls-Mitchell, SD	21.7	50.7	135	Wausau-Rhineland, WI	31.1	37.9
123	Lafayette, LA	15.7	43.1	93	Burlington, VT	32.1	38.9
112	Boise, ID	20.2	45.4	121	Santa Barbara, CA	27.5	33.4
150	Anchorage, AK	16.2	41.0	41	Harrisburg-Lancaster, PA	32.6	38.4
104	Myrtle Beach, SC	26.4	47.7	78	Paducah-Cape Girardeau	31.0	36.7
115	Augusta, GA	23.9	45.1	59	Knoxville, TN	33.4	38.5
95	Baton Rouge, LA	24.3	45.5	61	Tulsa, OK	29.1	33.9
101	Johnstown-Altoona, PA	23.0	44.0	90	Jackson, MS	28.9	33.6
195	Eureka, CA	25.8	45.8	8	Atlanta, GA	25.7	30.3
92	Tri-Cities, TN-VA	22.2	40.7	62	Ft. Myers-Naples, FL	27.9	32.4
134	Wilmington, NC	27.6	46.1	129	Corpus Christi, TX	29.6	33.8
54	Wilkes Barre, PA	27.5	44.6	63	Lexington, KY	27.4	31.2
117	Traverse City, MI	25.7	42.5	87	Harlingen-Weslaco, TX	23.5	27.2
52	Providence, RI	26.0	42.7	131	Amarillo, TX	32.4	36.0
96	Savannah, GA	27.1	43.7	82	Huntsville, AL	30.5	33.4
74	Springfield, MO	28.0	43.3	40	Birmingham, AL	31.5	34.3
64	Dayton, OH	28.8	44.0	188	Laredo, TX	30.4	32.8
128	Columbus, GA	29.0	44.1	148	Joplin, MO-Pittsburg, KS	38.0	39.9
65	Charleston, WV	32.6	47.1	84	Shreveport, LA	30.4	32.2
143	Lubbock, TX	30.6	45.0	21	St. Louis, MO	30.5	32.1
133	Columbus-Tupelo, MS	24.5	38.0	66	Flint-Saginaw, MI	32.0	33.6
174	Rapid City, SD	30.0	42.8	156	Odessa-Midland, TX	32.8	34.4
89	South Bend-Elkhart, IN	23.1	35.2	27	Raleigh-Durham, NC	28.6	30.1
165	Abilene-Sweetwater, TX	28.4	40.4	184	Grand Junction, CO	33.9	35.2
71	Des Moines-Ames, IA	27.2	38.5	146	Erie, PA	34.9	36.2
137	Columbia, MO	23.4	34.6	102	Evansville, IN	37.1	37.9
88	Cedar Rapids, IA	27.9	38.9	42	Las Vegas, NV	25.2	25.7
79	Columbia, SC	28.3	39.2	76	Omaha, NE	34.4	34.9

Given the clear disparities between the financial position of the 3rd and 4th ranked stations and higher ranked stations in many markets, these lesser performing stations are highly unlikely to be effective competitors in the marketplace but are likely to lack the resources to serve their local audiences as effectively as better performing stations. Allowing these stations to combine and to realize cost and revenue efficiencies would better enable them to make the necessary investments to compete more effectively against the stronger television stations in their local markets. Under the current local television rule's top-four restriction, these stations may be relegated to their 3rd and 4th ranks indefinitely, struggling to compete for years to come. A rule change – or at the least a reformed waiver policy -- appears warranted to promote more effective competition between local television stations and between local stations and other competitors in the video marketplace.

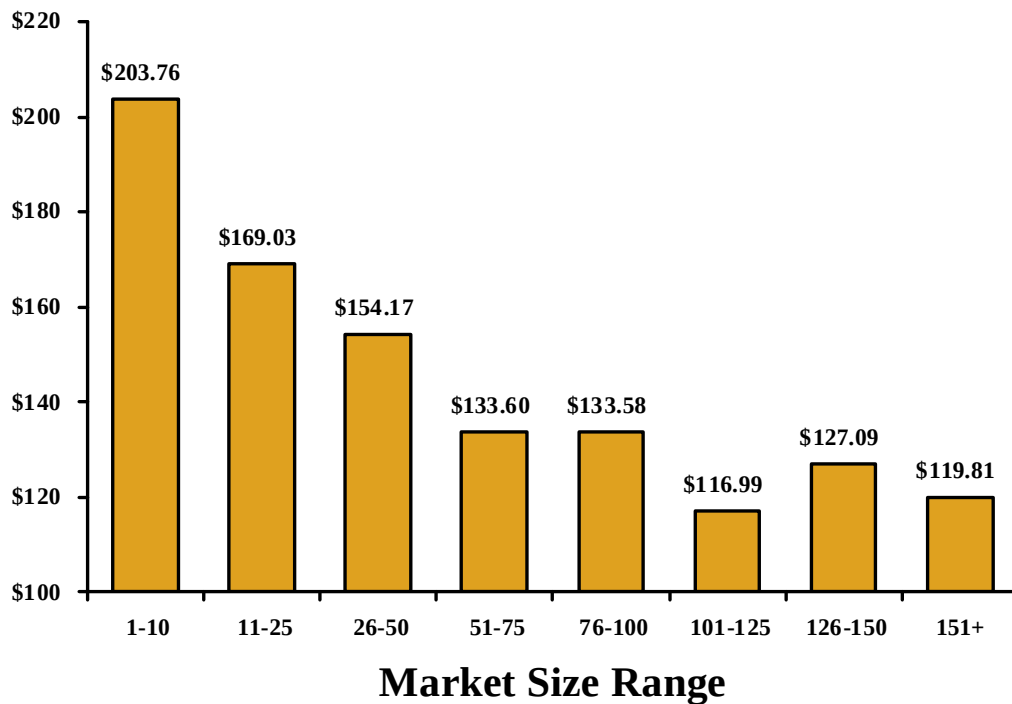
Local Television Markets Analysis

Beyond the difficult challenges faced by the 3rd and 4th ranked television stations in many markets, all of the local television stations in numerous markets face considerable challenges in generating enough revenue to adequately compete and provide services to their local communities. These challenges are most pronounced in smaller markets where the local commercial base is very limited. This revenue challenge in smaller markets is relevant to answering the Commission's question, "Do DMAs of a similar Nielsen rank share certain characteristics even though there may be a significant difference in the number of television stations?"⁹

⁹ NPRM., para. 48, p. 19.

Figure 1 shows the average revenues per television household across all market size ranges.

Figure 1 – Average Revenue per Television Household 2010



When moving from the largest markets to the smaller markets, the revenues generated by local television stations as a group declines, both in absolute amounts and in terms of the revenue per television household. As shown by Figure 1, television households in the top ten markets are valued at a substantially higher level than television households in markets 11-25 – let alone households in markets above 50. These disparate values result from the fact that (1) smaller markets are not as attractive to national advertisers, and (2) the smaller local economies

in smaller television markets have fewer businesses that wish to advertise on local broadcast stations.

Given the limited amount of potential revenues available, local television stations in smaller markets find it more difficult to generate sufficient revenues to cover the fixed costs of operating a television station, no matter the number of stations in the market.

News/Talk Radio and Daily Newspapers Analysis

As the NPRM recognized, daily newspapers and broadcast outlets are facing increased competition from other technologies and their advertising revenues are under pressure. In response, some outlets have contracted the size of their news staffs.¹⁰ The continued provision of news not only requires adequate revenues to pay for staff, but also requires a substantial amount of investment for equipment and significant funds for operating expenses.

The Commission highlighted these difficulties by seeking comment on eliminating or modifying the radio/newspaper cross-ownership rule. Specifically, the Commission asks, “Could such [radio/newspaper] combinations provide an opportunity for both radio stations and newspapers that are struggling financially to become more vital participants in the news and information marketplace?”¹¹

To shed some light on that general question, it is important to note the present status of news/talk radio stations and daily newspapers. In another study, this author documented the

¹⁰ NPRM, para. 3, p. 3.

¹¹ NPRM, para. 112, p. 42.

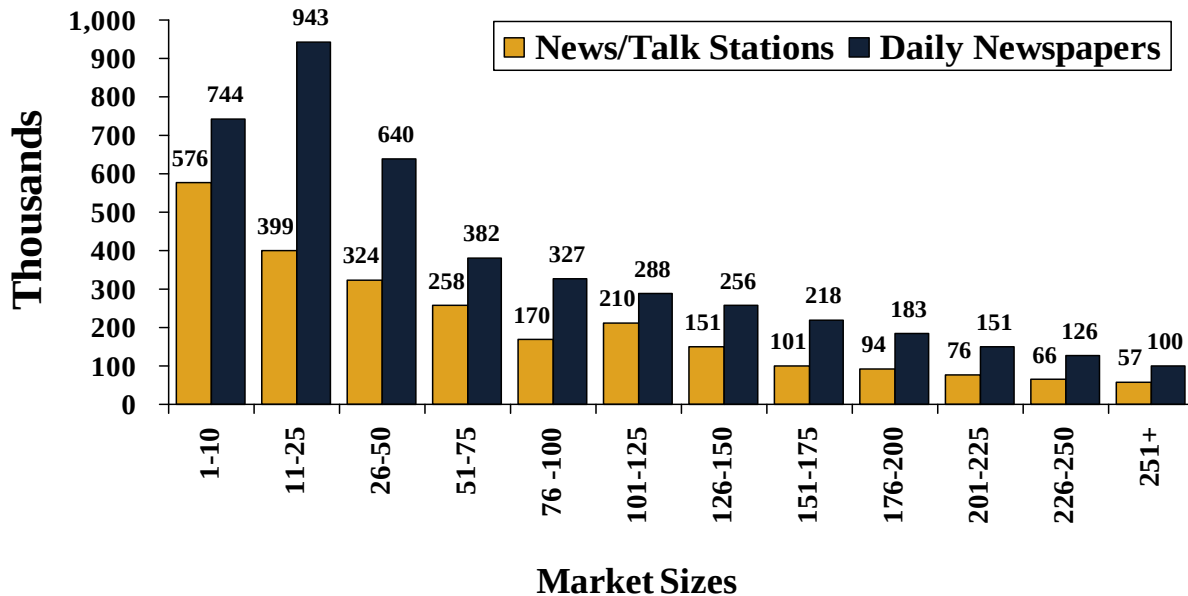
growing numbers of news/talk radio stations providing service to their local communities.¹²

While the number of news/talk stations is impressive, it is important to note the limited potential audience of many of these news/talk stations, and thus, their limited potential revenues.

Similarly, many of the daily newspapers serving radio markets with news/talk stations have a limited number of potential readers, and once again, lower levels of potential advertising revenues.

A good approach to illustrate the challenges facing both news/talk radio stations and daily newspapers is to assess the sizes of their potential audiences. By dividing Arbitron radio markets' total population by the number of local news/talk and daily newspapers, we can determine the sizes of their potential audiences. Figure 2 shows the average populations in radio markets divided by the numbers of news/talk radio stations and daily newspapers.

¹² See Mark R. Fratrik, "Over-the-Air Radio Service to Diverse Audiences – 2012 Update," submitted as Appendix G, NAB Comments in MB Dockets 09-121 and 07-294, March 5, 2012.

Figure 2 – Average Radio Markets’ Populations Divided**by Number of News/Talk Radio Stations and Daily Newspapers**

As shown, the populations served by news/talk radio stations and daily newspapers are significantly lower in smaller markets. These limited populations limit the potential revenues that these local operations can generate.¹³ Given the declining advertising revenues earned by daily newspapers in markets of all sizes, as well as the more limited revenue potential of news outlets in smaller markets, elimination of the newspaper/radio cross-ownership ban would be warranted so these outlets can take advantage of economies of scale and scope.

¹³ As a result, it is unsurprising that the number of these types of radio stations and daily newspapers drops in smaller markets, which lack the revenue base to support greater numbers of these types of outlets. For example, in Arbitron markets 11-25, there are an average of 10.7 news/talk radio stations and 4.5 daily newspapers. In contrast, the smaller population and revenue base in Arbitron markets 101-125 can support, on average, 4.1 news/talk stations and 2.6 daily newspapers.

Conclusion

The local media marketplace has become increasingly competitive for television and radio stations and local newspapers. As a result, some local outlets have found it increasingly difficult to compete successfully with outlets in the same media (let alone newer media outlets). Certain local ownership regulations continue to prevent combinations of these underperforming outlets that could make them more competitive and better able to serve their local communities.

Specifically, the position of many 3rd and 4th ranked television stations suggests that competition will increase and local communities will be better served if those operations were allowed to combine. Likewise, in smaller markets with limited revenue potential, allowing more flexible rules for local television combinations would help those stations take advantage of efficiencies of scale and ultimately better serve their local communities. Finally, allowing local radio stations and daily newspapers to combine would allow these outlets to use newsgathering resources more efficiently, potentially leading to improved news service, especially in markets lacking the population and revenue opportunities needed to support larger numbers of independently owned outlets.

ATTACHMENT B

Independent Radio Voices In Radio Markets

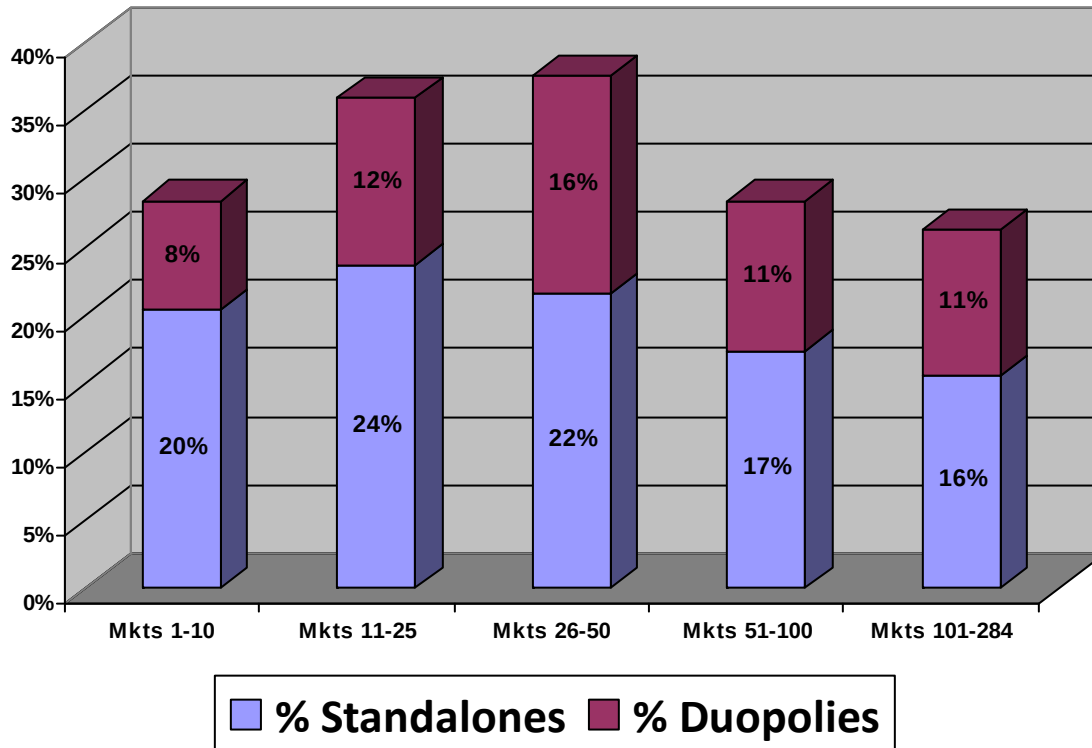
**Sharon Warden, Ph.D.
Vice President, Research and Information Group
National Association of Broadcasters
April 2012**

This report assesses the number of independent radio voices available in individual Arbitron markets. Independent is defined as those stations that are either the sole station owned in a market by a station owner or a station that is part of a two-station duopoly in a market.

Information on station ownership was obtained from BIA's Media Access Pro database for all commercial radio stations in 284 Arbitron-rated markets as of April 2012. Within each market, the number of stations owned by the same group was calculated. A summary of this information is provided in the table included as Appendix A. Each line in the report lists the number of groups that own a certain number of stations within the market. For instance, in the Los Angeles market, 16 entities own one station each; 6 groups own two stations each; 3 groups each own three stations; and so on.

The chart on the following page summarizes these findings by showing the percentages of radio stations within specific market rank groupings that are the only station owned within the market by the station's owner. Nationally, there are currently 1,528 stations, or 23 percent of the 6,630 full-power commercial stations operating in Arbitron markets, that are the only station owned within its market by its station owner. In addition, there are another 469 stations (7.1 percent of the total) that are in duopoly situations. In other words, 30 percent of all radio stations in Arbitron-rated markets are either standalone or duopoly stations.

% Local Commercial Radio Station Standalones or Duopolies by Market Size Groups



Appendix A

Market Rank	Market Name	Number of Stations in a Market													
		1	2	3	4	5	6	7	8	9	10	11	12	13	14
1	New York, NY	8	7			2	1								
2	Los Angeles, CA	16	6	3	1	1	3		1						
3	Chicago, IL	18	5	1	4	1		3	1						
4	San Francisco, CA	7	3	3	1		2	1							
5	Dallas-Ft. Worth, TX	15	7	3	1	1	3		1						
6	Houston-Galveston, TX	13	6	3	1	1	3								
7	Philadelphia, PA	18	1	1	1	2	1								
8	Washington, DC	12	3	2	2	2	1								
9	Atlanta, GA	24	4	6	2	2		1							
10	Boston, MA	21	6	2	2	3									
11	Detroit, MI	5	1	4	2		1	1							
12	Miami-Ft. Lauderdale-Hollywood, FL	11	2	4	2	1		1							
13	Seattle-Tacoma, WA	14	3	5	3	1		1							
14	Puerto Rico	47	9	2	1	1		1				1			1
15	Phoenix, AZ	14	3	2	3	1			1						
16	Minneapolis-St. Paul, MN	13	3	2	1	1	1								
17	San Diego, CA	9	4		1			1							
18	Nassau-Suffolk, NY	11	1	1	3										
19	Tampa-St. Petersburg-Clearwater, FL	8	2	4			2		1						
20	Denver-Boulder, CO	5	2	2	3	1			1						
21	Baltimore, MD	9	3		3										
22	St. Louis, MO	10	9	2	2		1								
23	Portland, OR	11	1	1	1		2	1	1						
24	Charlotte-Gastonia-Rock Hill, NC-SC	19	5	3		1	1	1							
25	Pittsburgh, PA	12	5	2	2		1	1							
26	Riverside-San Bernardino, CA	14	2	1			1								
27	Sacramento, CA	5	2	1	2	1	2								
28	San Antonio, TX	11	4			1		3							
29	Cincinnati, OH	9	2	2	1	1	1								
30	Cleveland, OH	8	2	1	2	1									
31	Salt Lake City-Ogden-Provo, UT	15	4		2		2		1						
32	Las Vegas, NV	7	7	4			2								
33	Kansas City, MO-KS	6	5		3					1					
34	Orlando, FL	6	3	2	1		2								
35	Columbus, OH	6	4	3	1			1							
36	Austin, TX	4	2	2		2	1								
37	San Jose, CA	9	3												
38	Milwaukee-Racine, WI	6	3	2	1	1	1								

39	Hudson Valley, NY	5	2	1	1		1
40	Indianapolis, IN	8	2	3	2		
41	Middlesex-Somerset-Union, NJ	3	1				
42	Providence-Warwick-Pawtucket, RI	10	3		1	1	
43	Raleigh-Durham, NC	11	2	1	3		1
44	Norfolk-Virginia Beach-Newport News, VA	4	3	3	2	2	
45	Nashville, TN	19	6	3		2	
46	Greensboro-Winston Salem-High Point, NC	10	3	1	1	1	2
47	New Orleans, LA	17	3	2	1		2
48	Oklahoma City, OK	7	2	1	1	1	2
49	West Palm Beach-Boca Raton, FL	11	3			1	1
50	Jacksonville, FL	11	2		2		2
51	Memphis, TN	9	3		1	1	1 2
52	Hartford-New Britain-Middletown, CT	6	1	2	1	1	
53	Monmouth-Ocean, NJ		1			2	
54	Louisville, KY	12	5	1	1	1	1
55	Buffalo-Niagara Falls, NY	7	1		1	1	1
56	Richmond, VA	9	1		3	1	1
57	Rochester, NY	7	3	1	1	1	1
58	McAllen-Brownsville-Harlingen, TX	5		1	1	1	1
59	Birmingham, AL	15	1			2	1 1
60	Greenville-Spartanburg, SC	13	2	2			1 1
61	Tucson, AZ	5	2	1	2	1	1
62	Ft. Myers-Naples-Marco Island, FL	3	1	1	3	2	
63	Dayton, OH	4	2		1	1	1
64	Honolulu, HI	9	2		1		1 2
65	Albany-Schenectady-Troy, NY	7	2	1	1	1	1 1
66	Tulsa, OK	7	2	1		2	2
67	Fresno, CA	8	4	3	1	1	1
68	Albuquerque, NM	10	2		1		1 2
69	Grand Rapids, MI	5	4			2	1
70	Allentown-Bethlehem, PA	3	2		1	1	
71	Wilkes Barre-Scranton, PA	4	1	2		1	2 1
72	Knoxville, TN	15	6	2	2		
73	Des Moines, IA	8	2			2	1 1
74	Omaha-Council Bluffs, NE-IA	4		1		2	1
75	El Paso, TX	4		2		2	
76	Sarasota-Bradenton, FL	7					1
77	Bakersfield, CA	7	1	1	2	1	1 1
78	Akron, OH		1	1	1		
79	Wilmington, DE	3	1	1	1		

80	Harrisburg-Lebanon-Carlisle, PA	9	2			2			
81	Baton Rouge, LA	4				2	1		
82	Greenville-New Bern-Jacksonville, NC	6	5	1	1	1	1	1	
83	Charleston, SC	1	3		1	2	1		
84	Little Rock, AR	12	1	1	2			1	
85	Syracuse, NY				1	1	1	1	1
86	Gainesville-Ocala, FL	4	4		1	1		1	
87	Stockton, CA	2	3						
88	Monterey-Salinas-Santa Cruz, CA	8	3	2	1	2			
89	Columbia, SC	4	1	1		1	2		
90	Portland, ME	5			1	2		1	1
91	Springfield, MA	4	2	1		1			
92	Colorado Springs, CO	5	2	1	1		1		
93	Spokane, WA	4	2				1	2	
94	Daytona Beach, FL	6	1		1				
95	Toledo, OH	3	1			1	1		
96	Lakeland-Winter Haven, FL	7			1				
97	Mobile, AL	6	3	1	1	1			
98	Ft. Pierce-Stuart-Vero Beach, FL	5	1	1	2				
99	Wichita, KS	5	2		1		2		
100	Madison, WI	1	2	1		1	1		1
101	Boise, ID	7	2		2		2		
102	Melbourne-Titusville-Cocoa, FL	6			1	1			
103	Lexington-Fayette, KY	8		2		2	1		
104	Visalia-Tulare-Hanford, CA	7	2	1					
105	Johnson City-Kingsport-Bristol, TN-VA	13	2	1		2	1		
106	Huntsville, AL	9	2	1	1	1	1		
107	York, PA	3	2		1				
108	Chattanooga, TN	12	1		3	1			
109	Lafayette, LA	6	1	2	1	1	1		
110	Augusta, GA	8	1			2			1
111	Corpus Christi, TX	11	3	3	1		1		
112	Lancaster, PA	4	2						
113	Ft. Wayne, IN	7	2	1	1	1			
114	Roanoke-Lynchburg, VA	12	5	2		1	1		
115	Worcester, MA	6	1	1					
116	New Haven, CT	3		1					
117	Morristown, NJ	2	1						
118	Modesto, CA	2	2	1	1	1			
119	Oxnard-Ventura, CA	3		1	1		1		
120	Ft. Collins-Greeley, CO	11			1	1			
121	Portsmouth-Dover-Rochester, NH	1	2	1			1		
122	Santa Rosa, CA	1	2	2		1			

123	Victor Valley, CA	10	3	2	1			
124	Reno, NV	6	1	2	1	1		
125	Bridgeport, CT	6						
126	Jackson, MS	11		1	2			
127	Lansing-East Lansing, MI	3		2	1			
128	Pensacola, FL	8	4	1				
129	Youngstown-Warren, OH	2	1	1	1	1		
130	Fayetteville, AR	4	2	1	1	1		
131	Fayetteville, NC	5	2	1	1			
132	Palm Springs, CA	6	1	1	2			
133	Flint, MI	5			1	1		
134	Reading, PA	3	1					
135	Canton, OH	5	3					
136	Shreveport, LA	4	2		1	2		
137	Appleton-Oshkosh, WI	5	1	1	1	1		
138	Springfield, MO	3	1	2	2			
139	Saginaw-Bay City-Midland, MI	5		2	1			
140	Salisbury-Ocean City, MD	8	1		1	1	1	
141	Beaumont-Port Arthur, TX	6			2			
142	Burlington-Plattsburgh, VT-NY	11	2	1	1	1	1	
143	Killeen-Temple, TX	2	1		1			
144	Tyler-Longview, TX	3	2	2	1	1	1	
145	Atlantic City-Cape May, NJ	1	2		2		1	
146	Trenton, NJ	4	1					
147	Fredericksburg, VA		2	1	1			
148	Stamford-Norwalk, CT	3	1					
149	Eugene-Springfield, OR	5	1	1	1	1		
150	Biloxi-Gulfport-Pascagoula, MS	5	1	1	1	1		
151	Quad Cities, IA-IL	2		1	1	1		
152	Montgomery, AL	7	2	1	1	1		
153	Peoria, IL	4			1	1	1	
154	Flagstaff-Prescott, AZ	10	1	2	1	1		
155	Ann Arbor, MI	3		1				
156	Savannah, GA	6	1		1	1		
157	Macon, GA	4	1	1	1	1	1	
158	Rockford, IL	3		2				
159	Myrtle Beach, SC	7	2	1	1	2		
160	Ft. Smith, AR	4	3	1	2	1		
161	Asheville, NC	5			1	1		
162	Wilmington, NC	3	1		3			
163	Huntington-Ashland, WV-KY	1	4	1	1	1		
164	Tallahassee, FL	4			1	2		
165	Evansville, IN	7	1		1	1		

166	Utica-Rome, NY		2		1	1	1	
167	Poughkeepsie, NY	4		1		2		
168	Hagerstown-Chambersburg-Waynesboro, MD-PA	3	1		1	1		
169	Amarillo, TX	2	3		1	1	1	
170	Anchorage, AK	4		1		1	2	
171	Lincoln, NE	1			1		1	
172	Morgantown-Clarksburg-Fairmont, WV	3	4		3			
173	Erie, PA	4			1		1	
174	Wausau-Stevens Point, WI	3		1	2		1	
175	San Luis Obispo, CA	6	1		2	1		
176	Concord, NH	6		1		1		1
177	Wenatchee, WA	3	3	3	1	1		1
178	New London, CT	1	1	1	1			
179	Lubbock, TX	7	1		1	1	1	
180	New Bedford-Fall River, MA	2	2					
181	Odessa-Midland, TX	5	1	1		1	1	
182	Merced, CA	5	2				1	
183	South Bend, IN	5	4		1			
184	Binghamton, NY	4	1			1	1	
185	Lebanon-Rutland-White River Junction, NH-VT	4	2		1	2	1	
186	Kalamazoo, MI	1	1	1			1	
187	Charleston, WV	1			1	1		1
188	Richland-Kennewick-Pasco, WA	2	1	2	1		1	
189	Green Bay, WI	3	2		1	1		
190	Dothan, AL	7	2	1	2			
191	Columbus, GA		1			1	2	
192	Tupelo, MS	3	3	1	1		1	
193	Ft. Walton Beach-Destin, FL	7	1		1	1		
194	Salina-Manhattan, KS	1	3		1	1	1	
195	Frederick, MD	2	3					
196	Manchester, NH	4	1	1				
197	Traverse City-Petoskey, MI	1	1		2	1	1	1
198	Bryan-College Station, TX	2			1	2		
199	Waco, TX	2		2		1		
200	Topeka, KS	2	2				1	
201	Yakima, WA	3	1	1			2	
202	Cape Cod, MA	2		1	2			
203	Danbury, CT			2				
204	Chico, CA		1		1	1	1	
205	Laredo, TX	2	2	1				
206	Santa Maria-Lompoc, CA	1		3	1			
207	Fargo-Moorhead, ND-MN	3			1	1	1	
208	Duluth-Superior, MN-WI	2		1	2		1	

209	Cedar Rapids, IA	2	1	1		1
210	Terre Haute, IN	3	2		1	1
211	Medford-Ashland, OR	2			1	1
212	Champaign, IL	5		1	2	
213	Bend, OR	3	1		2	1
214	Las Cruces, NM	1	2		1	
215	Florence, SC	1	1		1	2
216	Muncie-Marion, IN	1			2	
217	Winchester, VA	1	2		2	
218	Santa Barbara, CA	5	1			1
219	St. Cloud, MN	2	1		1	1
220	Bangor, ME	2	3		1	1
221	Tuscaloosa, AL	3	1		1	1
222	Laurel-Hattiesburg, MS	6		2		1
223	Olean, NY	3	4	1		1
224	La Crosse, WI			1	2	2
225	Alexandria, LA	5	2	1		1
226	Elmira-Corning, NY	4	2	1	1	1
227	Lake Charles, LA	2				2
228	Rochester, MN	2	1	1		1
229	Jonesboro, AR		1	1		1
230	Redding, CA	4				1
231	Twin Falls (Sun Valley), ID	3		1	1	1
232	Lafayette, IN	3			1	1
233	Joplin, MO	3	1			2
234	Bloomington, IL			3		
235	Panama City, FL	4			1	2
236	Muskegon, MI	1				2
237	Dubuque, IA	1			1	2
238	Columbia, MO	3				1
239	Eau Claire, WI	2	1			1
240	Abilene, TX	2	2	1	1	1
241	Albany, GA	4				1
242	Pueblo, CO	6		2		
243	Lufkin-Nacogdoches, TX	4			1	1
244	Waterloo-Cedar Falls, IA	2	1	2	1	
245	LaSalle-Peru, IL	2	2	1		1
246	Wheeling, WV	4			1	1
247	Sussex, NJ	1		1		
248	Parkersburg-Marietta, WV-OH		1	1		1
249	Florence-Muscle Shoals, AL	5	1	1		1
250	Lima, OH	1	1			2
251	Billings, MT	4	1		1	1

252	Monroe, LA	4	1	1	1	
253	Grand Junction, CO	2	2		1	1
254	Kalispell-Flathead Valley, MT	2	3		1	1
255	Valdosta, GA	3	1	1	1	
256	Wichita Falls, TX	3		2		
257	Texarkana, TX-AR	4	1		2	
258	Battle Creek, MI	2	1			
259	Grand Island-Kearney, NE	1		1	2	
260	Harrisonburg, VA	3	1	1	1	
261	Altoona, PA	2	1		1	1
262	Montpelier-Barre-St Johnsbury, VT	2		2	1	1
263	Columbus-Starkville-West Point, MS	3		1		1
264	Augusta-Waterville, ME			1	2	
265	Rapid City, SD	7	2	1		1
266	Mankato-New Ulm-St Peter, MN	1	1		1	1
267	Lawton, OK	2		1	1	
268	Williamsport, PA	3	1		2	
269	Sioux City, IA	1			2	
270	Sheboygan, WI	3			1	
271	Watertown, NY	2			1	1
272	Bismarck, ND	2			1	1
273	Decatur, IL		1		2	
274	Bluefield, WV	3	3			1
275	San Angelo, TX	2	1		1	1
276	Sebring, FL	1			1	
277	Grand Forks, ND-MN	1	1		2	
278	Hot Springs, AR	1		1	1	
279	Jackson, TN	1	3		1	
280	Cheyenne, WY	5	2	2		
281	Beckley, WV	1	1			1
282	Brunswick, GA	2	1		1	
283	Mason City, IA	2			1	1
284	Casper, WY	2		1	1	1