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

2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	**MB Docket No. 06-121**
2002 Biennial Regulatory Review	)	**MB Docket No. 02-277**
Cross-Ownership of Broadcast Stations and Newspapers	)	**MM Docket No. 01-235**
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	**MM Docket No. 01-317**
Definition of Radio Markets	)	**MM Docket No. 00-244**
Ways to Further Section 257 Mandate and To Build on Earlier Studies	)	**MB Docket No. 04-228**

FURTHER COMMENTS OF CONSUMERS UNION, CONSUMER FEDERATION OF AMERICA AND FREE PRESS

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I. History and Overview of Consumer Comments

Consumer Commenters have been involved in the proceedings on the broadcast media ownership rules[1] for many years, submitting detailed economic, legal, and social policy analysis at every stage of the process. We have seen the Commission attempt in a variety of ways to loosen these rules, contorting policies in ways that would require the Courts "to abandon both logic and reality."[2] . We have yet to see a proposal that was even remotely in the public interest and opened to a transparent process for full public deliberation and scrutiny. Instead, we have seen the Commission pursue an ends-oriented process with predetermined conclusions that paper over empirical problems and policy inconsistencies with creative disregard for the facts in the record.[3]

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[1] Throughout this Ex Parte, unless otherwise stated, all references are to comments filed in the following proceedings: In the Matter of 2006 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 06-121; In the Matter of 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277; In the Matter of Cross-Ownership of Broadcast Stations and Newspapers, MB Docket No. 01-235; In the Matter of Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, MB Docket No. 01-317; In the Matter of Definition of Radio Markets, MB Docket No. 00-244.

[2] "A Diversity Index that requires us to accept that a community college television station makes a greater contribution to viewpoint diversity than a conglomerate that includes the third-largest newspaper in America also requires us to abandon both logic and reality", Prometheus Radio Project v. F.C.C., 373 F.3d 372 (C.A.3 2004) at 408.

[3] Craig Aaron, Marvin Ammori, Joseph Torres and S. Derek Turner, "Devil in the Details: 10 Facts Kevin Martin Doesn't Want You to Know About His New Media Ownership Rules," November 2007, Available at http://www.stopbigmedia.com/files/devil_in_the_details.pdf; Comments of Consumers Union, Consumer Federation of America and Free Press ("Consumer Commenters"), October 22, 2007; A Freedom of Information Act Request from the Institute for Public Representation submitted on August 10, 2006 was required in order to obtain crucial FCC research documents. Nonetheless, the FCC has yet to release more than 1400 pages from the documents requested.

We have seen the Commission's proposals and rules subjected to spirited opposition and rejection by the US Congress.[4] We have seen its proposals and rules roundly criticized in the court of public opinion—repeatedly in hearings across the country.[5] And we have seen the Commission's rules overturned by the 3rd Circuit Court of Appeals and remanded for reconsideration.[6] We now stand in the midst of the remand review, facing yet another instance of unprecedented behavior from the FCC in the handling of this matter.

On November 13, 2007, Chairman Kevin Martin offered the public a proposal to relax the newspaper-broadcast cross-ownership rule. He did so outside the normal channels of agency procedure, publicizing the proposal instead through a press release and an Op-Ed in the *New York Times*.[7] The proposal and the time table for public comment were not conducted using standard Commission process, nor were they published in the Federal Register or put out on Public Notice. The Chairman declared that he would permit 30 days for public comment, which

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[4] Ben Scott, "The Politics and Policy of Media Ownership," American University Law Review, Vol. 53:645.

[5] See http://www.stopbigmedia.com/=hearings; S.J. Res. 17, 108th Cong. (2003); Wayne LaPierre, "Speak Out vs. FCC While You Can," New York Daily News, July 18, 2003, Available at http://www.freepress.net/news/21810; "FCC in Seattle: Time to Listen," Seattle Times, Nov. 9, 2007; "Congress Should Slow New Media Ownership Rules," Portland Press Herald, Nov. 13, 2007, Available at http://www.freepress.net/news/28122; James S. Granelli, "Consolidation in Media Is Called Stifling," Los Angeles Times, Oct. 4, 2006, Available at http://www.freepress.net/news/18144; Deborah Douglas, "Nurture, Don't Squelch, Independent Media Voices," Chicago Sun-Times, Sept. 26, 2007, Available at http://www.freepress.net/news/26489; "Hundreds Oppose FCC 'Media Consolidation' Move at Seattle Meeting," Associated Press, Nov. 10, 2007; Kim Hart, "FCC Chairman Draws Fire for Cross-Ownership Plan," Washington Post, Dec. 6, 2007, Available at http://www.freepress.net/news/28775; Stephen Labaton, "Few Friends for Proposal on Media," New York Times, Nov. 14, 2007, Available at http://www.freepress.net/news/28090; Jim Puzzanghera, "Bad Reviews Pile Up for FCC Chief's Plan," Los Angeles Times, Nov. 19, 2007, Available at http://www.freepress.net/news/28224.

[6] Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004)

[7] Kevin J. Martin, "The Daily Show," New York Times, Nov. 13, 2007, Available at http://www.nytimes.com/2007/11/13/opinion/13martin.html; Federal Communications Commission, "Chairman Kevin J. Martin Proposes Revision to the Newspaper/Broadcast Cross-Ownership Rule," News Release, Nov. 13, 2007, Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278113A1.pdf.

would be due on December 11^{th}. Immediately thereafter, the "sunshine rules" would apply (barring some change in usual procedure) in advance of a December 18^{th} vote and the public would have no further opportunity to comment or to reply to the comments of other stakeholders.

We meet this arbitrary deadline of December 11^{th} under protest. For the reasons we outline in this filing, it is not possible to assess the purpose, function, or impact of the Chairman's proposed rule. The Chairman has not given the public a proper Further Notice giving appropriate explanation as to the intentions of this proposal. The public deserves to scrutinize and to comment upon any proposed rules and their rationale due to the controversial nature of this proceeding. Given the credibility deficit that follows from the agency's record on this issue, it is imperative that the Commission avoid the cloud of suspicion that will arise in its absence of a transparent process that the Commission has yielded once more to the will of industry pressure.

This is a necessity in this case because nowhere in the record does any commenter ever request, recommend, or propose anything like what the Chairman has offered. Needless to say, the November 13^{th} proposal does not offer any explanation nor cite anything in the record upon which it is based. Terms are not defined. Classifications, conditions and standards for merger review are ambiguous. The range of potential impacts is wide. The issues left completely unaddressed are highly significant and deeply intertwined with the rule itself. In short, this proposal is a post-it note conclusion to one of the most complex, controversial and important public policies the Commission has made in many years. Such an ending is neither just nor fitting—nor should the public be forced to tolerate this latest and most egregious example of indifference to, and abuse of, the policy making process.

Consumer Commenters take this opportunity to remind the Commission that a great body of empirical research lies unaddressed in the record. In particular, we highlight work done on the key issues of viewpoint diversity, localism, newsroom output, and minority ownership. The

November 13th proposal is void of any meaningful incorporation of these facts. The Commission has a broad body of evidence in the record generated by numerous studies on media ownership rules, market economics, minority ownership, content bias, and other related topics. The most recent round of ten studies came at considerable cost to taxpayers. We have filed lengthy critiques of these studies elsewhere.[8] But we note that the data set produced by this research offers a rich seedbed to foster exactly the kind of public interest rules we have long requested. Our own research based on that data suggests many of the right starting points. We would like to once more quickly summarize the key arguments that remain without rebuttal or evaluation. In its December 5, 2007 report on the FCC's studies, the Congressional Research Service supported our findings and we submit that the problems we identify cannot be ignored.[9]

First, we have fundamentally overturned the primary claim at the center of the FCC's argument for cross-ownership—that newspaper owned broadcast stations result in more news for local communities. Despite the Court's reliance on this argument in the *Prometheus* case, it is not supported by the expansive data sets collected by the Commission this year. The Commission has studied the impact of these mergers only at the station level, rather than at the market level. At the market level, cross-ownership results in the loss of an independent voice as well as a decline in market-wide news production. Once definitions are corrected and policy relevant variables included in properly specified statistical models, there is no support in the FCC data to relax media ownership limits. The CRS report on the FCC's studies affirms the relevance of this critique:

> "The peer reviewers and the Consumer Commenters identified a number of possible technical problems in the econometric analyses performed in the 10 studies. The potentially most noteworthy criticism appears to be that all but one of the studies addressed the impact of media ownership characteristics on

[8] Comments of Consumer Commenters, October 22, 2007.

[9] Charles B. Goldfarb, "The FCC's 10 Commissioned Economic Research Studies on Media Ownership: Policy Implications," Congressional Research Service, Dec. 5, 2007. ("CRS Report")

> the programming provided by individual cross-owned stations, not on the total programming available to consumers in the local market, which arguably is the key public policy concern."[10]

Second, in its 2003 Final Order, the Commission ignored minority ownership issues – the under-representation of minorities and females and the lack of diversity in the media – so totally that it elicited a stern reprimand from the Court. Unfortunately, over the course of four years, the FCC has failed to rectify the situation in its research agenda. In fact, the Commission has never bothered to create an accurate census of the gender and race of broadcast licensees based on its own data—relying instead on summary data that are hopelessly inadequate. Instead, it commissioned last minute studies that attempted to gloss over its own inattention to the issue. The authors of both studies were hamstrung by the absence of usable data on minority ownership. At the same time, the commission's flawed data on minority and female ownership was allowed to infect all of the major statistical studies of the broadcast media. Closer examination of corrected data shows that relaxation of media ownership limits reduces minority ownership.

The obvious contradiction between permitting further media consolidation and promoting minority ownership begs the question of whether the Commission is ignoring this central policy issue in order to avoid inconvenient realities that derail its preset agenda. The CRS report confirms:

> "In its Prometheus decision, the Third Circuit instructed the FCC to consider the impact of changes in its media ownership rules on minority ownership. Without accurate data on minority (and female) ownership, it is impossible to perform such analysis…It is possible that the Third Circuit would not approve any FCC media ownership rule until the Commission has developed a minority ownership database of sufficient accuracy to allow for reliable testing of the impact of the rules on minority ownership."[11]

[10] CRS Report, Summary Page.
[11] Id., p. 55.

On the whole, despite months of research, the Commission has never provided any compelling evidence that public interest limits on media ownership should be relaxed. On the contrary, the data collected show the opposite—the ownership limits protect the quantity and quality of local news. Further, the Commission has ignored the key questions of localism and diversity, avoiding any substantive analysis of consolidation's impact on minority ownership based on an accurate count of minority owners. Throughout, the Commission has followed a process that was ends-oriented from the start, never deviating from a research plan that traded objectivity and the public interest for blind faith in deregulation.

The Commission's failure to address these empirical issues prior to the issuance of a proposed rule—even one delivered via a press release—is stunning. It demonstrates either that the Commission is uninterested in a policy based on facts, or that the agency believes that the diversity of viewpoints in the news and the diversity of station ownership are not compelling public policy goals despite Congressional obligations to treat them as such. It is on this backdrop, this history of administration neglect and abuse, that we file these comments.

In this filing, we will outline the issues raised by the Chairman's proposal. We will demonstrate through a conceptual critique of its model and framework a more appropriate way to make media ownership rules. We will give empirical evidence to justify these proposals. Finally, we will raise all of the questions left unaddressed and unanswered by the November 13th policy-proposal-by-press-release. It is our view that the Commission should answer these queries in a full Further Notice on the actual proposed rule before concluding this proceeding. Unless Chairman Martin remedies procedural flaws, eliminates dangerous and vague exceptions, and thoroughly expands meaningful minority ownership and local programming needs, his plan will not serve the public interest or meet minimum legal fairness requirements for FCC rules.

Beyond our procedural concerns, the Chairman's proposal to allow case-by-case review of newspaper –TV mergers in all media markets suffers from a number of critical infirmities.

The benefits he claims for it in his Op-Ed are not demonstrated in the record. The assertions that cross-owned combinations produce more news and that they benefit the financial viability of the newspaper business are simply not borne out by the facts and in no way justify reducing the diversity of viewpoint in our community. We note that both broadcast stations and newspapers (to the extent the Commission even has jurisdiction over these entities) continue to be very profitable businesses that do not deserve a bail out at the expense of the public interest. Further, there has never been any explanation for how the checks and balances provided by independent voices in different local media will be replaced in consolidated markets. The idea that the Internet is a suitable substitute for local news and original reporting doesn't pass even the lowest evidentiary bar. These are the central issues in setting the limits on cross ownership. Chairman Martin's proposal does not meet any of these public interest tests.

It is notable that the new proposal appears to permit media concentration only in the largest markets.[12] However, this facial difference from the proposal of the previous FCC (which would have swept away ownership limits in all but the smallest markets) does not appear to hold up under scrutiny. Those mergers that are not permitted presumptively would be subject to a four part test. The criteria it proposes to use to ensure that mergers do not harm the public interest are vague and unspecified, and therefore unlikely to afford protection from harm. Of greatest concern, perhaps, is the fact that this new four part test could possibly be met almost entirely with unilateral assertions from merging companies ("Yes, we will do more news after consolidation." "Yes, we are having financial difficulties."). Effectively, this new waiver standard could permit waivers in most markets in the country. In this filing, we outline the range

[12] "Beyond giving newspapers in large markets the chance to buy one local TV or radio station, no other ownership rule would be altered." [12] Kevin J. Martin, "The Daily Show," New York Times, Nov. 13, 2007, Available at http://www.nytimes.com/2007/11/13/opinion/13martin.html.

of possibilities in this ill-written rule. The most likely outcome is considerable harm to the public interest.

Finally, we look in vain for any mention of minority ownership in this proposed rule, despite the fact that both the Congress and the Courts have repeatedly asked the Commission to address the issue. The agency's record on the issue of minority broadcast ownership can best be described as one of willful neglect. People of color own just 3 percent, and women just 5 percent of all TV stations, even though those groups make up 35 percent and 51 percent of the U.S. population, respectively. Sadly, those striking numbers had to be compiled by Free Press because the Commission has never conducted an accurate census of minority owners. The FCC has clear statutory and moral obligations to address the woefully inadequate levels of minority and women-owned broadcast outlets before permitting any further media consolidation.

For this proposal to be worthy of consideration by the public and the Congress, the FCC should first correct its process problems and complete the record with regard to localism and minority ownership. From there, if the Chairman is determined to press forward quickly, it is imperative that strong limits on media mergers are preserved with very narrow exceptions based on important public policy goals that would prevent the most dangerous consolidation that could harm our democracy. Among those provisions that would be a starting place for consideration, the Commission should maintain the top four-firm exclusion concept as a hard line and impose a high standard with regard to other mergers, eliminating the loose waiver process. To the extent that a newspaper-TV combination will add news production to a TV station that has not produced local news during the period of its license (as opposed to merely adding news to an outlet that already does news), it should raise the merits for its consideration. The Commission should study the impact of top market mergers on minority owners and the quantity/quality of local news to determine the economic impact at the market level.

To prevent excessive concentration, the FCC should adopt a ten voice test – which is consistent with the DOJ/FTC *Merger Guidelines* for the threshold where a market is defined as unconcentrated (more than 10 voices). The voice count should be based on a measure of market concentration that reflects all types of media outlets, their audiences and their relative contribution to the overall media market place. Only by adopting such an approach to counting of voices will the FCC ensure that its market analysis reflects the reality of media markets and achieves the public policy goal of promoting "the widest possible dissemination of information from diverse and antagonistic sources."[13] Within this conceptual frame, the Commission should adhere strictly to the thresholds of impermissible concentration in the *Merger Guidelines.*

Finally, the Commission should address the wide variety of definitional problems, ambiguities, and inconsistencies that plague the proposed rule. The conditions applied toward the presumptions must be clarified. The definitions relevant to voice counts must be provided. Enforcement mechanisms should be articulated. The concentration standard must be established, defined, and defended in the record. The public interest standard for permitting mergers against a rebuttal presumption must be strengthened considerably and the obvious weaknesses eliminated. The Commission must identify what it intends to do with current license holders that stand outside the new rules by virtue of waivers and grandfathered combinations. In short, the Commission should offer a Further Notice that explains, defines, and defends its new rule in a cogent and intellectually consistent manner. Only then can such a rule be expected to win the confidence of the public and stand the tests of time and judicial scrutiny. We offer the following analysis and commentary as a starting point for this necessary enterprise.

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

II. Analyzing the Rule

A. A Pig in a Poke is Not a Proposed Rule

Chairman Martin's proposal to relax the limit on the ownership of a newspaper and a TV station in the same market constitutes a radical change from current policy. The proposal as written is so poorly defined that it is almost impossible to tell exactly which mergers would be allowed and which mergers would be disallowed because the criteria by which mergers would be evaluated are completely undefined. The proposal will allow media owners to propose any merger they want. These mergers would be subject to a case-by-case review. For mergers in the 20 largest markets the Commission would presume that the merger is in the public interest if it met certain conditions. For mergers in markets smaller than the 20 largest markets, the merger would be considered to not be in the public interest. **However**, the presumptions appear to be rebuttable according to a series of factors that will be taken into account in the "individualized determination."

In the press release accompanying Chairman Martin's proposal he claims that it "is notably more conservative in approach than the remanded newspaper/broadcast cross-ownership rule that the Commission adopted in 2003." **The analysis in this section shows that, because of the massive ambiguity in the proposal, this claim is, at best, misleading**.

While it is true that FCC's 2003 remanded rule "would have allowed transactions in the top 170 markets," it is not true that "[t]he rule Chairman Martin proposes today would allow only a subset of transactions in the top 20 markets, which would still be subject to an individualized determination that the transaction is in the public interest." Contrary to this claim, Chairman Martin's proposal would allow mergers in ***all*** 210 markets, subject to an individualized determination. Moreover, under Chairman Martin's approach, it appears that the most concentrated media markets have the fewest protections against the exercise of market power and excessive influence by media companies.

The analysis in this section uses data in the current proceeding record to show that Chairman Martin's proposal is completely undefined – essentially a blank check for the Commission to approve mergers across a wide range of markets. Depending on how the factors and conditions are defined and applied, Chairman Martin's proposal could have dramatically different effects on media markets. The proposal fails to provide the public with any idea whatsoever, of what the FCC's merger policy would look like.

1. The Most Protection Where it is Least Needed

The proposal starts with the presumption that mergers are in the public interest if they meet the following conditions:

> Under the new approach, the Commission would presume a proposed newspaper/broadcast transaction is in the public interest if it meets the following test:
>
> (1) the market at issue is one of the largest Nielsen Designated Market Areas (DMAs);
>
> (2) the transaction involves the combination of a major daily newspaper and one television or radio station;
>
> (3) if the transaction involved a television station at least 8 independently owned and operated major media voices (defined to include major newspapers and full power commercial TV stations) would remain in the DMA following the transaction; and
>
> (4) if the transaction involves a television station, that station is not among the top four ranked stations in the DMA.
>
> All other proposed newspaper/broadcast transactions would continue to be presumed not in the public interest.
>
> "Moreover, notwithstanding the presumption under the new approach, the Commission would consider the following factors in evaluating whether a particular transaction was in the public interest:
>
> (1) The level of concentration in the DMA;
>
> (2) a showing that the combined entity will increase the amount of local news in the market.
>
> (3) a commitment that both the newspaper and the broadcast outlet will continue to exercise its own independent news judgment; and
>
> (4) the financial condition of the newspaper, and if the newspaper is in financial distress, the owners' commitment to invest significantly in newsroom operations.

The first set of conditions, which create the assumption that the proposed merger is in the public interest, do not appear to apply to markets outside the top 20. The factors that can be used to rebut the presumption appear to apply to **<u>all</u>** markets. In other words, by explicitly applying conditions to the top 20, but not applying them to markets outside of the top 20, it appears that proposal is structured to allow mergers outside of the top 20 markets that could involve top 4 ranked stations, where there are fewer than 8 voices and the merged entity owns a duopoly – subject, of course, to the "individualized determination." To be sure, even within the top 20 markets, it is possible to propose a merger that violates the conditions and take on the task of rebutting the presumption that the merger is not in the public interest. But if the conditions of non-top 4 and eight voices are important to prevent excessive concentration, they ought to apply to all markets.

The evidence in this proceeding shows quite clearly that the larger the market, the less concentrated the media tend to be. So Chairman Martin's proposal has the ironic effect of providing the greatest protection where it is least needed. The entire weight of protecting the public interest falls on the factors that will be used to evaluate mergers in "individualized determinations." These factors are described as follows for the top 20 markets:

> (i) whether the cross-ownership will increase the amount of local news disseminated through the affected media outlets in the combination;
>
> (ii) whether each affected media outlet in the combination will exercise its own independent news judgment;
>
> (iii) the level of concentration in the Nielsen Designated Market Area (DMA); and
>
> (iv) the financial condition of the newspaper, and if the newspaper is in financial distress, the owner's commitment to invest significantly in newsroom operations.

If Chairman Martin really wanted to "allow only a subset of transactions in only the top 20 markets," he could have easily done so by saying mergers in markets outside of the

top 20 are banned. He chose not to. Therefore, it must be presumed that the rule contemplates mergers in all markets subject to an "individualized determination."[14]

2. Ambiguities in the Conditions and Factors Governing Individual Determinations

The conditions that shift the burden of the presumption and the factors that could be used to rebut the presumption are not defined anywhere in the proposal. They have all be the subject of considerable controversy in this proceeding and how they are defined would have a huge impact on how the rule would affect media markets.

The Designated Market Area is not the proper geographic unit of analysis. The remanded rule used a much smaller unit of analysis – the Arbitron market. We have shown that the DMA is far too large for newspapers and radio, both of which are implicated by the Chairman's proposal.

The 8-voice test is unsupported and undefined. In the past, the FCC has counted newspapers with more than a five percent market share for purposes of implementing its rules. Is this the definition of "major" newspaper? In the past, the FCC used an 8-voice test, but the courts have never found that this standard is correct. In two prior proceedings, the courts found so many flaws in the FCC rules that they remanded them without ever passing judgment on the reasonableness of the 8-voice standard.

In the remanded rule, the FCC totally botched the concentration analysis. The court explicitly accepted the idea of concentration analysis, but told the FCC to do a better job. Simply saying "we will do it," without explaining how, as Chairman Martin's proposal does, is not the solution.

[14] It should also be noted that in the op-ed piece in the New York Times – which must stand for the public notice of the proposal since it was never published in the Federal Register – the Chairman failed to mention that mergers could be allowed in markets outside of the top 20.

Defining and measuring the amount of local news provided has proven to be difficult. Measuring an increase in the amount of local news will be even more difficult. Three different FCC studies used three different approaches to counting local news and came up with three different estimates of the amount of local news.

The eight voice test and the top-4 exclusion are carryovers from earlier proceedings, but their fundamental application is different in Chairman Martin's proposal. In those proceedings, they were absolute lines in the sand. If there were more than eight voices, a merger was allowed; if there were not, the merger was not allowed. In this proceeding, these thresholds give only a rebuttable presumption. They give away less (only a rebuttable presumption), but the take away more (a prohibition on mergers).

Beating the thoroughly discredited proposal of Chairman Martin's predecessor is hardly a relevant standard by which to judge the proposal. The remanded rule missed the mark by a wide margin, and just doing a little better or even a lot better does not promote or protect the public interest. Providing an approach that makes it impossible to know, with any level of precision, just how media markets will be affected is not an adequate response. As written, Chairman Martin's proposal could literally mean that anything goes. Which mergers will be allowed in which markets depends entirely on how the factors for evaluating mergers are applied. Unfortunately, the Chairman's proposal provides no guidance whatsoever on how the factors will be interpreted.

Given this lack of clarity in the proposal, we must start from the assumption that anything goes and explore how local media markets would be affected. If we conclude that a loose interpretation of the factors does not protect the public interest, we can then begin to identify how more stringent interpretations of the factors and conditions might protect the public interest.

These comments demonstrate that the controversial definitional issues ignored by Chairman Martin's proposal would have a huge impact on the effect of the rule. These are exactly the type of issues that should be laid out in a Further Notice of Proposed Rulemaking so that the public can have the opportunity to comment on the proposed rule. Without following such an approach, the public has been asked to accept a pig in a poke.

B. Analyzing the Potential Effects of the Martin Rule

In these comments we analyze four key ambiguities that afflict Chairman Martin's proposal.

1. Whether the top-4 exclusion should apply to all markets
2. Whether the 8-voice test should take audience size into account and be based on all outlet or news outlets.
3. How a simple distinction of whether or not a TV stations produces local news affects the outcome, as opposed to a more rigorous approach to the quantity of news produced.
4. How concentration analysis based on a strict adherence to the Department of Justice (DOJ)/Federal Trade Commission (FTC) *Merger Guidelines* affects the "individual determination."

All of the elements to conduct such an analysis already exist in the record. Had the Chairman followed proper procedure and issued a Further Notice of Proposed Rulemaking, his proposal would have already reflected the evidence in the record as a basis for further analysis. Since the time frame allowed for a response to the Chairman's off-the-cuff proposal was short, we rely primarily on the evidence already in the record. This includes several data sets: the one relied on by consumer groups in the comments filed in 2002 and 2003; the one relied on by consumer groups in he comments filed in 2006; and the most recent data set developed by consumer groups based on the FCC's 10 Media Ownership Studies (2007).

a. The Standard for Promoting the Public Interest

As noted, the Supreme Court has determined that "the widest possible dissemination of information from diverse and antagonistic source is essential to the public welfare." The record evidence shows that broadcast television stations and daily newspapers are overwhelmingly the leading source of local news and information. It also shows (with both quantitative and qualitative evidence) that media ownership matters in the slanting or biasing of the coverage and presentation of the news. The loss of independence of one of these important media outlets through a merger runs counter to the express goal of promoting the "widest possible dissemination of information from diverse and antagonistic sources."

In an earlier analysis, we have shown that the FCC has improperly shifted its charge under the Communications Act from *promoting* the public interest to *doing no harm to* the public interest. The Supreme Court language "widest possible," suggests the proactive goal.

The specific merger authority also indicates that mergers should promote the public interest. When contemplating any relaxation of media ownership limits, the Commission must conduct a full inquiry into the complex set of goals that the Communications Act has established, as suggested by Exhibit 1.

Exhibit 1: The Public Interest and the Chairman's Proposal

	Promote the Public Interest	**Protect the Public Interest**
Diversity/Antagonism		
Widest possible Dissemination		

b. The *Merger Guidelines*

Throughout these proceedings, we have applied the market structure analysis and competitive harm assessment embodied in the *Merger Guidelines* authored by the Department of Justice (DOJ) and the Federal Trade Commission (FTC). We have advocated strict adherence to the *Guidelines*. As we have explained repeatedly throughout these proceedings, the *Merger Guidelines* were adopted to assess the potential impact of mergers on economic market structures. While the courts have rejected the FCC's application of market structural analysis, they have endorsed the general approach.

The *Guidelines* define three categories of markets using a measure known as the HHI (Hirschman Herfindahl Index). The index is calculated by measuring the market share of the individual firm, squaring it, multiplying by 10000 to clear the fraction, and summing across all firms in the market. Markets with an HHI less than 1,000 are said to be unconcentrated. A market with 10-equal sized firms would have an HHI of 1,000.[15] Markets with an HHI of 1800 are said to be highly concentrated. A market with six equal sized firms would have an HHI of 1667. Thus, highly concentrated markets are said to be markets with fewer than 6 equal sized competitors.[16]

These thresholds have been chosen based on theory, empirical evidence and experience with the exercise of market power. Mergers between firms that result in markets that are moderately or highly concentrated raise concerns. As stated in the *Merger Guidelines*:

> b) <u>Post-Merger HHI Between 1000 and 1800</u>. The Agency regards markets in this region to be moderately concentrated… Mergers producing an increase in the HHI of more than 100 points in moderately concentrated markets post-merger

[15] HHI = (.10*.10*10000) + (.10*.10*10000) +(.10*.10*10000) +(.10*.10*10000) +(.10*.10*10000) +(.10*.10*10000) +(.10*.10*10000) +(.10*.10*10000) +(.10*.10*10000) +(.10*.10*10000).

[16] HHI = (.1667*.1667*10000) + (.1667*.1667*10000) + (.1667*.1667*10000) + (.1667*.1667*10000) + (.1667*.1667*10000) + (.1667*.1667*10000)

> potentially raise significant competitive concerns depending on the factors set forth in Sections 2-5 of the Guidelines.
>
> c) Post-Merger HHI Above 1800. The Agency regards markets in this region to be highly concentrated…. Mergers producing an increase in the HHI of more than 50 points in highly concentrated markets post-merger potentially raise significant competitive concerns…. it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise.

These are fairly small changes in market concentration that trigger concerns. That is, mergers in moderately concentrated markets that raise the concentration by as little as 5.5 percent are deemed to be a competitive concern. Mergers in highly concentrated markets that raise the level of concentration by less than 3 percent are deemed to be of concern.

These thresholds are designed for situations that involve only economics. One can argue that the health of democratic discourse is more important and deserves even higher standards, but for the purposes of these comments we accept the thresholds in the *Merger Guidelines.* We have shown in this proceeding that the tendency of antitrust practice to be more lax than the guidelines, should not lead the FCC to adopt a lower standard. First, the theory of collusion under which the FTC has allowed mergers to go forward is inappropriate for democratic discourse in media markets. Second, the FTC actually imposes much stricter standards than the average on certain industries because of their importance or economic fundamentals. Because media markets are so important to the health of democratic discourse, we believe they deserve to be held to the highest standard, which leads us to apply the thresholds outlined in the *Merger Guidelines* as triggering concern.

1. The Top-4 Exclusion should be a Hard Bar and Top-4 or Big-4?

The top-4 firm exclusion, if it were rigorously enforced is actually an important approach to protecting the public interest. A ban on mergers involving top 4 stations would parallel the ban on duopoly mergers involving the big 4 networks (ABC, NBC, CBS and Fox), which have been upheld repeatedly by the courts. The logic is that the major networks have a uniquely powerful position in the media market. The extension to newspaper-TV cross ownership situations is straight forward since 93 percent of the top 4 ranked stations are also big 4 stations, while 78 percent of the non-top-4 ranked stations are not big-4 affiliates (see Exhibit 2). Viewed the other way, 90 percent of the non-Big 4 affiliates are not ranked in the top 4, whereas 85 percent of the Big 4 affiliates are Top-4 stations.

Exhibit 2: Top 4 Stations are Overwhelmingly Big 4 Network Affiliates

	Big 4 Affiliated?		
	No	Yes	Total
Percent of Non-Top 4 Ranked Stations	78%	22%	100%
Percent of Top 4 Ranked Stations	7%	93%	100%

	Top 4 Ranked?		
	No	Yes	Total
Percent of Non-Big 4 Affiliated Stations	90%	10%	100%
Percent of Big 4 Affiliated Stations	15%	85%	100%

Source: Free Press database, calculated from BIA Financial.

Thus, there is a strong correlation between top-4 rank and Big-4 affiliation. The concern about market power resulting from a merger between a newspaper and one of these stations would be quite strong based on both the market share that the post-merger firm would have, and the fact that it is very likely to also be a Big-4 network with its added influence in the market.

a. Stations Producing Local News

The strong correlation between the top-4 and big-4 variables implicates another of the key factors the Chairman's proposal says will be considered in the individualized determination" – the status of news production. One of the criteria that might be used to allow or disallow mergers is "a showing that the combined entity will increase the amount of local news in the market."[17] Measuring any increase in the amount of local news in the market is going to be a challenging task. As we have shown in our earlier comments in this proceeding, cross-ownership tends have a crowding out effect. While cross-owned stations might produce more news (although we do not find this to be true), non-cross-owned stations may do less news in response to the competitive harm caused by the cross-ownership. One circumstance that would, on its face appear more likely to increase the amount of news in the market is where a cross-ownership merger induced a TV station that did not do news to start doing so. A long-term indirect effect might be to drive non-cross-owned stations to do less news, but the initial impact of adding news to a station that did not produce local news prior to the merger would appear to increase the amount of local news in the market.

The top-4/Big 4 exclusion is reasonable in this regard as well because they overwhelmingly tend to already provide local news (see Exhibit 3). Exhibit 3 shows that 86 percent of the top-4 stations produce news and 87 percent of the big-4 stations produce news. For stations that are both top 4 and big 4, the figure is almost 90 percent. In contrast, less than 20 percent of stations that are neither top-4 nor big-4 provide local news.

Exhibit 3: Percent of Stations Providing Local News

Top 4	Big 4 Affiliated?		
Ranked?	No	Yes	Total
No	18%	77%	30%
Yes	46%	89%	86%
Total	21%	87%	62%

Note: Stations providing local news are defined as non-satellite commercial stations with a local news program listing plus any stations in the Crawford Study ("Study 3") database that have a news director listed in the BIA database and a non-zero entry for local news programming in the Study 3 database.

Source: Free Press database, calculated from BIA Financial; Study 3 database.

[17] The language about local news production at the "market" level is contained within the Chairman's press release. However the text of the rule itself refers to the "amount of local news disseminated through the affected media outlets in the combination."

This analysis shows that approximately 59 percent of the commercial TV stations are top 4 or big 4 and already do local news. It is difficult to imagine the public interest being served by allowing these stations to merge with a major local newspaper and easy to see how the public interest would be harmed.

2. The Eight Voice Count: It Should be Audience-Weighted, News Voices

The second market structural factor that the Chairman's proposal identifies is the total number of media voices in the market. As was the case for the top-4 factor, the threshold chosen – eight voices – is also a hangover from the duopoly rules. The FCC allowed duopolies in markets with more than eight media voices. However, the threshold was not endorsed by the courts. Neither the D.C. Circuit in *Sinclair v. the FCC* nor the Third Circuit in *Prometheus v. the FCC* upheld the eight voice threshold.

The eight voice standard as applied by the FCC suffers from fundamental flaws. It is derived from the *Merger Guidelines* in an *ad hoc* manner. As we have seen, under the *Merger Guidelines* a market with an HHI index of less than 1000 is considered to be unconcentrated. Mathematically, a market with ten firms that have equal market shares produces an HHI of 1000. Thus, it is convenient to say that a market with ten or more equal-sized competitors is unconcentrated. Similarly, a market with an HHI above 1800 is said to be highly concentrated. A market with six firms with equal market shares has an HHI of 1667, while a market with 5 firms with equal market shared produces an HHI of 2000. Thus, it is convenient to say that a market with fewer than six equal sized competitors is highly concentrated.

The FCC averaged the two standards to arrive at its threshold of eight voices. There are two problems with this approach. First, as we pointed out, democratic discourse demands a high threshold. Thus, the FCC should apply the 10 voice test. Second, while the HHI can be interpreted in terms of equivalent equal-sized voices, that is only a convenient way of describing the threshold, not a statement about market reality. **One must actually look at the market shares of the firms to evaluate the level of concentration in the market.** Just because there are 10 firms in the market, does not mean they are equal-sized. The FCC does something the DOJ/FTC never would. It just assumes equal market shares, an assumption that completely distorts the analysis, as the Third Circuit made abundantly clear in remanding the earlier rule.

Simple numerical example makes the point. A market that has one firm with a 64 percent market share and 9 firms with a 4 percent market share each would have an HHI of 4240 and be considered highly concentrated. A merger between the dominant firm and one of the small firms would raise the HHI by 512 points, an increase that is ten time the *Guideline* threshold. A merger between two of the smaller firms in the market would increase the HHI by a mere 32 points, considerably below the threshold of concern.

Another ambiguity in the voice count test derives from the fact that the Chairman's proposal is focused on news and information, but the counting of voices has not focused on news and information in the past, and may not in the future. Several of the factors and conditions involve the production of news. The Third Circuit made it clear that in evaluating sources like cable and the Internet, the FCC should focus on news and information. Yet, as practiced in the past, the eight voice test counted all outlets, whether or not they provide news. In particular, only about 60 percent of TV stations produce local news. One can argue that the 40 percent that do not produce local news should not be included in the voice count.

Another ambiguity arises on the newspaper side of the equation. Newspapers cover local news, but many of them have very small circulation. The FCC's ban on mergers involving newspaper-TV combinations applied to newspapers with more than a 5 percent market share. However, it seems odd to count a newspaper with a 5 percent market share as equal to a newspaper with a 95 percent market share for purposes of the voice count factor.

For the purposes of this analysis, we consider only two of these ambiguities and how they interact to produce very wide differences in the impact of the rule. We examine the two characteristics that the Third Circuit court expresses a strong opinion about. That is we look at the difference between a voice count that includes all TV stations v. those that produce news[18] and we look at the difference between a simple count and an audience weighted count.[19] Because the condition is stated in terms of the post-merger number of voices, the analysis also must take into account whether or not the TV stations that is the target of the merger proides local news. The result is a very wide range of markets that might or might not pass the 8-voice test (see Exhibit 4).

Exhibit 4: The Number of Markets Passing the 8-Voice Test

Number of DMA Markets Passing The 8-Voice Test	Pre-Merger 9 (TV Station Does News) Type of Outlet		Pre-Merger 8 (TV Station Does NOT Do News) Type of Outlet	
	All	News Only	All	News Only
Number of Outlets Assumes Equal-Sized	117	29	154	46
Market Share Weighted	13	8	30	22

Sources: CFA 2003 database for equal-sized analysis. CFA 2005 database for Market Share Weighted analysis.

The number of markets that would pass the 8-voice test varies from as low as 8 toas high as 154, depending on the way the counting is implemented. Including either a news voice only approach or an audience-weighted voice count lowers the number of markets in which mergers would be allowed sharply.

[18] We assume that all newspapers produce local news and count only TV stations that provide local news.

[19] We derive the audience weighted count by setting the number of TV stations equal to the inverse of the TV total day HHI. We derive the newspaper voice count by setting the number equal to the inverse of the daily circulation HHI.

3. Market Concentration: The *Merger Guidelines* Should Apply

Evaluating the impact of the market concentration screen is a more complex proposition than the other factors/conditions because it is merger specific. Unlike the three factors discussed above, the market concentration analysis depends on the market shares of the merging entities.

To assess the importance of the market concentration factor, we have extracted a subset of the markets and examined the impact of a number-one ranked newspaper merging with a number-5 ranked TV station. We have analyzed 59 markets – the top 20 and every fifth market outside of the top 20. Exhibit 5 shows the market shares for the top three daily newspapers in this subset of markets. There is a clear relationship between market share for the leading firm and market size (r=.57). Interestingly, there is no such relationship for the second and third largest dailies. Note also that once we move beyond the top 20 markets, the difference between the leading newspaper and the second and third newspapers grows sharply.

Exhibit 6 shows the market shares of the number one, number four and number five TV stations in each of the sample markets. The pattern is similar except that the market share of the dominant TV stations generally much lower than the market share of the dominant newspaper. They do tend to increase as market size declines and the relationship is stronger (r=.85).

Exhibit 5: Newspaper Market Shares

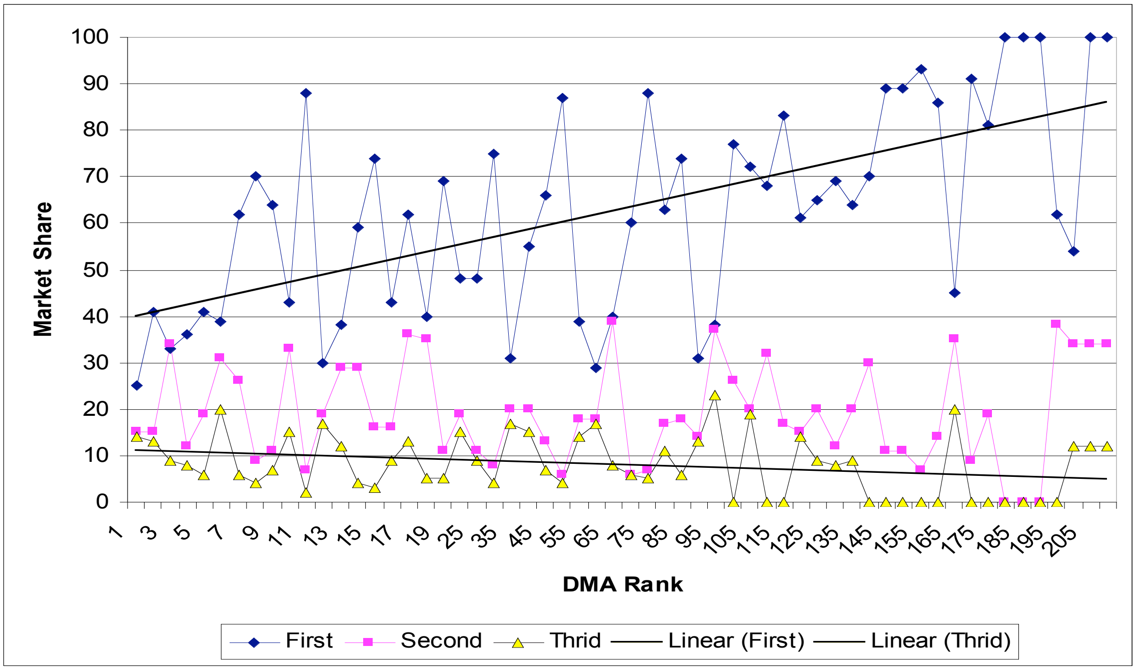
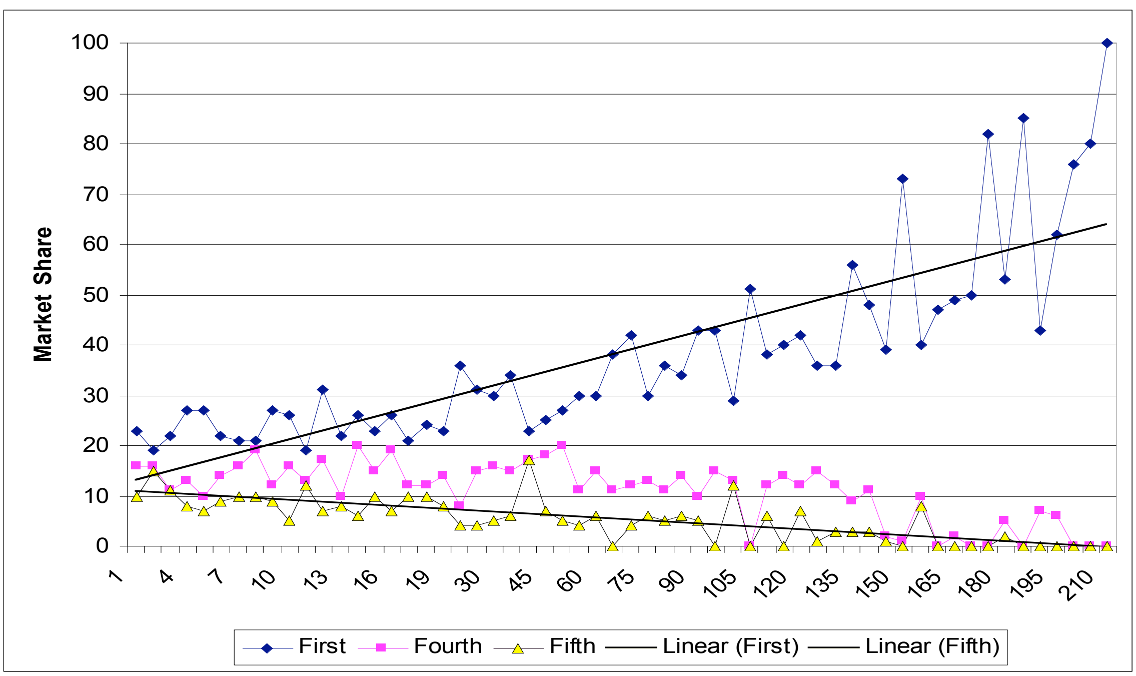


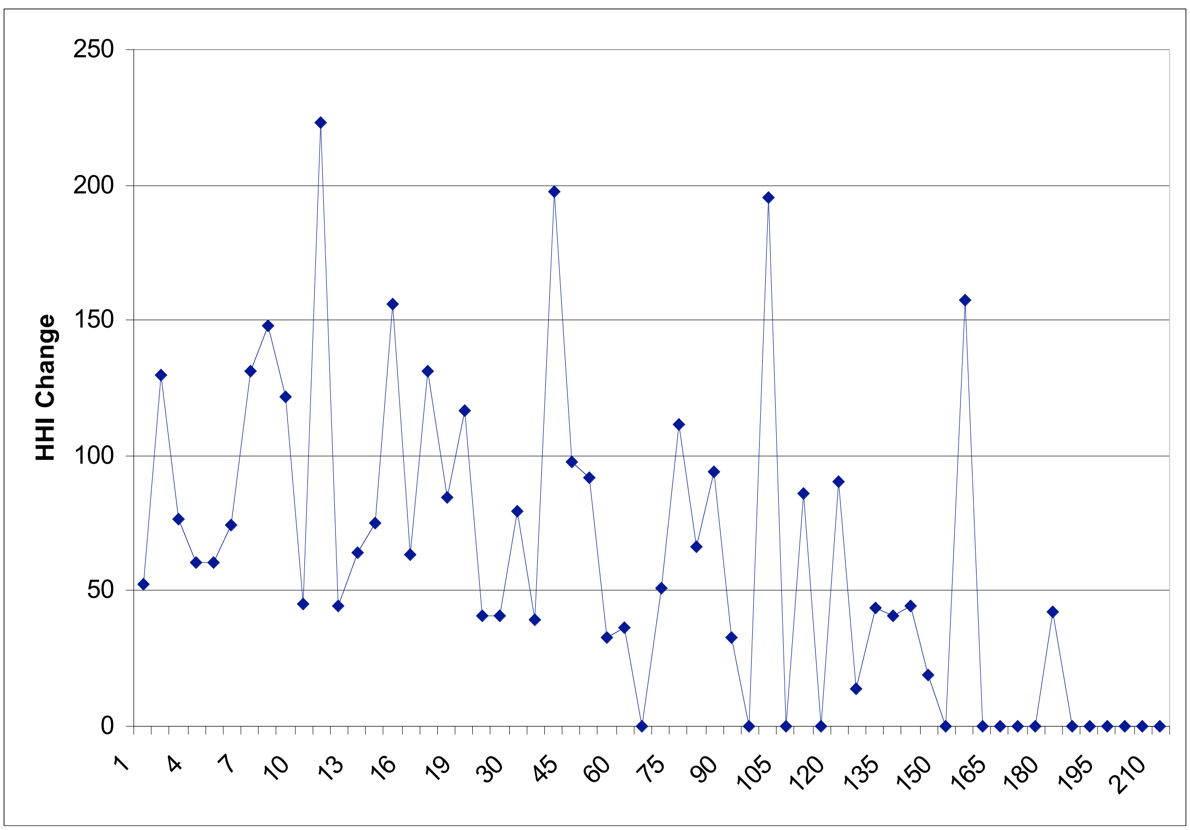
Exhibit 6: TV Market Shares



However, since we have seen the correlation between top-4 market rank and big 4 affiliation, there is more at work in the distinction. In fact, 87 percent of the fourth ranked stations are also big-4 affiliates, more than twice the percentage of fifth ranked stations (39 percent) that are. Fourth ranked stations are much more likely to provide local news than fifth ranked stations (68 percent v. 40 percent).

Thus, this analysis utilizes the top-4 factor as the screen for merger concentration analysis. Simply, we analyze the impact of a number one newspaper merging with a number 5 TV station. This is the worst case scenario if the top-4 exclusion is a hard bar to mergers (see Exhibit 7).

Exhibit 7: Impact of Dominant Newspaper/No. 5 TV Stations Mergers on Market HHI



In the top 20 markets, where the markets tend to be moderately concentrated, a 100 point increase would violate the *Merger Guidelines.* About half of the 1-5 mergers would do so. In these markets, there would be stations with smaller market shares that are available. Outside of the top 20, the markets tend to be highly concentrated and a 50 point increase would violate the *Merger Guidelines.* Here there are three roughly equal outcomes. In about 40 percent of the markets, there is no fifth ranked TV station. In about 30 percent of the markets, a merger between the dominant newspaper and the number five TV stations violates the *Merger Guidelines.*

Exhibit 8 shows two aspects of the market concentration impacts of various types of mergers. It shows the average change in the HHI and the percentage of mergers that violate the *Merger Guidelines.* Mergers involving the top for TV stations consistently violate the *Merger Guidelines.* A majority of the mergers involving the fifth ranked station in the 20 largest markets would not violate the *Guidelines*, but over 70 percent of those in markets outside the largest 20 would.

Exhibit 8:
Merger Impact on Market Concentration and Status under the *Merger Guidelines*

Outlet Rank		Percent Violating Guideline		Average Change in HHI	
Newspaper	TV	20 Largest Markets	190 Smallest Markets	20 Largest Markets	190 Smallest Markets
1	1	100%	100%	253	711
1	2	100%	100%	221	339
1	3	95%	100%	192	223
1	4	70%	92%	127	148
1	5	45%	71%	95	74

C. The FCC has Improperly Defined Media Markets

The above analysis examines the market and firm characteristics that will affect the "individual determinations" based on the designated market area as the unit of analysis. For both the TV stations and, especially for newspaper, that market definition is too large. Broadcast TV stations are not available over the air throughout the DMA.

Prior analyses by the FCC have recognized this by conducting "contour B" analysis. With the advent of cable distribution, most households receive broadcast stations in their basic cable service. Broadcast stations have a right to demand carriage in their markets. However, not all stations reach all households.

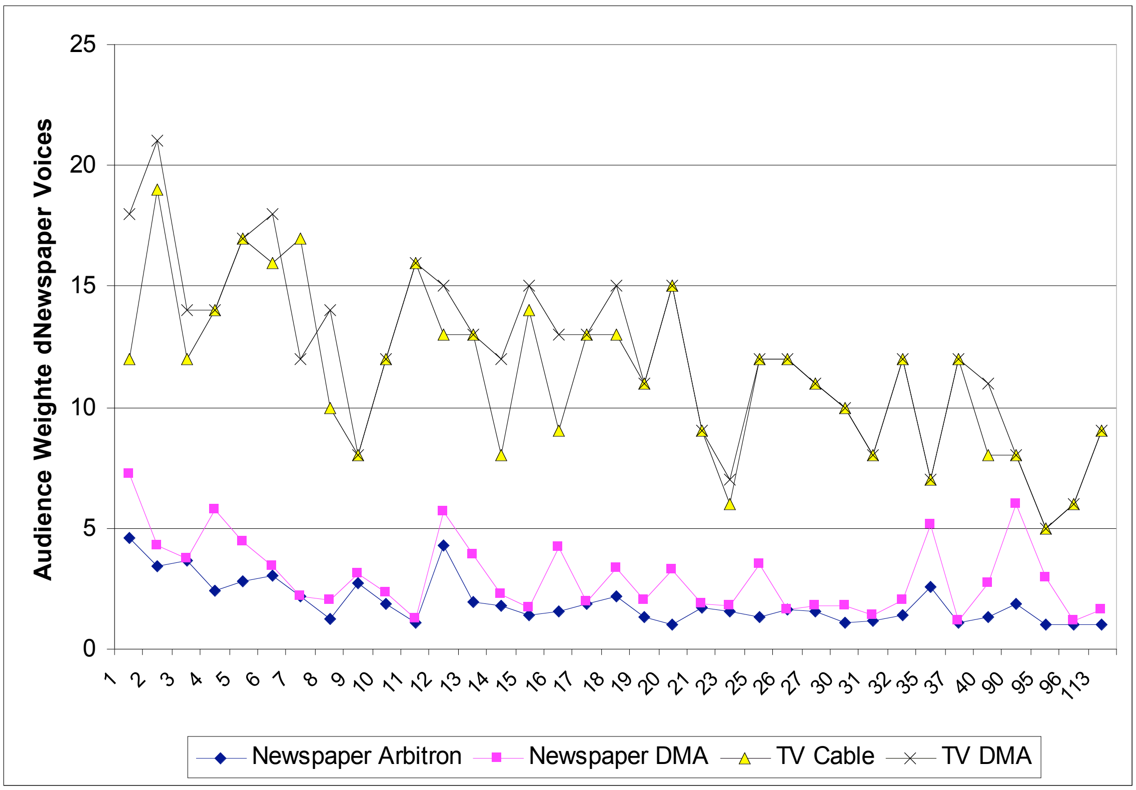
We have shown that newspaper circulation does not spread evenly over the DMA. Many DMAs are far too large. The Arbitron area is a much better approximation of the newspaper market.

To assess the potential impact of these flaws in market definition on the Chairman's proposal, we have examined alternative market definitions for 35 markets for which we had the full cable channel listings from an earlier study filed in this proceeding. This set of markets includes all the top 20 markets and 15 other markets ranked from 21 to 113. While it is not a representative sample, it shows that market definition matters and would matter more in the smaller markets that were not samples.

We compared the number of broadcast stations listed in the cable program to the total number of stations in the FCC database. For newspapers, we calculated the HHI for daily newspaper circulation based on the Arbitron area and the DMA, ascribing all circulation to the Arbitron area.

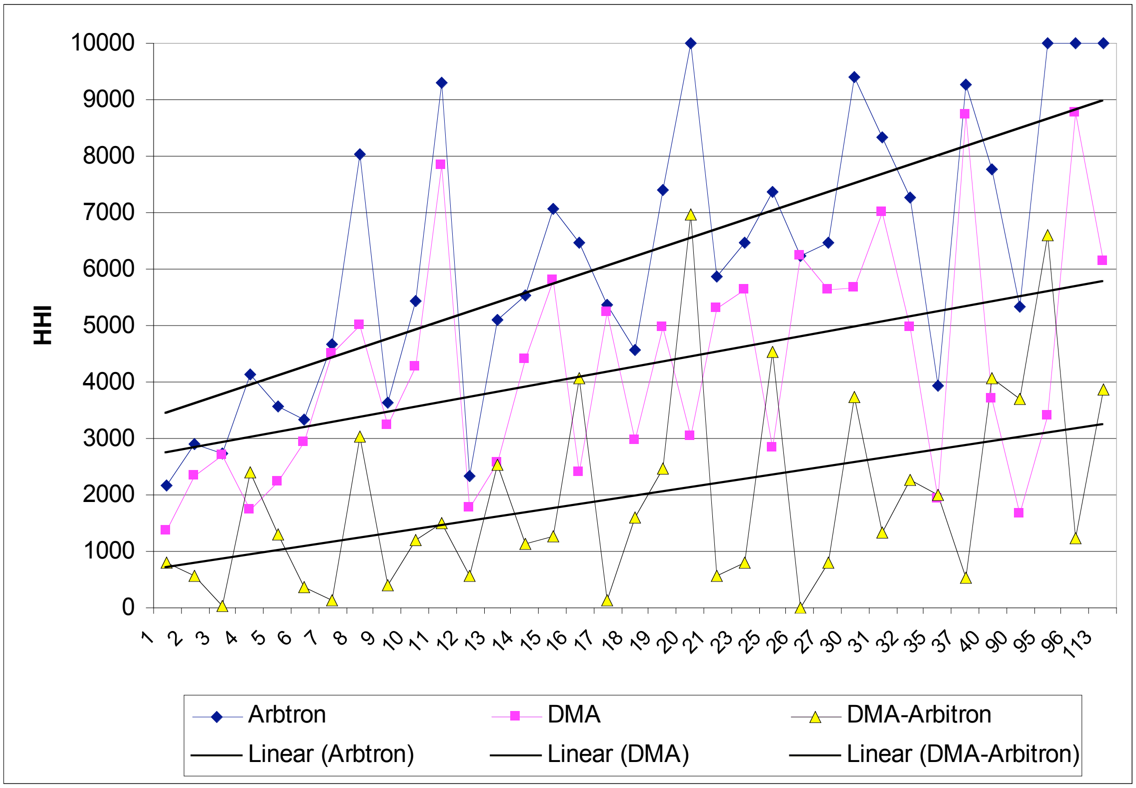
On average, using simple counts the difference in both the TV station count and the newspaper count was about one per market (See Exhibit 9). That is, counting all TV stations in the DMA leads to a small over estimation of the number of TV stations received by the typical household in the DMA. The same is true for newspapers. This difference would not change many of the determinations of whether or not a market passes the 8-voice test. It would have a bigger impact if the FCC used a 10-voice test.

Exhibit 9: Comparison of Market Definitions and Simple Voice Count



The market definition would have a much larger impact on the market concentration analysis because of the impact on the estimation of newspaper market concentration. As Exhibit 10, shows, on average, newspaper circulation is about 2000 points more concentrated with the Arbitron market definition than the DMA market definition. The trend lines suggest the trend lines suggest that the smaller the market, the larger the impact of market definition. Thus, careful market definition is critical to reasonable analysis.

Exhibit 10: Impact of Alternative Market Definition on Newspaper Market Concentration



D. The Chairman's Proposal is Essentially Hollow, Telling us Nothing About the Impact of the Rule on Media Markets

Our purpose in this paper has not been to advocate a position on the factors and conditions mentioned in the Chairman's proposal, rather, our purpose has been to demonstrate that the proposal itself is hollow, since it fails to define its key concepts or indicate how they will be applied. By identifying alternative definitions and implementations of concepts that are well grounded in the record of the proceeding and the court cases that have preceded it, we have shown that there could be a vast difference in the impact of the rule on media markets.

At one extreme, almost any merger could be found to pass one of the factor tests. Would that secure approval? If so, virtually every market and every TV stations would be a potential acquisition target. At another extreme, if each of the factors and conditions were defined to set a high threshold (as defined above), measured rigorously and applied sequentially and cumulatively, only a handful of mergers would be allowed in a handful of markets.

The Chairman's claim that his proposal "would allow only a subset of transactions in the top 20 markets, which would still be subject to an individualized determination that the transaction is in the public interest" is only true under a strict definition and applications of multiple screens (see Exhibit 9). While it is possible to identify how each of the factors and conditions would promote or protect the public interest, without knowing how they will be defined and implemented, it is entirely unclear whether the factors and conditions will achieve their purpose.

Exhibit 11: The Public Interest and the Chairman's Proposal

	Promote the Public Interest	Protect the Public Interest
Diversity/Antagonism	Localism, Minorities	Independent news voices Top -4 Voice count
Widest possible Dissemination	Distressed firm provision Increase amount of news	Concentration

For example, applying a market-weighted 8-voice, news only count test for mergers that do not involve a TV station that produce local news, yields 22 markets in which the merger could pass the screen. While there are 284 TV stations in those markets, only 196 are not ranked in the top 4, but only about 45 of those do not provide news (the case where the commitment to increase news can clearly be demonstrated). F the market concentration analysis is based on news market shares, there would be no increase in concentration (since the station has zero news market share). If the audience market share for all outlets is used to evaluate the merger, our analysis shows that just under half of the mergers would fail a strict *Merger Guidelines* standard.

The Third Circuit expressed great displeasure with market structure analysis that was not grounded in reality. It also emphasized the importance of local news and information in its evaluation of media outlets. While it accepted the antitrust market structure approach to the analysis, it found so many flaws in the FCC's proposed rules and remanded them without taking a position on the eight-voice threshold.

The market reality, on which any changes in the rules must be based, reflects the highly concentrated nature of media markets in America. The *point* of the analysis and the creation of the conditions and factors is to *promote the public interest*, not open the door to as many mergers as possible.

To say that the devil is in the details is a gross understatement, The Chairman's proposal tells us almost nothing. This analysis has shown that the vague and ill-defined proposal put forward by Chairman Martin cannot claim to protect the public interest and promote the "widest possible dissemination of information from diverse and antagonistic sources." There are many configurations of the "factors" and "conditions" that will be used "in evaluating a particular transaction" in which the public interest would not be served. Defining the factors/conditions properly imposing all of the conditions properly and imposing them all on proposed mergers is essential to making a colorable claim that the rule does not harm the public interest. While it could be argued that extremely strong definitions of some factors are sufficient to promote the public interest (e.g. a failing firm proviso, or a commitment to produce news at stations that have not done so), the Chairman's proposal fell far short of that mark.

Leaving the factors/conditions completely undefined, as the Chairman has in his proposal, and failing to provide an adequate opportunity to comment on an actual proposed rule, casts severe doubt on the value of the proposal. The public deserves a much more detailed explanation of what the rule would look like so it can fully comprehend and comment on the rule. The Commission cannot defend the rule without providing a much more detailed analysis of how the rule would operate in practice.

III. The Commission Must Seek Further Comment on the Details of a Proposed Rule

The FCC must put out a further notice detailing the proposed rule, and must provide more detail than in the Chairman's press release. Based on the Third Circuit's previous instructions, if the FCC adopts a rule without further notice, likely the Third Circuit will promptly send the rule straight back to the Commission to provide adequate notice.

A. The Third Circuit Specifically Required the Commission to Provide Detailed Notice of the Cross-Ownership Rule on Remand

If the FCC does not put out a further notice detailing a proposed rule, the FCC is merely repeating the same mistake made by Chairman Powell's Commission in 2003. In 2003, the FCC provided inadequate public notice, and the Third Circuit specifically warned the FCC to provide better notice on remand, specifically regarding the cross-ownership rule. In 2003, the FCC replaced the cross-ownership ban with Cross Media Limits based on a Diversity Index. The Third Circuit provided an "extensive and detailed criticism" of the Diversity Index.[20]

Beyond substantive problems, the *Prometheus* Court devoted an entire section to the proposition summed up in the heading-title: "The Commission should provide better notice on remand."[21] The Court explained that a remand of the cross-ownership issues would provide the Commission with "an opportunity to cure its questionable notice."[22] The Court was unmistakable: "As the Commission reconsiders its Cross-Media Limits on remand, it is advisable that any new 'metric' for measuring diversity and competition in a market be made subject to public notice and comment before it is incorporated into a final rule."[23] Nonetheless, though the Commission is reconsidering cross-media limits, and using metrics such as eight-voice diversity

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[20] FNPRM, 2006 Biennial Review, rel. July 24, 2006, ¶32.
[21] Prometheus Radio Project v. FCC, 373 F.3d 372, 411 (3d Cir. 2004).
[22] *Id.*
[23] *Id.* at 412.

tests and references to market concentration, the Commission has not provided public notice on the rule or the proposed factors.

In this remand, if the Commission adopts the Chairman's proposal (or some clarification of the proposal), the Commission provided inadequate notice under any measure, let alone when the remanding court specifically required the Commission to put the proposed rule, or its underlying metrics, out for public comment. Here, the Commission merely asked the following general questions, with no notice of the factors later incorporated into Chairman's press-release proposal:

> We invite comment on all of the issues remanded by the *Prometheus* court regarding cross-ownership. … To the extent that we will not use the [Diversity Index] to justify changes to the existing cross-ownership rules, we seek comment on how we should approach cross-ownership limits. Should limits vary depending upon the characteristics of local markets? If so, what characteristics should be considered, and how should they be factored into any limits? We seek comment on the newspaper/broadcast cross-ownership rule and the radio/television cross-ownership rule. Are there aspects of television and radio broadcast operations that make cross-ownership with a newspaper different for each of these media? If so, should limits on newspaper/radio combinations be different from limits on newspaper/television combinations? Lastly, are the newspaper/broadcast cross-ownership rule and the radio/television cross-ownership rule necessary in the public interest as a result of competition?[24]

If the Commission adopts a cross-ownership rule from this notice, it will have clearly failed to heed the Third Circuit's commands. This paragraph does not suggest any of the key components of the Chairman's press-release proposal. The public was not informed that the Chairman would draw a line with the top twenty markets; nor that a metric would involve eight "voices" in those markets; nor that a top-four television limit would apply to those markets; nor that the Commission would merely implement presumptions on an *ad hoc* basis in every market regarding every possible transaction. Rather, the FCC has not "provided better notice" on remand than it provided in the 2002 Review.

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[24] FNPRM, 2006 Biennial Review, rel. July 24, 2006, ¶32.

Even if the Court had not specifically directed the Commission to provide better notice, precedent interpreting the Administrative Procedure Act makes it apparent that the FCC must provide better notice of proposed rules, as commenters have urged for over a year.[25] Members of the public deserve to know how a potential ownership-rule change will affect their local media environments, not just that the Commission is considering making changes. If the public has notice of a proposed rule, it can provide empirical and anecdotal comment that would result in a more reasonable rule—a rule that a court may actually uphold. The *Prometheus* Court pointed out this well-known result: "As the Diversity Index's numerous flaws make apparent, the Commission's decision to withhold [the Index] from public scrutiny was not without prejudice."[26]

The Administrative Procedure Act (APA) requires that the Commission's notice include "either the terms or substance of the proposed rule" or "a description of the subjects and issues involved."[27] The FNPRM includes neither.

First, the FNRPM did not include the terms or substance of the Chairman's press-release proposal. While agencies are not limited to adopting final rules identical to proposed rules, the rules must be a "logical outgrowth" of the Commission proposal.[28] But the FNPRM provided no proposals, and "something is not a logical outgrowth of nothing."[29]

Second, the FNPRM did not adequately describe the subjects and issues involved in the Chairman's press-release proposal. The "essential inquiry" in assessing adequacy of notice is whether "commenters had a fair opportunity to present their views on the contents of the final plan."[30] The Commission must even provide notice of how the individual components of the rule fit together; notice of the "individual parts of a proposed rule is not necessarily notice of the

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[25] Reply Comments of United Church of Christ et al., at 40-46 (filed in MB Dkt. 06-121 et al.) (January 16, 2007).
[26] Prometheus, 373 F.3d at 412.
[27] 5 U.S.C. 553(b)(3).
[28] *See, e.g.,* Shell Oil Co. v. EPA, 950 F.2d 741, 751 (D.C. Cir. 1991).
[29] *Id.* at 1259 (citing Kooritzky v. Reich, 17 F.3d 1509, 1513 (D.C. Cir. 1994)).
[30] BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 642 (1st Cir. 1979).

whole."[31] Court emphasize that "general notice that a new standard would be adopted affords the parties scant opportunity for comment."[32] If merely noting that the agency might adopt new rules were sufficient notification, then "an agency could simply propose a rule and state that it might change that rule without alerting any of the affected parties to the scope of the contemplated change, or its potential impact and rationale, or any other alternatives under consideration."[33] Despite this established law, the FNPRM merely noted that the Commission might adopt new rules. The public did not have fair opportunity to comment on the final plan, nor did the Commission discuss the whole of the Chairman's press-release proposal (nor any of its individual parts).

The Chairman's press release proposal cannot substitute for the appropriate notice under the APA. The Third Circuit stated that the "Commission," not any one member of the Commission such as the Chairman, "should provide better notice on remand." As the D.C. Circuit recently held, the statements of individual Commissioners are not actions by the Commission.[34] Furthermore, Congress in the Administrative Procedure Act required notice to be provided in the Federal Register—not the *New York Times* editorial pages or any other means devised by an individual agency Commissioner.[35]

[31] 16 F.3d 1246, 1267 (D.C. Cir. 1994).
[32] *Id.*
[33] National Black Media Coalition v. FCC, 791 F.2d 1016, 1023 (2nd Cir. 1986).
[34] Sprint Nextel Corp. v. FCC, No. 06-1111 (December 7, 2007), *available at* http://pacer.cadc.uscourts.gov/docs/common/opinions/200712/06-1111a.pdf.
[35] 5 U.S.C. §553(b).

B. In Providing Further Notice, the FCC Should Explain the Reasoning of and Clarify the Startling Ambiguities in the Chairman's Press Release Proposal

Even if the Chairman's press-release proposal had been properly issued by the entire Commission and properly noticed, a further notice would be necessary to resolve the multitude of ambiguities inherent in the vaguely phrased press release. The Commission would have to provide both the basis for many of its judgments and clarify many of the rule's ambiguities. As the Commission must provide an FNPRM due to the Third Circuit's remand and other judicial precedent, the Commission can provide its reasoning and clarifications in a (required) FNPRM.

The Chairman's press-release proposal authorizes the Commission to determine, on a case-by-case basis, whether any cross-ownership in any town serves the public interest. The third paragraph of the Chairman's proposal establishes certain criteria for determining if a cross-owned combination might serve the public interest, including, "among other factors": (i) whether the cross-ownership will increase the amount of local news disseminated through the affected media outlets in the combination; (ii) whether each affected outlet will exercise independent news judgment; (iii) concentration in the Designated Market Area ("DMA"); and (iv) the financial condition of the newspaper, and if the newspaper is in financial distress, the owner's commitment to invest significantly in newsroom operations.[36] In applying these factors, among others, the proposal would adopt a "presumption" that cross-ownership serves the public interest in the top 20 markets where a merging television station is not among the top four stations and where eight "voices" remain after the merger. The Commission would also adopt some sort of "presumption" that cross-ownership disserves the public interest in every other circumstance.

The Chairman (let alone the Commission) has not explained its reasoning behind the decisions in the proposal and has vaguely defined the proposal.

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[36] Chairman Kevin J. Martin Proposes Revision to the Newspaper/Broadcast Cross-Ownership Rule, Nov. 13, 2006, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278113A1.pdf ("Press Release Proposal").

1. The Commission Must Provide Its Reasoning Underlying the Proposal

Beyond ambiguity, the Commission must provide reasoned basis for the elements of any adopted rule. The Chairman has provided no basis for even the most significant aspects of his press-release proposal. The Commission must explain its basis for at least the following decisions, and should provide these bases in the FNPRM so that the public can comment on the Commission's assumptions and rationales.[37] The proposal suggests the following questions.

First, what is the reasoned basis for selecting the number "20" as the point of demarcation between those receiving the presumption in favor of cross-ownership and those receiving the presumption against?

Second, what is the reasoned basis for choosing "eight voices," and the accompanying definition of voices, for the presumption in the top 20 markets?

Third, what is the reasoned basis for choosing a case-by-case method coupled with "presumptions," rather than clear rules?

Fourth, what is the reasoned basis for adopting a proposal providing the Commission with almost boundless discretion when the public has little confidence in the Commission? The Commission is ignoring the comments of millions of Americans opposing further relaxing the ownership rules and the Commission has a recent history of suppressing evidence opposing increased consolidation.[38] The Chairman of the House Energy and Commerce Committee accused the FCC Chairman of abuses of power, and cited complaints by fellow Commissioners that the Chairman withholds information from fellow Commissioners and provides minimal timelines to address important and complex issues.[39] Do you think the FCC inspires public confidence by seizing boundless discretion regarding consolidating local news markets?

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[37] *See, e.g.*, Prometheus Radio Project v. FCC, 373 F.3d 372, 411 (3d Cir. 2004).

[38] *See* Part III.C below.

[39] Jim Puzzanghera, *FCC target of House Panel's Investigation*, L.A. Times, Dec. 4, 2007, http://www.latimes.com/business/la-fi-fcc4dec04,1,4417226.story?coll=la-headlines-

Fifth, what is the reasoned basis for abandoning the factors in the current waiver standard to adopt the Commission's new factors? Currently, the Commission applies a four-prong test to determine whether or not to waive the cross-ownership restriction in particular cases. The four prongs essentially require that one of the two merging outlets be on the verge of going out of business.[40] As a result, there have been only 4 permanent waivers ever granted since 1975.[41]

Sixth, what reasoned basis does the Commission have for making it considerably more burdensome for the public to oppose media consolidation? If the FCC adopts a case-by-case standard, the public, with the help of a handful of public interest attorneys, would have to monitor the Daily Digest for case-by-case filings and then marshal the resources, evidence, and legal arguments to challenge specific mergers in cases where the merging companies' control the relevant information and can put tremendous pressure on the FCC to bless mergers or existing combinations. Is that the intended effect of the proposal?

Seventh, what reasoned basis does the Commission have for assuring the public that the FCC will apply these factors honestly? The Commission currently applies the existing waiver standard dishonestly, as discussed below;[42] the FCC merely states the waiver standard and then fails to apply the standard, and merely grants waivers or ignores oppositions.

Eighth, what reasoned basis does the Commission have for believing the Chairman's press-release rule will not lead to a wave of mergers in every market in the nation, especially in

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business; Corey Boles, *Alltel Deal Illustrates 'Process Problems' at FCC, Dow Jones*, December 10, 2007, *available at* http://www.freepress.net/news/28884.

[40] These four prongs are: 1) when a licensee is unable to see a station, 2) when the only sale possible would be at an artificially depressed price; 3) when separate ownership and operation of the newspaper and the broadcast station could not be supported in the locality; or 4) when the purposes of the rule (to increase diversity and competition) would be disserved by its application. *See Multiple Ownership – Second Report and Order*, 50 FCC 2d 1046, 1085 (1975).

[41] The fifth, to Tribune, was granted recently, and a clear misapplication of the existing waiver standard. *Shareholders of Tribune Company*, MB Dkt. 07-119, November 30, 2007, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-211A1.pdf.

[42] *See* Part III.C below.

light of the current long license terms? A broadcaster that buys a local newspaper in violation of the existing cross-ownership rule must divest the station or the newspaper before the end of its license term (or within one year, if the license term expires within a year).[43] License terms are now eight years long. Because media companies expected the Commission to eliminate the cross-ownership rule, companies like Tribune, Gannett, Fox, and Media General began assembling illegal cross-ownerships in big and small town across the nation: Los Angeles, New York, Miami, Phoenix, Hartford, Florence (South Carolina), Panama City (Florida), Columbus (Georgia)., and Bristol (Tennessee). But, by the time the companies' licenses came up for renewal, the cross-ownership rule remained because the FCC could not justify replacing it. So the companies asked for waivers.[44]

Under the Chairman's press-release proposal, we can expect companies to do the same thing, but even more voraciously and with some legal sanction. Companies would buy outlets during their license terms, run the stations for several years, and then, at license renewal, put tremendous pressure on the Commission to grant waivers for "existing" combinations. Does the Commission have any reasoned basis for believing anything else would happen?

Ninth, what reasoned basis does the Commission have for favoring cross-ownerships increasing news through the "affected outlets" and not those increasing news only at the market-

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[43] *See, e.g.*, Angela J. Campbell, *A Public Interest Perspective on the Impact of the Broadcasting Provisions of the 1996 Act*, 58 Fed. Comm's L. J. 455 (2006).

[44] *See, e.g.*, Petition to Deny Application for Renewal of Broadcast Station License of KTLA, Inc., by Media Alliance, File No. BRCT-20060811ASH, filed Nov. 7, 2006; Petition to Deny Renewal Office of Communication of United Church Of Christ, Inc. and Rainbow/Push Coalition, File Nos. BRCT – 20070201AJT, BRCT – 20070201AJS, filed May 1, 2007; Reply to Opposition to Petition to Deny Application for Renewal of Broadcast Station Licenses of WTXX, Waterbury, CT, and of WTIC-TV, Hartford, CT, File No. BRCT– 20061201APT et al., filed May 25, 2007; Comments of Office of Communication of United Church of Christ, Inc., National Organization For Women, Media Alliance, Common Cause, Benton Foundation, 2006 Quadrennial Regulatory Review, MB Docket Nos. 06-121 et al., 71-72, October 23, 2006 (discussing the challenges brought in Florence, S.C., Panama City, FL., Columbus, GA., and Bristol, TN).

level? Cross-ownership leads to less news for consumers at the market level. Indeed, we have used precisely the same data relied upon the FCC to demonstrate that the presence of a cross-owned station in a market leads other stations in the same market to collectively curtail their news by about 25 percent.[45] Does the Commission have a reasoned reasoned basis to dispute that result? Does the Commission have a reasoned basis to believe that cross-owned TV stations would not use their exclusive access to the local newspaper to shut out competitors from the stories that the competitors would normally report? As a result, wouldn't that lead to non-cross-owned stations curtailing their local news operations, as we have found?

Tenth, one factor the FCC would take into account is the financial health of the newspaper. What reasoned basis does the FCC have for taking the newspaper's health into account, when it has no jurisdiction over newspapers? If the FCC does take an outlet's financial health into account (whether broadcast or newspaper), isn't bad financial health most likely an indication of poor management or consumers making market decisions, not the need for greater consolidation? What statutory authority does the FCC have to attempt to increase newspapers' profits?

More importantly, what reasoned basis does the Commission have to suggest that greater cross-ownership will in fact help newspapers when existing evidence demonstrates no correlation between cross-ownership and better performance? For example, Tribune Co. is often cited as one of the most financially troubled newspaper companies, yet it is by far the largest owner of cross-owned newspaper-TV combinations operating under temporary waivers.

2. The Commission Must Clarify the Proposed Rule's Many Ambiguities

The Chairman's press release proposal is rife with consequential ambiguities. Unless the Commission resolves some of the ambiguities, the public will be unable to comment on the real

[45] Comments of Consumers Union, Consumer Federation of America and Free Press at 88 (filed in MB Dkts. 06-121 et al.) (Oct. 23, 2007).

world effects of modifications to the cross-ownership rule. Here, we list some of the more important ambiguities that would affect the public's analysis and the rule's real-world consequences. The FCC would consider four factors to determine if a cross-ownership will serve the public interest, and each factor is ambiguous.

a) Factor 1: "Whether the cross-ownership will increase the amount of local news disseminated through the affected media outlets in the combination"

The first listed factor is ambiguous.

First, how would the FCC even determine if the combination will increase the amount? Does the media company merely pledge to do more local news?

Second, would the company have to increase the amount of news by any specific minimal amount? What would the minimal amount be? If a specific minimal increase is required, what would count as local news? Would repeating news shows count as an "increase" under this paragraph? Would an increase in local sports or weather coverage count? Would repeating news programs count?

Third, there is an important discrepancy between the Chairman's proposed rule attached to the press statement and the rule as described in the press statement. The proposed rule refers to whether or not a merger results in more news through the affected "outlets" while your press statement released with the rule refers to an increase in the "amount of local news *in the market*." Which is it? Is the public interest served by an increase in local news dissemination through the affected outlets *even if* local news dissemination decreases at the market-level?

Fourth, what kind of enforcement is envisioned? If the Commission approves of a specific cross-ownership and the company does *not* subsequently increase the amount of local news through the affected media outlets as promised, will the Commission require divestiture? And if so, when—up to eight years later, at license renewal? What if the outlets increased the amount of local news but not as much as promised, or not exactly in the method promised—

would that result in divestiture or other punishment? How much and what kind of evidence would be necessary for full divestiture? Which types of violations would result in divestiture and which in fines?

b) Factor 2: "Whether each affected media outlet in the combination will exercise its own independent news judgment"

The second factor is also ambiguous. First, what kind of evidence and how much is necessary regarding a showing that "each affected media outlet in the combination will exercise its own independent news judgment"?

Second, would the outlets share any staff? To what extent could they share staff? What kind of staff could they share, generally—high-level staff as well as other staff?

Third, again, what kind of enforcement is envisioned? For example, will the FCC be prepared to reject a license renewal application if the conditions of editorial separation are not met? If at some point in the future, each outlet does not exercise its independent news judgment, will the FCC force divestiture? How much and what kind of evidence would be necessary for full divestiture? What kinds of violations would result in divestiture? Would minor violations result in fines?

c) Factor 3: "The level of concentration in the Nielsen Designated Market Area (DMA)"

The third factor is highly ambiguous, as our analysis in this filing makes clear.

First, will the FCC measure concentration using the Herfindahl-Hirschman Index (HHI), four-firm concentration ratio, or another tool? If HHI is used, what are the thresholds? Would the FCC aim for concentration around 1000 or 1800 HHI? Would the FCC unrealistically assume equal shares? Would the FCC attempt to outlaw mergers increasing the HHI by 50 or 100 points?

Second, for which market will the FCC measure concentration? For the local news market? What is the definition of the local news market? Which outlets does it include? All television stations or just those providing local news? All radio stations or only those providing local news? How much local news would a broadcast station need to provide to count? Will the Commission include all local newspapers or only daily papers? All daily papers or only those with greater than a certain percentage of the local daily circulation? Which percentage would that be?

Third, will the concentration formula be weighted for amount of news provided by the outlets? Weighted for market share? Weighted for media type and usage?

Fourth, again, what kind of enforcement is envisioned? For example, if the DMA's concentration goes up at any time after approving a cross-ownership, will the FCC require divestiture?

d) Factor 4: "The financial condition of the newspaper"

The fourth factor is also ambiguous: "The financial condition of the newspaper, and if the newspaper is in financial distress, the owner's commitment to invest significantly in newsroom operations."

First, how will the FCC even factor in "the financial condition of the newspaper"? If the financial condition of a newspaper is poor, will the FCC be likely to permit cross-ownerships to improve the condition of the newspaper? If the financial condition of a newspaper is sound, will the FCC be likely to permit cross-ownerships to support the financial condition of broadcast stations? Is it "heads, media consolidation wins," and "tails, same"?

Second, what would the Commission consider to be "financial distress"? When the Chairman released his proposed rules, he published an op-ed in the *New York Times*.[46] Both the op-ed and the statement published with the proposed rules focused on newspapers' finances.

[46] Press Release Proposal.

Industry-wide, newspapers still enjoy operating profit margins near or above 20 percent—higher than the S&P 500 average. As the State of the News Media reported, "The industry is recording pre-tax profit margins in the high teens, and online editions are adding readers and advertising revenues at a healthy pace."[47] Would the Commission consider companies with such margins to need regulatory "relief"? Is "financial distress" anything less than a 10 (or perhaps 20) percent operating margin? Three years of losses? Bankruptcy?

Third, what level of investment qualifies as investing "significantly" in newsroom operations? Which investments count as "newsroom operations"?

Fourth, will the newspaper have to make its finances available to the public, so that the public can provide input into this factor?

Finally, what kind of enforcement is envisioned? For example, if the newspaper's financial condition changes, will the company be required to divest one of the cross-owned outlets?

e) Eight Voices

The Commission's reference to eight voices is ambiguous. In the top twenty markets, the Commission will presume cross-ownerships serve the public interest when, among other things, "8 independently owned and operating major media voices would remain," noting that "for purposes of this provision major media voices include full-power commercial TV broadcast stations and major newspapers." What is a "major" newspaper? What are the attribution rules to determine if a media voice is independently owned? What are the rules to determine if a voice is operated independently?

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[47] Newspapers: Introduction, State of the News Media 2007, http://www.stateofthenewsmedia.org/2007/narrative_newspapers_intro.asp?cat=1&media=3

Will the Commission count towards the eight voices only those stations whose Grade B signal contour overlaps with the Grade B contour of one of the stations in the proposed merger, as the Commission proposed in relaxing the duopoly rule in 2001?[48]

f) Other Ambiguities

The FCC lists four factors. How will each of the four factors be weighted? The proposal permits the Commission to consider "other factors". What other factors will these be?

Does each of the listed factors pertain to information and promises controlled by the company seeking a waiver? Can outside parties interested in buying one of the outlets weigh in, to demonstrate that other parties are interested in purchasing one of the outlets and ensuring the public has access to diverse sources?

Will the presumption be any harder to overcome in the top 20 markets (say for the merger a newspaper and a top four television station) than in markets outside of the top 20?

What is a "presumption," and how will it be employed? How strong is the presumption? How can it be overcome? What standard is employed for the burden of persuasion and burden of evidence?

C. The Chairman's Press-Release Proposal is Just the Latest Chapter in a Pattern of Administrative Abuses Outlawed by the Administrative Procedure Act

The Chairman's press-release proposal is, while an unprecedented and bizarre administrative exercise, only one of many administrative abuses punctuating this proceeding. If the Commission adopts a proper further notice, it corrects at least the lack of notice from its FNPRM. Otherwise, the press-release proposal is just part of the Commission (and Chairman's) larger pattern of abuse.

At Least Two Suppressed Studies: In September, 2006, Senator Barbara Boxer produced a leaked FCC study from 2004, which was never released by the FCC.[49] This study provided

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[48] Sinclar Broadcast Group, Inc. v. FCC, 284 F.3d 148, 155 (2002).

painstaking analysis determining that locally owned news stations provided more than five-and-a-half minutes more of local news for each half-hour newscast. The study contradicted the FCC's public position favoring consolidation. Several weeks later, Senator Boxer revealed another suppressed study, this one regarding radio ownership,[50] which also provided evidence contradicting the Commission's pro-consolidation agenda.

Results-Driven Studies: In previous Comments, we have detailed how the Commission under Chairman Martin shifted its research focus towards results-driven studies supporting rules changes favoring increased consolidation.[51] An example of a document laying out a strategy for results-driven studies is a memorandum by the FCC's then-Chief Economist to the Chairman of the FCC, received in response to a Freedom of Information Act Request.[52] This memorandum detailed a research agenda to support eliminating the newspaper-broadcast cross-ownership rule. The author stated, "This document is an attempt to share some thoughts and ideas I have about how the FCC can approach relaxing newspaper broadcast cross-ownership restrictions."[53]

FOIA: The FCC still has not responded to a FOIA request pre-dating Senator Boxer's revelations. Georgetown's Institute for Public Representation (IPR) filed a FOIA request in August of 2006 seeking unpublished studies.[54] Several months following Senator Boxer's revelations, in January, 2007, the FCC made available 580 pages of documents, both to the public and to IPR. It withheld, however, over 1400 pages, vaguely invoking apparently

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[49] David Folkenflik, *FCC Study of TV Ownership Comes to Light*, All Things Considered, September 15, 2006, http://www.npr.org/templates/story/story.php?storyId=6082952.

[50] John Eggerton, *Boxer Produces Another Unpublished Report*, Broadcasting & Cable, September 18, 2006, available at http://www.broadcastingcable.com/article/CA6373194.html.

[51] Comments of Consumers Union, Consumer Federation of America and Free Press at Part II (filed in MB Dkts. 06-121 et al.) (Oct. 23, 2007).

[52] Leslie M. Marx, *Summary of Ideas on Newspaper-Broadcast Cross-Ownership* (June 15, 2006).

[53] *Id.* at 3.

[54] Letter from Marvin Ammori to Shoko Hair re: FOIA Request, Aug. 10, 2006; Clarification Letter from Marvin Ammori to Shoko Hair re: FOIA Request, Aug. 23, 2006.

inapplicable FOIA exemptions.[55] IPR filed an administrative appeal in, but the FCC never responded.[56] After months of broken promises by the FCC, IPR finally filed suit against the agency to obtain the requested records.[57]

Ten Railroaded Studies: The FCC commissioned ten studies. In doing so, according to two Commissioners, the Chairman selected researchers without consulting them. The Commission never did explain—not even to two of its own Commissioners—how it chose the researchers, and the researchers were all apparently sole-sourced and hand-selected.[58]

In Complaints under the Data Quality Act, we have detailed how the Commission's research program violated basic notions of peer review and objectivity. The Commission released the ten studies before peer-reviewing them. The peer-reviews were by individuals, not panels, and were not blind. Moreover, the Commission withheld the data underlying the studies for over a month after posting the studies. The Commission also provided the public only a few weeks, from when the underlying data was available, to test analyze the studies.[59]

Poorly Noticed Hearings and Ignored Public Feedback. The FCC agreed to complete six public hearings regarding media ownership since it issued the FNPRM in 2006, and it has

[55] Letter from Michael C. Perko to Marvin Ammori re: FOIA Request, FOIA Control No. 2006-483, Jan. 4, 2007, at 4.

[56] Application for Review of Institute for Public Representation, Freedom of Information Act Request Concerning Localism Proceeding or Media Ownership Rules, FOIA Control No. 2006-483, February 5, 2007.

[57] Complaint, IPR v. FCC, filed Nov. 16, 2007.

[58] *See Commissioner Michael J. Copps Comments on the FCC's Media Ownership Studies*, MB Dkt. No. 06-121, Nov. 22, 2006, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-268611A1.doc; *Commissioner Jonathan S. Adelstein Says Public Notice On Media Ownership Economic Studies Is "Scant" And "Undermines Public Confidence,"* MB Dkt. No. 06-121, Nov. 22, 2006, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-268616A1.doc. *See also FCC Seeks Comment On Research Studies On Media Ownership*, Public Notice, MB Dkt. No. 06-121, July 31, 2007, available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A1.pdf.

[59] *See, e.g.*, Complaint Under Data Quality of Consumers Union, Consumer Federation of America, and Free Press, MB Dkt. No. 06-121 et al., Sept. 11, 2007; Second Complaint Under Data Quality of Consumers Union, Consumer Federation of America, and Free Press, MB Dkt. No. 06-121 et al., Nov. 9, 2007.

completed the remaining hearings that were part of the Localism Inquiry.[60] In conducting these hearings, the FCC provided the public with minimal notice, sometimes as little as one-week notice, of the hearing and its location.[61] Moreover, well over 99% of the public providing input at these hearings opposed further media consolidation; the Chairman admitting remembering "only one" member of the public at all the hearings supporting increased media consolidation.[62] If the Commission pushes ahead with relaxing the cross-ownership rule, as the Chairman proposes, then the Commission will have ignored the consistent, resounding message of the members of the public who attended these hearings, giving up hours of time with their children or working in order to make their opinions known.

Waiver Abuses: During this proceeding, the FCC has also been committing administrative abuses in individual waiver proceedings meant to enforce the existing ownership rules. These abuses are particularly illuminating considering the Chairman's case-by-case press-release proposal.

Since 2004, citizen groups have challenged cross-ownership waiver requests in at least eight cases—in California, New York, Connecticut, South Carolina, Florida, Georgia and Tennessee.[63] The FCC has completely ignored most these petitions, refusing to rule in most cases. In 2007, Commissioner Adelstein stated the obvious: "The Commission historically has failed to enforce the terms of its temporary waivers and, as a result, parties have simply failed to take the step necessary to demonstrate a good faith effort to comply with our ownership limits."[64] The FCC did not once deny a request for waiver.

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[60] Notice of Inquiry, *Broadcast Localism*, MB Docket No. 04-233, June 7, 2004.

[61] *See, e.g.*, Eric Prynem, *FCC announces Seattle hearing to be held Friday*, Seattle Times, Nov. 3, 2007 http://seattletimes.nwsource.com/html/localnews/2003991318_fcc03m.html.

[62] Archived hearing audio can be found here: http://www.fcc.gov/realaudio/agendameetings.html.

[63] *See* sources cited in note 44 above.

[64] Univision Communications Inc., 22 FCC Rcd. 5842, 5878 (2007) (Commissioner Adelstein, approving and concurring in part).

Even in the most egregious conditions, the FCC hands out "temporary" waivers freely and then refuses to enforce them. First, in 2001, the FCC gave Fox a "temporary" waiver requiring Fox to sell a newspaper or broadcast station in two years. After two years, Fox hadn't made the slightest effort to sell anything and the FCC didn't enforce the waiver.[65] In 2006, three years of violation, the FCC gave Fox another two-year waiver.[66] In that Order, the FCC listed its waiver standard, but did not actually apply that standard.[67]

Second, in 2001, the FCC gave Tribune the first of a series of temporary waivers so Tribune could sell a TV station or newspaper in Hartford. Tribune sold nothing. In 2003, when the last waiver had expired, a local citizen sued Tribune. The FCC ignored the suit. In 2005, the federal judge ruled for the citizen. Then the FCC stepped in and—instead of punishing Tribune—granted another two-year waiver, overruling the judge.[68]

Third, recently, in 2007, the FCC approved of the transfer of Tribune Company to Sam Zell.[69] In approving the transfer, the FCC granted temporary waivers in four markets and a permanent waiver in Chicago—even though Tribune never even *asked* for a permanent waiver. In this Order, once again, the FCC listed its waiver standard, but did not actually apply that standard.[70]

Minority and Female Ownership: The FCC has provided no accurate census of minority and female ownership. Through considerable effort, consumer researchers have provided the

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[65] For facts, *see, e.g.*, Petition to Deny & Reply to Opposition to Petition to Deny of United Church of Christ and Rainbow/PUSH Coalition, File Nos. BRCT – 20070201AJT, filed May 1, 2007 and June 19, 2007 respectively.

[66] K. Rupert Murdoch and Fox Entertainment Group, Memorandum Opinion and Order, 21 FCC Rcd 11499 (2006).

[67] *See* Petition for Reconsideration of United Church of Christ and Rainbow/PUSH Coalition of *K. Rupert Murdoch*, File No. BTCCT-20050819AAF, et al., Nov. 6, 2006, at 15-16.

[68] Ellis v. Tribune Television Co., 443 F.3d 71 (2d Cir. 2006).

[69] *Shareholders of Tribune Company*, MB Dkt. 07-119, November 30, 2007, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-211A1.pdf.

[70] *Id.* at 9-14.

only accurate count of minority and female ownership.[71] The Commission has never made an accurate count. Indeed, the FCC's own commissioned studies refused to use the Commission's flawed ownership data. Study 2 failed to identify 69% of all minority TV station owners and 75% of all women owners. Study 7 refused to use the FCC data. The FCC still has not performed a credible census of minority and women ownership.

Respectfully submitted,

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[71] Derek Turner & Mark Cooper, *Out of the Picture 2007: Minority & Female TV Station Ownership in the United States*, Oct. 2007, www.freepress.net/docs/otp2007.pdf.