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ABRACADABRA! HOCUS-POCUS!
MAKING MEDIA MARKET POWER DISAPPEAR WITH THE FCC'S DIVERSITY INDEX

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I. INTRODUCTION AND SUMMARY

The Federal Communications Commission's Diversity Index plays the central role in determining where to allow newspaper-broadcast cross-ownership mergers to take place.[1] In a lengthy discussion, the Federal Communications Commission (FCC) describes how it used the index to identify markets that would be "at risk" from excessive loss of diversity if such a merger were to take place.[2]

While we have conducted and supported market structure analysis in this rulemaking,[3] we find that the FCC's Diversity Index is fundamentally flawed. The Diversity Index is a grotesque distortion of the market structure analysis routinely conducted by economists and produces results that are absurd on their face. As a result, the FCC's new rules would allow the overwhelming majority of media markets in America to become extremely concentrated. In Washington, the magician claims that media markets are competitive, but the reality across America would be media giants dominating local markets.

A. Illogical Results

In this paper we explain how the FCC missed the mark with the Diversity Index, examining four of the markets the FCC used as examples in detail. The following are some of the results that the FCC's Diversity Index produces:

- In the New York City area, Shop at Home Incorporated TV, the Dutchess Community College TV and Multicultural Radio Broadcasting Inc. (with three radio stations) all have more weight than the New York Times.
- Again in New York, Univision TV has more weight than ABC Inc., NBC/GE, Viacom or News Corp., even when Viacom's and News Corp.'s radio stations and newspapers are included. Univision is three times as important as the New York Times.
- In Birmingham, AL, the most important news source is the Internet delivered by telephone companies.

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[1] Federal Communications Commission, "Report and Order," In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, MB Docket No. 02-277, MM Dockets 02-235, 01-317, 00-244 July 2, 2003, (hereafter, Order), at para. 391, states that "In order to provide our media ownership framework with an empirical footing, we developed a method for analyzing and measuring the availability of outlets that contribute to viewpoint diversity in local markets."

[2] Order, para. 442.

[3] We have presented market structure analysis throughout this proceeding (see for examples Consumer Federation of America, Consumers Union, Center for Digital Democracy and Media Access Project, "Comments of the Consumer Federation of America, et al," *In the Matter of Cross Ownership of Broadcast Stations and Newspaper; Newspaper/Radio Cross-Ownership Waiver Policy* (MM Docket Nos. 01-235, 96-197), December 4, 2001 (hereafter First Initial Comments], pp. 96-98.

- In Altoona, PA the Fox affiliate, Peak Media, has twice the weight of the NBC and CBS affiliates, even though each of the latter has over four times the audience.
- In Charlottesville, VA, Virginia educational television has more weight than the Daily Progress, the only daily newspaper in town.

We also examine the impact of the numerous flaws in the Diversity Index on the analysis and policy recommendations for a set of Designated Market Areas (DMAs) that include the state capitols. These are extremely important local markets for purposes of civic discourse. We find a pervasive pattern of illogical and unrealistic results. Among the most notable we find the following for mid sized markets.

- In the Tallahassee DMA, the Thomasville Tribune with daily circulation just under 10,000 per day is given equal weight with the Tallahassee Democrat, whose more than 50,000 daily circulation and twice as much weight as the local CBS affiliate, which has over 50,000 viewers a day, and 59 percent of the TV market.
- In the Lexington KY DMA, the Corbin Times Tribune with average daily circulation of 5,000 is equal to the Lexington Herald Leaser with avg. daily circulation of 115,000 and 1.3 times as much weight as the CBS duopoly, an average of 66,000 viewers. A top four TV station with 29,000 daily viewers cannot merge with a top four TV station with 17,000 daily viewers, but a TV duopoly with 66,000 avg. daily viewers can merge with a newspaper with 115,000 readers.

If the Diversity Index "informed" the judgment of the Commissioners who voted for it, then they were misinformed about the reality of American media markets.[4]

B. Flawed Analysis and Assumptions

The Commission arrived at these absurd results by making a series of faulty assumptions using a number of factually incorrect conclusions. Above all, the FCC has decided to ignore the audience of the individual outlets that will actually merge and swap. In other words, the FCC's Diversity Index never considers the actual market share of these media outlets in the market.

The FCC attempts to put a façade of market structure analysis on the Diversity Index by assessing the importance of each medium, rather than each firm. That is, while it treats all TV stations equally, no matter how many people view them, it did assign different weight to TV as a medium than newspapers, radio or the Internet. All TV stations are treated equally because they use the same technology to broadcast.[5]

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[4] The FCC asserts (para. 433) that "Based on an analysis of a large sample of markets of various sizes, the Diversity Index suggests that the vast majority of local media markets are healthy, well-functioning and diverse."
[5] Order, para. 422, "We believe that the overall impact of a medium is substantially determined by the physical attributes of its distribution technology, along with user preferences."

To the extent that cross-media analysis is necessary to determine what different types of media are included and how much they should count, a weighting scheme may have made sense. However, the FCC got the weighting completely wrong. It underweights TV and daily newspapers and vastly overweights weekly newspapers, radio and the Internet, giving them more than twice the weight they deserve. In fact, its own experts and analysis, not to mention the evidentiary record, demonstrated that the Internet should not even be included as a local news source.

C. CONTRADICTORY ASSUMPTIONS AND STATEMENTS

The Order is riddled with contradictory assumptions and incorrect conclusions.

The FCC justifies getting rid of the ban on cross ownership on the basis of a discussion of the market share, or the "strength," or "influence" of individual outlets. Yet, when it comes to writing the new rule, it declares that market share, strength and influence do not matter.

The FCC presents an extensive analysis of the coverage or reach of TV and radio stations, but presents no such analysis of newspapers. Worse still, it concludes that signals that cannot be easily received for purposes of the TV ownership limits should be discounted. It concludes that radio signals must be analyzed in small markets because of their limited strength for purposes of the radio ownership limits. However, it ignores or forgets these conclusions when it comes to the cross-ownership rules. In other words, voices that cannot easily be heard and therefore are not counted for the purposes of one set of rules suddenly can be heard and are then counted for the purposes of another set of rules. The only consistency in the FCC's analysis in this instance is that it gives the largest media companies exactly what they wanted in both cases.

The Order presents a vigorous defense of and upholds the existing ban on mergers between dominant TV stations (in local markets) and dominant TV networks (in the national market). It never conducts a similar discussion of the threat of mergers between dominant TV stations and dominant newspapers in local markets, even though every one of its reasons for the within-media ban logically should apply to cross media mergers.

The FCC defends mergers in its competition analysis, claiming that the production of news programming is difficult and expensive. Then it claims it does not have to consider market shares in its diversity analysis because the production of news programming is easy and cheap.

The FCC claims that the various media are not substitutes for purposes of advertising, but they are substitutes for the purposes of usage. The evidence before the Commission does show that the media are not sufficiently substitutable to be considered one market for advertising purposes, but the extent of substitutability between the media for usage is actually lower than it is for advertising. There is less evidence to support treating usage as one big market than there is to support treating advertising as one big market.

D. Outline of the Report

Every one of the erroneous assumptions or contradicted arguments has the effect of understating the concentration of local media markets for purposes of the cross ownership analysis and therefore permitting many more mergers than are in the public interest. In order to demonstrate how misguided the FCC approach is, this paper compares traditional market analysis and the FCC's magic act.

First we describe the flaws in the reasoning underlying the Diversity Index and the inconsistencies in the FCC's statements that underlie the flaws.

We also identify some of the absurd results that the flawed reasoning underlying the Diversity Index produces in a subset of DMAs, U.S. state capitals. We also demonstrate that in a real world context, rules based on the Diversity Index will result in extremely concentrated markets that violate traditional measures of concentration through merger.

Finally, to leave no doubt about the distortion in market analysis that results from the FCC's Diversity Index, we apply it to the facts of the Microsoft case. In that case, both the District Court and the D.C. Circuit Court of Appeals found that Microsoft had monopoly power in the PC operating system market under antitrust laws.[6] Yet, under the FCC Diversity Index, the computer market would not even be considered moderately concentrated. In other words, the FCC's sleight of hand makes the monopoly disappear.

II. THE MAJOR FLAWS IN THE DIVERSITY INDEX STEM FROM CONTRADICTORY AND INCORRECT ANALYSES

The Media Ownership Order is riddled with contradictions, misstatements of empirical fact and unrealistic or unsupported assumptions about market conditions. The inconsistencies occur within the discussions of each rule, as well as between the arguments presented for each of the rules. These inconsistencies and flaws result in an analytic framework that produces absurd results.

Market shares play the central role in market structure analysis.[7] The FCC decision to abandon this fundamental tenet of sound economic analysis has no basis in the professional

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[6] Consumer Federation, et al, First Initial Comments, made this very point, p. 103, noting that

> For economic analysis eyeballs are what should be counted, not stations. In other markets the number of competitors is not the central issue, it is their market share that matters. Recently, Microsoft asserted that there were seven different operating systems in the marketplace with over twenty thousand applications available and at least three different computing environments (handhelds, PCs and the Internet) and therefore Microsoft could not possible be a monopoly. Even a conservative appeals court resoundingly rejected that argument.

[7] Shepherd, William G., *The Economics of Industrial Organization* (Englewood Cliffs, NJ: Prentice Hall, 1985); Scherer, F. Michael and David Ross, *Industrial Market Structure and Economic Performance* (New York:

literature. Its efforts to justify this radical break with common practices are feeble at best and flat out wrong at worst. It is also inconsistent with much of the analysis in the order.

A. THE SIZE OF THE AUDIENCE MATTERS A GREAT DEAL

The most blatant contradiction underlying the Diversity Index occurs within the discussion of the cross ownership rule. The FCC justifies getting rid of the ban on cross ownership on the basis of a discussion of the market share and "influence" of the various media. Yet, when it comes to writing the new rule, it declares that market share and influence do not matter.

In a paragraph labeled *Benefits of Common-Ownership* the FCC claims that cross ownership yields diversity benefits, stating the following:

> A recent study, for example, determined that, on average "grandfathered" newspaper-owned television stations, during earlier news day parts, led the market and delivered 43% more audience share than the second ranked station in the market and 193% more audience than the third ranked station in the market.[8]

In a paragraph labeled *Harm to Diversity Caused by the Rule*, the Commission claims that the newspaper cross ownership ban harmed diversity. It again made direct reference to market shares:

> Newspapers and local over-the-air television broadcasters alike have suffered audience declines in recent years. In the broadcast area, commenters have reported declines in the ratings of existing outlets as more media enter the marketplace. For example, the number of television stations in the Miami-Ft. Lauderdale and the adjacent West Palm Beach markets has increased from 10 to 25 from 1975 to 2000. As more stations have begun to program local news, however, the ratings for individual stations have dropped. Broadcast groups owned by GE, Disney, Gannett, Hearst-Argyle and Belo have lost 10 to 15% of their aggregate audience in the past five years. Local over-the-air broadcast TV's share of total television advertising dollars, which includes the new broadcast networks, new cable networks and syndication providers, has fallen from 56% in 1975 to 44% in 2000. E.W. Scripps Company argues that consolidation among established media outlets and the proliferation of new media outlets since 1975 requires broadcasters and newspapers to grow, consolidate, and achieve critical scale in their local markets to survive and effectively serve the public.[9]

Houghton Mifflin Company, 1990).Viscusi, W. Kip, John M. Vernon, and Joseph E. Harrington, Jr., *Economics of Regulation and Antitrust* (Cambridge: MIT Press, 2000).

[8] Order, para. 357.

[9] Order, para. 359.

It is not the number of stations that matters most, but the loss of market share or audience that is the driving force in the argument.

> Given the decline in newspaper readership and broadcast viewership/listenership, both newspaper and broadcast outlets may find that the efficiencies to be realized from common ownership will have a positive impact on their ability to provide news and coverage of local issues. We must consider the impact of our rules on the strength of media outlets, particularly those that are primary sources of local news and information, as well as on the number of independently owned outlets.[10]

How does one measure the strength of media outlets, but by their audience size? The FCC goes on to assert that "Given the growth in available media outlets, the influence of any single viewpoint source is sharply attenuated."[11] How does one measure the influence of an outlet, but by its audience size? The FCC presents no measure of influence or evidence of its "sharp attenuation" other than market share and audience data.

Having relied extensively on market shares in declaring that the blanket prohibition on cross-media mergers cannot be sustained, the FCC then refuses to incorporate the audience of outlets into the Diversity Index. Instead, the FCC assumes, contrary to fact, that all outlets within each medium are equal in size.

> We have chosen the availability measure, which is implemented by counting the number of independent outlets available for a particular medium and assuming that all outlets within a medium have equal market shares.[12]

This counterfactual assumption is what opens the door to the absurd results. The FCC assumes, incorrectly, that each TV station has the same strength and influence as every other TV station in the market. It assumes that each newspaper has the same strength and influence as every other newspaper in the market. It assumes that each radio station has the same influence and strength as every other radio station in the market.

B. INCONSISTENCIES IN THE COUNTING OF OUTLETS

The equal market shares assumption conflicts with another set of analyses in the order. In the discussion of both the television and radio ownership limits, the Commission presents an extensive discussion of coverage or reach of the outlets. This discussion leads to important decisions in both cases. For example, the Commission concludes that the weaker signal and therefore lesser coverage of UHF stations require them to be discounted.[13] It also concludes that the smaller Arbitron areas are more appropriate for the radio analysis.[14]

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[10] Order, para 360.
[11] Order, para. 366.
[12] Order, para. 420.
[13] Order,

In the cross ownership rule, it engages in no such analysis. The FCC does not analyze the coverage of newspapers and it forgets about its coverage analysis for TV and radio.[15] UHF stations are not discounted and all radio stations are assumed to cover the entire DMA.[16]

> because our assumption regarding DMA-wide carriage is not universally true, and in recognition of the signal propagation limitations of UHF signals, we adopt herein a waiver standard that will permit common ownership of stations where a waiver applicant can show that the stations have no Grade B overlap and that the stations are not carried by any MVPD to the same geographic area. (187).
>
> As discussed in our national television ownership rule section, UHF stations reach fewer households than VHF stations because of UHF stations' weaker broadcast signals. Reduced audience reach diminishes UHF stations' impact on diversity and competition in local markets. Accordingly, we will consider whether one or both stations sought to be merged are UHF stations. (230)

[14] Order,

> We understand that geographic areas are less accurate than contours in measuring the signal reach of individual stations. But radio stations serve people, not land; and while radio signals may overlap over uninhabited land or even water, people in the United States tend to be clustered around specific population centers. The fact that radio signals are not congruent with geographic boundaries does not undermine the logic of relying on geographic areas to define radio markets.
>
> As explained below, we will rely on the Arbitron Metro Survey Area (Arbitron Metro) as the presumptive market. We also establish a methodology for counting the number of radio stations that participate in a radio market. We initiate below a new rulemaking proceeding to define radio markets for areas of the country not located in an Arbitron Metro, and we adopt a modified contour-overlap approach to ensure the orderly processing of radio station applications pending completion of that rulemaking proceeding. (273-274)

[15] Consumer Federation of America, Consumers Union, Center for Digital Democracy and Media Access Project In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, MB Docket No. 02-277, MM Dockets 02-235, 01=317, 00-244, January 2, 2003 (hereafter Second Initial Comments), noted that the coverage of newspapers is much smaller than the DMA.

[16] Order,

> Our cable television signal carriage rules generally permit a television broadcast station within a DMA to obtain cable carriage throughout the DMA, and our DBS signal carriage rules generally ensure that all television stations within a DMA are treated the same with respect to satellite retransmission. For this reason, we assume that all television broadcast stations in a DMA are available throughout the DMA. As explained above, each broadcast television station receives an equal share of the broadcast television weight.
>
> We combine the television stations in each DMA with the radio stations in the Arbitron radio metro with which the DMA is paired. There are 287 Arbitron radio metros in the country. Each one is smaller than the DMA within which it lies. Arbitron radio metros do not cover the entire country. More sparsely populated areas are not included in radio metros; approximately one-half of radio stations are not in a metro market. As explained below in the cross-media limits section of this *Order*, we use the Diversity Index to help us identify markets that are "at risk" for excessive concentration in the "viewpoint diversity market." Once those markets have been identified, and cross-media limits imposed, the actual implementation of the cross-media diversity limits will not require information on a local radio market, only on the

It is blatantly contradictory to assume that a signal that does not reach a viewer/listener for purposes of competition analysis and the media specific ownership rules somehow magically reaches them for purposes of the diversity analysis under the cross-ownership rule.

C. CONTRADICTIONS IN THE ECONOMIC ANALYSIS

The FCC tries to justify abandoning market shares with an economic argument. The audience shares of the dominant mass media do not matter, we are told, because entry into the market is easy and the production of news can be expanded at little marginal cost. This claim is simply wrong, contradicted by the evidence before the Commission and even by the Commission's own words.

The Order states that "This point has particular force when dealing with competition in the marketplace of ideas because media outlets can rapidly expand their distribution of content (including local news and current affairs) at very low marginal cost." Yet, in the discussion of the need to relax the duopoly rule, the Commission reaches the exact opposite conclusion, stating, "Moreover, rising news production costs and other factors may cause broadcasters to turn to less costly programming options."[17]

A look at the empirical facts about trends in the industry before the Commission reinforces this view. There has been almost no entry into the business of publishing daily newspapers, the mainstay of print journalism, in decades. The record shows that the number of papers and owners has been shrinking, not expanding.[18] Entry into the TV business has taken place. The number of full power stations has increased. However, the FCC acknowledges that the important public policy goal it to encourage entry by new owners, since owners control the electronic voices of the outlets. The number of owners has declined sharply. Moreover, the number of stations providing news has declined slightly. The claim that ownership entry is easy at the level of long-term competition (i.e. sinking new capital into the market) is not supported by the record.

The FCC might claim that it is addressing the marginal cost of expanding news production for stations already doing news, which it deems to be low. At least for these stations the marginal cost of expanding output, although not low, would not involve starting a whole news department. If this were the argument on which the FCC was relying, it should have counted only broadcast stations that currently provide news in its index and not those stations that do not. It did not make this distinction. We have pointed out in our filings at the Commission that market structure analysis based on a news voice count yields a result similar to market structure analysis based on market shares.[19] The reason is simply that the stations

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television market (DMA) within which the radio stations are located that are part of a proposed merger. (429-430).

[17] Order, para. 167.

[18] Consumer Federation of America, et al., First Initial Comments, p.77.

[19] Mark Cooper, Ex Parte presentation in Docket No. 02-277, March 24, 2003Principles Of Market Structure Analysis For Media Based On Economic Fundamentals And The Unique Importance Of Civic Discourse

with small market shares do not contribute much to the total Hirshman Herfindahl Index (HHI, which is the FCC's preferred measure of concentration) they are also less likely to do news.

However, the actual language used by the FCC to describe the cost of news production will not allow it to get away with this dodge. There is no doubt that the difficulty and expense of news production stems from its variable costs, not its fixed costs.

> The study finds that although equipment prices are dropping rapidly, rising demand for qualified personnel is increasing the amount stations must spend on salary and benefits. Smith Geiger concludes that a startup news operation would not "break even" until year 13 in a small market and year 14 in a mid-sized market. The study concludes that in this climate, if a local station were to cease news operations, "it is difficult to imagine another entity stepping in to take its place." Smith Geiger notes that although news operations earn a profit, they require the parent company or station to carry a significant cost load and deal with other intangibles such as personnel management, liability, and community goodwill. Smith Geiger concludes that this may lead local stations to exit the local news business in favor of lower cost alternatives, such as acquired programming, which it estimates will earn a higher profit in both small and mid-sized markets. Smith Geiger ultimately concludes that "the continuing profitability of a local television news operation is now highly uncertain." Many commenters agree. NAB submitted an additional study which compares the average cost of producing news by affiliates of "Big Four" networks (*i.e.*, ABC, CBS, Fox, and NBC) in markets of various sizes. These data show that the average news expense of affiliate stations has increased by as much as 104% between 1993 and 2001.[20]

The FCC's economic analysis is also inconsistent in its discussion of substitutability. The FCC claims that patterns of usage also support the decision not to rely on market shares.[21] It does so on the basis of claims about the substitutions between media. This claim is contradicted by its own data and analysis in other parts of the order.

In each of the competition analyses the evidence on competition in advertising media markets indicates that the different are separate products. In contrast, the FCC claims that the evidence on the use of media for diversity purposes in the marketplace of ideas indicates they are one large market. The econometric evidence in the record supports the opposite

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Ex Parte presentation in Docket No. 02-277, May 21, 2003, Mark N. Cooper, Promoting The Public Interest Through Media Ownership Limits: A Critique Of The FCC's Draft Order Based On Rigorous Market Structure Analysis And First Amendment Principles, May 2003

[20] Order, para. 167.

[21] Order, para, 399, cites Media Ownership Working Group Study No. 3 to the effect that "the record contains evidence that most people can and do substitute among different media for news and information," Para. 423, claims that current usage is not a predictor of future usage.

conclusion. Substitutability between media for advertising purposes, although not great, is much larger than the substitutability of the media for usage purposes.[22]

D. INCONSISTENCIES ACROSS POLICY ANALYSES

The failure to conduct a rational market structure analysis for purposes of the cross ownership rule draws the FCC into a broad range of contradictions with the other rules at the level of policy. Based on sound market structure analysis of the local and national television markets, the FCC concludes that the dominant firms – the top four local stations and the four major national networks – should not be allowed to merge with each other. The FCC identifies a host of dangers in such mergers and little potential public interest benefit from them.

According to the FCC, such mergers would

- increase economic market power.[23]
- create dominant firms that are much larger than their nearest rivals,[24]

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[22] CFA, Second Initial Comments.

[23] Order,

> To the contrary, such mergers are likely to create or enhance market power or to facilitate its exercise. (197)
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> So, for example, if Fox merged with GE and Disney merged with Viacom, the HHI would increase by almost 767 points. Then, if these two companies merged with each other, the HHI would increase by 2,246 points. Either of these changes in the HHI would be scrutinized under DOJ Merger Guidelines. Since these networks own television stations, the change in the HHI would actually be higher than in these examples. (604)

[24] Order,

> Moreover, in local markets, there is a general separation between the audience shares of the top four-ranked stations and the audience shares of other stations in the market….
>
> Thus, although the audience share rank of the top four-ranked stations is subject to change and the top four sometimes swap positions with each other, a cushion of audience share percentage points separates the top four and the remaining stations, providing some stability among the top four-ranked firms in the market. Nationally, the Big Four networks each garner a season to date prime time audience share of between ten and 13 percent, while the fifth and sixth ranked networks each earn a four percent share.[24] While there is variation in audience shares within local markets, these national audience statistics are generally reflected in the local market station rankings. The gap between the fourth-ranked national network and the fifth-ranked national network represents a 60% drop in audience share (from a ten share to a four share), a significant breakpoint upon which we base our rule. (195)
>
> The recent growth of cable and DBS does not alter our conclusion. Despite that growth, the top-four networks continue to provide the greatest reach of any medium of mass communications. The top-four networks attract much larger prime-time audiences in relation to advertisement-supported cable networks. Broadcasting's percentage share of advertising revenue continues to exceed its percentage share of viewing. Moreover, despite a decrease in

- who could distort the market for inputs available to other distributors of content,[25] and
- diminish the incentive to compete.[26]

Furthermore, there is likely to be little public interest benefit from dominant firm mergers because the merging parties are likely to be healthy and already engaged in the production of news and information products. [27]

> audience share, the top-four networks continue to command increases in advertising rates, a further testament to the strength of broadcasting television as an advertising medium. (608)

[25] Order,

> The vertically integrated networks would limit competitors' access to programming by denying remaining networks access to the production output of the merged network. In addition the merged firm can raise the price paid by those competitors for programming created and produced by the merged network's program production assets. (605)
>
> A top-four network merger would give rise to competitive concerns that the merged firm would restrict the consumption of programming by using its market power to limit competitors' access to sources of programming. In addition, the merged network could use its market power to control the price it pays for programming or to raise competitors' costs of acquiring programming. In concentrated markets, viewers have access to fewer programming choices if the number of national, independent purchasers of programming decreases due to limited access to programming and higher programming costs. (602)

[26] Order

> Permitting combinations among the top four would reduce incentives to improve programming that appeals to mass audiences. The strongest rival to a top four-ranked station is another top four-ranked station… When formerly strong rivals merge, they have incentives to coordinate their programming to minimize competition between the merged stations. Such mergers harm viewers. (200)
>
> There we conclude that Big Four networks continue to comprise a "strategic group" within the national television advertising market. That is due largely to those networks' continued ability to attract mass audiences. It is this network programming that explains a significant portion of continued market leadership of the top four local stations in virtually all local markets. Thus the continued need for the Dual Network rule to protect competition at the network level also supports our decision to separate ownership of local stations carrying the programming of Big Four networks. (196)
>
> The top-four networks compete largely among themselves for advertisers that seek to reach large, national, mass audiences – a significant portion of the national advertising market that provides the top-four networks with a significant portion of their profits. We therefore conclude that a merger of two or more of the top-four networks would substantially lessen competition in the national advertising market, especially within the strategic group, with the concomitant harm to viewers described above. (608)

[27] Order,

> In contrast, no commenter discussed the efficiencies and public interest benefits associated with a merger between two financially strong stations. Nothing in the record indicates that such mergers will produce efficiencies that translate into benefits for the viewing public. (197).

Each and every one of these reasons given to ban mergers between dominant entities in TV markets is a valid reason to ban a merger between dominant TV stations and newspapers in the local media market. A merger between a dominant TV station and a dominant newspaper results in an resulting entity that dwarfs its nearest competitors in terms of control of news production.[28] The dominant firm would control a large percentage of the reporters in the market. It would also have a sufficiently large cross-media presence to diminish the antagonism between print and video media, thereby reducing competition. It would have a diminished incentive to compete (especially across media types), an increased incentive to withhold product, and can leverage its market power in cross promotion. The public interest benefit is likely to be small because these are the most profitable entities in their local market and not likely to add product that promotes the public interest. Indeed, the synergies sought are likely to diminish the total resources available for news production.

E. BOGUS LEGAL ARGUMENTS AGAINST SENSIBLE MARKET STRUCTURE ANALYSIS

The FCC offers two general legal arguments as to why it cannot or should not use market shares in its construction of a Diversity Index. These simply do not withstand scrutiny.

The FCC declares that basing the Diversity Index on market shares or audiences would run afoul of constitutional prohibitions on content regulation.

> If we were to adopt a usage measure designed to reflect our concern with local news and current affairs, we would need information on viewing/listening/reading of local news and current affairs material. To implement this procedure, it would be necessary first to determine which programming constituted news and current affairs. We believe that this type of content analysis would present both legal/Constitutional and data collection problems.[29]

The claim is completely unfounded and contradicted by extensive analysis conducted throughout the order.

First, it recognizes its constitutional authority to deal with types of programs in the case of children's programming.[30] In that instance, the Congress is prescribing a quantity of

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> One reason that combinations involving top four-ranked stations are less likely to yield public interest benefits such as new or expanded local news programming is that such stations generally are already originating local news. (198)
>
> As noted in the national TV ownership rule section, we conclude that affiliates play an important role in assuring that the needs and tastes of local viewers are served. Elimination of the dual network rule would harm localism by providing the top-four networks with increased economic leverage over their affiliates, thereby diminishing the ability of the affiliates to serve their communities. (611)

[28] Cooper, Ex parte.
[29] Order, para., 420.
[30] Order, para., 183.

programming to be aired. If such a policy passes constitutional muster, then merely counting the quantity of programming stations choose to add is no threat to the First Amendment.

Moreover, the FCC declares at the beginning of the order that news and information should be the focus of its analysis.[31] In the cross ownership discussion it cites studies of local news and information shows that it claims demonstrate that removing the ban will promote the public interest.[32] In the discussion of the duopoly rule it presents extensive discussions of the quality and content of local news an information programming.[33] The does a lengthy analysis of merger impacts based on the simple question of whether a station does or does not originate local news shows. [34]

The extensiveness of the analysis of local news programming in which the FCC engages for purposes of the duopoly rule shows at least one simple distinction that would be a non-infringing implementation. In justifying the ban on mergers between top four stations in a market, the FCC relies on the fact that 85% of the top four firms originate local news.[35] In contrast, only 19% of the remainder of the stations broadcast news. It concludes that banning top four mergers and allowing other mergers has a high probability of promoting the public interest since this reduces the chances of "losing" an independent source of news.

When it comes to the definitions of the Diversity Index, however, it suddenly and incorrectly claims that it cannot identify local news programming without straying into content regulation, which is frowned upon by First Amendment jurisprudence. How can it discover at the end of the order that all this analysis, upon which it relied in determining local impact of various media ownership rules, is suddenly constitutionally suspect for establishing a new set of rules?

The FCC also claims it can, or should, ignore the size of the audience because the purpose of diversity policy is only to prevent the complete suppression of ideas. If an idea can get out into the public through any means of mass communications, diversity has been served, in the FCC view.[36] We disagree with this view of the public policy purpose of the Communications Act. The FCC has given up all pretense of ensuring a broad opportunity for ideas to circulate and will allow owners of the electronic media outlets to amass huge audiences by buying dominant newspapers and leading TV stations. The FCC has abandoned

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[31] Order, para., 32, 78.
[32] Order, para., 343, 344,
[33] Order paras., 157-164.
[34] Order, para. 198.
[35] Order, para. 198.
[36] Order, para. 420, "The decision of whether to do weighting turns on whether our focus is on the availability of outlets as a measure of potential voices or whether it is on usage (*i.e.*, which outlets are currently being used by consumers for news and information). We have chosen the availability measure, which is implemented by counting the number of independent outlets available for a particular medium and assuming that all outlets within a medium have equal shares. In the context of evaluating viewpoint diversity, this approach reflects a measure of the likelihood that some particular viewpoint might be censored or foreclosed, *i.e.*, blocked from transmission to the public."

the principle that First Amendment policy should promote "the widest possible dissemination of information from diverse and antagonistic sources."[37]

Given the prominent role that market shares play in the analysis of industrial organization, the clear First Amendment jurisprudence that rejects the FCC's extraordinarily narrow vision of diversity, and the weak and contradictory economic arguments within the Order, the FCC has clearly erred in its decision to ignore audience size.

III. MEDIA WEIGHTS

As noted, the FCC can insist that if it is to offer a coherent analytic framework, it must combine outlets and audiences of different media types in some manner. It must find a way to weight the various media. Unfortunately, the FCC got the media weights wrong. The agency fails to ask the proper questions on its survey instrument and chose not to conduct a second survey.[38] It then combines questions that distort the weights. It cites other surveys to support some of its analytic conclusions, but does not notice that those same surveys contradicted its much more important assumptions and choices.

The FCC attributes an importance to radio that hit has not had in decades. It overweights the Internet and weekly newspapers. The weights produce results that defy common sense because the FCC conducted sloppy research and selective analysis of the data it consulted.

A. Asking The Wrong Questions

The FCC asked respondents "What single source do you use most often for local and national news and current affairs?"[39] This question gets directly at the relative importance of the news sources. Unfortunately, the FCC did not ask the question about local news only.

The FCC fell back on a much weaker question for local news: "What source, if any, have you used in the past 7 days often for local news and current affairs?" [40] This was an open question in which respondents were allowed multiple responses. Sources they mention here clearly came to their minds. One might infer that what they recall reflects the importance of the sources to them.

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[37] Order, para. 353, "Nor is it particularly troubling that media properties do not always, or even frequently, avail themselves to others who may hold contrary opinions. Nothing requires them to do so, nor is it necessarily healthy for public debate to pretend as though all ideas are of equal value entitled to equal airing. The media are not common carriers of speech."
The cited First Amendment policy was first established by the Supreme Court in Associated Press v. United States, 326 U.S. 1, 20 (1945), and has been consistently reaffirmed since then.
[38] Order, para. 410, "Unfortunately, we do not have data on this question specifically with regard to local news and current affairs."
[39] Nielsen Media Research, *Consumer Survey On Media Usage* (Media Ownership Working Group Study No. 8, September 2002) (hereafter, MOWG), question no. 10.
[40] MOWG, Study No. 8, question no. 1.

Unfortunately, the FCC did not accept these responses. It then followed up with a prompted question directed only at those who did not mention a source.[41] The FCC asked those people who failed to mention a source whether they had used it. The FCC then combined the answers to the two questions, giving them equal weight. This approach was certain to overweight the less prevalent sources by asking many more people about those sources a second time with a prompted question.

In the course of justifying its decision not to include magazines in the final weighting, the FCC cites Pew Center studies in support of this decision.[42] The Pew studies also had a great deal of useful information about all sources of news and information, but the FCC chose to ignore it.

Table 1 translates the responses to four questions (two from Pew and two from the FCC) into weights according to the methodology used by the FCC. It contrasts the results to the Diversity Index weightings.

The two Pew questions on campaign sources and the FCC question on most important sources of news all yield very similar results. The TV weight is in the range of 55 – 60, almost twice the weight given it by the FCC. The newspaper weight is in the range of 24 to 28, equal to the FCC weight. The radio weight is in the range of 10 to 11, less than half the weight given it by the FCC. The Internet is in the range of 5 – 6, less than half the weight given it by the FCC.

The Pew question on where people get most news for local elections is particularly important: " How do you get most of your news about the election campaigns in your state and district?" We use it as the basis for the weights in our comparative analysis.

The FCC's failure to ask the proper questions about the importance of local news source also undermines it ability to set the weights for daily newspapers compared to weekly newspapers. Relying on the question about any source of local news, the FCC establishes a ratio of 2.5 to 1 between dailies and weeklies. The problem here should be evident. Asking people whether they had referred to a source any time in the past seven days and then giving equal weight to dailies and weeklies misses the obvious point that weeklies come out once a week and dailies come out five, six or seven times. Many people get as many as seven dailies to one weekly.

If we divide the weekly responses by 7, we conclude that dailies should be weighted 11.5 times weeklies. Interestingly, when the FCC asked about the most often used source, dailies were mentioned 12.2 times as often as weeklies. For purposes of comparison with the FCC diversity weights, within the newspaper category, we set dailies at 92 percent and

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[41] MOWG, Study No. 8, question no. 2.
[42] Order, para. 407, citing PEW, *Internet Sapping Broadcast News Audience* (June 11, 2000), para. 417, citing Pew Center for the People and the Press, *Sources for Campaign News, Fewer Turn to Broadcast TV and Papers* (Apr. 27, 2003).

weeklies at 8 percent, an 11.5 to 1 ratio, (rather than the 70.3% and 29.7% weights used by the FCC).

Moreover, the FCC analysis only looks at the demand side of the market. Newspapers play a much larger role on the supply side (See Figure 1). They employ many more reporters and newsroom staff and produce many more and much longer news stories than TV or radio. The typical market has just under four TV stations broadcasting news, just over two newspapers, and nine radio stations doing news. Based on data we filed in the record, on a national average basis, we estimate 130 newspaper newsroom staff; 95 TV newsroom staff; and 27 radio newsroom staff per market. This further supports the view that the FCC has overweighted radio.

B. Reasonable Weights for Combining Media in Market Structure Analysis

Table 2 summarizes a reasonable set of weights for the media. Television and daily newspapers should be given much more weight than the FCC gave them. Radio, weeklies and the Internet should be given less importance. Indeed, the only task force report that addressed the Internet in any detail assumed that it was a national source, not a local source. Our analysis supports that view. The FCC has no justification for including it in the Diversity Index, which is a measure of local sources. Table 2 also includes a scenario that is based on TV, newspapers and radio only. Finally, the analysis also includes a scenario based on a count of TV stations that originate local news.

IV. MEDIA MARKET STRUCTURE

A. Detailed Analysis of the FCC Examples

Table 3 presents the results of our analysis of the distortion introduced into the proposed rule by the flaws in the Diversity Index. Taken together, these flaws result in a gross distortion in the assessment of the state of diversity and competition in media markets.

Even in the largest markets in the country, the FCC should not be pursuing a policy of blanket approval of mergers.

- For New York City, instead of an HHI of 373, a reasonable approach would produce an HHI of 1055 if the HHI is computed as it should be, taking market share into account. Figure 2 show this difference graphically.

- In other words, instead of depicting New York City as having the equivalent of 27 equal-sized competitors, it should be seen as having about 10 when market share is considered. This is moderately concentrated and just at the level where antitrust authorities become concerned about mergers.

- For Charlottesville, VA, the smallest TV market considered, the distortion is even more troubling. Instead of an HHI of 1358, about halfway up the moderately concentrated zone of the HHI should be over 4200. Figure 3 shows this difference graphically. Instead of painting a picture of a market with the equivalent of over seven equal-sized competitors, the proper picture is just over three.

Figures 4 and 5 present the different pictures that proper weighting create for Birmingham and Altoona.

The differences in the larger markets, when one uses proper methods by accounting for market share, are informative. New York is more concentrated than Birmingham when market shares are considered because of the high level of cross-ownership in New York. In New York, eight of the largest owners are in two of the three media. In Birmingham, there is not one cross-ownership situation. There are also four times as many noncommercial TV stations in New York, but one and one quarter times as many commercial TV stations. The FCC's simple voice count approach tends to underweight cross-ownership by the largest players in the market and overweight small and non-commercial outlets. These stations are much less likely to do local news. Even if the FCC were to rely on a count of TV stations doing news, the picture it would get would be very different.

Thus, the FCC's conclusion about the health and diversity of local media markets is entirely a function of its faulty assumptions and analytically incorrect approach to market structure analysis.

B. Irrational Outcomes in Other Markets

The FCC's sample cities do not tell the entire story. While the FCC bases its rule on a DMA analysis, the examples are city-by-city and not properly defined.[43] To flesh out the illogical results of the Diversity Index, we examine state capitol DMAs. These are critically important DMAs for the purposes of civic discourse. As Table 4 shows, we identify four types of anomalies that result from the FCC approach.

- The within-media anomalies for newspapers are the result of the failure to consider the audience or, in the case of TV, the audience and coverage of stations.
- The within-media anomalies for TV are the result of the failure to consider the audience and coverage of stations.
- The between-media anomalies result from multiple failures – audience, coverage and weighting.
- The merger anomalies result from the failure to apply the dominant firm analysis to cross-media mergers.

[43] Trenton newspapers are included in the New York analysis, when it is in the Philadelphia DMA. The New York analysis includes no Connecticut newspapers, when several are in the New York DMA.

The FCC analysis consistently and repeatedly equates media outlets that are of vastly different strength and influence, both within media types and across media. It precludes dominant firm mergers in the TV market that appear to be substantially less threatening to diversity in civic discourse than the cross media mergers it would allow. Consider the following examples from mid-size markets.

In the Tallahassee DMA, the Thomasville Tribune with daily circulation just under 10,000 per day, about 10 percent of the total daily newspaper circulation, is given equal weight with the Tallahassee Democrat, whose more than 50,000 daily circulation, gives it almost two thirds of the daily circulation. The Thomasville Tribunes is given twice as much weight as the local CBS affiliate, which has over 50,000 viewers a day, and 59 percent of the TV market.

In the Lexington KY DMA, the Corbin Times Tribune with average daily circulation of 5,000 is equal to the Lexington Herald Leaser with avg. daily circulation of 115,000. The Paxson affiliate with less than 1% TV market share and WKLE PBS with less than 1% TV market share are equal to co-owned CBS stations with 42% TV market share. Times Tribune with avg. daily circulation of 5,000 is equal to 130% of co-owned CBS stations with avg. daily viewers of 66,000. A top four TV station with 29,000 daily viewers cannot merge with a top four TV station with 17,000 daily viewers, but a TV duopoly with 66,000 avg. daily viewers can merge with a newspaper with 115,000 readers.

C. SETTING HIGH STANDARDS

Measuring the concentration of markets is only part of the job for a policymaker. The FCC must also decide which mergers are to be allowed or disallowed given the structure of markets. How much of an increase in concentration and loss of competition and diversity should be tolerated. The Department of Justice and the Federal Trade Commission have issued *Merger Guidelines*. Under these *Guidelines*, mergers that would increase the HHI by 100 points in a market that is moderately concentrated after the merger are a source of concern. Mergers that increase the HHI by more than 50 points in a market that is highly concentrated after the merger are a source of concern.

We believe that because of the importance of mass media in democratic debate and civic discourse, the Communications Act warrants higher standards. At a minimum, the economic standards of the antitrust laws should be an absolute floor as the goal for Communications Act policy.

Unfortunately, the FCC has gone in exactly the opposite direction (see Table 5). In over half the scenarios for broadcast-newspaper mergers the FCC has offered blanket approval to mergers that would violate the *Merger Guidelines* by a substantial margin. All of the market/merger scenarios underlined in bold in Table 5 violate the threshold of a 100-point increase in the HHI.

While the FCC focuses its analysis on TV, we believe it is necessary to examine both the TV and the newspaper sides of the market to appreciate how troubling the potential mergers are. The FCC has set its rules in terms of the number of TV stations. Looking at the problem from the point of view of the number of newspapers, we find that the FCC would approve mergers that fracture the *Merger Guidelines*. Figure 6 shows the possible impact of the blanket approval of mergers on the Birmingham market. Birmingham ranks in the top quintile of both the TV and radio markets. Thus, it is well above the national average.

Yet, as the exhibit shows graphically, a string of newspaper-TV mergers and TV-TV mergers under the FCC blanket approval policy could raise the HHI by almost 900 points.[44] This would render the total media market well up into the moderately concentrated range. Over 400 points of the increase comes from the newspaper-TV mergers. The largest entity in the market would control over half the reporters in the market.

D. DIVERSITY INDEX HOCUS POCUS: AN APPLICATION TO THE PERSONAL COMPUTER MARKET

To underscore the FCC's extreme departure from established analytic practice, we work a similar example using the facts and findings of the Microsoft case to show how completely at odds the FCC Diversity Index is with standard market analysis. The District Court found and the Appeals Court upheld that Microsoft has monopoly power based on its market share. As the Appeals Court summarized the facts:

> Having thus properly defined the relevant market, the District Court found that Windows accounts for a greater than 95% market share… The Court also found that even if Mac OS were included, Microsoft share would exceed 80%.[45]

Note that the Appeals Court felt the Intel-PC market should be kept separate from the Mac market for purposes of antitrust analysis, but it accepted the District Court conclusion that Microsoft's market share was huge even in the more broadly defined personal computer market.

For the purpose of this analysis, we consider the case of operating systems in the broad computer market that includes both PCs and Macs. In other words, the computer market is made up of two very different types or "mediums" for operating systems, PCs and Macs. They are similar in some respects, but quite different in others, like newspapers and TV. At the time, Apple accounted for 17 percent of the personal computer market, while Intel-PCs accounted for 83%. The PC market was deemed to have five operating systems in

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[44] In this analysis we assume the number one TV station buys the number one newspaper and the maximum number of radio stations. The number two TV station forms a duopoly with the largest available TV station and acquires the maximum number of radio stations. The process continues until no more TV mergers are allowed.

[45] *U.S. v. Microsoft Corp.*, 253 F. 3d 34, 49 (D.C. Circ. 2001) (hereafter, *Appeals*), pp. 19-20. See also the *Conclusions of Law,* United States v. Microsoft Corp., 87 F. Supp. 2d 30, 44 (D.D.C. 2000) (hereafter, *Conclusions)* and the *Findings of Fact*, United States v. Microsoft Corp., 84 F. Supp. 2d 9 (D.D.C. 1999) (hereafter, *Findings*, citations are to paragraphs). Establishing the existence of a monopoly is central to the case, so both the District Court (*Findings*, 18-27, 30, 33-43, 54-55, 141, 166; *Conclusions*, 4,5, 6) and the Appeals Court (14-25) devote a great deal of attention to the monopoly and barriers to entry into the market.

addition to Windows: Linux, OS/2, BEos, Solaris, Unix, and DR-Dos. Windows has a 95 percent market share in the PC-based segment of the computer market. Apple has a 100 percent market share in the Mac segment of the market.

Because the FCC methodology does not consider the market share of the individual firm operating systems, **Apple's weight is .17, since it has 100 percent of the Mac share. Microsoft's weight is only .12, since it is one of six firms in the PC segment of the computer market.** Instead of an HHI of 6700, using the FCC approach, the HHI would be just below 1300, which is in the middle of the moderately concentrated range.

The distortion does not stop there. Just as the FCC has done with respect to local news sources, Microsoft tried to cram all manner of devices into the definition of the computer market, but the court refused to allow this. Microsoft wanted to include handheld devices, information appliances, and web sites in the definition of the operating system market. The Appeals Court supported the decision of the District Court to reject these arguments, offering the following observation in the case of information devices:

> In particular, the District Court found that because information appliances fall far short of performing all of the functions of a PC, most consumers will buy them only as a supplement to their PCs.[46]

TV and radio stations that do not broadcast news certainly fall far short of performing all of the functions of TV stations that broadcast news. TV stations that do not do news should not be included in that market. Other outlets that do not provide local news also should not be included and the weights need to be realistic if they are included. The large role that the FCC attributes to radio and the Internet further distorts the analysis, just as it would have distorted the picture of the personal computer market.

Because the court refused to consider this unjustified expansion of the market definition to include non-computers, we cannot present a precise estimate of how this would affect the analysis of the facts in the Microsoft case. This goes to the question of how the weights were chosen, the topic of a separate discussion. For purposes of comparison, we treat the other appliances like the Internet in the FCC analysis. We reduce the market share of the PC operating systems and include appliances. The HHI drops to less than 800, well below the moderately concentrated threshold.

Figure 7 shows the distorted picture that the FCC's Diversity Index would paint of the computer operating system market. This methodology paints the computer operating system market as unconcentrated. Windows becomes the third most important competitor, behind Mac and the dominant alternative appliance.

In essence, the FCC has adopted the Microsoft approach to market structure analysis that the District or Appeals Court rejected on a 7-0 vote. This is the same court that will review the new FCC ownership rules.

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[46] *Appeals*, p.17.

V. CONCLUSION

FCC Commissioner Abernathy has stated repeatedly that reasonable people can disagree about market analysis. That is only true if they start from a reasonable set of assumptions. The FCC's Diversity Index does not pass the laugh test, not to mention the First Amendment rationality test.

We conclude that the "empirical gap" to which the D.C. Appeals Court referred in the Sinclair decision has been closed.[47] The hard data and evidence on the record does not support the rules the FCC has adopted. A set of rules that restricts merger activity to a small number of markets is well justified on the basis of the empirical data. If the empirical record shows anything, it shows that previous policy implementation has allowed media markets to become far too concentrated. Democratic discourse demands many more media voices. While the FCC cannot create those voices, it can certainly prevent the wholesale reduction of voices by setting high First Amendment standards and relying on rigorous market structure analysis. Instead, it has done the opposite—the FCC has twisted itself and its data into a pretzel trying to find facts that fit big media conglomerates' theories that they should be allowed to get even bigger.

[47] *Sinclair Broadcasting, Inc. v. FCC*, 284 F.3d 148 (D.C. Circ. 2002), p. 5.

TABLES

TABLE 1: WEIGHTS BASED ON VARIOUS QUESTIONS ABOUT THE IMPORTANCE AND USE OF MEDIA SOURCES FOR LOCAL AND NATIONAL NEWS AND CURRENT AFFAIRS

QUESTION	WEIGHTS			
	TV	**Papers**	**Radio**	**Internet**
FCC Diversity Index[a/]	33.8	28.8	24.8	12.5
PEW QUESTIONS				
How have you been getting most of your[b/] news about the presidential election campaign?	60.5	25.5	9.7	4.8
How do you get most of your news about the[c/] election campaigns in you state and district?	55.5	27.8	10.9	5.9
FCC QUESTIONS				
What single source do you use most often for[d/] local or national news and current affairs.	58.8	24.4	10.5	6.2
What source, if any, have you used in the past[e/] 7 days for local news and current affairs?	42.0	31.1	17.5	9.3

a/ Federal Communications Commission, "Report and Order," In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, MB Docket No. 02-277, MM Dockets 02-235, 01=317, 00-244, July 2, 2003, at para. 415.

b/ Pew Center for the People and the Press, *Sources for Campaign News, Fewer Turn to Broadcast TV and Papers* (Feb. 5, 2000), q. 13.

c/ Pew Center for the People and the Press, *Modest Increase in Internet Use for Campaign 2002* (Jan. 5, 2003), q. 17.

d/ Nielsen Media Research, *Consumer Survey On Media Usage* (Media Ownership Working Group Study No. 8, September 2002) question no. 10.

e/ Media Ownership Working Group Study No. 8, question no. 1.

TABLE 2: MEDIA WEIGHTS

MEDIA	FCC DIVERSITY INDEX	CFA W/INTERNET	CFA W/O INTERNET
TV	33.8	55.5	58.8
Radio	24.8	10.9	11.5
Dailies	20.2	25.6	27.6
Weeklies	8.6	2.2	2.4
Internet	12.5	5.9	0

TABLE 3: ESTIMATED MEDIA MARKET CONCENTRATION RATIOS (HHI) UNDER VARIOUS ASSUMPTIONS ABOUT MARKET STRUCTURE AND MEDIA WEIGHTS

Designated Market Area		Concentration Analysis Assumptions						
		FCC DI	Changes in Individual Assumptions			Combined Changes		
Area	Rank		Use Audience Shares	Reweight Radio/ Internet	Internet is national	Reweight & Use Audience	Reweight & Use Internet Audience is national	Reweight & Use Internet is national TV News Voice Count
New York, NY	1	373	361	906	438	965	1055	725
Birmingham, AL	40	591	796	852	803	871	951	961
Altoona, PA	96	960	1384	1231	1413	1781	1987	1676
Charlottesville, VA	186	1358	2420	2045	2077	3823	4256	4256

TABLE 4: IRRATIONAL CONCLUSIONS RESULTING FROM UNREALISTIC ASSUMPTIONS AND INCOMPLETE ANALYSIS IN THE ORDER: STATE CAPITOL DMAS

DEFINITIONS:

DMA of State Capitol; (RANK of DMA)

1. Smallest newspaper compared to largest newspaper; anomaly results from failure to consider markets share. Circulation is total weekly divided by 7.
2. Smallest commercial, smallest largest non-commercial TV station compared to largest TV station; anomaly results from failure to consider market shares and coverage. TV stations are measured by average day part share, 9:00 AM to Midnight.
3. Weight of smallest newspaper compared to largest TV station: anomaly results from failure to consider market share, coverage and weights. Average daily circulation compared to TV viewership measured as households based on average commercial day-part share multiplied by households using television.
4. Smallest TV-TV merger disallowed compared to largest TV-newspaper merger allowed; anomaly results from failure to apply dominant firm analysis to cross media mergers. The station is the top in viewership. Newspaper is average daily circulation.

EXAMPLES:

ALBANY NY DMA (55)

1. Register Star with avg. daily circulation of 7,000 is equal to the Time Union with avg. daily circulation of 100,000
2. ABC with less than 1% TV market share and WMHT PBS with 2% TV market share are equal to NBC with 3% TV market share
3. Register Star avg. daily circulation of 7,000 is equal to 57% of NBC with avg. daily viewers of 55,000
4. TV station with a 37,000 daily viewers cannot merge with a TV station with 17,000 daily viewers, but a TV station with 55,000 viewers can merge with a newspaper with 100,000 readers

ANNAPOLIS MD IN BALTIMORE DMA (24)

1. Cecil Whig with avg. daily circulation of 10,000 is equal to the Baltimore Sun with avg. daily circulation of 325,000
2. ABC with 13% TV market share and MD PBS with 3% TV market share are equal to NBC with 28% TV market share
3. Cecil Whig with avg. daily circulation of 10,000 is equal to 133% of NBC with avg. daily viewers of 150,000
4. TV station with a 71,000 daily viewers cannot merge with a TV station with 54,000 daily viewers, but a TV station with 150,000 viewers can merge with a newspaper with 325,000 readers

AUGUSTA ME IN PORTLAND ME DMA (76)

1. Berlin Daily with avg. daily circulation of 6,000 is equal to the Portland Press Herald, with avg. daily circulation of 84,000
2. Fox with 1% TV market share and Maine PBS with 3% TV market share are equal to NBC with 41% TV market share
3. Berlin Daily with avg. daily circulation of 6,000 is equal to 95% of NBC with avg. daily viewers of 48,000
4. TV station with 21,000 daily viewers cannot merge with a TV station with 6,000 daily viewers, but a TV station with 48,000 avg. daily viewers can merge with a newspaper with 84,000 readers

BOISE ID (124)

1. The Argus Observer with avg. daily circulation of 6,000 is equal to the Idaho Statesman with avg. daily circulation of 70,000
2. UPN with 9% TV market share and KAID PBS with 4% TV market share are equal to NBC with 43% TV market share
3. Argus Observer with avg. daily circulation of 6,000 is equal to 150% of NBC with avg. daily viewers of 28,000
4. TV station with 11,000 daily viewers cannot merge with a TV station with 9,000 daily viewers, but a TV station with28,000 avg. daily viewers can merge with newspapers with 70,000 readers

BOSTON MA /CONCORD NH (6)

1. Athol Daily News with avg. daily circulation of 4,000 is equal to commonly owned Boston Globe/ Worcester Telegram with avg. daily circulation of 605,000
2. Pax with 1% TV market share and WGBH PBS with 3% TV market share are equal to NBC with 25% TV market share
3. Athol Daily with avg. daily circulation of 4,000 is equal to 50% of NBC with avg. daily viewers of 235,000
4. TV station with 192,000 daily viewers cannot merge with a TV station with 142,000 daily viewers, but a TV station with 235,000 avg. daily viewers can merge with newspaper with 605,000 readers.

DENVER CO (18)

1. Steamboat Today with avg. daily circulation of 8,000 is equal to the Denver Post with avg. daily circulation of 420,000
2. An independent TV station with less than 1% TV market share and KRMA PBS with 2% TV market share are equal to NBC with 26% TV market share
3. Steamboat Today with avg. daily circulation of 8,000 is equal to 50% of NBC with avg. daily viewers of 150,000
4. TV station with 100,000 daily viewers cannot merge with a TV station with 88,000 daily viewers, but a TV station with 152,000 avg. daily viewers can merge with newspaper with 420,000 readers.

INDIANAPOLIS IN (25)

1. Call Ledger with avg. daily circulation of 3,000 is equal to the commonly owned Indianapolis Star/Muncie Star Press with avg. daily circulation of 300,000
2. UPN with 7% TV market share and WFYI PBS with 3% TV market share are equal to CBS with 28% TV market share
3. Call Ledger with avg. daily circulation of 3,000 is equal to 45% of CBS with avg. daily viewers of 128,000
4. TV station with 64,000 daily viewers cannot merge with a TV station with 32,000 daily viewers, but a TV station with128,000 avg. daily viewers can merge with newspapers with 300,000 readers

LEXINGTON KY (65)

1. Corbin Times Tribune with avg. daily circulation of 5,000 is equal to the Lexington Herald Leaser with avg. daily circulation of 115,000
2. Pax with less than 1% TV market share and WKLE PBS with less than 1% TV market share are equal to co-owned CBS stations with 42% TV market share
3. Times Tribune with avg. daily circulation of 5,000 is equal to 130% of co-owned CBS stations with avg. daily viewers of 66,000
4. TV station with 29,000 daily viewers cannot merge with a TV station with 17,000 daily viewers, but a TV duopoly with 66,000 avg. daily viewers can merge with a newspaper with 115,000 readers

NASHVILLE TN (65)

1. Paris Post with avg. daily circulation of 5,500 is equal to the Tennessean with avg. daily circulation of 200,000
2. PAX with less than 1% TV market share and WNPT PBS with 3% TV market share are equal to co-owned Sinclair stations with 36% TV market share
3. The Paris Post with avg. daily circulation of 5,500 is equal to 100% of Sinclair stations with avg. daily viewers of 150,000
4. TV station with 80,000 daily viewers cannot merge with a TV station with 47,000 daily viewers, but a TV duopoly with 150,000 avg. daily viewers can merge with a newspaper with 200,000 readers

PROVIDENCE RI (48)

1. Westerly Sun avg. daily circulation of 10,000 is equal to the Providence Journal with avg. daily circulation of 175,000
2. Paxson with 1% TV market share and RI PBS with 1% TV market share are equal to NBC with 41% TV market share
3. Westerly Sun with avg. daily circulation of 10,000 is equal to 69% of ABC with avg. daily viewers of 110,000
4. TV station with 35,000 daily viewers cannot merge with a TV station with 24,000 daily viewers, but a TV station with 110,000 avg. daily viewers can merge with newspapers with 175,000 readers

TALLAHASSEE FL (107)

1. Thomasville Tribune with avg. daily circulation of 10,000 is equal to the Tallahassee Democrat avg. daily circulation of 50,000
2. UPN with less than 1% TV market share and WFSU PBS with less than 1% TV market share are equal to CBS with 59% TV market share
3. Thomasville Tribune with avg. daily circulation of 10,000 is equal to 204% of CBS with avg. daily viewers of 50,000
4. TV station with 12,000 viewers cannot merge with a TV station with 10,000 daily viewers, but a TV station with 50,000 avg. daily viewers can merge with newspapers with 50,000 readers

TOPEKA KS (138)

5. The Council Grove Republican with avg. daily circulation of 1,500 is equal to the Topeka Capital Journal with avg. daily circulation of 55,000
6. An independent with less than 1% TV market share and KTWU PBS with 3% TV market share are equal to CBS with 46% TV market share
7. The council Grove Republican with avg. daily circulation of 1,500 is equal to 55% of CBS with avg. daily viewers of 24,000
8. TV station with 7,000 viewers cannot merge with a TV station with 3,000 daily viewers, but a TV station with 24,000 avg. daily viewers can merge with newspapers with 55,000 readers

TRENTON NJ/WILMINGTON DE IN PHILADELPHIA PA DMA (6)

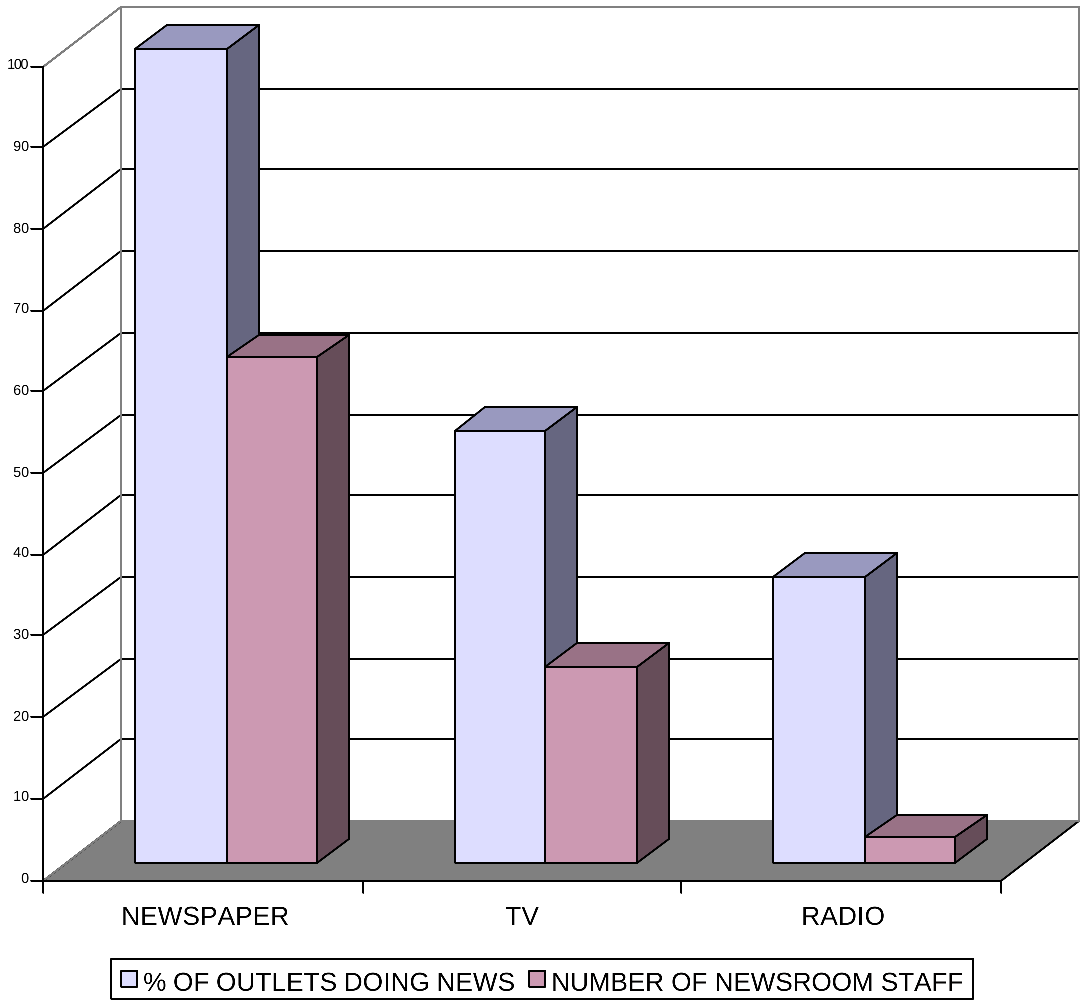
1. Phoenixville Phoenix with avg. daily circulation of 15,000 is equal to the Philadelphia Inquirer/Daily News, with avg. daily circulation of 405,000
2. Paxson with 1% TV market share and WHYY PBS with 3% TV market share are equal to ABC with 26% TV market share
3. Phoenix with avg. daily circulation of 15,000 is equal to 60% of ABC with avg. daily viewers of 395,000
4. TV station with 275,000 daily viewers cannot merge with a TV station with 200,000 daily viewers, but a TV station with 395,000 avg. daily viewers can merge with newspapers with 405,000 readers.

TABLE 5: FCC BLANKET APPROVAL OF MERGERS THAT VIOLATE THE *MERGER GUIDELINES*
(Underlined Bold Violate DOJ/FTC *Guidelines*)

Base Case		Average Change in Diversity Index, Resulting from Mergers			
TV Stations In Market	Average Diversity Index	Newspaper and Television	Newspaper, TV, and ½ Radio	Newspaper and TV Duopoly	Newspaper, Radio, and TV Duopoly
4	928	**<u>242</u>**	**<u>408</u>**	----	----
5	911	**<u>223</u>**	**<u>393</u>**	**<u>376</u>**	**<u>846</u>**
6	889	**<u>200</u>**	**<u>340</u>**	**<u>357</u>**	**<u>688</u>**
7	753	121	**<u>247</u>**	242	**<u>533</u>**
8	885	**<u>152</u>**	**<u>314</u>**	**<u>308</u>**	**<u>734</u>**
9	705	86	207	172	**<u>473</u>**
10	635	51	119	101	292
15	595	48	145	97	302
20	612	40	128	80	350

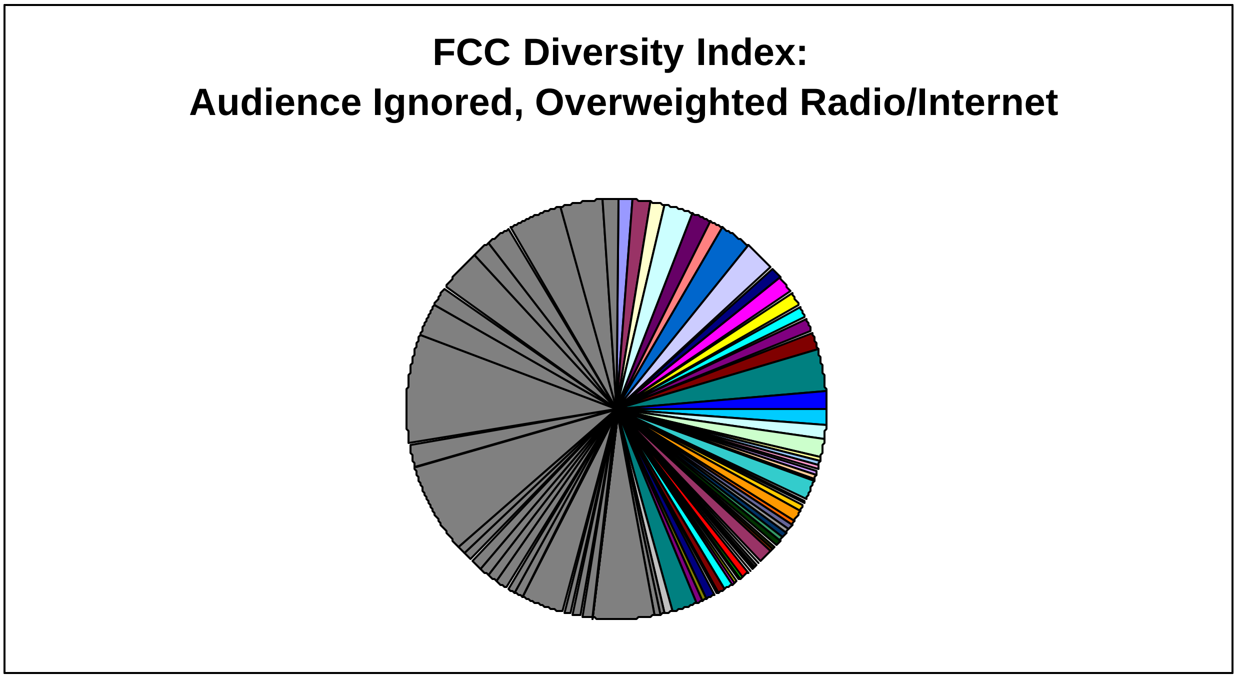
FIGURES

FIGURE 1: NEWS PRODUCTION CAPABILITIES IN LOCAL MEDIA OUTLETS



SOURCES: Vernon Stone, News Operations at U.S. Radio Stations, News Operations at TV Stations; U.S. Bureau of the Census, Statistical Abstract of The United States: 2000 Tables 2, 37, 932; Lisa George, *What's Fit To Print: The Effect Of Ownership Concentration On Product Variety In Daily Newspaper Markets* (2001); *Editor And Publisher*, *International Yearbook*, Various Issues.

FIGURE 2: FCC DISTORTION OF MARKET STRUCTURE ANALYSIS:
NEW YORK CITY (DMA RANK 1)



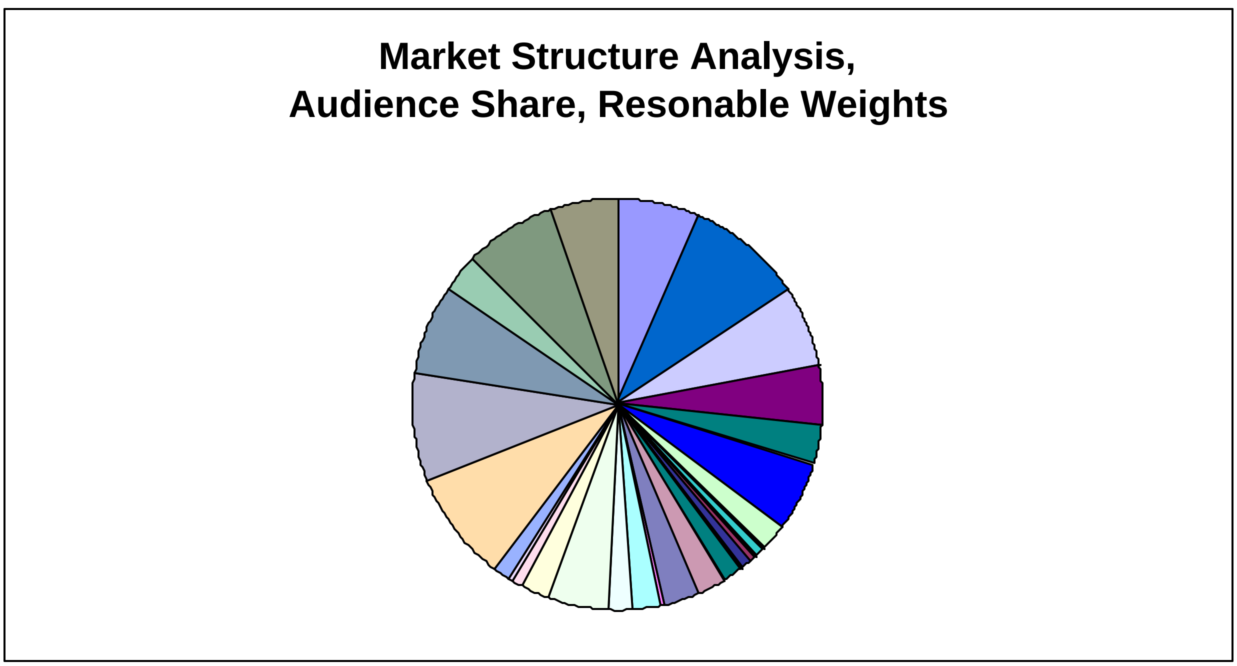
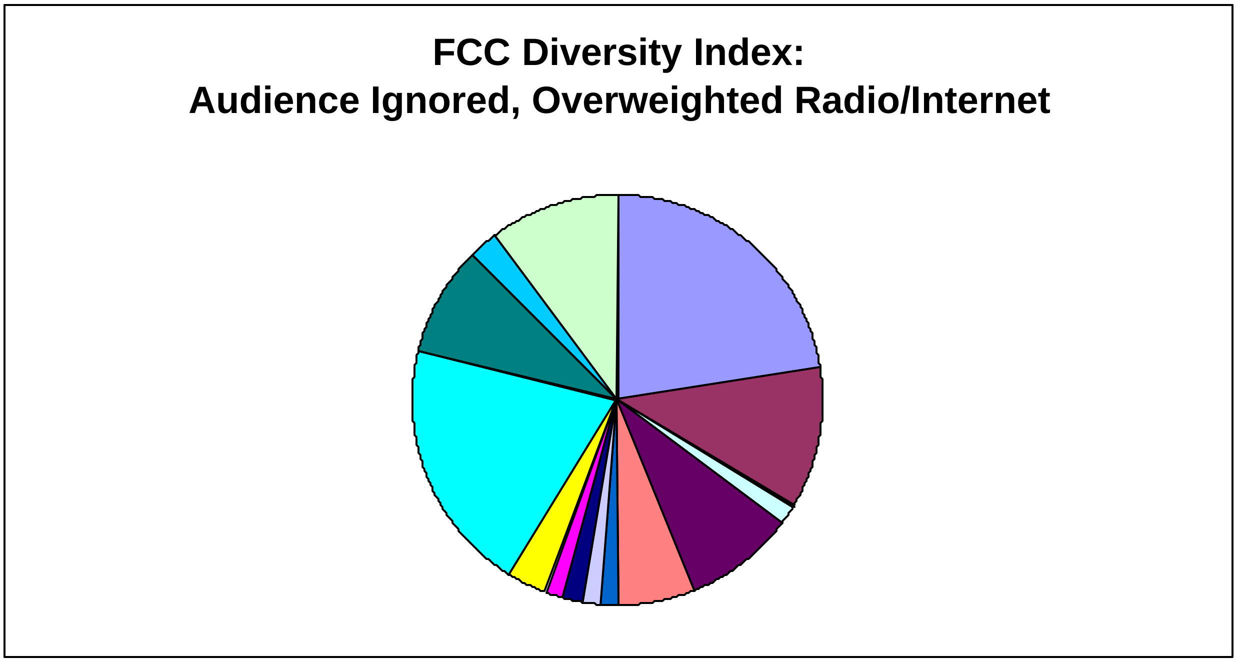


FIGURE 3: FCC DISTORTION OF MARKET STRUCTURE ANALYSIS: CHARLOTTESVILLE VA (DMA RANK 186)



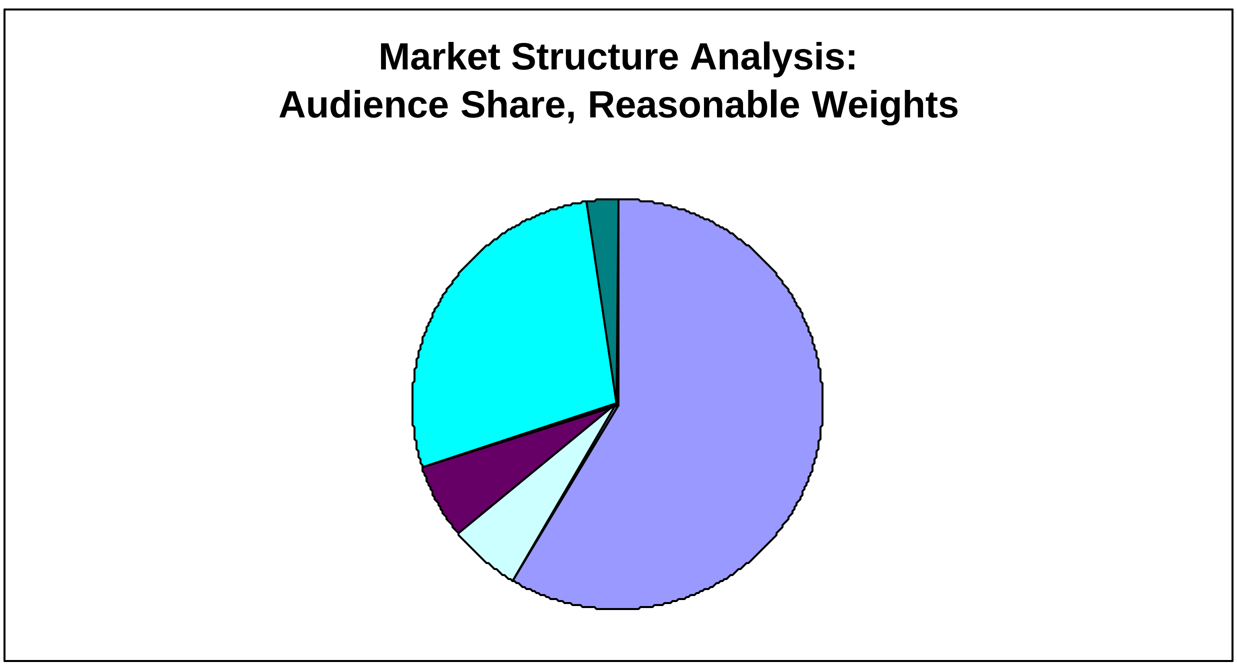
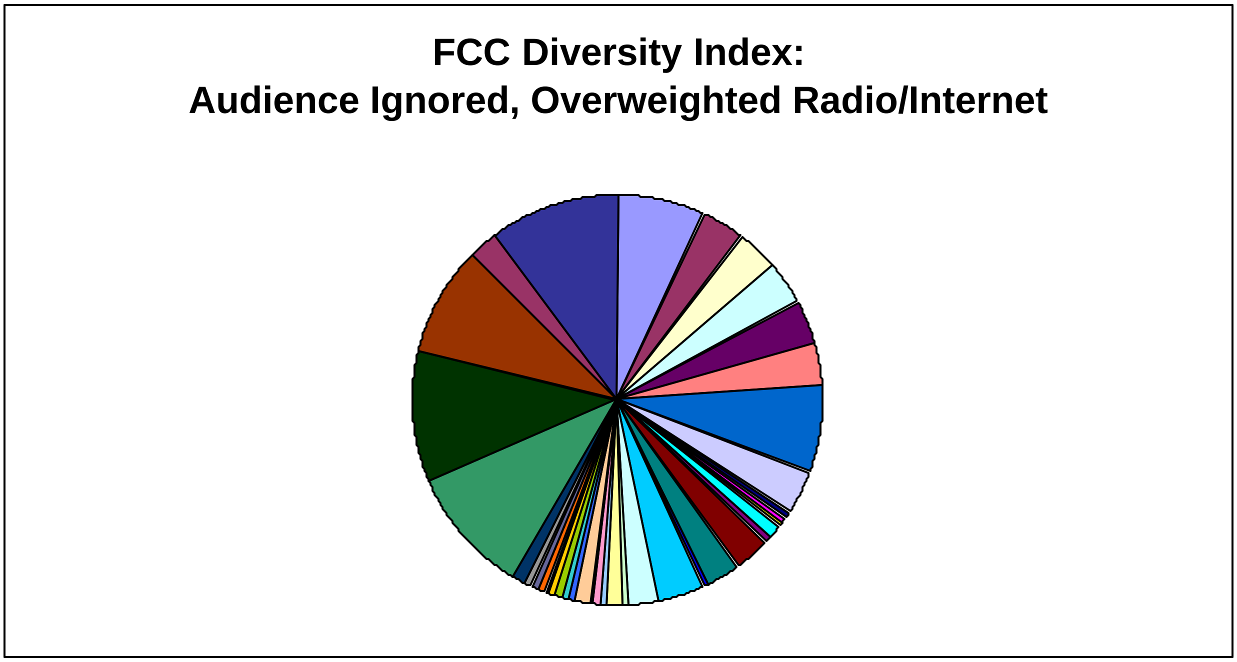


FIGURE 4: FCC DISTORTION OF MARKET STRUCTURE ANALYSIS: BIRMINGHAM AL (DMA RANK 40)



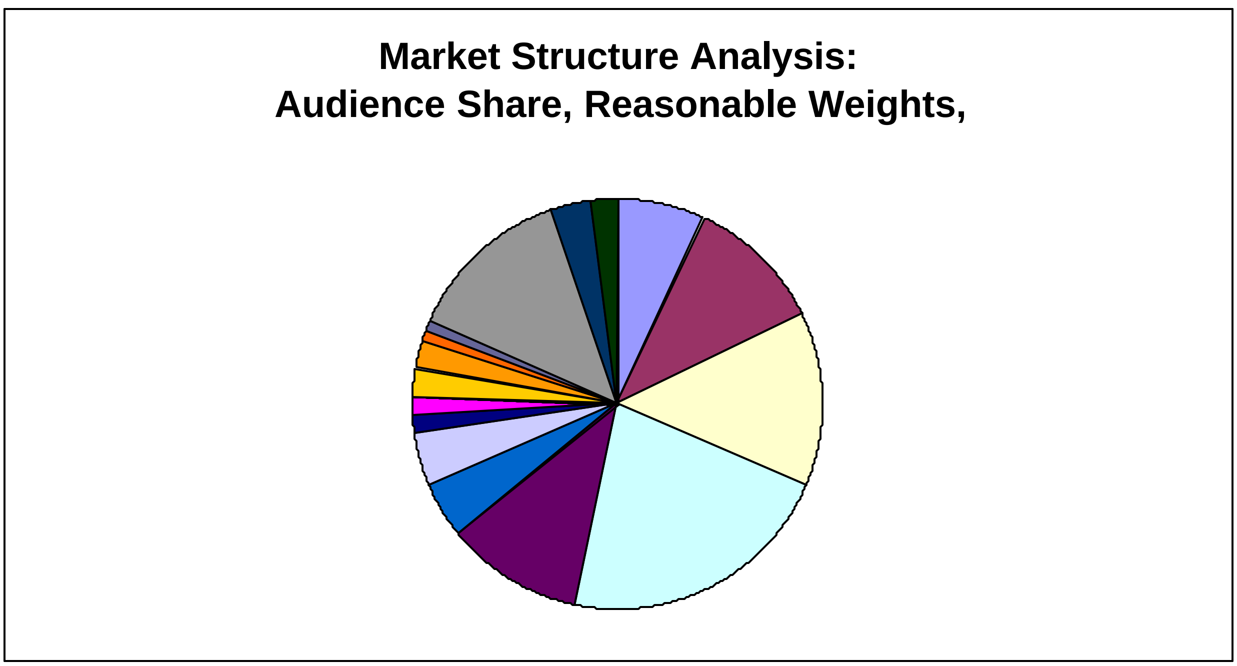
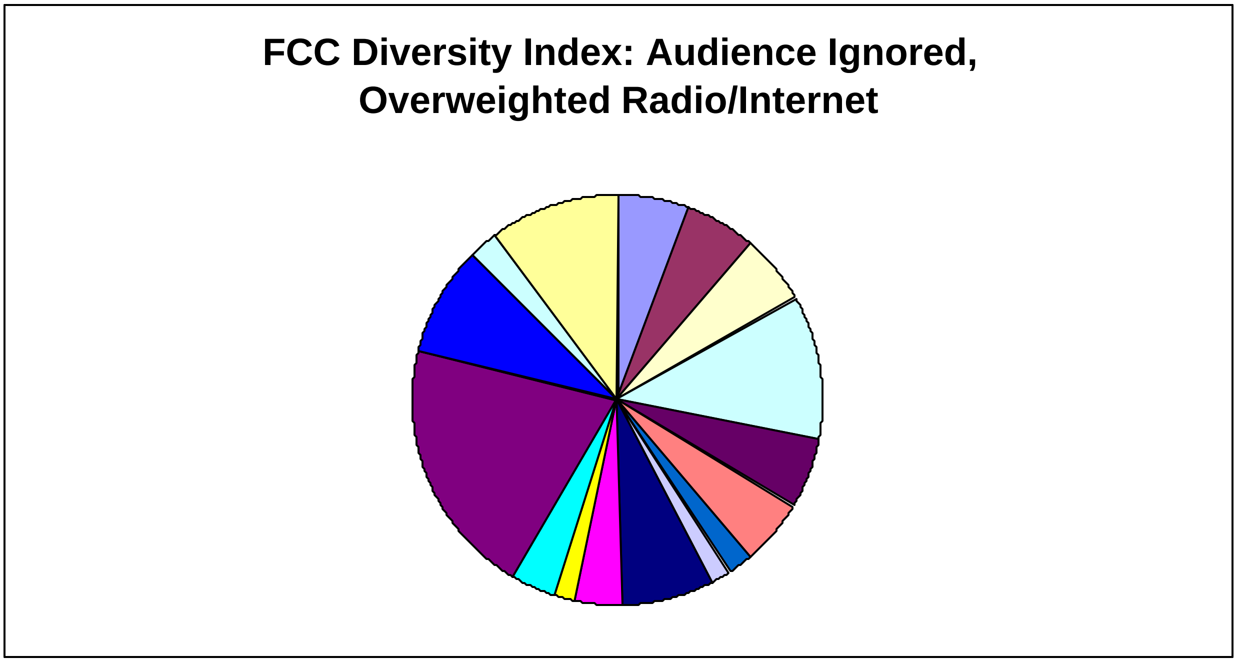


FIGURE 5: FCC DISTORTION OF MARKET STRUCTURE ANALYSIS: ALTOONA PA (DMA RANK NO. 96)



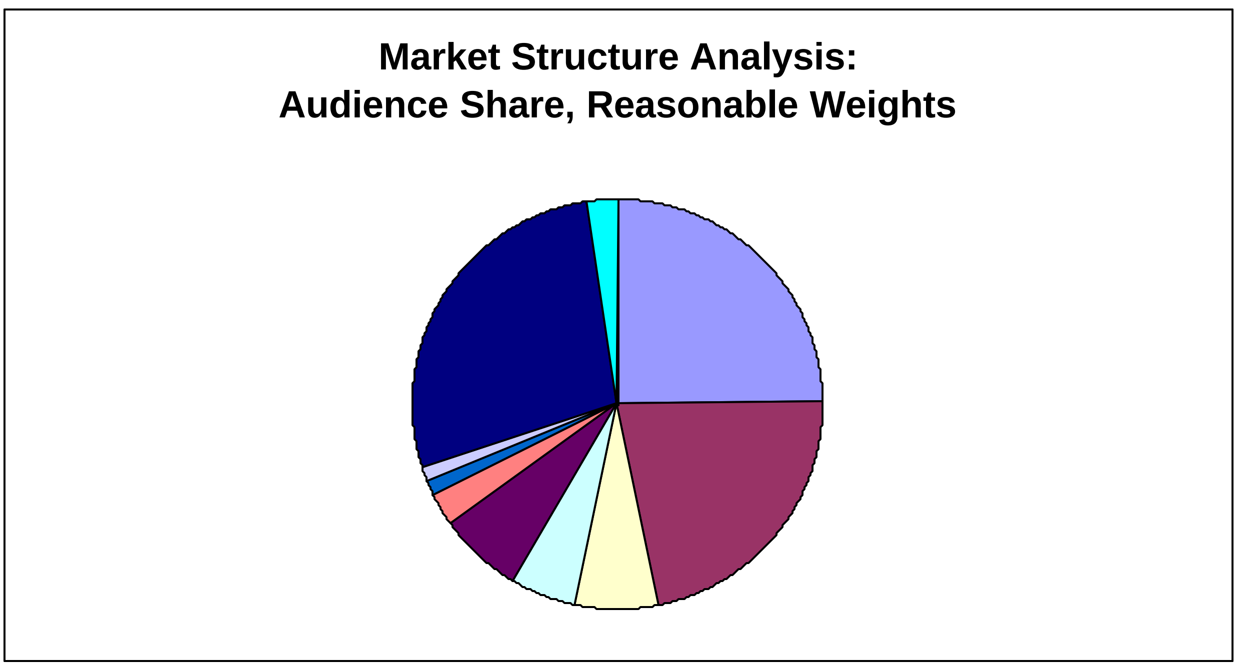
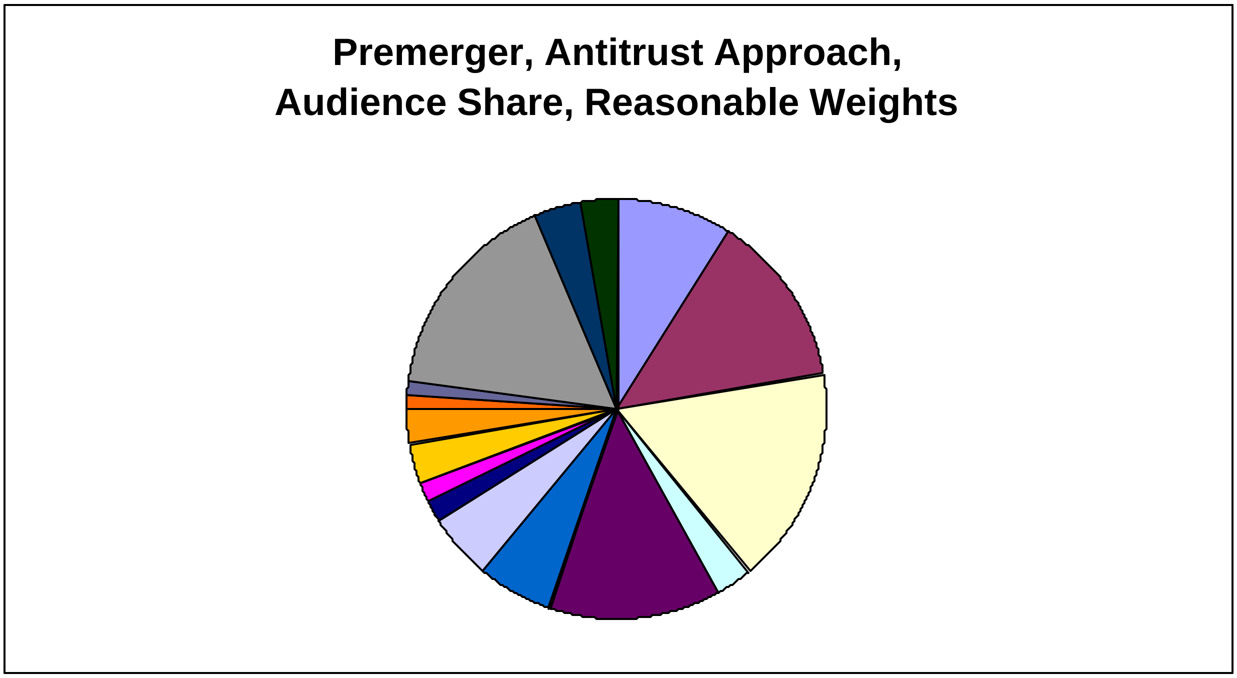


FIGURE 6: IMPACT OF NEWSPAPER-TV MERGERS ON BIRMINGHAM, AL



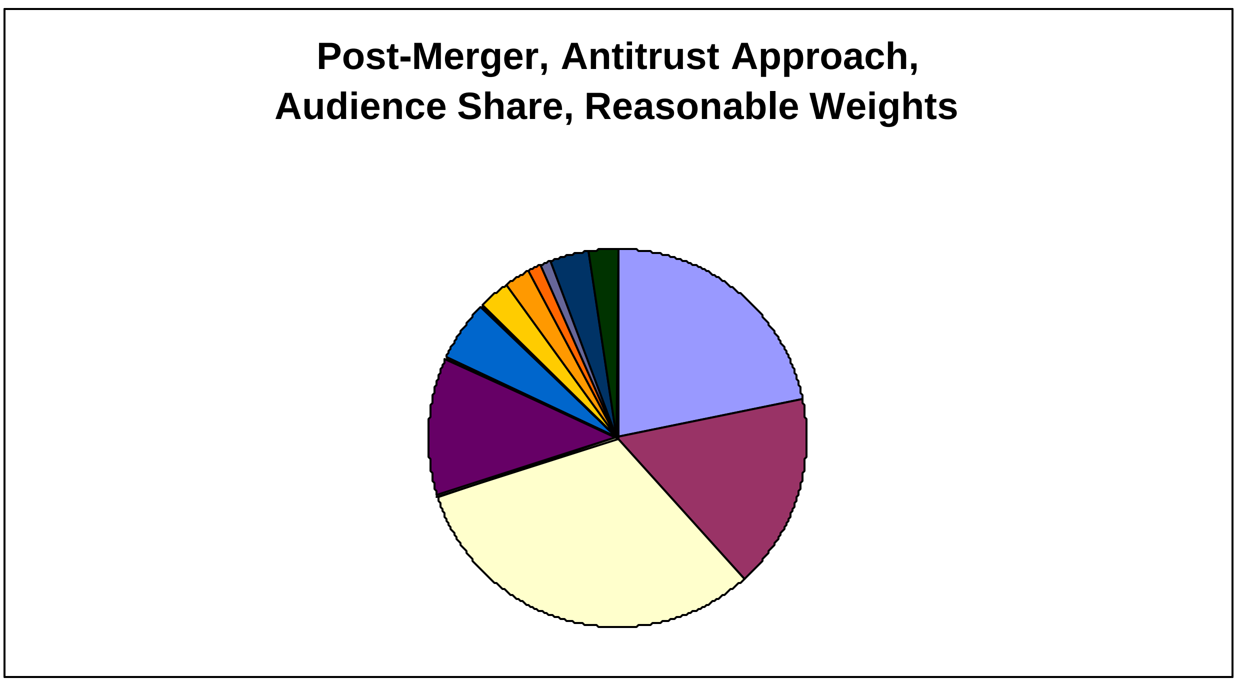


Figure 7: Making The Microsoft Monopoly Disappear