STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN,
DISSENTING

Re: Report and Order In the Matter of 2002 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules; Cross Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; and Definition of Radio Market.

With the adoption of this Order, a dark storm cloud looms over the future of the American media. The majority has sealed into federal regulations the most sweeping and destructive rollback of consumer protection rules in the history of American broadcasting.

The public stands little to gain and nearly everything to lose by slashing the protections that have served them for decades. Allowing fewer media companies to control what Americans see, hear and read will not serve our democracy well. Today's relaxation of our media ownership rules is likely to damage the media landscape for generations to come, as all of our experience tells us that the relentless waves of consolidation are virtually impossible to rollback once they advance. Today's action will likely diminish the diversity of voices heard over the public airwaves, which can only dilute the quality of our society's intellectual, cultural and political life. It will also likely diminish local control of our media, the core concept at the foundation of the American system of broadcasting, as media giants buy more local stations and homogenize the programs and stories they broadcast.

In the end, the new rules simply make it easier for existing media companies to gobble up more outlets and fortify their market power. Today's Order capitulates to many of the longstanding demands of the media giants we oversee. It shatters many of the vestiges of the consumer protections that weren't eliminated in the 1980s. It pulls the teeth out of the remaining protections, leaving the Commission little more than a toothless tiger.

As big media companies get bigger, they may chase the bottom dollar ahead of serving the local needs of the community. They're likely to broadcast even more homogenized programming that increasingly appeals to the lowest common denominator. If, in the words of former Chairman Mark Fowler, television is nothing more than a toaster with pictures, we are paving the way for only Wonder Bread to pop out.

I dissent, finding the decisions embodied in today's Order are bad policy, indefensible under the law, and inimical to the public interest and the health of our democracy.

I. Suffering the Consequences

Now that this document, with its peculiar diversity index and other proposals, will finally become public, I expect media experts, academics, public interest groups, and most of all, the American people and their representatives will find it riddled with contradictions, false assumptions, and outcome-driven thinking.

It may take a while for the public to feel the full effects of today's decision. Consolidation in the media markets could take place over a number of years, just as it did in radio. But most people already expect it to prove a disaster. They intuitively distrust more media control in the hands of a few corporate giants. People will notice every time a new merger goes through that eliminates a voice in a community. Anger will flash when greater consolidation leads to more sensationalism, commercialism, crassness, violence, homogenization, and noticeably less serious coverage of news and local events.

It didn't have to turn out this way. Congress and the courts forced a massive review. They did not force massive deregulation. We had a choice. The courts required us to justify our rules, not to gut them or replace them with pale substitutes. Certainly, the media markets have changed and our rules must keep pace with those changes. But the majority chose to go much further than Congress or the courts required. They chose to pursue gratuitous deregulation. This is the most dramatic weakening of our media ownership rules this country has ever seen.

I had hoped for a better outcome I could support. The Commission undertook the most comprehensive review of its broadcast ownership rules ever. It was supposed to produce a judicially-sustainable, intellectually-coherent framework. But those good intentions and good faith efforts are not reflected in the final product. The comprehensive framework never materialized. An effort begun with serious intellectual aspirations descended into an incoherent, outcome-driven document, the likes of which the Commission has too often seen and sought to avoid.

A new regime for a new era fell short. Instead, we're left with a muddled patchwork of skeletal protections based on market-driven philosophies and deregulatory outcomes. The Order is rife with more than a hundred references to market efficiencies for broadcasters, yet it is upon consumers that the effects of our decision will be most palpable. It is these listeners and viewers, not the media companies, whom we are charged with protecting.

II. Today's Decision in Context

The majority touts the changed legal and technological environment since these rules were adopted. Yet, for all the changes we have undeniably experienced, some important foundational principles remain constant. For all the striving to update our rules with modern empirical support, some core concepts underpinning our broadcast media remain as elusive and as imperative as ever.

A. Our Statutory Public Interest Responsibility

The majority implies that Congress and the courts forced this outcome. I disagree. We had much wider latitude than this suggests. The biennial review provides a simple directive – to determine whether the rules "are necessary in the public interest as the result of competition," repealing or modifying them only if we determine they are "no longer in the public interest."[1]

The *Fox* and *Sinclair* courts sent the rules back to us for justification, not for evisceration.[2] It wasn't the prior Commission's attempt to maintain the rules in their current form that failed to satisfy the courts, it was the failure to examine the current environment and justify retention of the rules based on that environment.[3] Congress's direction in the statute is to review the rules, not to revise them. The Commission is only required to, as the D.C. Circuit characterizes, "continue the process of deregulation" if it finds after review that the current rules no longer serve the public interest. The *Fox* court even stated, with respect to the 35-percent national ownership cap, "we cannot say it is unlikely the Commission will be able to justify a future decision to *retain* the Rule."[4] And the court made clear that the Commission could use "either analytical or empirical" reasoning to justify its decisions.[5]

The linchpin of Congress's statutory directive is two words – public interest. The Commission for decades has sought to serve the public interest by promoting diversity, localism and competition through diversification of mass media ownership.[6] The courts have consistently approved these priorities, agreeing that assuring the public access to a multiplicity of information sources is a governmental purpose of the highest order which promotes values central to the First Amendment.[7] Diversity is of exceptional importance, for achieving "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[8] Time and again, the Supreme Court has validated broadcast structural regulations like those we erode today, recognizing that "their purpose and effect is to promote free speech, not to restrict it."[9] For, as the Supreme Court stated with respect to the print media, "[f]reedom to publish is

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[1] Telecommunications Act of 1996, Pub.L. No. 104-104, § 202(h) (1996 Act). *See also* 1996 Act § 257(b) (asserting the need to "promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity").

[2] *See Fox Television Stations v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002). *See also Sinclair Broadcast Group v. FCC*, 284 F.3d 148, 152 (D.C. Cir. 2002) (noting that the *Fox* case remanded the national cap "for justification" by the FCC).

[3] *See Fox*, 280 F.3d at 1044 (criticizing the prior Commission for merely listing facts in a single paragraph, "without defining the relevant markets, let alone assessing the state of competition therein" and without linking the listed facts to the decision to retain the rule, "precisely what § 202(h) requires.").

[4] *Id.*, 280 F.3d at 1049 (emphasis added).

[5] *Id.*, 280 F.3d at 1048.

[6] *See FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 780, 808 (1978) (*NCCB*). *See also United States v. Storer Broadcasting*, 351 U.S. 192 (1956).

[7] *Turner Broadcasting System v. FCC*, 512 U.S. 622, 663 (1994)

[8] *Id.*, 512 U.S. at 663-64 (*quoting Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

[9] *NCCB*, 436 U.S. at 801.

guaranteed by the Constitution, but freedom to combine to keep others from publishing is not."[10] There can be no question that the granting of exclusive rights to use the public airwaves affords the Commission great latitude, and great responsibility, in the field of broadcasting to protect the public's right to a multiplicity of sources of information, news, and culture.

Since the earliest days of the FCC, no court decision or statute has diminished the Commission's authority, or its responsibility, to ensure the public's access to diverse and antagonistic sources by protecting competition, localism and diversity over the public airwaves. No matter what the majority believes the D.C. Circuit may have implied, the Commission continues to have a special duty to protect what the Supreme Court referred to as an "uninhibited marketplace of ideas."[11] As the Supreme Court stated in its seminal *Red Lion* decision, "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC."[12]

I am afraid that today's decision departs dramatically from our statutory responsibility. Our mandate in the field of broadcast regulation assures maximum flexibility for us to operate in the public's interest. The Communications Act says, simply, we are to establish rules in the "public interest, convenience, and necessity."[13] Let me explain why today I think we fail to meet even that flexible, broad standard.

Judging from our record, public opposition is nearly unanimous, from ultra-conservatives to ultra-liberals, and virtually everyone in between. We have heard from nearly two million people in opposition to relaxing our ownership rules, and only a handful in support. Comments came in the form of letters, emails, postcards, and petitions. Some of them were form postcards, but many were thoughtful, eloquently expressed observations, entreaties, and personal experiences with media concentration in local communities. Of the hundreds of citizens I heard from directly at field hearings across the country, not one stood up to call for relaxing the rules. Of the thousands of emails I personally received, only one did not oppose allowing further media concentration. The American people appear united in believing that media concentration has gone too far already and should go no further.

I have heard it said we cannot make this decision by polls or by weighing postcards. That is fair enough.

But the statute does not let us simply dismiss the public's views with a passing reference in one paragraph. We are charged by law to serve the public interest. And the public apparently has no interest in further media consolidation. Is the majority that

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10 *Associated Press*, 326 U.S. at 20.

11 *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

12 *Id.*, 395 U.S. at 390. *See also NCCB*, 436 U.S. at 794-95, 799-802; *Sinclair*, 284 F.3d at 161-62, 168 (reiterating that there is no First Amendment right to hold a broadcast license where it would not satisfy the public interest).

13 *See* 47 U.S.C. § 307(c)(1). *See also* 47 U.S.C §§ 303, 307(a), 309(a).

confident that it is serving the interests of the nearly two million citizens who are motivated enough to contact the Commission or attend field hearings to oppose further concentration? I would not assume that those people who took the time to alert us to their concerns, more than 99.9 percent in opposition, are wrong unless overwhelming evidence and reasoned analysis proves it. Here, just the opposite is true. Plenty of evidence, and plenty of common sense, shows the people are right.

The public is joined by expressions of concern from their elected representatives, in resolutions passed in several state and local legislatures, and in a bipartisan chorus of caution from Members of Congress. Organizations from nearly every political stripe, from the National Rifle Association to the National Organization for Women, including the Catholic Conference of Bishops, the Leadership Conference on Civil Rights, the Parents Television Council, Common Cause, the National Association of Black-Owned Broadcasters, the National Association of Hispanic Journalists and the Writers Guild, and many others expressed grave doubt about the wisdom of relaxing these protections. Hundreds of musicians and performing artists, and media industry insiders also registered their concern.

It has been said that the public comments we received are too simple and offer no substantive basis from which to make our decision. I beg to differ. I have read many of these comments, and I've listened to hundreds of people firsthand in city halls, schools, churches and meeting rooms. The Americans I heard from know what they're talking about. This is the media they watch, listen to, and read every day. We have heard from people who have collectively spent billions of hours watching television, listening to the radio, and reading newspapers. There is no better control group than the American people. There is no more objective jury than the American people. They take it very personally, and they are very articulate.

But today's decision overrides the better judgment of the American people. It instead relies on the reasoning of a handful of powerful media companies who have a vested financial interest in massive deregulation. Those who would benefit by buying and selling the public airwaves won out over the public.

B. Media's Place in Our Democracy

It violates every tenet of a free democratic society to let a handful of powerful companies control our media. A diverse, independent media is a steward of democracy. The viewing and listening public have an overriding right to be informed by a diversity of viewpoints concerning matters in their local communities, across the nation, and in the global community. Without a diverse, independent media, citizen access to information crumbles, along with political and social participation.

Some argue that this concern is overblown, because the American democracy is strong and resilient. While our democracy is indeed strong, does that mean we can afford to weaken it? The fundamental issue before the Commission is whether the media is serving American democracy well, and what ownership structure, or other rules, would encourage the media to serve American democracy better. The real question is whether our media can make it stronger.

A study of television broadcast coverage of the 2000 election found that only 74 seconds per night were dedicated to all campaigns, federal, state and local.[14] In that election, the public heard far more from paid political ads, many of them negative. Could this lopsided coverage have accounted for depressed voter turnout? Would allowing media companies to swallow up each other, eliminate other voices, and grow bigger lead to more or less time dedicated to serious coverage of candidates and issues before the voting public? The majority makes no attempt to answer even this question, possibly because we can confidently predict that it will only make it worse. We had an opportunity to at least consider whether to require merging entities to commit to more coverage of the matters before our democracy. But the majority dismissed such an approach out of hand, discarding an opportunity to better democratize the media.

The airwaves belong to the American people. Access to them must be preserved as widely as possible to encourage a broad range of voices and editorial viewpoints. What transmits over the public's airwaves affects people's preferences and opinions, their knowledge and level of civic discourse, their political decisions, and much more.

The majority all but abandons the principle of public ownership of the airwaves in a results-driven rush to bring new revenue opportunities to broadcasters. The Order fails to emphasize that in return for the free and exclusive use of valuable and scarce public spectrum, broadcasters have a special obligation to serve the public interest.

That is, after all, the social compact broadcasters enter into with the public. When people choose to become licensed broadcasters, they understand that public service and a regulated environment come with that privilege. As Newton Minow sought to remind stockholders, "an investment in broadcasting is buying a share in public responsibility."[15] Broadcasters today know that they will have to compete with other enterprises, but so far few, if any, have turned in their license because of this, and they are not lining up to do so. Similarly, broadcasters know that they must serve the public interest and meet the local needs of the community, and I hear no complaints that this is an unfair bargain. Indeed, many local broadcasters I know embrace this public service commitment with gusto.

C. The Soundness of Structural Regulations in an Era of New Technologies

By law, the Commission watches over broadcasting as a public trust. For decades, the Commission has sought to protect the public's access to multiple sources of information, news, and culture in the local or larger community through structural ownership rules that were designed to foster diversity, localism and competition.

[14] Martin Kaplan & Matthew Hale, "Local TV Coverage of the 2000 General Election," the Norman Lear Center Campaign Monitoring Project, USC Annenberg School (Feb. 2001).
[15] Newton N. Minow, "Television and the Public Interest" Speech Before the National Association of Broadcasters (May 9, 1961).

We are indeed in an era of rapid technological advance, as the majority proclaims. But the abundance of media platforms and channels, many aligned with a handful of global media conglomerates, does not invalidate the Commission's core concern with protecting diversity, localism, and competition over the public airwaves in our communities. It is no surprise to anyone that the number of outlets has increased in the past 40 years. What is more relevant to the question of whether structural ownership rules continue to serve the public is whether the rules still serve important purposes and what has been the effect of consolidation among owners, particularly since the loosening of some restrictions in 1996.

Technological advances over the past 40 years have not overcome all barriers in the field of broadcasting. Despite the Order's assumption that technological advancements render broadcasters just another voice in a crowd of ever-expanding and fungible media channels, a simple fact remains. No technological advances have made it possible for every person who wants to broadcast in a local community to do so.[16] There may be an ever-expanding number of printing presses available in the market. Manufacturers are not precluded from producing as much coaxial cable as the market will bear. Even Internet domain names and servers are plentiful and expanding. But no one yet has figured out how to replicate the electromagnetic spectrum for everyone who wants to broadcast a message in a particular community. The exclusive right to use the broadcasting spectrum denies it to all others.

The majority completely ignores the reality that neither cable nor the Internet has changed the huge market power granted by federal license to use scarce broadcast spectrum, particularly when that license comes with the requirement to be carried on cable. Indeed, the majority excludes cable as a significant local news voice in a community. If all media outlets are indeed fungible, why then would someone spend hundreds of millions of dollars to buy one television station when the same money could be spent to create thousands of websites?

While the number of platforms for news and information, particularly on the national level, is indeed expanding, ownership across these platforms has become more concentrated. The exact figure is debated, yet it remains the case that a large degree of programming is produced and distributed by a handful of global media firms.[17] Eighty percent of the 91 major cable networks are owned by six media conglomerates.[18] The four major broadcast networks, alone, have part or whole ownership in roughly 78

[16] *See Sinclair*, 284 F.3d at 168-69 (dismissing the assertion that structural broadcast ownership regulation is undermined by cable, DBS, and the Internet; finding the rationale for structural regulation remains the necessity for the Commission to select among competing applicants for the same channel).

[17] *See* Coalition for Program Diversity Reply Comments; "Weekend Media Blast #22: Sucked Into the Dereg Process," Bernstein Research Call, Sanford C. Bernstein & Co., May 30, 2003 at 1 (noting that five media conglomerates – Viacom, Disney, AOL Time Warner, NewsCorp and NBC/GE – control a 70% share of homes watching prime time).

[18] *See* WGA/PGA Joint Comments.

nationally distributed non-broadcast networks.[19] A recent survey of the Internet found that nearly all of the top twenty Internet news sites are owned by large media conglomerates, with eight affiliated with major newspaper organizations.[20]

While a high proportion of the American public can now access numerous channels, if the same few vertically-integrated global media firms are behind the curtain, how will these wizards in our new Oz ensure diversity, localism, and competition on the public's airwaves? Under a principled approach to the public interest, the ultimate sources of information, not just the number of different ways a message can be delivered, must remain as widespread and diverse as possible. A person can always add more electrical outlets in his house, but that does not mean that he will get his electricity from new sources. The same goes for media outlets – making more media outlets available to the public does not necessarily mean the public has access to distinct sources.

Even in this era of technological advance, not all media convey the same local focus. Our record shows that people still get the vast bulk of their local news and information from the same places they always have: their local newspaper and television stations.[21] As was the case in the 1970s, television stations and daily newspapers continue to be the main avenues where people turn for discussion of matters of local concern. Yet, these are the very outlets we are granting the most new flexibility to combine.

We cannot ignore the populace that does not have access to these wonderful new technological marvels. Forty million Americans do not subscribe to cable or satellite service. Not all Americans have access to these enhanced technologies, so as an arbiter of the public interest, we should recognize a fundamental need for this Commission to protect the diversity available in those primary outlets that are accessible to the underserved.

I do not support regulating content, and nothing here should be read otherwise. Rather, our task should be to encourage the widest possible dissemination of antagonistic expression through structural protections, and not merely assure a four-voice or six-voice sliver of diversity. We should encourage more competition and more localism.

This Order, to the contrary, concludes that there is plenty of diversity already, so we can afford to sacrifice some and have enough left over. It implies that the barest of competitive protections will promote localism and assure all Americans an adequate slice of diversity. By severely weakening our structural protections, I fear that little remains in place to protect the American public from the media trends they find so alarming already.

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19 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Ninth Annual Report, MB Docket No. 02-145 (Dec. 31, 2002).

20 *See* Nielsen, Top Twenty Internet News Sites, Nov. 2002; "Newspapers Run 8 of Top 20 News Sites," Editor & Publisher (Feb. 20, 2003).

21 MOWG Study # 8, Nielsen Media, "Consumer Survey on Media Usage," Sept. 2002.

D. The Rumored Demise of the Networks and Free Over-the-Air TV

I have heard it said that we should unleash the media giants in order to preserve free over-the-air broadcast television. That is a worthy goal. But the evidence shows that the networks are far from financial distress. The rumors of the demise of free over-the-air television, widely spread, are greatly exaggerated.

In reality, the broadcast networks still deliver a sizable nationwide audience which has kept the advertising market strong, and they receive substantial syndication revenues.[22] In 2001, the broadcast television industry received $38.9 billion in advertising revenue, compared to $15.5 billion for cable television.[23] While cable certainly has taken some viewership from the broadcast networks, which themselves have significant interests in cable networks, from objective accounts, the broadcast networks are not in the dire financial shape alleged by the majority. Just last month, broadcast network advertisers spent a record $9.4 billion in upfront sales for 2003-2004 lineups, up from $7.7 billion last year.[24] The Wall Street Journal recently reported that some networks make $600-$700 million in profits, while others are less profitable.[25]

It is quite telling that in the wake of record advertising numbers and millions in profits, the best case that can be made for consolidation is that the networks need to make still more. It requires pretzel logic to claim the public interest demands buttressing the bottom line of some of the nation's largest and most profitable media giants. It is not the Commission's job to make sure every big television network makes money – that is the job of management. Our first priority is ensuring the American people get a diversity of viewpoints and expression over their public airwaves.

One sure sign that over-the-air TV is in real trouble will be when broadcasters start lining up to turn back their licenses. Today, quite the opposite is true. The value of television stations continues to grow at a faster rate than inflation, signaling financial health.[26] In many cities, these licenses are so scarce their price continues to skyrocket. One station sold for $823 million, another for $650 million.[27] Why, for example, are the networks interested in increasing the nationwide cap or acquiring triopolies in local markets if this business is plummeting? It is quixotic that while the majority so trusts the market when it comes to deregulation, they can so easily ignore it when it says loudly

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22 *See* Jonathan Levy, Marcelino Ford-Livene, Anne Levine, "Broadcast Television: Survivor in a Sea of Competition," OPP Working Paper 37 (Sept. 2002).

23 Universal McCann, U.S. Advertising Volume, March 2003; Kagan World Media, Broadband Cable Financial Databook 2002.

24 David Bauder, "Network Estimate $9.4B in 'Upfront' Sales," Associated Press, May 23, 2003 (noting that advertisers are overlooking the declines in viewership among the broadcast networks).

25 Emily Nelson, "CBS Narrows Profit Gap with NBC," Wall Street Journal, Apr. 15, 2003, at B3 (estimating net revenues of $1.68 billion for CBS and $2.17 billion for NBC).

26 *See* Testimony of Jim Goodmon, President and CEO, Capitol Broadcasting Company, before the Senate Committee on Commerce, Science & Transportation, Media Ownership Hearing (May 13, 2003) (stating that "[f]ree over-the-air and network television is a very profitable business with tremendous margins that other industries envy.").

27 *See, e.g.,* Richard Morgan, "Viacom Pays $650M for Another L.A. Station" The Daily Deal (Feb. 14, 2002).

that broadcast licenses are only increasing in value, signaling that free over-the-air television is alive and well.

Given this evidence of solid financial footing, has the majority gathered the necessary financial data or conducted any analysis on which to base its conclusion that we must act now – and in such a radical deregulatory manner – to stop a landslide loss of quality programming to cable? We do not even know how much the networks make, since they do not report their earnings by category and we have not asked for such information. We have not accounted for the less measurable benefits of station ownership, such as retransmission consent, or the less tangible benefits of network ownership, such as cross-promotion opportunities. Such data is not in our record. Today's Order is devoid of the necessary evidence and analysis on which to conclude that free over-the-air television is seriously and imminently threatened.

E. Radio: What is Past is Prologue

Today's media environment contains a strong warning against hasty media deregulation in the form of the rapid radio consolidation following the 1996 Act. The most constant refrain I heard from coast to coast was complaints about the homogenization and loss of news coverage and local artists on the radio dial since 1996. People begged us not to let happen to television what happened to radio. But the majority did not heed this concern, despite the fact that our record is replete with problems consolidation caused in the radio market. By ignoring this history, we may be destined to repeat it. Radio is a very sick canary in the coal mine, and today's decision is likely to transmit the same disease to television.

Since 1996, the number of radio owners dropped 34 percent.[28] The average number of owners in a local radio market declined from 13.5 in 1996 to 9.9 in 2002. Virtually all radio markets are now oligopolies. The revenue share of the top owner in a local market now averages 47 percent, with the two largest firms averaging 74 percent.[29] Advertising time and rates increased.[30] Consolidation enhanced market power, which hurt the ability of smaller players to generate advertising revenue, to invest in improvements to radio service, and even to stay in business.[31] Large group owners downsized local staff, including popular local DJs, eliminated news coverage, began running stations remotely with voice tracking technology, and standardized programming.[32] A Future of Music Coalition study found shorter, homogenized playlists mean fewer opportunities for artists, particularly local or regional artists, to be heard on

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28 MOWG Study No. 11.

29 *Id.*

30 MOWG Study Nos. 4, 11.

31 *See, e.g.,* Idaho Wireless Comments in MM Docket No. 01-317; North American Comments in MM Docket No. 01-317, UCC Comments and Reply Comments in MM Docket No. 01-317.

32 *See, e.g.,* Statement of Jenny Toomey of the Future of Music Coalition, FCC Field Hearing, Richmond VA (Feb. 27, 2003); AFL/CIO AFTRA Comments.

the radio.[33] Perhaps some of these factors account for why radio listening has declined over the same period and why the public expressed such profound outrage to us.[34]

III. Misguided Goals

Before turning to my concerns with the decision's bottom lines, I find the majority's discussion of the policy goals that inform its choices grossly inadequate for our overarching mission of promoting the widespread dissemination of antagonistic voices over our broadcast media. Many of today's rule changes are driven from a mindset that efficiencies for the actual broadcaster are all that is necessary to promote localism and competition, which will in turn ensure sufficient diversity. But our fundamental public interest goals encompass more than what is economic and efficient.

A. There's More to Localism than Efficiency

While it may very well be true that localism can be promoted by a local broadcaster realizing efficiencies and cost savings from consolidation, and I would welcome a case-by-case showing to that effect, I do not believe that efficiency alone sufficiently upholds all the important values that are embodied within localism.

The public interest means more than just efficiencies and cost savings. Even the *Fox* court, which had much to say about the Commission's lax rule justifications, nevertheless still sanctioned our ability to promote public interest goals at the expense of efficiency. Rejecting the networks' "paean to the undoubted virtues of a free market in television stations" as not responsive to the ultimate question of whether Congress could determine that a more diversified ownership structure "would likely lead to the presentation of more diverse points of view," the court went on to acknowledge that an industry with a larger number of owners may well be less efficient.[35] But the court stressed that values other than efficiency may be pursued in the regulation of broadcasting.[36]

The majority makes the blanket assumption, without requiring any proof, that putting more money in the hands of the broadcaster will always promote localism. And it measures localism solely by selection of programming and local news quantity and quality. It does not account, for example, for the hiring of local employees, for the air time of local creative artists, and for the length and depth of coverage of local elections and local issues.

Every community has local needs, local elections, local news, local talent, local advertisers, and local culture. While localism reflects a commitment to local news and public affairs programming, it also means much more. It means providing opportunities for local self-expression and finding, developing, and promoting local talent. It means

[33] *See* Future of Music Comments "Radio Deregulation: Has It Served Citizens and Musicians?"
[34] MOWG Study No. 11.
[35] *Fox*, 280 F.3d at 1047.
[36] *Id*.

making programming decisions that serve local needs. It means coverage of weather reports, local economic conditions, local sporting events, local education issues, city council meetings, and local culture expressed in a variety of ways. It means allocating resources to promote the desires and needs of the community. It is reflected in hiring decisions, as well as in the way in which the broadcaster responds to feedback from the community. Localism's many virtues are hard to capture, but may get easier to ignore as companies consolidate.

From the outset of broadcasting, policymakers have always understood that localism is inefficient, yet upheld its crucial role in American broadcasting and made decisions to ensure that it would be protected. Going back to 1927, the Federal Radio Commission reported to Congress that it would assign station frequencies to serve as many communities as possible. It specifically sought to prevent New York and Chicago stations from dominating the airwaves. The Commission historically has maintained numerous policies to promote localism. Station managers used to interview local leaders to ascertain the needs of the community, and then tell the Commission how they intended to and did respond to those concerns. The Commission reviewed these and other programming commitments in rigorous renewal proceedings. For many years the Commission favored applications by local owners who knew their own communities. Many of these policies are now largely abandoned, and local stations have been absorbed by conglomerates with no direct connection to the communities they serve and with little oversight by the Commission. Today, the Commission veers even further off course.

Until now, American broadcasting has never been about maximizing bottom-line efficiencies over all else.[37] If efficiencies were all that mattered, Congress could have directed the Commission to award national or regional broadcast licenses. After all, it is hard to contest that the most efficient structure is a concentrated media empire. Think of all the efficiencies if one large company gathered the news for everyone. Yet nothing in the 1996 Act jettisoned the core community-based organizational principle of the Commission's dispersal of valuable broadcast spectrum rights. As stated during Congressional consideration, "Localism is an expensive value. We believe it is a vitally important value, however, [and] should be preserved and enhanced."[38]

The Commission's sacrosanct responsibility to ensure diversity, competition and localism may mean certain efficiencies must be held back in the greater public interest. Nothing in the Commission's biennial mandate suggests that we should facilitate the corporate interest or other narrow economic interests at the expense of vital public interest goals like local control of our media.

B. Diversity in More than Just Viewpoints

I am troubled that the majority, while validating viewpoint diversity in concept if not in action, in many ways discounts other forms of diversity. We should be

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[37] *See Turner Broadcasting System v. FCC*, 512 U.S. at 663 ("The interest in maintaining the local broadcasting structure does not evaporate simply because cable has come upon the scene.").

[38] H. Rep. No. 104-204 (1995) at 221.

preeminently concerned with diversity in news and editorial opinion. But we should also ensure a profusion of diverse sources, programs, outlets, and owners to serve the democratic needs of the nation. Diverse outlets, for example, provide a redundancy in infrastructure to alert the public to emergencies or other hazardous conditions. Diverse sources, particularly in news, editorial opinion, or educational programming, provide for a better informed public and a better media watchdog. Diversity in programming, among other benefits, offers the potential to greatly benefit the coverage and portrayal of minorities and issues of concern to minority communities. Outsourced content masquerading as local, or repurposing the same content on multiple commonly-owned outlets may not always serve the public.

The majority also glosses over the role of diverse media outlets in protecting the body politic. An abundance of independent owners serves not only as a check on the exercise of government powers, but also as a check on other outlet owners, to deter the personal biases or vendettas of a particular owner from obfuscating facts. For example, none of the Commission's studies adequately probed the effects of more concentrated local media markets on one of the most sensitive areas of speech – local political speech. Yet, it stands to reason that as the number of independent diverse owners of media outlets in a particular market dwindles, the ease with which the remaining owners can engage in abusive practices increases. Will all the media outlets that today antagonistically report on one another and chase leads still function the same when commonly-owned?

It is the multiplicity of independent media voices informing our citizens that helps keep our market economy functioning. Our loss of diversity may be reflected in future stories not told, in programs not produced, in would-be broadcasters not entering the field, or in hazardous warnings never transmitted.

C. Innovation is Unpredictable

At times, the majority recognizes the important policy goal of fostering innovation, even acknowledging that innovation more often springs from small, new entrants than from incumbents. Other times, the majority fails to consider the effects of its decisions on innovation. This selective approach to innovation undermines the policy goals that inform the majority's choices.

While competition, particularly in the form of new entrants, can spur innovation, it is also undeniable that market structures which significantly raise the cost of entry may harm innovation and the greater public interest. Innovation should be encouraged not just in program delivery but in program production. The majority fails to account fully for innovation in programming, particularly given the trend toward repurposing content among commonly-owned local outlets in a market. What about innovation in news and public affairs reporting? The majority implies that potential innovation in news production can only come about through achieving efficiencies for incumbents, discounting new entrants. And what about innovation in radio offerings? Is a large media conglomerate more or less likely to try something innovative?

While generating efficiencies for larger media companies may improve their ability to make investments that benefit the public, we should also ensure that smaller owners can remain viable and that innovative ideas in distribution and programming technologies can develop and prosper.[39]

D. Commoditizing Ideas

I am troubled by the assumption that with a baseline set of competitive protections, the marketplace will preserve localism and diversity in our broadcast media. Localism and diversity are not intended objectives of commercial competition. It is far from clear that the media embodies or operates as a free market, or that the media's role in civic discourse can be reduced to mere economic principles. People use and value their media for various reasons, from entertainment to instruction to political expression to receipt of local news and information. Dissemination of antagonistic ideas and opinions using broadcast media is not readily susceptible to being captured through economic analysis alone. This is especially true when the analysis is based not on an actual local environment but upon a hypothetical market structure, as the majority selects.

Unlike typical consumer products, the media produces significant positive and negative externalities.[40] For example, exposing political or corporate corruption, or merely threatening to, produces a significant benefit to the public that is not effectively captured by the market. The media is where people receive information and guidance for their democracy and their way of life. As Justice Frankfurter explained, the business of the press is truth and understanding, and these "are not wares like peanuts or potatoes."[41] A broadcaster is still in many senses a trustee – deciding which issues are important to a community, whether any particular speaker gains access to the airwaves, and how various sides of an issue are presented.[42]

Even when viewed strictly as a commercial enterprise, the media marketplace has massive entry barriers, and the barriers will likely rise even higher after today, with a detrimental effect on a widespread dissemination of antagonistic viewpoints. By validating local television clusters and cross-consolidation of broadcast stations with newspapers and other sources of local news production and distribution, today's action

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[39] *See* Ted Turner, "Monopoly or Democracy?", *The Washington Post*, A23 (May 30, 2003) (opining that it would have been virtually impossible to launch CNN without structural ownership rules, and that significant relaxation "will stifle debate, inhibit new ideas and shut out smaller businesses trying to compete" for smaller independents tend to be innovators and risk takers while large media companies are more profit-focused and risk averse).

[40] *See* Consumers Union Comments in MM Docket 01-235; Consumer Federation of America *et al.* Comments; C. Edwin Baker, "Giving Up on Democracy: The Legal Regulation of Media Ownership." For a more complete recitation of the externalities, see C. Edwin Baker, Media, Markets, and Democracy, Cambridge University Press 2002.

[41] *Associated Press*, 326 U.S. at 17 (Justice Frankfurter, concurring).

[42] According to Theodore Peterson, "[a] press characterized by bigness, fewness, and costliness in effect holds the freedom of the press in trust for an entire population." Theodore Peterson, "The Social Responsibility Theory of the Press."

further escalates the entry barriers for small businesses.[43] Relevant economic considerations in evaluating a proposed combination should include its effect on conditions of entry and the likelihood of coordinated behavior, but the majority chooses to focus primarily on efficiencies.[44]

What assurances can the majority offer that the marketplace will drive broadcasters to be responsive to the tastes and needs of a local community or to unpopular points of view? In the case of radio, for example, the market has resulted in pumped-in, homogenized, syndicated programming, with programmers located hundreds or thousands of miles from the community. Given real-world examples like the train derailment in Minot, North Dakota, how can the market alone assure us that these remote stewards of someone else's local airwaves would always know, for example, that a dam has broken free and is flooding the town? Or that a local artist has received a tremendous ovation at a neighborhood festival?

IV. Irresponsible Policies with Dangerous Outcomes

Moving beyond the goals of the decision, I find that the bright lines established by the majority whittle away most of the existing protections designed to preserve diversity, localism, and competition in broadcast media, and, in doing so, harm the public interest.

A. Unleashing Massive Consolidation

The bottom line of today's decision means massive new consolidation opportunities on the local and national level, both within specific platforms and across media platforms.

On the national level, a single entity can now own television stations that reach up to 45 percent of the nation's television households – 90 percent if those stations are UHF stations. This seems to take us closer to a system of national, rather than local, broadcasting.

In local communities, mergers between a newspaper and a television station are now permissible in nearly every media market. The majority moves from prohibiting in absolute terms certain combinations across media platforms, such as common ownership of a full-service broadcast station and a daily newspaper, to allowing these combinations in as many as 179 media markets across the country, where 97.7 percent of Americans live. Television duopolies are now potentially viable in as many as 162 markets, where 95.4 percent of the U.S. population resides, depending on the strength of noncommercial stations in that area. Television triopolies are allowed for the first time in the top television markets.

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[43] *See* Ted Turner, "Monopoly or Democracy?", *The Washington Post*, A23 (May 30, 2003) (noting that to compete a new entrant would need not only a TV station license, but also good programming and good distribution, both owned by self-sufficient conglomerates with incentives to promote themselves, making it "hard to compete when your suppliers are owned by your competitors.").

[44] *See, e.g., Great Empire Broadcasting*, 14 FCC Rcd 11145 (1999).

This, to me, far exceeds our statutory mandate. Assuming that some change to our current cross-media rules is needed, the extent to which the majority has gutted the protections and expanded the opportunities for media consolidation is not supported by our record and is not in the public interest. The leap from protecting the entire population to less than three percent is a dramatic and reckless jump. In some cases, these mergers may bring some new heft to a struggling television or radio station. But are we confident that this is true in virtually every case?

One company will now be in a position to greatly influence a region's access to information. We have moved from an environment prohibiting common ownership of a newspaper with a television or a radio station and limiting multiple television, multiple radio, and television/radio combinations, to a world where in larger markets one entity is permitted to own three television stations, eight radio stations, and the dominant, if not only, local daily newspaper, not to mention the cable system, leading Internet provider, non-broadcast networks, magazines, and programming studios which could produce the vast bulk of the programming available to those outlets. In my view, it is no exaggeration to say that the rules now permit the emergence of a 21st Century Citizen Kane on the local level, with perhaps a handful of Citizen Kanes on the national level.

In smaller markets, say the community of Bluefield, West Virginia with a population of 11,451, our new rules permit one entity to own the leading television station, the dominant newspaper, multiple radio stations, and presumably the cable system. Even more consolidation is possible in "small towns" like Burlington, Vermont, which, according to Bureau figures, is in a DMA with 4 commercial and 6 noncommercial television stations, placing it in a category for which cross-ownership restrictions have now been entirely lifted. For that town with a population of 39,824, the new rules permit one entity to own the newspaper, one of the four commercial television stations, and seven radio stations.

Lacking any assessment of actual market share, the new rules carry the potential for one entity to saturate a community with a single editorial voice. How would this confluence of media power into one owner's hands affect local politicians? How would it affect local artists seeking to get airtime? Will the newspaper still run reviews critical of the local television station's programs? Will the commonly-owned outlets make it harder for competitors to advertise on those platforms? These are questions which I believe have not been fully examined and analyzed in the majority's rush to judgment.

And there is no telling how many of the skeletal protections that remain will be lifted in the future by waiver or other artifice to flaunt the meager remaining ownership protections. For example, against all common sense, the majority unwisely decides to retain a policy whereby even if a broadcaster is restricted from acquiring a newspaper under our bright line rules, the broadcaster can still buy the paper and hold it until its next renewal period – a period of eight years. This is outrageous and untenable, and calls into question the Commission's willingness to enforce compliance with even the minimal rules it has retained.

B. Rejecting a Case-by-Case, Market-by-Market Approach

This Order often equates the public interest with the economic interests of media conglomerates. It assumes that efficiencies and cost savings created by mergers will translate into benefits for the public. But it makes no effort to ensure that the benefits will actually flow to the public. Worst of all, it bases that dubious assumption on the claims of the companies that seek to merge, and ignores substantial evidence, experience, and common sense to the contrary.

We could have easily addressed these concerns. I could have supported retaining stronger rules but allowing us flexibility to evaluate mergers on a case-by-case, market-by-market analysis. This would determine if a merger would actually benefit the public, as opposed to just the companies themselves. I share the view that given changes in the marketplace, some of the contemplated combinations and additional flexibility may make sense. But the best way to determine the consequences of a given merger is for the Commission to request companies that seek to merge to demonstrate how, in the case of particular entities in particular markets, any efficiencies gained by the merger would be channeled into something positive for the viewing public. This could entail a market-by-market determination of the level of actual concentration in that market before allowing further consolidation.

C. The Bright Line as the Bottom Line

The majority rejected such an approach in favor of bright line rules. They refused even to ask parties that seek to merge to say anything about how many news staff would be retained, the number of hours of local programming planned, cross-programming plans for television duopolies, or the overall impact on news and public affairs programming. The majority's approach takes a huge leap of faith that if we let media companies merge, they will channel the resulting efficiencies into better programming for the public. But it is a leap into a chasm because there is little evidence to support it. There is no mechanism to require or even ask those companies to do anything for the public in exchange for the ability to get bigger. There is no effort whatsoever to ensure that they channel any of the economic benefits they generate into serving the public.

The majority's stated goal is to achieve more market certainty for entities that seek to merge. The Order proudly notes that establishing bright line rules facilitates transactions, reduces costs for merging companies, and makes deals more attractive to the capital markets. Another stated goal is to avoid the administrative burden that a case-by-case approach would impose upon the Commission.

While the concept of providing regulatory certainty is worthwhile, in this context, it should have been balanced against the certain losses to localism, competition, and diversity. The cross-media limits, for example, are grounded on a "Diversity Index" that purports to tell us how markets premised upon equal voices within media spread across unequal media platforms ought to work. What the Commission might find in any individual case, however, is of no bearing and facts to the contrary are not welcome for our consideration.

The Order actually makes a special effort to state explicitly that the Commission has no interest in the facts of particular cases since the new rules are the be-all and end-all of what is in the public interest. It says we do not want to be bothered with facts that might point in another direction.

In its rigid insistence on fixed rules based on arbitrary methodologies, the Order subordinates our statutory obligation to serve the public interest, convenience, and necessity in favor of the convenience of those who seek to maximize the money they can extract from private sale of the exclusive right to use public airwaves. And it favors the Commission's administrative "convenience" ahead of the public interest. We are here to carry out the statute, not to subvert it with the excuse that it is too much work to implement. This will not do when our very democracy is at stake.

In the absence of some other compulsion, the media companies' fiduciary responsibility to shareholders will require them to maximize profits. The logic of the marketplace leaves them with little choice but to chase the bottom line and pare down the debt occasioned by consolidation sprees. That works fine in almost every industry, for consumers' interests are largely confined to pricing and getting the best economic value. But this analysis breaks down in the case of the media, where the public interest is often non-economic and should be defined by getting the most complete and accurate information to inform everything from commercial to cultural to political decisions.

The majority's industry-focused view will, in the service of maximizing economic efficiencies, likely foist upon the public even more programming directed at the lowest common denominator. It is highly suspect to assume that much, if any, of the savings will automatically go toward meeting the responsibility of serving the public interest. If the government required such a commitment up front to all merging broadcasters across the board, broadcasters would operate on a level playing field that would serve the public's needs. But if we leave it to the tender mercies of the marketplace, the economic environment will actually make it more unlikely the public will see any benefit.

People will question whether this decision slays the angel of the public interest and deifies in its place the invisible hand of the market. The results may well subvert the better angels of our nature, and make the invisible hand very apparent in the ever more rampant commercialization of America's media culture.

V. Indefensible and Irrational Results

Aside from the decision to slash the protections through rigid bright line rules, the majority has made other decisions that are arbitrary, unjustified, inconsistent, or contrary to the public interest. I turn now to some of those questionable decisions.

A. Erratic Application of an Outmoded UHF Discount

Despite the proven subscribership of cable and other multichannel video programming distribution systems (MVPDs), the majority decides to retain a discount of 50 percent for UHF stations in the national television cap, yet fails to justify the level or to apply it to other rules where common sense dictates comparable treatment. For example, the local television rule and cross-media limits are explicitly grounded upon the presumption that by reason of cable carriage, all television stations are deemed available throughout their Designated Market Area. To then discount some stations for one rule without a sound rationale for failing to do so in other rules is by all appearances arbitrary and unjustifiable.[45]

The task before us was to reassess our rules in light of technological and market developments. Imposed in 1985, the UHF discount was designed to reflect technical inferiority of the UHF signal in reaching the full audience of a VHF station and to promote UHF.[46] Today, however, 85 percent of the population receives broadcast television signals through cable or other MVPD service, and 70 percent of television sets are connected to these services. Must-carry and channel positioning requirements, both on cable and DBS, ensure that UHF stations can reach these viewers just as VHF stations.[47] Even back in 1995, the Commission found that various regulatory and statutory policies to ease UHF reception had "substantially alleviated the technical disadvantages faced by UHF television receivers."[48] If constraints on the ability to reach a full audience have eroded due to cable carriage and improvements in receiver technology, so too should the UHF discount.[49] If the purpose of this exercise was to update our rules in light of technological and market developments, we cannot ignore some just because we don't like the outcome of more stringent limits.

So why does this Order settle on a discount of 50 percent? Even taking the majority's assumption that geographic service area is the key, the majority's own data show that UHF stations reach between 56 and 61 percent of the service area of VHF stations. Other data in the record using a more refined measure of actual population coverage rather than square miles show population reaches of 87.1, 92.7, 94.7, and 95.5

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45 *See Fox*, 280 F.3d at 1052 (faulting the Commission for making no attempt to harmonize seemingly inconsistent decisions); *Sinclair*, 284 F.3d at 162-65 (stating that Commission must provide a reasoned explanation for its action in defining voices differently in the cross-ownership and local ownership rules).

46 *See NPRM* at para. 130 (explaining that the discount was enacted because UHF stations were competitively disadvantaged by weaker signals and smaller household reach than VHF stations).

47 *See 1998 Biennial Review*, 13 FCC Rcd 11276, 11284 (1998).

48 *Review of the Commission's Rules Governing Television Broadcasting*, 10 FCCRcd 4538, 4542 (1995). *See also Review of the Prime Time Access Rule*, 11 FCCRcd 546, 583 (1995) (concluding that the UHF handicap has been reduced due to technological improvements and the growth of cable penetration); Letter from James F. Goodmon, Capitol Broadcasting Company, to Michael K. Powell, Chairman, FCC (May 29, 2003) (CBC Letter) (achieving almost equivalent coverage of the company's UHF and VHF signals utilizing maximum power levels).

49 *See Capital Cities/ABC Incorporated*, 29 F.3d 309, 312 (7th Cir. 1994) (noting that, for independent stations, "their weak UHF signals [were] brought to parity with VHF by cable television").

percent.[50] After all, just as the majority finds in radio, television stations "serve people, not land" or bodies of water. Scanning these figures, along with 85 percent MVPD subscribers and 70 percent of television sets hooked into MVPDs, I fail to find adequate justification for a UHF discount of 50 percent.

The only mention of 50 percent is from outdated studies submitted by Paxson. These studies show, first, that VHF affiliates of the top four networks averaged 9.8 prime-time rating compared to 6.4 for their UHF counterparts using 1997 Nielsen data, and, second, that UHF affiliates generated less than 50 percent advertising revenues for the period from 1993-1996 than their VHF counterparts. It is hardly surprising that VHF stations, with their head start, lead the ratings game, even though UHF stations, both prior to and after 1997, have made tremendous strides in proving themselves worthy adversaries.[51] In fact, the recent growth of alternative broadcast networks gives UHF stations much sought-after national advertising opportunities and greater programming choices. But the majority goes out of its way not to rely upon ratings and advertising revenues in other contexts. After all, if ratings or advertising revenues were our guides, then surely we would have continued to impose a radio share cap and we would not equate a local community station or home shopping channel with a NBC station for diversity calculations. Moreover, what assurance do we have that 1993-1997 figures are an accurate reflection of today's media environments, given the tremendous growth of alternative broadcast networks since 1997?[52]

So the majority strives to find other reasons for retaining the discount, and settles upon promoting entry and competition among broadcast networks. But this laudable goal is not endorsed in the other rules under consideration today. Promoting new entrants is apparently enough for measures which lead to greater consolidation, but is not sufficient in the context of the local radio, local television, and cross-media rules, where the focus is quite clearly on allowing large incumbents to grow bigger, paying only lip service to promoting new entry. I find the majority's retention of a 50 percent UHF discount indefensible in light of today's media environment.

B. Revised Radio Definition and the Removal of Market Power Protections

At first blush, the retention of the local radio ownership rules appears an acknowledgment by the majority that they could not stomach the fallout in communities across the country from the rapid consolidation of radio over the past seven years. While that did not stop them from introducing potentially similar problems in other media platforms, it at least kept them from further lifting the cap on the number of stations a single owner can control in a particular radio market.

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50 Letter from Alexander V. Netchvolodoff, Cox Enterprises to Marlene H. Dortch (May 29, 2003). *See also* CBC Letter (finding less than a 6 percent difference between the company's VHF and UHF signals based on actual interference-free population).

51 *See* Letter from Andrew Jay Schwartzman, Media Access Project, to Michael Powell (May 29, 2003), Att. Economists Inc. Study "Prime Time Access Rule: A Supplementary Analysis (May 26, 1995) (concluding profitability data does not show UHF handicap)

52 *See* CBC Letter (showing equivalent ratings for the Super Bowl, Sunday NFL Football, and Prime-Time Reality Hits for the company's UHF and VHF stations using data from 2001-2003).

In a long-overdue acknowledgement that our current system of contour circles fails to provide a meaningful measure of a local radio market, the majority rationally sought to impose a geographic market solution. The current practice of drawing overlapping contour circles, after all, often produced results about as alien as crop circles. It allowed Yankton, South Dakota, to appear as one of the largest radio markets in the country. It allowed Clear Channel to control all but one of the commercial stations in Minot, North Dakota. Clearly, the contour circles have benefited very few, with the exception of those companies that mastered the art of clever contour linking.

Understanding that the Arbitron/BIA approach is not entirely sanitized from abuse by market participants, I nevertheless agree with the use of Arbitron/BIA as the relevant market where it is available. A meaningful geographic market is far preferable to a contour-based methodology using the outlets of only one party to define the market participants. Unfortunately, for a sizable part of the country where Arbitron markets are not defined, I question whether the majority has replaced one haphazard system with another. I have had little time to study the new approach being adopted on an interim basis in the non-Arbitron markets, which was submitted by a commenter just 10 days before the vote. As the jury remains out on the ultimate solution, which is the subject of a further notice, I am hopeful that the attention the public has focused on this problem may yet yield a rational solution for rural areas of the country.

Yet, for all the talk about tightening the radio rules to respond to the unintended consequences and unprecedented consolidation that occurred after their relaxation in 1996, in several important respects the majority actually further unleashes the industry, which compels me to dissent.

The Order unwisely eliminates the current hard-look policy for transactions resulting in significant market power concentration in a local market. Currently the Commission "flags," or takes a closer look, when one entity would control 50 percent or two entities would control 70 percent or more of the advertising revenues in the relevant Arbitron radio market. I am puzzled why the majority would cast aside such a fundamental and economically sound principle as accounting for the measure of power of particular combined stations.[53] The majority acknowledges market share as the primary economic indicator of market power, yet it finds that an inflexible market share limit in a bright line rule would add little benefit. Many radio station owners are already near the 50 percent threshold of today's flexible flagging policy. Without any concentration assessment, what protections are there against radio owners achieving market dominance through acquisitions, or in achieving a sufficient level of market share to result in diminished incentives to compete? The omission of an audience or advertising share cap in radio is all the more glaring when trying to reconcile the radio rule with the local television cap and dual network rules, which recognize market power accumulation of the leading outlets.

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53 I am heartened that the majority attributed Joint Sales Agreements, which are, after all, a reflection of the power of advertising. Failure to attribute of these agreements until now may have skewed our full ownership picture.

With no measure of audience or advertising share, the revised rule now clears the way for combinations that previously were denied or designated for hearing due to the strong likelihood of negative competitive effects. I am at a loss to explain how the majority can now find that transactions that a year or two ago were determined to accrue excessive market power in one owner are now appropriate.

The majority further decides to keep grandfathered clusters alive indefinitely and allow them to shift hands to reach the nation's radio giants, as I discuss below. The Order also adds noncommercial stations to the count of radio stations in a market, noting that this will reflect more accurately the competitive reality of radio broadcasters despite the fact that noncommercial stations do not compete with commercial stations for advertising dollars. In effect, this enlarges the total number of stations in many markets. Despite the benefits of an Arbitron/BIA market measurement, I also note that in areas with adjacent Arbitron Metros, changing from a contour-based approach, with significant contour overlap between the Metros, to an Arbitron/BIA approach, where each Metro is considered a separate market, may very well increase the number of stations that a major group owner could acquire.

C. Impact of Consolidation on Minorities and Women

With ownership of a license to use the public airwaves comes the ability to promote the ideas, news, culture, and language of the owner's choosing. Unfortunately, females and minorities historically have been, and continue to be, underrepresented in media ownership. As reported by NTIA, in 2000, minority broadcasters owned a mere 4 percent of the nation's commercial radio stations and 1.9 percent of the nation's commercial television stations.[54] This is the lowest level of minority television ownership since the tracking of such data began in 1990. Minority ownership of broadcast stations has fallen by 14 percent since 1997.[55] Given that minority ownership tends to foster diverse editorial viewpoints, this is a troubling trend. I welcome the recommendations of the Advisory Committee on Diversity and hope that the Commission will promptly explore ways to counteract this alarming trend, which will only worsen after today's decision.

Minority broadcasters and others concerned about the low level of minority ownership of the media overwhelmingly oppose further media consolidation.[56] They believe concentration has contributed to higher station purchase prices which has prevented budding broadcasters from entering the field. They claim that consolidation has made it more difficult for minorities to raise capital to make investments in their broadcast properties.

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[54] NTIA, "Changes, Challenges, and Charting New Courses: Minority Commercial Broadcast Ownership in the United States," US Dept. of Commerce, Dec. 2000, Part IV (187 minority broadcasters owned 449 out of 11,865 total stations).

[55] NABOB/Rainbow/PUSH Comments.

[56] *See, e.g.,* NABOB/Rainbow/PUSH Comments, MMTC/Diversity and Competition Supporters Comments at 36-37, NOW Comments.

The majority's response? The Order devised a transferability exception to grandfathered above-cap broadcast station clusters that, however well-intentioned, pales in usefulness to the clear and present danger presented by the overall thrust of the item to the ability of minorities and women to gain access to and ownership of broadcast outlets. The massive increase in consolidation in the new rules taken as a whole will astronomically raise the already high entry barriers for smaller market participants or new entrants. Small or single-station entrants will find themselves increasingly competing with large, consolidated group owners. While a systematic solution such as tax credits for station sales to minority or female owners would offer a substantial offset to some of these barriers, the transfer of entire grandfathered clusters to small entities is likely to prove a rare occurrence. As such, it will do little to offset the damage to new entrants created by today's Order as a whole. A concern for small and new entrants would have been better reflected by a decision not to grandfather any above-cap combinations, or at least not to grandfather in egregious cases where anomalies have produced unintended results, as the Commission has done before.[57]

The marginal value of this exception is underscored by the difficulty small businesses will encounter in raising capital needed to buy expensive, large clusters, if they ever even come on the market at all. This is especially true given that the seller could peel off one or two stations and then sell both the remaining cluster and the spun-off stations with no restrictions to an unlimited pool of potential buyers, which will limit the exclusivity of the eligible entity buyer pool and raise the market price. Such spin-offs before a sale are especially likely considering most grandfathered clusters are only one or two stations over the limit and are therefore easy to bring into compliance. Those spin-offs may in fact be much more affordable to small businesses than the entire cluster. So minorities and women potentially would have benefited more if we had required clusters to be broken up rather than allowing transfers as a group.

In my view, adding a well intentioned provision that potentially affects only a handful of stations, if it ever gets used at all, does not come close to offsetting the sad reality that small businesses, including those owned by minorities and women, are going to find it even more difficult in more concentrated and expensive media markets to raise capital, own outlets, or have their unique voices heard.

Most alarming is that after only three years, the small business can flip the grandfathered cluster to any large radio or media conglomerate. For example, there is little protection to prevent a front company, including an existing small business that forms close ties with larger conglomerates, from buying a cluster and three years later selling it to a large radio owner or media conglomerate. Making this approach so ripe for abuse further diminishes the likelihood that it will serve much of a useful purpose. Real disadvantaged businesses potentially will have to bid against companies that plan to sell to well-capitalized radio giants, raising the price of clusters. Nothing in the Order

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[57] While the Chairman claims to have fixed the "vaunted" case of Minot, North Dakota, by deciding to grandfather the current ownership situation in Minot that resulted from an anomalous and irrational market definition, in my view nothing for now has actually been "fixed" for the residents of Minot.

precludes such an outcome. The ultimate beneficiaries of this approach could be the largest group owners, like Clear Channel, that could add even more grandfathered clusters than they currently control.

While the provision serves a laudable purpose, in my judgment it pales in comparison to the harm more concentrated media markets pose for small businesses, minorities and women, as industry pioneers like Ted Turner and Barry Diller have made clear. I hope that I am proven wrong. Nevertheless, nobody should find comfort that the availability of this transferability exception will come anywhere close to counteracting the damage done by the Order taken as a whole.

We should have made sure we understood the full impact of consolidation on minority ownership, minority employment, issue coverage, and the portrayal of minorities before rushing ahead with massive new consolidation opportunities.

D. Gutting the Local TV Rule

The majority today introduces a new concept into our media landscape: a television triopoly. One entity can now own up to three stations in a local community where there are at least 18 commercial and noncommercial television stations in the market. Strictly on the basis of empirical evidence of common ownership of two television stations, the majority leaps ahead to triopolies. Based on Bureau figures, these triopolies are available in a handful of the nation's 210 television markets, no more than nine markets representing 25.2 percent of the population.

What is more troubling is the dramatic leap forward in terms of the number of communities across our country in which television duopolies are now permitted. Currently the Commission allows common ownership of two television stations only when the stations' signals do not directly overlap or where both stations are not among the top-four ranked stations and eight independently owned stations remain after the merger. The post-merger eight independent voices test essentially meant that no station owner in markets 70-210 could acquire a duopoly, and those in the top 70 markets still had to meet the other restrictive criteria.

Today, the majority expands this reach of duopolies to many more markets and removes the protections that the signals not overlap or that a minimum number of independent voices remain. The new rules essentially make television duopolies potentially viable in as many as 162 of the nation's 210 markets, representing 95.4 percent of the population, depending on the ratings success of noncommercial stations in the market. While common ownership may be appropriate in the larger markets where diverse voices can be shown to flourish, and in the smallest of markets where proven localism gains may outweigh the diversity harms, it is the mid-sized markets that concern me most.

Reflecting the reasoning that is lacking in radio, the majority restricts duopolies to only those where one station not is ranked among the top-four stations based on audience share. This is a rational realization that certain combinations will produce a single firm with significant market power, even if the majority then backs off by widening the scope of waivers.

As the sole duopoly protection that remains, the top-four restriction effectively preserves only four independent voices in many markets, down from eight. Curiously, however, in effect, at least six independent voices are preserved for triopolies. So, pragmatically applying the new rule, a market with 18 stations will protect at least six independent owners, yet a market with one fewer station, a total of 17, will preserve at least nine independent owners, a figure which is reduced to four as markets get smaller. If the main point of this Biennial Review was to meet the court's mandate to make our requirements consistent, the Order clearly fails in permitting this glaring inconsistency.

Again, by allowing such extended consolidation in one fell swoop, the majority puts efficiencies and cost savings ahead of other public interest goals. Diversity, in nearly all its forms, is particularly undervalued. Commonly-owned stations that no longer produce news independently could have a detrimental effect on the diversity of news sources as well as news slants. Sending only one reporter and one photographer to a story instead of two, while certainly more efficient, could mean a lost opportunity to interview a critical witness or snap that award-winning photograph. Retaining multiple distinct television outlets in a community also contributes to emergency preparedness through redundant broadcasting infrastructure. To the extent that the majority claims incentives to increase program diversity through consolidation, this is contradicted by findings that consolidation may lead to repurposing, resulting in less original program diversity, which even the majority finds troubling in the context of children's programming.

There is record evidence of the types of harm occasioned by same-market combinations. One study found that the number of hours of children's programming aired by broadcasters in LA decreased by more than 47 percent between 1998 and 2003, with the largest decreases occurring at commonly-owned stations.[58] Other evidence on the record shows negative effects of same-market combinations on news production.[59] While there is certainly record evidence of how duopolies have benefited the public, at best, the conflicting evidence in the record should signal us to move more conservatively.

Even taking as a given that the benefits of efficiencies automatically outweigh the harms in all the markets where the majority takes us, can these benefits mechanically be presumed for a triopoly without further analysis? Does there come a limiting point at which the efficiencies trail off but the public interest harms intensify?

Another basis for a more measured approach is the digital television transition. Our local television broadcasters are in transition, and there is no question it is capital intensive. But there is also an unknown frontier ahead of them. It may be that digital

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58 *See* "Big Media, Little Kids: Media Consolidation and Children's Television Programming," A Report by Children Now (May 21, 2003) at 2, 5-6, 9.

59 *See* UCC *et al.* Comments at 40.

television ultimately produces additional revenue opportunities for broadcasters. While common ownership in a particular market may indeed stimulate the transition, or serve the public in other tangible ways, broadcasters could come before the Commission on a case-by-case basis and explain why that is so.

So, taking the record as a whole, rather than lifting the limits in the majority's breathtaking fashion, I would have preferred us to start with more incremental steps and sufficiently monitor whether the benefits flowed to the public. With a more conservative course, as we get further into the transition, we could have had a more firm understanding of the likely effects of further consolidation on the transition itself and on the future digitized television environment.

In the television context, the majority also inexplicably removes a longstanding requirement from the Commission's failing station waiver standard – that the station show that no bona fide out-of-market buyers were interested in acquiring the station. While this requirement may not seem like much, it was a way to maintain a maximum number of independent voices in a market and provided a sensible check to avoid unscrupulous accounting gimmicks. A similar requirement, for example, applies in the context of satellite television stations. Given that satellite stations, which can now originate an unrestricted amount of programming, are exempt from our broadcast ownership rules, a station owner may have an economic incentive to claim a particular station as a satellite. Yet, before doing so, the station owner has to show that no other entity is interested in operating the station as a full station. In an era of lax corporate accountability, the Commission should go out of its way to avoid the potential for questionable practices.

E. Precarious Cross-Media Limits

Cross-ownership restrictions remain a fundamental and necessary public protection to prevent a single entity from gaining through acquisition so powerful a voice across various media outlets that the entity can control a community's most critical sources of local news and information. Restrictions against cross ownership preserve a number of diverse editorial voices in a community, which is necessary for meaningful public debate, not to mention scrutiny of the media companies themselves or criticism of the one platform's offerings by another. These restrictions are especially important in smaller or mid-size communities where citizens have fewer outlets for local news and expression.

The record contains overwhelming support for continuing cross-ownership restrictions. It also contains evidence of potential benefits of newspaper/broadcast cross ownership in certain cases.[60] But I fail to find support for the majority's particular decision to drastically eliminate citizen protections without any case-by-case analysis or

[60] *But see* PEJ Study (finding *inter alia* that cross-owned television/newspaper stations were twice as likely to have declining ratings and were less enterprising than other stations, particularly in the area of sending out reporters to cover stories).

any effort to anticipate effects in a given community, and without requiring commitments attesting to the benefits to the public of particular mergers.

Under the new rules, mergers between a television station and a newspaper are permissible in up to 179 local media markets, representing more than 97.7 percent of the population. Combinations involving radio and television are similarly permissible in those areas. And a newspaper could acquire two or more television stations in markets representing nearly 73 percent of the population. These are drastic reductions in longstanding consumer protections.

The majority's justifications for this drastic of a change do not measure up. For example, the majority strongly criticizes the current rules for inadequately accounting for the competitive presence of cable. Yet it then finds that cable has no significant presence as a source of local news and information, omitting cable from the Diversity Index (DI) and the rules that emanate from it. To justify a wholesale overhaul of the rules in part on the basis of significant competition from cable, and then not account for that influence in a measure of diversity of media outlets in any given community is puzzling at best. Perhaps the majority means to imply that cable's many channels contribute to news and entertainment programming on a national level. But if the core of the Commission's public interest responsibility is diversity, and diversity is best demonstrated through local news and public affairs programming, then I am at a loss for how the mere presence of cable can be asserted as a justification for undercutting decades of media ownership protections.

I am also puzzled as to why the majority fails to restrict combinations among the most powerful voices in a community, as they do in the local television rules. If consolidation among the top four-rated television stations would create excessive market power in a community, why are combinations involving these stations and the dominant daily newspaper allowed? A newspaper, with in-depth analysis, opinion, and investigative reporting, may very well bring a unique perspective to public debate about issues of local concern.

Analyzing the effects of further cross ownership would logically start with the realities of each market segment. Newspapers and broadcast television are already highly concentrated markets, and radio is already concentrated, with each market segment dominated by large, vertically-integrated corporations.[61] The market for program content is similarly oligopolistic. Given this existing market structure, I do not believe the majority has adequately accounted for the effects of horizontal and vertical combinations that could result from the new rules. Perhaps this is why the majority declines to base its local rules, which are grounded on competition concerns, on traditional economic measures such as the Department of Justice's Herfindahl-Hirschman Index. And perhaps

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[61] *See* Consumer Federation of America *et al.* Comments; CWA Comments (explaining that newspapers and television are already highly concentrated markets, with sample newspaper markets with HHI scores above 2200 and sample television markets with HHI scores above 1800); UCC Comments in MM Docket No. 01-135; Letter from Mark Cooper, Consumer Federation of America, to Marlene Dortch (May 21, 2003), Att.

this accounts for the peculiar way in which the Diversity Index treats the players within each market segment.

For the reasons outlined below, I am not convinced that the Diversity Index (DI) is an appropriate bellwether of diversity in local media markets on which to base a set of bright-line rules. Although a noble effort, the index tragically degenerated into a flawed philosophical invention of little use.

Before turning to its inherent flaws, let me stop to point out the utterly bizarre use of the DI within the new media ownership framework. After detailing at length the new formula and its underpinnings, the majority stresses that the DI is used only to conclude that the current rules are not necessary and then to sort markets into tiers, from which bright-line rules are applied based solely on the number of television stations in a market. Despite the supposed virtues of the DI and its lofty purpose, the order specifically denies any person the right to apply this new magical formula to a particular market. In other words, no one can use the Commission's new methodology to show that its application in a particular market would reveal public interest harms. This is peculiar, at best.

I agree with the majority that diversity is inherently subjective and difficult to reduce to scientific formula. It is precisely because of its elusiveness, combined with the difficulty of resurrecting it when it is taken away, that the Commission must tread more carefully in this arena than in any other.[62] The majority appears not to care that the DI change in a particular market may be more than it has bluntly asserted, that people in a given market actually watch certain stations more than others, or that some of the outlets they include do not even carry local news programming. But I say that our cherished diversity principles deserve more careful precision lest they be dulled to the point of senselessness.

The majority concludes that viewpoint diversity is best measured through news and public affairs programming. Curiously, it then makes arbitrary assumptions about which outlets provide local news. I do not understand why certain providers such as magazines and cable operators are removed from the DI on the basis of their lack of local news coverage, while television stations like home shopping stations, which carry little or no local news programming, are fully included. By not basing the entire index on local news voices, the results could very well overstate the choice of local news and public affairs programming outlets available in any given market. Not only is news content more easily measured than other types of content, but, more importantly, it relates directly to the Commission's core policy objective of facilitating robust civil discourse.

The majority then fails to account for actual usage patterns in the DI. This understates the market shares of relevant providers in each local market, resulting in grossly understated measurements of the impact of any particular combination when the understated shares are squared and the change measured. For example, in New York, the

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[62] *See, e.g., NCCB*, 436 U.S. at 797 (finding that diversity and its effects are elusive, that evidence of specific abuses by common owners is difficult to compile, and that "benefits of competition do not lend themselves to detailed forecast.") (*quoting FCC v. RCA Communications*, 346 U.S. 86, 96 (1953)).

majority treats Shop At Home and the Dutchess Community College television stations the same as the local NBC and CBS station. Similarly, with respect to newspapers, the *New York Times* is treated the same as the *Polish Daily News* in terms of assessing the relative share of the overall newspaper weight to attribute to the owner. This arbitrary assigning of equal weights undoubtedly understates the real market power of the relevant local providers, which is compounded by squaring the artificially equalized shares to measure the supposed effect of a transaction among providers in that market. Presumably, under this analysis, a merger of the *Polish Daily News* with the Shop At Home station would count the same as combining the *New York Times* with the NBC station. As a result, the calculations of the DI change from a particular transaction, which are the very calculations that form the basis for the majority's cross-media tiers, are not actual reflections of the real world effects of cross-media combinations.

While this does not trouble the majority insofar as media outlets are generally available and over time may change the amount of news and current affairs that they offer, with a concern as paramount as diversity, failing to capture the real world effects of any changes in our rules seems to be slighting our responsibility and shortchanging the public. In addition, I find it ironic that the majority in its discussion of the local television rule finds that local news is expensive, but then assumes for cross-media purposes that any available outlet could at any time become a provider of local news.

I also fail to reconcile the majority's treatment of the Internet in its cross-ownership analysis. Much of the Internet's news content is derived from newspapers and other media companies, yet the majority does not adequately account for the vertical integration.[63] The DI assumes that the provider of local news and information is the media outlet, say the particular television station or newspaper, as the gatekeeper of the content that is made available. It matters not whether a consumer procured the *New York Times* through a vending machine, at her home, or at a local convenience store. As it concerns the Internet, the DI deems the relevant provider the cable modem provider or the dial-up, DSL or other access provider, not accounting for the ultimate destination of the consumer. This has the potential to understate the concentrated market power of vertically-integrated media companies that have popular Internet websites. Moreover, a reflection that the access provider is the gatekeeper to news content available on the Internet surely carries significant repercussions for our treatment of such providers in other settings.

Despite the quest for solid empirical footing, the DI is premised on admittedly incomplete and ineffectual data points. Recognizing that the Nielsen study failed to ask specific questions on the source of local news and public affairs programming, the majority marches ahead, cobbling its own data points on local news sources from selective answers to the admittedly-muddled questions. Again, I believe that nothing in our statutory directive requires us to make the dramatic deregulatory leaps that we make today, particularly when the size of the jump rests on such a shaky foundation.

[63] *See* Nielsen, Top Twenty Internet News Sites, Nov. 2002; "Newspapers Run 8 of Top 20 News Sites," Editor & Publisher (Feb. 20, 2003).

The DI's flaws have a very serious practical effect, for not only was the DI used to conclude that a blanket ban on newspaper or radio broadcast cross-ownership was not necessary, but the cross-media limits are derived for the most part from DI calculations of the effects of certain categories of transactions on the overall level of viewpoint diversity in local media markets. If the index itself is flawed, on what does the majority rely to justify its decision to allow cross ownership in nearly every market in the country? Based on flawed foundational principles that call into question the resulting cross-media tiers, the entire exercise appears as a pretext for arriving at a pre-ordained outcome: gutting the newspaper/broadcast cross-ownership rule and leaving a pale substitute in its wake.

F. Enlarging the National Television Cap

I believe the record demonstrates sufficient concern with further concentration of power in the hands of networks at the expense of localism, innovation, and program diversity that retention of the national network cap at the 35-percent level set by Congress is justified. The record shows harm occurred in the leap from 25 to 35 percent, and common sense dictates that the harm will likely get exponentially worse as the number increases.

A sufficient number of local stations should remain free to serve their local communities and counteract the power of the networks. When a network acquires a local station, there is some risk that the network will seek to maximize revenue and national programming at the expense of local interests and needs.

The network/affiliate relationship continues to involve a delicate balance of network influence on stations, network influence on creators, and advertiser influence on networks. Without analyzing all these effects in concert, I am not convinced that the majority has adequately justified the selection of a new 45-percent cap. Ample evidence justifies retaining the cap in its current form.

i. Retention of the National Cap

A cap on national television ownership reach promotes localism, innovation, and program diversity by preserving the power of affiliates to negotiate with the networks and make independent programming decisions responsive to the tastes and needs of their communities. It also facilitates competition in the program production market and in the national advertising market.

It is axiomatic that the focus and incentives of the local affiliate are on making programming decisions that closely align with the needs and tastes of the local community, whereas broadcast networks earn income from programming and syndication revenue as well as local station ownership.

The record is replete with the instances of affiliates exercising independence in programming to meet the needs of their local communities. They range from NBC dropping a trial program of liquor advertisements when affiliates refused to air them, to affiliates seeking to shift the Victoria's Secret Fashion Show to a later time slot or delaying the Olympics to reflect different time zones, to objecting to the explicitness of promotional pieces.[64] In other examples that strike at the heart of localism, a network refused to permit affiliates to blend in local news content during a two-hour morning news program, and another station was denied permission to air a political debate that would have preempted a season premiere.[65] Even Jerry Lewis laments the increased pressure the networks have put on affiliates who seek to run charitable telethons.[66]

The collective negotiating power of affiliates is immeasurably valuable to the public. Successful affiliate pressure on the network could even result in networks delivering programming that is more conscious of local community needs. Preemption, which the record shows affiliates do more of than network-owned stations, also fosters localism.[67] The cap also offers protections in the national advertising market, where network-owned stations may have less incentive to compete directly with an affiliated broadcast network. In my view, the record shows overwhelmingly the need for a cap to protect the public interest in fostering localism, innovation, and diversity.

ii. Level of the Cap

For a cap to be effective at promoting these values, it must be set at a level to ensure, at minimum, that local programming reflects local values and preferences and that a critical mass of affiliates remain to bargain successfully with the networks. Increasing the cap risks eliminating the unique choices local programming can provide. This sizable risk, combined with the fact that the full extent to which this harms the public may not occur overnight, calls for a measured approach.

In retaining the cap, the majority acknowledges that localism is served both by an individual affiliate's ability to preempt programming as well as by the collective influence of the affiliates in network programming decisions. When it comes to determining whether to continue a 35-percent cap or raise it higher, the majority relies on record materials relating to affiliate preemptions, essentially ignoring the consequences a 45-percent cap may have on the collective bargaining power of the affiliates. Yet even in looking at the preemption statistics, which substantiate that on average affiliates preempted 48 hours per year between 1991 and 1995 when the cap was at 25 percent and 36 hours per year between 1996 and 2001 when the cap was 35 percent,[68] the majority dismisses this data. They say a more accurate measure would be to compare the affiliate preemption rates with preemption rates of network-owned stations over this period. I

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64 *See* NAB/NASA Comments at 29-30, Att. 2.

65 NAB/NASA Comments at 25-26; NAB/NASA Reply Comments at 38.

66 NAB/NASA Comments Att. 6, Letter from Jerry Lewis to Michael Powell (Jan. 29, 2001) (noting that few network-owned stations carried the Muscular Dystophy Association Telethon, and that affiliates were pressured by the networks to drop it).

67 *See* Fox Economic Study G (affiliates preempted 9.5 hours per year of prime time programming versus 6.8 hours for network-owned stations).

68 NAB/NASA Comments at 16.

find this assertion to be a bold one, knowing that the affiliates may not be able to access this data but the Commission could, if it so desired.

To support the increase to 45 percent, the majority overlooks evidence supporting 35 percent and relies primarily on evidence showing that affiliates preempted the largest networks with a reach over 35 percent as often as the smaller networks. This is a thin reed on which to justify a ten-point increase. Without access to the data, the majority's conclusion is less reliable and less convincing.

Differences between network-owned stations and affiliate stations in the quantity of news did not prove statistically significant in larger markets.[69] Despite entry fees and other difficulties with using awards as a measure of quality, I find these quality measures, ratings, and awards, essentially inconclusive. To the extent that network-owned stations do better in DuPont awards, the affiliates had higher quality scores in the PEJ Study. Given this, the majority finds 35 percent not necessary to maintain high quality local news.

But the PEJ Study also found that 48 percent of stations owned by midsize and small group owners earned "A" grades for quality, compared with only 22 percent for the 25 largest group owners.[70] This signifies a cutoff in quality as consolidation occurs and affects the bottom line. While the majority deems this differential statistically insignificant, even an equal level would call into question the majority's assumption throughout this Order that greater efficiencies from common ownership automatically lead to greater quality. Where might that cutoff lie?

The majority picks 45 as a number that equates to roughly half of all homes, represents the increment that Congress used in 1996, and leaves room for additional growth. That Congress's wisdom can be useful in the incremental increase of the cap, but not in the cap's overall number, is curious. That 45 percent is not half is undeniably true, but it is much closer to that brink than 35. Nothing in the record or the majority's analysis assures me that 45 will not prove harmful to the localism goals the majority so proudly claims it is protecting.

The majority's concern with network profitability and rising programming costs is ironic, given the trend of networks supplying more of their own programming. The majority not only fails to substantiate this charge with any record evidence, but also ignores the fact that the Commission's role is not to help broadcast networks financially. It is to serve the public interest. The broadcast networks remain alive and well. In fact, as I noted, they just announced a record upfront advertising buy of $9.4 billion, well over the upfront booked by cable.

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[69] *See* Letter from Susan Fox, The Walt Disney Company, to Marlene Dortch, Secretary, (Feb. 13, 2003), at 8-9; NAB/NASA Early Submission, filed Dec. 9, 2002.

[70] Project for Excellence in Journalism, "Does Ownership Matter in Local Television News: A Five-Year Study of Ownership and Quality", Feb. 26, 2003, at 3 (PEJ Study).

I question whether the Commission should have acted based on unsubstantiated claims that the networks' poor financial health will result in the migration of expensive programming to cable. Did the Commission gather and analyze relevant network financial information? Did it measure other tangible and non-tangible benefits of network ownership? Cox, for example, cites the leveraging of broadcast station ownership during retransmission consent negotiations.[71] Was this calculated? In fact, the Commission made no effort to answer these questions.

In the end, I believe we have yet another tradeoff favoring corporate efficiencies over public interest goals such as localism. In my view, the social benefit of locally originated and oriented programming and ultimate program selection authority clearly outweighs any efficiencies gained by allowing media companies to achieve further consolidation.

I am troubled that after admitting a recent trend of extensive backward integration into program supply, the majority gives short shrift to the program production market. The majority conducts no significant analysis regarding whether networks are capable of exercising market power in this area.

Lastly, I am troubled by the majority's failure to appreciate the role of the cap in promoting diversity on a national scale and preventing further homogenization of national programming. The majority narrowly assumes that viewers do not travel, communicate with others, or appreciate a diversity of views in communities other than their own.[72] Clearly, if all television or radio stations nationwide were commonly-aligned, this would have a demonstrable effect on the public's access to diverse airwaves. Surely there is some limiting principle for the protection of diversity on a national basis.

G. Dual Network Rule

Finally, I cannot join the majority in voting for retention of the dual network rule that prohibits ABC, CBS, Fox, or NBC from merging with one another, as I would have also addressed other modern marketplace realities in such a rule.

As an initial matter, I disagree with my colleagues that diversity no longer underpins this rule. The question of multiple network ownership is more than a question of market power and promotion of new entry. I believe diversity, including source and program diversity, as well as innovation, is also implicated in such network combinations. I note that in analyzing competitive effects, the majority sidesteps the program production market, looking only at the program acquisition market.

But more importantly, a more rigorous examination of this rule must be conducted in light of the rising tide of Spanish broadcasting networks. The rule is retained for the top-four English-language networks, which comprise a "strategic group"

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71 Cox Comments at 8, 42-47.

72 *See* NAB/NASA Comments at 12, 69-70, Attachment 1, Marius Schwartz & Daniel R. Vincent, The Television National Ownership Cap and Localism, at 12-12.

within the national advertising market and compete largely among themselves. Did the Commission consider whether Spanish-language broadcasting is similarly separate for advertising purposes? Spanish-language broadcasting should be examined separately, in order to determine whether common ownership of the preeminent Spanish-language networks should receive comparable treatment to the top-four English-language networks.

The rapid growth of the Spanish-language media in the past several years is having a significant effect on the landscape in which broadcast networks operate. I believe that these developments require us to consider whether to afford Spanish-speakers the same protections available to English-speaking television audiences.

A horizontal merger between preeminent Spanish broadcast networks could have demonstrable effects on market concentration within Spanish media, as well as on price competition for Spanish media advertising. Such a merger could also affect the program production and acquisition markets. The competitive analysis should be informed by key distinctions in the use of the media. For example, the need for a national footprint is diminished in Spanish broadcasting, as the vast bulk of Spanish speakers can be reached through a handful of key television markets. Evidence in this record also suggests that far fewer Hispanic television households subscribe to cable than the general U.S. population, meaning that competitive effects inside the Spanish broadcasting networks take on greater importance.[73] The competitive effects also must be considered against the backdrop of permanent waivers of the network representation rule granted to Spanish-speaking broadcast networks.

Beyond the possible harmful competitive effects, a merger among leading Spanish television networks would reduce the number of independent Spanish-speaking voices and thereby diminish diversity, particularly source and viewpoint diversity, for the Spanish-speaking population. This diminution could also have a dramatic impact on localism and innovation.

The contemporary broadcast network marketplace, with a growing role for Spanish-speaking networks, raises questions that bear analyzing before we understand the full impact of dual network ownership on our public interest goals. These are serious questions, and, until the Commission asks and answers them, I am not prepared to join my colleagues in supporting this dual network rule.

H. Independent Production

I take seriously the concerns that the contemporary program production market has deteriorated to the point that we should consider whether an independent production

[73] *See* Univision Reply Comments at 6 (52 percent of Hispanic television households in the top 30 markets subscribe to cable television, compared with 67.8 percent of overall U.S. households that subscribe to cable).

requirement is needed to foster competition, diversity, and innovation.[74] The majority does not contest that far fewer programs are produced independently now than in the past, but apparently is not moved to address the consequences of the decline, finding no sufficient explanation of its cause. As concentration limits for the vertically-integrated broadcast networks are further relaxed today, I would have preferred to see us examine in this proceeding, or at minimum issue a further notice probing into, the basis for the noticeable reduction in independent program production and its implications for the broadcast viewing public.

A further inquiry would enable us to evaluate the effects of dominant network ownership of programming on competition for content production, on small businesses, on technicians and writers, and on innovation and creative expression. It would allow us to analyze fully how the trends over the past decade have affected the diversity of viewpoints from different sources and impacted the public interest. Will market forces alone enable independent producers to disseminate their expression and preserve source and viewpoint diversity on our airwaves? These are worthwhile issues to explore. A further notice would have been the prudent course for the public interest.

VI. The Public's Right to Comment

I am dismayed that many of the inconsistencies and unintended consequences which I point out today, and perhaps others, could have been avoided by public scrutiny of the specific proposals put forth by our rulemaking agency. Perhaps the majority's observation of the general nature of the hundreds of thousands of citizen comments reflects the lack of specificity given to the public about the pending changes, so they had few concrete details on which to respond.

While some may say that selecting cross-media tiers based upon the mixture of choices embodied in the Diversity Index that appeared for the first time in this Order, or truncating certain radio contours in a manner suggested in a late-filed comment, were logical outgrowths of the questions presented in the notices to the public, I am not convinced that mere logic would lead someone to the framework, let alone results, reached in this decision. The lack of notice of the Diversity Index, for example, is compounded by a bright-line regulatory framework that denies people the ability to say that the hypothetical index does not represent the diversity options available in their local community.[75] Without more specific notice of the interrelated proposals adopted today, at no point was the public able to evaluate and comment upon how all these rule changes might work in concert, particularly the increase in the national cap and retention of the

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[74] *See* NPRM at para. 49 (inviting comment on whether to impose behavioral regulations and what, if any, should be imposed); Coalition for Program Diversity Comments, Reply Comments at 2 (noting that in 1992, 66.4 percent of the networks' prime time schedule consisted of programs produced and owned by independent producers, compared with 24 percent of the top-four networks prime time schedule today).

[75] *See, e.g.,* Letter from Amy R. Wolverton, Georgetown University Law Center, to Marlene H. Dortch, Secretary, FCC (April 15, 2003) (underscoring the lack of information about the application of a diversity index); Letter from Chris Powell, Managing Editor, *Journal Inquirer*, to Michael K. Powell (May 19, 2003) (noting difficulty in responding to cross-ownership metrics without actual proposals that can be applied to specific situations).

UHF discount overlaid with triopolies and more expansive duopolies, or what the collective effect of the changes would be on small businesses.[76]

The Commission should strive for an open administrative process which enables the public to participate meaningfully in the rulemaking process, and which helps to assure that the Commission will have the relevant facts and information before it. Publishing notices with sufficient specificity for meaningful comment is not just the right thing to do, it may very well be what the law requires.[77] Particularly in matters as sweeping as this, affording the public the right to comment on mere general questions is not a substitute for a hearty public debate on specific, interrelated proposals.

This is particularly true when the Commission went to great lengths to employ an empirical evaluation of the elusive values underpinning our protections. The Commission's sponsored studies, while voluminous, were the subject of significant and precise criticism, even though the public had little time to evaluate them (even less time to review the underlying data) and was never given a clear understanding of their anticipated use.[78] Even the majority admits that the studies were not complete and did not ask the right questions. And even now, have we, let alone the public, evaluated the overall collective effects of our rule changes?

We should have made every effort to ensure a transparent process in which the public could fully participate. I requested and was denied a public forum to reveal even the broad contours of our proposals. An open process, a serious attempt to gather and analyze the necessary data, and thoughtful deliberation on specific proposals would have helped in convincing the public that the Commission is acting with the larger interests of a democratic society in mind.

Instead, the public today sees the changes for the first time. I am not persuaded by the refrain that this is the way we always do business. In the majority's own assessment, this is the most rigorous and comprehensive review of media ownership rules ever. It also sparked unprecedented interest from the public at large. This is an extraordinary proceeding that affects our very democracy, and we should have taken extraordinary measures to ensure full and meaningful public participation in the rulemaking process.

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76 *See, e.g.,* Letter from Thomas M. Sullivan, Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration to Michael K. Powell (Apr. 9, 2003); Center for Creative Community Comments Regarding the Commission's Initial Regulatory Flexibility Analysis (Jan. 2, 2003).

77 *See, e.g., MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136, 1140-41 (D.C. Cir. 1995), *Appalachian Power Co. v. EPA*, 135 F.3d 791, 802-04 (D.C. Cir. 1998).

78 *See, e.g.*, "Democracy Unhinged: More Media Concentration Means Less Public Discourse: A Critique of the FCC Studies on Media Ownership," Dean Baker, Co-Director, Center for Economic and Policy Research, AFL-CIO (Dec. 2002); Letter from Amy Aidman *et al.*, to Michael Powell (May 1, 2003) (submitted by nearly 300 academics, including Mara Einstein, author of FCC study on program diversity).

VII. Moderating Extreme Proposals through a Conservative Approach

I had truly hoped for a better outcome – an approach that took into account the current technological and market environment and protected competition, localism, and diversity. The turning point when I realized I could not likely support this item was when a majority settled on the notion embodied in this Order that bright line rules, which as it turned out allow consolidation in nearly every media market in America, were preferable to making case-by-case determinations as to whether media mergers served the public interest. With the stakes so high, the public interest, in my opinion, calls for examining media consolidation on a market specific basis.

Media consolidation undeniably means a loss of an independent voice in the community, which is difficult to ever gain back. We should take a slow, graduated approach to unleashing further media consolidation. And where we do allow more consolidation, it is only through an explicit showing that the public will know that they will benefit from efficiencies to a sufficient degree to counteract the loss of localism, competition and diversity in the affected communities. Broadcasters seeking to consolidate should be required to demonstrate the extent to which the efficiencies created thereby will accrue to the public benefit.

What better programming, particularly locally originated and oriented programming, will the buyer produce? Will the buyer hire additional reporters to investigate local news stories? What better coverage will result of local cultural events and local artists? Will each entity retain separate editorial discretion, and will the overall editorial budget be increased? How will the owner treat complaints of stories not being covered? Will the broadcaster improve its emergency broadcasting capabilities, or invest in better technology to alert the community to dangerous conditions? Before allowing media companies to expand into traditionally-protected areas, the public should know how they will benefit.

And the broadcaster should remain accountable. A consolidated broadcaster's performance should be matched against its promises through an annual showing that it met its commitments. The public should know whether its airwaves are being lavishly squandered for corporate interests, or whether they are being used in a manner which both compensates the broadcaster and serves the public. The Commission has consistently required broadcasters seeking waivers of ownership rules to make specific, tangible representations of the benefits of consolidation. Given all the benefits claimed in this proceeding, this should be an easy showing for consolidating parties, now that consolidation can occur in nearly every market without a waiver. And it would allow the Commission and the Congress to make more informed decisions on future levels of concentration.

In addition, diversity concerns stemming from cross-ownership of a broadcast station with other media outlets like newspapers or cable should be addressed based upon a specific showing of the diverse voices available in individual local markets and the power of the proposed combination to undermine diverse viewpoints. To promote the widespread dissemination of information from a multiplicity of sources, or at least to know the effect of any given transaction upon the diversity of viewpoints in an area, safeguarding diversity should not be subject to abstract diversity scenarios that hypothetical markets of certain sizes may engender. Given diversity's paramount position in our democracy, it shouldn't be given short shrift by rules that neither reflect the realities of available viewpoints nor the power of particular combinations.

The Commission should also monitor what it unleashes. It should conduct an extensive examination of positive and negative effects from the likely consolidation that today's action will bring. Having just completed reviewing the rules, the majority would undoubtedly agree that there are areas calling out for more effective data collection to understand the full effects of media consolidation. Now is the time to institute such a framework for reporting and analyzing full and complete data on the effects of media consolidation. I urge my fellow Commissioners to step up and start rigorous information collection and analysis.

Even assuming that some level of greater consolidation is warranted, given the dramatically expanded consolidation opportunities created today, I am not convinced that the modified rules have been reset at the proper levels necessary to serve the public interest. I do not mean to suggest that bigness is bad, or that free enterprise will always fail the public. There is some truth to the arguments that my fellow Commissioners make. There is nothing inherently wrong with earning profits from the use of public property.

But when it comes to gaining even greater profits at the expense of the cornerstones of our democracy, we must carefully question the rationale and the effect on the public. Today's rules do not only let the big get bigger, they effectively raise barriers to new entrants and prevent smaller entities from breaking in while disserving the public interest by increasing the likelihood of homogenization of the airwaves. Given the potential harms in overhauling these longstanding rules in such a dramatic fashion, I advocate an incremental approach that will show the public at each step how it will benefit.[79]

Proceeding with utmost caution and deliberation through a graduated approach would provide the public more certainty as to the effects of greater consolidation and would prevent unintended consequences. While the majority expresses concern that some revised market definitions might disrupt the markets, it overlooks the disruptive restructuring of the entire media landscape brought about by today's interrelated decisions. A graduated approach which modifies rules in a more incremental fashion would not be a wait-and-see postponement of our statutory duty – it would still be a modification, just one that would better serve the public interest. Congress, after all, directed us to reexamine this landscape every two years, not every five or ten years, which implies a certain level of comfort with an incremental approach.

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[79] *See Capital Cities/ABC Inc. v. FCC*, 29 F.3d 309, 316 (7th Cir. 1994) ("Phased deregulation is common, practical, and sensible.").

VIII. Conclusion

We should always be wary of dismissing the American public's strongly-held views about their media. This, in conjunction with an exercise of gratuitous deregulation, is a recipe for disaster, and it will have consequences we are already beginning to see. My prediction is that the public will notice the effect of greater media concentration and be outraged. One very possible backlash is that the public may someday soon demand more intrusive content regulation or a return to the prescriptive solutions of the past. As the majority today whittles away the last vestiges of structural regulation, pressure for more intrusive regulation may boil over.

Since my arrival here late last year, I have approached this proceeding with a constructive frame of mind. I sought to understand the various proposals and their underpinnings, and offer my views on their efficacy. Even after others closed in on an approach with which I was not comfortable, I made reasonable attempts to moderate the proposals, which were refused. In the end, it was not the process that precluded me from participating in drafting and supporting today's Order. It was the substantive direction the item took and the results-driven imposition of bottom line, bright line rules ahead of all else.

The majority claims these rules are responsive to the changes in the world around us. Yet I question whether cobbling together a results-driven regime allowing massive media consolidation serves the public interest. I am disappointed that a majority of my colleagues could not be persuaded to take a more reasoned, conservative, case-by-case approach.

This is far from over. Congress may prove more responsive to the citizens who passionately plea for the independence and diversity of their media. The courts may yet tell the Commission to try once again for a coherent comprehensive framework. To paraphrase Winston Churchill, this is not the end, or even the beginning of the end, but just the end of the beginning.