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

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

REPLY COMMENTS OF CONSUMER FEDERATION OF AMERICA CONSUMERS UNION CENTER FOR DIGITAL DEMOCRACY MEDIA ACCESS PROJECT

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EXECUTIVE SUMMARY

Public policy has long endeavored to promote diversity of ownership within media based on a compelling public interest standard for preserving multiple, competing and independent media sources. The bold aspiration set out by the Supreme Court for the First Amendment is to achieve "**the widest possible dissemination of information from diverse and antagonistic sources**." This modern interpretation captures the strong belief of the framers of the Constitution that active and involved citizens are critical to the preservation of democracy.

As the Federal Communications Commission reviews the comments received in response to the omnibus media ownership rulemaking, it must keep in mind its overriding obligation to ensure that vibrant civic discourse is not threatened in the pursuit of economic profits and marketplace efficiencies. The stakes for citizens, consumers, and the Nation are enormous.

The mass media are the primary means through which citizens gather news and information. TV in particular is the primary vehicle for political advertising. At the same time, digital media are at the center of the information economy and the emerging multimedia environment in which consumers and citizens will not only listen and watch, but must also be able to express their opinions and views.

Structural limits on ownership, which are content neutral, are ideally suited to promote the complex, qualitative goals the Supreme Court set for the First Amendment. Public policy should continue to strive to create an environment for civic discourse where numerous, independently-owned, institutionally-distinct media outlets are accessible to the public, responsive to local needs, and reflective of diverse socio-economic and cultural points of view. Repeal or significant modification of these rules would open the floodgates of mergers and acquisitions that would reduce competition and diversity in the media. The public interest would not be served.

Legal principles, economic analysis and public opinion do not support the relaxation of structural limits on media ownership and the dramatic increase in concentration that would inevitably follow. The Commission has the ammunition to defend the current rules; the Commission has the data it needs to meet the heightened scrutiny of the courts.

Indeed, we believe the very data of the media giants who desire the relaxation of these limits already demonstrate high levels of concentration in the most significant media markets. Their comments also obscure the facts related to such concentration by arguing that all media outlets are equal substitutes; for instance, equating an obscure, virtually unknown website with the most popular television network. Finally, their comments attempt to promote a radical new public interest standard based solely on economics and not on the established goal of promoting " the widest possible dissemination of information from diverse and antagonistic sources."

We focus our reply comments, therefore, on the initial comments of the major media companies. The industry comments can be addressed *en masse* because they share a legal and analytic approach that we believe is fundamentally flawed and cannot support the repeal or relaxation of the current rules on media ownership.

In **Section I** we briefly restate the basic elements of our initial comments which outlined the bold aspiration for the promoting the public interest in civic discourse that Congress has enacted and the courts have supported.

In **Section II** of these reply comments, we present our review of the empirical facts placed before the Commission in the initial comments of the media companies. We conclude—using the industry's data—that our analysis in the initial comments is fully supported by overwhelming evidence which justifies and requires preservation of existing ownership and cross-ownership rules. Virtually all television and newspaper markets are tight oligopolies, duopolies or monopolies.

The industry's own data shows that 70 percent of all markets have four or fewer sources of original local news production. Analyzing data for all prime time viewing in television markets (including cable and satellite) provided by the industry, we find that these markets are highly concentrated and tight oligopolies. Application of traditional antitrust principles and any reasonable interpretation of the levels of competition/antagonism necessary to promote and maintain a marketplace of ideas requires preservation of strict ownership limits in video markets (particularly for news and information).

Where the industry has provided data on newspaper circulation, which includes circulation of numerous weeklies that serve only small parts of the overall market, we find extremely high levels of concentration – near monopolies. In Phoenix, for example, the dominant firm's (Gannett) market share is close to 70 percent and the HHI is 5000, a level of concentration similar to what the Commission found high enough to block the proposed Echostar/DirecTV merger.[1]

Again, application of traditional antitrust principles, augmented by the goal of preserving competition/antagonism between consumers' two major sources of news and information (television and newspapers), requires preservation of the newspaper/broadcast cross-ownership rule.

In **Section III**, we discuss how the media industry tries to obscure the facts related to market concentration with a variety of analytic/empirical claims, none of which withstand close scrutiny. First the industry claims that there is a great deal of substitution between media, but this is refuted by the FCC's own studies. If there were a great deal of substitution, then concern about concentration in any one media (e.g. television) would be mitigated by the ability of consumers to switch to another media (e.g. newspapers). In fact, there is very little substitution between the media, certainly not enough to ignore the fact that television and newspapers deliver different products. They are distinct products providing distinct functionalities and used by consumers in distinct ways. Furthermore, the presence of the Internet has not changed the overwhelmingly dominant position of television and newspapers, especially not in political campaigns.

The media industry also claims that ownership does not matter, a claim that is contradicted by their own behavior and a mountain of economic and political evidence. No matter how concentrated media markets become, they claim there is no public policy concern over civic discourse beyond antitrust law concern with the abuse of economic market power, because media owners act only on economic motives. However, the analysis of slant and bias in the news media in our original comments refutes the claim of objectivity among owners. Clear empirical findings demonstrating the tendency of media companies to underserve minorities refutes the claim that the economic outcome is neutral from the point of view of

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[1] FCC Hearing Designation Order, *In the Matter of Application of Echostar Communications Corp., General*

diversity in civic discourse. The media industry has provided no new information to rebut these findings.

Finally, most industry commenters try to show that increasing cross ownership and concentration will produce significant improvements in the quality or quantity of news and information. The evidence does not support this claim. In fact, it shows that concentration and cross ownership produce a dramatic reduction in the diversity of ownership of the media but only small differences in quantity and quality.

In **Section IV** we examine efforts of some media owners to obscure the damaging empirical evidence, and their demand that the FCC interpret the public interest standard of the Communications Act in a manner that radically departs from Congressional intent, legal precedent and common sense. The broadcast networks would have the Commission abandon the goal of promoting "the widest possible dissemination of information from diverse and antagonistic sources." Instead, they would have the Commission do no more than prevent a media ownership structure that could lead to the complete suppression of ideas. For example, the Joint Commenters contend that no media ownership rules are required at all once mergers meet a certain minimal "safe harbor" benchmark of companies remaining post-merger. To support this contention, they provide their analysis of the range of outlets available in the Milwaukee, Wisconsin market. Amusingly, they include within the range of "available" media outlets Web sites of the following organizations: the Milwaukee Curling Club, the Milwaukee Astronomical Society, and the Milwaukee Aquarium Society. The contention that somehow these niche Web sites are substitutes for broadcast television stations—with huge

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Motors Corp., and Hughes Electronics Corp., CD Docket No. 01-348 (Adopted 10/9/02).

market share and broadcast licenses obligating them to serve their local community—is a laughable revision of even the narrowest construction of the public interest.

In order to make this radical reinterpretation of the public interest standard of the Communications Act more palatable, the media owners argue incorrectly that the 1996 Act placed the goal of competition ahead of the goal of promoting the public interest. The claim that the law reduces the public interest standard to a pure economic test and compels the FCC to abandon all authority to the antitrust laws is inconsistent with the plain language of the Act and the legislative history of its enactment.

I. INTRODUCTION

Public policy has long endeavored to promote diversity of ownership within media based on a compelling public interest standard for preservation of multiple, competing and independent media sources. The bold aspiration set out by the Supreme Court for the First Amendment is to achieve **"the widest possible dissemination of information from diverse and antagonistic sources."** This modern interpretation captures the strong belief of the framers of the Constitution that active and involved citizens are critical to the preservation of democracy.

This important aim of the First Amendment - what should be considered a bold aspiration - has supported a broad range of policies to promote civic discourse.

- The needs of citizens cannot be reduced to the needs of consumers. Policies to promote vibrant civic discourse must take precedence over the pursuit of economic profits and efficiency in the commercial marketplace of ideas.

- Vibrant democratic discourse demands that citizens be more than passive listeners or viewers. Public policy must strive to ensure they have the opportunity to be active speakers as well.

- Information from one type of media cannot easily substitute for another, therefore numerous independent and diverse institutional media voices are necessary. Institutional diversity that ensures unique perspectives - different types of media, with different cultural and journalistic traditions and different business models - plays a special role in promoting rich civic discourse.
- As the media have become more powerful and our society has become more diverse and more deeply interconnected with a complex global economy, there is a greater need for media diversity and citizen access to media.

The Commission and the courts have indicated that a review of the media ownership rules should be based on empirical data. The Commission need not go far, however, to find an abundance of data to support the conclusion that the current media marketplace is already significantly concentrated in major markets and elimination of media ownership and cross-ownership rules would endanger free-speech principles espoused by the framers of the Constitution and upheld by the Supreme Court.

II. MEDIA MARKETS ARE HIGHLY CONCENTRATED, AND MEDIA MONOPOLIES DO NOT PROMOTE THE PUBLIC INTEREST

A. Local TV news markets are highly concentrated.

The broadcast networks produce an analysis that shows the high level of concentration of local broadcast news.[2] In 70 percent of the markets, original local news is available from only four (or fewer) broadcasters. Even if we include stations that do not produce original local news but air news content produced by someone else, we still find that in 62 percent of the markets there are four or fewer stations airing local news.

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[2] Unless otherwise noted, all references are to initial comments filed on January 2, 2003, in the omnibus rulemaking. See Owen, Bruce M. Kent W Mikkelsen and Allison Ivory, "News and Public Affairs Offered by

Even using a simple voice count approach, which underestimates the concentration of the local market because it treats all broadcasters the same, regardless of their market share, virtually every local TV news market in the country is highly concentrated (see Exhibit 1).[3] Nine percent of all local TV news markets are monopolies and 13 percent are duopolies. Sixty-two percent are tight oligopolies (3-5 sources). In other words, over four-fifths (83 percent) of local TV news markets are highly concentrated, tight oligopolies or worse. Only one percent of these markets are "unconcentrated." These results are very similar to the data we supplied the Commission in our initial comments. This means that there are virtually no localities in the U.S. where mergers between two or more local broadcast outlets would not substantially diminish competition in the coverage of local news and informational events.[4]

We have also shown that while this number may have increased over the history of FCC oversight over this market in absolute terms it has been declining on a per capita basis, particularly in recent years[5] and it certainly has not grown to reflect the increasing diversity of the population and the complexity of our global situation.[6]

B. Video Markets Including Cable Viewership

In the comments of Sinclair Broadcast Group, Inc., they included detailed market share data that is traditionally treated as proprietary.[7] This can be combined with the

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the Four Top-Ranked Versus Lower-Ranked Television Stations," Economic Study A, Attached to the Joint Comments of Fox, et al.

[3] Definitions of market types are provided in Comments of the Consumer Federation of America, Consumers Union, Center for Digital Democracy and Media Access Project (hereafter, Consumer Commenters), VII.A.

[4] Consumer Commenters, VIII.A.

[5] Consumer Commenters, VIII.E.

[6] Consumer Commenters, II.F, V.A.

[7] Sinclair, Exhibit 15.

broadcast network data on ownership and general data on stations affiliations to produce an analysis of individual markets based on market share, or “eyeball” data.

EXHIBIT 1:
CONCENTRATION OF LOCAL NEWS DISTRIBUTION BASED ON STATION COUNTS

	LOCAL NEWS MARKETS BY TV OUTLET COUNT		LOCAL TV MARKETS BY BROADCAST SHARE	
	NUMBER OF DMAs	PERCENT OF DMAs	NUMBER OF DMAs	PERCENT OF DMAs
MONOPOLY	18	9	26	12
DUOPOLY	27	13	56	27
OTHER HIGH CONCENTRATED	129	62	112	53
MODERATELY CONCENTRATED	33	16	16	0
UNCONCENTRATED	3	1	0	0

SOURCE: Owen Bruce, Kent W. Mikkelsen, Allison Ivory, “News and Public Affairs Programming Offered by the Four Top-ranked Versus Lower-Ranked Television Stations,” Economic Study A. Consumer Commenters, p. 169.

One example is provided below in detail – Milwaukee (See Exhibit 2). This is the example chosen by the broadcast networks to present detailed analysis.[8]

In voice count analysis, cable systems have traditionally been counted as one owner. Cable owners control all of the channels on their systems, with the exception of broadcast networks, which have must carry and retransmission rights and a small number of PEG channels (which do not exist in many communities and have virtually no viewership where they do exist). Because they assert and aggressively defend their rights to choose the programming that gets on their system, all cable systems have been treated as one owner.

A recent Washington Post article[9] points to Comcast's blanket refusal to air an anti-war commercial, reminding us of the power of cable operators to control content distributed over the cable platform at critical times of public debate, and affirming that counting the cable owner (or satellite distributor) as a single voice is the correct approach. Moreover, since there is virtually no competition between cable operators (since they rarely overbuild one another) each cable system is a local monopoly.

Although satellite is beginning to play a meaningful role in the video market, their role in the dissemination of news and information is still very small. Since satellite companies are currently dependent upon broadcasters and the largest cable programming owners for their news and information programming, they do not constitute a significant "voice" in most local markets. In any event, we suggest that satellite video providers—which

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[8] Since Baltimore is the 24th largest DMA and Milwaukee is the 34th, we can generally expect the vast majority of (smaller) DMAs to be more concentrated.
[9] *"Comcast Rejects Antiwar TV Spots,"* Washington Post (Jan. 29, 2003), p. A7.

control the vast majority of programming on their distribution systems, just like cable companies—should be treated, for the purpose of a voice count analysis, as similar to cable.

EXHIBIT 2: MILWAUKEE VIDEO MARKET STRUCTURE BASED ON VIEWER SHARES
(Based on Top Six Entities)

	RATINGS POINTS			MARKET SHARE	
	Broadcast Networks	Cable Networks	Total	Percent of Total	
ABC/DISNEY	7.65	2.39	10.04	16	
CBS/UPN/VIACOM	11.03	3.11	14.14	22	
FOX/Newscorp.	7.89	2.35	10.29	16	
NBC	12.14	0	12.14	19	
AOL TW/WB	3.82	3.47	7.29	12	27
REMAINING CABLE MARKET SHARE		9.20	9.20	15	

CONCENTRATION MEASURES

CABLE AS A SINGLE OWNER, CR4 = 84%; HHI = 2086

Sources:

Video Shares = Sinclair, Exhibit 15.

Network Ownership = Owen, Bruce and Michael Baumann, "Concentration Among National Purchasers of Video Entertainment Programming," Comments of Fox, Economic Study F: Network Affiliations of Local Stations, *Television Market Report, 2001.*

In the following analysis, which focuses on prime time network market shares, we have not distinguished between cable and satellite. All programs that are not attributed to one of the entities that owns a network are treated as controlled by the cable operators. Given the urban markets this simplifying assumption would have little impact on the calculation of prime time entertainment HHIs.

Moving from a voice count to a market share analysis that includes cable and satellite market shares raises some methodological issues. The broadcast networks, who have must carry rights and can negotiate for retransmission, have a mixture of broadcast and cable programming. We have attributed all programming (cable, satellite and broadcast) to the parent of the programming network.

AOL/Time Warner presents a unique problem for this analysis. It is the number two cable system operator, a broadcast network owner, and one of the largest cable and satellite network program owners. For the purposes of this analysis, we treat it as a separate entity. We subtract its share of cable "eyeball" from the cable total. In communities where AOL/Time Warner is the cable operator, this will underestimate market concentration. In communities where it is not the cable operator, the estimate of market structure will be only slightly affected (because AOL Time Warner tends to attract more eyeballs as a cable programmer than a broadcast network owner).

We find that these markets are quite concentrated. In the Milwaukee market we attribute all cable market share to AOL Time Warner, since it is the dominant cable provider. The CR4 is 84 percent and the HHI is 2086. This video market is a highly concentrated tight oligopoly. If AOL Time Warner is treated as a separate entity from its programming affiliates, the CR4 is 73 and the HHI is 1726, just below the highly concentrated threshold.

The other markets for which data are provided are also quite concentrated (see Exhibit 3). The 21 DMAs for which Sinclair provided data are quite large, all ranking in the top 60 television markets in the U.S.

All 21 markets are tight oligopolies as measured by the four-firm concentration ratio. Most are well above the 60 percent market share figure. Measured by the HHI, most markets are moderately concentrated and several are highly concentrated. Among the moderately concentrated markets, most are at the higher end of the range. One of the reasons that the growth of cable networks has not deconcentrated the prime time market is that over half of the prime time market share for cable is for channels that are owned by firms that also own national broadcast networks. As we stated in our initial comments, the phenomenon is simply a migration from over-the-air broadcast to through the wire carriage of network-owned programming.

These estimates of concentration for entertainment are certainly lower than estimates of concentration for news and information would be, because some broadcasters do not air news and many cable operators do not air news. Only about half of the broadcast networks that air entertainment also air local news. If the media companies had provided the Commission more refined data separating news and information from entertainment programming, it would demonstrate that the market for news and information is significantly more concentrated and subject to monopolistic abuse than the entertainment market.

EXHIBIT 3: MEASURES OF CONCENTRATION IN TELEVISION MARKETS
(Based on Viewer Share)

DMA	Rank	Four-Firm Concent. Ratio	HHI Index	% of Cable Share for Broadcast Owners	% of Broadcasters Who Provide Local News
Minneapolis	13	75	1762	58	64
Tampa	14	69	1432	55	54
Sacramento	19	70	1617	63	70
Pittsburgh	21	77	1798	63	50
St. Louis	22	76	1670	72	44
Baltimore	24	78	1875	52	50
Raleigh	29	73	1732	67	50
Nashville	30	81	1826	54	40
Kansas C.	31	71	1641	63	67
Cincinnatti	32	76	1723	54	50
Milwaukee	33	73	1776	46	40
Columbus	34	75	1639	55	57
San Antonio	37	61	1188	60	58
Birmingham	39	66	1421	58	50
Norfolk	42	75	1695	61	56
Greensboro	44	69	1606	64	44
Oklahoma C.	45	72	1611	61	45
Buffalo	47	70	1530	68	45
Las Vegas	51	68	1495	63	60
Richmond	58	76	1847	67	57
Dayton	60	75	1664	57	40

Sources: Video Shares = Sinclair, Exhibit 15.

Network Ownership = Owen, Bruce and Michael Baumann, "Concentration Among National Purchasers of Video Entertainment Programming," Comments of Fox, Economic Study F: Network Affiliations of Local Stations, *Television Market Report, 2001.* Owen, Bruce and Michael Baumann and Allison Ivory, "News and Public Affairs Programming Offered by the Four Top-Ranked Versus Lower Ranked Television Stations," Comments of Fox, Economic Study A.

Moreover, the levels of concentration in larger television markets—and smaller markets have fewer video outlets—indicate that the major players should not be allowed to merge. Any merger between two of the top six firms we have identified (ABC/Disney, CBS/UPN/Viacom, Fox/Newscorp, AOL Time Warner/WB, and NBC/MSNBC) would clearly violate the antitrust merger guidelines. As we pointed out in our initial comments, this fact is the basis for both a pure antitrust/economic based, and marketplace of ideas-based rule that prohibits ownership of multiple broadcast stations in the same local market. Such a rule is particularly necessary to preserve competition in the marketplace of ideas for local news and information.

C. NEWSPAPER MARKETS

Gannet also presents evidence on the newspaper market in the Phoenix area. The current circulation data for all dailies and weeklies. Using circulation data, we find that the market remains highly concentrated. Gannet's market share is approximately 70 percent. The HHI is 5000. This market falls in the monopoly range.[10]

In other words, when all newspapers throughout a local market are appropriately accounted for, the overwhelming majority of newspaper markets are so monopolistic that the limited competition/antagonism with broadcast television outlets would be substantially endangered if no newspaper/broadcast cross-ownership ban existed.

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[10] Definitions are provided in Consumer Commenters, VII.A.

III. EMPIRICAL REALITY OF MEDIA INDUSTRY STRUCTURE AND CONDUCT

A. Substitutability

The central thrust of the argument media owners use to blunt the clear evidence on concentration of markets is the claim that media are substitutable. They insist that the Commission ignore differences among media and count the total number of outlets available. But this assumes that each of the outlets provides the same product and that consumers switch between them easily.

Substitutability is an empirical question, but the media companies present no original evidence on the matter. Instead, they point to two studies prepared for the Commission, particularly as they list the number of outlets available to consumers.[11]

We have shown in our initial comments that the claim of substitutability does not withstand rigorous statistical analysis.[12] Consumers are much more likely to use the media as complements rather than as substitutes. This complementarity stems from the different nature of the media.[13] Newspapers and television serve different functions. Newspapers are specialized in the production of news, providing in-depth coverage of issues. Broadcast television news tends to announce events with short pieces. The Commission's own studies found little evidence of the substitutability between the media that the networks claim.[14] Our reanalysis of the Commission's data and review of academic studies shows that substitution is minuscule, if it exists at all. In fact, in Prof. Waldfogel's study, cited by several industry commenters as "evidence" of a high degree of substitution between media, he found

[11] Fox, et al., pp. 50, 58; Sinclair, pp. 21, 24-26 and Exhibits. 15, 34-36; Gannett, pp. 15-16; Hearst, p. 6.
[12] Consumer Commenters, VI.
[13] Consumer Commenters, V.
[14] Consumer Commenters, VI.

complementarity rather than substitution. In other words, rather than usage of one kind of media displacing usage of another for an individual, an increase in usage of one type was accompanied with an increase in the other.

This complementarity exists not only for individuals' media usage, but also at the level of institutions. Newspapers provide an investigative function that stimulates reporting by other, less news intensive entities—such as the way a story in a local newspaper will often be the impetus for a local broadcast television station's coverage of the same matter. In addition, media also police each other when they are separately owned, providing a unique watchdog function that serves as a checks and balances system, generating antagonism across media types.

We have presented both anecdotal and statistical evidence that this function breaks down in cross-ownership situations.[15] The examples run the full gamut of issues. They include, at one end, statistical studies which show that the stronger the interest media owners have in national policies – like media ownership – the less likely they are to cover the issue. They include qualitative studies of efforts by media companies, like CanWest, to impose national uniformity of editorial policy, which in turn places pressure on all reporters in a media entity to cover issues in a unified way.[16] Examples also include biased reporting of local policy issues, like the funding of a stadium in which the local media mogul has a direct economic interest[17] and the failure of cross-owned newspapers to criticize their sister outlets.[18]

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[15] Consumer Commenters, XI.
[16] Id., Statement of Steve Amber, Appendix C
[17] Consumer Commenters, XI.C.4, XI.C.5.
[18] Consumer Commenters, XI.C.1, IX.C.3.

Of all the media to which the networks point as changing civic discourse, the Internet receives the greatest attention. The networks continue to insist that the Internet changes everything.[19] We have shown the Internet has changed little with respect to the mass media, especially at the local level.[20] Most often, the Internet sites that produce local news are the sites of the very same newspapers and local television stations that have dominant market share. Furthermore, in the FCC's own data, the Internet was always cited last as a source of news and information. In the Commission's deprivation analysis (where, for example, consumers were asked what they would do if they could no longer get television, the newspapers, then radio, etc.), the Internet was the last source to which consumers would turn. Only 6 percent of Americans said the Internet was their main source of news, compared to 56 percent who said TV and 23 percent who said newspapers. The gap is much larger when it comes to campaign news.[21] The Internet revolution simply has not yet happened with respect to news and information. It may someday, but it also may not.

B. Ownership Matters

The broadcast networks also insist that ownership does not matter. They present a theoretical argument about why the economic interests of owners would compel media owners to present diverse points of view. Yet they present no original economic evidence to support their view.

The behavior of the news organizations of the media companies contradicts the claims of objectivity by these media companies. The leaders of several of these companies have

[19] Fox, et al, pp. 11, 58; Gannett, p. 10.
[20] Consumer Commenters, V.C.4; VI.; VII.E., VIII.E.
[21] Consumer Commenters, V.C.

engaged in an ugly name-calling contest about bias.[22] CBS alleges that FOX and the *Wall Street Journal* are biased, while FOX alleges that the other networks are biased. We have also presented a great deal of systematic evidence on bias.[23]

To support their claims regarding lack of media bias, industry commenters point to one of the studies prepared at the request of the FCC staff by David Pritchard. This study purports to show there is no systematic bias in reporting when newspapers and television stations are owned by a single entity. In fact, this study shows that the overwhelming majority of coverage is slanted.[24] Nevertheless, the study itself has major flaws. The study failed to include any controls such as including either cities without cross-owned newspapers or independent newspapers within the same city. It was based on a small sample.[25] The authors even note that the event chosen was not very conducive to a study of slant in news reporting because of its extreme prominence and the fact that it was likely to cast the Republican candidate in a bad light.[26] The cities chosen were located in states that were not very competitive in the closest presidential election in American history.[27]

In contrast to this ill-conceived, anecdotal study, we cited in our original an extensive review of academic and scientific research that demonstrates slant and bias in reporting.[28] The evidence includes about two dozen studies published between 1957 and 2002.

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[22] Consumer Commenters, III.A.
[23] Consumer Commenters, III.A.
[24] FCC Study No. 2.
[25] FCC Study, No. 2, p. 10.
[26] Or as the study put it, p. 7, "the tenor of events… featured a certain amount of news that was almost inevitably antibush (e.g. the revelation of the decades-old drunk-driving arrests of both Bush and his vice presidential candidate, Dick Cheney).
[27] Contrast Study No. 2, p. 2, and Baker, Dean, *Democracy Unhinged: More Media Concentration Means Less Public Discourse, A Critiqu of the FCC Studies on Media Ownership*, p. 6.
[28] Consumer Commenters, III.A.

C. Duopolies and Cross-Ownership Diminish Diversity Without Adding to the Quantity of Coverage

The Networks ignore the importance of ownership and instead present an immense amount of information to the Commission demonstrating that the quantity of news is increasing and therefore implying that the quality of the news is being preserved. Lengthy tables are provided to show that the networks have increased the number of hours devoted to news. They claim that duopolies enable them to do so, but the evidence does not support even this conclusion (see Exhibit 4). Increases in news coverage are equal in duopoly and non-duopoly markets. More importantly, the loss of independent hours of news exceeds the gain in the total hours of news. In other words, we get a little more quantity at a severe cost to quality (measured by hours of independent news production). Conversely, the ban on duopolies promotes diversity of viewpoints (using independent ownership as a proxy) without detracting from the quantity of news.

EXHIBIT 4:
THE COSTS OF DUOPOLY FAR EXCEED THE BENEFITS

		DUOPOLY[a/]		NON-DUOPOLY[b/]	
	# of Markets	Change in Hours of News	Lost Hours of Independent News	# of Markets	Change in Hours of News
FOX	9	+1.7	-2.5	16	+1.9
NBC	6	+4.4	-12.0	10	+3.9
TOT/ AVG	15	+2.8	-6.3	26	+2.7

Source:

a/ Viacom data does not provide sufficient detail to conduct the lost hours analysis.

b/ Fox shows much larger gains for non-duopolies when it goes back to its pre-acquisition of stations, which in many cases is a decade or more ago. Use of this data would make non-duopolies appear even more valuable. This analysis uses changes since 11/2000.

Appendix B to the broadcast networks comments presents an econometric analysis which is consistent with these findings. It finds a small increase in the *probability* that a station will cover news (from 66.5 to 74.5 percent), but no statistically significant differences in the amount of news. Because the networks disregard ownership, the study did not examine the loss of independent news. Also the network-sponsored econometric study cannot address the question of causality. It did not inquire as to whether the duopolists added news after a duopoly was created, or merely bought stations that already produce news.

An examination of the detailed data provided by FOX and NBC shows that they did not add news to any stations that did not already carry it and, in one case, they eliminated the news on a duopoly station. Thus, Appendix B to the Network filing has mistakenly ascribed a positive effect to duopolies where none exists. In terms of news carriage, the networks were not able to show a positive effect in the amount of news carried, and completely ignored the negative effect of the loss of an independent news voice.

A similar conclusion emerges from the study prepared for Sinclair by Robert Crandall.[29] Using a standard of statistical significance that is rarely seen in the academic social science literature (10 percent), Crandall concludes that duopolies result in a slight decrease in advertising rates. The decrease is extremely small, just .3 percent. In other words, according to Crandall, prohibiting duopolies (which preserves a valuable independent TV voice) imposes a statistically insignificant and quantitatively miniscule economic cost.

The evidence presented by the newspaper corporations on cross-ownership and its effect on journalistic production (as measured by receipt of journalism awards) has the same weaknesses as the broadcast data, and leads to the same incorrect conclusions. There is no time series data provided, so it is hard to ascertain whether the TV stations they own always presented more news, or increased their news after they became cross owned. More importantly, when we analyze media markets, we find that cross ownership adds little in quantity, while eliminating an important independent voice.

Once again, the media companies cite a FCC study to bolster their claims about awards and cross-ownership, but the FCC's conclusions are not presented as statistically significant (no statistical tests were applied). Moreover, the FCC analysis focuses on the output of stations, rather than the output of markets. We have shown above that when a cross-owned combination dominates a market, other independent stations may move away from the dominant station, reducing news output.[30] The FCC study appears to combine TV stations owned by newspapers that are not in the same market with instances in which the TV station and the newspaper are in the same market. We have identified specific problems with cross-ownership within markets.

Even with these caveats about the awards data, the evidence does not support the claim to benefits of concentration and cross ownership. The networks contend that the journalistic awards received by cross-owned stations indicate that such stations are "better off" than non-cross-owned stations. Looking at a cross-owned situation in the same market, however, it is difficult to conclude that the stations are better or worse (See Exhibit 5). We observe many that are better and many that are worse.

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[29] Crandall, Robert W., *The Economic Impact of Providing Service to Multiple Local Braodcast Stations Within a Single Geographic Market,"* Sinclair, Exhibit1.
[30] Consumer Commenters, II.E, IV.B., IV.C., IX.B.

EXHIBIT 5:
TELEVISION NEWS AWARDS

	NON-CROSS OWNED	CROSS OWNED
4 OR MORE AWARDS	12	0
3 AWARDS	8	2
2 AWARDS	14	4
1 AWARD	23	2

SOURCES: Spavins, Thomas C., et al, "The Measurement of Local Television News and Public Affairs Programs," Appendices B and C.

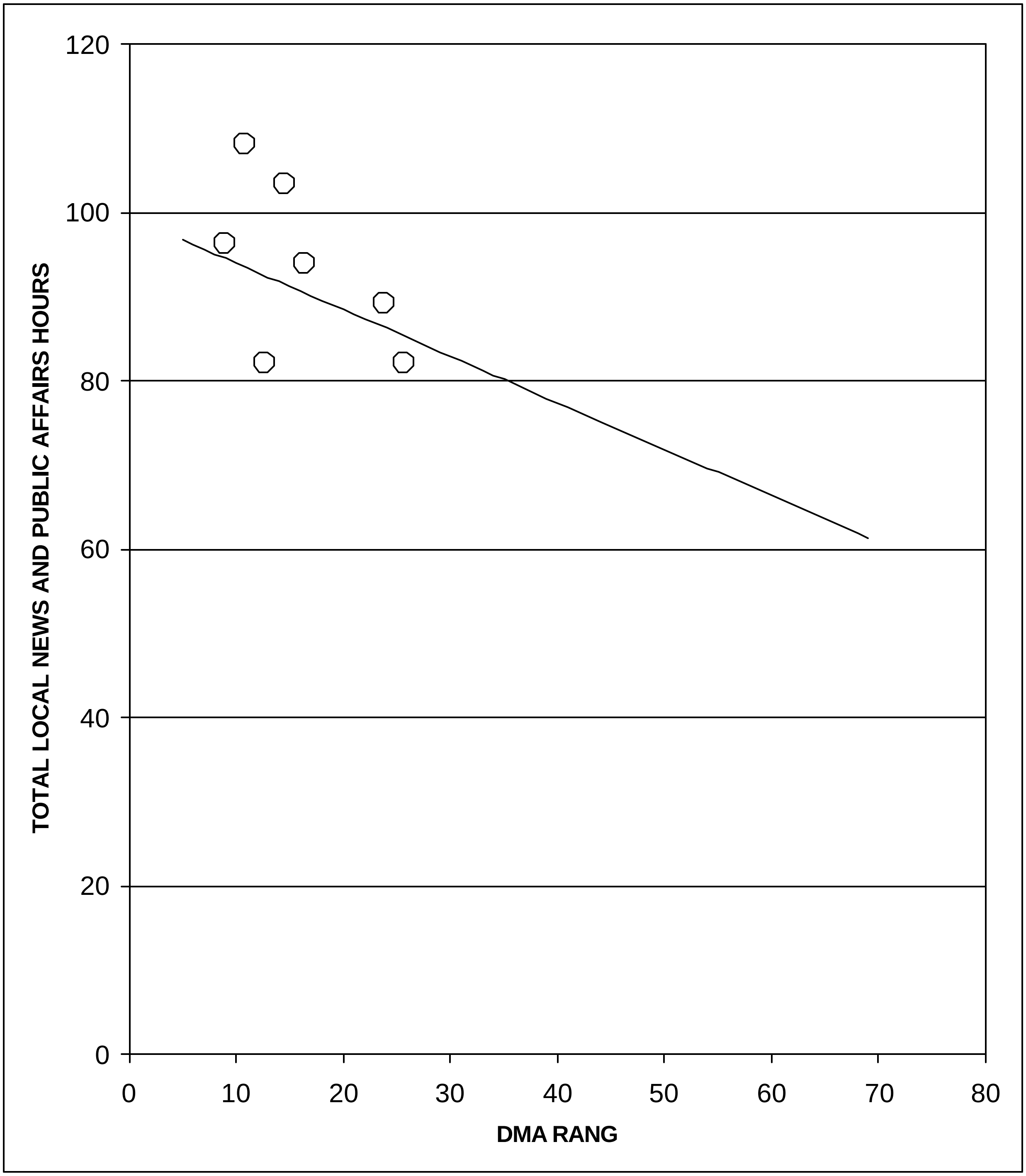
The inconclusiveness of the award data above is demonstrated by the following observations. In the aggregate, cross-owned stations may be more likely to win awards, but the statistical validity of the conclusion and the representativeness of the sample are suspect. When viewed on a market-by-market basis, the data is not convincing.

There were nine markets with cross-owned stations in which awards were made. In four markets, the cross-owned stations won all of the awards. They tended to be among the top two highest ranked stations in terms of viewership. The non-cross-owned stations that won awards in markets where cross-owned stations exist were ranked considerably lower in terms of viewership. On average, they were ranked (between third and fourth) in their markets, compared to the cross-owned stations that won (which were ranked second on average). In five markets where awards were won, the cross-owned station won none, and tended to be lower ranked. The cross-owned stations that did not win awards were ranked about fourth on average. Generally, the non cross-owned stations did more with less.

Looking at the quantity of news in markets with cross-owned stations, we observe that two of the six markets with cross-owned stations were on the trend line of all stations as calculated in Exhibit 6. There were two well above the line. There were two somewhat below it. There were three close to it.

The claim that concentration and cross ownership are good for news output is not supported by this data. At best, there is a small difference between stations in newspaper/broadcast combinations and duopolies. Whatever small increases in quality and/or quantity come with very large losses in media ownership diversity.

EXHIBIT 6:
TOTAL HOURS OF LOCAL NEWS AND PUBLIC AFFIARS
(Markets With Cross Owned Stations compared to trend line)



SOURCES: Spavins, Thomas C., et al, "The Measurement of Local Television News and Public Affairs Programs," Appendix A.

D. ECONOMIC THEORY V. THE TYRANNY OF THE MAJORITY IN MEDIA MARKETS

Much of the analysis of the media companies is presented after regurgitating the economic theories under which the Commission suggests that concentrated markets and monopolies may be better for consumers. Industry commenters present no economic evidence in support of these theories. As pointed out by several commenters, the FCC either misrepresents the original idea, or fails to recognize that the assumptions underlying the theory do not fit media market reality.

The Information Policy Institute presents a thorough critique of the Steiner hypothesis that concentrated markets generate greater variety.[31] The critical assumption underlying the theory is a relative homogeneity of taste. The theory may have been true when it was first offered fifty years ago, given the homogeneity of the population and the demographic characteristics of the audience at whom the media were targeted. The empirical evidence of the past decade shows that strong differences in taste result in minorities being underserved and undervalued by the commercial mass media.[32] Moreover, as the population becomes increasingly complex, the role of differences in information needs grows.[33] Even where it can be shown that mergers theoretically allow a journalism beat to be added, we often we find that production of more upscale entertainment is the end result of a merger (mining the favored majority audience), rather than availability of more news and information for minorities. It is time for the Commission to abandon this theory to support increasing concentration in media

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[31] Information Policy Institute, pp. 53-59.
[32] Consumer Commenters, III.B, IV.A.2.
[33] Consumer Commenters, V.A.

markets. It no longer fits the reality of the conditions of civic discourse in America, if indeed it ever did.

The second theory that the Commission relies upon to suggest that it should allow or promote concentrated media markets is the Schumpeterian argument on transitory monopoly power. Here, the Information Policy Institute rightly points out that the Commission has completely misinterpreted the Schumpeterian argument.[34] The FCC seeks to justify market concentration, whereas Schumpter focused on market size. There is no doubt that the dominant commercial mass media firms are already large enough to possess economies of scale. Given large firms, concentration which increases market power may undermine Schumpeterian processes because they dull competition, which was central to his argument.

The monopoly rents earned by the innovative entrepreneur must be transitory, lest they degenerate into plain vanilla antisocial monopoly rents. We have pointed out that media industry moguls look and behave much more much more like traditional anti-competitive monopolists than innovative Schumpeterian entrepreneurs.[35] The Information Policy Institute analysis adds the critical observation that the underlying technologies have been relatively stable for decades. Strengthening the hand of entrenched incumbents using off-the-shelf technologies hardly seems the way to promote innovation and creative destruction. The Commission's policies are having the opposite effect.[36] Here, as in the case of the Steiner hypothesis, the Commission has simply failed to accept the empirical facts.

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[34] Information Policy Institute, pp.46-52.
[35] Consumer Commenters, IX.; "Initial Comments of Consumer Federation," et al., *Cross Ownership of Broadcast Stations and Newspapers*, MM Docket No. 01-235, December 4, 2001.
[36] Cooper, Mark, *Cable Mergers and Monopolies: Market Power Digital Media and Communications Networks* (Washington, D.C.: Economic Policy Institute, 2002)

Based upon the empirical evidence in the record the Commission must abandon Steiner/Schumpeter style justifications for concentration and monopoly power in media markets. Whether these two arguments articulated over fifty years ago ever made sense for media markets is debatable, but it overwhelmingly clear they do not fit the facts of 21st century America.

IV. CONSUMER MEDIA ECONOMICS VS. CITIZEN DEMOCRATIC DISCOURSE

A. THE AUDIENCE DOES NOT MATTER

The media companies have a remarkably simple strategy for hiding the extremely concentrated condition of media markets. They insist that the FCC simply ignore it.[37] The position of the broadcast networks in this proceeding can be summarized in one sentence offered by their own leading expert witness.

> In short, the audience of a media outlet is unrelated to the outlet's significance in the marketplace of ideas.[38]

The Commission is told that the size of the audience does not matter in civic discourse. Obviously, if you are a prime time programming giant that reaches into tens of millions of homes each night seeking to eliminate regulations that prevent you from growing larger, it is convenient to claim you have no more significance than the Web site of the local astronomical society,[39] which gets a handful of hits a month. It may be convenient, but it does not make much sense. Yet, that is exactly how the network broadcasters recommend the FCC analyze media markets.

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[37] Fox, et al., pp. 59-63; Sinclair, pp. 31-33; Media General, p. 4, Hearst, p. 3; Clear Channel, pp. 5-6.
[38] Owen, Bruce M., "Statement on Media Ownership Rules," *Joint*, p. 9.
[39] Owen, Bruce and Kent W. Mikkelsen, *Counting Outlets and Owners in Milwaukee: An Illustrative Example*, Economic Study F: Attached to Fox, et. al., Table F-8.

In their analysis, the network broadcasters equate WTMC, the NBC affiliate in Milwaukee that leads the broadcast market, to the following Web sites: Milwaukee Aquarium Society, Milwaukee Astronomical Society, and the Milwaukee Curling Club. Interestingly, the Journal Communications, which owns WTMC, the number one TV station, also owns the Milwaukee Journal, the largest newspaper in the Milwaukee DMA, and two of the top radio stations in the Milwaukee area. The failure to recognize any difference between huge media conglomerates and minuscule web sites, defies common sense, is inconsistent with economic analysis[40] and has no basis in media jurisprudence.[41]

If the Commission abandons the current rules, and adopts the recommendation of the broadcast networks, it will not be because the broadcast networks have shown that the concerns on which the rules were founded have been laid to rest by marketplace developments, it will be because the Commission changes the definition of the public interest obligations under the Communications Act. Such a change is not justified by the statute, nor is it called for by recent court rulings.[42]

B. PUBLIC POLICY DOES NOT MATTER

The broadcast network game is a thinly veiled attempt to eliminate the scarcity doctrine. Similar arguments that have been rejected by the courts for six decades (that there is no scarcity in media) have come back with the window dressing of Internet growth. As the networks' expert states clearly, "the 'scarcity doctrine' is and always has been a factual and economic absurdity." By adopting the broadcast network view of the mass media, the

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[40] Consumer Comments, VII.A.
[41] Consumer Comments, II.
[42] Consumer Comments, I.A.

Commission does not need to point to the recent growth of traditional outlets and the advent of new media—the agency would simply be adopting the old arguments of the networks that have failed to sway policymakers and the courts for decades.

> Once a new idea is available to the community, either directly through each consumer's access to an unpopular source or indirectly through interpersonal communications, its diffusion cannot be prevented whether or not more popular media adopts the idea.[43]

> What really matters with ideas from a political point of view is whether they can be suppressed. But given the importance of interpersonal communications, it is extremely difficult to suppress ideas – they can "leak out" even through small or economically minor media outlets.[44]

The media owners' utter disdain for the public policy repeatedly underscored by the Congress and supported by the courts is repeated in their rejection of the policy to promote localism in the media. As their leading expert puts it: "Why should the government seek to promote local content as opposed to, and especially at the expense of, any other category of ideas?"[45] Congress has long recognized that local decisions like school board elections, policing, zoning, refuse collection, and fire and rescue, deeply affect the quality of life and the empirical evidence indicates that their concern that national media will neglect local issues is well grounded.[46] The national chains may not like the policy of promoting localism, but it has a sound basis in social reality and law.

Rejecting the fundamental premises of decades of public policy, the broadcast networks take a mere "monopoly prevention" approach to the public interest standard. The FCC's role is reduced to assessing whether the lid can be clamped down so tightly by

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[43] Owen, p. 10.
[44] Owen, p. 10.
[45] Owen, p. xx.
[46] Consumer Comments, IV.B.

consolidated media ownership as to prevent ideas from leaking out, rather than the bold aspiration for the First Amendment articulated by the Supreme Court[47] in the phrase "widest possible dissemination of information from diverse and antagonistic sources."

C. NOTHING MATTERS EXCEPT ENTERTAINMENT ECONOMICS

The role of the FCC is further restricted in this view by insisting that the economic impact on consumers is the focal point of analysis.

> Whether ownership concentration poses harm to competition or to consumers is precisely the question on which the Commission should focus, and it is exactly the question upon which the antitrust laws and their enforcers focus.[48]

In the narrow economic view, the importance of ownership disappears since, "it is the tastes and demands of audiences, not the wishes of broadcasters, that determine the extent of content diversity in a competitive marketplace."[49] The empirical evidence simply does not support this view. Not only do owners actively take points of view on key issues,[50] but also economic processes drive them to under serve and undervalue minorities' preferences.[51]

Moreover, since the role of citizens and civic discourse are read out of the Communications Act by the broadcasters, we should not be surprised to find that the distinction between entertainment on the one hand and news and information on the other is also eliminated.

> [T]he Commission's sometime preoccupation with news and public affairs, as distinct from entertainment programming… makes even less sense than localism. First, broadcast news is entertainment – it has to be, at least in part, in order to attract audiences that can be sold to advertisers.[52]

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[47] Consumer Comments, II.
[48] Owen, p. 1.
[49] Owen. p. 6.
[50] Consumer Commenters, III.A, XI.C.
[51] Consumer Commenters, III.D, III.E, IV.A.
[52] Owen, p. 11.

In this view of the world, people cannot possibly watch television to become informed. They only watch it to be entertained. Needless to say, if the Commission accepts this view of its First Amendment charge under the Communications Act, it should not be surprised to find that it has no role since "it will duplicate the work of the Antitrust Division, which would be a waste of public resources."[53] Although entertainment certainly can contribute to civic discourse and it certainly shapes social and cultural values, news and information provides the critical inputs for public decision making about key public policy issues.[54]

D. AND ITS VERY BAD ECONOMICS, AT THAT

The twisted logic of the broadcast networks stands economic analysis on its head. Using the most basic information of market structure to count the actual market share of each outlet is transformed into an act of omission.

> To discount media that are available to all but that garner small audiences because consumers prefer other content would understate the level of diversity from the perspective of any coherent public policy theory of the *purpose* of promoting diversity.[55]

In fact, our recommendation was quite the opposite.[56] We do not propose to discount these sources, we propose to count them in exactly the way sound economic analysis counts them: according to their market share.

Under the media owner definition of the public interest, there is little for the Commission to do. To the extent that the broadcast networks accept that the Commission

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[53] Owen, p. 10; Fox et. al., pp. 27, 47, 49, 57, 58, 64; Sinclair, p. 18-20, 46; Gannett, p., 18; Belo, p., 25; Media General, p. 4; Clear Channel, p. 8.
[54] Consumer Commeters, II.D.
[55] Owen, p. 8.

might continue to analyze media markets, the recommended approach is a neutered antitrust standard:

- Market structure analysis is encouraged, but its most basic ingredient – market shares – is never allowed to enter the calculation.
- Differences between media in the ability to deliver messages are ignored, because an idea is an idea, no matter where or how it is expressed. As a result, product market definition is banned.
- Geographic market definition is ridiculed; local markets disappear in a sea of national networks and Web sites.

This is the reasoning by which the network broadcasters arrive at the recommendation that the FCC should equate the Milwaukee Curling Society Web site to the Journal Broadcasting Company in Milwaukee, which owns the number one TV station, the number one newspaper, and two of the top radio stations in the market.

The absurdity of the neutered market structure analysis becomes clear in the role that the Internet plays in the voice count example provided for Milwaukee. One hundred of the 170 voices are Internet Web sites that "do or could plausibly offer content specific to the Milwaukee DMA." [57] A cursory glance at the Internet websites would no doubt show that the content was not "specific" to Milwaukee. Over half of the Web sites on the list are, in fact, the web sites of local media outlets. Being the same owners, they bring little new to the table. Virtually all of the remainder is highly specialized, with little capacity or inclination to produce general news and information. None have the ability to announce events with the broad impact of the electronic media.

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[56] Consumer Commenters, VI.A, VIII, XIV.

[57] Owen, Bruce and Kent W. Mikkelsen, "Counting Outlets and Owners in Milwaukee: An Illustrative Example," Economic Study F.

This approach to the analysis of the market structure in the marketplace of ideas certainly suits the interests of the owners of the high-rated prime time show, but it is simply not a realistic view of the role and function of broadcast TV in contemporary society.

One need only observe the behaviors of political candidates to recognize that all media outlets are not equal in democratic discourse.[58] Political candidates spend huge sums of resources on TV advertising, which consumes the vast majority of their campaign budgets. To underscore the importance of broadcast television in this political equation and the degree to which media are ***not substitutable***, we suggest the following challenge: ask politicians on both sides of the aisle in the next campaign cycle to forego advertising on broadcast television and instead spend their campaign dollars advertising on alternative sources, such as the Internet, or radio. We believe their likely horror at this suggestion speaks volumes.

E. THE PUBLIC INTEREST STANDARD WAS EMBRACED BY THE 1996 ACT

As we have already iterated in our previous comments, industry commenters analysis of §202 (h) overstates the burden the Commission must overcome to retain the rules, and their revisionist history of the public interest standard's history is equally misguided.

While some of the structural limits on media ownership are being reviewed at the direction of the Appeals Court, others are being evaluated as part of a biennial review process mandated by the Telecommunications Act of 1996.[59] In fact, all of the rules ultimately must be reviewed under that standard. The Commission is to "determine whether any of such rules are necessary in the public interest as the result of competition…." The agency's charge is to

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[58] Consumer Commenters, III.B.
[59] The ongoing proceedings include *Cross-Ownership of Broadcast Stations and Newspapers*, MM Docket No. 01-235; *Newspaper/Radio Cross Ownership Waiver Policy*, MM No. 98-82; *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, MM Docket No. 01-317.

evaluate if the rules are still needed if evidence of new competition emerges, in which case it must "repeal or modify any regulation it determines to be no longer in the public interest."[60]

The public interest still prevails in the 1996 Act. The Act does not embrace competition for competition's sake, nor did it change the definition of the public interest when it comes to media ownership policy. The public interest is the master that competition must serve and the FCC must find that competition is sufficient to promote the public interest before it repeals or modifies these rules.

As the Commission engages in its review of the broadcast ownership rules, we note for the record that under any construction of the biennial standard of review set forth in Section 202(h), the Commission now has more than sufficient empirical evidence to justify keeping the current rules in place.

While these and other comments fully meet the standard enunciated in Fox Television Stations, Inc. v. Federal Communications Commission (D.C. Cir., No. 00-1222, Feb. 19, 2002) (hereafter "Fox"), and provide ample basis for retaining the current ownership regime, we do wish to make plain that Fox erroneously establishes a far more stringent legal test than actually contemplated by Congress in enacting Section 202(h). We will, at the proper time, argue to the Courts of Appeals, sitting en banc if necessary, and to the U.S. Supreme Court, that the Fox case was wrongly decided.

First, Fox improperly treated the 2000 the Biennial Review Report as reviewable agency action. Second, Fox treated Section 202(h) as creating a different review standard than would otherwise be required under the Administrative Procedure Act (APA) for review

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[60] 1996 Acts. 202(h).

of an agency decision not to repeal a rule. Third, the Fox decision ignored the clearly defined framework of the statute in vacating the Commission's cable-broadcast cross-ownership rule.

The only remedy contemplated by Section 202(h) upon a finding that a regulation no longer serves the public interest is a rulemaking to determine what rule, if any, would be appropriate. The net effect of the Fox decision is to undermine the public's rights under the APA by denying the opportunity to create a record to justify a particular rule in response to a targeted Notice of Proposed Rulemaking.

The D.C. Circuit Court in Fox found that protecting diversity and safeguarding competition can be the proper basis for promulgating and preserving media ownership rules, but insisted that the Commission must present better evidence for those rules if the burden of §202(h) is to be met. We welcome the opportunity to provide a solid factual basis for the FCC's media ownership rules, and believe that the record currently before the Commission rises to meet that challenge.

We agree with the FCC's interpretation of the statute set forth in its *Petition for Rehearing or Rehearing En Banc* in Fox: the D.C. Circuit court has misapplied §202(h), creating a counter-intuitive and nonsensical situation where there is a higher standard to retain an existing rule than to adopt it in the first instance. As the FCC correctly notes, this misguided interpretation would impose a "substantial and continuing burden on the agency that threatens administrative paralysis. This result is not compelled by the language of the statute or by its legislative history." *Id.* at 2.

The National Association of Broadcasters' *Petition for Rehearing or Rehearing En Banc* in Fox makes this point concisely: "In addition to departing from the statutory text and prior judicial decision, the panel's suggestion that a higher standard applies under §202(h) [than under §201(b), establishing the commission's broad rulemaking authority,] makes little sense as a matter of policy. It is illogical to impute to Congress an intent to authorize the Commission to adopt new rules under one standard but then to require that the rules be repealed or modified two years later if a higher standard—expressed in language *identical* to that of the first standard—is not met."

Furthermore, the Supreme Court, in FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) (hereafter "NCCB"), stated that the Commission is authorized to promulgate "such rules and regulations, . . . not inconsistent with law, as may be necessary to carry out the provisions of [the Act]," §303(r), and held that this statutory grant of authority confers on the Commission broad discretion, notwithstanding the word "necessary," to implement its view of the public interest standard "so long as that view is based on consideration of permissible factors and is otherwise reasonable." NCCB at 793.

In effect, the D.C. Circuit in Fox has by judicial fiat written a deconstructive weapon into the statute which Congress never intended. The biennial review provision is a directive to the FCC that it should regularly revisit the rules in place, and based on the comments it receives, if it makes the determination that a rule is no longer serving the public interest, should then commence a rulemaking to determine the proper remedy.

Instead, the D.C. Circuit has construed §202(h) as supplanting the ordinary APA rulemaking provisions, which give the public notice and an opportunity to comment. This has the perverse effect of forcing proponents of a rule to engage in a continual process of justifying every rule on the agency's books, rather than allowing commenters to focus on a particular rule that the agency thinks is suspect.

F. CONCLUSION

As the framers of the Constitution so strongly believed, free expression and the free exchange of ideas form the cornerstone of democracy. Relaxation or repeal of the current media ownership rules would undermine the civic discourse and the goal of an active and informed citizenry that our founding fathers claimed was essential to a democratic society.

In this proceeding, the media industry commenters disregard this principle, and instead argue that the current marketplace needs only very narrow antitrust protection. But the media owners have simply not made their case. In their zeal to replace the longstanding public interest standard in communications law with an overly narrow, economically flimsy concept, they provide a superficial analysis that is inconsistent with market realities, generally accepted antitrust principles, and traditional Constitutional and statutory goals. If the Commission is to meet the Court's demand for empirically-based, rational rules that promote the public interest, it must recognize the differing roles, impacts, and functions of the various media in our society. To ignore these differences would be to ignore the public interest. Based on all of the empirical data presented by both media companies and other commenters, it is clear that preservation of the Commissions' media ownership and cross-ownership rules is absolutely essential to promote competition in the marketplace of ideas, and critical to the preservation of our nation's democratic processes.

Respectfully submitted,

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