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MEDIA OWNERSHIP

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

MAY 22, 2003

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

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MEDIA OWNERSHIP

THURSDAY, MAY 22, 2003

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 10:10 a.m. in room SR–253, Russell Senate Office Building, Hon. John McCain, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. JOHN McCAIN, U.S. SENATOR FROM ARIZONA

The CHAIRMAN. Good morning. Today the Committee continues its series of hearings examining consolidation of ownership in the media marketplace. During each of the previous hearings we have heard concerns about horizontal concentration in various media markets. The FCC is in the final days of examining the rules that govern media ownership. We will hear from the Commission shortly after that decision. I intend to have a hearing immediately upon our return from our recess.

We have also heard concerns about increased vertical integration in all media. The radio, cable, and network television industries have all seen increased levels of vertical ownership. Many people fear that this phenomenon threatens diversity and competition as vertically integrated industries squeeze out their rivals. Recently, News Corp. announced its agreement to purchase a significant interest in DIRECTV. If the deal is approved, News Corp. will own the studios where content is created and the means to deliver the content either through its national broadcast network, including 35 local broadcast stations, its 30-plus cable channels, including Fox News and Fox Sports Net, or its satellite system.

I want to thank Mr. Murdoch for testifying today, and look forward to hearing more about this agreement. I also appreciate other witnesses for joining us today, and I will abbreviate my remarks, because I know all committee members are interested. I would appreciate if they would abbreviate theirs. We know we have a full day of votes, and we look forward to hearing from the witnesses.

Senator Hollings.

STATEMENT OF HON. ERNEST F. HOLLINGS, U.S. SENATOR FROM SOUTH CAROLINA

Senator HOLLINGS. Thank you, Mr. Chairman. I appreciate very much the hearing. I would ask consent that we include my statement, an editorial in *Business Week,* an editorial this morning by William Safire, an article, “The U.S. Media Marketplace is Highly

Competitive," a listing of holdings, and then, the author of that article, a listing of his holdings, that is, of the News Corporation, if we could include that all in the record here.

The CHAIRMAN. Is that the article that has the "shucks, we are no monopolists" line that Rupert Murdoch will take today in testimony before the pussycats of John McCain's Senate Commerce Committee? Is that the one we want included in the record?

[Laughter.]

The CHAIRMAN. Without objection.

Senator HOLLINGS. As one pussycat to another, we ought to get that right in the record, I think, and I would include that statement, and thank you very much.

[The prepared statement of Senator Hollings follows:]

PREPARED STATEMENT OF HON. ERNEST F. HOLLINGS, U.S. SENATOR FROM SOUTH CAROLINA

Thank you, Mr. Chairman. Today the Committee again turns its attention to media ownership, and to plans afoot at the FCC that could drastically change the American media marketplace. Since its very beginnings, our system of broadcasting has been designed to ensure that the public airwaves serve the public. In that regard, we have entrusted our regulators with a fundamental responsibility—to protect the public interest from economic self-interest, and to promote the core values of localism, diversity, and competition that are essential to a well-functioning marketplace of ideas.

Unfortunately, instead of fighting zealously for American citizens and these ideals, the FCC appears ready to unilaterally disarm. Chairman Powell has artificially set June 2 as "D-Day" for the current ownership rules, and a small, but well-connected "coalition of the willing" has spared no expense in its assault on these limits.

Already the top 5 programmers—Viacom/CBS, Disney/ABC, NBC, Time Warner, and News Corp./Fox (and potentially, News Corp./Fox/DIRECTV) now control 75 percent of prime time programming and are soon projected to increase their share to 85 percent—the level reached by NBC, CBS and ABC at their peak. From every corner of the nation, there are examples where the interests of local communities are being sacrificed to the needs of network executives to find more eyeballs. But in response to claims that the future of broadcast television is in jeopardy, the FCC appears willing to respond—in an amazing act of corporate welfare—to raise the 35 percent national broadcast cap established by Congress to 45 percent.

With matters so fundamental to the fabric of democracy at stake, it was my hope that these issues would be considered in a fair manner with every measure taken to inform the public of the options under consideration, and their potential effect on local media markets. Unfortunately, that has not occurred.

Mr. Chairman, the American people deserve better. They deserve to know that merger reviews will be searching and thorough, and that regulators will demand proof of tangible public benefits. But if the FCC continues its course in allowing the self-interest of a few media titans to trump the public's interest in protecting a diverse marketplace of ideas, the effects may not be immediate, but they will be far reaching.

We will see fewer creative outlets for independent TV and content producers; higher ad rates for large and small businesses; fewer antagonistic sources of news and opinion, less air time for local politicians and community groups, and a growing reluctance of local station operators to take on network executives in rejecting nationally-produced programming that violates community standards.

While I welcome the testimony of the witnesses today and their responses to our questions, I am disappointed that we have not served our constituents by inviting the FCC Commissioners to testify on these issues in a public forum prior to their upcoming decision. While I understand it is the Chairman's intention to invite the Commissioners soon after their decision, I fear that a "shoot-first, ask questions later" strategy plays right into the hands of the media conglomerates and leaves the American people a day late and a dollar short.

The CHAIRMAN. Thank you. Again, I would appreciate if my colleagues would be brief in their opening remarks. Senator Allen.

STATEMENT OF HON. GEORGE ALLEN, U.S. SENATOR FROM VIRGINIA

Senator ALLEN. Thanks, Mr. Chairman. I will try to be brief, and I would like my statement to be in the record.

The CHAIRMAN. Without objection, all statements will be made a part of the record.

Senator ALLEN. Thank you. In the midst of all of this, one of the key factors that I think needs to be updated as far as the regulations, is that smaller markets ought to have the same sort of regulations that are enjoyed by larger markets, including the duopoly rules, which I think discriminate against small markets. I am also in favor of newspaper cross-ownership. The costs are increasing, and the more you look at all the facts, where you do have the cross-ownership, the programming, including local programming, has improved.

Also, I would ask people to be cognizant of the big increase in the number of outlets and opportunities for media, news and information via cable, satellite, FM stations and, of course, the Internet as well. And insofar as the hearing today will examine Fox News' proposed acquisition of DIRECTV, I will note, and I am sure it will come out in the testimony, that in this effort to make sure there are no antitrust violations, which will be enforced by the Department of Justice, it seems to me that this programming appears to be available on a nonexclusive basis, and nondiscriminatory practices will be involved insofar as prices, terms, and conditions. I look forward to hearing our witnesses and their testimony, and also questioning them, and I thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Allen.

Senator Wyden.

STATEMENT OF HON. RON WYDEN, U.S. SENATOR FROM OREGON

Senator WYDEN. Thank you, Mr. Chairman. I have a prepared statement for the record, if I could have that entered. I will just make a couple of comments.

The first is that the country is now on the eve of the most important set of communications decisions in years, and I think it is important to understand what is really at issue before the Federal Communications Commission. It seems to me what is being debated now is that the media conglomerates are saying, trust us, we do not need ownership rules to do what is right. They are saying this despite the fact that the radio changes that are along the lines of these FCC changes have produced a wave of fake localism.

They are saying this despite the needs that the cross-ownership conflicts need to be policed, and they are saying this in spite of the fact that there are new studies that indicate that public interest programming goes down when you have more media concentration. I am going to submit that set of studies as a part of the record, so I think it is important we have these hearings. I still hope that we will have a chance to review what the Federal Communications Commission is doing, because I think that the country is standing on the edge of a cliff here. We ought to look at what lies ahead, and these changes are not going to be good for the country. I thank you.

[The prepared statement of Senator Wyden follows:]

PREPARED STATEMENT OF HON. RON WYDEN, U.S. SENATOR FROM OREGON

Time on this issue is getting very short.

The FCC has made it clear that it intends to march ahead on its predetermined schedule. It won't break stride, and it won't heed the calls for caution by members of Congress (including many on this Committee) or by two of the five FCC commissioners.

The problem is, I think the country could be standing on the edge of a real cliff when it comes to media consolidation. The public ought to be given a clear look at what lies below, because it may not like it sees. And once the threshold is crossed, it may be nearly impossible to turn back.

There is a lot at stake here. Media ownership is important for diversity of viewpoints. It is important for robust public debate. And it is important for ensuring the kind of independent and competitive media corps that underpins a healthy democracy.

Given the importance, I think the FCC should go the extra mile in this proceeding, not focus on efficiency or artificial deadlines. It's really a matter of good government. At the very least, the agency should not be choosing this proceeding to cast aside its usual practice of allowing any Commissioner to request a one-month extension.

There's already been a great deal of concentration in the media industry. So I think it's pretty ironic that the FCC seems to take the view that many media ownership rules are now obsolete. I think you could argue that they're more important than ever.

Perhaps the core disagreement here is whether the *ownership* of media really matters much. Some may say that jointly owned media outlets can still offer diverse and independent viewpoints. That media outlets owned by a distant conglomerate can still provide localism. That media outlets that own their own programming can still be open to independent creative programming.

Maybe. But I don't think the American public wants to bank on it. When the big media

conglomerates say, "trust us, we won't let our ownership influence our content," I think the public reply is—thanks, glad to hear you say that, but we want a guarantee. "Trust us" isn't good enough. That's why we've had the media ownership rules. And it's why they shouldn't be rolled back.

The CHAIRMAN. Thank you.

Senator Stevens.

STATEMENT OF HON. TED STEVENS, U.S. SENATOR FROM ALASKA

Senator STEVENS. I apologize, I have no opening statement.

The CHAIRMAN. Thank you.

Senator Breaux.

STATEMENT OF HON. JOHN B. BREAUX, U.S. SENATOR FROM LOUISIANA

Senator BREAUX. Thank you, Mr. Chairman. Thank you for having the hearing. On the point of the 35 percent cap, whether it should be increased to 45 percent, I think the caps the way they have been set up is really a misnomer, because it goes back to the days when we basically watched our television from over-the-air transmissions, and if you lived in a city and had stations in cities that encompassed over 35 percent of the population, you could not own any more, but that is not the way people watch television today. They get their television through cable; they get their television through satellites. Very few, in fact, get it through over-the-air transmissions, and yet, we are still looking at the area size where the stations are located. If the population adds up to over

35 percent, you cannot have any more stations. Well, that is ludicrous in the way things actually operate today.

In those cities, in Los Angeles, for instance, you may have one NBC affiliate or CBS affiliate, and if they had a station in Chicago and Houston and Miami and Los Angeles and New York, it probably adds up to over 35 percent. That does not mean 35 percent of the people are watching that one outlet. It may be less than 3 percent, because in Los Angeles or any one of those cities, the people have a choice between 150 stations, and just the fact that they are in a large area with the potential to have 35 percent viewership does not mean they really do, so it is really a misnomer. It is not the best way to judge whether people are watching more than one outlet. It is a throwback that is antiquated and should be replaced by a new and different standard.

Thank you.

The CHAIRMAN. Thank you.

Senator Ensign.

STATEMENT OF HON. JOHN ENSIGN, U.S. SENATOR FROM NEVADA

Senator ENSIGN. Thank you, Mr. Chairman. I want to just echo, and I will keep it very brief, just echo some of the comments made by Senator Breaux. In just thinking when I used to visit my in-laws down in Southern California, and thinking of the large Hispanic population, I mean, that does not take into account the number of Hispanics that are watching purely Hispanic television when you are looking at the media percent ownership. We live in a completely different world today than when these rules were put into place, and to not recognize that I just think is not the right kind of public policy.

Technology has radically changed the way the people get information. When looking at the purpose of the rules in the first place was to make sure that a small percentage of people was not dominating thought, was not dominating the information that came into your household. Today, that is virtually impossible to do even if the caps are lifted the way that they are being proposed by the FCC, so I think this whole thing needs to be looked at taking all the technologies into account: cable, satellite, over-the-air broadcasts, the Internet, radio, newspapers.

Everything needs to be taken into account, because it is not just print newspapers anymore, there are newspapers on the Internet and the like, and so for us to have these antiquated rules governing such a completely different marketplace I think is outdated and needs to be changed.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Dorgan.

STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

Senator DORGAN. Mr. Chairman, I regret that which some feel is old-fashioned—competition, diversity, and localism—are considered antiquated. The fact is, the American people own the airwaves. We license them for people's use. If one company owned 100 different television channels and beamed it into your home, I suppose they could make the case what wonderful variety you have. You have much more variety than if you had four channels, 25 times more variety, all from the same source.

Look, the fact is, in 1995 we had the largest 25 television companies owning 24 percent of the stations. In 6 years they doubled that, now owning 44 percent of the stations. Seven cable companies have 90 percent of the U.S. cable subscribers. Ninety percent of the top 50 cable channels are already owned by the top four television and cable networks, and if the FCC gets its way in the next couple of weeks, we could easily be headed for a day when it will be legal for one company to own the cable company, the newspaper, the biggest TV stations, and the dominant radio stations all in exactly the same town.

In my judgment, it ought never be old-fashioned for us to cling to the notion of competition, diversity and localism. The fact is we have gone a long way from those basic principles. I think the FCC is poised to march to the rear, regrettably, in the next couple of days, and then we will be able to visit with them after they have done it. I think that will be very destructive to the interests of this country.

The CHAIRMAN. Senator Sununu.

STATEMENT OF HON. JOHN SUNUNU, U.S. SENATOR FROM NEW HAMPSHIRE

Senator SUNUNU. Thank you, Mr. Chairman. I do not believe that the principles of competition, localism, or diversity are old-fashioned, and I would venture to say that I do not think anybody on this committee believes that the principles of competition, localism, and diversity are old-fashioned.

The question, and the question probed by some of the previous speakers, is whether or not the rules needed to ensure those principles that were originally designed in 1955 or 1965 are appropriate to ensure those principles in 2005 or 2015 or 2025 for that matter. The principles are not necessarily old-fashioned, but technology has changed, competition has changed, the nature that people get their information has changed, and what we are here to discuss today is whether or not in order to keep pace with those changes in technology, some modification of the rules or the regulations might be appropriate.

Thank you, Mr. Chairman.

The CHAIRMAN. Obviously, there is a diversity of opinion on this pussycat committee.

[Laughter.]

The CHAIRMAN. Senator Boxer.

STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM CALIFORNIA

Senator BOXER. Mr. Chairman, I ask unanimous consent to put my statement in the record.

The CHAIRMAN. Without objection.

Senator BOXER. I am keeping track of who the pussycats are. It is interesting.

[Laughter.]

Senator BOXER. But let me say that people are calling certain rules antiquated when they were set in 1996, so let us get that squared away. The rules, the 35 percent rule went into effect in 1996. I would like to ask unanimous consent to place into the record an article entitled, “Children’s TV Shows Cut in Half After Media Mergers,” and it says, as the FCC prepares to announce sweeping changes to regulations governing how many media outlets a single company can own. A new study shows dramatic decrease in children’s TV programming following a rise in media consolidation, and this was against all the promises that were made. I would just cut to the heart of it.

We are going to hear from the FCC. I think they are being very unresponsive to many letters that many of us have sent. They refuse to really be transparent about what they are doing. They will not move back the date. The bottom line is, I am surprised to hear so many voices here who seem to take the opposite view of what I would think they would, meaning that we should stand for competition, free speech and all the rest, and believe me, I am going to fight for that, and I think we may have to fight for that.

Thank you.

The CHAIRMAN. Senator Lott.

Senator LOTT. I believe since I have just arrived I will pass.

The CHAIRMAN. Senator Nelson.

Senator NELSON. Thank you, Mr. Chairman. Competition, diversity, and local coverage. Those are old-fashioned values that can be applied to the new age.

The CHAIRMAN. We welcome before the Committee, our colleague and friend, Senator Allard, for a brief statement in preparation for this hearing. We thank you for your interest. We appreciate you appearing this morning, Senator Allard.

STATEMENT OF HON. WAYNE ALLARD, U.S. SENATOR FROM COLORADO

Senator ALLARD. Well, I would like to thank you, Mr. Chairman and members of the Committee, for allowing me to speak here today, and I would like to especially thank you, Mr. Chairman and Ranking Member Hollings, for both of your commitment to examining media ownership this year, and I look forward to working with you on these important issues.

On May 13, this committee heard testimony from Frank Blethen, publisher of the *Seattle Times,* and Mr. Blethen stated, “the American newspaper, large and small and without exception, belongs to a town, a city, at the most, to a region.” There is a certain pride and comfort to be taken from the notion that the media that so pervades our lives could be so rooted in focus and accountability.

As my colleagues well know, the Federal Communications Commission is currently reviewing a series of historical, broad rule changes that would make it easier for large media corporations to gobble up a greater share of local media, including television stations in the same market. The Commission and those who already hold enormous control over the content of the press claim this will only enhance the ability of the media to meet the needs of the consumer. The world, they claim, has grown so large and so complex that only vast resources and centralized control can carry important stories across the globe, and I respectfully disagree, Mr. Chairman.

Consumers benefit from technology more today than at any time in history. In an age of satellite television and the Internet, I am not as convinced as some that the greatest toll in news coverage is the world beyond our region. The Consumers Union has correctly pointed out, in fact, that the opposite is the case. Satellite provides no independent local news information and is struggling just to make local stations available to subscribers.

Radio providers, another acute example, prior to 1996, there was a 40-station national ownership cap in the radio industry. Today, Clear Channel alone owns almost 1,240 stations, and between one-third and one-half of all independent radio stations have been absorbed or run out of business, including many in Colorado. Suggesting allowing increased cross-ownership does not strike me as a policy in the greatest interest of the public, whom the FCC is chartered to serve.

The current generation of Americans have seen the number of independently owned newspapers dwindle from 1,700 to 280. As Chairman McCain noted last week, this often equates to a loss of diversity of opinion in the pages of those newspapers with a common owner. I share the Chairman's opinion on this matter, and am profoundly concerned with the marginalization of information being funneled to the local communities by multimarket media corporations.

As Mr. Blethen stated in his testimony, the secret of a free press and vibrant public discourse depends upon voices in the communities themselves. While the facts stand on their own, it is equally compelling to examine what we have witnessed in my home state of Colorado in recent years.

Since the joint operating agreement, referred to in my testimony as JOA, between the *Denver Post* and the *Rocky Mountain News,* local businesses have reported an increase in advertising rates between 6 and 10 times pre-JOA levels charged by both papers when they were separately owned. This represents an enormous fiscal impact on large and small businesses as well as individuals, infringing on their ability to reach the consumers they relied upon for years. Those who can still afford to advertise are forced to pass these increased costs to consumers.

The issue before the FCC and this committee is not whether we need to redebate the Telecommunications Act of 1996, or specific joint operating agreements. The issue today is whether the public will be well served by another round of consolidation, particularly the wisdom of enhancing the ability of a large corporation to purchase broadcast outlets and newspapers in the same market.

On several occasions, I have contacted the FCC chairman, Michael Powell, to express my concern over the direction the FCC appears to be taking and the speed with which it is moving. In my opinion, the scheduled June 2 vote of the FCC does not give the public nor Congress an adequate chance to comment on changes of such enormous consequence.

I have joined Senator Stevens, Senator Hollings and others on this committee in support of legislation concerning one of the rules being examined by the FCC, that of a media ownership cap and localism in television, and look forward to working on that issue with this committee. I have been impressed and encouraged by the broad coalition of organizations expressing similar concerns over the FCC's press for action. The Consumers' Union, National Rifle Association, Common Cause, the Traditional Values Coalition, Code Pink Women for Peace, the U.S. Conference of Catholic Bishops, and the Future of Music Coalition are just a few of the organizations that share my concern for independent and diverse media in the United States.

The FCC must carefully consider the prudence of these rule changes and the overall public interest at stake. Reed Hundt, FCC chairman during the passage of the Telecommunications Act, stated well the intention of the Congress. The Commission's goal in this proceeding is to further competition, just as we seek to promote competition in other communications industries we regulate, but in our broadcast ownership rules, we also seek to promote diversity in programming and diversity in the viewpoints expressed on this powerful medium that so shapes our culture, close quote.

Mr. Chairman, what we must encourage is locally driven news coverage, as opposed to national news that attempts to find a local perspective, but never gives local communities the in-depth coverage they should have. Do we want top-down coverage or bottom-up coverage? I opt for local to national competition which in my view is the best way to go. It is my hope that the FCC will listen to the many voices that are coming forward, and ask them to take more time on these important issues before charting the course for media and consumers in the coming years.

In conclusion, Mr. Chairman, the FCC would be wise to maintain the existing commitment made to the public, facilitating greater opportunity for Americans to do business, seek information, and enjoy entertainment from a vibrant, diverse, and healthy media. If the FCC fails in doing this, then we must be prepared to act again.

I thank the Committee for their time and energy on these matters. I look forward to working with each of you as we address these most important issues.

[The prepared statement of Senator Allard follows:]

PREPARED STATEMENT OF HON. WAYNE ALLARD, U.S. SENATOR FROM COLORADO

I'd like to thank the members of the Committee for allowing me to speak here today. I would especially like to thank Chairman McCain and Ranking Member Hollings for their commitment to examining media ownership this year and I look forward to working with you on these important issues.

On May 13 this Committee heard testimony from Frank Blethen, Publisher of the *Seattle Times.* Mr. Blethen stated "the American newspaper, large and small, and without exception, belongs to a town, a city, at the most to a region." There is a certain pride and comfort to be taken from the notion that the media that so pervades our lives could be so rooted in focus and accountability.

As my colleagues well know the Federal Communications Commission is currently reviewing a series of historically broad rule changes that would make it easier for large media corporations to gobble up a greater share of local media, including television stations, in the same market. The Commission and those who already hold enormous control over the content of the press claim this will only enhance the ability of the media to meet the needs of the consumer.

The world, they claim, has grown so large and so complex that only vast resources and centralized control can carry important stories across the globe. I respectfully disagree.

Consumers benefit from technology more today than in any time in history. In an age of satellite television and the Internet I am not as convinced as some that the greatest hole in news coverage is the world beyond our region. The Consumers Union has correctly pointed out, in fact, that the opposite is the case: satellite provides no independent local news information and is struggling just to make local stations available to subscribers.

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The current generation of Americans has seen the number of independently owned newspapers dwindle from 1,700 to 280. As Chairman McCain noted last week, this often equates to a loss of diversity of opinion in the pages of those newspapers with a common owner. I share the Chairman's opinion on this matter and am profoundly concerned with the homogenization of information being funneled in to local communities by multi-market media corporations, As Mr. Blethen stated in his testimony, the secret of the free press and vibrant public discourse depends upon voices in the communities themselves.

While the facts stand on their own, it is equally compelling to examine what we have witnessed in my home state of Colorado in recent years.

Since the Joint Operating Agreement (JOA) between the *Denver Post* and the *Rocky Mountain News* local businesses have reported an increase in advertising rates between six and ten times pre-JOA levels charged by both papers when they were separately owned. This represents an enormous fiscal impact on large and small businesses as well as individuals, infringing on their ability to reach the consumers they relied upon for years. Those who can still afford to advertise are forced to pass these increased costs to consumers.

The issue before the FCC and this Committee is not whether we need to re-debate the Telecommunications Act of 1996 or specific Joint Operating Agreements. The issue today is whether the public will be well served by another round of consolidation, particularly the wisdom of enhancing the ability of a large corporation to purchase broadcast outlets and newspapers in the same market. On several occasions I have contacted FCC Chairman Michael Powell to express my concern over the direction the FCC appears to be taking and the speed with which it is moving. In my opinion the scheduled June 2 vote at the FCC does not give the public nor Congress an adequate chance to comment on changes of such enormous consequence. I have joined Senator Stevens, Senator Hollings, and others on this Committee in support of legislation concerning one of the rules being examined by the FCC, that of a media ownership cap and localism in television, and look forward to working on that issue with this Committee.

I have been impressed and encouraged by the broad coalition of organizations expressing similar concerns over the FCC's press for action.

The Consumers Union, National Rifle Association, Common Cause, the Traditional Values Coalition, CodePink Women for Peace, the U.S. Conference of Catholic Bishops and the Future of Music Coalition are just a few of the organizations that share my concern for independent and diverse media in the United States. The FCC must carefully consider the prudence of these rule changes and the overall public interest at stake.

Reed Hundt, FCC Chairman during the passage of the Telecommunications Act, stated well the intention of the Congress. "The Commission's goal in this proceeding is to further competition, just as we seek to promote competition in other communications industries we regulate. But in our broadcast ownership rules we also seek to promote diversity in programming and diversity in the viewpoints expressed on this powerful medium that so shapes our culture." What we must encourage is locally driven news coverage as opposed to national news that attempts to find a local perspective but never gives local communities the in-depth coverage they should have. Do we want top down coverage or bottom up coverage? I opt for local to national.

It is my hope that the FCC will listen to the many voices that are coming forward and asking them to take more time on these important issues before charting the course for media and consumers in the coming years.

The FCC would be wise to maintain the existing commitment made to the public, facilitating greater opportunity for Americans to do business, seek information, and enjoy entertainment from a vibrant, diverse, and healthy media. If the FCC fails in doing this then we must be prepared to act.

Again, I thank the Committee for their time and energy on these matters. I look forward to working with each of you as we address these issues.

The CHAIRMAN. Thank you very much, Senator Allard. We look forward to working with you. This issue will be with us for sometime.

We now would like our panel to come forward, which is Mr. Rupert Murdoch, President and CEO of News Corporation, Mr. Gene Kimmelman, the Director of Consumers Union, Dr. Kent Mikkelsen, the Vice President of Economists, Incorporated, and Mr. Tom Fontana, who is the President of the Levinson-Fontana Company.

Please take your seats, gentlemen. All of your complete statements will be made a part of the record without objection, and we will begin with Mr. Murdoch.

Welcome before the Committee, Mr. Murdoch.

STATEMENT OF RUPERT MURDOCH, CHAIRMAN AND CHIEF EXECUTIVE, THE NEWS CORPORATION, LTD.

Mr. MURDOCH. Thank you, and good morning, Chairman McCain.

The CHAIRMAN. Could you pull the microphone a little closer? Thank you.

Mr. MURDOCH. Good morning, Chairman McCain, Senator Hollings, and members of the Committee. Thank you for the invitation to testify this morning on News Corporation's proposed acquisition of a 34 percent interest in Hughes, owner of Direct Television, which is not a broadcaster, but a distributor.

This transaction will infuse DIRECTV with the strategic vision, expertise and resources necessary to bring increased innovation and robust competition to the market. The resulting public interest benefits are manifold and substantial, and today I would like to tell you specifically why this deal will be good for consumers and good for competition. By combining the expertise and technologies of our two companies, consumers will benefit from better programming, more advanced technologies and services, and greater diversity.

One of the first enhancements DIRECTV subscribers will enjoy is more local television stations. News was the first proponent of local service as a part of our satellite venture 6 years ago, and it remains one of our top priorities. News is committed to dramatically increasing DIRECTV's present local into local commitment of 100 DMAs by providing local into local service in as many of the 210 DMAs as possible, and to do so as soon as economically and technologically feasible.

In addition, News is exploring new technologies to expand HDTV content and aggressively build broadband services. News will also bring a wealth of new services to DIRECTV subscribers from Britain, including interactive news and sports and access to online shopping, games, E-mail, and information services, and we will infuse Hughes with our deep and proven commitment to equal opportunity and diversity, including more diverse programming and a variety of mentoring, executive development and internship programs. You can count on these enhancements because innovation and consumer focus is part of our company's DNA.

We have a long and successful history of defining conventional wisdom and challenging market leaders, whether they be the Big Three broadcast networks, the previously dominant cable news channel, or the entrenched sports establishment. We started as a small newspaper company and grew by providing competition and innovation in stale, near-monopolistic markets. It is our firm intention to continue that tradition with Direct Television.

With these consumer benefits, DIRECTV will become a more formidable competitor to cable and thus enhance the competitive landscape of the entire multichannel industry. To that end, I should note there are no horizontal or vertical concerns arising from this transaction. The transaction does result in a vertical integration of assets because of the association of DIRECTV's distribution platform and users' programming interests, but this is not anticompetitive for two reasons.

First, neither company has sufficient ties in the market in order to be able to act in an anticompetitive manner. Second, neither News nor DIRECTV has any incentive to engage in anticompetitive behavior. As a programmer, News' business model is predicated on achieving the widest possible distribution to maximize advertising revenue and subscriber fees.

Similarly, DIRECTV has every incentive to draw from the wider spectrum of attractive programming regardless of its source. Nevertheless, we have agreed to a series of program access undertakings to eliminate any concerns over the competitive effects of this transaction. We have asked the FCC to adopt these program access commitments as a condition of our application.

Viewed from another perspective, neither News nor Hughes is among the top five media companies in the United States. News is sixth, with 2.8 percent of total industry expenditures, and Hughes is eighth. Even combined, the companies would rank no higher than fifth, half the size, or less than half the size of the market leader.

In closing, I believe this transaction represents an exciting association between two companies with the assets, experience and history of innovation to ensure DIRECTV can provide better service to consumers and become an even more effective competitor to cable.

Thank you for your attention. I look forward to your questions.

[The prepared statement of Mr. Murdoch follows:]

PREPARED STATEMENT OF RUPERT MURDOCH, CHAIRMAN AND CHIEF EXECUTIVE, THE NEWS CORPORATION, LTD.

Good Morning, Chairman McCain, Senator Hollings, and Members of the Committee. Thank you for the invitation to testify today regarding News Corporation's proposed acquisition of a 34 percent interest in Hughes Electronics Corporation.

Let me say at the outset that we believe that this acquisition has the potential to profoundly change the multichannel video marketplace in the United States to the ultimate benefit of all pay-TV customers, whether they are direct-to-home satellite or cable subscribers. It is my hope, and my goal, that as a result of this acquisition, Hughes' DIRECTV operation will be infused with the strategic vision, expertise, and resources necessary for it to bring innovation and competition to the multichannel marketplace and, of course, to the televisions of tens of millions of American viewers.

The public interest benefits of this transaction are manifold, but I would like to briefly touch on three key areas today:

First, News Corporation's outstanding track record of providing innovative new products and services to consumers, a track record that it is determined to replicate at Hughes and DIRECTV;

Second, the specific consumer benefits that will be realized from this transaction, including improvements in local-into-local service, new and improved interactive services, and the many new diversity programs News Corporation will bring to Hughes; and

Third, the absence of any horizontal or vertical merger concerns about this transaction. This transaction will only increase the already-intense competition in the programming and distribution markets, and market realities will compel our companies to continue the open and non-discriminatory practices each company has lived by. Nonetheless, to eliminate any possible concerns over the competitive effects of vertical integration, the parties have agreed as a matter of contract to significant program access commitments, and have asked the FCC to make those commitments an enforceable condition of the transfer of Hughes' DBS license.

News Corporation's track record of innovation as a content provider and as a satellite broadcaster is without parallel. Our company has a history of challenging the established—and often stagnant—media with new products and services for television viewers around the world. Perhaps our first and best-known effort to offer new choices to consumers in the broadcasting arena came with the establishment of the FOX network in 1986. FOX brought much-needed competition to the "Big 3" broadcast networks at a time when conventional wisdom said it couldn't be done. Seventeen years later, we have proved unambiguously that it could be done, with FOX reigning as the number one network so far this calendar year in the highly valued "adults 18–49" demographic. Along the way, we redefined the TV genre with shows like *The Simpsons, In Living Color, The X-Files,* and *America's Most Wanted,* and more recently *24, Boston Public, Malcolm in the Middle, The Bernie Mac Show,* and the biggest hit on American TV, *American Idol.*

The FOX network was launched on the back of the Fox Television Stations group, an innovator in local news and informational programming since it was first formed. Today, Fox-owned stations air more than 800 hours of regularly scheduled local news each week—an average of 23 hours per station. We have increased the amount of news on these stations by 57 percent, on average, compared to the previous owners. Viewers demand more local news, and we provide it. Fox-owned stations were often the first—and in many markets are still the only—stations to offer multiple hours of local news and informational programming each weekday morning. This commitment to local news extends well beyond the stations we own. Since 1994, Fox has assisted more than 100 affiliates in launching local newscasts.

In addition to providing greater choice and innovation in network entertainment and local news, we have also redefined the way Americans watch sports. With viewer-friendly innovations such as the "FOX Box" and the first "Surround Sound" stereo in NFL broadcasts, the catcher cam in baseball, the glowing puck in hockey, and the car-tracking graphic in NASCAR, FOX has made sports more accessible and exciting for the average fan. FOX Sports Net, launched in 1996, has provided the first and only competitive challenge to the incumbent sports channel, ESPN. Fox Sports Nets' 19 regional sports channels, reaching 79 million homes, regularly beat ESPN in several key head-to-head battles. In 2002, Major League Baseball on ESPN averaged a 1.1 rating. On Fox Sports Net, baseball scored an average 3.5 rating in the markets it covers. The NBA on ESPN has averaged a 1.2 rating during the current season. In Fox Sports Net's markets, it has rated a 2.2. The key to Fox Sports Net's success is its delivery of what sports fans want most passionately: live, *local* games, whether at the professional, collegiate, or high school level, coupled with outstanding national sports events and programming.

Perhaps News Corp.'s most stunning success against conventional wisdom—and our most innovative disruption of the status quo—is the Fox News Channel, launched in 1996. A chorus of doubters said CNN *owned* the cable news space and no one could possibly compete. A scant five years later, Fox News Channel overtook CNN, and since early 2002 has consistently finished first among the cable news channels in total day ratings. Growing from 17 million subscribers at launch to almost 82 million subscribers this month, Fox News Channel boasts some of the most popular shows on cable and satellite. I think it is fair to say Fox transformed the cable news business, introducing innovative technology and programming, and bringing a fresh choice and perspective to American news viewers.

Across the dial on American television are examples of where our challenges to the status quo have made a difference for viewers and proven we could be competitive against entrenched competition. We've launched and expanded FX, a general entertainment channel; we've launched the movie channel FXM; and we've relaunched and expanded the Speed Channel, a channel devoted to auto racing enthusiasts. And in January 2001, we launched National Geographic Channel with our partner, the National Geographic Society, into nine million homes. Today, Nat Geo is the fastest-growing cable network in the Nation with 43 million subscribers and is making steady progress in the ratings against the established industry leader, The Discovery Channel.

News Corp.'s track record of innovation is not limited to the United States. News Corp. will bring a wealth of innovation to Hughes and DIRECTV from its British DTH platform, BSkyB. We launched BSkyB in 1989 with only four channels of programming. In 1998, frustrated by the limitations of analog technology and determined to give viewers even wider choices, BSkyB launched a digital service that boasted 140 channels. In 1999, in order to speed the conversion to digital and to drive penetration, BSkyB offered free set-top boxes and dishes. The conversion to digital took three years and cost BSkyB nearly one billion dollars, but by 2001, when the transition to digital was complete, BSkyB's subscriber base had grown to 5 million homes. Through BSkyB's digital offering, BSkyB viewers may choose from 389 channels delivering programming 24 hours each day. They also have a vast array of new services, including world-first interactive innovations such as a TV news service that allows viewers to choose from multiple segments being broadcast simultaneously on a news channel, multiple camera angles during sporting events, or multiple screens of programming within a certain genre. In addition, BSkyB viewers have access to online shopping, banking, games, e-mail, travel, tourism and information services. With the launch of Europe's first fully integrated digital video recorder in 2001, BSkyB customers won access to even more interactive capabilities and viewing choices.

Upon completion of this transaction, News Corp. will bring the same spirit of innovation to the DBS business in the U.S., in the process redefining the choices Americans have when they watch television. This spirit of never-say-die competition and News Corp.'s demonstrated determination to provide ever-expanding services to the public have the potential to re-energize the entire American multichannel video marketplace.

To my second point about this transaction: its benefits to consumers. Apart from a history of bringing new competition and innovation to the television industry, News Corp. has been tremendously successful in bringing tangible benefits to consumers over nearly two decades of operating both here in the United States and abroad. This transaction will be no exception, enabling us to share our best practices across our platforms and across geographical boundaries to the benefit of consumers. These benefits will be very real, and often easily quantifiable.

One of the first enhancements to DIRECTV's service that News Corp.'s investment in Hughes will bring will be more local television stations for subscribers, offering consumers a more compelling alternative to cable. News Corp., as a leading U.S. broadcaster, was the first proponent of local-into-local service as part of our American Sky Broadcasting ("ASkyB") satellite DTH venture six years ago. In fact, I testified before Congress on this very topic, urging passage of copyright legislation to allow the retransmission of local signals by DBS. ASkyB conceived and designed a DBS spot beam satellite to implement this previously unheard of idea. As a broadcast company, News Corp. was convinced then—as it is now—that DBS will be the strongest possible competitor to cable only if it can provide consumers with the local broadcast channels they have come to rely on for local news, weather, traffic and sports.

With that in mind, News Corp. is committed to dramatically increasing DIRECTV's present local-into-local commitment of 100 DMAs by providing local-into-local service in as many of the 210 DMAs as possible, and to do so as soon as economically and technologically feasible. To that end, we are already actively considering a number of alternative technologies, including using some of the Ka-band satellite capacity on Hughes Network Systems' SPACEWAY system; seamlessly incorporating digital signals from local DTV stations into DIRECTV set-top boxes equipped with DTV tuners; and by exploring and developing other emerging technologies that could be used to deliver local signals, either alone or in combination with one of the above alternatives.

In addition, News Corp. is exploring new technologies that promise to improve spectrum efficiency or otherwise increase available capacity so that DIRECTV can expand the amount of HDTV content. Options include use of Ka-band capacity, higher order modulation schemes, such as the 8PSK technology FOX uses for its broadcast distribution to affiliated stations, and further improvements in compression technology. News Corp. will urge DIRECTV to carry many more than the four HDTV channels it currently carries and the five channels that some cable operators carry. In this way, we hope to help drive the transition to digital television by providing compelling programming in a format that will encourage consumers to invest in digital television sets.

As to broadband, News Corp. will work aggressively to build on the services already provided by Hughes to make broadband available throughout the U.S., particularly in rural areas. Broadband solutions for all Americans could come from partnering with other satellite broadband providers, DSL providers, or new potential broadband providers using broadband over power line systems, or from other emerging technologies. News Corp. believes it is critical that consumers have vibrant broadband choices that compete with cable's video and broadband services on capability, quality and price.

The public will also benefit from the efficiencies and economies of scope and scale that News Corporation will bring to DIRECTV. We believe by sharing "best practices," and by using management and expertise from our worldwide satellite operations, we will be able to substantially reduce DIRECTV's annual expenses by $65 to $135 million annually. Other efficiencies include sharing facilities of the various subsidiaries of News Corp. and Hughes in the U.S., and developing and efficiently deploying innovations, such as next-generation set-top boxes with upgraded interactive television and digital video recorder capabilities and state-of-the-art anti-piracy techniques. When Hughes becomes part of News Corp.'s global family of DTH affiliates, it will benefit from a number of scale economies that will more efficiently defray the enormous research and development costs associated with bringing new features and services to market. Moreover, common technology standards for both hardware and software across the News Corp. DTH platforms should help to drive down consumer equipment and software costs. Through these various cost savings, DIRECTV will be able to finance more innovations in programming and technology to ensure that it achieves and maintains the highest level of service for its customers at competitive prices.

News Corp. also plans to bring to DIRECTV the "best practices" it has developed at its satellite operations in other countries. DIRECTV's "churn rate"—that is, the rate at which customers discontinue use of the service—is around 18 percent, whereas BSkyB's annual churn rate is currently 9.4 percent. By using BSkyB's "best practices" and accelerating the pace of innovation, we predict that DIRECTV should experience a 2 to 3 percent decline in its annual churn rate. We calculate that every percentage point reduction in churn will add approximately $33 million to Hughes' earnings. With these additional financial resources, DIRECTV will be able to finance additional initiatives in research, development and marketing.

Another important element that News Corp. will bring to Hughes and DIRECTV is its deep and proven commitment to equal opportunity and diversity. Specifically, the diversity initiatives we will implement include:

- A commitment to carry more programming on DIRECTV targeted at culturally, ethnically and linguistically diverse audiences;
- An extensive training program for minority entrepreneurs seeking to develop program channels for carriage by multichannel video systems;
- A program for actively hiring and promoting minorities for management positions;
- An extensive internship programming for high school and college students;
- Improved procurement practices that ensure outreach and opportunities for minority vendors; and
- Upgraded internal and external communications, including the Hughes website, to assist implementation of the above initiatives.

Finally, to my third point: there are no horizontal or vertical merger concerns arising from this transaction. Because this transaction involves an investment in DIRECTV, a multichannel video programming distributor with no programming interests, by News Corp., a programmer with no multichannel distribution interests, no "horizontal" competition issues arise. There will be no decrease in the number of U.S. competitors in either the multichannel video distribution market or the programming market. To the contrary, because of News Corp.'s plans to bring "best practices" and innovations to DIRECTV, competition in these markets will intensify and consumers will be presented with more and better choices.

The transaction does result in a "vertical" integration of assets because of the association of DIRECTV's distribution platform and News Corp.'s programming assets. But this "vertical" integration is not anti-competitive for two reasons. First, neither News Corp. nor DIRECTV has sufficient power in its relevant market to be able to act in an anti-competitive manner. DIRECTV has a modest 12 percent of the national multichannel market, compared to as much as 29 percent of the market held by the largest cable operator. News Corp. has a modest 3.9 percent of the national programming channels, compared to the largest cable programmer at 15.2 percent of the channels.

Second, rational business behavior will prevent News Corp. and DIRECTV from engaging in anti-competitive behavior. As a programmer, News Corp.'s business model is predicated on achieving the widest possible distribution for our programming in order to maximize advertising revenue and subscriber fees. Any diminution in distribution reduces our ability to maximize profit from that programming. Even if we were voluntarily willing to lower our earnings potential by withholding our programming from competing distributors, we would be precluded from doing so by the FCC's program access rules. Similarly, DIRECTV has every economic incentive to draw from the widest spectrum of attractive programming, regardless of source, in order to maximize subscriber revenue. In short, it makes no business sense for either party to do anything to limit our potential customer base or our programming possibilities.

Notwithstanding these strong economic and business incentives, News Corp. and Hughes have agreed—as a matter of contract—to a series of program access undertakings to eliminate any concerns over the competitive effects of the proposed transaction. We have asked the FCC to adopt these program access commitments, which are attached to my written testimony, as a condition of the approval of our Application for Transfer of Control that was filed at the FCC on May 2. These program access commitments are largely the same as those required of cable operators, but in some respects go further. These commitments will:

- Prevent DIRECTV from discriminating against unaffiliated programmers;
- Prevent DIRECTV from entering into an exclusive arrangement with any affiliated programmer, including News Corp.; and
- Prevent News Corp. from offering any national or regional cable programming channels it controls on an exclusive basis to *any* distributor and from discriminating among distributors in price, terms or conditions.

These extensive commitments apply for as long as the FCC's program access rules remain in effect and News Corp. owns an interest in DIRECTV. They make it clear that News Corp. and Hughes are committed to fair, open and non-discriminatory program access practices that go well beyond what the law requires of DBS operators, cable programmers, and even cable operators.

In any event, neither News Corp. nor Hughes is among the top five media companies, by expenditure, in the United States. As you can see in the chart attached to my testimony, News Corp. is sixth with 2.8 percent of total industry expenditures, and Hughes is eighth with 2.2 percent. Even combining the expenditures of News Corp. and Hughes would place the company fifth in expenditures behind AOL Time Warner with 10.1 percent, Viacom with 6.4 percent, Comcast with 6.3 percent, and Sony at 5.3 percent. If the expenditures from Disney's theme parks were included in its total, the combination of News Corp. and Hughes would rank sixth in total "entertainment" revenues.

In closing, I believe this transaction represents an exciting association between two companies with the assets, experience and history of innovation that will ensure DIRECTV can become an even more effective competitor in the multichannel market. There will be significant public interest benefits for consumers as a result of this transaction, including bringing more local channels to more markets, innovations such as set-top boxes with next generation interactive television and digital video recorder capabilities, and a diversity program that will set the standard for the rest of the entertainment industry.

Thank you for your attention, and I look forward to your questions.

EXHIBIT F

Program Access Requirements: News Corp. and DIRECTV Commitments

News Corp. and DIRECTV will be bound by the FCC's program access rules (otherwise applicable to vertically-integrated satellite cable programming services) regardless of whether News Corp., DIRECTV or any of their program services is deemed to be a vertically integrated satellite cable programming vendor under such rules.

In addition, News Corp. and DIRECTV will make the following commitments, above and beyond those contained in the FCC's program access rules.

- News Corp. will not offer any of its existing or future national and regional programming services on an exclusive basis to any MVPD and will continue to make such services available to all MVPDs on a non-exclusive basis and non-discriminatory terms and conditions.
- Neither News Corp. nor DIRECTV will discriminate against unaffiliated programming services in the selection, price, terms or conditions of carriage.

- DIRECTV will not enter into an exclusive distribution arrangement with any Affiliated Program Rights Holder. "Affiliated Program Rights Holder" includes (i) a program rights holder in which News Corp. or DIRECTV holds a non-controlling "Attributable Interest" (as determined by the FCC's program access attribution rules); and (ii) a program rights holder in which an entity holding an non-controlling Attributable Interest in News Corp. or DIRECTV holds an Attributable Interest, provided that News Corp. or DIRECTV has actual knowledge of such entity's Attributable Interest in such program rights holder.

  Liberty Media owns approximately 18 percent of the non-voting equity of News Corp. Liberty Media currently is considered a vertically integrated programmer under the FCC's program access rules and, as such, is restricted in its ability to enter into exclusive or discriminatory agreements with respect to satellite-delivered cable programming services in which it has an Attributable Interest. In the event Liberty Media is no longer deemed a vertically integrated programmer (including by reason of the sale of its Puerto Rican cable interests) and so long as Liberty Media holds an Attributable Interest in News Corp., DIRECTV will deal with Liberty Media with respect to programming services it controls as if it continued as a vertically integrated programmer subject to the program access rules.

  DIRECTV may continue to compete for programming that is lawfully offered on an exclusive basis by an unaffiliated program rights holder (*e.g.,* NFL Sunday Ticket).

- Neither News Corp. nor DIRECTV (including any entity over which either exercises control) shall unduly or improperly influence: (i) the decision of any Affiliated Program Rights Holder to sell programming to an unaffiliated MVPD; or (ii) the prices, terms and conditions of sale of programming by any Affiliated Program Rights Holder to an unaffiliated MVPD.

These commitments will apply to News Corp. and DIRECTV for the later of (1) as long as the FCC deems News Corp. to have an Attributable Interest in DIRECTV and the FCC's program access rules are in effect (provided that if the program access rules are modified these commitments shall be modified to conform to any revised rules adopted by the FCC) or (2) if these commitments are embodied in a consent decree or other appropriate order issued by or agreement with the DOJ, FTC or FCC, for the term specified by such consent decree, order or agreement.

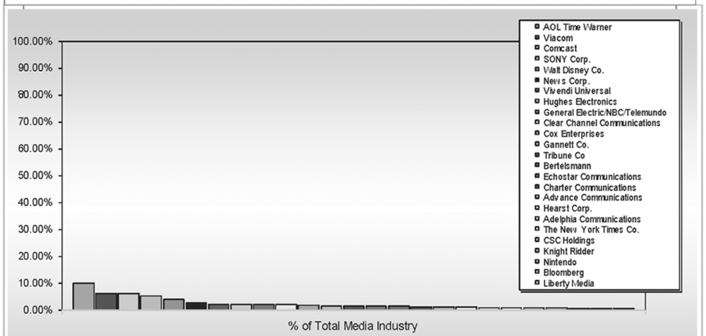
The U.S. Media Marketplace Is Highly Competitive

	Company	2002 U.S. Media Revenues (in millions)	Company Revenues as a % of Total Media Industry
1	AOL Time Warner	$32,630	10.1%
2	VIACOM	$20,670	6.4%
3	Comcast	$20,470	6.3%
4	SONY Corporation	$17,090	5.3%
5	The Walt Disney Co.	$13,110	4.0%
6	News Corporation	$9,130	2.8%
7	Vivendi Universal	$7,580	2.3%
8	Hughes Electronics	$7,190	2.2%
9	General Electric/NBC/Telemundo	$7,150	2.2%
10	Clear Channel Communications	$6,920	2.1%
11	Cox Enterprises	$6,400	2.0%
12	Gannett Co.	$5,590	1.7%
13	The Tribune Company	$5,400	1.7%
14	Bertelsmann	$5,270	1.6%
15	Echostar Communications	$4,750	1.5%
16	Charter Communications	$4,570	1.4%
17	Advance Publications	$4,000	1.2%
18	Hearst Corporation	$3,990	1.2%
19	Adelphia Communications	$3,340	1.0%
20	The New York Times Company	$3,080	1.0%
21	Cablevision Systems Corporation	$3,070	0.9%
22	Knight Ridder	$2,840	0.9%
23	Nintendo	$2,130	0.7%
24	Bloomberg	$2,110	0.7%
25	Liberty Media	$2,080	0.6%
	Totals for the Top 25 Media Companies (By Revenue)	$200,560	62.1%

Source: Corporate SEC filings (except as noted in the End Notes).

THE VAST MEDIA UNIVERSE

% Share of U.S. Total Media Industry, By Company



❖ COMPETITION FLOURISHES AMONGST A MULTITUDE OF MAJOR MEDIA COMPANIES

- The largest 25 media companies collectively account for only 60% of the Total Media Industry.
- Even the largest media company has only a small portion of the Total Media Industry.

THE VAST MEDIA UNIVERSE

END NOTES

1. Media include the following industry segments: broadcast television, broadcast radio, cable & satellite providers, cable & satellite programming, newspaper publishing, consumer magazine publishing, consumer book publishing, consumer Internet sites, filmed entertainment, recorded music, interactive entertainment, and outdoor advertising (the "Media"). Total U.S. expenditures (end-user spending) on the Media was estimated to be $324.006 billion in 2002 (the "Total Media Industry"). *Source: PQ Media, LLC; Veronis Suhler Stevenson.* Company revenues for the Media are reported as a percentage of the Total Media Industry. Since most private companies do not publicly report financial performance, data on total revenues for the Media is unavailable. The Total Media Industry, which includes expenditures on both publicly- and privately-owned companies, approximates total U.S. revenue for both public and private companies operating in the Media.

2. Corporate SEC filings for AOL Time Warner, Comcast, News Corporation, CSC Holdings and Tribune Company do not separately break out revenues for certain segments (*e.g.*, sports teams) that are not among the segments that comprise the Total Media Industry.

3. Corporate SEC filings for Viacom and Clear Channel Communications and Bertelsmann's Annual Report do not separately break out revenues for certain segments (*e.g.*, theme parks, live entertainment and media services) that are not among the segments that comprise the Total Media Industry.

4. As reported in its 10-K, Comcast's figures include unaudited *pro forma* revenues for AT&T Broadband, which merged with Comcast in November 2002.

5. News Corp.'s figures include U.S. and Canadian revenues for both Fox Entertainment Group, Inc. and Harper Collins, but exclude revenues for the New York Post.

6. SONY, Vivendi Universal, Hughes Electronics, GE/NBC/Telemundo, CSC Holdings, Nintendo, and Liberty Media figures may include some non-U.S. revenues.

7. The figures for Cox Enterprises are 2001 revenues and have been derived from the company's web site, http://www.coxenterprises.com.

8. Adelphia Communications' figures are an estimate based on financial statements filed by the company with the United States Bankruptcy Court on November 25, 2002. *See* Mike Farrell, *Adelphia's Numbers Aren't All Bad*, Multichannel News, December 2, 2002, at 6.

9. Revenues for the following, privately-held companies have been derived from Advertising Age: Advance Publications, Hearst Corporation and Bloomberg. *See Leading Media Companies*, Advertising Age, August 19, 2002, at S-2. The revenue figures for these companies are 2001 figures and may exclude certain revenues from certain industry segments that comprise the definition of the Total Media Industry.

Securities Laws Information

In connection with the proposed transactions, General Motors Corporation ("GM"), Hughes Electronics Corporation ("Hughes") and The News Corporation Limited ("News") intend to file relevant materials with the Securities and Exchange Commission ("SEC"), including one or more registration statement(s) that contain a prospectus and proxy/consent solicitation statement. Because those documents will contain important information, investors and security holders are urged to read them, if and when they become available. When filed with the SEC, they will be available for free (along with any other documents and reports filed by GM, Hughes or News with the SEC) at the SEC's website, *www.sec.gov.* GM stockholders will also receive information at an appropriate time on how to obtain transaction-related documents for free from GM. When these documents become available, News stockholders may obtain these documents free of charge by directing such request to: News America Incorporated, 1211 Avenue of the Americas, 7th Floor, New York, New York 10036, attention: Investor Relations.

GM and its directors and executive officers and Hughes and certain of its executive officers may be deemed to be participants in the solicitation of proxies or consents from the holders of GM $1–2/3 common stock and GM Class H common stock in connection with the proposed transactions. Information about the directors and executive officers of GM and their ownership of GM stock is set forth in the proxy statement for GM's 2003 annual meeting of shareholders. Participants in GM's solicitation may also be deemed to include those persons whose interests in GM or Hughes are not described in the proxy statement for GM's 2003 annual meeting. Information regarding these persons and their interests in GM and/or Hughes was filed pursuant to Rule 425 with the SEC by each of GM and Hughes on April 10, 2003. Investors may obtain additional information regarding the interests of such participants by reading the prospectus and proxy/consent solicitation statement if and when it becomes available.

This communication shall not constitute an offer to sell or the solicitation of an offer to buy any securities, nor shall there be any sale of securities in any jurisdiction in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such jurisdiction. No offering of securities shall be made except by means of a prospectus meeting the requirements of Section 10 of the Securities Act of 1933, as amended.

Materials included in this document contain "forward-looking statements" within the meaning of the Private Securities Litigation Reform Act of 1995. Such forward-looking statements involve known and unknown risks, uncertainties and other factors that could cause actual results to be materially different from historical results or from any future results expressed or implied by such forward-looking statements. The factors that could cause actual results of GM, Hughes and News to differ materially, many of which are beyond the control of GM, Hughes or News include, but are not limited to, the following: (1) operating costs, customer loss and business disruption, including, without limitation, difficulties in maintaining relationships with employees, customers, clients or suppliers, may be greater than expected following the transaction; (2) the regulatory approvals required for the transaction may not be obtained on the terms expected or on the anticipated schedule; (3) the effects of legislative and regulatory changes; (4) an inability to retain necessary authorizations from the FCC; (5) an increase in competition from cable as a result of digital cable or otherwise, direct broadcast satellite, other satellite system operators, and other providers of subscription television services; (6) the introduction of new technologies and competitors into the subscription television business; (7) changes in labor, programming, equipment and capital costs; (8) future acquisitions, strategic partnerships and divestitures; (9) general business and economic conditions; and (10) other risks described from time to time in periodic reports filed by GM, Hughes or News with the SEC. You are urged to consider statements that include the words "may," "will," "would," "could," "should," "believes," "estimates," "projects," "potential," "expects," "plans," "anticipates," "intends," "continues," "forecast," "designed," "goal," or the negative of those words or other comparable words to be uncertain and forward-looking. This cautionary statement applies to all forward-looking statements included in this document.

The CHAIRMAN. Thank you, Mr. Murdoch.

Mr. Kimmelman.

STATEMENT OF GENE KIMMELMAN, SENIOR DIRECTOR OF ADVOCACY AND PUBLIC POLICY, CONSUMERS UNION, ON BEHALF OF CONSUMERS UNION AND THE CONSUMER FEDERATION OF AMERICA

Mr. KIMMELMAN. Thank you, Mr. Chairman. On behalf of Consumers' Union, the print and online publisher of *Consumer Reports,* and the Consumer Federation of America, I appreciate the invitation, and Mr. Chairman, I am particularly grateful you are willing to have me back to testify on these important media ownership issues.

Six years ago, I appeared at this very same table next to Mr. Murdoch and supported a satellite venture he was proposing because it appeared quite likely to bring more competition to cable monopolies who were raising their rates three times faster than inflation. Unfortunately, this morning I do not believe the News Corp./DIRECTV deal would lead to that result.

Mr. Murdoch owns a programming juggernaut, a national television network, 35 local stations, 20 regional sports channels with rights to 67 professional teams that everyone in their community would like to see on television, Fox News, FX, a load of other production through its own studios, programming for its own networks, ownership of professional sports teams themselves, and to sustain this programming empire, Mr. Murdoch's incentives, according to Wall Street analysts, and we believe they are accurate, are to raise the price of his programming.

He offers access. That is laudable. But he will make it accessible at a high price to every cable operator in the country, to his own satellite subscribers and to his one satellite competitor. Prices go up for everyone in the industry. Prices go up for consumers nationwide. Cable rates are now up 50 percent since you passed the Telecom Act of 1996. There is not enough competition. I suggest this is not the correct direction to go.

We will seek conditions on this merger to prevent this from happening to consumers nationwide, and hope the Department of Justice and the FCC will take heed. Now, normally I would go on for 5 minutes about the problems with this deal, but I believe this morning, Mr. Chairman, there is a much more important issue before the Committee.

I have had the honor to testify dozens of times before this committee under your leadership, under Senator Hollings' leadership. I do not believe I have ever testified on an issue more important than who owns the media in America, and on June 2, the FCC will abolish most of the important ownership rules that help make our markets competitive.

Now, why do we have ownership limits in the first place? What is this all about? Almost all of the FCC's rules are really about local markets. Let us accept that the national news market is pretty competitive. There are lots of stations, there are lots of technologies, lots of transmission. These rules are about local markets, not national, and while entertainment matters a lot, and Mr. Fontana will address that, the rules are really most importantly about local news.

How do we get news in our communities? How do we find ways to make sure our citizens are informed in their home towns about what matters to them in a local community? Let us look at just the facts. Where do consumers get their news? There are mile-high data filings at the FCC that clearly demonstrate that consumers get it—almost 80 percent of consumers use newspaper and their local TV stations as their major source of local news and information.

And yes, there has been an enormous technology explosion, agreed, satellite, cable, and the Internet, but what on satellite is local? Only your local broadcast channels. What on cable is local? Only your local broadcast channels, and maybe, maybe one local cable news channel. In this community, it is owned by a local broadcast station, as it is in many other communities.

So what the FCC is doing, according to press leaks, is allowing mergers of the two major sources of news and information about the community in more than 150 markets covering more than 90 percent of the population of our country, allowing a dominant newspaper, one with 80 to 100 percent of the market share of print news in that local community to combine with the largest local broadcast station news department in the community, the station with the largest local news audience combining with the dominant newspaper.

In more than 90 communities, this would yield one company that controls more than 50 percent of the news produced for the community, more than 50 percent of the employees providing news coverage.

Why should we care about these two sources coming together? Because I believe everybody in America knows the media is biased. Let us just look at it head on. The media has a point of view, every owner, every editor, every writer, every news anchor, and we protect that with the First Amendment. They have the right.

But we need different owners and different points of view in order to have competition, and I believe these rules are about making sure there are as many different owners, different points of view as possible in the most important sources of news in our local markets, and it is most important also to make sure the media companies are there to keep an eye on each other, to make sure that no one company is breaking the rules.

The FCC is about to substantially reduce the level of competition in the local news markets in our country. You may like the owner of that dominant newspaper/broadcast company today. They may be admirable individuals, someone like Mr. Murdoch, good entrepreneurs, good citizens. What about tomorrow? What about when they sell, the next day and the next owner?

I believe that is why the National Rifle Association and Consumers' Union believe that what the FCC is doing is just simply dangerous to a free marketplace of news in our society. We should not have to rely upon a benevolent media dictator for quality news. That is not what our society is about. Our democracy requires competition between media owners in order to function. I ask you please not to let the FCC move forward and destroy that competition.

Thank you.

[The prepared statement of Mr. Kimmelman follows:]

PREPARED STATEMENT OF GENE KIMMELMAN, SENIOR DIRECTOR OF ADVOCACY AND PUBLIC POLICY, CONSUMERS UNION, ON BEHALF OF CONSUMERS UNION AND THE CONSUMER FEDERATION OF AMERICA

Summary

Today consumers are not receiving the fruits that a competitive cable and satellite marketplace should deliver. Since passage of the 1996 Telecommunications Act, cable rates have risen over 50 percent,[1] and according to the Federal Communications Commission's (FCC), satellite competition is not helping to keep those rates down. Despite the promise for more source and viewpoint diversity from new technologies such as the Internet and satellite, a mere five media companies control nearly the same prime time audience shares as the Big Three networks did 40 years ago.[2] Unfortunately, the market for news production and distribution is even more concentrated.

And a troubling situation is about to get much worse.

The recently announced proposed merger between News Corporation ("News Corp./Fox") and Hughes Electronics Corporation's satellite television unit DIRECTV ("DIRECTV"), combined with the FCC's current efforts to relax or eliminate media ownership rules, threaten to seriously harm meaningful competition between media companies in this Nation. This lack of competition will mean that control of media that Americans rely upon most for news, information and entertainment could eventually be placed in the hands of a few powerful media giants.

Yesterday, Consumers Union[3] and Consumer Federation of America[4] released a report[5] critiquing the FCC's plans to relax the ownership rules, particularly as they apply to the FCC's plan to lift the cross-ownership ban on mergers between television broadcast stations and newspapers.

Using the standard antitrust market definitions, we found that lax First Amendment policy implementation and weak antitrust enforcement has resulted in media markets that are already shockingly concentrated. For instance:

- Every local television and newspaper market in the country is already concentrated.
- Every local newspaper market in the country is already highly concentrated.
- Over 95 percent of the TV and radio markets are highly concentrated.

Ignoring this already concentrated media landscape, the FCC is set to undo media ownership limits by June 2. If a majority of the FCC Commissioners have their way, a wave of mergers in 150 of the top media markets could occur. This will reduce competition between media companies, decrease the diversity of news, information, and entertainment programming available to Americans, undermine media coverage of local issues and concerns, and raise advertising rates for small businesses.

Consider the powerful interaction between the FCC's rush to lift media ownership rules and the proposed merger between News Corp./Fox and DIRECTV, the largest direct broadcast satellite (DBS) network. The FCC is considering:

- Relaxing the ban on news/broadcast cross-ownership would allow broadcasters to buy newspapers in the same communities they own local stations (even when

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[1] Bureau of Labor Statistics, Consumer Price Index (March 2003). From 1996 until March 2003, CPI increased 19.3 percent while cable prices rose 50.3 percent, 2.6 times faster than inflation.

[2] Tom Wolzien, *"Returning Oligopoly of Media Content Threatens Cable's Power."* The Long View, Bernstein Research (Feb. 7, 2003).

[3] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to provide consumers with information, education and counsel about good, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Reports,* its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with more than 4 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[4] The Consumer Federation of America is the Nation's largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power an cooperative organizations, with more than 50 million individual members.

[5] See Appendix, "Promoting the Public Interest through Media Ownership Limits: A Critique of the FCC's Draft Order Based on Rigorous Market Analysis and First Amendment Principles" (May 21, 2003).

there is only one dominant newspaper in that community). News Corp./Fox already has broadcast/newspaper cross-owned properties.

- Raising or eliminating the cap on how many television stations national TV networks may own (which was set at 35 percent by Congress in 1996) would extend national network control over local stations. News Corp./Fox already far exceeds the cap, as does Viacom/CBS.
- Letting a single TV broadcaster own more than 2 stations in a single market. News Corp./Fox already owns 2 broadcast stations in New York, Los Angeles, Dallas, Washington, D.C., Houston, Minneapolis, Phoenix, and Orlando.

While the antitrust laws can and should be used to limit potential competitive abuses resulting from the News Corp./DIRECTV merger,[6] these laws are not enough to prevent the excessive consolidation in the marketplace of ideas that would result from any combination of transactions under relaxed ownership rules. Antitrust has never been used effectively to promote competition in and across media where there is no clear way—like advertising prices—to measure competition/diversity in news sources, information and points of view presented through the media.

Consumers Union and the Consumer Federation of America believe the Department of Justice should impose significant conditions on the News Corp./DIRECTV deal, and Congress should review and alter the laws that enabled industry consolidation spurred by excessive deregulation to weaken or undermine competitive conditions in media markets. The News Corp./DIRECTV merger is likely to lead to higher prices for both satellite TV and cable TV, since the combined company can maximize its earnings by inflating the prices it charges for its broad array of popular programming that all cable and satellite customers purchase.

We are pleased to see that the combined News Corp./DIRECTV has agreed to offer access to their programming as part of the acquisition.[7] However this promise must be expanded to prevent other forms of anti-competitive discrimination, and must be enforceable through appropriate Department of Justice oversight mechanisms.

Even given the terms of what News Corp. is willing to concede by way of program access, substantial danger remains. First, there is no mechanism that can prevent News Corp. from discriminating against non-affiliated programmers in determining what programming to offer on its DIRECTV satellite system. News Corp. could also pressure cable operators to do the same in return for more favorable carriage terms for News Corp. owned programming.

Second, the agreement preserves the right to a variety of exclusive carriage arrangements, including distribution of Liberty Media programming, as well as sports programming where News Corp. enjoys substantial market power. Liberty Media owns approximately 18 percent of News Corp., and News Corp. has interests in several Liberty properties, indicating a close relationship between the two. It is hard to understand how such exclusive arrangements involving a company with such massive market power would not have a detrimental impact on competition in video programming. Antitrust officials must prevent these types of behavior.

Once again, this transaction, in conjunction with relaxed media ownership rules, will spur a wave of mergers among the remaining national broadcast networks, satellite and cable giants.

We believe it is time for Congress to intervene and finally deliver more choices and lower prices for the media services consumers want, and to prevent excessive relaxation of media ownership which threatens the critical watchdog function media

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[6] "As part of the acquisition, News Corp. and DIRECTV has agreed to abide by FCC program access regulations, for as long as those regulations are in place and for as long as News Corp. and Fox hold an interest in DIRECTV . . . Specifically, News Corp. will continue to make all of its national and regional programming available to all multi-channel distributors on a non-exclusive basis and on non-discriminatory prices, terms and conditions. Neither News Corp. nor DIRECTV will discriminate against unaffiliated programming services with respect to the price, terms or conditions of carriage on the DIRECTV platform." News Corporation Press Release, *"News Corp. Agrees to Acquire 34% of Hughes Electronics for $6.6 Billion in Cash and Stock."* Apr. 9, 2003.

[7] "As part of the acquisition, News Corp. and DIRECTV has agreed to abide by FCC program access regulations, for as long as those regulations are in place and for as long as News Corp. and Fox hold an interest in DIRECTV . . . Specifically, News Corp. will continue to make all of its national and regional programming available to all multi-channel distributors on a non-exclusive basis and on non-discriminatory prices, terms and conditions. Neither News Corp. nor DIRECTV will discriminate against unaffiliated programming services with respect to the price, terms or conditions of carriage on the DIRECTV platform." News Corporation Press Release, *"News Corp. Agrees to Acquire 34 percent of Hughes Electronics for $6.6 Billion in Cash and Stock."* Apr. 9, 2003.

companies play in our Nation's democracy. It is time for Congress to drop the rhetoric and look at the reality of deregulated video markets. Congress should:

- Reconsider its grant of retransmission rights to broadcasters, where a broadcaster also owns a second means of video distribution.
- Let consumers pick the TV channels they want for a fair price.
- Prevent all forms of discrimination by those who control digital TV distribution systems and those who control the most popular programming in a manner which prevents competition in the video marketplace.
- Strengthen, rather than weaken, media ownership rules, to prevent companies from owning the most popular sources of news and information in both the local and the national markets.

The News Corporation/DIRECTV Merger

If competition in the multichannel video market had performed up to its hope and hype, the NewsCorp./Fox/DIRECTV merger might not be so threatening. But in light of the failure of deregulation, it presents a problem for public policy that cannot be ignored. There are two points of power in the marketplace—distribution and program production. The problem with a combination of News Corp./Fox and DIRECTV is that it combines the two.

The reach of News Corp./Fox's media empire is truly staggering. The following are highlights of some News Corp./Fox properties in the U.S.:

- Broadcast Television Stations (35 stations, including two broadcast stations in New York, Los Angeles, Dallas, Washington DC, Houston, Minneapolis, Phoenix and Orlando)
- Filmed Entertainment (20th Century Fox Film Corp., Fox 2000 Pictures, Fox Searchlight Pictures, Fox Music, 20th Century Fox Home Entertainment, Fox Interactive, 20th Century Fox Television, Fox Television Studios, 20th Television, Regency Television and Blue Sky Studios)
- Cable Network Programming (Fox News Channel—the most watched cable news channel, Fox Kids Channel, FX, Fox Movie Channel, Fox Sports Networks, Fox Regional Sports Networks, Fox Sports World, Speed Channel, Golf Channel, Fox Pan American Sports, National Geographic Channel, and the Heath Network)
- Publishing (New York Post, the Weekly Standard, HarperCollins Publishers, Regan Books, Amistad Press, William Morrow & Co., Avon Books, and Gemstar—TV Guide International)
- Sports Teams and Stadiums (Los Angeles Dodgers, and partial ownership in the New York Knicks, New York Rangers, LA Kings, LA Lakers, Dodger Stadium, Staples Center, and Madison Square Garden)

News Corp./Fox's merger with DIRECTV adds a new, nationwide television distribution system to News Corp./Fox's programming/production arsenal. DIRECTV is the Nation's largest satellite television distribution system, with more than 11 million customers and the ability to serve all communities in the United States.

News Corp./Fox's vast holdings provide it with leverage in several ways. "The biggest, most powerful weapon News Corp./Fox has is 'a four-way leverage against cable operators, competing with satellite and using the requirement that cable get retransmission consent to carry Fox-owned TV stations, while potentially leveraging price for Fox-owned regional sports networks and its national cable and broadcast networks. . .'"[8]

One of News Corp./Fox's most important weapons is significant control over regional and national sports programming. Mr. Murdoch often describes sports programming as his "battering ram"[9] to attack pay television markets around the world. As David D. Kirkpatrick noted in an April 14, 2003 *New York Times* article regarding Mr. Murdoch's control over sports programming:

> In the United States, News Corp./Fox's Entertainment subsidiary now also controls the national broadcast rights to Major League Baseball, half the Nascar racing season and every third Super Bowl. On cable, Fox controls the regional rights to 67 of 80 teams in the basketball, hockey and baseball leagues as well as several major packages of college basketball and football games, which it

[8] Diane Mermigas, *"News Corp.'s DIRECTV Monolith." Mermigas on Media Newsletter,* (Apr. 16, 2003), quoting Tom Wolzien, a Sanford Bernstein Media Analyst.

[9] David D. Kirkpatrick, *"Murdoch's First Step: Make Sports Fans Pay." The New York Times,* Apr. 14, 2003.

> broadcasts on more than 20 Fox regional sports cable networks around the country. By acquiring DIRECTV, Mr. Murdoch gains the exclusive right to broadcast the entire slate of Sunday NFL games as well.
>
> With DIRECTV, Mr. Murdoch can start a new channel with immediate access to its subscribers, currently 11 million. He has other leverage in Fox News, now the most popular cable news channel, and essential local stations in most major markets around the country.[10]

It is important to consider the ramifications of Mr. Murdoch's control of over 40 percent of Fox broadcast stations nationwide, control of 11.2 million satellite subscribers, and his stranglehold over regional sports programming. With those extensive holdings, News Corp./Fox is in a position to determine what new programming comes to market, and to undercut competitive programming. The company will be able to decide what programming it does not want to carry and may be able to indirectly pressure cable operators (by offering a lower price for Fox programming as an inducement) not to carry programming that competes with Fox offerings. We believe Mr. Murdoch has a right as an owner to put whatever he wants on his system, but with the FCC moving to relax media ownership rules, companies like News Corp./Fox will have the ability to control key sources of news and information in an unprecedented manner.

The merger between News Corp./Fox and DIRECTV is extremely unlikely to stop skyrocketing cable rates and could very well exacerbate the problem. According to David Kirkpatrick's *New York Times* article:[11]

> [S]ome analysts said the structure of the deal suggested Mr. Murdoch hoped to use DIRECTV mainly to punish other pay television companies and benefit his programming businesses. The *Fox Entertainment Group,* an 80 percent-owned subsidiary of News Corporation, will own a 34 percent stake in DIRECTV's parent, creating the potential for programming deals that favor Fox over DIRECTV.
>
> "My sense is that the major purpose for News Corporation controlling DIRECTV is to use it as a tactical weapon against the cable companies to get them to pay up for its proprietary programming," said Robert Kaimowitz, chief executive of the investment fund Bull Path Capital Management.

While News Corp./Fox has agreed to abide by the FCC's program access requirements, this pledge could end up being nothing more than a tool for pumping up cable prices. That is, while News Corp./Fox agrees to make its programming available on non-discriminatory terms and conditions, there is absolutely nothing that would prevent News Corp./Fox from raising the price that it charges itself on its satellite system, in return for increased revenues from the other 70 million cable households. If a cable system refuses to pay the increased price, then News Corp./Fox will be able to threaten cable operators to use its newly acquired satellite system to capture market share away from cable in those communities.

An article in the *Washington Post*[12] recently detailed the way this might work:

> For instance, News Corp./Fox raised the cost of his Fox Sports content to some cable systems by more than 30 percent this year, according to one cable operator. Like most officials interviewed yesterday, he refused to be identified, saying he had to continue dealing with News Corp./Fox.
>
> Most recently, in Florida, News Corp./Fox pulled its Fox Sports regional sports programming off of competitor Time Warner Cable's system over a rate dispute. News Corp./Fox wanted to charge more than Time Warner was willing to pay, but the conflict was resolved and service restored. "If this happens when Rupert owns DIRECTV, you can assume DIRECTV will go into the market and just pound away at the cable system," said one cable channel executive.

And price is only the beginning of the problems in this industry. Even in the 500-channel cable universe, control of prime time programming rests in the hands of a very few media companies. Given the enormous power that will be concentrated in News Corp./Fox as a result of the DIRECTV transaction, not only will the combined entity be able to insist on top dollar for its programming, it will be able to determine who makes it and who fails in the programming marketplace.

[10] *Id.,* Emphasis added.

[11] David Kirkpatrick, *"By Acquiring DIRECTV, Murdoch Gets Upper Hand." The New York Times,* Apr. 10, 2003.

[12] Frank Ahrens, *"Murdoch's DIRECTV Deal Scares Rivals." Washington Post,* Apr. 11, 2003.

Cable Rates Have Escalated and Satellite Competition Has Not Kept Them Under Control

Despite the growth of satellite TV, the promise of meaningful competition to cable TV monopolies remains unfulfilled. Cable rates are up 50 percent since Congress passed the 1996 Telecommunications Act, nearly three times as fast as inflation.[13] We welcome the possibility that satellite would aggressively cut its price and compete with cable, thereby keeping cable rates in check, but for several reasons that is unlikely to happen.

Satellite competition has failed to prevent price increases on cable because cable and satellite occupy somewhat different product spaces. First and foremost, the lack of local channels on satellite systems in many communities prevents satellite from being a substitute for cable; in fact, many satellite subscribers also purchase cable service for the express purpose of receiving local channels. And while many larger communities now receive local broadcast channels from satellite, service is not as attractive as cable in several respects and many consumers simply cannot subscribe. Many urban consumers cannot receive satellite services because of line of sight problems, or because they live in a multi-tenant dwelling unit where only one side of the building faces south.

Restrictions on multiple TV set hookups also make satellite more costly. The most recent data on the average price for monthly satellite service indicates that consumers pay between $44 and $80 a month to receive programming comparable to basic cable programming. This monthly fee often includes two separate charges above the monthly fee for basic satellite programming—one fee to hook a receiver up to more than one television in the household, and another fee so consumers are able to receive their local broadcast channels.

Satellite customers often subscribe to receive high-end services not provided (until the recent advent of digital cable) on cable systems, such as high-end sports packages, out of region programming, and foreign language channels. In essence, it is an expensive—but valuable—product for consumers that want to receive hundreds of channels.

If satellite were a close substitute for cable, one would expect that it would have a large effect on cable. In fact, the FCC's own findings and data have contradicted the cable industry claims for years. The FCC found that satellite only "exerts a small (shown by the small magnitude of DBS coefficient) but statistically significant influence on the demand for cable service."[14] In the same econometric estimation, the FCC concluded that the "the demand for cable service is somewhat price elastic (*i.e.,* has a price elasticity of minus 1.45) and suggests that there are substitutes for cable."[15] This elasticity is not very large and the FCC recognizes that in using the adjective "somewhat." The FCC also attempted to estimate a price effect between satellite and cable. If cable and satellite were close substitutes providing stiff competition, one would also expect to see a price effect. Most discussions of in economics texts state that substitutes exhibit a positive cross elasticity.[16] The FCC can

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[13] Bureau of Labor Statistics, Consumer Price Index (March 2003). From 1996 until March 2003, CPI increased 19.3 percent while cable prices rose 50.3 percent, 2.6 times faster than inflation.

[14] Report on Cable Industry Prices, February 14, 2002, p. 36.

[15] Report on Cable Industry Prices, February 14, 2001, p. 36.

[16] Pearce, George, The Dictionary of Modern Economics (MIT Press, Cambridge, 1984), p. 94. Cross Elasticity of Demand. The responsiveness of quantity demanded of one good to a change in the price of another good. Where goods i and j are substitutes the cross elasticity will be positive-*i.e.,* a fall in the price of good j will result in a fall in the demand for good i as j is substituted for i. If the goods are complements the cross elasticity will be negative. Where i and j are not related, the cross elasticity will be zero. Taylor, John, B., Economics (Houghton Mifflin, Boston, 1998), p. 59.

A sharp decrease in the price of motor scooters or rollerblades will decrease the demand for bicycles. Why? Because buying these related goods becomes relatively more attractive than buying bicycles. Motor scooters or rollerblades are examples of substitutes for bicycles. A substitute is a good that provides some of the same uses or enjoyment as another good. Butter and margarine are substitutes. In general, the demand for a good will increase if the price of a substitute for the good rises, and the demand for a good will decrease if the price of a substitute falls. Bannock, Graham, R.E. Banock and Evan Davis, Dictionary of Economics (Penguin, London, 1987).

Substitutes. Products that at least partly satisfy the same needs of consumers. Products are defined as substitutes in terms of cross-price effects between them. If, when the price of records goes up, sales of compact discs rise, compact discs are said to be a substitute for records, because consumers can to some extent satisfy the need served by records with compact discs. This account is complicated by the fact that, when the price of an item changes, it affects both the REAL INCOME 01 consumers and the relative prices of different commodities. Strictly, one

Continued

find none. In fact, it found quite the opposite. The higher the penetration of satellite, the higher the price of cable.[17]

The most recent annual report on cable prices shows that the presence of DBS has no statistically significant or substantial effect on cable prices, penetration or quality.[18] This is true when measured as the level of penetration of satellite across all cable systems, or when isolating only areas where satellite has achieved a relatively high penetration.[19] At the same time, ownership of multiple systems by a single entity, large size and clustering of cable systems results in higher prices.[20] Vertical integration with programming results in fewer channels being offered (which restricts competition for affiliated programs).[21]

In other words, one could not imagine a more negative finding for intermodal competition or industry competition from the FCC's own data. All of the concerns expressed about concentrated, vertically integrated distribution networks are observed and the presence of intermodal competition has little or no power to correct these problems. The claims that the cable industry makes about the benefits of clustering and large size—measured as price effects—are contradicted by the data. In fact, only intramodal, head-to-head competition appears to have the expected effects. The presence of wireline cable competitors lowers price and increases the quality of service.

While we hope that satellite will ultimately have a price disciplining effect in those communities where satellite offers local broadcast stations it is clear that the single most important variable in cable prices is whether there is a cable overbuilder in a particular community. Wire-to-wire competition does hold down cable rates and satellite does not seem to do the trick. The U.S. General Accounting office describes this phenomenon:

> Our model results do not indicate that the provision of local broadcast channels by DBS companies is associated with lower cable prices. In contrast, the presence of a second cable franchise (known as an overbuilder) does appear to constrain cable prices. In franchise areas with a second cable provider, cable prices are approximately 17 percent lower than in comparable areas without a second cable provider.[22]

In other words, where there are two satellite and one cable company in a market, prices are 17 percent higher than where there are two cable companies and two satellite providers in a market. If we had this type of competition nationwide, consumers could save more than $5 billion a year on their cable bills.

Program Production

The failure of competition in the cable and satellite distribution market is matched by the failure of competition in the TV production market. In the 1980s, as channel capacity grew, there was enormous expansion and development of new content from numerous studios. Policymakers attributed the lack of concentration

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product is a substitute for another if it enjoys increased demand when the other's prices rises and the consumer's income is raised just enough to compensate for the drop in living standards caused (pp. 390–391).

Cross-price elasticity of demand. The proportionate change in the quantity demanded of one good divided by the proportionate change in the price of another good. If the two goods are SUBSTITUTES (*e.g.,* butter and margarine), this ELASTICITY is positive. For instance, if the price of margarine increases, the demand for butter will increase (p. 99).

[17] Report on Cable Prices, p. 11.

[18] Federal Communications Commission, 2002b.

[19] Federal Communications Commission, 2001b, describes the DBS variable as the level of subscription. Federal Communications Commission, 2002b, uses the DBS dummy variable.

[20] The cluster variable was included in the Federal Communications Commission 2000a and 2001b Price reports. Its behavior contradicted the FCC theory. It has been dropped from the 2002 report. The MSO size was included in the 2002 report. System size has been included in all three reports.

[21] Vertical integration was included in Federal Communications Commission, 2002b.

[22] U.S. General Accounting Office, *"Report to the Subcommittee on Antitrust, Competition, and Business and Consumer Rights, Committee on the Judiciary, U.S. Senate: Issues in Providing Cable and Satellite Television Services."* October 2002. In an important clarifying footnote, the report finds that:

"This was a larger effect than that found by FCC in its 2002 *Report on Cable Industry Prices* (FCC 02–107). Using an econometric model, FCC found that cable prices were about 7 percent lower in franchise areas when there was an overbuilder. One possible explanation for the difference in results is that we conducted further analysis of the competitive status of franchises that were reported by FCC to have an overbuilder. We found several instances where overbuilding may not have existed although FCC reported the presence of an overbuilder, and we found a few cases where overbuilders appeared to exist although FCC had not reported them. We adjusted our measurement of overbuilder status accordingly.

in the production industry to market forces and pushed for the elimination of the Financial Interest in Syndication rules (Fin-Syn) that limited network ownership and syndication rights over programming. The policymakers were wrong.

Following the elimination of the Fin-Syn rules in the early 1990s, the major networks have consolidated their hold over popular programming. The market no longer looks as promisingly competitive or diverse as it once did. Tom Wolzien, Senior Media Analyst for Bernstein Research, paints the picture vividly—he details the return of the "old programming oligopoly":

> Last season ABC, CBS and NBC split about 23 percent [of television ratings] . . . But if the viewing of all properties owned by the parent companies—Disney, NBC, and Viacom—is totaled, those companies now directly control television sets in over a third of the TV households. Add AOL, Fox and networks likely to see consolidation over the next few years (Discovery, A&E, EW Scripps, etc.), and five companies or fewer would control roughly the same percentage of TV households in prime time as the three net[work]s did 40 years ago. The programming oligopoly appears to be in a process of rebirth.[23]

In addition, the number of independent studios in existence has dwindled dramatically since the mid-1980s. In 1985, there were 25 independent television production studios; there was little drop-off in that number between 1985 and 1992. In 2002, however, only 5 independent television studios remained. In addition, in the ten-year period between 1992 and 2002, the number of prime time television hours per week produced by network studios increased over 200 percent, whereas the number of prime time television hours per week produced by independent studios decreased 63 percent.[24]

Diversity of production sources has "eroded to the point of near extinction. In 1992, only 15 percent of new series were produced for a network by a company it controlled. Last year, the percentage of shows produced by controlled companies more than quintupled to 77 percent. In 1992, 16 new series were produced independently of conglomerate control, last year there was one."[25]

The ease with which broadcasters blew away the independent programmers should sound a strong cautionary alarm for Congress. The alarm can only become louder when we look at the development of programming in the cable market. One simple message comes through: those with rights to distribution systems win.

Of the 26 top cable channels in subscribers' and prime time ratings, all but one of them (the Weather Channel) has ownership interest of either a cable MSO or a broadcast network. In other words, it appears that you must either own a wire or have transmission rights to be in the top tier of cable networks. Four entities—News Corp./Fox (including cross ownership interests in and from Liberty) AOL Time Warner, ABC/Disney and CBS/Viacom—account for 20 of these channels.

Of the 39 new cable networks created since 1992, only 6 do not involve ownership by a cable operator or a national TV broadcaster. Sixteen of these networks have ownership by the top four programmers. Eight involve other MSOs and 10 involve other TV broadcasters. Similarly, a recent cable analysis identified eleven networks that have achieved substantial success since the passage of the 1992 Act. Every one of these is affiliated with an entity that has guaranteed carriage on cable systems.[26]

Moreover, each of the dominant programmers has guaranteed access to carriage on cable systems—either by ownership of the wires (cable operators) or by carriage rights conferred by Congress (broadcasters).

- AOL Time Warner has ownership in cable systems reaching over 12 million subscribers and cable networks with over 550 million subscribers.
- Liberty Media owns some cable systems and has rights on Comcast systems and owns cable networks with approximately 880 million subscribers. Liberty owns almost 20 percent of News Corp./Fox.
- Disney/ABC has must carry-retransmission rights and ownership in cable networks reaching almost 700 million subscribers.
- Viacom/CBS has must carry-retransmission rights and ownership in cable networks reaching approximately 625 million subscribers.

[23] Tom Wolzien, *"Returning Oligopoly of Media Content Threatens Cable's Power."* The Long View, Bernstein Research (Feb. 7, 2003). Emphasis added.

[24] Coalition for Program Diversity, Jan. 28, 2003.

[25] Victoria Riskin, President of Writers Guild of America, West. *Remarks at FCC EnBanc Hearing, Richmond, VA* (Feb. 27, 2003).

[26] Federal Communications Commission, *Ninth Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* MB docket No. 02–145 (Dec. 31, 2002).

- Fox (has must carry-retransmission and ownership in cable networks reaching approximately 370 million subscribers and a substantial cross ownership interest with Liberty).

These five entities have ownership rights in 21 of the top 25 cable networks based on subscribers and prime time ratings. They account for over 60 percent of subscribers to cable networks, rendering this market a tight oligopoly. Other entities with ownership or carriage rights account for four of the five remaining most popular cable networks. The only network in the top 25 without such a connection is the Weather Channel. It certainly provides a great public service, but is hardly a hotbed for development of original programming or civic discourse. Entities with guaranteed access to distribution over cable account for 80 percent of the top networks and about 80 percent of all subscribers' viewing choices on cable systems.

In the world of broadcast and cable networks, almost three-quarters of them are owned by six corporate entities.[27] The four major TV networks, NBC, CBS, ABC, Fox, and the two dominant cable providers, AOL Time Warner (which also owns a broadcast network) and Liberty (with an ownership and carriage relationship with Comcast and Fox), completely dominate the tuner. Moreover, these entities are thoroughly interconnected through joint ventures.

If distribution rights win then an entity like News Corp./Fox/DIRECTV would create a powerhouse with guaranteed transmission rights on all three of the technologies used to distribute TV to the home. It will own broadcast stations, have must carry/retransmission rights on cable and satellite because of the broadcast licenses it holds, and own the largest satellite network. This is an immense power of distribution for a company that is vertically integrated into both broadcast and cable programming.

In the 1992 Cable Act, Congress recognized that the Federal government "has a substantial interest in having cable systems carry the signals of local commercial television stations because the carriage of such signals is necessary to serve the goals . . . of providing a fair, efficient, and equitable distribution of broadcast services."[28] Congress also recognized that "[t]here is a substantial government interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming."[29]

These governmental interests, as well as a finding that "[c]able television systems often are the single most efficient distribution system for television programming," formed the original rationale behind Retransmission Consent. Because a majority of the country was receiving broadcast television service through cable, it was necessary to require that cable systems carry local broadcast signals. However, a merger between News Corp./Fox and DIRECTV would change the landscape against which Retransmission Consent was created. Given that this transaction will provide News Corp./Fox with assets that no local broadcaster had in 1992 when Retransmission Consent was originally put in place—it will have a satellite distribution system capable of reaching a majority of the country—it seems that the original logic behind the rule is strained in the present circumstances. Not only will News Corp./Fox own its own transmission system, but it also owns other programming that it bundles with its network programming, which may give it too much market power in negotiating cable and other carriage agreements. Congress should revisit the necessity of Retransmission Consent as it pertains to stations owned and operated by News Corp./Fox.

Conclusion

Consumers Union and Consumer Federation of America believe that the Dept. of Justice should impose substantial conditions on this deal which will otherwise be

[27] One of the more ironic arguments offered by the cable operators feeds off of the observation that broadcast networks have carriage rights. They argue that even if cable operators foreclosed their channels to independent programmers, these programmers could sell to the broadcast networks. This ignores the fact that cable operators control the vast majority of video distribution capacity. There are approximately 60 channels per cable operator on a national average basis (Federal Communications Commission, 2002b, p. 10). There are approximately 8 broadcast stations per DMA on a national average basis (BIA Financial, 2002). Each broadcast station has must carry rights for one station. They can bargain for more, particularly in the digital space, but the cable operators control more stations there as well. In other words, if we foreclose 85 percent of the channels, the programmers will be able to compete to sell to the remaining 15 percent of the channels. Needless to say, this prospect does not excite independent programmers.

[28] Public Law 102–385, Section 2(a)(9).

[29] Public Law 102–385, Section 2(a)(12).

harmful to competition in the video programming market—harm that will be borne on the backs of consumers.

Congress should impose a new set of nondiscrimination requirements that would enable all media distributors and consumers to purchase video programming and related services on an individual—as opposed to bundled—basis under terms that maximize competition and choice in the marketplace. Congress must reexamine the enormous market power and leverage that Retransmission Consent provides broadcast programmers—particularly one like News Corp. which, as a result of the merger with DIRECTV, will own a new nationwide video distribution system (in addition to its over-the-air broadcast distribution system). And Congress should require cable and satellite operators to offer consumers the right to select the channels they want to receive at a fair price—in other words, require an a la carte program offering from all video distributors. Since the average household watches only about a dozen channels of video programming, this requirement could empower consumers to help discipline excesses in cable (or satellite) pricing, and could possibly spur more competition.

Congress must also carefully consider all the ramifications associated with the rulemakings on media ownership. Specifically, given that the FCC has announced an intended June 2nd decision date on media ownership rules, Congress should insist on seeing the FCC's proposal before any decision is finalized.

If media ownership limits are significantly relaxed or eliminated by the FCC then the News Corp./DIRECTV deal may look almost harmless in comparison to an avalanche of media mergers that ensue. It is completely unfair to force American consumers to accept inflated cable rates and inadequate TV competition. But excess consolidation in the news media is even worse: the mass media provides Americans the information and news they need to participate fully in our democratic society. Without ownership rules that effectively limit consolidation in media markets, one company or individual in a town could control the most popular newspaper, TV and radio stations, and possibly even a cable system, giving it dominant influence and power over the content and slant of news. This could reduce the diversity of cultural and political discussion in that community.

The cost of excessive media consolidation and further media deregulation is very high. The cost of market failure in media markets is the price we pay when stories are *not* told, when sleazy business deals and bad accounting practices do *not* surface, when the watchdog decides that it would rather gnaw on the bone of softer news than chase down the more complicated realities that must be uncovered to make democracy function.

Appendix

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

Dr. Mark N. Cooper, Director of Research, Consumer Federation of America

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Executive Summary

Courts Support Public Interest Standards to Promote Diversity in Media Markets; They Want Coherent Policy Analysis

While the Federal Appeals Court for the District of Columbia has issued decisions instructing the FCC to provide better justification for its rules, it has clearly stated that public policies to promote a more diverse media landscape are constitutional, even if they reduce economic efficiency. The notion that the courts have demanded that the FCC get rid of or substantially relax media ownership rules is simply wrong. The fact that the Court of Appeals has demanded a coherent analytic framework based on empirical facts does not necessarily indicate a relaxation of the limits on ownership is warranted. To the contrary, the court recognized that the limits could go be loosened or tightened.

In *Fox* v. *FCC,* for example, the court noted that "it is not unreasonable—and therefore not unconstitutional—for the Congress to prefer having in the aggregate more voices heard," even though "an industry with a larger number of owner may well be less efficient than a more concentrated industry." In *Sinclair* v. *FCC* the court thoroughly rejected Sinclair's claim that its First Amendment rights had been harmed by the duopoly rule and reminded the parties that the Supreme Court "saw nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the 'public interest' in diversification of the mass communications media."

Yet, to the public's great detriment, we find that the FCC is not doing the one thing the court demanded—*i.e.,* careful analysis of media markets keeping with longstanding principles of economic analysis. For example, one of the most important media ownership rules, the newspaper-broadcast cross-ownership prohibition, the FCC is:

- Looking at the wrong product (entertainment),
- Analyzing the wrong market (national news),
- Doing the market structure analysis incorrectly (not considering market shares), and
- Choosing a dangerously low standard.

The Supreme Court has repeatedly defined the public interest for electronic mass media by expressing a bold aspiration for the First Amendment declaring *the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.*

Applying High Standards in Rigorous Market Structure Analysis

While the goal of promoting diversity under the Communications Act is broader than the goal of protecting competition under the antitrust laws, the *Merger Guidelines* of the Department of Justice and the Federal Trade Commission are a useful starting point for analysis of media markets. For two decades the antitrust authorities have used these *Guidelines*—which are based on extensive theoretical and empirical evidence—to categorize markets for purposes of merger analysis.

- A market with the equivalent of 10 or more equal-sized firms is defined as *unconcentrated.*
- Markets with fewer than the equivalent of 10 but more than 6 equal-sized firms are considered *moderately concentrated.*
- Markets with the fewer than 6 equal-sized firms are *highly concentrated.*

Concentrated markets like these "raise significant competitive concerns" for antitrust authorities because they create market power that can be used to raise prices, reduce quality, or retard innovation. Those charged with promoting the public interest under the Communications Act should be more than concerned if media markets become this concentrated because of the broader goals of First Amendment policy.

To the extent the Commission chooses to rely on the analysis of commercial media markets, especially if different types of media are combined, caution is necessary and should be expressed in the form of rigorous analysis and high standards. Public policy should err in favor of more competition, which translates into greater diversity, to reflect the unique importance and role of media in promoting the robust exchange of views on which democratic dialogue and debate depends.

Media Markets Are Already Concentrated

The evidentiary record before the FCC shows that the mass media have not experienced an Internet or broadband revolution. Most people still get their news and information from TV and newspapers. Further, there is no simple common "currency" by which TV viewing and newspaper reading can be measured. In other words, is a half hour of TV worth an inch of newspaper space? Citizens do not easily substitute between these media, making it even more difficult to compare them. Different media are used in different ways, have different impacts, and play different roles in civic discourse. Rigorous analysis must recognize the distinct product markets and the importance of newspapers and television.

Using the standard antitrust market definitions, we find that lax First Amendment policy implementation and weak antitrust enforcement has resulted in American media markets that are shockingly concentrated, especially in light of the bold aspiration for the First Amendment.

- *Every* local television and newspaper market in the country is already concentrated.
- *Every* local newspaper market in the country is already highly concentrated.
- Over *95 percent of the TV and radio* markets are *highly concentrated.*
- Local TV news markets are *much more concentrated* than entertainment markets.

- Even adding together television and newspaper outlets, we find that *virtually every local market is concentrated.*
- National markets for prime time entertainment programming are concentrated and *national TV news markets are highly concentrated.*

The evidence provides strong support to those who feel the analysis of the media under the First Amendment jurisdiction of the Communications Act cannot be reduced to simple economic terms and that further relaxation of the rules on media ownership will lead to much more concentrated markets and decreased diversity of news and information sources.

The FCC Proposal Effectively Repeals the Public Interest Standard, Affording Less Protection for Media Mergers than the Antitrust Laws

Unfortunately, the proposed rules circulated by the Commission are driven by political deals, not rigorous analysis or high standards.

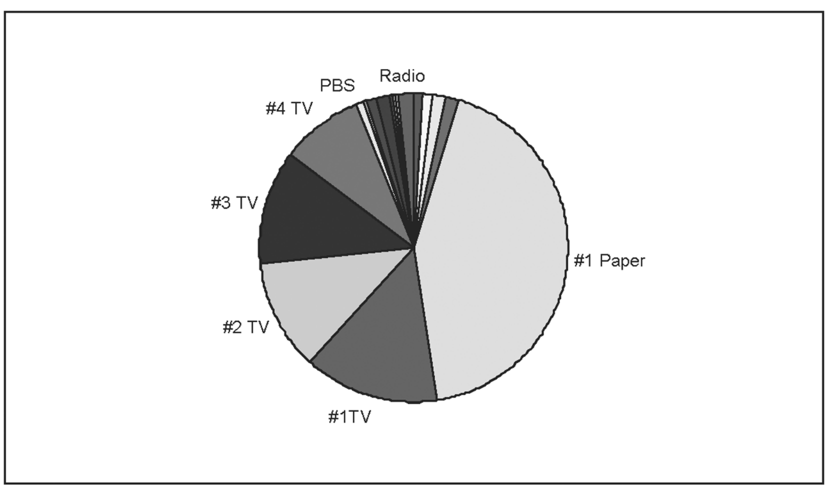
- The Commission has failed to define the product market properly, ignoring the fact that almost half of all broadcast stations do not provide news.
- It has ignored the local market, by counting stations and outlets that do little, if any local news.
- It has failed to conduct proper market structure analysis, by failing to consider the audience (markets shares) of the media outlets.
- The FCC has set a dangerously low standard for competition in local media markets allowing the count of major media voices to decline as low as three or four in many markets.

The result will be to allow markets to become extremely concentrated and the local news markets to be dominated by one huge media giant. There is no chance for effective competition between TV-newspaper combinations in as many as three-quarters of the markets in which such mergers would be allowed because there is only one dominant newspaper. Exhibits ES–1 and ES–2 graphically depict these markets.

- In one-paper cities, the local media giant would have a 90 percent share of the newspaper circulation, one-third of the TV audience, and one-third of the radio audience. No second entity could come close to matching this media power.
- In the typical two-paper town, the dominant firm would have four-fifth of newspaper market, and one-third of the TV and radio markets. The second firm would have a paper with only one-seventh of the circulation. In most of these markets, the TV market is also highly concentrated.

Exhibit ES–1: Impact of Newspaper-TV Mergers In One-Paper Cities (Based on TV Entertainment HHI and Newspaper Circulation HHI)

Pre-Merger Market



Post-Merger Market

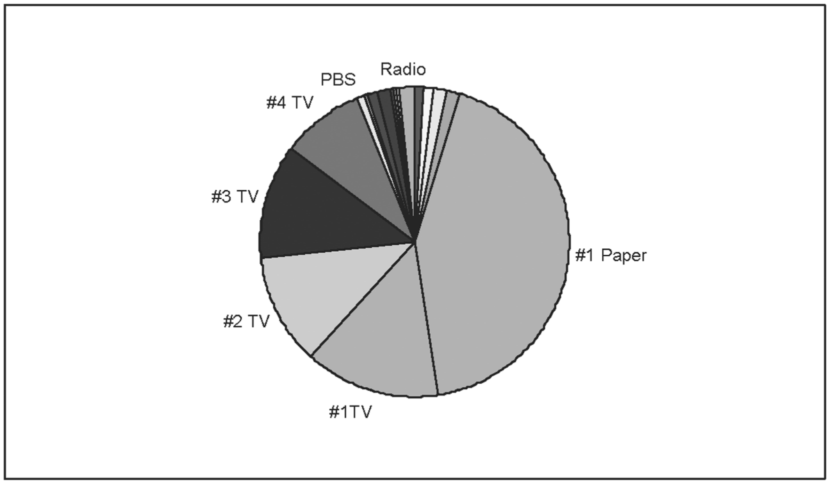
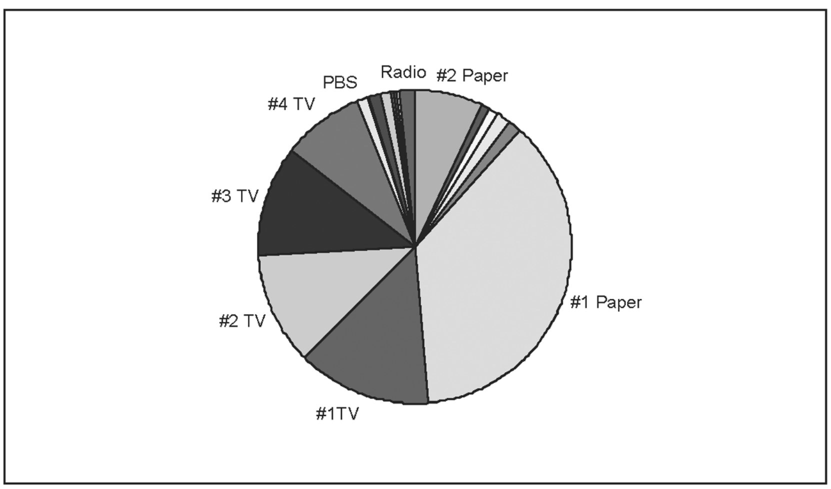
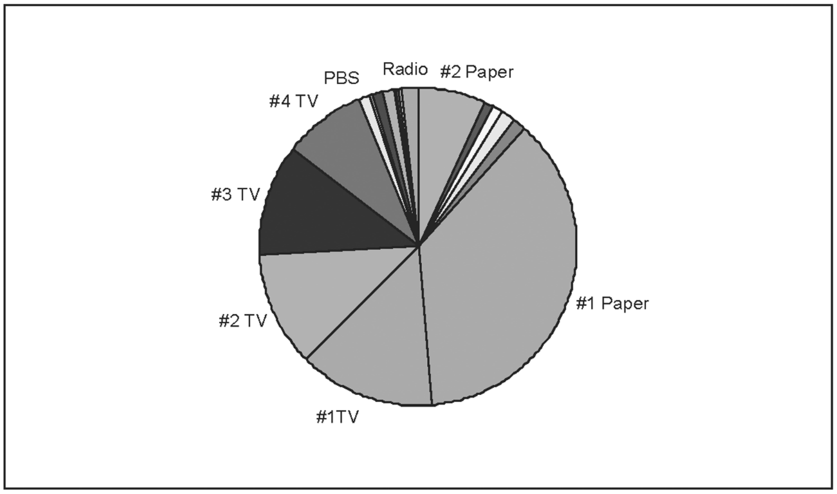


Exhibit ES–2: Impact Of Newspaper-TV Mergers In Two-Paper Cities (Based on TV Entertainment HHI and Newspaper Circulation HHI)

Pre-Merger Market



Post-Merger Market



We believe that the FCC would inappropriately allow mergers in 140 of the top 150 markets. Of those 140 markets, approximately 90 are one or two newspaper towns. Approximately 45 million households reside in these types of markets. In approximately 50 markets that have three or more papers, a merger between a newspaper and a TV station would render the local news media market concentrated. Exhibit ES–3 characterizes the 150 largest markets in which the draft order would allow cross-ownership mergers. Almost one half are one or two paper cities in which the TV news market is highly concentrated. One-sixth are one or two paper markets in which the TV market is moderately concentrated. One-quarter have three or more newspapers, but the TV market is highly concentrated. In only one-fifteenth of these markets is the TV market not highly concentrated and the total local news market unconcentrated.

The absurdity of the FCC's approach is readily apparent when the mergers it would allow are viewed in terms of the *Merger Guidelines.* Based on the record, we count newspapers and TV stations as equal voices and set radios equal to one-tenth of the market.

In one-paper cities, the pre-merger market is highly concentrated and the merger would raise the HHI by approximately 1,200 points. The antitrust authorities believe mergers that raise the HHI by merely 50 points in a market such as this "are likely to create or enhance market power or facilitate its exercise." The increase in concentration that would pass the FCC's scrutiny is over twenty times the level that triggers antitrust concerns.

Two-newspaper markets would be somewhat less concentrated, but the FCC would still allow excessively high levels of concentration that would not support vigorous competition. This pre-merger market would fall just below the highly concentrated threshold and the merger would raise the HHI by over 900 points. This is over nine times the level that triggers antitrust concerns.

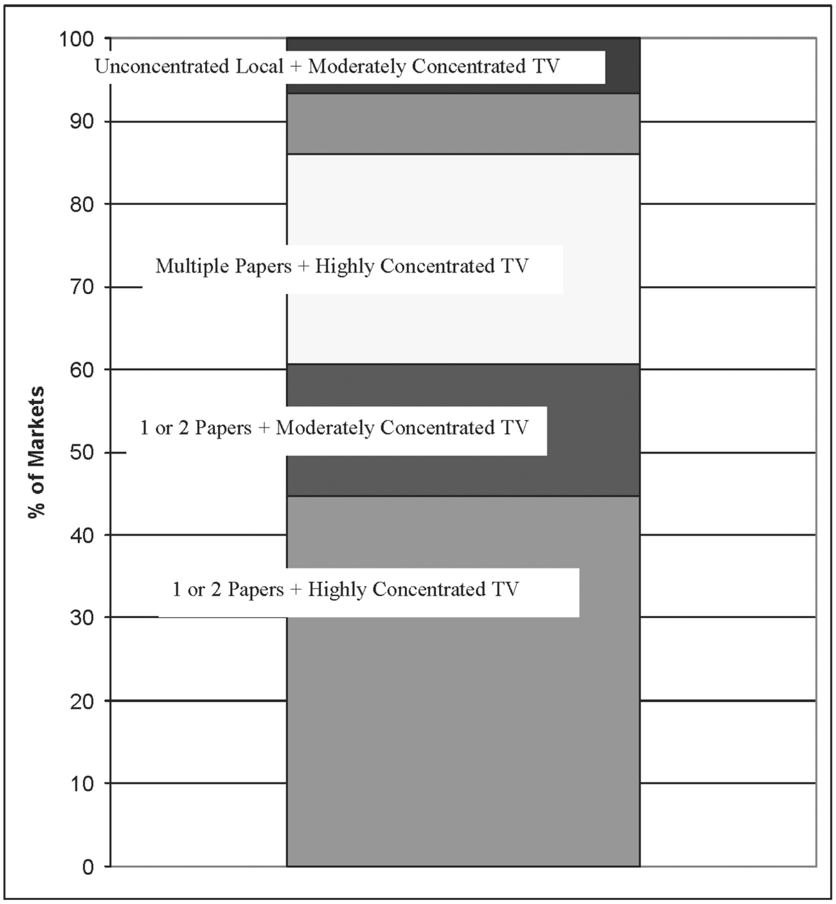
A Responsible Approach

We believe that a set of rules based on rigorous analysis of the current structure in contemporary media, using careful geographic and product definitions and audience market shares, that adopts a high standard is consistent with the record in this proceeding. It would restrict merger activity to a small number of markets. Preventing the overall media market from becoming concentrated and individual product markets from becoming highly concentrated is a reasonably cautious standard.

- *No mergers between TV stations and newspapers should allowed if the overall media market in a locality is or would become concentrated as a result of the merger.*
- *No mergers involving TV stations should be allowed if the TV market in a locality is or would become highly concentrated as a result of the merger.*

This approach would allow cross-ownership mergers in ten of the largest markets.

Exhibit ES–3: Concentration of Top 150 Markets



I. Legal and Analytic Framework

The Evidence Supports Limits on Media Ownership

This paper presents the case for a rigorous, unified framework for media ownership analysis under the Communications Act of 1934. It demonstrates that the current limits on media ownership should not be substantially relaxed. It shows that, consistent with the empirical record, the Federal Communications Commission (FCC) can adopt a rule based on market structural analysis—which has a long history in the industrial organization literature—that promotes the public interest by limiting mergers. Such a rule should build on economic fundamentals but it must be driven by the First Amendment policy articulated by Congress and endorsed by the courts for the electronic mass media.

The policy aspiration for the First Amendment is embodied in the principle that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[1] The Supreme Court has repeatedly supported this principle for more than half a century. Modern First Amendment jurisprudence has also clearly recognized that "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."[2]

The empirical evidence demonstrates that traditional mass media still dominate the dissemination of news and information. Lax implementation of First Amendment policy and weak enforcement of antitrust policy have allowed media markets to become concentrated. Further relaxation of the limits on media ownership will allow more concentrated ownership of media conglomerates to be consolidated in national chains and result in a severe loss of diversity of news and information sources and local news content.

At a practical level, the paper answers each of the main questions raised in the court cases and the omnibus media ownership proceeding initiated by the FCC.

For example, in the case of *Sinclair* v. *Federal Communications Commission,* the D.C. Appeals Court held "that the Commission had failed to demonstrate that its exclusion of non-broadcast media from the eight voices exception 'is necessary in the public interest'."[3] Why didn't the FCC include newspapers and radios in its voice count for the rule that limited the number of markets in which one owner could hold licenses to more than one TV station (the duopoly rule)? The answer it could have given is now clear and supported overwhelmingly by the empirical evidence in the record:

- *TV is the dominant source of news and information, while radio, newspapers and the Internet are not good substitutes for TV.*
- *These other products do not belong in a TV voice count analysis and TV markets are already highly concentrated.*
- *The limits on TV mergers are well justified.*

Similarly, the question posed by the review of the newspaper broadcast cross-ownership ban can be answered with a strong empirical statement. The Commission "seeks comments on whether and to what extent we should revise our cross-ownership rule that bars common ownership of a broadcast station and daily newspaper in the same market."

- *Newspapers are the second most important source of information and play a unique watchdog role, providing in-depth and investigative reporting.*
- *All newspaper markets are highly concentrated and virtually all newspaper-TV markets are already concentrated.*
- *Newspaper-TV combinations should not be allowed in all but a handful of media markets because they would drive media concentration above already unacceptably high levels and allow excessive control over the production of news content in local media markets.*

The empirical evidence on radio markets not only confirms that there is a problem, but it underscores the point that antitrust authorities cannot be relied upon to prevent excessive concentration in media markets.

- *No additional radio mergers should be allowed because virtually every radio market in the country is highly concentrated.*

The Courts Support Congressionally Mandated Public Interest Standards To Promote Diversity In Media Markets; They Want Coherent Policy Analysis

The Fox and Sinclair Circuit Court decisions affirm First Amendment principles

Over the past two years the Federal Appeals Court for the District of Columbia has issued decisions instructing the FCC to reexamine several of its rules governing structural limitations on media ownership.[4] The Appeals Court has been careful to point out that it is not challenging the constitutional or even policy basis on which the rules rest; it is demanding that the FCC give better justifications for its rules.

In fact, while the D.C. Appeals Court was stinging in its criticism of the FCC for not doing its homework, it also chided media companies for ignoring the importance of noneconomic considerations in policies to promote civic discourse.[5] It clearly stated that public policies to promote a more diverse media landscape are constitutional, even if they reduce economic efficiency.

> An industry with a larger number of owners may well be less efficient than a more concentrated industry. Both consumer satisfaction and potential operating cost savings may be sacrificed as a result of the Rule. But that is not to say the Rule is unreasonable because the Congress may, in the regulation of broadcasting, constitutionally pursue values other than efficiency—including in particular diversity in programming, for which diversity of ownership is perhaps an aspirational but surely not an irrational proxy. Simply put, it is not unreasonable—and therefore not unconstitutional—for the Congress to prefer having in the aggregate more voices heard, each in roughly one-third of the nation, even if the number of voices heard in any given market remains the same.[6]

In the Fox case, a rule that increases the number of voices in the Nation without increasing the number of voices in a local market can pass constitutional muster if it is properly justified. Rules that are aimed at increasing local voices, as are many currently under review by the FCC, stand on even firmer ground. In fact, in the Sinclair decision, which dealt with local media markets, the Court went to considerable lengths to reject Sinclair's claim that it's First Amendment rights had been harmed by the duopoly rule.

> [B]ecause there is no unabridgeable First Amendment right comparable to the right of every individual to speak, write or publish, to hold a broadcast license, Sinclair does not have a First Amendment right to hold a broadcast license where it would not, under the *Local Ownership Order,* satisfy the public interest. In *NCCB* the Supreme Court upheld an ownership restriction analogous to the *Local Ownership Order,* based on the same reasons of diversity and competition, in recognition that such an ownership limitation significantly furthers the First Amendment interest in a robust exchange of viewpoints. The Court states in *NCCB* that it "saw nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the 'public interest' in diversification of the mass communications media." [7]

The conclusion that broadcasters do not have "unabridgeable rights" in their licenses is typically linked to a specific concept of scarcity that looks at citizens not simply as listeners, but also as speakers. Thus, in *Red Lion* the court notes that

> where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.[8]

While the number of networks and TV channels has certainly increased, the total available comes nowhere close to the number of potential speakers. Thus the key underpinning for the public interest policies to promote diversity of ownership, the scarcity of the opportunity to speak with an electronic voice, persists.

Furthermore, the Court did not challenge the specific threshold the FCC had chosen, noting in Sinclair that "We leave for another day any conclusion regarding the Commission's choice of eight" and adding that "[o]n remand the Commission conceivably may determine to adjust not only the definition of 'voices' but also the numerical limit."[9]

The public interest is still the master of the biennial review standard

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 under the standard in section 202(h).[10] There the FCC must "determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest." [11]

Simply put, the public interest still prevails in the 1996 Act.[12] 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; the FCC must find that competition is sufficient to promote the public interest before it repeals or modifies these rules. It can certainly find that stronger rules are necessary to promote competition—under the first prong of 202(h)—or the public interest—under the second prong of 202(h).

Notwithstanding some concerns about preconceived notions,[13] the court's rulings and the biennial review are the starting point for debate, not the end point. There is nothing in the court ruling that would preclude the preservation or even strengthening of the rules if the evidentiary record supports such action.

A High Standard is Necessary to Serve the Public Interest

For reasons of both public policy and economic fundamentals, market structure analysis, as the basis for determining merger policy and ownership limits in broadcast media markets, requires a high threshold or standard for competition. Preventing the overall media market from becoming concentrated and submarkets from becoming highly concentrated is a reasonably cautious standard.

First Amendment policy is broader than antitrust

The goal of First Amendment policy under the Communications Act is broader than the goal of competition under the antitrust laws. In merger review, the antitrust laws seek to prevent the accumulation of market power while merger review under the Communications Act seeks to promote the public interest,[14] defined by the courts as the "widest possible dissemination of information from diverse and antagonistic sources."

In both cases, these standards are prophylactic, asking the authorities to make predictive judgments about the effect of the merger and take actions to prevent negative outcomes (in the case of antitrust) or ensure positive outcomes (in the case of the Communications Act). Media mergers must pass both reviews because Congress and the courts recognize that media and communications industries play a special dual role in society. They are critical commercial activities and deeply affect civic discourse. They affect both consumers and citizens.

While economic competition is one way of promoting the public interest, the Communications Act and the Courts identify several others. Under the Act, the needs of citizens and democracy take precedence.

Economic analysis under the Merger Guidelines restricts mergers

Antitrust authorities have adopted guidelines that indicate when mergers are likely to be challenged. The *Guidelines* consider the state of competition and the extent to which concentration of a market would increase as a result of a merger. They use market shares to create an index known as the HHI, which describes the level of concentration in a market.[15] They define highly concentrated markets as markets with an HHI of 1800. This is the equivalent of fewer than (roughly) six equal-sized competitors.[16] They define unconcentrated markets as markets with an HHI of 1000, which is the equivalent of ten or more equal-sized competitors. Moderately concentrated markets have the equivalent of between 6 and 10 equal-sized competitors.

The guidelines identify the types of mergers that will raise competitive concerns as follows:

> Mergers producing an increase in the HHI of more than 100 points in moderately concentrated markets post-merger potentially raise significant competitive concerns . . . Mergers producing an increase in the HHI of more than 50 points in highly concentrated markets post-merger potentially raise significant competitive concerns.[17]

To appreciate the nature of these thresholds, a firm with a 15 percent market share that sought to buy another with a two percent market share would violate the 50-point threshold. If the firm being acquired had a market share of just over three percent, it would violate the 100-point threshold.

The competitive concern for antitrust authorities is the potential for the exercise of market power. The *Guidelines* define market power as "the ability profitably to maintain prices above competitive levels for a significant period of time" or to "lessen competition on dimensions other than price, such as product quality, service or innovation."[18] While concerns exist in all concentrated markets, the *Guidelines* note that in highly concentrated markets, mergers "are likely to create or enhance market power or facilitate its exercise."

Although the antitrust authorities frequently allow mergers to go forward after considering other factors, we believe that for media markets these should be firm thresholds. The Sinclair decision notes that in 1995 the Commission had already argued "the merger guidelines of the Justice Department and the Federal Trade Commission might be too low as their purpose lay in defining the point at which antitrust scrutiny is required, and not in encouraging a wide array of voices and viewpoints."[19] Whereas antitrust authorities become concerned about these levels of concentration, Communications Act authorities should become alarmed about concentrated markets like these because of the broader goals of First Amendment policy.

Promoting the Public Interest Through Unconcentrated Media Markets

Local Media Markets Should not be Concentrated

The evidentiary record makes it clear that the Commission must proceed cautiously in relaxing limits on media ownership. It shows that the mass media have not experienced an Internet or broadband revolution. The dominant sources of information are still TV and newspapers. Further, there is no simple common "currency" by which TV viewing and newspaper reading can be measured. Different media are used in different ways, have different impacts, and play different roles in civic discourse. The evidence provides strong support to those who feel the analysis of the media under the First Amendment jurisdiction of the Communications Act cannot be reduced to simple economic terms and that the rules should not be relaxed.

At the same time, the record sends a strong warning to those who would rely on economic analysis, especially if different types of media are combined, that great caution is necessary and should be expressed in the form of rigorous market analysis and high competitive standards. Public policy should err in favor of more owners, which translates to greater diversity, to reflect the unique importance and role of media in civic discourse.

Based upon the above legal framework and observations, we propose a two pronged market structure standard that builds on economic fundamentals but is driven by First Amendment jurisprudence. Preventing the overall media market from becoming concentrated and broadcast markets from becoming highly concentrated is a reasonably cautious standard.

The Federal Communications Commission should not tolerate or encourage concentrated media markets. The standard definition of unconcentrated markets, well grounded in economic theory and practice, is a market with the equivalent of ten or more equal-sized producers. Civic discourse demands even more vigilance.

The Commission must approach the market structure analysis in a rigorous manner that reflects the current empirical reality of media markets. Since the *Merger Guidelines* have been a part of market structure policy for two decades, these simple rules are transparent. The data needed to categorize media markets are available.

Furthermore, as a matter of economic fundamentals, caution is called for. Media markets are difficult to define and most data available is limited to very large markets. Using concepts like the Designated Market Area (DMA) for TV or the Arbitron rating area for radio, creates market areas that are generally larger than and certainly do not fit precisely with each other, or with newspaper markets. Including the Internet and cable in the local market definition, when the FCC's own expert declared these to be national, not local, media, further confounds market analysis.

Given these difficulties in product and geographic market definitions, the FCC should be extremely cautious about thresholds. By combining products that are not good substitutes and do not compete head-to-head in the market we are likely to overestimate the extent of actual competition. Therefore, based on strict economic grounds we should be cautious in the thresholds.

Thus, a rule that takes unconcentrated local markets as the minimum standard is justified in both the antitrust and First Amendment contexts.

Broadcast Markets Should Not Be Highly Concentrated or The Source of Excessive Leverage Across Sub-Markets

Many TV markets are highly concentrated because they have never had a large number of stations, even though frequencies are available. For these, unconcentrated markets are a goal, but the existence of such markets does not mean that where markets are not concentrated we should abandon that goal or allow mergers to frustrate it. At a minimum, FCC policy should encourage or allow individual TV broadcast product markets to become highly concentrated.

Excessive market concentration in electronic media cannot be compensated for by cross media competition. Each product market should be no worse than moderately concentrated. The FCC should not allow horizontal mergers in properly defined TV media markets that are highly concentrated, post-merger. That is, if the merger proposed is in a market that is highly concentrated or would result in a market that is highly concentrated it should not be allowed.

TV broadcast should not be a source of excessive leverage in the overall media market. The FCC should not allow dominant firms in highly concentrated broadcast markets to merge. The FCC should have a waiver policy to allow horizontal mergers in properly defined media markets that are moderately concentrated (post-merger). The merging parties should be required to show that the merger would promote the public interest. The FCC should require the preservation of functionally separate news and editorial departments in the subsidiaries of the merged entity.

III. Rigorous Analysis of Media Markets

Market Structure Analysis Must Recognize Differences Between Media in Function, Reach, Impact And Audience

The empirical record does not support the conclusion that the various media products (broadcast video, cable TV, newspaper, radio, Internet) are substitutes. On the contrary, the overwhelming evidence indicates that they are complements. Allowing mergers between them may undermine the ability of each media type to fill the distinct needs that it addresses. Therefore, the Commission must proceed with great caution if it combines media for purposes of market structure analysis. Market structure analysis should recognize the function, reach, and impact of different media products.

Market structure analysis must start with the audience that each of the media outlets has. Just as market power is grounded in the size of the market an individual firm gains, so too media influence and impact, the ability to be heard, is a function of the audience. It is absurd to ignore the audience of a media outlet in assessing its influence and impact on civic discourse, as it would be absurd to ignore the market share of a firm in assessing its economic market power.

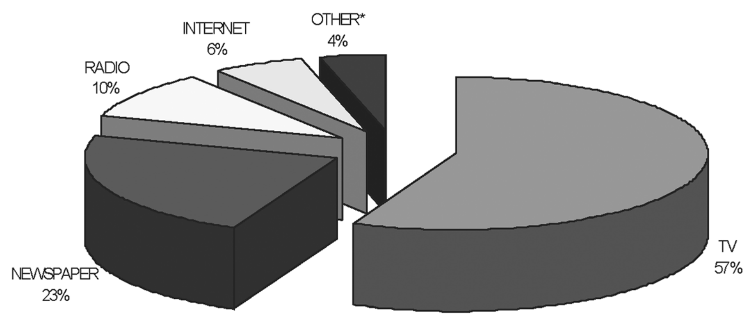
Television and Newspapers Should Be The Focal Point of Analysis

Television and newspapers dominate the news media market (see Exhibits 1 and 2). Television provides the announcement function. Newspapers provide in-depth coverage. Other sources of news are dwarfed by the two dominant sources. Approximately 80 percent of respondents say they get most of their news and information from TV or newspapers. The percentage of local news is similar, with newspapers playing a role closer to TV. That percentage has been stable since the advent of the Internet. It is even higher for election information. Clearly, market analysis must focus on TV and newspapers. The number of voices could be adjusted to take account of the lesser voices available on radio, the Internet, and other sources.

The Analysis of News and Information, As Opposed To Entertainment or Ad Markets, Should Be The Primary Basis of Market Structure Analysis

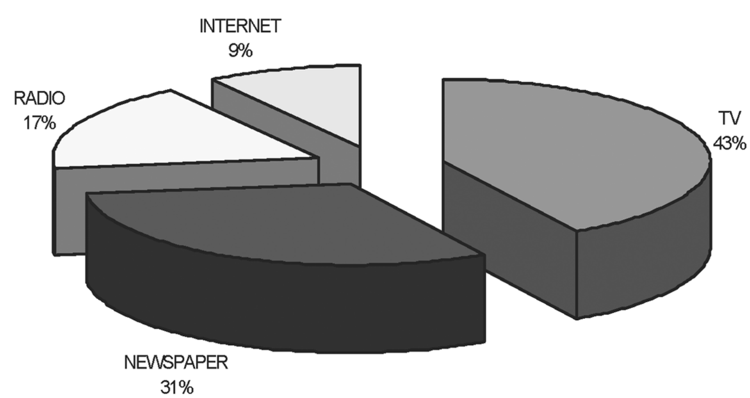
Much of the FCC's previous analysis has focused on entertainment and advertising markets. The evidence before the Commission now shows that news and information is a distinct product market. Many broadcast stations do not provide news whatsoever. Radio has all but abandoned news (see Exhibit 3). As a consequence, news media markets are much more concentrated than broadcast and video TV markets.

Exhibit 1: TV and Newspapers Are The Public's Most Important Source of All News



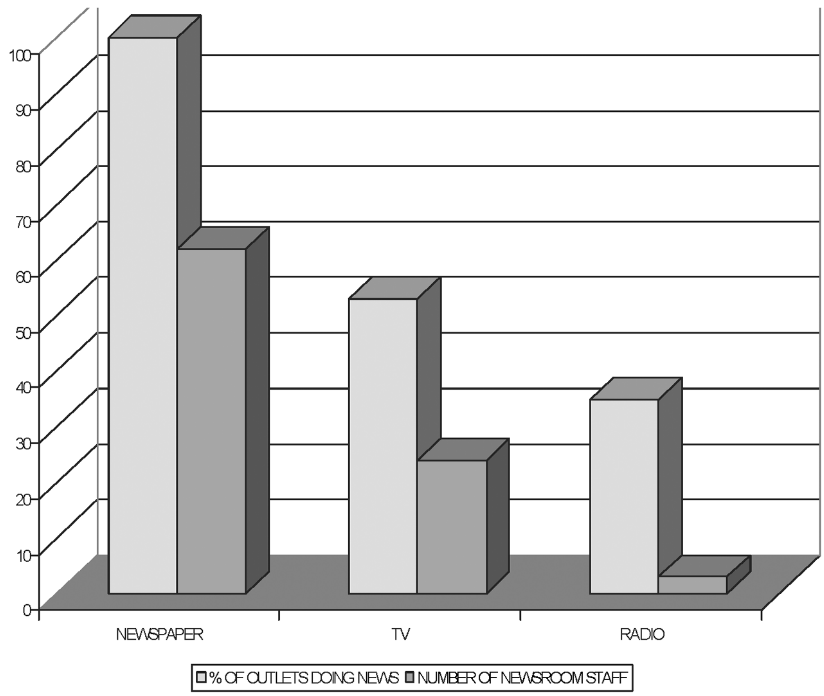
SOURCE: Federal Communications Commission, Study 8, *Consumer Survey on Media Usage,* prepared by Nielsen Media Research, September 2002, Question 10.

Exhibit 2: TV and Newspapers Dominate as Local News Sources



SOURCE: Federal Communications Commission, Study 8, *Consumer Survey on Media Usage,* prepared by Nielsen Media Research, September 2002, Question 1. Multiple responses allowed, percentage of total responses.

Exhibit 3: Comparing News Capabilities: Newspapers Produce the Bulk of Local News



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.

Newspapers dominate the production of local news content. They are devoted to news, whereas most other media are primarily devoted to entertainment. Newspapers also have large staffs. As Downie and Kaiser point out

> Television, like radio, is a relatively inefficient conveyor of information. The text of Cronkite's evening news, after eliminating the commercials, would fill just over half the front page of a full-sized newspaper. A typical network evening news show now mentions just over fifteen or so different subjects, some in a sentence, whereas a good newspaper has scores of different news items every day. A big story on television might get two minutes, or about 400 words. The *Los Angeles Times* coverage of the same big story could easily total 2,000 words.[20]

The Commission should examine the difference between entertainment HHIs and news HHIs. News markets are much more concentrated than entertainment markets. National aggregate data suggests that TV news markets are twice as concentrated as TV entertainment markets.

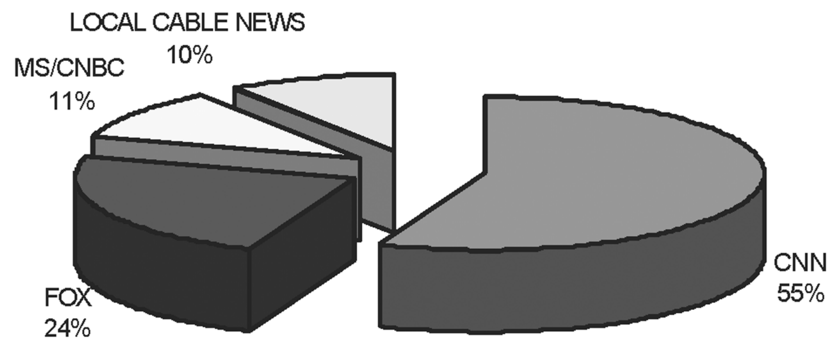
Cable, Satellite and the Internet Provide Little, If Any, Local News and Information

The Commission has considered cable TV as a single additional voice. However, the data before the commission shows that cable is not an independent source of local news and information. At present, satellite provides no independent local news or information. Indeed, it is struggling just to make all local stations available. It is most interesting to note in this context that the Commission's task force study on media substitutability assumed that cable and the Internet are national, not local, sources of news.

Cable plays only a small role as a source of local news and information. Only eleven percent of those who rely on cable cite a local cable channel (see Exhibit 4). Few cable operators provide news, and when they do, it frequently replicates one of the broadcast networks.

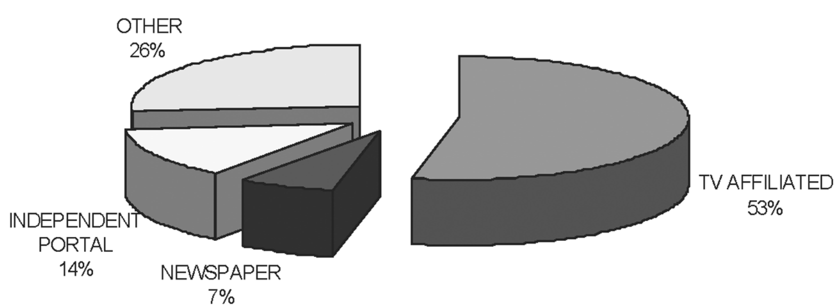
The Internet's role as an independent source of news is even smaller. The websites of the dominant TV outlets and newspapers dominate as sources on the Internet (see Exhibit 5). Even the 6 percent of respondents who say it is their primary source of news are more likely to say they use the websites of major TV networks or newspapers than other sites. The Internet should not be counted as an additional local voice.

Exhibit 4: Few Cable Viewers Get Their Local News From Local Cable Channels



SOURCE: Federal Communications Commission, Study 8, *Consumer Survey on Media Usage,* prepared by Nielsen Media Research, September 2002, Question 7. Multiple responses allowed, percentage of total responses.

Exhibit 5: Most Internet Users Visit Websites of the Major TV News Outlets and Newspapers



SOURCE: Federal Communications Commission, Study 8, *Consumer Survey on Media Usage,* prepared by Nielsen Media Research, September 2002, Question 9. Multiple responses allowed, percentage of total responses.

Media Markets are Already Concentrated

Applying the above methods to the analysis of media markets, we find that they are concentrated at present. Exhibits 6 thru 8 show the level of concentration in each specific media product in local media markets using the standard market definition and analytic approach applied by the Department of Justice and the Federal Trade Commission. We find that every television and newspaper market in the country is already concentrated. In fact, every newspaper market in the country is already highly concentrated, as are over 95 percent of the TV and radio markets. We use television markets as the geographic basis for defining markets because television is the primary news source.

While most of the rules apply to local markets, the national broadcast cap applies to a national market. The national TV market greatly affects the ability of program developers to gain access to a sufficient market to launch programs or channels. For example, one of the FCC studies examined the owners of programming aired in the national prime time market. Exhibit 9 shows three important indicators of concentration in national programming markets, network prime time producers, total prime time viewing and news programming. The prime time market is concentrated and the news market is highly concentrated.

IV. Proposed FCC Rules Have No Analytic Or Legal Basis

Flaws in the FCC Rules

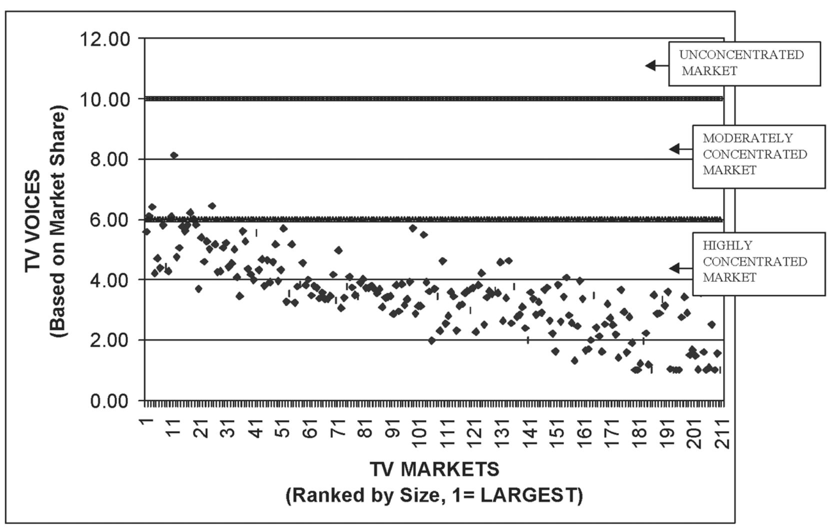
According to press accounts, the FCC appears to be headed in a very different direction than the above approach. The analytic framework adopted by the FCC is not rigorous. It is apparently based on a simple voice count of all TV stations. Thus, it addresses neither the product market in question, nor the market shares. To make matters worse, the simple TV voice count appears to include PBS stations, although few do local news and all have a very small market share.

Furthermore, the FCC has failed to set a high standard for the most important rule—TV/newspaper cross-ownership. It will apparently allow the count of independent newspapers and TV stations to decline to as low as four. That is, it will allow a TV station to buy a newspaper in a market where there are only a total of four TV stations.

In short, the FCC is

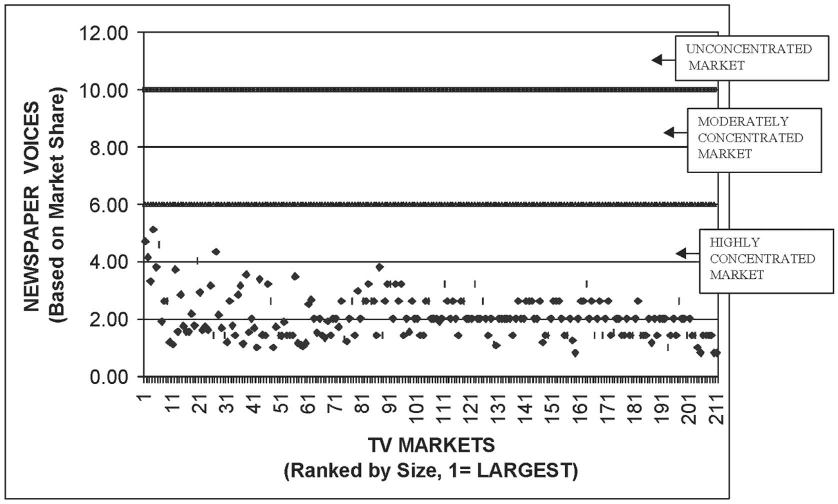
- looking at the wrong product (entertainment),
- analyzing the wrong market (national news),
- doing the market structure analysis incorrectly (not considering market shares), and
- choosing a dangerously low standard.

Exhibit 6: Broadcast TV Voice Count



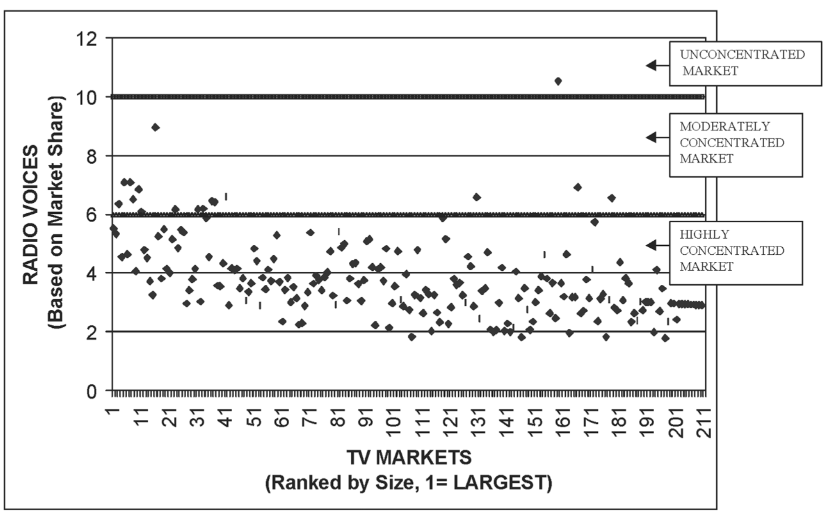
SOURCE: BIA Financial, *Television Market Report: 2000.* Year 2000 broadcast TV viewing data for all 211 DMAs.

Exhibit 7: Newspaper Voice Count



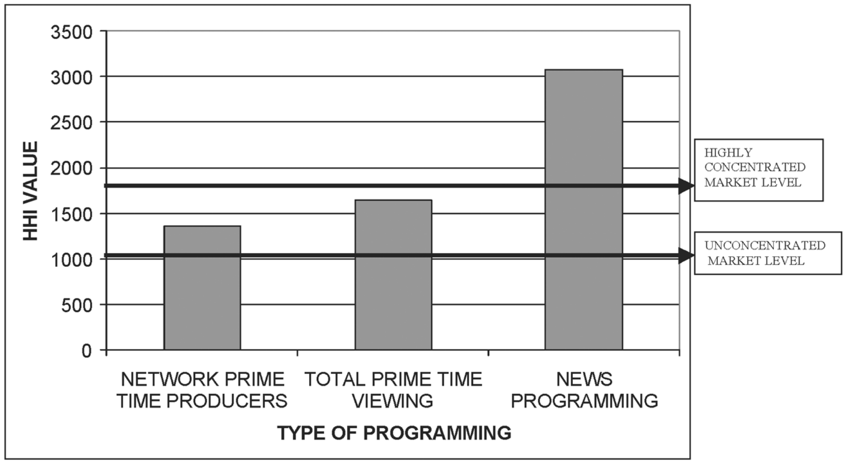
SOURCE: Market profiles from *Editor and Publisher* and *Media Week,* various issues; "Initial Comments of the NAA," and Initial Comments of Hearst Argyle, Exhibit 1, "Selected Media 'Voices' by Designated Market Areas," In the Matter of Cross-Ownership of Broadcast Stations and Newspapers; Newspaper-Radio Cross-Ownership Waiver Policy: Order and Notice of Proposed Rulemaking, MM Docket No. 01–235, 96–197, Table 3. Year 2000 newspaper circulation for 68 markets. Missing data estimated by regression of DMA size.

Exhibit 8: Radio Voice Count



SOURCE: Keith Brown and George Williams, *Consolidation and Advertising Prices in Local Radio Markets* (Federal Communications Commission, Media Bureau Staff Research Paper, September 2002). HHIs based on top 4 firms only, assuming firms 3 and 4 have equal shares.

Exhibit 9: Concentration of National Programming Markets



SOURCE: Mara Epstein, *Program Diversity and the Program Selection Process on Broadcast Network Television* (Federal Communications Commission, Media Ownership Working Group, September 2002); "Comments of Sinclair Broadcasting," Exhibit 15; Bill Carter, "Nightly News Feels Pinch of 23-Hour News" *New York Times,* April 14, 2003, p. C–1.

The result will be to allow markets to become extremely concentrated.

The FCC's analysis also appears to be applying logically inconsistent approaches across media markets, an analytic flaw that was particularly offensive to the D.C. Circuit.

- UHF stations appear to be counted as one-half for the purposes of the national cap, but a full station for purposes of the cross-ownership and the duopoly rule. This inconsistent treatment biases the rules toward greater concentration and less diversity.
- Similarly, the FCC recognizes the importance of major TV voices by banning a duopoly merger between two TV stations ranked in the top four in any market. However, the FCC does not recognize the importance of newspapers for broadcast newspaper cross-ownership. It fails to impose a similar restriction on a top four TV station combining by a newspaper.

The FCC Proposal Guts the Public Interest Standard for Media Ownership Under The Communications Act

The impact on media market structure will be devastating. The FCC approach would allow newspaper-TV combinations in 150 markets. These markets cover approximately 90 percent of the total population. The media market structure in many of these localities would become greatly distorted because of a lack of competition.

We believe that the FCC has misclassified at least 140 of these markets and would incorrectly allow mergers. These 140 markets cover approximately 70 percent of the population in the Nation.

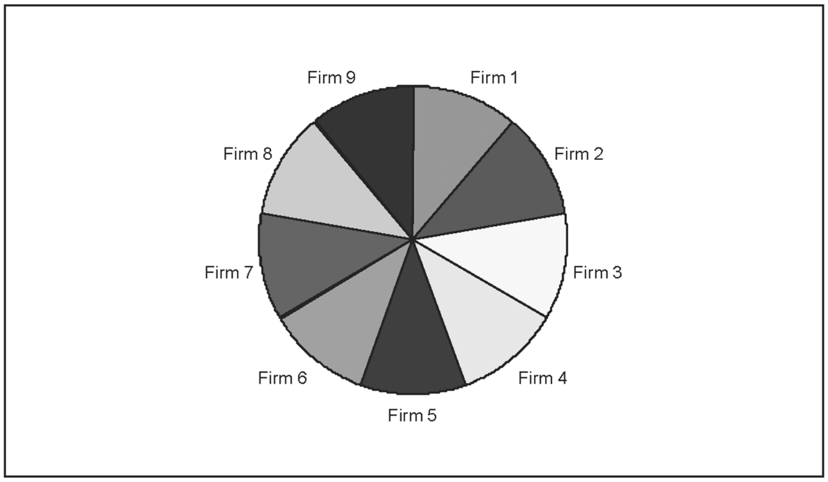
Of the 140 misclassified markets, 36 are one-newspaper towns. That is, the second newspaper has a market share of less than five percent. Another 55 are two newspaper towns. Thus approximately two-thirds of these markets would have one or two newspaper-TV combinations.

Moreover, even in multiple newspaper towns, most newspaper markets are dominated by a single paper. We have data on 17 of the 55 two paper towns in which the FCC would inappropriately allow mergers. This sample of markets is representative of all two-paper towns, with an average DMA ranking of 38 compared to 39 for all two-paper cities. We find that the number one newspaper has a market share of 80 percent compared to 15 percent for the number two newspaper.

This very lax rule holds the prospect of having many markets dominated by a single newspaper-TV combination, with few TV stations and no prospect of an equal combination being formed in the market. Exhibit 10 presents a graphic representation of moderately concentrated and highly concentrated markets as a point of reference. Exhibit 11 presents a graphic picture of the impact that this lax rule would have on single paper markets.

Exhibit 10: Graphic Representation Of Concentrated Markets

Moderately Concentrated Market (Nine Equal Sized Competitors)



Highly Concentrated Market (Five Equal Sized Competitors)

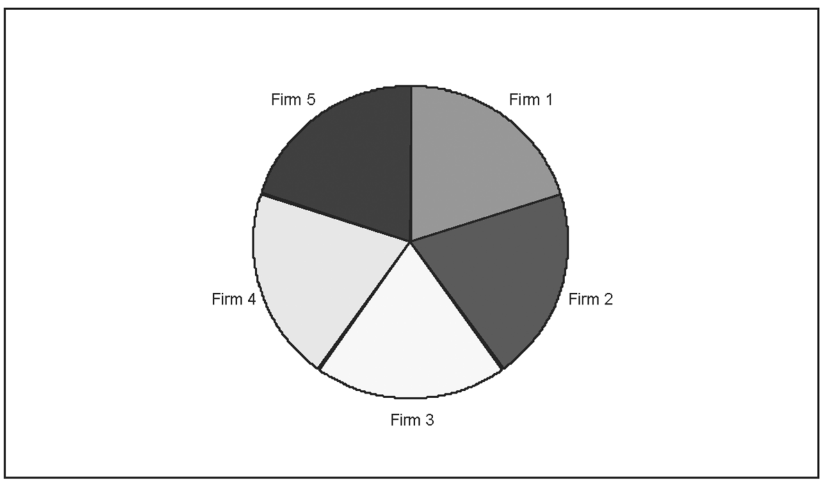
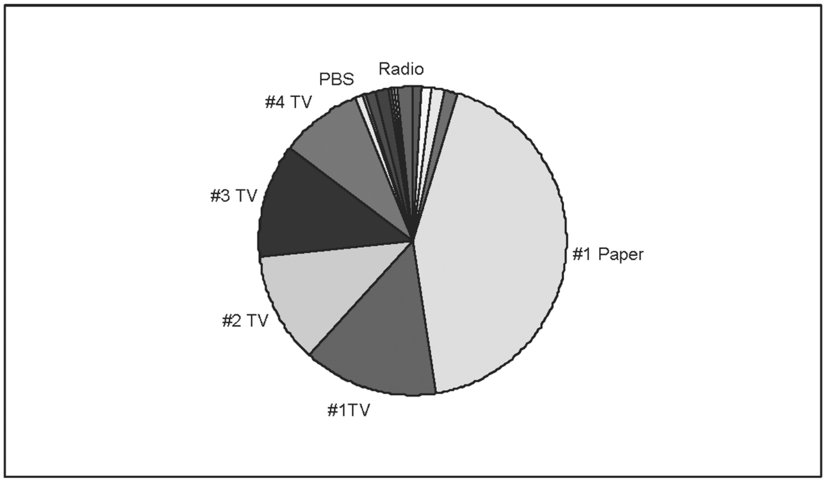
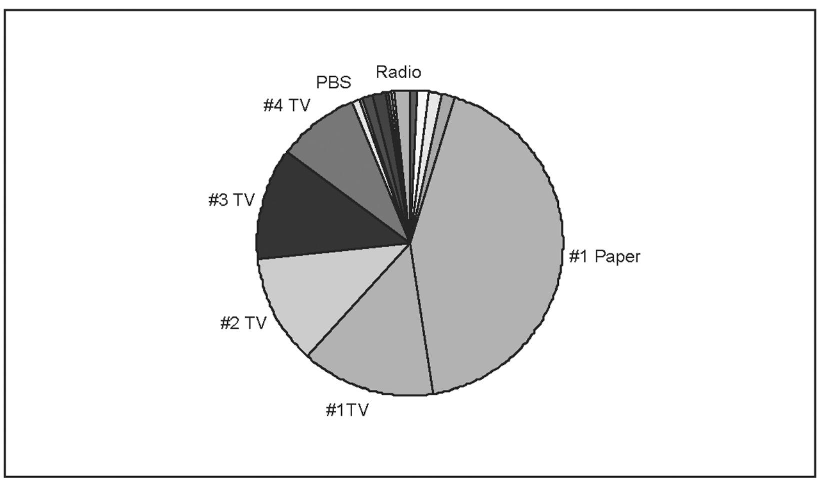


Exhibit 11: Impact Of Newspaper-TV Mergers In One-Paper Cities (Based on TV Entertainment HHI and Newspaper Circulation HHI)

Pre-Merger Market



Post-Merger Market



In a typical one-paper city, the local media giant would have a 90 percent share of the newspaper circulation, one-third of the TV audience, and one-third of the radio audience. No second entity could come close to matching this media power. The 36 markets include just under 20 million households, or one-fifth of the country. There are some very large cities on the list, like Atlanta, Baltimore and New Orleans, as well as small cities.

Applying the framework developed above (treating newspapers and TV as equal sources, and weighting radio at 10 percent of the total market). The FCC would approve mergers that fracture the *Merger Guidelines.* In one-paper cities, the pre-merger market is highly concentrated and the merger would raise the HHI by approximately 1100 points. Recall that the antitrust authorities believe mergers that raise the HHI by 50 points in a market such as this “are likely to create or enhance market power or facilitate its exercise.” One entity would thoroughly dominate the media landscape in these markets, accounting for over one-half of the local market.

The increase in concentration is over twenty times the level that triggers antitrust concerns.

Two-newspaper markets would be somewhat less concentrated, but the FCC would still allow excessively high levels of concentration that would not support vigorous competition (see Exhibit 12). In the typical two-paper town, the dominant firm would have two-thirds of newspaper market, and one-third of the TV and radio markets. The second firm would be a paper with only one-fifth of the circulation. These cities include approximately 25 million households, or about one-quarter of the national population.

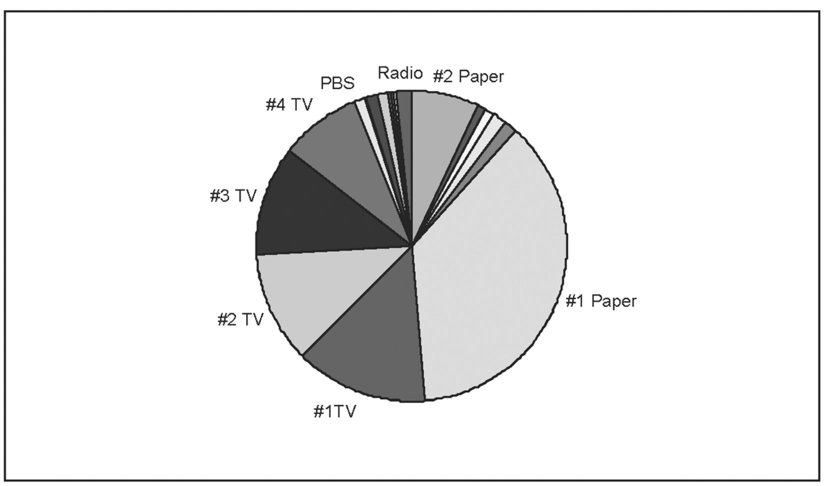
This pre-merger market would fall in the just below the highly concentrated threshold. The merger would raise the HHI by about 1000 points. This is over nine times the level that triggers antitrust concerns.

The problems that these mergers pose are obviously not close calls, but the difficulty runs deeper (see Exhibit 13). Even if the number 2 TV stations in either of these types of markets were, which typically has a market share of 24 percent, were to combine with the dominant newspaper, the increase in concentration would far exceed the threshold that triggers concern. In fact, even if the fourth largest station, which typically has a market share of 10 percent, were to combine with the leading newspaper, the resulting increase in concentration far exceeds the antitrust threshold. This supports the observation that it is inconsistent to preclude mergers between the top four TV outlets under the duopoly rule but not between top four TV stations and newspaper for the cross ownership rule.

Exhibit 14 characterizes the 150 largest markets in which the draft order would allow cross-ownership mergers. Almost one half are one or two paper cities in which the TV news market is highly concentrated. One-sixth are one or two paper markets in which the TV market is moderately concentrated. One-quarter has three or more newspapers, but the TV market is highly concentrated. In only one-fifteenth of these markets is the TV market not highly concentrated and the total local news market unconcentrated.

Exhibit 12: Impact of Newspaper-TV Mergers in Two-Paper Cities (Based on TV Entertainment HHI and Newspaper Circulation HHI)

Pre-Merger Market



Post-Merger Market

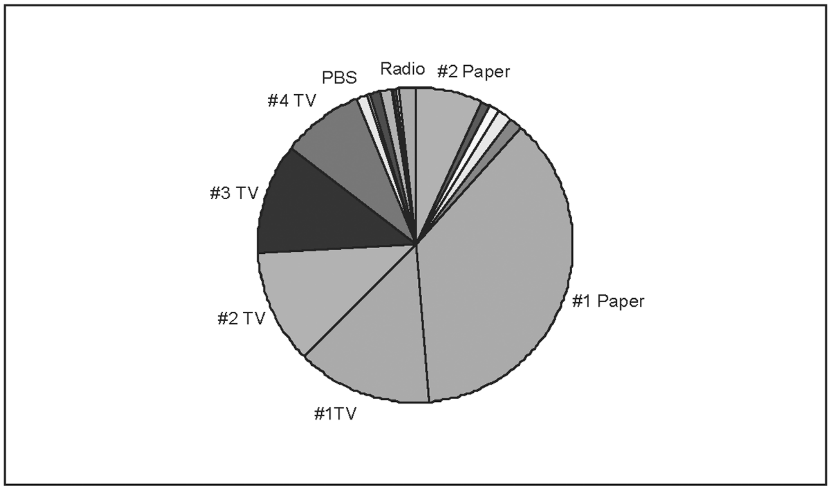


Exhibit 13: Increase in HHI Caused by Leading Paper-TV Station Mergers (Based on TV Entertainment HHI and Newspaper Circulation HHI)

TV STATION		LEADING PAPER	
RANK	MARKET SHARE	ONE-PAPER CITY (90% Circulation Share)	TWO-PAPER CITY (80% Circulation Share)
1	30	1115	1000
2	24	821	723
4	10	290	252
Merger Guideline Threshold	na	50	100

Exhibit 14: Most Concentrated News Markets For to Cross–Ownership Under the FCC Draft Order

One or Two Paper Markets Where TV News Market is Highly Concentrated

Albany, GA	Lincoln-Hastings-Kearney, NE
Amarillo, TX	Little Rock-Pine Bluff, AR
Atlanta, GA	Louisville, KY
Augusta, GA	Macon, GA
Austin, TX	Monroe, LA-El Dorado, AR
Baton Rouge, LA	Montgomery, AL
Beaumont-Port Arthur, TX	Nashville, TN
Bluefield-Beckley-Oak Hill, WV	New Orleans, LA
Boise, ID	Norfolk-Portsmouth-Newport News, VA
Buffalo, NY	Omaha, NE
Charleston, SC	Pittsburgh, PA
Chattanooga, TN	Portland-Auburn, ME
Chico-Redding, CA	Reno, NV
Colorado Springs-Pueblo, CO	Richmond-Petersburg, VA
Columbus, GA	Roanoke-Lynchburg, VA
Columbus, OH	Rochester, NY
Columbus-Tupelo-West Point, MS	Rockford, IL
Dayton, OH	Savannah, GA
Des Moines-Ames, IA	Shreveport, LA
Duluth, MN-Superior, WI	Sioux City, IA
Evansville, IN	Springfield, MO
Fargo-Valley City, ND	St. Louis, MO
Flint-Saginaw-Bay City, MI	Syracuse, NY
Ft. Smith-Fayetteville-Springdale-Rogers, AR	Tallahassee, FL-Thomasville, GA
Green Bay-Appleton, WI	Terre Haute, IN
Greenville-New Bern-Washington, NC	Toledo, OH
Harlingen-Weslaco-McAllen-Brownsville, TX	Traverse City-Cadillac, MI
Jackson, MS	Tucson, AZ
Joplin, MO-Pittsburg, KS	Tyler-Longview, TX
Knoxville, TN	Wausau-Rhinelander, WI
La Crosse-Eau Claire, WI	West Palm Beach-Ft. Pierce, FL
Lafayette, LA	Wheeling, WV-Steubenville, OH
Lansing, MI	Wichita-Hutchinson, KS
	Wilmington, NC

Of the 91 one and two paper markets, 71 would have six or fewer news voices before a cross ownership merger. In those markets, newspapers already can be considered dominant or leading firms. Thus the FCC is allowing mergers involving dominant firms in highly concentrated markets.

Moreover, there are many other combinations that should be a source of concern. In one-third of the three newspaper cities, there are very few TV stations. These markets would become very tight oligopolies (see Exhibit 15). These markets represent almost another 3 million households.

In the broader perspective, the FCC approach would allow mergers in a total of 79 markets that have six or fewer major media firms. Of the 140 markets inappropriately opened to mergers, over 100 have either six or fewer major local news voices or two or fewer newspapers.

While the discussion of individual market situation shows the problem, it can be complex. We believe that a systematic approach to market structure analysis and a rule based on a high competitive standard is called for. The next section outlines such an approach.

V. A Responsible Approach To Ownership Limits

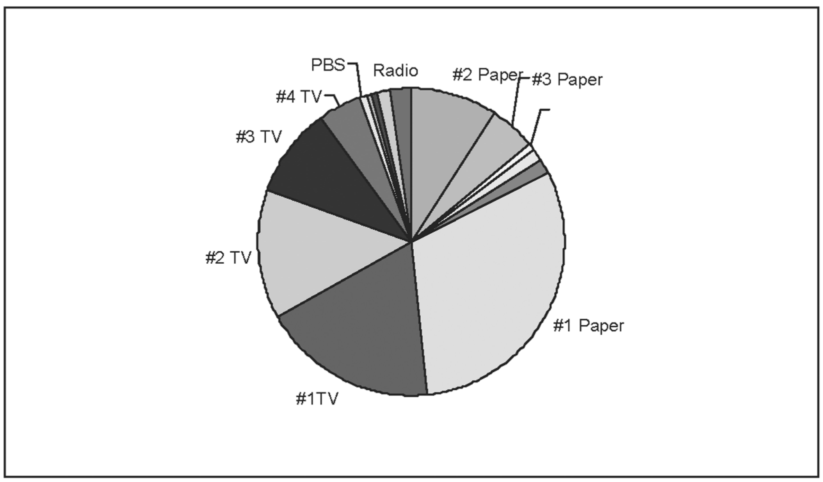
It is clear that the FCC's proposed rules are extremely. We believe the record supports a principled approach to market structure analysis and a much higher standard. The high standards described above for merger policy under the Communications Act can be summarized in two principles.

- No mergers between TV stations and newspapers should be allowed if the overall media market in a locality is or would become concentrated as a result of the merger.
- No mergers involving TV stations should be allowed if the TV market in a locality is or would become highly concentrated as a result of the merger.

Exhibit 16 demonstrates how markets would be categorized for First Amendment ownership limits. Implementing the principles requires care.

Exhibit 15: Impact of Newspaper-TV Mergers in Cities with Three Papers and Three or Fewer TV Stations Providing News

Pre-Merger Market



Post-Merger Market

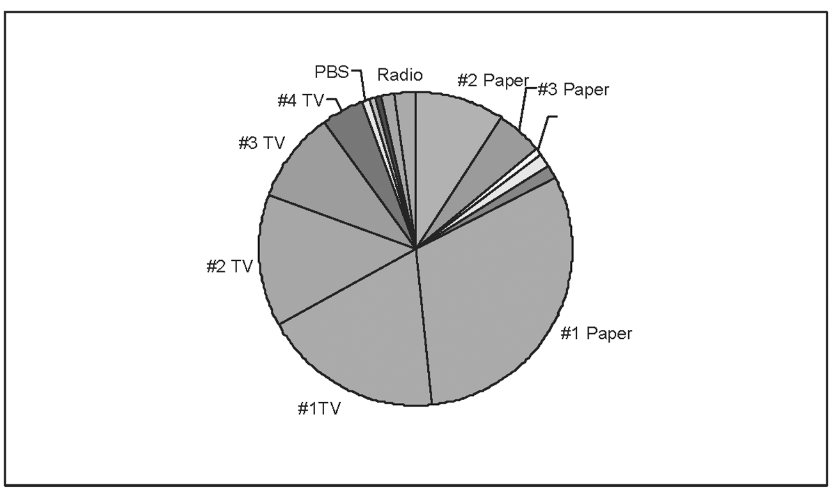
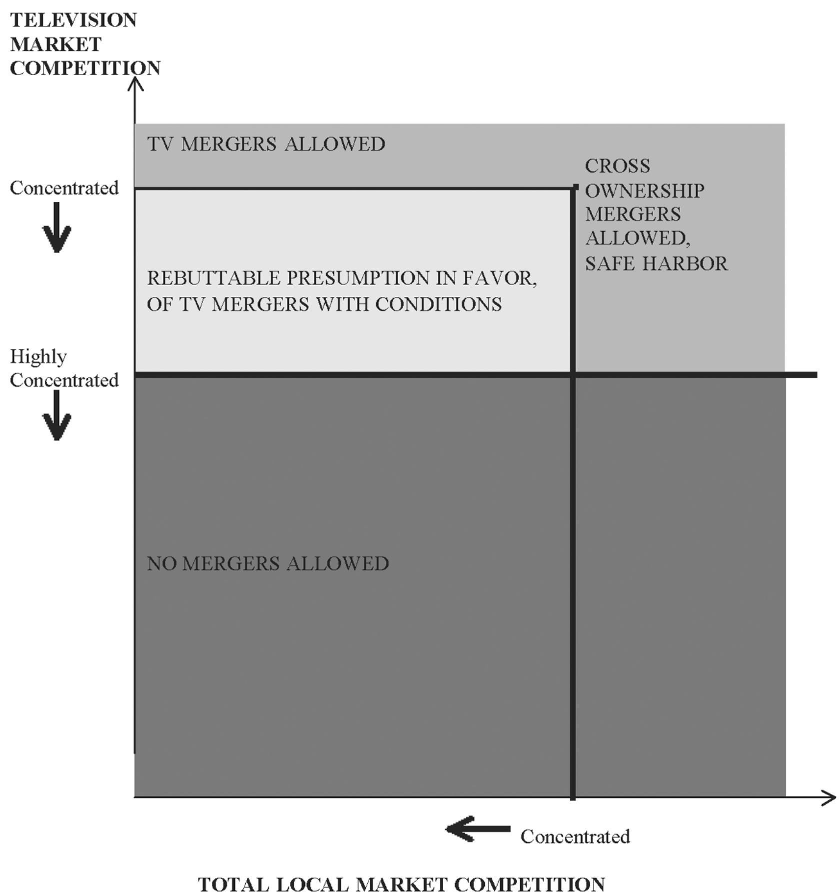


Exhibit 16: Media Market Categorization for Merger Review



Counting Voices in a Total Media Market

The Courts have suggested that the FCC should adopt a consistent methodology for voice counts for all of the rules. The empirical evidence supports the proposition that each of the media constitutes a separate product. Rules about mergers within those markets can be written in terms of the number of voices within the individual product and geographic markets, as long as a consistent methodology and analytic framework is utilized across all markets.

However, the cross ownership rule poses more of a challenge. The case can be made that TV and newspapers play such important and unique roles in civic discourse that they should be kept separate. This paper has suggested that if the two are to be allowed to combine, a cautious market structure approach should be taken.

These rules must reflect the reality of the marketplace and should promote unconcentrated markets, when all voices are being counted. The following formula is consistent with the record before the Commission.

Voice Count = (Broadcast + Newspaper)/.8)-jointly owned voices

The important role of newspapers and the closeness of usage in local markets lead us to equate TV and newspapers. Market share data must be used as the basis for voice counts and can be readily translated into voice count equivalents. As an example, consider the following calculation, which is actually close to the national average.

A broadcast HHI of 2000 converts to equal-sized voice equivalents of five equal-sized voices (10,000/2000)]. Newspaper HHIs would be similarly converted to equal-sized voice equivalents (*e.g.,* an HHI of 5000 converts to two equal-sized voice equivalents). Thus, treating TV and newspapers equally, we start with seven major voices.

As a first approximation, the Commission could assume the major TV and newspaper voices represent 80 percent of the market (based on the Nielsen study). Radio is the primary source of news for only ten percent of the people. The Internet is given as the most frequent source by only six percent of the respondents, but the most frequent sites mentioned are the websites of the major broadcasters and newspapers. Another four percent of respondents identify other sources as their primary means of getting news or refused to answer. To continue the previous example, the TV plus newspaper voice count of 7 voice equivalents represents 80 percent of the market. Therefore, we can divide that voice count by .8 to adjust for the lesser voices. This increases the voice count to 8.75 (7/.8=8.75).

This is a generous estimate of the voice count for three reasons. First, in many markets there is at least some cross-ownership of radio stations by newspapers and TV broadcasters. This should be taken into account by increasing the adjustment factor. In the above example, the adjustment was .8, based on .1 for radio and .1 for Internet and other. If the radio holdings of broadcasters and newspapers have a market share of 40 percent of the radio market, then the adjustment for radio would be decreased to .06. The voice count would be (7/.84=8.33). Second, as noted above, the typical geographic market definitions used are too broad. Third, the Internet and other categories do not represent independent sources of local news.

Exhibit 17 shows the estimation of market voices based on this approach. There are about one dozen that are unconcentrated. A large number falls into the moderately concentrated region.

Reasonable Adjustments To Counting Of Voices

Existing cross-ownership and duopoly situations should be taken into account in the final market-wide voice count

Ownership of multiple outlets must be taken into account. For example, the television HHI would attribute viewers of both stations in a duopoly to the parent firm. Similarly, where a newspaper is cross-owned with a television station, both the TV and newspaper audience should be attributed to one owner.

A diminimus exception should be allowed to promote civic discourse

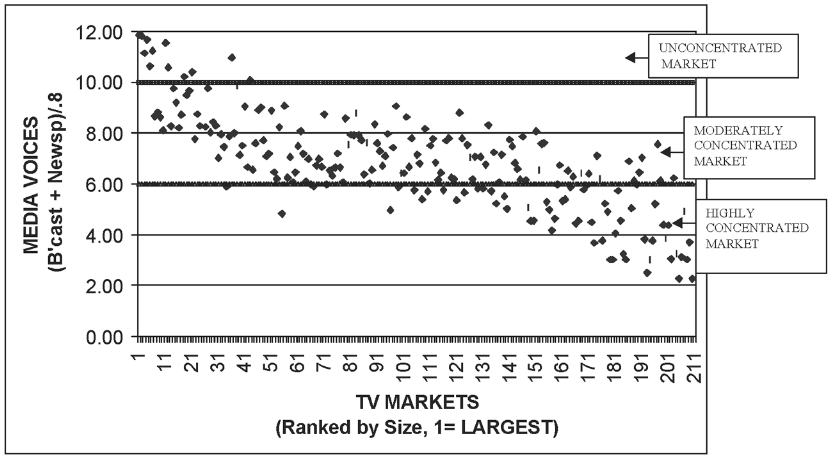
Relatively small newspaper or television outlets (less than five percent market share) should be exempted from the above rules. To the extent that larger media outlets seek to obtain cross technology partners, this should be allowed as it can increase the availability of important voices.

Similarly, the Commission should keep the traditional failing firm exception. Under the principle that it is better to keep a media voice that is bankrupt in the market through a merger than to lose it, failing firms have been allowed to merge, even where such a merger would not otherwise be approved.

The empirical estimate of market structure analysis can be altered if empirical evidence indicates changes are justified

The above principles are well supported in the record before the Commission. They are based on data that can be reviewed and updated on a regular basis, as required by the Telecommunications Act of 1996. The biennial review process affords the Commission the opportunity to systematically and routinely examine the assumptions used in constructing the market screens used to determine the markets in which mergers will be allowed mergers.

Exhibit 17: Total Media Voices



SOURCE: See previous Exhibits.

Establishing Thresholds and Market Screens

Having counted voices, it is important to keep in mind that thresholds and market screens apply to the post-merger market. That is, if we establish a rule that total local media markets should not be allowed to become concentrated, we mean that the total number of voices should not be less than ten after the merger. This means that we must start scrutinizing mergers when the number of voices reaches eleven, since a merger could lower the voice count below the threshold. Similarly, in the case of specific product markets, if we adopt a policy that prevents markets from becoming highly concentrated, we would not want fewer than six voices and we would begin scrutinizing mergers when the voice count reached seven.

Market-share based analysis

The adoption of this approach would make a small number of cross-ownership mergers possible (see Exhibit 18). Based on the unconcentrated total market requirement, about a dozen markets would be candidates. Factoring in the requirement that TV markets not be highly concentrated, the number of market in which cross-ownership mergers would be allowed would fall to fewer than half a dozen.

The market share based approach would have an impact on the number of markets in which TV mergers would be allowed. There are just over two dozen such markets. Almost all of these are markets in which duopoly mergers would be allowed today. There are just over another two dozen markets that pass the current voice count test, but would fail the market share based test.

Simple Voice Counts vs. Market Share Weighted Voice Counts

The above analysis is based on market shares for entertainment. Market shares for news are not widely publicly available (although they are routinely collected for proprietary purposes). However, a simple count of local stations that program news is available. If the FCC were to count only those broadcast stations that produce news, the results would be similar to the results based on the entertainment market share based approach, as Exhibit 19 shows. The reason is that the stations with smaller audiences do not contribute much to the HHI. They are also the stations that are least likely to provide news.

If the unconcentrated total market thresholds/moderately concentrated thresholds are applied to the simple news voice count markets, where both important newspapers and TV stations are counted on a simple basis (not market share based), the number of markets where cross-ownership mergers would be allowed is similar to the market share based analysis, although somewhat different markets could witness mergers (see Exhibit 20). In about 20 markets TV mergers would be allowed.

Exhibit 18: Two-Pronged Market Standard for Cross–Ownership

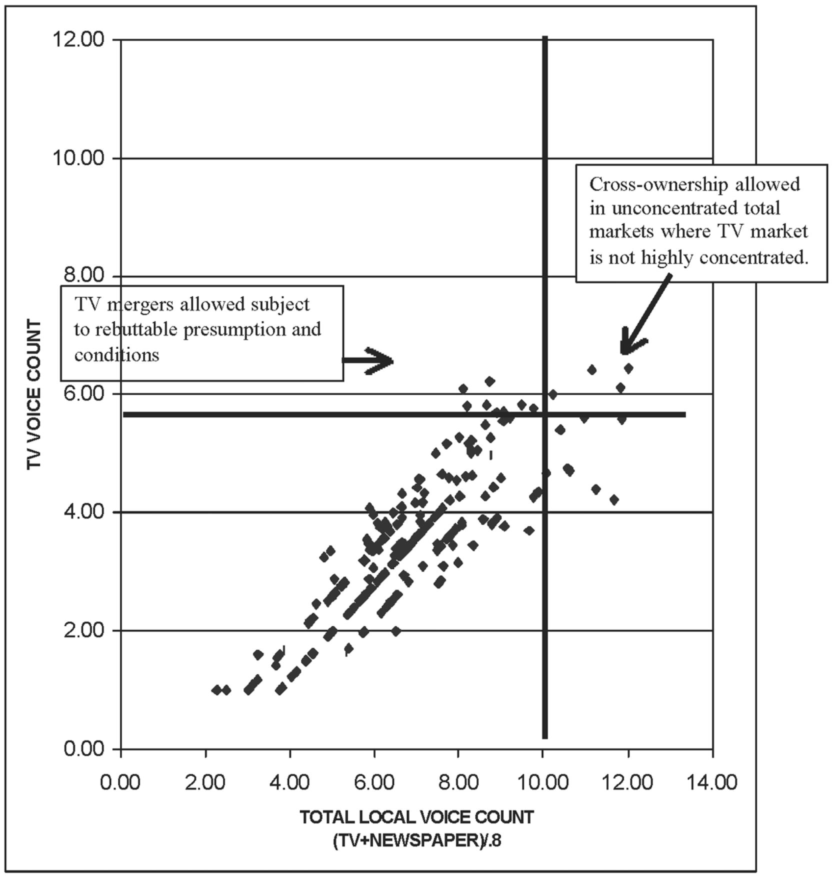
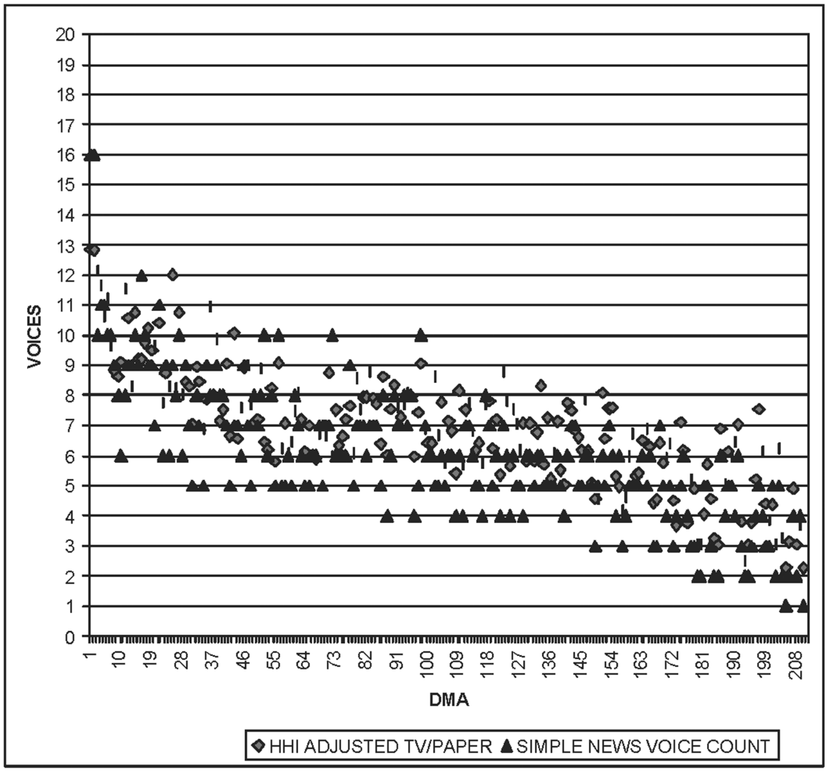


Exhibit 19: Simple News Voice Count vs. Market–Share Based, Adjusted Voice Count [(TV+Newspaper)/.8]



SOURCE: Newspaper voice count, “Initial Comments of the Media,” In the Matter of Cross-Ownership of Broadcast Stations and Newspapers; Newspaper-Radio Cross-Ownership Waiver Policy: Order and Notice of Proposed Rulemaking, MM Docket No. 01–235, 96–197. Television voice count, Bruce Owen, 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.

Exhibit 20: Market Eligible For Cross-Ownership Mergers
(Cities Surpassing Threshold on Two or More Screens)

DMA	FIRST TEST		SECOND TEST	
	Total Local Market Unconcentrated		TV Market Not Highly Concentrated	
	Market Share Based Count	Simple News Voice Count	Market Share Based Count	Simple News Voice Count
New York	x	x		x
Los Angeles	x	x	x	x
Chicago	x		x	
Philadelphia	x	x		x
San Francisco	x	x		x
Houston	x		x	
Miami		x		x
Denver	x		x	
Orlando	x	x		
San Diego	x		x	

Conclusion

When the FCC abandoned a principled analysis of media market structure in favor of political deals, the media ownership proceedings lost any hint of intellectual or public policy integrity. The number and types of markets in which TV-newspaper mergers would be allowed are completely out of line with First Amendment jurisprudence and even antitrust principles.

In order to eliminate or dramatically relax the limits on newspaper-TV cross-ownership and TV stations ownership, the FCC must take the position that concentrated media markets defined loosely in terms of products and broadly in terms of geographic scope are acceptable First Amendment policy. It must ignore audience size (market shares), ignore actual patterns of media use, and ignore the dramatic difference between entertainment and the dissemination of news and information. We do not think that this is consistent with the Communications Act or the recent court remands of ownership rules.

We conclude that the "empirical gap," to which D.C. Appeals Court referred in the Sinclair decision has been closed.[21] The hard data and evidence on the record does not support the rules the FCC has proposed. 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 lax antitrust enforcement and First Amendment policy have allowed media markets to become far too concentrated. Democratic discourse demands many more media voices.

Endnotes

[1] *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945).

[2] *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945).

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

[4] *Fox Television Stations, Inc.* v. *FCC,* 280 F.3d 1027 (D.C. Circ. 2002) (hereafter Fox v. FCC); Sinclair.

[5] *Fox* v. *FCC,* pp. 12–13.

> The networks . . . argue that the Rule fails even rationality review because "[P]ermitting one entity to own many stations can offer . . . more programming preferred by consumers". . . but for the Rule "buyers with superior skills [could] purchase stations where they may be able to do a better job" of meeting local needs even as they realize economies of scale.
>
> This paean to the undoubted virtues of a free market in television stations is not, however, responsive to the question whether the Congress could reasonably

determine that a more diversified ownership of television stations would likely lead to the presentation of more diverse points of view.

[6] *Fox* v. *FCC,* p. 13.
[7] Sinclair, p. 15.
[8] 395 U.S. 388 (1969).
[9] Sinclair, p. 11.
[10] 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.
[11] Telecommunications Act of 1996, Pub. LA. No. 104–104, 110 Stat. 56 (1996), 202(h).
[12] *Fox* erroneously establishes a far more stringent legal test than actually contemplated by Congress in enacting Section 202(h). First, *Fox* improperly treated the 2000 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 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 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.
[13] Judge Sentelle," Concurring and Dissenting in Part," *Sinclair Broadcast Group, Inc.* v. *Federal Communications Commission,* April 2, 2002. The *Washington Post* echoed this concern, offering the following observation on things to come under the headline *Narrowing the Lines of Communications,* February 24, 2002.

> The decisions will give added support to FCC Chairman Michael K. Powell, who views such restrictions as anachronisms in an era of Internet, broadband and satellite technology . . . Any excess concentration, Powell argues, can be handled by the Justice Department in its traditional role as enforcer of the antitrust laws.

[14] The difference between simple economics under the antitrust law and civic discourse under the Communications Act is woven into the fabric of the statutes. Under the antitrust laws, mergers may be "prohibited if their effect may be substantially to lessen competition or to tend to create a monopoly," or "if they constitute a contract, combination . . ., or conspiracy in restraint of trade," or "constitute an unfair method of competition" (U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines,* 1997, section 0); The standard under the Communications Act is higher, reflecting the special role of communications and mass media in our democracy. The Federal Communications Commission is charged to transfer cable, broadcast and telecommunications licenses only upon a "finding by the Commission that the public interest, convenience and necessity will be served." (U.S.C., 47, 310(b)).
[15] William G. Shepherd, *The Economics of Industrial Organization* (Englewood Cliffs, NJ: Prentice Hall, 1985), p. 389, gives the following formula for the Herfindahl-Hirschman Index (HHI):

$$H = \sum_{i=1}^{n} S_i^2 \times 10,000$$

where

n = the number of firms

m= the market share of the largest firms (4 for the four firm concentration ratio)

S_i = the share of the ith firm.

[16] The HHI can be converted to equal-sized equivalents as follows

Equal-sized voice equivalents = (1/HHI)*10,000.

[17] U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines,* 1997, section 1.51.

[18] *Id.,* section 0.1.

[19] Sinclair, p. 5.

[20] Leonard Downie, Jr. and Robert G. Kaiser, *The News About the News* (New York: Alfred A. Knopf, 2002), p. 125.

[21] Sinclair, p. 5.

The CHAIRMAN. Thank you.
Dr. Mikkelsen.

STATEMENT OF DR. KENT W. MIKKELSEN, VICE PRESIDENT, ECONOMISTS, INC.

Dr. MIKKELSEN. I am pleased to have an opportunity today to present an economist's perspective on three media ownership issues, the broadcast television national ownership cap, the so-called duopoly rule, and the ban on newspaper-broadcast cross-ownership. I have been looking at these issues for nearly 20 years. I have worked for clients with an interest in these rules, including broadcast networks and the Newspaper Association of America, but I am not representing any clients here today.

Economists and society as a whole generally believe in free markets. Individuals and firms acting in their own self-interest will generally produce socially desirable outcomes. A totally free market is not always best. An exception to the rule is in the area of competition. Economic theory teaches that competing firms have an incentive to combine together, reduce competition, and raise their profits at the expense of consumers. The antitrust laws are designed to prevent such a concentration from occurring.

These laws are justified by the clear potential for what economists call market failure. The antitrust agencies have developed regular, widely accepted procedures for determining whether or not a particular merger or joint ownership situation is likely to reduce competition significantly. As a rule of thumb, five to six equal-sized firms or a larger number of unequal-sized firms is considered sufficient to safeguard competition.

The agencies do not attempt to maximize the number of competitors by opposing all mergers. Mergers and joint ownership can yield benefits to consumers in the form of improved product offerings and lower costs. In addition, economic freedom should not be curtailed unless there are clear compelling benefits to be gained. For these reasons, only mergers that are likely to reduce competition significantly should be opposed.

One of the reasons given for the FCC media ownership rules under review today is that they protect competition. In my view, they are not needed to preserve this function. Broadcast stations compete locally to attract audience and advertisers and to acquire local programming rights. It is possible that a merger of two television stations in the same market or the purchase of a broadcast station by a local newspaper could significantly reduce competition, particularly in a smaller local market with relatively few media outlets, but there are other markets in which such a merger would raise no competitive problem.

These are precisely the issues of ownership concentration and competition that the antitrust agencies routinely deal with in enforcing the antitrust laws. There is no need for a separate set of competition standards for media, nor is there any need for a one-size-fits-all restriction such as the duopoly rule and the cross-ownership ban.

Diversity is offered as a second basis for the FCC's ownership rules. I find it instructive to contrast the competition and diversity rationales. First, competition policy is justified by clearly identified market failure. In contrast, I do not know that anyone has shown there is a corresponding market failure that leads the market to produce the wrong amount of diversity.

Second, unlike with competition, there is no sound theoretical basis for linking deconcentrated station ownership to content diversity or viewpoint diversity. Often maximizing station owners do not typically enforce their viewpoints on their stations. Instead, they provide the diversity their audiences demand.

Note that the national television ownership cap does not bear on any competition or diversity issues whatsoever. Competition among television stations and other media outlets occurs at a local level. Audience coverage across multiple markets does not affect local competition. Likewise, the diversity available to an individual consumer is determined in a local market and is not affected by ownership in other markets.

Finally, a third FCC objective, localism, is advanced when stations provide programming, including news, that serves the needs and interests of their community. All media outlets have strong economic incentives to provide programming appealing to their local audiences. Local ownership is not required, and if it were, the ownership rules under consideration today would be poor tools to ensure local ownership. There is no reason to think that eliminating these rules would decrease localism. To the contrary, there is evidence that news and public affairs programming would increase if the rules were removed.

In conclusion, competition in broadcasting can be preserved using antitrust standards without the need for one-size-fits-all restrictions like the duopoly and cross-ownership rules. If, in selected markets, ownership concentration were allowed to rise to somewhat higher levels consistent with antitrust standards, I see no reason to think that the associated amount of diversity provided by broadcast stations and other sources would be insufficient. No separate ownership standard based on diversity is warranted. The national television ownership cap, which serves neither competition nor diversity, should also be removed. None of the rules are needed to promote localism.

Thank you.

[The prepared statement of Dr. Mikkelsen follows:]

PREPARED STATEMENT OF KENT W. MIKKELSEN, VICE PRESIDENT, ECONOMISTS, INC.

I am pleased to have an opportunity to present an economist's perspective on three media ownership issues now being considered by the Committee: the broadcast television national ownership cap, the so-called "duopoly" rule and the ban on newspaper-broadcast cross-ownership.

A few brief words about my background would be in order. I received a Ph.D. in economics from Yale University in 1984. I was an economist in the Antitrust Division of the U.S. Department of Justice, analyzing competition issues. Since 1986 I have been employed by Economists Incorporated, an economic research and consulting firm located in Washington D.C., where I am a vice president. I have been examining competition and regulatory issues in media, including broadcast and newspapers, for 19 years. Economists Incorporated is currently retained by Fox, NBC and Viacom to conduct research and analysis related to the ownership rules now before the Federal Communications Commission. I have previously been retained by the Newspaper Association of America to analyze newspaper-broadcast cross-ownership issues. However, the views I express today are my own; I am here on behalf of none of my clients.

Among economists, there is a general presumption that in a free market, the self-interested actions of individuals and firms will lead to socially desirable amounts and types of goods and services being produced as efficiently as possible.

Exceptions to this general presumption can occur due to what economists call "market failure." Market failure can occur, for instance, when too much or too little of some good is produced because economic actors do not fully internalize the costs or the benefits of their actions. Of particular interest today is another type of market failure referred to as problems of monopoly or market power. In many industries, firms could increase their profits by combining to reduce or eliminate competition among themselves. The participating firms get higher profits, but consumers suffer through higher prices and inferior products and services. For this reason, the antitrust laws were designed to discourage or prevent firms from significantly reducing competition. These laws are justified by this potential market failure.

Economic theory teaches that competition can be threatened if economic activity in a market is concentrated into the hands of a small number of firms. Generally speaking, the larger the number of firms in the market, and the more similar the firms are in size, the greater is the likelihood that competition will prevail (other things being constant). Thus, there is a clear theoretical link between the structure of ownership in the market and the presence of competition.

The U.S. Department of Justice and the Federal Trade Commission, the two main Federal antitrust agencies, have developed a standard methodology to identify changes in ownership structure that can potentially reduce competition. Their "Horizontal Merger Guidelines" are also widely used elsewhere in analyzing competition issues. At the risk of oversimplification, I would like to very briefly describe the analytical process.

- The first step is to determine all the products and services in which the merging parties compete.
- Next, one determines who else competes. That is, one determines what other products and services are close substitutes in use and are available in the relevant geographic area.
- Having identified the relevant products and competing providers, the next step is to assess the concentration of ownership among the providers. Concentration is usually measured using an index based on the market shares attributable to each separate owner in the market, using actual sales shares or shares based on capacity.
- The measured concentration level is then compared with external standards. While there are other factors that are also considered, the Federal agencies that routinely analyze mergers have identified as a minimum threshold the concentration level that would exist in a market with 5–6 equal-sized firms, or

some larger number of unequal-sized firms, depending on the degree of inequality.

- Based on the results of this analysis, an antitrust agency would decide whether a proposed merger was likely to result in a significant decrease in competition. If so, the agency would likely oppose or seek modification of the proposed merger.

Please note that the antitrust agencies do not attempt to "maximize" the number of competitors. Against the possibility that competition would not be preserved if two firms merged, competition policy recognizes that mergers and joint ownership can yield benefits to consumers in the form of improved product offerings and lower costs. It is also recognized that economic freedom should not be curtailed unless there are clear, compelling benefits to be gained. For these reasons, the antitrust agencies only oppose those mergers that are judged likely to have a significant impact on competition.

One of the reasons given for the FCC media ownership rules now under review is that they protect competition. In my view, they are not needed to serve this function.

Competition among television stations to attract viewers and advertisers and to acquire local programming rights occurs at a local level. It is possible, particularly in smaller local markets with relatively few media outlets, that competition would be significantly reduced if two television stations that now have different owners were brought under common ownership. Competition might also be reduced in specific markets if a television station or radio station were to be acquired by the owner of a local newspaper. But these are precisely the issues of ownership concentration and competition that the antitrust agencies routinely deal with in enforcing the antitrust laws. There is no need for a separate set of competition standards for media. Nor is there any need for one-size-fits-all restrictions such as the "duopoly" rule and the cross-ownership ban. Joint ownership of two of the leading television stations in a market, or cross-ownership of a newspaper and a broadcast station, need not significantly reduce competition in local markets with many media outlets.

In individual cases, joint ownership could be beneficial despite producing concentration levels that would appear troubling. If joint ownership or operation is necessary to bring stations on the air that would otherwise not be broadcasting or would be insignificant as a competitive force, joint ownership is probably not anticompetitive. Joint ownership or operation can also enable stations to provide superior services that would not be economical for either station to offer by itself on a stand-alone basis. Such gains may outweigh competitive concerns. But this can best be determined by looking at each specific case.

Finally, the national television ownership cap does not bear significantly on any competition issues whatsoever. Competition among televisions stations and other media outlets occurs at a local level. Competition in one local market is not reduced if one of the stations in the local market is jointly owned with a station in another market.

Another reason offered for the media ownership rules is to promote diversity. I find it instructive to contrast the competition and diversity rationales.

First, the justification for a competition policy is "market failure." I do not know of a corresponding rationale that demonstrates that the amount of diversity produced by economic agents in the market is or would tend to be too small.

Second, unlike with competition, there is no sound theoretical basis for linking deconcentrated station ownership to the types of diversity the Commission is concerned about. It is presumed that, with a given number of stations, content diversity will be greatest if all stations are separately owned. However, it is equally plausible to believe that, if one party owned several stations, it would purposely diversify the offerings on its stations so as to increase the overall audience it would attract.

The link between ownership diversity and *viewpoint* diversity is equally tenuous. Station owners do not typically enforce their viewpoint on their stations. If we assume profit-maximizing behavior, diversity in the audience seems to dictate that there will be diversity of viewpoints expressed on each station, as well as diversity across stations. Furthermore, station managers and news directors usually determine what is aired, not the corporate owners.

Even if it could be demonstrated that deconcentrated ownership resulted in increased diversity, this would not justify what I will call an "absolutist" approach to diversity, *i.e.,* if diversity is good, then a policy that leads to more diversity must be preferred to a policy that yields less diversity. Such an absolutist approach is not the basis for sound decision-making. To illustrate with an example, most people would agree that safety is a desirable goal. Nevertheless, we do not adopt policies that "maximize" the amount of safety. Mandating speed limits of 25 mph everywhere, or imposing restrictive licensing that would sharply reduce the number of cars on the road, would both likely increase traffic safety. We choose not to adopt these policies, however, because the cost in inefficiency and loss of personal freedom is judged to be too high. Similar balancing is needed in the pursuit of diversity or any other social goal.

As with competition, it is difficult to find any connection at all between diversity concerns and the national television broadcast ownership cap. What matters to diversity is the range of viewpoints available to individuals. That range is not diminished when a local media outlet available to an individual is jointly owned with another media outlet in another geographic area that is not available to the individual.

A third FCC objective is localism. I understand this objective to be that stations will provide programming, including news and public affairs programming, that serves the needs and interests of their community. All media outlets have strong economic incentives to respond to the needs of their local audiences. Local ownership is not required to achieve local responsiveness; if local ownership were necessary, the ownership rules under consideration would be very inefficient tools to bring it about. There is no reason to think that cross-ownership of a broadcast station and a newspaper in a market, or joint ownership of two television stations in a market, would decrease localism. To the contrary, there is evidence that a television station that is jointly owned or operated with another local television station is more likely to carry news and public affairs programming. No one has shown that lifting the national television broadcast ownership cap would lead to less localism.

In conclusion, competition in media can be preserved using antitrust standards without the need for one-size-fits-all restrictions like the "duopoly" rule and the cross-ownership ban. If, in selected markets, ownership concentration were allowed to rise to somewhat higher levels consistent with competition standards, I see no reason to think that the associated amount of diversity provided by broadcast stations and other sources would be insufficient. No separate ownership standard based on diversity is warranted. The national television ownership cap, which serves neither competition nor diversity, should also be removed. None of the rules is needed to promote localism.

The CHAIRMAN. Thank you.

Mr. Fontana, welcome.

STATEMENT OF THOMAS FONTANA, PRESIDENT, FONTANA-LEVINSON ON BEHALF OF WRITERS GUILD OF AMERICA, EAST, THE CAUCUS FOR TELEVISION WRITERS & DIRECTORS, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS

Mr. FONTANA. Thank you very much. Hello to everybody. Thank you, Chairman McCain, for allowing me to speak, and Senator Hollings and the rest of you. My name is Tom Fontana. I am on the Council of the Writer's Guild of America, East, and I am also a representative of the Caucus of Television Producers, Writers, and Directors. Somewhere behind me is John Connolly, the President of AFTRA, and Mona Mangan, the Executive Director of the Writers Guild of America, East.

Obviously, I have never done this before, so bear with me. I think the last time I wore a tie was when I got married.

[Laughter.]

Mr. FONTANA. In the past 22 years, I have produced and written numerous television programs, from the gritty realism of *Homicide: Life on the Street,* to the religious fable, *The Fourth Wise Man,* and to *America: A Tribute to Heroes,* and I really have to tell you that in the past day-and-a-half, since it was discovered that I was going to be speaking before you, I realized your jobs are a lot harder than I ever thought, because I suddenly found out I had a constituency, and I have been getting faxes and phones and e-mails from a wide range of people with a lot of opinions, and I am going to try to boil all of that down to a simple fact.

I am a small businessman, and unlike my father, who ran a bar, I am blessed to be able to work in a profession that I love, in an industry that I love, and I do think of it as an industry. I know it is a business, and I guess the question that I came here to ask is what kind of business is it going to be in the years to come?

I think the answer lies somewhere in the past. It usually does. Twenty years ago, I worked for the best independent production company in the history of television, Mary Tyler Moore Enterprises, or MTM. You know, Mary and Rhoda, Bob Newhart, *Hill Street Blues,* and the show I did, *St. Elsewhere.* Ten years ago I started making *Homicide* for Reeves Entertainment, and 6 years ago I created *Oz* for Rysher, Incorporated.

Now, what do these three independent production companies have in common? They are all out of business. They have all been bought by large conglomerates, as a result in part of the elimination of the Fin-Syn rules. Eight years ago, after much public debate, the Fin-Syn rules were dropped, and at that time, the heads of the major networks assured us that nothing would change.

Here is what has actually occurred. In 1992, 15 percent of new prime time series were produced by the major networks. Ten years later, 2002, that number increased five times to 77 percent. In 2002, only one new series, *Dinotopia,* which I am sure you all watched——

[Laughter.]

Mr. FONTANA.—was completely produced, was the only show completely independent, not produced in any way, shape or form by a conglomerate, and it was almost immediately canceled.

To go back to MTM for a second, it was an independent not just because it was not owned by anybody else, but because Grant Tinker made decisions based on both business savvy and a passion for quality. Grant was fearless when fighting against the dumbing-down of his products. He could afford to be strong because he had no corporate structure to answer to. As a result, his extraordinary vision nurtured several generations of TV's best talent, including many minorities and women, but as I said, MTM is no more.

Big is not necessarily bad, but sometimes by deregulating a big business, you can choke the life out of a small one, and with that, you lose energy, imagination, and the entrepreneurial spirit. An example of that is Norman Lear's landmark series, *All in the Family.* Rejected by ABC, Mr. Lear took his idea to CBS. Because ABC did not own or control Mr. Lear's production company, he was free to take his show elsewhere, and I think we are all richer for the freedom he enjoyed.

Another example is *The Cosby Show.* When Marcy Carsey first presented *The Cosby Show* to the network executives, they wanted to turn the middle-class Dr. Huxtable into a cigar-smoking Las Vegas entertainer. Cosby and Carsey stuck by their guns and went to another network, NBC. They could do that because they were protected by the FCC rules.

Without Fin-Syn, many other fundamental practices in our industry have corroded over time, so rather than eliminate the rules we have, I am going to be bold enough to encourage you to establish a program source diversity rule which would require that broadcast networks and cable or satellite programming services purchase a specific percentage of their prime time programming from independent producers. By independent, I mean not owned in whole or in part by a company affiliated with a network or the distributor. Without such a rule, competition and diversity in my business will become a fiction.

But simply adding a new rule is not enough. As you heard, we need to keep the national TV ownership cap at 35 percent, and the duopoly rule in place. Why? Because the leaders of the media are telling us once again that eliminating these rules will not hurt the industry. Well, I think, what are they going to say? It is unfair and unreasonable for us to expect any businessman to police himself. To do so would contradict the very model of capitalism that dictates corporate growth. It is not the job of business to protect us, it is the job of Government. Why? Television is democracy, it is our only national town hall.

Television is where divergent points of view can be expressed, where conflicting opinions can be argued not just within one segment of *Meet the Press,* but from program to program. The brutality of *NYPD Blue* is balanced by the spirituality of *Touched by an Angel,* yet *NYPD Blue* would never have made the CBS schedule, and *Touched by an Angel* would have never aired on NBC.

People will say there is diversity simply by the sheer number of networks currently available, but those channels are owned and controlled by a smaller and smaller number of companies, and in reality, many series are now repurposed, with episodes airing on cable several days after their broadcast premier. These shows, however, are not offered for sale on the open market, as has been traditionally done, but are automatically going to an entity tied corporately to the major network.

For example, the ABC series, *Life With Bonnie,* was repurposed on the Family Channel because Disney owns both the broadcast network and the cable network. Back alley deals diminish a program's long-term value, but the need for diversity in television has a much larger reach. My series, *Oz,* is extremely popular all over the world, including such countries as Israel, Canada, and Italy. Entertainment is the second-largest product exported by this country after aerospace. In order for us to maintain our leadership in an industry so vital to our economy, we must ensure the quality of the product, and quality only comes through diversity and competition.

By changing the rules, television will not get better, not for me as a writer/producer, not for me as a viewer, not for me as a stockholder, and not for me as an American, so I ask you to think long and hard before you allow history to be so dangerously rewritten. Five companies should not be permitted to own all the voices on the airwaves.

Thank you.

[The prepared statement of Mr. Fontana follows:]

PREPARED STATEMENT OF THOMAS FONTANA, PRESIDENT, FONTANA-LEVINSON ON BEHALF OF WRITERS GUILD OF AMERICA, EAST, THE CAUCUS FOR TELEVISION WRITERS & DIRECTORS, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS

First, I want to thank Chairman McCain, Senator Hollings and the members of the Committee for giving me the opportunity to speak.

My name is Tom Fontana. I am a Council Member of the Writers Guild of America, East and a representative of the Caucus for Television Producers, Writers and Directors. In the past twenty-two years, I have produced and written numerous television programs, from the gritty realism of *Oz* and *Homicide: Life on the Street* to the religious fable *The Fourth Wiseman* to *America: A Tribute to Heroes.*

I'd like to start by saying that for the first time in my life, I have a much greater appreciation of what you Senators go through to do your jobs. After it was decided that I would be appearing before this Committee, I started to hear from my constituency: I have been flooded with phone calls, e-mails, faxes, facts, figures—the amount of input is staggering.

But the simple truth is this: I am a small businessman. Instead of running a bar, like my father, I have been blessed, doing work that I love. I am proud to be a part of the entertainment industry. Yes, I say industry. I know that television is a business. The question is what kind of business will it be in the years to come. The answer, as usual, lies in the past.

Over twenty years ago, I worked for the best independent production company that ever existed—MTM—Mary Tyler Moore Enterprises. Mary and Rhoda, Bob Newhart, *Hill Street Blues* and, the series I did, *St. Elsewhere.* Ten years ago I started making *Homicide* for Reeves Entertainment. Six years ago, I created *Oz* for Rysher, Incorporated.

What do these three independent production companies have in common? They are all out of business, swallowed up by conglomerates, in part, as a result of the elimination of the Fin-Syn rules.

Eight years ago, after much public debate, the Fin-Syn rules were dropped. At the time, the heads of the major networks assured us that nothing would change.

Here's what has actually occurred:

- In 1992, 15 percent of new prime time series were produced by the major networks;
- By 2002, that number increased over 5 times to 77 percent;
- In 2002, only one new series, *Dinotopia,* was completely produced independent of a conglomerate. It was soon cancelled.

MTM was an independent not just because it wasn't owned by anyone else, but because Grant Tinker made decisions based on both business savvy and a passion for quality. Grant was fearless when fighting against the dumbing down of his products. He could afford to be strong, he had no corporate structure to answer to. His extraordinary vision nurtured several generations of TV's best talent, including many women and minorities. But, as I said, MTM is no more.

Big is not necessarily bad. But sometimes by deregulating a big business, you can choke the life of a small one. And with that you lose energy, imagination and entrepreneurial spirit of that small business.

Norman Lear's landmark series, *All In The Family,* is another example of that spirit. Rejected by ABC, Mister Lear took his idea to CBS. Because ABC did not own or control Mister Lear's production company he was free to take his show elsewhere and I think we are all richer for the freedom he enjoyed.

Another example is *The Cosby Show.* When Marcy Carsey first presented *The Cosby Show* to network executives they wanted to turn Doctor Huxtable into a cigar smoking Las Vegas entertainer. Cosby and Carsey stuck to their guns and went to NBC. They could do that because they were protected by FCC rules.

Without Fin-Syn, many other fundamental practices in our industry have corroded over time. So, rather than eliminate the rules we have, I encourage you to establish a Program Source Diversity Rule, which would require that broadcast networks and cable or satellite programming services purchase a specific percentage of their prime time programming from independent producers. By independent I mean, not owned in whole or, in part, by a company affiliated with a network or distributor. Without such a rule, competition and diversity will become a fiction.

But simply adding a new rule is not enough: the rules currently in place must be maintained. In particular, the National TV Ownership cap must remain at 35 percent and the Duopoly Rule must remain intact in order to prevent the homogenization of local TV.

The media giants are once again telling us that eliminating these rules will not hurt the industry. What else can they say?

I think it's unfair and unreasonable for us to expect businessmen to police themselves. To do so would contradict the very model of capitalism that dictates corporate growth. It is not the job of business to protect us, it's the government's.

Television is democracy, it is our only national town hall. Television is where divergent points of view can be expressed, where conflicting opinions can be argued, not just within one segment of *Meet The Press,* but from program to program. The brutality of *NYPD Blue* is balanced by the spirituality of *Touched By An Angel.* Yet, *NYPD Blue* would have never made the CBS schedule and *Touched by an Angel* would have never aired on NBC. Certain shows can only exist at certain networks, either because of branding or because of some executive's individual taste.

People will say there's diversity simply by the sheer number of networks currently available, both broadcast and cable. But those channels are owned and controlled by a smaller and smaller number of companies. And in reality, many series are now "repurposed", with episodes airing on cable several days after their broadcast premiere. These shows, however, are not offered for sale on the open market as has traditionally been done, but are automatically going to an entity tied corporately to the major network. For example, the ABC series *Life With Bonnie* was repurposed on the Family Channel because Disney owns both the broadcast network and the cable network. Back alley deals diminish a program's long-term value.

But the need for diversity in television has an even larger reach. My series *Oz* is extremely popular in such countries as Israel, Canada and Italy. Entertainment is the second largest product exported by this country after aerospace. In order to maintain our leadership, in an industry so vital to our economy, we must ensure the quality of the product. And quality only comes through diversity and competition.

By changing the rules, television will not get better. Not for me, as a writer and producer. Not for me, as a viewer. Not for me, as a stockholder. Not for me, as an American.

So, I ask you to think long and hard before you allow history to be so dangerously rewritten. Five companies should not be permitted to own all of the voices on our airwaves.

I wish to quote from a fellow Italian American more famous than I in these halls and ask you to listen to the advice of one the industry's wisest statesman:

> Unless we knowingly abuse the essentials of a free and living land, our government must, at all costs and in spite of all pressure, never allow a tiny group of corporate entities, no matter how seemingly benign the management, to establish dominion over what is seen on television.

I agree with these sentiments that were originally presented to this Committee by Mr. Jack Valenti on June 1989.

Thank you for your kind attention.

The CHAIRMAN. Thank you, Mr. Fontana. That is a good-looking tie.

[Laughter.]

Mr. FONTANA. Thank you very much. I have to get it back this afternoon.

[Laughter.]

The CHAIRMAN. Mr. Murdoch, Mr. Kimmelman states in his written testimony, and I quote—and by the way, we will stick to 5 minutes. We will have additional rounds. I will try not to go over, and I will ask my colleagues to do the same.

Mr. Murdoch, Mr. Kimmelman says, quote, while News Corp. Fox has agreed to abide by the FCC's program access requirements, this pledge could end up being nothing more than a tool for pumping up cable prices. There is absolutely nothing that would prevent News Corp./Fox from raising the price that it charges itself on its satellite system in return for increased revenues from the other 70 million cable households. If the cable system refuses to pay the increased price, then New Corp./Fox would be able to threaten cable operators to use its newly acquired satellite system to capture market share away from cable in those communities.

Would you respond to that, please?

Mr. MURDOCH. Thank you, Mr. Chairman. I would be delighted. I am surprised at Mr. Kimmelman's ignorance of how things work, although I do not mean to be insulting to him.

[Laughter.]

Mr. MURDOCH. The fact of the matter is, we are only buying 34 percent of Direct Television. A majority of the directors will be independent directors with no connections to News Corporation at all. The Audit Committee will be 100 percent manned by those independent directors, and it is absolutely impossible for us to do what he suggests, and as the legislators in this country, you will all know the penalties that exist in the Sarbanes-Oxley Act should we try to rip off our company and use our shareholding for what Mr. Kimmelman suggests. It would be go-to-jail time, and there is no interest or possibility of that.

We have the same situation, as a matter of fact, in Britain—I will just give a little anecdote, if I may indulge you, seek your indulgence—where we have 36 percent of BSkyB, and it has taken us 3 years to get only last week an agreement with BSkyB to carry a Fox channel for 7 cents a month. I can assure you there is a lot of blood on our corporate floors over that, so it is just not possible to do what Mr. Kimmelman suggested legally, or in our economic interest or in anybody's interest.

The CHAIRMAN. Mr. Kimmelman, by the way, we are in agreement that the change in the FCC rules will trigger a wave of consolidations. Is there any disagreement to that, even you, Dr. Mikkelsen? There will be purchases by newspapers of television stations, et cetera. That is the whole reason why they are seeking relaxation of these rules, right?

Dr. MIKKELSEN. I am sure if no one wanted to make any acquisitions there would not be any interest in relaxing the rules. I do not know if I would characterize it as a wave.

The CHAIRMAN. Thank you. Thank you.

Go ahead, Mr. Murdoch.

Mr. MURDOCH. If I could interrupt, I certainly have no plans for anything other than what I have before you today.

[Laughter.]

The CHAIRMAN. Thank you.

Mr. KIMMELMAN. If I may respond, Mr. Chairman, there are a couple of hundred newspapers abroad that you own, Mr. Murdoch. I guess at some point you owned 100 or 50?

Mr. MURDOCH. That would include——

Mr. KIMMELMAN. Apparently you have a pretty good appetite for acquisitions. I am not suggesting anything illegal. I want to make it clear, I am not suggesting violations of any laws, but since the last time I supported Mr. Murdoch's effort to try to compete against cable, a number of things have happened.

When he initiated that process, he got quite a strong reaction from the cable industry. They did not really like it. He changed his mind. He decided he was going to try to sell his satellite capacity to PrimeStar Properties, owned by the cable industry. The Justice Department did not really like that idea of having cable-owned satellites, and they blocked it, and in their complaint to block that transaction, they quote from someone you know well, Mr. Malone. And if I may I would just like to quote it.

> There is some kind of peace in which Rupert gets what he wants, which is broader distribution of his programming net-

work, in exchange for which he is not quite as aggressive in DBS.

Well, when the deal was made, before Justice intervened, the Justice Department found more information from Mr. Malone, quote——

The CHAIRMAN. Make your point.

Mr. KIMMELMAN. Malone testified, this agreement, in effect, resolved the difference between Murdoch and the cable industry because, quote, it just really says, hey guys, I am not Darth Vader any more. If you carry my programming, you will not be subsidizing the enemy, and therefore feel free to treat me as a friend, not as an enemy, although the written agreement did not so specify, at about the time the agreement was reached, certain PrimeStar partners' cable systems began to widely carry Murdoch's program networks.

The CHAIRMAN. Dr. Mikkelsen, I would like you also to respond, but at the same time, because I am trying to stay within a reasonable time here. I received a letter from Diane English, the developer of the TV show, *Murphy Brown.* Ms. English states that she left series television in 1998 after Fox told her it would not put her pilot on the air unless she made a production deal with Fox's sister company, 20th Century Fox, for far less than what she paid for producing *Murphy Brown*.

In order to have a television series picked up by a network, are networks forcing writers and producers to team up with the network's affiliated studios? Do you want to address the first question, Mr. Murdoch?

Mr. MURDOCH. As far as Ms. English goes, I heard about that allegation. I have inquired into it. She did offer us a program. We said that we were prepared to invest $600,000 in a pilot, and she said that was not enough, and we said, we are very sorry, we are not prepared to put more money than that into it, and that lapsed.

I would say I am a little surprised at Mr. Fontana, of whom I am a very great admirer—we just recently signed a contract with him for a pilot program which we are looking forward to getting into production as soon as Disney releases it in July——

The CHAIRMAN. Thank you.

Mr. MURDOCH.—and we will buy programs simply from anyone who has got a good idea, and if I just can go on for a second, this year, for instance, we have just announced our new programming. Forty percent of all our programs will come from completely 100 percent independent producers, nothing to do with Fox, 30 percent will be done in association with other companies and independents, only 30 percent, the remaining 30 percent will be done by Fox 100 percent.

The CHAIRMAN. Thank you. My time has expired.

Senator Hollings.

Senator HOLLINGS. Well, let the record show that I am sorry we do not have Mr. Powell up here, the Chairman, and I know you and I discussed it, Mr. Chairman. I have written two letters asking for it. The reason I pursued it is because Mr. Powell has been appearing everywhere else——

[Laughter.]

Senator HOLLINGS.—and to come after the ruling on June 2 is like the horse already leaving the barn.

With respect to antiquated rules, come on. We took 2 years when I had the bill, and then 2 more years when Chairman Pressler had the bill, over a 4-year period, and I wish Mr. Dorgan was here, because we had an amendment on the cap of 25 percent, but did not agree to the 35 percent. Mr. Dorgan won, and Mr. Kimmelman can shake his head, because he knows that Mr. Dole with some of the other lobbyists and so forth changed that vote. We came back and it went up to 35 percent, not antiquated rules. It took us 4 years to bring everything up to date in 1996. These caps now released to 35 percent. You have got five programmings, not just 77 percent, Mr. Fontana, but the recent report of the analyst is that they will own, increase their share to 85 percent of the prime time programming.

Mr. FONTANA. Well, I gave you the 2002——

Senator HOLLINGS. Yes, that is right. So, they are going up to 85 percent under the present rules of holdings, just five programmers, and three companies own over 50 percent of the radio stations. We have a witness say that no rules are needed to promote localism. Come on.

Mr. Murdoch, I admire you. There is not any question you come out of Australia and you built up a fourth network, but—and I was saying, well, it is not so bad. What is wrong? We could see the wrong in EchoStar, because that left rural America with one provider in obtaining DIRECTV, so I said what is really wrong with Murdoch and News Corporation taking hold of this one. I saw where you said the media market is highly competitive, and I looked at that and found out about the five and the three on radio. Then I looked at your holdings, where you said they are completely independent. I wish I could buy some stock in this thing, 10 pages.

Mr. MURDOCH. Any day.

[Laughter.]

Senator HOLLINGS. I will tell you, you have got it all. I mean, what are you going to do with an additional takeover? What are you going to do with it?

Mr. MURDOCH. We are going to work very, very hard to make it successful. I know that things add up to a lot there, but for instance, you throw in a book publisher, Harper Collins. It is one of hundreds of book publishers.

I repeat what I said in my opening statement. We only have 2.8 percent of the market here, and we feel that is not a significant thing in any anticompetitive terms or even in anticompetitive power.

Senator HOLLINGS. Well, I do not know. We had a witness here just a week or so ago, Mr. Goodman, who was one of your affiliates. He said look, they put in the contract—you say they are going to operate independently, but here is what the lawyers put in the contract, that Fox can terminate the entire contract if Fox's program is not carried, or if the station intends not to carry or preempt three of their programs. That is three strikes and you're out. You have got that in your contract. That does not sound like localism or anything else, when the poor fellow is struggling. He just did not want to put on *Who Wants to Marry a Multimillionaire*.

[Laughter.]

Mr. MURDOCH. It was a different program, sir, but he—

[Laughter.]

Mr. MURDOCH. He—Mr. Goodmon is not a poor struggler. However, he did preempt a series, I believe, or half a series on what he considered was a matter of taste, and we did not penalize him in any way at all. There are often preemptions. We do have these rules. We have to run a network. We have to run a business. We spend $2 million an hour on programming. We have to get advertising to cover that.

These stations, all these affiliates are dependent on having good prime time viewing. It is the basis, really, of the identification in the market, whether it be for weekend football or all this expensive programming which the Big Three broadcasters bring them. That really is the bedrock.

Now, to succeed further in their markets, they need to do a great job locally, and I agree with that entirely, but if I could just go on for a second here, we have heard from people that everything should be about localism and diversity, and public interest. Can I just give you my history of this? We have 33 stations, it is true. Since we have bought those stations, we have increased the local news on those stations on an average of 60 percent.

We now have 800 hours of local news on our stations, and we are very proud of it, and we are continuing to expand them. We are just about to go with morning news in Boston and in Denver. By the end of this year, we plan to have 3 to 4 hours of news every morning on every station that we own. That is not true, you will find, if you go into the small affiliate groups who are complaining about expansion. They do not do nearly as good a service in local news.

And I cannot come to you and honestly say I am doing this out of the interest of the public good. It is simply good business for stations to identify—the only way a free broadcaster can really stay in business against 100 cable channels is to identify with his local community as well as have some headline programs at night.

Senator HOLLINGS. Your lawyer is good. Your answer went past the red light. Thank you, Mr. Chairman.

[Laughter.]

Mr. MURDOCH. Sorry.

Senator HOLLINGS. Jesus.

[Laughter.]

The CHAIRMAN. Senator Stevens.

Senator STEVENS. Mr. Kimmelman, I have been very interested in your testimony before, and I thought I heard that you said that over 60 percent, these five companies own over 60 percent. You are talking about cable operations, though. Five companies own 60 percent, they account for 60 percent of subscribers to cable networks. Do you disagree with this chart that Mr. Murdoch has given us that shows that his company, the News Corporation has 2.8 percent of total media?

Mr. KIMMELMAN. Well, when you define total media as including *Consumer Reports,* which we publish, he probably is down at that percentage. It includes everything that—probably every napkin that has something written on it.

[Laughter.]

Mr. KIMMELMAN. The issue that I focused on, Senator Stevens, has been prime time programming.

Senator STEVENS. You are talking about cable, though?

Mr. KIMMELMAN. Yes. Cable and network.

Senator STEVENS. Maybe rural America does not get cable yet.

Mr. KIMMELMAN. Satellite, cable, and networks, any technology transmitting the programming. We are looking at where it comes from, who owns it, and prime time is where you have the largest audience share. That is where the networks——

Senator STEVENS. All right. I only have 5 minutes. Let me tell you, my state is 20 percent of the land mass of the United States. We have 227 different villages. You know how they get television today? Our state pays for 4 hours of television distribution of network programming. We are talking about total media now, not just the people who get cable. To be a monopolist today, you have to have control of total media because of the vibrant competition between all sources of means to deliver the news or whatever it is to our consumers, but I do not think you are looking at rural America. I hope you will take another look at this from the point of view of media control.

Mr. Murdoch, let me ask you—I do not have much time—thinking about this problem of rural America, you will have the ability now, if you exercise it, to deliver signals to any small town anywhere in rural America. Are you going to try and proceed to cover the whole country with your system?

Mr. MURDOCH. We want to cover all the designated market areas which make up all of America, which is 210 areas.

Senator STEVENS. Well, there are some areas that are not market areas. My mother-in-law happens to live out in rural Arizona, as a matter of fact.

Mr. MURDOCH. If she has a local station there——

Senator STEVENS. No. They waited a long time for signals and they finally got satellites, but they do not have access to total media. Your system could deliver to rural America total access to all media if it wanted to do so.

Mr. MURDOCH.—Senator Stevens, we do that. I understand that both satellite operators do, in fact, carry the network, a network station at least, in what we might call the white areas where there is no local station, all of our programs are there.

Senator STEVENS. Would this merger expand the capability?

Mr. MURDOCH. We do have a problem in Alaska, but that is a rather special one.

Senator STEVENS. We are considered special. This committee gets tired of hearing about exceptions for Alaska.

Mr. MURDOCH. I am afraid it has to do with the curvature of the Earth and where we have the spectrum.

Senator STEVENS. What is your answer, though, to Mr. Kimmelman about the percentage that you do control with regard to the cable systems?

Mr. MURDOCH. I think he is misled. We have four or five channels he lumps together as a great number of channels, or this chart that I have here, what we call the Fox Sports Net—in fact, we are involved in and have our name on 24 local channels, like in Los

Angeles or in Chicago or Detroit or Phoenix. Of those—I think there are actually 23. We have ownership and control of 12 of them, in a junior partnership role with other people in the remainder of those channels, and they were lumped together and said, hey, Murdoch's got 24 channels.

I have a different chart here, as a matter of fact, crediting me with all of those, but actually says that about 10 companies—I will give it to Mr. Kimmelman, but these include—really, a lot of them are very minority investments in channels. Liberty is there with a lot, and they only—they have 50 percent in one channel, and a lot of influence. The rest——

Senator STEVENS. Can you proceed with your merger without the FCC lifting the 35 percent cap?

Mr. MURDOCH. Oh, yes, sir.

Senator STEVENS. I have no more questions.

The CHAIRMAN. Senator Wyden.

Senator WYDEN. Thank you, Mr. Chairman.

Mr. Murdoch, what is of concern to me is, your proposal would take consolidation to a new and unprecedented level, and let me be specific. Your impending purchase of DIRECTV would be the first time there was a merger between a major broadcast network and a multichannel video distribution platform, specifically cable, or satellite, and my sense is that this is going to mean everybody else has got to keep up with the Joneses. So there will be great pressure for NBC and ABC and CBS to go forward with exactly the same kind of approaches. Now, do you think that is in the public interest?

Mr. MURDOCH. Senator, I can only answer that by saying that all of those companies which are very, very much bigger companies than mine, had a look at Direct Television and passed on it, so they had their opportunity. That is all I can give you, so I presume they do not have any intention of following it.

Senator WYDEN. What do you think happens to consumers, Mr. Kimmelman, if the big networks go out and buy cable or satellite?

Mr. KIMMELMAN. I think there is a likelihood they are going to at least want to. Whether they have the cash to do it, I do not know. I think everyone is going to want to bulk up and make sure they control the distribution system as well as content. They are going to want to make sure they are as well-positioned as they can be vis-à-vis Mr. Murdoch, and so I think it is very likely that a Comcast and an AOL-Time Warner, EchoStar, are likely to be looking at network relationships to try to match Mr. Murdoch.

Senator WYDEN. Mr. Murdoch, we had testimony from the Media News Group recently that viewpoint diversity does not require ownership diversity, and they basically said that even if we get down to two or three companies in this country, we are going to still have plenty of diversity. Do you share that view?

Mr. MURDOCH. No. I think there was a problem of diversity, and I think there is a monolithic view. The almost farthermost powerful newspaper and the farthermost powerful force in this country is *The New York Times.* Its news and its priorities are repeated in hundreds of newspapers across the country that buy its service. I am not saying it is not a fine newspaper, but there is very much a tendency there, if you like, to domination by one company.

Senator WYDEN. Do you think, Mr. Murdoch, that there ought to be any limits on vertical integration at all? I mean, do you basically think that the more the merrier, and there should not be any limits?

Mr. MURDOCH. No. I do not think you can defend—in the particularly small markets, where there may only be one newspaper and one television and a couple of radio stations, I do not think you can defend that being all in one hand, not for a minute.

Senator WYDEN. So, how do consolidations in different areas of the media reinforce each other? Mr. Kimmelman, maybe this would be appropriate for you, because it seems to me, again, when you start down this consolidation path, I have said it is sort of like being on a cliff. Once you go over it, you are not going to like what is below, but tell us in your view why it is going to result in areas of the media reinforcing each other.

Mr. KIMMELMAN. As you well know, Senator Wyden, it is extremely expensive to build out infrastructure to distribute anything from telephone service to television service in this country, extremely expensive. It is very expensive to invest in quality programming and maintain it.

There are key inputs to this industry, and so when one person controls satellite distribution and has—granted by Congress—the right under law to get on every cable system through must-carry or retransmission consent and owns a lot of programming, Mr. Murdoch's right, a lot of it is regional sports channels, that happen to be the most important channel, often, in every community to get your local teams, so it is significant in that community, when one company has all of that, the others who have these similar investments and needs to keep up I think are going to be looking at cross-platform investments and combinations.

Senator WYDEN. Mr. Murdoch, on this point, with respect to the producers getting their shows on the network, do you know how many shows in your, say, prime time schedule Fox is coproducing or has a financial stake in?

Mr. MURDOCH. Yes, sir. We have a full financial stake in 30 percent and we coproduce a further 30 percent, and 40 percent is bought totally from outside. That is the plan as we have for this year. Now, it comes up and down and it varies, but frankly, anyone who will come to us with an idea that we think will get us a commercial audience, we will be the first to buy it.

Senator WYDEN. Mr. Fontana, I share your views that these issues are a concern, that it is a problem for your people from a creative point of view. Why don't you amplify on that?

Mr. FONTANA. Well, for me, it is interesting, sitting here with Mr. Murdoch, because this is one of the few cases where we wrote a show for ABC, they passed on it, and yet because they owned a part of it, they did not want us to do it on Fox. Fox was very open to us and is very open to us doing it there, and after a very intense negotiation, the project has moved forward quite stunningly, I think.

Having said that, there are those times when the pressure to get a series on the air, things that happen the weekend before the schedule is announced in hotel rooms that I am not privy to, because I am not an executive, people are told that they have to give the networks a piece of the show. That has happened, and what happens sometimes is, the network will not step up until they have decided they are going to air the show, so they make the studio put up the money and then take a piece of it after the time, after they decide they are going to air it.

Senator WYDEN. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Allen.

Senator ALLEN. I first want to direct my questions to you, Dr. Mikkelsen. In reading through your testimony and background, you have performed intensive research on media ownership rules, and people seem to think that things have not changed in the last six, seven, 8 years, or the last 20 years, and clearly they have changed in the last 6 to 7 years, since the 1996 act. Have you seen any changes in the media marketplace in, say, the last 10 years that would justify retaining the FCC's newspaper-broadcast cross-ownership rule in any market?

More particularly, I would like you to address if there are any studies that empirically show that there is a basis that the FCC ought to treat smaller markets differently from larger markets. In other words, why should not smaller markets have the same benefits as do large metropolitan areas insofar as cross-ownership is concerned?

Dr. MIKKELSEN. Thank you for your question, Senator. As I think the members of the Committee know, the cross-ownership ban was put in place in 1975. A few years ago, I and some others did a study comparing local concentration among the media that are affected by this rule, radio, TV, and newspaper, in a sample of 23 different markets. We took one at random from 1 through 10, and one at random from 11 through 20 and so on, to try to cover the entire representative scope of the markets, and we found that in 20 of these markets, concentration as measured conventionally by economists decreased significantly.

In 19 of those it increased by an average of 20 percent or more, so we looked at on a local basis, where competition issues are really important, as I think Mr. Kimmelman also acknowledged, in many markets, there has been a drastic decrease in concentration, and this was done, of course, several years after the 1996 Act, so it also reflects buying activity that followed on that Act.

With respect to local markets in rural areas or in smaller markets, as I said in my earlier statement, I really think that what we need to preserve competition is effective antitrust enforcement. It is a fact that in some smaller markets, there tend to be fewer media outlets selling advertising or presenting points of view than in some of the Nation's largest markets.

Senator ALLEN. Let me ask you to give us a summation. The point is, in larger markets there is a reason for these duopoly rules. For larger markets there are limits on cross-ownership and so forth that apply, in small markets that do not. However, have you not seen in some of your studies there are costs in programming updates and technology and so forth that you could actually have improved capabilities in localities if there were the relaxation or updating of the rules, as opposed to having discrimination in smaller areas in cross-ownership, or for that matter the duopoly rules?

Dr. MIKKELSEN. Well, I guess I see two areas in which smaller markets might benefit from a relaxation of this absolute ban and a focus on market-by-market analysis to see whether cross-ownership is merited. One is in the area that you spoke of, possibly increased efficiencies through cross-ownership is something that the antitrust agencies always look at in connection with a merger, and the second would be if there is a prospect of one of these media outlets actually going out of business where the cross-ownership allowed them to remain a business and provide a service that they would otherwise not provide.

Senator ALLEN. So your testimony, to sum it up, is that it ought to be looked upon on a case-by-case basis, or market-by-market basis, as opposed to absolute, one-size-fits-all rules for every community in this country?

Dr. MIKKELSEN. That is correct.

Senator ALLEN. Thank you.

Mr. Murdoch, it is my understanding DIRECTV, and this was somewhat of an answer to Senator Stevens' question, that you committed to providing local-to-local to the top 100 designated market areas by the end of the year. What commitments would you be willing to make to provide local-to-local in the final 110 DMAs?

Mr. MURDOCH. Well, let us say at least another 100, but that will mean launching two more satellites. They have to be ordered; that will take time, but we will do that.

Senator ALLEN. So your commitment to local-to-local in the top 100 is firm, and you have those capabilities?

Mr. MURDOCH. Oh, yes. Those satellites are already in production, and I think one is launching very shortly. We will have something over, slightly over 100, I believe, by the time this deal is even concluded.

Senator ALLEN. Quickly, Mr. Murdoch, broadband access is important to many people in rural areas. Do you have any plans to provide broadband, utilizing your DIRECTV satellites or customers in rural areas?

Mr. MURDOCH. Senator, we are studying this, and we have people on it all the time. To do it by satellite on the technologies that I have so far heard about is perfectly possible, but very expensive in that the two-way receiver that has to be installed in the home is about eight times as much as what it costs to put cable in. That will come down, but not to that sort of level.

We are investigating at the moment two or three different technologies to be able to provide broadband to every home via the electricity grids and the utility companies. There is a lot of promising work being done there, particularly Allied, with this new Wi-Fi technology. We are not at a stage to make promises about it, but we are working at it.

Senator ALLEN. Thank you for your honesty.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Breaux.

Senator BREAUX. Thank you, Mr. Chairman, again for having the hearing. I thank the panel. I have no problems with having some type of a cap established to prevent market dominance by any group of station owners. My argument is only that the current standard that is being used has nothing to do with market dominance of the station owners.

Mr. Kimmelman, is it not correct that you could have a group of station owners or a network that had a station in every one of the largest cities in the United States, but had a viewership of only 1 percent of the people there, because they do not like what they are putting on the air——

Mr. KIMMELMAN. That is correct.

Senator BREAUX.—and yet they would be exceeding the cap of 35 percent, not because anybody is watching them, not because they have market or economic dominance, but only because they have a station in an area that has the potential audience to reach 35 percent of the population? I just think it is an archaic way of measuring market dominance.

I mean, if nobody is watching the stuff that they are putting on the air, that is certainly not market dominance, and that is what we are relying on really, is an estimate of the population in the area, not how many people watch the channel or watch the broadcast. It seems to be deficient to me, how we measure it.

Mr. KIMMELMAN. Senator Breaux, I do not disagree that it is a very odd measurement.

Senator BREAUX. Yes.

Mr. KIMMELMAN. Forty-five percent is no better than 35 percent in that regard. The other thing the FCC does is it treats UHF stations as half a station, and Mr. Murdoch has got 17 of those. When you get it on cable, when you get it on satellite, it is the same as anything else, so there is a clear problem here in how the measurement is being done.

Senator BREAUX. I agree with that. I mean, I looked at the thing that one of the networks put out. I mean, it shows that—they probably should not put this out to their advertisers because it shows how little people are watching the networks, but I mean, NBC with all their stations has 1.6 percent of the population in prime time. Fox, Mr. Murdoch, has 2.7 percent in prime time. I mean, that is not anywhere near 35 percent market dominance. I mean, you could have a station, like I said, in every large city in the country, and nobody watches it. You could not get another station because you have market dominance. It is unrealistic, the way we measure market dominance.

I think people ought to have choices. If you are a network in Los Angeles or New York, you probably have 150 other choices, and people look at those other choices.

Mr. KIMMELMAN. If I could just add one thing, Senator Breaux, the one critical thing, you are absolutely right about the illogic of that, but here is where it is important. It is the potential eyeballs that can be seen over that network——

Senator BREAUX. Sure.

Mr. KIMMELMAN.—and it is what advertisers are paying for, and it is what local affiliates have to deal with, and where it is relevant, whatever the number is, it is relevant in who has more bargaining power in the negotiation over whether a locally selected program goes on or a network program.

Senator BREAUX. But advertisers just do not look at the size of the city that the station is in. They look at the ratings to see if anybody is watching the stuff, and that is what the prices are determined on. They are not determined on how big the city, or station is. They say, what is your percentage of people watching your station, OK.

The other point is, the whole argument—I thought we had set this argument aside, that somehow local ownership versus network ownership guarantees more local news. That is not correct. In Louisiana, we have seven media markets. I have got one station in one market of the seven that is locally owned. One. I mean, and some are owned by networks, but everything else is owned by people in New York or Los Angeles. That is not local input. I mean, they do not even know where Lafayette, Louisiana is, or Lake Charles. I mean, they are all owned by people and conglomerates who are very sophisticated, but they run local news because it is in their interest to do so.

The FCC has told us that network-owned stations, in fact, have about 30 percent more local news than the non-network-owned facilities. They run local news because it is good for business, and they cannot tell me that in my home town, that the local station, which is non-network-owned, serves the community better because all the owners are in New York City. String them up.

[Laughter.]

Senator BREAUX. But, that argument, I thought has been set aside. I cannot—I think that argument is really not responsive, so I guess my point is, really that we ought to have a measurement of dominance, and you should not have any outlet that dominates the market, but having said that, the standard that we use is not connected to reality. We ought to find out which one is and move in that direction. The 35 percent, 45 percent is meaningless in terms of market dominance.

Mr. Fontana, I have a great deal of sympathy for you, but, the networks are the content providers. They hire. They have to hire writers. You are either writing independently, or you have negotiated a contract to write for a network, and you agree to the price or not agree, or negotiate and get a better price. They cannot produce content without writers. The writers are either going to be working for themselves or working for the people who are producing the content. Explain the difference, and why one is better than the other——

Mr. FONTANA. Well, this is less about the specific deal than it is about the kind of programming that a particular network wants to do, and, you know, if you have a deal, let us say with a specific company, and this is why the thing with Fox is so extraordinary, because I do have a deal with HBO, which has a deal with ABC, and normally what would happen if ABC said we do not want it, it would be dead.

Senator BREAUX.—if you worked for ABC.

Mr. FONTANA. With the way my current deal is set up, it would be dead. Normally that is what would happen.

Senator BREAUX. Did anybody negotiate a deal with the content provider that says, look, I am writing this, if you do not like it, I will reserve the right to take it somewhere else?

Mr. FONTANA. Well, there are those things in there. You usually have to wait about 9 months to a year to get the property back, and——

Senator BREAUX. But it is your property.

Mr. FONTANA.—well, technically it is theirs until they are willing to sell it back to me.

Senator BREAUX. But every writer is being compensated for the product.

Mr. FONTANA. Oh, absolutely. I am not complaining with the compensation, believe me.

Senator BREAUX. Well, you all do great work. I admire it immensely. Oh, I am sorry, I am out of time. Thank you.

The CHAIRMAN. Senator Sununu.

Senator SUNUNU. Thank you, Mr. Chairman.

Dr. Mikkelsen, the studies you have done on ownership, whether it is TV or newspapers, does your evaluation support the assertion of Senator Breaux that having an owner from outside the local area does not necessarily mean that you will not carry local content, local news in your media property?

Dr. MIKKELSEN. Our research does support the notion that network ownership of a station results in statistically more news programming being shown than ownership by an affiliate. It does not go directly to the question of where they are located, and I frankly do not see that any of these rules are very well designed to ensure that a station is owned in the same city in which its operated. The relevance of where the owner is to where the station is located is oblique at best.

Senator SUNUNU. I appreciate that point.

The other concern would be that somehow opening up the rules means that more owners from outside the area will come up and buy local properties, and I think the question that has been raised by Mr. Kimmelman and others is whether that results in less local news and local information, and Mr. Kimmelman, can you speak a little bit to that point? You raise the issue that the rules first and foremost are about, or at least should be about local news and information, and Senator Allen pointed out that this acquisition will result in rural areas getting into local content for, I guess, 100 market areas by the end of the year. Would that not be a good thing for local news and information?

Mr. KIMMELMAN. We have supported local-into-local forever, getting local broadcast signals to as many communities as possible. That is wonderful. That is repeating the current voice in the local community, the existing broadcasters, and bringing them in through a new technology. It is wonderful. It is a new option for satellite customers. It is not another local news voice.

I do not know of a satellite channel that is a local Roanoke or Manchester station beaming in just to your community. I wish there were. I think it would be wonderful, but I do not know of that.

Senator SUNUNU. But those rural communities are relying on a distributor to put together the technology necessary to get them access, and I have rural communities in New Hampshire, and they cannot get that local voice because of geography and interference and other issues, and it seems to me that there is some value—it might not be a reason for you to support the acquisition, but some value in a commitment to get that local-into-local in 100 areas by the end of this year, I think that was the number, and 200 long term.

Mr. KIMMELMAN. Yes, Senator, and we have supported it from Mr. Murdoch's competitor, and I would just note I heard him say where it is economically and technically feasible, and that is totally logical and reasonable, but I am not sure what number that ends up getting you. We hope that through competition, he and EchoStar will serve every community with local channels as soon as possible.

Senator SUNUNU. Fox also has ownership of 40 local sports networks. I am pretty sure——

Mr. KIMMELMAN. Twenty-three.

Mr. MURDOCH. Twenty-three.

Senator SUNUNU. Twenty-three?

Mr. MURDOCH. Yes, I believe so.

Senator SUNUNU. I stand corrected.

Mr. MURDOCH. Nineteen, sir. I am sorry. It is going down fast. [Laughter.]

Senator SUNUNU. A number of local sports channels, and I think eight, 10 years ago, I certainly do not recall having access to these local sports networks. Again, putting aside, Mr. Murdoch, your News Corporation, is not this a positive trend in delivering local source sports information or news, and is not that a positive step forward at least in the delivery of that local content?

Mr. KIMMELMAN. Absolutely, Senator Sununu. I can remember when I had to listen to a local radio late at night to hear those games. Now you can see them. My question is, is it exclusive control and distribution? What is the cost of it? Is it at a competitive price? That's all, and we have a problem here with leagues that have protection from antitrust laws, and that is another difficulty in the price of a product.

Senator SUNUNU. I would agree with a number of those points. I mean, the concerns of pricing and antitrust issues in local markets I think need to be addressed, but the reason that we are addressing them is because someone has made the investment to create the local networks in the first place, and I just wanted to underscore at least my sense that having this new option, having this new source of information, having this locally driven source of information is a positive thing.

Mr. Fontana, Mr. Murdoch indicated that 40 percent of their programming, at least this year, is exclusively independent. I assume you think that is a good thing, and second, do you think that is part of the reason for the current level of success of the network, or is it a coincidence?

Mr. FONTANA. Well, I do think it is a good thing. You know, I am not opposed categorically to the network owning shows, but I do think—I did not know the statistic that 40 percent of Fox was outside programming, and I think that is an admirable thing, so what makes success is something, if I had that answer I would not be sitting here right now.

Senator SUNUNU. With regard to the Fin-Syn rules, I found it very dismaying that at the time that the rules change was put forward, two things, (1) that executives suggested that it would not change anything, and (2) that anyone believed them when they said that.

[Laughter.]

Senator SUNUNU. Of course changing those rules would change things, and I think it is inevitable that it would result in a reduction in purely independent production players, and that is not necessarily a bad thing.

The question in my mind is the degree to which those independents provide some special virtue, some special value, and that is what I am struggling with a little bit here. You mentioned some good programs and some bad programs actually. *The Cosby Show* and *Dinotopia,* we do not need to talk about which is which, and then, of course, a lot of the product you put together, but I also see equally good product that may well be produced and controlled by the networks. Can you try to give a little bit clearer picture as to what the special virtue is, or the uniqueness of the independently produced programs?

Mr. FONTANA. I will give you an example in the sense of what happened to *Homicide* when Reeves went out of business, and *Homicide* was sold to NBC Studios by Reeves. There was a kind of like a buy-three-desks-and-a-TV-series fire sale, and what happened was, is that the studio that I answered to and the network that I answered to were basically the same people, so I did not really have an advocate.

I did not really have back-up. The studio functions for me in a way to say, no, no, no, we are behind Tom and where he wants to take the direction of the series. When it is all homogenized and when you are talking to the studio, but they really are the network, and the network is really the studio, I am kind of out there by myself.

Now, I happen to be somebody who is very willing to argue for things that I believe in, but I am not sure the next generation—I am less worried about myself than I am about the next generation—of creative people coming into the business, because they will have never known the joys of the Fin-Syn world, and so I find myself like some elder, you know, storyteller trying to go back to the golden days of yore.

That is where I worry. I worry about a television universe created by people who do not know that they do not have to listen to from the studio/network.

The CHAIRMAN. Senator Boxer.

Senator BOXER. Thank you very much, Mr. Chairman, for this hearing. This has been a fascinating hearing, as yours usually are. I think there is grave concern across the political spectrum in this country from Wayne LaPierre of the NRA to very liberal groups that—and as a matter of fact, he said diversity is what America is all about, so let us take that as a centerpiece.

I agree with that, so the ability to echo a particular political point of view, now—and it could be echoed in many ways. It could be echoed on news programs; it could be echoed on entertainment. You know, it could be echoed in so many ways. This is the concern, frankly, that I have, and I have it across the board. Just because Mr. Murdoch is here, I have this chance to ask him about that.

What it said was, on February 23, when it was clear that France would oppose an American resolution at the United Nations, a Fox News anchor described France as a "member of the axis of weasels." This phrase was then picked up——

The CHAIRMAN. Which he got from the *New York Post,* I think. [Laughter.]

Senator BOXER. No, no. It was picked up in the *New York Post,* which is owned by the same individual. OK. That is exactly my point, and it often appeared at the scroll at the bottom of the screen on Fox News.

Senator LOTT. And in the *Congressional Record,* probably.

Senator BOXER. Well, that is fine. I am just talking about how one can take a political—suppose it just said, you know, America is acting terribly in this, and that was repeated, it all is disturbing that a political point of view is represented in one place, second place, third place, fourth place, fifth place, sixth place, whatever, whether it is from *The New York Times,* which owns many stations, or you, so I am trying to be fair here. I am using this as an example because it was used in this particular article.

So I guess my question is to Mr. Murdoch and whoever else might want to comment on it. Do you believe there should be any limits at all on how much media one individual or one company can control, and if so, what would those limits be?

Mr. MURDOCH. I have no idea what the limits are, but I do not think anybody today is anywhere near those limits. I think 2.8 percent is neither here nor there, which is what we have. That is in media. What we are talking about, what I am talking about today, DIRECTV is hardly media. It is simply a distribution platform.

Senator BOXER. I was not talking about DIRECTV at all.

Mr. MURDOCH. I understand that.

Senator BOXER. I am talking about the other issue that is before Chairman Powell. I am not talking about that.

Mr. MURDOCH. Right. Right.

Senator BOXER. I am talking about the ability to take a point of view, left, right, center, whatever the point of view is, and have the ability to reiterate it.

Mr. MURDOCH. I do not know what the right limits are, but I am certainly in favor of relaxing the existing limits, Senator.

Senator BOXER. You are in favor of relaxing the limits. Do you have any idea if there should be any limits at all?

Mr. MURDOCH. No. I think it depends. I mean, as I say, I do not intend to take advantage of it. On the other hand, I think I have demonstrated how much in the public interest our ownership of 33 stations has been to those 33 major communities.

Senator BOXER. Well, what if you owned everything?

Mr. MURDOCH. What if I owned everything?

Senator BOXER. Would there be any limits on you?

Mr. MURDOCH. No, of course not. And we do not expect——

Senator BOXER. You think there should be limits?

Mr. MURDOCH. I think there should be competition everywhere. My life has been built, and my business, starting competition and starting up against other people, and providing diversity.

Senator BOXER. So we have gotten this far, so you agree there should be limits?

Mr. MURDOCH. I should think there should always be diversity.

Senator BOXER. Good. Limits and diversity, we agree. So then, the question is, how much, and you are saying you cannot put a number on it.

Mr. MURDOCH. There should be no limit to diversity. And——

[Laughter.]

Senator BOXER. No, no, no. I am not asking you to limit diversity, limit the ability for one to own many, those are the limits we are talking about.

Mr. MURDOCH. I do not know what the antitrust laws would say, you know, if you have 25 percent of a media market or something, I am sure that could be enormous.

The CHAIRMAN. Let me weigh in on this. Do you think it is right for one city, for all six radio stations to be owned by one company?

Mr. MURDOCH. No, sir.

The CHAIRMAN. That is the case. Go ahead.

Senator BOXER. Thank you.

Mr. MURDOCH. I do not have a dog in that fight. Yet.

[Laughter.]

Senator BOXER. That is good. Mr. Kimmelman, I think what we are having here is a problem, because Mr. Murdoch is using 1 percentage of this 2.8. You are saying he is including things like *Consumer Reports*. I think that needs to be discussed. So are we going to have another round after this if we want? Is it possible?

The CHAIRMAN. If you desire it, yes.

Senator BOXER. That would be swell. Maybe while the yellow light is on, just tell me, do you agree when Mr. Murdoch uses this 2.8 percent?

Mr. KIMMELMAN. Absolutely not, Senator Boxer. You need to look at exactly what Senator Breaux said. You need to look at market dominance, market concentration. The issue is, what is the market? What do you care about? I think most people care about news and information. I am not worried about the national market. I am worried about local markets.

Here is what the FCC is doing. They are saying, if you are a national network you are going to count UHF stations for 50 percent so they can own more, but when you look at the local market and they say how many local broadcasters there are, they are not counting the UHF as 50 percent, they are counting it as 100 percent, and when they are looking to see whether a newspaper can buy a local broadcaster, they are not looking at you to see whether it is 50 percent or 100, they are calling it 100 percent. They are relaxing any way they can, inconsistently, to allow more ownership without looking at real concentration factors.

I think to get diversity, you need the appropriate concentration measures. I do not think antitrust is enough, because antitrust, it can measure advertising revenue. It cannot measure what is competition of ideas. It never has. I wish it could. It cannot, and they have not ever tried to.

The CHAIRMAN. Senator Lott.

STATEMENT OF HON. TRENT LOTT, U.S. SENATOR FROM MISSISSIPPI

Senator LOTT. Thank you, Mr. Chairman, for having this hearing. I agree with Senator Boxer, this has been very, very interesting, very informative. Thank you all for being here. You have given very thoughtful testimony and have been very interesting, listening to you answer the questions.

I may come at it from a completely different point of view than Senator Boxer, but I do think that the 35 percent ownership cap is a reasonable one. I was involved in legislation, as were a number of the members of this committee, that came up with that kind of cap.

Now, generally speaking, philosophically I like deregulation. I do not like caps, but I do think in the media area, the possibilities of concentration and limiting people's access is something that you need to consider. It is dangerous.

I think that—I want to congratulate Mr. Murdoch for the fact that he has brought more diversity of viewpoint into the media in America. In the past, it was *The Washington Post, New York Times, L.A. Times,* the three networks, and they all took the same point of view, and if *The New York Times* said it, the networks picked it up. Used to, when I would go on the Senate talk shows—I do not do that much any more, but when I did—

[Laughter.]

Senator LOTT.—I knew exactly what the question was going to be on *Meet the Press* or *Face the Nation*.

All you had to do was read *The New York Times*. There it was. They were going to ask the questions based on the front page article, simple as pie. And so, you looked like you knew what they were going to ask. You did, because you read the *Post* and *The New York Times*.

So I am glad that you brought that diversity, but you did say that you think that there should be some limit. In answer to Senator Boxer's question, you did say that you had concern about a small local market, that the idea that one company would own the TV station and both radio stations and the newspaper, that would not be good.

But I do think we need to get to a really important question here to show that the Senate really does pay attention to pop culture, and this is the question. Did you do it internally, or was it an independent idea to come up with *American Idol* that led us to Ruben?

[Laughter.]

Mr. MURDOCH. That was actually a British idea and an independent programmer who offered it to Fox, and all I can claim is, I heard about it and called them and said, "for God's sake, buy it." That was last summer.

Senator LOTT. I hope he was well-paid, because he has created a phenomenon.

Mr. MURDOCH. I can assure you he will become very rich.

Senator LOTT. You know, also, looking at this philosophically, generally speaking my disposition would be that mergers are OK. I never thought that necessarily big is bad. I think if it makes good business sense, if it makes good sense in terms of providing the service, that that ought to be all right unless there is a good reason not to do it, and unless it does, as the Justice Department has to review it and the FCC, it wipes out competition, it has certain antitrust considerations, then you should not do it, and I had reservations about the earlier proposal for DIRECTV, and Dish to come together, because I do think that that was going to eliminate the competition in that area of media.

I think your situation is different, though, and I assume you would say it was different, because now you are going to be chairman of this board that will own it though, are you not, Mr. Murdoch?

Mr. MURDOCH. I hope so, yes.

Senator LOTT. But I do think—I mean, you are going to add strength and money, I presume——

Mr. MURDOCH. Yes, sir.

Senator LOTT.—to DIRECTV, and Dish is, I presume, hopefully going to be strong, and you all are going to really get out there and compete. You are not going to mistreat your installers.

Mr. MURDOCH. Dish already makes more money, more money per customer and more money totally than DIRECTV.

Senator LOTT. Since my son-in-law is an installer, I am worried about his future, too, but, so I do not feel like in this case that it is a further consolidation. I think it may, in fact, strengthen and improve what is offered in this particular area, but let me ask you a question where I do have some concerns, and that is about program access commitments.

I understand that News Corp. and DIRECTV have agreed to a series of program access commitments similar to the ones in the 1992 Cable Act, which are designed to ensure that News Corp. makes its programs available to other distributors in a nondiscriminatory way, but there has been some indication that if the FCC eliminates that access requirement, or it is rescinded, that News Corp. would not be inclined to keep its program access commitments. What is the situation on that?

Mr. MURDOCH. I think we will be certain to keep the practice because it is good business. On the other hand, I am not prepared to come here today and say I am prepared to operate under rules that do not apply to any of my competitors. If Comcast went and bought the Disney Company, or other people started things or used things in a discriminatory way against me, I would reserve the right to retaliate, but that is competition, and all I am saying is, we will abide by the rules, and we think it is good business to abide by the rules.

Senator LOTT. Well, I understand what you are saying——

Mr. MURDOCH. I think it is highly unlikely.

Senator LOTT.—but let me just say to you and to the industry, and we have had other people here, you know, program access is important to a lot of parts of the media now. I think this is a place where you all could get in real trouble. If you limit program access, eventually we are going to intervene, if there is not some fairness there.

Mr. MURDOCH. I agree totally.

Senator LOTT. You invented the fair and balanced term. Let us make sure it applies to program access, too.

Thank you very much, Mr. Chairman.

Mr. MURDOCH. Thank you, Senator.
The CHAIRMAN. You decide.
[Laughter.]
Senator Lautenberg.

STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM NEW JERSEY

Senator LAUTENBERG. Thank you, Mr. Chairman, for conducting this fair and balanced hearing. The one thing about our Chairman, he lets you spin, because he thinks that as you present different views, you get an energy source that produces conclusions that are well-thought-out. We salute the Chairman's deft hand.

I am pleased to have a chance to say hello to you, Mr. Murdoch. I do not think we have had a chance to meet over the years, and let me say I admire your success in having built this corporation that you now have. The prospects for the future are, some peril to the glow of that success, because you just said whatever the rules are, you will obey them. But you will, I assume, agree with the fact that you would like to change the rules.

Mr. MURDOCH. Not the program access rules, sir.

Senator LAUTENBERG. No, but other rules such as percentage of market and so forth.

Mr. MURDOCH. Yes.

Senator LAUTENBERG. Yes. And Dr. Mikkelsen, you said that you were not representing anybody here. You are not here on behalf of—I am here on behalf of none of my clients. Do you represent Fox at times?

Dr. MIKKELSEN. Our firm has worked for Fox, yes.

Senator LAUTENBERG. Yes. Mr. Murdoch, did you appear before the Commission, the FCC, to give any testimony?

Mr. MURDOCH. No, no, not on this matter, no.

Senator LAUTENBERG. Dr. Mikkelsen, did you appear before the Commission?

Dr. MIKKELSEN. I and others at my firm have written papers that have been submitted to the Commission, Senator.

Senator LAUTENBERG. Yes. So—and you present a point of view that you registered here. You were very clear and articulate, and I respect that, that you think we ought not to have these limitations. I do not know whether you said that there is an artificiality to them in the marketplace, or that maybe they are redundant because we have our rules that Justice maintains.

Dr. MIKKELSEN. I think that is the way I put it, Senator. There are some legitimate concerns, but I do not think these rules are needed to advance the goals we have.

Senator LAUTENBERG. Did you represent other people before the Commission who were also in the industry, other media companies?

Dr. MIKKELSEN. As I mentioned, I have done some work, some independent research that Senator Sununu asked about previously——

Senator LAUTENBERG. Right.

Dr. MIKKELSEN.—for the Newspaper Association of America, and some of the research we did most recently was funded by Fox and NBC and Viacom.

Senator LAUTENBERG. Are you under retainer now with Mr. Murdoch's company?

Dr. MIKKELSEN. I am not working for them presently. We have been working throughout this proceeding.

Senator LAUTENBERG. But you have a continuing relationship?

Dr. MIKKELSEN. Yes, sir.

Senator LAUTENBERG. OK. So can you be so balanced that when you come in here, you do not represent any of those points of view that you worked on so hard for such a long time?

Dr. MIKKELSEN. The views I have expressed have been views that I have articulated before and long held, Senator, and I would ask that people look at the research that we have done and evaluate it on its merits.

Senator LAUTENBERG. Yes. OK. So there might be coincidence of value that Mr. Murdoch receives as a result of your view here.

Dr. MIKKELSEN. Well, I do not know how the panel was chosen, Senator, but I think that——

Senator LAUTENBERG. No, but, I mean, based upon your testimony, you are saying, look, take off the wraps, and that certainly complies with Mr. Murdoch's intention at this point.

One thing about Mr. Murdoch, we know that what he means, he says, and what he says, he means, and sometimes you can agree—I find it a little harder as time goes on to agree, maybe because I am getting younger or something.

[Laughter.]

Senator LAUTENBERG. The fact is that I have spent some time with Hannity and Bill O'Reilly and so forth, and it is easy, I have put on my bulletproof jacket, I go into the studio, and we get along famously because I will not lie down.

But there is a coincidental common point of view that spreads through the Fox programs that we see that tend to be a little more conservative, and once we include the *New York Post,* we see all kinds of assertions, weasels and all of that. It is not bad to be called a weasel. There are worse names. Peter Arnett got a real scalding. We did not see the same applied to Geraldo when he violated the rules that the military thought were bad, and it is hard to get either fair or balanced views out of that.

Mr. Murdoch, did Star Satellite TV stop the BBC and CNN because Beijing had problems with their reporting?

Mr. MURDOCH. No, sir.

Senator LAUTENBERG. What was the cause?

Mr. MURDOCH. I just bought Star TV and it was losing $100 million a year, and an easy way to save $10 million was to drop BBC.

Senator LAUTENBERG. That only had you losing $90 million a year? That was—it really got to look like a good deal at that point.

Mr. MURDOCH. That is correct. It would have taken us 10 years to break even, and BBC then went up at their own cost.

The CHAIRMAN. The Senator's time has expired.

Senator LAUTENBERG. OK, Mr. Chairman. Thanks very much. If we had the time, we could sit here all day, but none of us has the time, Mr. Murdoch.

The CHAIRMAN. Thank you, Senator Lautenberg.

[The prepared statement of Senator Lautenberg follows:]

PREPARED STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM NEW JERSEY

Mr. Chairman,

I look forward to today's hearing on broadcast media ownership. I congratulate you for holding "fair and balanced" hearings in this Committee. We don't want any "spin" in this "zone" and I know the Chairman well enough that he won't permit it. He enables competing views to be heard. He is "fair" and "balanced" and we get all the data we require for an informed discussion. That's something we need in the media that I fear we are losing because of deregulation that is harming the public interest.

Over the years, Congress established media ownership rules to ensure that the public would have access to a wide range of news, information, programming, and political perspectives. The courts have repeatedly recognized the public interest goals of *diversity, competition,* and *localism.*

Repeal or significant modification of the rules will lead to mergers that reduce diversity, competition, and local control in the media. That's already happened under the 1996 Telecommunications Act, which relaxed the media ownership rules significantly. With regard to *broadcast television,* for instance, the number of companies owning stations has dropped 40 percent since 1995. With regard to *radio,* in 1995, the top radio station group owned 39 stations. Today, Clear Channel owns over 1200 stations.

It's important to remember that the airwaves belong to the *public,* and are to be managed in the *public interest.*

I would submit that the media consolidations and mergers we have already seen have not been in the public interest in at least one crucial area, and that's the public's access to "fair and balanced" news coverage that reflects varied viewpoints.

Consolidating media ownership means that a few large corporations can exercise considerable control over the news. As the distinguished Supreme Court Justice Learned Hand remarked in 1942, "The hand that rules the press, the radio, the screen, and the far-spread magazine rules the country." Is it really in the public interest to make it easier for a few companies to dominate the airwaves and determine what news the American people will—or won't—hear? I don't think so.

It's fitting that our first witness today is Rupert Murdoch, the President and CEO of News Corporation. I doubt there is any other individual or corporation that stands to benefit as much from additional de-regulation. Mr. Murdoch has deftly assembled a horizontally and vertically-integrated media behemoth that exceeds the 35 percent cap, has duopolies in nine of the top ten media markets, has an FCC waiver allowing cross-ownership of newspapers and broadcast stations, and was able to avoid complying with the FCC's so-called "FinSyn" (Financial Interest and Syndication) rules.

And now Mr. Murdoch and News Corp. would like to purchase a controlling interest in DIRECTV. On its face, this acquisition might appear to be good for consumers since DIRECTV, which is a Direct Broadcast Satellite (DBS) service, is cable's principal competitor.

But I'm not so sure. By gaining control of the DIRECTV platform, Mr. Murdoch would have considerable leverage to extract higher licensing fees, which would driver subscriber costs up, not *down.* He claims that News Corp. will continue to make its national and regional programming available to other pay-TV distributors on a nonexclusive basis and with non-discriminatory prices, terms, and conditions. We shall see.

And if Mr. Murdoch is so devoted to diverse programming, as he repeatedly claims, I'm curious to know why he dropped the BBC from his Star TV satellite operation in China.

Jeffrey Chester of AlterNet has written an article dated May l9, "Rupert Murdoch's Digital Death Star," which draws attention to potential problems with the merger. Mr. Chester calls the DIRECTV acquisition "A triple play when it comes to influencing U.S. television with his (*i.e.,* Murdoch's) control of broadcast, cable and satellite channels."

This concerns me. In the New York metropolitan area, News Corp. already owns two VHF broadcast stations, a daily newspaper, a broadcast network, a movie studio, a satellite service, and four cable networks.

"Imagine Fox News on steroids," is how Mr. Chester describes the impact of the DIRECTV acquisition if it goes through.

The danger here, as *Washington Post* columnist Richard Cohen recently wrote, is that Mr. Murdoch's media empire tends to "infuse" his conservative political ideology into news coverage "while insisting it does nothing of the sort."

Mr. Murdoch certainly has a right to his views and he certainly has a right to express them. But to call Fox News "Fair and Balanced" is a joke. I know—I have been on several of the Fox News Channel shows. I try to "give as good as I get" and I enjoy the banter, but I have no illusions whatsoever that these shows are anywhere near balanced.

There is an organization called FAIR—Fairness and Accuracy in Reporting. Interestingly, FAIR founder Jeff Cohen appears on Fox News on a regular basis. But he is about the *only* Fox commentator who presents a progressive viewpoint. In 2001, FAIR issued a report entitled "The Most Biased Name in News: Fox News Channel's Extraordinary Right-Wing Tilt." The report convincingly debunks any notion that Fox News is anything more than a mouthpiece for the right wing. It documents, for instance, that over a five-month period, of 56 partisan guests on "Special Report with Brit Hume," 50 were Republicans and 6 were Democrats. That's 89 percent Republican. The *conservative* point of view outnumbered all others by more than 2 to 1.

The FAIR report draws an interesting conclusion, similar to the point Richard Cohen made in his column:

> With the ascendance of Fox News Channel, we now have a national conservative TV network in addition to the established centrist outlets. But like the mainstream networks, Fox refuses to admit its political point of view. The result is a skewed center-to-right media spectrum made worse by the refusal to acknowledge any tilt at all.
>
> Fox could potentially represent a valuable contribution to the journalistic mix if it admitted it had a conservative point of view, if it beefed up its hard news and investigative coverage (and cut back on the tabloid sensationalism), and if there were an openly left-leaning TV news channel capable of balancing both Fox's conservatism and CNN's centrism.

So the problem isn't that Fox News is conservative. The problem is that it bills itself as "fair and balanced." And the problem isn't that Mr. Murdoch is conservative. The problem is that his company, News Corp., has enormous control over the media *now,* and he wants *even more control.* That burgeoning control threatens to drown out other voices and different points of view.

I urge my colleagues to review the broadcast ownership very carefully. We made substantial changes in 1996 that I don't think are in the public interest. At best, the jury is still out. I don't think we should be in any hurry to deregulate the industry even more. I repeat what Chairman Powell has said: "getting it right is more important than just getting it done." Getting it right means serving the public interest, not boosting profitability and ownership concentration.

Thank you, Mr. Chairman.

The CHAIRMAN. I want to thank the witnesses.

Senator BOXER. Can we have one more round?

The CHAIRMAN. Yes, ma'am. Can I finish? I want to thank the witnesses. We try to get the most qualified people to come here before the Committee and with diverse opinions, as Senator Lautenberg pointed out, and Dr. Mikkelsen, you were recommended to us as an extremely knowledgeable person basically with a difference of opinion from Mr. Kimmelman, and we appreciate you being here.

Mr. Fontana, I do not think you are going to see a return to Fin-Syn.

Mr. FONTANA. No, I do not expect so.

The CHAIRMAN. I think it is because of a court decision, but I am very impressed by the letters that I have received from the creators such as yourself, Mr. Gelbart, Mr. Burns, John Gay, some of the most respected people in your line of work, the creators, and they are all deeply concerned about this issue, and I will do what I can to pursue it, but frankly, right now, I do not know an answer, but you have helped the Committee and you have helped all of us by being here.

Mr. Murdoch, I do not know what the correct level of diversity is. I do not know what is the precise, appropriate rule, whether 35 or 45 or 55 or 25. I do know this, that the Clear Channel hearing we had was a miner's canary to all of us, whether it be an idiosyncracy in the rule, or what, but when one corporation owns every radio station, no matter how small the city is, there is something wrong with that picture.

I agree with Senator Lott's point about *The New York Times* and what questions we are going to be asked. I also agree that with Gannett, which owns *USAToday,* which owns the Arizona Republic, which owns Channel 12, I know what the news anchor's going to ask me about on the radio and television, and that is what was in the *Arizona Republic,* and I do not know if Gannett should own more than one station, three, four, five. Should they own every television station in Arizona?

I do not know where that answer is, but we need to look at this issue I think with great care so that we do preserve diversity, localism, et cetera, and I do believe that there is some danger that at least in some segments—and you know, you said that in rural areas that you would be concerned about diversity. What is a rural area? Phoenix, Arizona 20 years ago used to be a rural area. Now there are 3½ million people that live there.

So I am asking more questions than I am answering here. Example: Is EchoStar now going to have to be bought by one of the major networks? Can EchoStar survive independently now that you will acquire Direct?

Mr. MURDOCH. Very easily. I said it already makes a lot more money than Direct per customer, and you know the owner and I do, and I can tell you he is a very, very able operator.

The CHAIRMAN. I agree, and it is one of the great American success stories I think, just as yours is.

Mr. MURDOCH. Yes.

The CHAIRMAN. But there are many experts who say that EchoStar cannot survive independently, and I am not saying that, but there are a whole lot of experts in the media that say that is the case.

Mr. MURDOCH. Senator, we have neither the skills nor the financial resources.

The CHAIRMAN. I do not think bought by you. I am saying, bought by one of the other major networks——

Mr. MURDOCH. No, I mean, it could compete in a way to hurt them. Both services are increasing their reach by more than a million customers a year. They are both expanding very fast, giving cable a rough time.

The CHAIRMAN. Well, you have heard my sort of comments there, and so, since I am not going to ask questions again, maybe I could just have some responses to those comments, starting with you, Mr. Murdoch, down the line, or no response if you do not choose to.

Mr. MURDOCH. I do not wish to get into a debate with Mr. Fontana. I would just point out that in 1986, when we wanted to start a little network and get going, we could not do it without a waiver of the Fin-Syn rules. We received that waiver, and we started and struggled and lost some money, but we finally got there.

Later, the rules were taken away by the courts. Then you got Warner Brothers starting a network. Then you got Paramount starting a network. There are 6 networks today, where there were only 3, and there were not any really major cable operators. Today, a cable operator can reach 77 percent of the country. There are no limits on what he can reach up to 77 percent, and they do have a very great advantage.

I just wanted to make that point.

The CHAIRMAN. Thank you. Mr. Kimmelman.

Mr. KIMMELMAN. Mr. Chairman, you know that since 1997, I have been coming before this committee saying it is time to reopen a lot of these issues and consider the flaws in these markets. Will there be a merger with EchoStar? Well, Bell Atlantic bought NYNEX and SBC bought Pacific Telesis, and they said that would be it, but then Bell Atlantic bought GTE. It is now Verizon, and SBC bought Ameritech. I mean, it does not—this has to be mutual assured destruction in these industries. Given the assets involved, I think we will be back here looking at some other transactions in the future.

I think the big problem, Mr. Chairman, is the FCC is just about to make an enormous mistake about local markets, because it is looking at the wrong issues. It is not looking at the real facts, and I think there are easy ways to take the data the FCC has, and I think in some ways, the Chairman of the FCC has the right inclinations. He just may not have the votes or the support to look at this from a simple market concentration point of view, and look at where you get news and information, look at it right smack down the middle.

Look at where Mr. Murdoch's companies and Viacom's have bought two stations and reduced them down to one news operation, or where, in Chicago, Mr. Murdoch has taken local programming off of a channel he bought—he has two channels—and eliminated a top-rated children's television program. Look at the facts, and just set the limits. That is what we need. I am afraid we are going to be back here having to redo it.

The CHAIRMAN. Dr. Mikkelsen.

Dr. MIKKELSEN. Thank you for this opportunity. One thing that I have noticed in many of the discussions, not your comments in particular, Senator, is confusion with overbigness.

I spoke earlier about how I think the antitrust laws help us out to ensure competition. I think they also bring an analytical focus because they help us think about what goes together and what really does not go together, and so, I think it is quite dangerous to think about this as big. It has lots of media, without thinking carefully about whether they compete with one another or whether they are really alternatives to one another.

So, if stations in two different markets are commonly owned, I do not see how that reduces or even affects diversity because you have different people living in those two markets, so I think that we need to be cautious in worrying about some of these things.

And I have lost the other point.

[Laughter.]

The CHAIRMAN. That is all right. I just want to point out, we seem to see that often a group of stations, even though there is diversity in programming, use the same news source to keep down cost. We have already seen that, so you lose the diversity of news. I mean, that is just fact.

I have long exceeded my time.

Mr. Fontana.

Mr. FONTANA. The only thing I would like to add is, I always thought that what was brilliant about what Mr. Murdoch did in order to form Fox Network was to take a bunch of independent stations and pull them together to create that fourth network. It was a very bold move, and it also creatively opened up a whole new avenue for writers and producers.

What I guess I am worried about is, there are really only four networks. The other two, I do not really think are in the game, but there are no more opportunities to build another network, because all the stations seem to have been bought up.

The CHAIRMAN. Senator Dorgan.

Senator DORGAN. Mr. Chairman, thank you very much. I had to go to an Appropriations Subcommittee hearing and I have just returned.

Dr. Mikkelsen, you, in your testimony, said that, quote, what matters to diversity is the range of viewpoints available to individuals, that range is not diminished when a local media outlet available to an individual is jointly owned, and so on. Just because I have the information in front of me, I want to talk just for a moment about radio, because I know we are talking about television today.

The 44 largest stations owned by the five largest ownership groups in the country, 50,000 watts or greater, so these are the big stations owned by the five major groups, on a weekday, each weekday there are 312 hours of nationally syndicated conservative talk radio and 5 hours of nationally syndicated progressive or liberal talk radio. Now, that has come about, of course, as we have had this galloping concentration in radio. How does that fit with your theory in your testimony about a diversity of range of viewpoints? Would you consider that troublesome?

Dr. MIKKELSEN. I do not know whether that has been a result of, as you put it, galloping consolidation, Senator.

Senator DORGAN. Whatever its result, how do you square that with the issue of range of viewpoints and diversity?

Dr. MIKKELSEN. What you need to focus on in evaluating diversity is what viewpoints are available to people located in a single spot, so I would not count shows that are showing in California as either adding or detracting from diversity from shows that are available in some other state. I am not sure how the 305 are calculated, but that sounds like a lot of programming in a single market, that no individual, I would guess, is being exposed to or has even an opportunity to listen to 300 hours of conservative and 5 of liberal in the same market.

Furthermore, there are many, many other outlets available to people, other than radio. You have said let us look at radio, but we have other broadcasts.

Senator DORGAN. I understand that.

Dr. MIKKELSEN. And many other opportunities to inform oneself and for people to express their views.

Senator DORGAN. I was just asking this piece, because it seems to me every time we talk about the issue of concentration. We have got people saying, well, look, there is no concentration. Are you kidding me? There is so much more diversity, and such a range. Are you joking? It is kind of like the old, the gag in the movie, are you going to believe me or your own eyes?

It is quite clear what has happened in radio and television. I recited what has happened at the start of this hearing. It is hard to argue with that. One might say it is great. I mean, we had airlines in here saying let us just have one or two airlines. That way you would have seamless transportation.

It is fine for somebody to come and argue with us or debate the point that concentration is great for the American people. That is fine to do, but it is not fine for me to have somebody come in and say, well, there is no concentration going on. I mean, the evidence is quite clear it is.

Dr. MIKKELSEN. Well, Senator, I know you are not advocating that the FCC regulate whether stations have conservative viewpoints or liberal viewpoints, or wanting to get involved in content at all.

Senator DORGAN. I am only asking about your—well, you are an economist. I taught economics in college 2 years and overcame that——

[Laughter.]

Senator DORGAN.—but you are an economist, and you said that what matters is a range of viewpoints and diversity. I was only making the point to you, it does not appear to me, as I drive in my car and listen to the radio, you find much diversity, and so I think this is an economic theory that does not hold a drop of water.

Dr. MIKKELSEN. Well, the question is whether that range of diversity would be any different if we had a different ownership structure, and I do not think that has been demonstrated. And that is what is at issue in these rules.

Senator DORGAN. I want to ask Mr. Murdoch a couple of questions. I might say you are begging that we be cautious in worrying about concentration. You have a great constituency down at the FCC. They are very cautious in worrying about concentration of ownership, regrettably so, I must say.

Anyway, look, I love economists. I mean, the field of economics is really just psychology pumped up with a little helium. We all love to talk about all of these theories.

Dr. MIKKELSEN. And a little math.

Senator DORGAN. That is right.

Mr. Murdoch and Mr. Kimmelman, I was interested in your opening dialogue. I know you patted him on the arm when you said he was ignorant, so you were just kidding Mr. Kimmelman. Later you said he was misled, but you and Mr. Kimmelman have very different views of not just this issue, but also, I think, the issue of concentration. I want to ask you just a bit about that if I can. I do not want to talk so much about this proposal. I mean, there is time to do that, because I think that is before the FCC, and there is a lot to discuss, I suppose.

You indicate that you will agree to abide by the FCC program access regulations for as long as those regulations are in place. One of my concerns about all of these things with respect to the media is—and especially ownership, is the regulations do not always stay in place. You know, you say, well, I will abide by whatever is there, and then we have got people trying to change it very aggressively.

My colleague, Senator Hollings, indicated that in 1996, I offered an amendment on the floor of the Senate, and my amendment was to restore the 25 percent ownership limitation with respect to television stations. It was opposed by Senator Dole very aggressively, and I will be darned if I did not beat him. I beat him by, I think, three or four votes at 4 in the afternoon, and I thought, this is pretty incredible. I mean, you seldom ever have that kind of a win.

And then dinner intervened—supper, in North Dakota, we call it, intervened, and apparently four or five of my colleagues had an epiphany over dinner. Lord knows what they ate, and we had a revote and I lost, and so, we have 35 percent rather than 25 percent. Now we have a proposal to take it to 45 percent. The question is, I guess, what would concern you about concentration?

I understand you have answered a question from other colleagues that there might be circumstances in which concentration would be bad for the American people. Can you describe your feelings about that?

Mr. MURDOCH. Not well, but I think I would find myself in agreement with what Mr. Kimmelman hinted at earlier, that there should be some measure of what is concentration market by market, which apparently, rumor has it Mr. Powell proposed and could not get through the FCC. Mr. Kimmelman would know more about that than I do, but I may disagree about where the level is, but I think there are very strong reasons for something like that.

Senator DORGAN. As an expert, and you are quite an incredible businessman with a reputation of great success, let me ask you if you might respond to the same question I asked Dr. Mikkelsen. I described to you what is happening on the top 44 radio stations, 50,000 watts and above, owned by the five largest ownership groups with respect to diversity, 312 hours of nationally syndicated conservative talk, and 5 hours of nationally syndicated liberal or progressive talk. Can you give me your impression of that?

Mr. MURDOCH. Yes. Apparently conservative talk is more popular. The people running that are just businessmen. I can tell you that, for instance, Infinity, which is owned by CBS, is no conservative organization.

Senator DORGAN. What if, at some moment, there is only one thing the American people want to hear, and only one viewpoint, and we have substantial concentration in the media, and only one viewpoint is available to the American people because it makes money, and that is what they want to hear. Is that a good thing for our country and our democracy?

Mr. MURDOCH. I think one should always—as I say, we should always be fair and balanced. I am most serious about that. I know that Democrats are not used to seeing conservative viewpoints put on the air, but we put on both sides, and we are very, very serious about it, and if you can point to anything where we have erred, I will be the first to move in and try and put it right.

Senator DORGAN. If it were your stations, it was 312 hours to 5 hours, would that be fair and balanced?

Mr. MURDOCH. I am not in the radio business.

Senator DORGAN. Oh, I understand that, but I am just asking what your definition of fair and balanced is. Is the 312 to five fair and balanced?

Mr. MURDOCH. Oh, if we could find a popular—maybe you could do it, if we could find a popular, amusing broadcaster to talk for an hour or two every day, and he was a liberal, we would have him on like a shot.

Senator DORGAN. So do you think this is an audition for me?

[Laughter.]

Mr. MURDOCH. You are doing very well.

Senator DORGAN. I understand you pay better than the Senate.

[Laughter.]

The CHAIRMAN. Senator Boxer.

Senator BOXER. Thanks, Mr. Chairman, for allowing me a second round. I do not agree that Democrats are not used to conservative viewpoint. I mean, do you ever watch the Senate?

[Laughter.]

Senator BOXER. Do you ever watch television? We are quite used to it, believe me. Coming from the state I come from, you know, it is a very interesting State, because we have, I say the most conservative and the most liberal politicians get elected from different areas of the state, and sometimes even statewide, so we are used to it, but I have got to tell you, and I need you to take a look at this, I have seen crawls under politicians' names when they go on your fair and balanced news show that are ridiculous, and why anyone would want to go on there and subject themselves to that is another issue, so I hope you will take a look at it.

Mr. MURDOCH. Senator, I know of your conversation about this yesterday.

Senator BOXER. I have had many.

Mr. MURDOCH. I only learned about it last night, and I will certainly look into it, and if there was anything unfair or inaccurate, I will certainly have it put right. You would be very welcome back.

Senator BOXER. Well, it has nothing to do with me. I do not need to go back. That is not the point. I do not care about myself. I am making a point that has nothing to do with that. This is not about special favors. It is about decency and fairness, and I have to say, if you believe that your—that Fox News is fair and balanced, if you really believe that, I am kind of stunned, because I do think it is fair and balanced between the right and the far right——

[Laughter.]

Senator BOXER.—but in terms of overall—I mean, you have an absolute right to do what you do on your show. You have a right if I go on, or Senator McCain, to run anything underneath our name you want. That is free speech. It is your right.

The question I am trying to get you to think about is not personal, it is what is really fair, and I hope you will take that away from this hearing today.

Mr. Kimmelman, I wanted to ask you, there have been more than 20,000 public comments about the media ownership rules at the FCC, and the analysis of that is, 9,000 were citizens opposed to changing existing rules, 99 were organizations opposed to the rule, 46 were organizations supporting a relaxation of the rules, and 11 were comments supporting the rules change.

As an observer of the FCC, how seriously do you think the commissioners have taken what I consider to be a pretty decent public outcry against media concentration, and I have to say, our office has been overwhelmed. That is why I was so happy to have a chance to be on this committee to be able to address this. Do you think they are really seriously looking at it?

Mr. KIMMELMAN. Senator Boxer, I think when Chairman Powell started this process, he talked about the need to gather facts to deal with the court that had overruled the previous rules, and to make sure that he was updating them to fit with market conditions. Everything I have seen in the last few months tells me he has thrown out the facts, he has thrown out the market conditions analysis, and he is not listening to these thousands and thousands of individuals coming in.

It appears that this is a decision that will, in the end, favor a handful of media companies that have lobbied aggressively for many, many years, and you know it. They have been up here as well to say what they want to own, in what cities they want to own, and I think the definition of too much concentration that comes out of this, Mr. Chairman—you raised the question before—is, are any politicians afraid of any media companies? Are any politicians afraid to take them on?

When I sat behind many of you in a different situation and had the privilege of doing that, I saw some of that. I think it is getting worse and worse, and I think that is the danger of concentration, when people who otherwise represent the American people are afraid to get out and state their points of view because of retaliation from media companies, there is something wrong.

Senator BOXER. Well, let us hope that we will have an opposite effect today, because I think we have had a chance to be pretty upfront in this committee. I do not think there were that many pussycats here today. I am proud of that, and certainly, our Chairman, who has been called a lot of things, but never a pussycat as far as I am concerned, and—a lion would be more like it.

But I just want to ask my final question to Mr. Fontana. I represent a lot of the creative community in this country, and I do not know where we would be without a creative community, regardless of what politics they have, it does not matter, but they are the ones that make life so interesting, that challenge us, that bring us different points of view through entertainment, and I would like you, in the final moments here of this hearing, to tell us. I know you have been successful, but do you think you would have been any less successful if you were in a more consolidated marketplace, and if you could put that so that the people in my state and across the country can understand what is at stake here.

Mr. FONTANA. Well, the only thing I can think of, the extreme example is, having gone to China last year on a trip, I watched Chinese television, and I do not think I would have been very successful doing what I do in China, because I do not know how to write operas celebrating the triumph of the proletariat.

I think that the great danger is, as things get smaller, that people who take risks will be moved aside in favor of people who can do yet another version of yet another wildly successful show. The problem with my business is that we only think in terms of this week's ratings and last week's revenues, and so, I live in fear, as I said, for the next generation of young writers coming up that they will not be able to express themselves, create original kinds of programming, and so, it is a great concern of mine, and I thank you for asking about it.

Senator BOXER. I think you said it very eloquently. Thank you.

The CHAIRMAN. The witnesses have been very patient. You have been here over 2½ hours. I appreciate it. It has been an excellent hearing, and I thank you. This hearing is adjourned.

[Whereupon, at 12:30 p.m., the hearing was adjourned.]

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