BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In re:

Review of the Commission's Regulations Governing Television Broadcasting	}	MM Docket No. 91-221

AN ECONOMIC ANALYSIS OF THE BROADCAST TELEVISION NATIONAL OWNERSHIP, LOCAL OWNERSHIP AND RADIO CROSS-OWNERSHIP RULES

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EXECUTIVE SUMMARY

This economic report addresses three of the Commission's broadcast station ownership rules: the national ownership restrictions, the local ownership rule standards, and the television-radio cross-ownership rule. The application of competition (antitrust) policy analysis to questions of broadcast station ownership provides the Commission with a sound policy framework. Economic analysis within this framework can help the Commission assess the likelihood that changes in or abolition of its ownership rules will lead to anticompetitive behavior with respect to viewers, advertisers or program suppliers. Even with respect to such non-economic objectives as diversity, the tools of economic analysis can be helpful in assessing the likely effects of various policy changes, as well as the economic cost of pursuing diversity goals.

The economic approach in this report is based on competition policy analysis. This analysis leads to the following conclusions:

- National ownership rule: The application of generally-accepted merger standards to the economic structure of the broadcasting industry produces no justification for the present limitations (12 stations or 25 percent reach) on television station ownership, either in terms of effects on competition or in terms of economically reasonable diversity concerns. Broadcast stations compete in broad, relatively unconcentrated markets for advertising and for audiences. Broadcasters in different cities do not compete with each other. Increases in the size of broadcast groups would not threaten the competitiveness of program acquisition markets. Because no anticompetitive effects are likely to arise from increases in group ownership that go beyond the limits of the present rule, to prevent such transactions is to limit the efficient operation of the markets affected. Changes in ownership should be reviewed on a case by case basis, applying appropriate competition policy standards.

- Local ownership rule: The rule banning joint ownership of two stations in the same market is set forth in terms of overlapping Grade B contours. This definition is too strict. Generally, stations whose only overlap is in Grade B contours should not be regarded as competing for viewers. In the typical case, the extent of the overlap will be a small fraction of the potential audience of each station, likely too little to cause either station to change its behavior in response to changes in the behavior of the other. Such stations are commonly located in separate DMAs, in which case they do not compete significantly for advertising revenue. In many cases, stations with such an overlap also will not compete against each other in the purchase of video programming. Moreover, even if stations in separate DMAs with overlapping Grade B contours were regarded as in the same market, concentration would generally be decreased by the greater number of competitors in the enlarged geographic market. Finally, in some markets combinations of stations with overlapping Grade A contours would not threaten competition or diversity.

- Radio-television cross-ownership rule: The Commission's rules currently permit common ownership of two AM and two FM radio stations in cities with a sufficient number of competitors, but forbid common ownership of television stations and radio stations, subject to limited waivers. There is no basis in competition policy for a rule of this sort. Generally, proposals to increase cross-ownership should be scrutinized under applicable antitrust merger standards. In most large markets, there is room for substantial increases in radio-television combinations before competition in the purchases of programs, the supply of advertising or diversity would be threatened.

These conclusions are based on analysis of the various markets in which broadcasters compete. The Commission itself has tentatively identified and analyzed those markets and has concluded that significant relaxation of its ownership rules would not increase the potential for anticompetitive behavior. While the Commission's general conclusion is sound, in many instances its market definitions are overly narrow. This report presents data that shed further light on the Commission's market definitions, as well as on the broader market definitions that better comport with the results of competitive analysis. The conclusion is inescapable, even using the market definitions suggested by the Commission, that broader and more rapid deregulation is warranted. The present ownership policies preclude transactions that would enhance economic welfare without threatening competition. So long as these policies remain in effect, the economy suffers irreparable losses. More accurate and inclusive market definitions lend even greater support to the need for more extensive and rapid deregulation.

- Delivered video programming: Television broadcasters supply video programming to audiences. The alternatives available to viewers include cable television, direct broadcast satellite service, and rental or purchase of video cassettes, among other sources. Also, there is no evidence to contradict the common sense observation that other leisure-time activities compete with television viewing for the attention of the audience. Markets in which television stations compete for audiences are largely local, but are also supplied by national sources such as DBS. Concentration in local markets varies, being generally lower in the larger markets. Even in markets where there is modest concentration, anticompetitive behavior is unlikely on account of the nature of the product.

- Advertising: Broadcasters compete in national and local advertising markets. At the national level, broadcast networks, national spot sellers, cable networks, barter-syndicators and national print media all compete for the budgets of national advertisers. In addition, marketing strategies such as coupons and direct mail compete with advertising media. Advertising markets at the national level are unconcentrated. While local markets must be addressed on a case-by-case basis, the larger markets are unconcentrated and successful collusion is unlikely on account of the characteristics of the product.

- Video program production: At the national level purchases of video program rights are widely dispersed and unconcentrated. At present levels of concentration there is no danger of the exercise of monopsony or oligopsony power in this market. At the local level, purchasers in different geographic markets do not compete for programming.

- Diversity: There is little economic support for the proposition that increased concentration of ownership of broadcast media will lead to less viewpoint diversity. Diversity goals that reach beyond what can be achieved by a competitive market can cause economic losses to consumers, by imposing an inefficiently small scale of production on the industry. The application of competition policy to the evaluation of station ownership is likely to result in adequate protection of diversity concerns because diversity "markets" are probably broader than economic markets.

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I. INTRODUCTION

A. Consumer welfare and efficient use of resources should guide regulatory policy

This report is concerned with economic analysis of three of the Federal Communications Commission's broadcast television ownership rules on which the Commission has requested comment in its Further Notice.[1]

The Commission has identified two bases for these rules, one grounded in economics and the other grounded in the Commission's long-standing diversity concerns. Commission policy with respect to these issues should be guided by their effects on consumer welfare. Ownership patterns in the absence of any rules can be presumed responsive to consumer interests, either in terms of the types and quantities of service provided, or in terms of cost savings from effective use of resources. This presumption breaks down, of course, when an ownership pattern or structure leads to market power. Therefore, from an economic point of view, the Commission's ownership rules should be guided by the principles underlying competition policy. There is no economic basis, in other words, for ownership rules stricter than those that would be imposed by the application of generally accepted antitrust standards.

The analysis in this report demonstrates that reliance on current antitrust enforcement standards would protect the public both from the creation of market power and from any undue reduction in diversity. Despite some quibbles about the details, modern U.S. antitrust enforcement standards and methods of analysis are widely accepted, and are being adopted throughout the world.

B. Antitrust standards will protect consumer welfare and the efficient use of resources

The particular antitrust standards applicable to station ownership issues are merger standards. Under §7 of the Clayton Act, U.S. antitrust policy is designed to stop *in their incipiency* concentrations that threaten consumer interests. For this reason,

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1 FCC, *Further Notice of Proposed Rule Making*, MM Docket No. 91–221 & 87–8, released Jan. 17, 1995 [hereinafter Further Notice or FNPRM].

merger standards are much stricter than standards applicable to unilateral actions by an alleged monopolist.[2] Current merger law permits the enjoining, in certain circumstances, of an acquisition that would merely increase concentration in a market, but not create a firm with monopoly power. In other words, merger policy acts to stop threats to the consumer interest in competitive markets long before a monopoly is created.

The U.S. Department of Justice/Federal Trade Commission *1992 Horizontal Merger Guidelines* enunciate the methods and standards that those agencies apply to screen potentially troublesome mergers. The *Guidelines* have wider application, however, and their methods and standards are used in other antitrust contexts, including private litigation, and by other government agencies.

C. Antitrust enforcement will ensure diversity

The Commission's concern for diversity can be treated in various ways from the perspective of consumer welfare. For example, one can ask whether any particular ownership pattern produces a variety of programming that fails to maximize consumer welfare, other things equal. The answer to this question can guide policy. Alternatively, the Commission might set a particular objective in terms of diversity that exceeded what consumers would be willing to pay for. In this case, the public policy issue would be how much consumer economic welfare to sacrifice in order to achieve the Commission's non-economic objective. Fortunately neither of these alternatives is relevant because the application of merger standards to the ownership question guarantees a great deal of diversity. To put the matter a different way, the application of merger standards would stop any given merger or acquisition on economic grounds long before a significant reduction in diversity was threatened. This is true in part because the marketplace for ideas is broader than the markets relevant for competitive analyses.

D. The Clayton §7 approach to merger analysis

When Congress enacted the Celler-Kefauver amendment to the Clayton Act in 1950, the economic standard under which proposed mergers were judged changed

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2 Brown Shoe Co. v. United States, 370 U.S. 294, 312–323 (1962); LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF ANTITRUST LAW 593–94 (1977)

considerably. After that time, Clayton §7 became concerned not merely with the deterrence of monopoly, but with the elimination *in their incipiency* of trends toward undue concentration of economic power and anticompetitive behavior. The Clayton Act, a fundamental element of U.S. antitrust law, thus imposes strict standards of scrutiny on mergers and acquisitions, including those in the broadcast industry.

Because the Clayton Act provides for strict scrutiny of mergers and acquisitions, it is reasonable to presume that it could usefully serve as a guarantee that proposed concentrations of broadcast station ownership do not pose threats to competition or to the welfare of viewers and listeners. By the same token, merger or acquisition transactions that pass muster under Clayton §7 standards can be presumed to offer benefits to the economy.

It is useful to illustrate the operation of Clayton §7 merger enforcement standards and practices by reference to the U.S. Department of Justice/Federal Trade Commission *Merger Guidelines*.[3] The *Guidelines* express the current enforcement intentions and philosophies of the federal antitrust agencies, and as such they naturally reflect a prosecutorial viewpoint. Further, the *Guidelines* generally reflect a somewhat stricter set of standards than those applied in practice.[4] Still, a review of the *Guidelines* approach serves as a useful roadmap of Clayton §7 analysis and how it might be used to assess the competitive implications of station ownership changes.

The first step in merger analysis is product market definition.[5] The "relevant" market in which a merger is analyzed includes all those products (or services) that, together with the products of the merging parties, would have to be controlled by a hypothetical monopolist in order to raise prices profitably. Such markets are generally

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3 The current *Merger Guidelines* were released in 1992, although certain provisions of the 1984 release remain in effect.

4 It is uncommon for the federal antitrust authorities to conclude that a merger of competing firms would reduce competition if the post-merger HHI would be less than 1,800, as would be the case, for example, if there remained six equal-size competitors after the merger. Malcolm B. Coate and Fred S. McChesney, *Empirical Evidence on FTC Enforcement of the Merger Guidelines*, ECONOMIC INQUIRY 277-93 (April 1992).

5 Throughout this report the term "market" is used in a variety of contexts to illustrate the use of economic analysis applicable to the evaluation of the Commission's rules. Nothing herein is intended to imply a judgment concerning the relevant antitrust market for any specific transaction or practice that is the subject of antitrust litigation. As explained below, each case requires its own analysis.

defined in terms of the smallest set of products that meet the criterion. The price increase is assumed to be “small but significant and non-transitory.” The point of this process is to identify the alternatives available to customers of the merging parties. Thus, market definition is carried out from a demand-side perspective.

The second step in merger analysis is to define a relevant geographic market. A geographic market must pass the same conceptual test as a product market. It must be the smallest area containing the products of the merging parties that a hypothetical monopolist would have to control in order to profitably raise prices. A relevant geographic market might, for example, contain the products of firms located at great distances if their products were, or could readily be, consumed in the market.

The third step in merger analysis is to decide which firms should be included as sellers in the market. In addition to current sellers of products in the relevant market, these include sellers not currently making the product but readily capable of doing so, and firms outside the geographic market that could readily enter it. Generally, sellers are included in the market if they could enter in less than a year.

The fourth step is to measure concentration in the market thus defined. Concentration formerly was measured by computing the market shares of the largest four or eight firms. Currently, a Herfindahl-Hirschman Index (HHI) is computed. The HHI is defined as the sum of the squared market shares of each firm in the market.

The fifth step is to apply some standard to assess the measured concentration. According to the *Merger Guidelines*, mergers resulting in an HHI below 1,000 will not be further investigated. Mergers with HHIs above 1,800 are presumed anticompetitive unless further analysis produces contrary evidence. Mergers resulting in HHIs between 1,000 and 1,800 require more detailed analysis. In practice, both the Department of Justice and the Federal Trade Commission tend to use somewhat less strict standards than these.

The sixth step in merger analysis, for those transactions that do not fall into the harmless category at the previous stage, is to consider ease of entry. If a market is easy to enter then it will be impossible for incumbent firms to raise prices above competitive levels, even if the market is highly concentrated. Mergers in markets with easy entry are regarded as not anticompetitive regardless of the level of concentration in the market. The *Merger Guidelines* test for ease of entry is based on two years and the possibility of profitable entry at pre-merger prices.

The seventh step is to consider factors that would make tacit or explicit collusion, or the exercise of unilateral market power, difficult or impossible. For example, if the products involved are not homogeneous then it may be much more difficult to reach and maintain a collusive agreement than if they are homogeneous. In markets with differentiated products, the merger of two firms that are not each others' closest competitors may be treated less harshly.

The eighth step is to consider possible efficiencies resulting from the merger. For example, the firms may require the merger in order to produce some new product or to lower production costs. Such benefits, when clear and convincing, may in some cases outweigh a more speculative increase in the likelihood of anticompetitive behavior based on increased concentration.

This summary of the *Guidelines* approach to merger analysis omits a number of important considerations and details, but provides a useful outline of the basic approach and its purposes.

It is important to note that the vast majority of merger and acquisition transactions have no implications for competition (because they do not involve competitors). These transactions take place because the parties expect to achieve economic gains. Ultimately, these gains must come either from enhanced demand for the products being produced or from cost savings. In either case, consumers are likely in the end to benefit. Even most merger transactions among competitors have as their aim not a reduction in competition but the achievement of cost savings and product enhancements. It is the job of Clayton §7 analysis to weed out those transactions that are likely to harm consumers. If, by a rule, the Commission prohibits *all* mergers or acquisitions of a certain type, without regard to their effects on competition, the result is likely to be lost benefits for consumers and for the economy as a whole.

E. Burden of proof

Because of the presumption that mergers will enhance consumer welfare, those who would have the government intervene in competitive markets bear the burden of justifying this intervention. It is the conclusion of this report that proponents of the continuance of these ownership rules cannot meet this burden of proof.

F. Organization of the report

The report is organized in the same manner as the Commission's Further Notice.

Subject matter	**Further Notice**	**This report**
Competition analysis: video programming	Section III. C.	Section II
Competition analysis: advertising	Section III. D.	Section III
Competition analysis: video production	Section III. E.	Section IV
Diversity analysis	Section IV	Section V
National ownership rule	Section V	Section VI
Local ownership rule	Section VI	Section VII
Radio-TV cross ownership rule	Section VII	Section VIII

The analytical Sections (II through V) follow the competition policy approach illustrated above by the description of the *Merger Guidelines* to analyze issues of market definition, concentration and competition. These tools are then used to evaluate the rules.

Section II addresses the Commission's proposed delivered video services market. Based on the evidence examined, this section concludes that the Commission's proposed market definition is too narrow, and that it should include, for example, various non-broadcast video media.

Section III of the report examines the Commission's proposed advertising market definitions, again finding that the Commission's proposed markets are unduly narrow. Section IV addresses the Commission's proposed video program production market. Measures of concentration suggest that national station groups lack market power in the purchase of programming, and would lack such power even if they had 100 percent national coverage.

Section V of the report addresses, from an economic point of view, the Commission's concern for diversity of viewpoints in the provision of local news and public affairs programming. The argument is developed that a policy designed to satisfy the objectives of competition policy is likely also to satisfy diversity concerns. Further increases in diversity can only be achieved by reductions in consumer welfare.

Sections VI through VIII examine in turn each of the station ownership rules in light of the preceding analysis of relevant markets. In each case, where data are available, illustrative concentration information is provided. The conclusion of these analyses is that the Commission's present station ownership regulations are unduly restrictive, and likely result in an inefficiently small scale of enterprise for broadcast station owners.

II. The Commission's Delivered Video Services Market

A. Introduction

In order to address any of the ownership rules it is first necessary to consider the nature of the markets in which broadcast stations compete. This section and the two following ones provide analyses of the markets for video programming, advertising and program supply, respectively.

The Commission has proposed that one relevant market in which television stations compete is "delivered video programming." In providing video programming to audiences, television stations compete among themselves as well as with other providers of video programming and possibly with providers of non-video news and entertainment. Competition in this area is best analyzed on a local level, since the available alternatives vary from one location to the next. Thus, the local ownership rule is relevant to competition in this area, but the national ownership rule is not. If, as the Commission proposes, radio is not part of the market, then the radio-television cross-ownership rule is of no relevance. The radio-television rule would be relevant in a broader market that included both media, but such a market would likely include so many other participants that there would be little concern about the level of competition.

B. Product market

Commercial television stations earn their revenues by assembling audiences and selling time for advertising delivered to those audiences. In order to attract audiences, stations broadcast programming that audiences are interested in watching. One question relating to station ownership is whether increased ownership concentration would lead to a reduction in competition among stations to attract audiences. If it did, increased concentration might lead to a reduction in the quality of programming broadcast by television stations.[6] A reduction in competition could not lead to an increase in the price charged by commercial broadcast stations to viewers of their programming because their programming is "sold" to viewers at a zero price.[7]

To analyze whether increased concentration might lead to a reduction in the quality of their programming, one must define the product market in which commercial television stations compete to attract audiences. The Commission has tentatively concluded that the relevant product market in which these stations compete to attract audiences consists of commercial and non-commercial broadcast stations, cable systems and other systems that deliver video programming to the home.[8] There is ample evidence to support this conclusion. Cable television is the clearest example of a competing distribution medium. Increasingly, other distribution forms including MMDS, DBS and VDT will add to the competition.[9] Supporting evidence is presented in greater detail in Appendix A.

The competitive significance of cable, DBS and other non-broadcast video delivery modes does not depend on their adoption by all or even most television households. Cable television now passes and therefore is available to nearly all television households. Many more households have SMATV or MMDS available than currently subscribe. Although it is still in its relative infancy, DBS is available to a large fraction of all TV households. If the quality of broadcast television programming available to the viewers in a community were to decrease significantly, each of these provides programming that is an alternative to broadcast television. It is the presence of these alternative delivery systems and their ability rapidly to take dissatisfied

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6 "Quality" as used in this report in reference to programming is defined in terms of the production cost of programs, which is likely to be highly correlated with their popularity.

7 Cable operators and other video providers, which it will be argued also belong in the relevant product market, charge a positive price for their programming. In addition to decreasing quality, these firms could participate in anticompetitive behavior in the market for viewers by raising price, provided either that all their subscribers are located in the local area or that it is feasible to charge a different price to local viewers than to viewers in other areas. Cable operators subject to local and federal regulation are generally prohibited from charging different rates to different subscribers.

8 *See* FNPRM, *supra* note 1, 29.

9 MMDS stands for multichannel, multipoint distribution system. DBS stands for direct broadcast satellite system. VDT stands for video dialtone; in this report it also stands for other video services provided by telephone companies. SMATV stands for satellite master antenna television.

viewers away from broadcast television that is important, not their present scale of operation. Further, the fact that these alternative media are not available to each and every TV household in a given viewing area does not mean that they provide ineffective competitive restraints on broadcasters. Broadcasters cannot discriminate between those viewers who have and those who do not have competitive alternatives. Hence, those viewers who do have alternatives, if sufficient in number, protect the interests of those who do not.

The Commission tentatively concluded that the viewing of video cassettes is not part of the relevant product market. In other words, the Commission believes that viewers of broadcast television would not significantly turn to viewing video cassettes, whether rented or purchased, in response to a hypothetical decrease in the quality of programming offered on local broadcast stations. The Commission has noted that, unlike broadcast and cable television, video cassettes do not offer a full schedule of video service.[10] The important analytical question is not whether viewers could completely replace broadcast viewing with the viewing of video cassettes, as the Commission's rationale seems to imply, but whether a hypothetical decrease in quality or increase in price would cause significant substitution from broadcast viewing to the viewing of video cassettes. Households typically do not have enough video cassettes on hand to "program" the entire viewing day for an extended period of time. However, just as broadcast and cable television are available throughout the day, any VCR household can watch a rented or purchased video cassette any hour of the day. It is hard to argue that a family sitting down to watch a video cassette movie during prime time is not in many or most cases substituting this programming for broadcast or cable programming, or that morning viewers of a Jane Fonda exercise videotape are not doing the same. Further evidence of substitutability of video cassettes and broadcast television programming is presented in Appendix A.

The Commission has also tentatively concluded that broadcast and cable television and other distributors of video programming do not compete for their audiences with any non-video medium.[11] In other words, the Commission denies that a small but significant and non-transitory reduction in the quality or increase in the price of video programming would lead to a significant decline in audiences for such programming.

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10 *See* FNPRM, *supra* note 1, 30.

11 *See* FNPRM, *supra* note 1, 24.

Thus, the Commission does not believe that the quality of broadcast video programming is constrained by the ability of viewers to substitute such activities as listening to the radio or CDs, reading newspapers and magazines and playing computer games. The evidence on which the Commission based this conclusion may be inaccurate. Even if accurate, it would not be an appropriate or sufficient basis to conclude that non-video media do not compete with broadcast television in attracting an audience.

The Commission cites figures purporting to show that the percentage of leisure time (not number of hours) the average household spends watching television has changed little between 1970 and 1988. Other data on the use of leisure time do not support this conclusion. For example, the Americans' Use of Time Project has gathered survey data on time use in 1965, 1975 and 1985.[12] According to the Project's figures, the average time an adult spent watching television increased markedly from 1965 to 1975, from 10.5 hours to 15.2 hours, then declined slightly to 15.1 hours in 1985. As a percentage of total leisure time, 30 percent, 40 percent and 38 percent was spent watching television in these three years. Thus, there is reason to doubt the alleged constancy of television watching as a percentage of leisure time, on which the Commission based its conclusion.

The Commission tentatively concludes that its information on the use of leisure time demonstrates a low cross-price elasticity among television viewing and other activities.[13] Even if one had undisputed information on television viewing as a percentage of leisure time, this would not be sufficient or even especially relevant to computing the relevant cross-price elasticities. The relevant quantity is the amount of time spent watching television, which has not remained constant. For instance, according to a later edition of the source the Commission cites, average hours of television viewing per week increased 20 percent, from 1,226 to 1,470, between 1970 and 1990.[14] More price information is needed to calculate elasticities than a passing assertion that relative prices must have changed over time. Furthermore, one would need to take account of the many factors other than price that have changed, including

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12 Blaine Cutler, *Where Does the Free Time Go*, AMERICAN DEMOGRAPHICS MAGAZINE, Nov. 1990.

13 *See* FNPRM, *supra* note 1, at n.40.

14 *See* HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS 9 (1994).

the amount of leisure time, the level of income and the quality and diversity of television programming. It is simply not possible without more rigorous analysis to determine how sensitive (or allegedly insensitive) television viewing is to changes in the prices of alternative activities.

C. Geographic market

Though unproven, it will be assumed for purposes of this discussion that non-video media and other leisure activities do not belong in the relevant product market. Television stations, cable systems, MMDS, DBS and other satellite services and video rental and sales outlets provide video programming to consumers across the country. For an individual consumer, however, the set of relevant suppliers are those providing service in the consumer’s local area. The purpose of defining a geographic market is to identify those firms to which a consumer can reasonably turn.

A more detailed analysis of the relevant geographic market for video services is presented in Appendix B. In a typical case, viewers can obtain video programming from a number of commercial and non-commercial broadcast stations with relatively similar service areas, as well as from cable and other sources discussed above, all of which should be included in the local market. Some viewers in the area may also be able to receive broadcast signals from stations located outside the area. Of particular interest is a station in another community with a Grade B contour that overlaps the Grade B contours of local stations. Whether this station should be included in the local market depends on the degree of overlap. If the overlap is small and most viewers in the local area cannot receive programming from the outside station, it is unlikely that the actions of broadcast stations and other video providers located inside the community would be significantly restrained by the outside station. In that case, it may be appropriate to exclude the outside station from the relevant geographic market for viewers.

Many local circumstances are important in defining the proper geographic market in which to consider the competition for viewers in a given locale. Markets for advertising and the purchasing of video programming, considered below, also have important local components, and the structure of local markets is relevant to evaluation of several of the Commission’s proposed changes in ownership rules. It is beyond the scope of this report to examine each issue in every local area. Instead, five

DMAs were chosen as “illustrative” of the entire range of DMAs.[15] To select these five, all DMAs were ranked according to size (number of television households), and the list was then divided into quintiles, each of which included DMAs covering 20 percent of television households. For each quintile, a DMA was selected that was close to the median for the quintile based on number of full-power television stations, cable penetration, VCR penetration and number of television households. The selection of the five DMAs among those close to the median values in each quintile was also influenced by an attempt to achieve broad geographic diversity. Table 1 shows the “illustrative” DMAs chosen.

Table 1 DMAs used for illustrative analysis of local markets and concentration

DMA	Rank	TV households (mil.)
New York, NY	1	6.72
Cleveland, OH	13	1.46
Portland, OR	25	0.92
Richmond-Petersburg, VA	54	0.49
Amarillo, TX	130	0.17

In each of these five DMAs, one example of Grade B overlap was examined in detail. First, the commercial station with the largest Grade B contour was identified in the main city in each of the five DMAs. For each of these five stations, the station outside the city was identified that had the largest overlap of Grade B contours without an overlap of Grade A contours. Joint ownership of such stations would be prohibited under current Commission rules, but would be allowed under the Grade A standard that the Commission has proposed. In these five illustrative cases, an estimated 4 to 31 percent of the households in the first station’s Grade B contour also lay within the Grade B contour of the outside station. Since these station pairs were chosen to maximize the Grade B overlap, these results suggest that in most cases stations without overlapping Grade A contours do not significantly compete to attract an audience.

15 DMA stands for the Nielsen Designated Market Area.

D. Concentration and competition

Table 2 presents two estimates of viewer concentration in each of five illustrative DMAs, assuming for the sake of argument that the viewing of video programming is a relevant product market. The evidence summarized in Section II.C above (and in greater detail in Appendix B) suggests that distant stations may not be part of the same local market in competing for viewers. Accordingly, both estimates in Table 2 look at viewing in a local market, assumed to include all broadcast stations and cable located in the DMA. The first set of HHIs is based on the assumption that each station has approximately the same potential to attract an audience as any other station in its DMA.[16] To compute the HHI, each broadcast station is assigned an equal weight, and cable is treated as an additional "station."

Table 2 Estimated viewer HHIs in five illustrative DMAs[17]

DMA	Number of full-power broadcast stations in DMA	Equal shares HHI, broadcast stations and cable	Viewing shares HHI, broadcast stations and cable
New York	20	476	1,478
Cleveland	14	667	1,617
Portland	10	909	1,808
Richmond	7	1,250	2,050
Amarillo	5	1,667	2,003

The second approach in Table 2 uses information on actual viewing. Viewer shares are assigned to broadcast stations based on their November 1994 ratings.[19] Ratings reflect viewing in the entire DMA, because this is the form in which viewing information is normally available and used by the industry. Stations receiving a rating

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16 UHF stations have a smaller broadcast reach than VHF stations and may therefore attract a smaller audience, other things equal. However, the effect of the smaller broadcast reach has been greatly reduced by the carriage of both UHF and VHF signals on cable systems. Some stations may have a smaller potential audience because they are located in a less populous part of the DMA, but that too may be offset by cable retransmission.

17 Source: Appendix C for HHIs; NIELSEN MEDIA RESEARCH, NIELSEN STATION INDEX, DIRECTORY 1994–95 for number of stations.

18 Source: Appendix C for HHIs; NIELSEN MEDIA RESEARCH, NIELSEN STATION INDEX, DIRECTORY 1994–95 for number of stations.

19 "Rating" means television sets tuned to a particular station or network as a percentage of all television households (TVHHs), whether viewing or not, in a relevant geographic area.

below 0.1 (when rounded) are excluded. Cable operators are assigned a single share based on the combined ratings received by cable networks in that DMA. Share estimates for other significant video distributors, including video cassettes, DBS and MMDS, are not available and are therefore not included, which tends to make the estimated HHIs overstate the degree of concentration.

Judging by the first HHI, which assumes equal shares, the concentration of viewing in all five DMAs falls below 1,800, in the range the DOJ/FTC *Merger Guidelines* describe as unconcentrated or moderately concentrated. Using viewing shares, three of the DMAs are in the moderately concentrated range and two are just outside it. Not surprisingly, smaller DMAs tend to have fewer television stations and somewhat higher concentration in the competition for viewers, as measured in Table 2.

Even with HHIs exceeding 1,800 in some DMAs, anticompetitive behavior in local markets for viewers is unlikely. Anticompetitive behavior by a broadcast television station would involve reducing the quality of programming below the competitive level. In principle, stations could reduce programming quality by agreeing to reduce expenditures on programming. In practice, payments made for programming are subject to negotiation and cannot be observed by other stations. The problems of coordinating a reduction in programming quality are further complicated by including operators of cable, MMDS and other video systems and providers of video cassettes. These firms may prefer to increase price rather than reduce quality, which would introduce further coordination problems. All these factors make an anticompetitive agreement to reduce programming quality in a local market unlikely. The same factors would impede a “cooperative” or “consciously parallel” or “tacitly collusive” outcome. For these reasons, a given transaction may not be anticompetitive even though the HHI exceeds 1,800. In addition, the correct relevant market may be broader than video programming.

E. Conclusion

The market proposed by the Commission should be expanded to include all providers of video programming, including VDT, MMDS and satellite systems and video cassettes, and perhaps other non-video sources of news and entertainment as well. Competitive issues in this area are best analyzed on a local level. Analysis of several illustrative DMAs suggests that concentration among video suppliers tends to be moderate, and concentration would be lower still if data were available for all the market participants. No single firm is likely to have significant market power, nor is the collective exercise of market power likely in the supply of video programming to viewers. The implications of these results for the ownership rules are explored in Sections VI to VIII below.

III. ADVERTISING MARKETS

Mergers and joint ventures between competing advertising media, such as cable television networks, newspapers or broadcast stations, are often evaluated to determine whether they would adversely affect competition in relevant markets for advertising. In response to questions raised by the Commission,[20] the present section and Appendix D of this report address the following issues: How should one determine which forms of advertising are in a relevant market? Which other advertising media in fact constrain the prices charged for broadcast television advertising and thus are in the relevant markets in which broadcast television advertising competes? How should concentration in these relevant advertising markets be measured? How concentrated are these relevant advertising markets? If an advertising market is "highly concentrated" under the standards of the DOJ/FTC *Merger Guidelines* (that is, the market has an HHI over 1,800), does this necessarily imply that the exercise of seller market power is likely?

The analysis of advertising markets in the present section is an essential tool used in Sections VI through VIII to evaluate the appropriateness of the Commission's national ownership, local ownership and one-to-a-market rules as ways to deal with issues of competition in advertising. The latter sections of this report conclude that reasonable concerns regarding competition in advertising do not provide a rationale for any of the rules in question. Competition in advertising would in fact increase if the Commission replaced its flat prohibitions with reliance on the competition standard in Section 7 of the Clayton Act.

A. Advertising and promotion

Advertising market definition must start not with an analysis of which media provide effective substitutes for advertisers, but with the question whether advertisers have effective substitutes for advertising itself. Both national and local sellers of consumer goods attempt to increase their sales not only by advertising but also by engaging in promotional activities that substitute for advertising. For example, companies

20 *See* FNPRM, *supra* note 1, 35–45.

promote their products through telemarketing, payments to retailers for preferred shelf space, coupons and other discounts and rebates.[21] Some sellers of consumer brands do no advertising, at least in some periods. In many cases, advertisers can simply increase their promotional activities in response to an increase in advertising prices. Although the balance of this section focuses on advertising media alone, the interpretation of HHIs must take into account advertisers' broader alternatives.

At both the national and local levels, advertisers generally use an array of media. The roles of the various media used by national and local advertisers are indicated by the data on advertising expenditures in Table 3. Advertisers that use broadcast television typically make extensive use of other media as well.[22] Also, over time there have been substantial shifts in advertising among media, for example, from print to television, and within television from network to syndicated and cable, in response to changes in the relative prices and efficacy of these media.[23]

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21 Substitution between advertising and promotion is discussed further in Appendix D.

22 For national advertisers, *see* Appendix Table E–11. For local data, *see* Cele Otnes and Ronald J. Faber, *An Examination of Variables Influencing Local Advertiser Media Selection*, PROCEEDINGS OF THE 1989 CONFERENCE OF THE AMERICAN ACADEMY OF ADVERTISING, Kim B. Rotzoll, ed. (1989) and Glen T. Cameron, et al., *How Local Advertisers Choose and Use Advertising Media*, JOURNAL OF ADVERTISING RESEARCH, Nov./Dec. 1993, at 39–49.

23 *See*, for example, McCann Erickson time-series data for the advertising expenditure categories in Table 3.

Table 3 U.S. advertising expenditures by medium[24]

Medium	National		Local		Total	
	$ million	percent	$ million	percent	$ million	percent
Broadcast TV					28,020	22.1
4 Networks	10,209	15.4				
Spot	7,800	11.8	8,435	14.0		
Barter	1,576	2.4				
Cable TV	1,970	3.0	594	1.0	2,564	2.0
Radio					9,457	7.5
Network	458	0.7				
Spot	1,657	2.5	7,342	12.2		
Newspapers	3,620	5.5	17,086	28.3	20,706	16.3
Business Papers	3,260	4.9			3,260	2.6
Magazines	7,357	11.1			7,357	5.8
Yellow Pages	1,230	1.9	8,287	13.7	9,517	7.5
Outdoor	605	0.9	485	0.8	1,090	0.9
Direct Mail	13,633	20.5	13,633	22.6	27,266	21.5
Other	13,002	19.6	4,522	7.5	17,524	13.8
Total	66,377	100.0	60,384	100.0	126,761	100.0

24 Source: McCann–Erickson estimates of expenditures by U.S. advertisers including commissions and art, mechanical and production expenses. Other advertising dollar data used in the present report generally relate to gross media revenues. Classified advertising has been removed from local newspaper advertising based on the ratio of classified to total local advertising in NEWSPAPER ASSOCIATION OF AMERICA, FACTS ABOUT NEWSPAPERS 94, 1994. While McCann-Erickson treats all direct mail as national, the present report assumes that direct mail is 50 percent national and 50 percent local.

25 Source: McCann–Erickson estimates of expenditures by U.S. advertisers including commissions and art, mechanical and production expenses. Other advertising dollar data used in the present report generally relate to gross media revenues. Classified advertising has been removed from local newspaper advertising based on the ratio of classified to total local advertising in NEWSPAPER ASSOCIATION OF AMERICA, FACTS ABOUT NEWSPAPERS 94, 1994. While McCann-Erickson treats all direct mail as national, the present report assumes that direct mail is 50 percent national and 50 percent local.

B. Advertising product markets proposed by the Commission

1. National advertising product market

In the Further Notice, the Commission tentatively defines a national market for video advertising, thereby excluding all non-video advertising, such as national radio and national print advertising. Furthermore, the Commission's national video advertising market includes only advertising supplied by broadcast networks, program syndicators and cable networks. The Commission tentatively excludes DBS advertising and all national spot advertising carried by broadcast television stations and cable systems (except "perhaps" MSOs). The Commission proposes to include spot advertising in local advertising markets rather than to include national spot in its national video advertising market.[26] The Commission's proposed national video advertising market is too narrow. There is abundant evidence that a correctly defined national advertising market would include national spot advertising and a number of types of non-video advertising such as radio and print (see Appendix D).

The only rationale provided by the Commission for excluding national spot advertising from the market in which network advertising competes is invalid. The Commission's rationale is that "spot sales of advertising to national advertisers are frequently made to allow the national advertisers to reach a more targeted geographic focus and not to reach a national audience (*e.g.*, selling trips to the Bahamas to persons in the snow belt during January)."[27] However, the issue is whether spot advertising would constrain the pricing of a hypothetical monopolist of advertising sold by broadcast networks, cable networks and syndicators. For spot advertising to constrain network advertising, it is sufficient that there be a significant number of advertisers using network advertising for whom spot is a close substitute. It is not necessary that spot and network advertising be close substitutes for all, or even most, users of either spot or network advertising. Thus, the fact that spot advertising is frequently used for purposes for which network advertising is not a close substitute does not imply that spot advertising is not in the market in which network advertising competes.

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26 *See* FNPRM, *supra* note 1, 37.

27 *Id.*

An analogy may be helpful in understanding the logical flaw in the Commission's argument. Suppose one were to ask whether hair salons that serve both women and men belong in the market in which salons that serve only women compete.[28] By the Commission's reasoning, the former would not be in the latter market, because salons that serve both women and men frequently sell services to people (namely, men) for whom salons serving only women are not a substitute. However, it is clear that salons serving both women and men constrain the prices charged by salons serving only women. Thus, the relevant market in which salons serving only women compete would contain salons serving both men and women.

The Commission has tentatively excluded non-video advertising from the relevant national advertising market because the Commission has "no clear evidence on the degree to which all the other alternatives...are economically relevant substitutes for video advertising."[29] The only empirical evidence to which the Commission refers is contained in a single journal article, which in fact sheds no light on market definition.[30]

2. Local advertising product markets

The Commission tentatively defines local advertising markets that include broadcast stations, cable systems, radio stations and local newspapers.[31] The Commission tentatively excludes magazine, yellow pages, outdoor/billboard, direct mail,

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28 In this analogy, salons that serve women and men play the role of national spot advertising, while salons that serve only women play the role of network advertising.

29 FNPRM, *supra* note 1, 36.

30 Barry J. Seldon and Chulho Jung, *Derived Demand for Advertising Messages and Substitutability Among the Media*, 33 QUARTERLY REVIEW OF ECONOMICS AND FINANCE 71–86 (Spring 1993), provides an econometric analysis of substitution among broadcast, print, direct mail and other advertising. The study uses aggregate data for the economy as a whole on output of all goods and services, expenditures on each of the four categories of advertising and price (CPM) indexes for each category of advertising. While the authors conclude that their study suggests that "the various media are fairly good substitutes," the study does not provide a reliable basis for inferences about market definition. It ignores the fact that changes in the economy during 1951–87 are likely to have affected the relative demands for the four types of advertising. Changes in the mix of goods and services produced in the economy, in the relative effectiveness of different types of advertising, in income levels, and in the demographic characteristics of the population are likely to have caused changes in the mix of the four types of advertising that would have been demanded at any given set of relative prices for advertising.

31 *See* FNPRM, *supra* note 1, 43.

telemarketing and other forms of advertising and marketing. The Commission provides no basis for its tentative local advertising product market. Of course, it would be difficult to offer any competitive rationale whatsoever for the Commission's cross-ownership rules relating to broadcast stations, on the one hand, and cable systems, radio stations and local newspapers, on the other, if the local advertising markets in which broadcast stations compete were defined more narrowly than the Commission now proposes. In fact, the product market proposed by the Commission is too narrow. The empirical evidence presented in Appendix D indicates that other forms of advertising, such as yellow pages, outdoor and direct mail, are substitutes for video, radio and newspaper advertising.

C. Evidence on advertising product markets

Appendix D presents evidence on substitution by national advertisers among broadcast television spot, broadcast network, syndication, cable network, cable spot, radio network, radio spot, newspaper, magazine, yellow pages, outdoor and direct mail advertising. Similarly, the appendix presents evidence on substitution by local advertisers among broadcast television spot, cable spot, radio spot, newspaper, yellow pages, outdoor and direct mail advertising.

The evidence in Appendix D refutes the Commission's tentative conclusion that national spot advertising does not compete in the national advertising market in which broadcast network, syndication and cable network advertising compete. Similarly, the evidence refutes the Commission's conclusion that radio, newspaper and magazine advertising are not substitutes for national video advertising, even though radio and newspaper advertising are substitutes for local video advertising. There is persuasive evidence that radio and print advertising are substitutes for video advertising, and there is no basis—empirical or otherwise—for a conclusion that such substitution is important only for local advertisers. Furthermore, there is no evidence to support a conclusion that other forms of advertising—including yellow pages, outdoor and direct mail—do not constrain the prices of video, radio and newspaper advertising. In sum, advertising markets are likely to be broader than those tentatively identified by the Commission and HHIs measured in the tentative markets must be interpreted in light of this fact.

D. Concentration

This section analyzes concentration in the advertising markets in which the national spot advertising sold by television stations competes or is alleged to compete. This section then analyzes concentration in the advertising markets in which the local spot advertising sold by stations competes. Because many types of advertising are substitutes for television spot advertising, concentration is computed here for broad product markets. However, in order to determine the robustness of this report's policy conclusions with respect to alternative definitions of relevant advertising product markets, the report also calculates concentration for narrower "markets."

In measuring shares for television stations and other local advertising media that sell to both national and local advertisers, there are two ways to measure advertising revenues. First, one could measure revenues earned by local media from national advertisers and use these data to measure the shares of local media in the national advertising market. Similarly, one could measure revenues earned by local media from local advertisers and use these data to measure the shares of local media in local advertising markets.

Second, one could measure revenues earned by local media from both national and local advertisers and use these same numbers to measure the shares of local media in the national advertising market and in local advertising markets. The justification for using both national and local revenues in calculating shares of local media is that, for each local advertising vehicle, there is unlimited supply-side substitution between sales to national and to local advertisers. Advertising time or space is exactly the same regardless of whether it is sold to a national advertiser or a local advertiser. Put differently, the *capacity* of a station to supply advertisers of either type can be measured by its combined sales of advertising of both types. In addition, national advertisers can substitute between national advertising time or space purchased, for example, from national firms representing local stations, and local advertising purchased at the local level from broadcast stations. As a result, revenues from sales of national and local advertising combined are likely to provide the most useful measure of competitive significance for the purpose of calculating concentration in advertising.

This report presents HHIs calculated based on each of these two assumptions about the revenues that should be used to compute shares, although the second assumption is preferred. HHIs based on shares calculated using the first approach are called "national sales" and "local sales" HHIs, respectively. HHIs based on shares calculated using the second approach are called "capacity" HHIs.

To calculate HHIs that are relevant to current market conditions, ownership has been updated to 1995 where possible. Thus, HHI calculations reflect 1995 ownership of advertising media and 1993 or 1994 revenues for those media.

1. National advertising market

Concentration has been calculated in the following national advertising "markets:"

- Video advertising as tentatively defined by the Commission, including broadcast network, syndication and cable network advertising, but excluding broadcast and cable national spot advertising.
- Video advertising, including broadcast network, syndication, cable network, broadcast national spot and cable national spot advertising.
- Video and radio advertising.
- Video, radio, newspaper and magazine advertising.
- Video, radio, newspaper, magazine, yellow pages and outdoor advertising.
- Video, radio, newspaper, magazine, yellow pages, outdoor, direct mail and miscellaneous advertising.

In order to calculate concentration in national advertising, one must make an assumption about how to attribute revenue from local media, including broadcast spot, cable spot, radio spot, local newspaper, outdoor and yellow pages. It is assumed that in order to compete in the national advertising market, a supplier using local advertising media must offer a set of local media that covers a combined area that includes something like 75 percent of households nationwide.[32] The "supplier" could

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32 *See infra*, note 205, Appendix D.

be a media owner, an advertising sales representative or a buyer that assembles its own set of local media. For expositional purposes, suppose that suppliers of broadcast television national spot advertising are representative firms, examples of which include Blair Television, Katz Communications and Telerep. Suppose also that national advertisers make their national spot purchases based on competitive bids. In that case, in order to be counted as an independent competitor, a representative firm must represent stations with a DMA coverage[33] of 75 percent of households. Given the combined coverage of commercial stations in the country, there could be eleven independent bidders offering broadcast television national spot in the relevant advertising market.[34] For the purposes of the HHI calculations in this report, it is assumed that seven station representatives have equal shares of broadcast television spot advertising.

These spot advertising revenues are attributed to the advertising sales representatives, rather than to the station owners, because no entity owns stations with even half the coverage needed to be a supplier of national spot in the relevant market. What each station owner supplies is an input into the production of national spot advertising. The input is advertising delivered to DMAs with 25 percent or less of DMA households.

For similar reasons, it is assumed that there are two national advertising representative firms supplying cable national spot advertising, seven supplying radio national spot advertising, two supplying national newspaper advertising, two supplying national yellow pages advertising, and two supplying national outdoor advertising.

The rationale for assuming that two firms supply cable national spot is that virtually all areas of the country can be reached by both a cable system and a regional cable sports network. To a large extent these systems and networks currently rely on two representative firms, National Cable Communications and Cable Networks, Inc., as well as Liberty Sports Sales, to make sales to national advertisers.

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33 "Coverage" of seventy five percent means that seventy five percent of all U.S. television households can be reached by this means.

34 *See* Section VI, *infra*. Combined coverage is 866 percent; 866 divided by 75 is 11.5.

Given the large number of radio stations in virtually all urban areas of the country, there could be many suppliers of radio national spot advertising. It is assumed conservatively that there could be seven.

The rationale for assuming that two firms supply national advertising in newspapers other than *The Wall Street Journal* and *USA Today*, which are treated as national newspapers, is that a number of cities have two independently owned and operated daily newspapers and there are national as well as local weekly papers. Similarly, the rationale for assuming that two firms supply national yellow pages advertising is that a significant portion of the U.S. is reached by two or more yellow pages directories, including directories from the local telco, from other telcos and from non-telco firms such as R. H. Donnelley. The rationale for assuming that two firms supply national outdoor advertising is that in most areas of the U.S. there appear to be two principal suppliers of outdoor advertising.

The direct mail industry is highly fragmented. Advo, which specializes in ZIP-code targeted saturation mailing of materials for multiple advertisers in a single package, accounted for about 3 percent of direct mail advertising in 1993. It appears that no other firm accounted for even 1 percent.[35] Because of the fragmented structure of direct mail, in computing HHIs it is assumed that, with the exception of Advo, direct mail is supplied by many companies, each of which has a negligible share of direct mail advertising.

Table 4 summarizes the HHIs in each of a number of national advertising product "markets," computed under the assumptions described above. For each "market" there are two HHIs, one that uses total advertising revenue for local media and one that uses only national advertising revenue for those media. The table proceeds from the Commission's unduly narrow tentative market to more realistic broader markets.

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35 Other leading suppliers of direct mail advertising, include DIMAC, whose major clients include AT&T and American Express, with 1993 revenues of $80 million, and DiMark, whose major clients include Blue Cross associations and insurance companies, with 1993 revenues of $39 million. DIMAC, *1994 SEC Form 10-K*, and *DiMark, 1994 SEC 10-K*.

Table 4 HHIs for alternative national advertising product "markets," 1993[36]

Product "market"	National sales	Capacity
Broadcast TV network, syndication and cable network	1,666	1,666
National video*	850	719
National video & radio	753	508
National video, radio, magazines & newspapers	352	498
National video, radio, magazines, newspapers, yellow pages and outdoor	329	444
National video, radio, magazines, newspapers, yellow pages, outdoor, direct mail and miscellaneous	134	198

*National video includes broadcast TV network, syndication, cable network, broadcast national spot and cable national spot.

Table 4 demonstrates that regardless of how the relevant product market for national advertising is defined, concentration is moderate (HHI between 1,000 and 1,800) or low (HHI below 1,000) under the standards of the DOJ/FTC *Merger Guidelines*. In a properly-defined national advertising market, the HHI is well under 1,000. Thus, changes in the Commission's ownership rules that have any impact on national advertising pose no threat to competition.

2. Local advertising markets

For illustrative purposes, advertising concentration in five local markets are calculated in this report: New York, Cleveland, Portland, Richmond and Amarillo. The selection of these local markets is discussed above in connection with Table 1.

For the purpose of these illustrative calculations, it is assumed that DMAs are the relevant geographic markets in which broadcast stations compete in selling advertising. The general relevance of DMAs as the geographic markets in which television stations compete in sales to local advertisers is suggested by the fact that the ratings data that stations, sales reps, advertisers and advertising agencies typically

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36 Source: Appendix Tables E–1 to E–6.

37 Source: Appendix Tables E–1 to E–6.

purchase from A.C. Nielsen and rely on in marketing and purchasing spots pertain to DMAs. Furthermore, even where there are Grade B contour overlaps for stations in adjacent DMAs, it appears that a typical advertiser that is buying national spot buys time on a station in each DMA of interest, rather than relying on coverage from stations in adjacent DMAs. Also, Setzer and Levy, who interviewed advertising agency executives, report that aside from superstations, "stations that are imported as distant signals by cable systems reduce local station audiences but benefit little, in general, from their additional audiences because much of their advertising is local."[38] Thus, it appears that stations in adjacent DMAs that have overlapping Grade B contours do not compete in selling advertising.

In each DMA, shares and concentration are calculated for the following alternative advertising product "markets":

- The "market" tentatively proposed by the Commission, which includes only broadcast television, cable television, radio and newspapers.
- The preceding "market" plus yellow pages and outdoor.
- The preceding "market" plus direct mail and miscellaneous local advertising.

Because of lack of data, some smaller broadcast stations, cable systems, newspapers and yellow pages suppliers are excluded from the market share and concentration calculations.[39] Because numerous smaller suppliers of advertising are omitted from the tables. Other things equal the HHIs overstate actual concentration levels.

Table 5 provides HHIs for the three alternative advertising product "markets" in each of the five selected DMAs, as well as in an area consisting of the combined Cleveland and Youngstown DMAs. The Cleveland and Youngstown DMAs are adjacent, and

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38 Florence Setzer and Jonathan Levy, *Broadcast Television in a Multichannel Marketplace*, FCC Office of Plans and Policy, June 1991, at 129. *See* also CBS, 1994 *SEC Form 10–K*, at 7: "Competition with CBS's owned radio stations occurs primarily in their individual market areas, although on occasion stations outside a market place signals within that area. While such outside stations may obtain an audience share, they generally do not obtain any significant share of the advertising within the market."

39 For example, the HHI calculations for Cleveland and Youngstown combined include only the four leading daily newspapers, which account for approximately 60 percent of average weekly newspaper circulation. More than 50 other newspapers together account for the remaining 40 percent, and no one of these accounts for over 5 percent. See Appendix Table F–17.

there are Grade B contour overlaps between stations in Cleveland and Youngstown. While the relevant local advertising market in which Cleveland stations compete does not in fact appear to include Youngstown, HHIs were calculated for Cleveland and Youngstown combined to demonstrate that the effect of combining adjacent DMAs would typically be to *reduce* concentration.

Table 5 indicates that in a product market that includes video, radio, leading daily newspaper, yellow pages, outdoor, direct mail and miscellaneous local advertising, HHIs for "capacity" are typically substantially less than 700. They are only modestly higher when they are based solely on local advertising revenue. In the terminology of the *Merger Guidelines,* concentration in markets with HHIs below 1,000 is "low."

If direct mail and miscellaneous local advertising are excluded from the product market, concentration remains in the "low" range for New York and is in the "moderate" range (1,000 to 1,800) for the remaining DMAs based on the capacity measure.

If the product "market" is limited to video, radio and leading daily newspapers, as proposed by the Commission, concentration remains in the "low" range for New York and in the "moderate" range for Cleveland. The HHI is above 1,800 in the three smaller DMAs. However, the fact that an HHI exceeds 1,800, even if the market were properly defined, does not necessarily imply that the exercise of market power is likely, for reasons that are explained in the next two sub-sections.[40]

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40 It is widely recognized that the HHI threshold of 1,800 specified in the *Merger Guidelines* is not based on empirical evidence concerning the relationship between concentration and the likelihood that market power will be exercised. *See* Paul A. Pautler, *A Review of the Economic Basis for Broad-Based Horizontal-Merger Policy*, 28 ANTITRUST BULLETIN 571–651 (Fall 1983); Noel D. Uri and Malcolm B. Coate, *The Department of Justice Merger Guidelines: The Search for Empirical Support*, 7 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 113–20 (1987); and F. M. SCHERER AND DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE, (3rd ed.1990).

Table 5 HHIs for alternative DMA advertising product "markets," 1994[41]

Product "market"	DMA	Local sales	Capacity
Video, radio, & newspaper	New York*	722	703
	Cleveland	1,370	1,250
	Portland	2,244	1,839
	Richmond	2,299	1,924
	Amarillo	2,500	2,505
Video, radio, newspaper, yellow pages & outdoor	New York*	889	758
	Cleveland	1,275	1,106
	Portland	1,791	1,485
	Richmond	1,806	1,519
	Amarillo	1,742	1,722
Video, radio, newspaper, yellow pages, outdoor, direct mail, & miscellaneous	New York*	393	284
	Cleveland	565	418
	Cleveland & Youngstown	529	361
	Portland	797	564
	Richmond	811	583
	Amarillo	821	632

*1993 revenue

E. Substitutes that are not included in the market

1. National and local advertising markets are closely related

While it is usual to define separate national and local markets for advertising, there is both supply-side and demand-side substitution between these markets. This implies that national media have a role in constraining pricing in local advertising markets, and similarly that local media have a role in constraining prices in national advertising markets. This in turn implies that, other things equal, the potential for competitive problems in national and local advertising markets is even less than is suggested by

41 Source: Appendix Tables F–1 to F–16.

42 Source: Appendix Tables F–1 to F–16.

HHIs that are calculated on the assumption that national and local advertising markets are separate.[43]

On the supply-side, for example, the amount of advertising time on both broadcast and cable network programs that is used for network advertising and the share that is used for spot advertising are subject to negotiation and market incentives. Also, stations and cable systems are free to change the allocation of their spot advertising time between local and national sales, and local newspapers and other local media can do the same. In addition, according to a securities analyst, "the emergence of Fox, cable networks, and nationally syndicated shows sold on barter has pulled time out of the local pool into national time."[44]

On the demand side, national advertisers can substitute between buying advertising from national station representatives and buying in each local area. McDonald's Corp. provides a recent example:

> In a stunning move, the fast-food giant, with the blessing of its franchisees, is shifting much of its local ad spending to national TV media in 1995. A majority of the company's local/spot budget will now be earmarked for national network, cable and syndication....Franchisees formerly contributed roughly 4.25 percent of monthly sales to their co-ops; 44.7 percent of this money went to the national advertising fund, while the rest funded local programs. Now, 68.2 percent of that money will go to the national fund, with only 31.8 percent toward local marketing.[45]

The article goes on to quote Fox's Jon Nesvig on McDonald's switch:

> "You always get money shifting back and forth, but it may not always be one advertiser," Mr. Nesvig said. "And if network prices go up too much as a result, someone else will shift spending to spot and local."[46]

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43 The 1992 DOJ/FTC *Horizontal Merger Guidelines* explain, at §1.522, that for a given HHI the magnitude of any potential competitive problem depends on the extent of substitution between products in the relevant market and products outside the relevant market.

44 M.T. Cook, *Television Broadcasting—Industry Report*, Prudential Securities, May 4, 1993.

45 Wayne Walley, *McDonald's Yanks Local Ads; Broadcasters See Other Options*, ELECTRONIC MEDIA, Dec. 19, 1994, at 2.

46 *Id.*

Because national and local advertising markets are closely related on both the supply-side and the demand-side, a given HHI measured in either market alone does not have the same implications that it would have in a relevant market that did not exclude any substitutes.

2. Other forms of advertising and promotion

A similar argument can be made for any alleged advertising market that does not include all advertising and promotion. If a relevant "market" is defined to include only some subset of advertising, clearly there will be a number of substitutes, for example direct mail and telemarketing, just outside the market. Because there are such substitutes near the border of the "market," a given HHI does not have the same implications it would have in a relevant market that did not exclude any substitutes.

F. Collusion is unlikely

There is another reason that an HHI should not raise concern just because it exceeds some arbitrary threshold, such as 1,800. Even if broadcast television were found to compete in national or local advertising markets for which concentration and entry barriers were sufficiently high to raise *prima facie* concerns under prevailing antitrust standards, anticompetitive conduct would be unlikely. An anticompetitive increase in broadcast television advertising rates would require the coordinated efforts of not only television broadcasters, but also companies supplying advertising time and space in various other media. An effective collusive agreement limited to broadcast television would be at best difficult to reach and maintain. A successful conspiracy to raise advertising prices would be even more difficult to achieve and maintain for companies involved in the various different media that would be included in a properly-defined antitrust advertising market.

Prices (CPMs) for television advertising time are a function of the size and demographic composition of the audience, whether the broadcast time and audience size are guaranteed, the buyer's volume of advertising, when the ad is placed (for example, in the up front or scatter marketplace), and numerous other variables. Referring to the Fournier and Martin analysis,[47] the FTC staff noted that:

> [A]n impressive array of characteristics was found to influence the price of an advertising spot. The fraction of homes the spot is expected to reach, the absolute number of homes the spot is expected to reach, and the uncertainty connected with the spot's reach were all found to play a significant role in determining price. Each of these characteristics differs in turn depending upon the program shown, the time of day the program is shown, and the type of station (affiliate or independent) showing the program. This apparent complexity in determining the price of any particular spot would serve to increase the difficulty that networks or their affiliates [or independents] would encounter in any attempt to collude successfully on the price of spots.…In short, this study suggests overall that the obstacles to achieving and maintaining anticompetitive conduct in broadcasting are significant.[48]

Thus, it would be difficult for sellers of broadcast advertising time to reach agreement on a full array of prices for potential advertising contracts, and it would be difficult for them to determine whether any given contract violated the terms of an anticompetitive agreement. Furthermore, information on actual transactions prices for advertising are not publicly available, and thus monitoring of prices to detect cheating would require overt illegal activity—exchanging contracts.

One media planner who was interviewed by Economists Incorporated noted that if she thought television stations were trying to charge anticompetitive prices, she would respond by buying time from only some of the stations. She would attempt to lead the other stations to believe that the stations that made sales were cheating on the anticompetitive agreement by undercutting the cartel price. Such behavior could help to undermine any hypothetical agreement.

Inclusion of cable television, radio, newspapers and other media in a conspiracy to raise advertising prices would further complicate an already formidable task. For

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47 Gary M. Fournier and Donald L. Martin, *Does Government-Restricted Entry Produce Market Power?: New Evidence from the Market for Television Advertising*, 14 BELL JOURNAL OF ECONOMICS 44–56 (Spring 1983).

48 *Comments of the Bureaus of Consumer Protection, Economics, and Competition of the Federal Trade Commission before the Federal Communications Commission*, In the Matter of the Syndication and Financial Interest Rule, BC Docket No. 82–345, FCC, Jan. 27, 1983, at 22–24, footnote omitted.

example, it would be difficult to reach agreement on the relative prices of advertising supplied by different media. Price elasticities of demand for advertising, margins of prices over variable costs, and conditions for new entry—all of which affect the prices at which a cartel would maximize profits—would certainly differ among the various media that compete with broadcast television. As a result, companies in different media would be likely to have quite different views on how much a cartel should raise prices.

The implication of this discussion is that tacit collusion is unlikely to be successful in the markets in which television advertising is sold, even if the HHIs in these markets significantly exceed 1,800.

G. Conclusion

There is considerable evidence that the relevant antitrust markets in which to evaluate ownership of national and local advertising media are a good deal broader than the markets tentatively proposed by the Commission. In properly-defined product markets, the HHI does not exceed 1,800 for national advertising or for local advertising in any of the five DMAs analyzed for illustrative proposes. Thus, none of these markets is highly concentrated under the standards of the DOJ/FTC *Horizontal Merger Guidelines*. This alone indicates that anticompetitive behavior is unlikely.

Anticompetitive behavior is unlikely for two additional reasons. First, the exercise of market power in the relevant advertising markets would require collusion. It would be very difficult, not to mention unlawful, to reach, monitor and enforce a collusive agreement. Second, in a properly-defined product market, there would be scope for entry. As a result, even HHIs significantly over 1,800 do not imply that the exercise of market power is likely.

The analyses in this section and in Appendix D demonstrate the feasibility of analyzing the competitive effects of changes in station ownership in markets for advertising. These analyses also provide a model that the Commission might use to conduct similar analyses. For example, the analyses here suggest the types of advertiser interviews and documents that can be used to define markets as well as the sources from which data on market shares can be obtained.

The analyses of advertising markets in the present section of this report are applied to the evaluation of the Commission's national ownership, local ownership and one-to-a-market rules in Sections VI through VIII. Those sections conclude that concerns over competitive effects in advertising markets do not provide a rationale for the prohibitions imposed by these rules.

IV. The Commission's Video Program Production Market

A. Introduction

The purpose of this section is to explore the issues raised by the Commission's ownership rules in the market where video programming is bought and sold. The focus here is on the demand side of the market—that is, the purchase of programming. The purchase of video programming has implications for both the national ownership rule and the local ownership rule. The national ownership rule has only a limited effect on concentration among video purchasers at the national level, because television stations are not the only or even the principal purchasers of video programming. No station ownership restriction is needed to preserve competition in purchasing video programming at the national level. The purchase of video programming is also of some relevance for the local ownership rule, since television stations compete among themselves and with other local video providers to purchase local rights to video programming. The current local ownership rule, based on Grade B contours, is not well-suited to deal with potential competitive concerns, which are unlikely to arise in any event.

Competitive analysis typically focuses on the potential exercise of market power in the selling of goods or services produced by firms in a market. It is also possible that firms can exercise market power in the purchase of inputs. Under certain conditions, a single buyer or a small group of buyers acting in a coordinated fashion could have an incentive to reduce the purchases of some input below the amount that would be chosen under competitive conditions. The purpose of reducing purchases would be to reduce the price that the firm or firms would then pay on the remaining purchases of this input. The harm to society results not from the lower price, but from buyers purchasing "too little" of the input, less than the amount that would maximize social welfare. The Commission's interest in the purchasing of video programming is motivated by the possibility of monopsony or oligopsony power.[49]

49 *See* FNPRM, *supra* note 1, 46.

B. Product market

Broadcast stations require programming to show to their audiences. Many stations produce a portion of their programming themselves. This is typically news and public affairs programming, but it can also include coverage of other local events such as sports. Some station groups also produce entertainment programming such as local talk shows. Whatever programming is not produced internally must be purchased from other sources, including networks and syndicators.[50] As noted in Section II, the programming shown on broadcast television is substitutable with programming distributed by cable, DBS and other satellite services, and through video cassettes. The personnel and equipment used to create this programming are also largely undifferentiated, and can move freely from producing programming for one distribution outlet to producing for another outlet. The proper product market in which to consider the programming purchases of television stations should include all video programming.

C. Geographic markets and competitive consequences

1. National market

The scope of the geographic market in which to consider the possibility of market power in the purchase of video programming depends on the exhibition rights that are being purchased for the programming. National exhibition rights permit the purchaser to distribute the programming to an audience located anywhere in the country, typically through a specified distribution medium and for some specified period of time or number of viewings. National exhibition rights are purchased by broadcast networks, syndicators, cable networks, DBS operators, distributors of MMDS, SMATV and satellite dish programming services, and distributors of video cassettes. National rights to video programming are purchased from suppliers throughout the United States and even from foreign sources. The market in which national rights are purchased should be considered a national market for purposes of analyzing issues of buyer market power.

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50 Programming can be purchased either through a money payment, or through granting advertising time to the programming supplier, such as a network or barter-syndicator.

2. Local markets

Broadcast stations purchase programming primarily from networks or syndicators. For non-network programming, stations are restricted by Commission regulations from purchasing exclusive program exhibition rights except in a limited local area.[51] A broadcast station seeking to purchase the exhibition rights to non-network programming in its own local area competes against other stations in that area to obtain those rights. Any local station can purchase the rights, and if the rights are purchased by one station in the area they cannot be purchased by another station in the area. However, a station does not compete against stations located outside its area, because stations outside the area are prohibited from purchasing exclusive rights within the area. Even if they were not, it is unlikely that a station would seek to buy rights outside of its own broadcast area because such rights would have no value to that station. Accordingly, the local area for which a station may purchase exclusive rights is the relevant geographic market in which to analyze competition among broadcast stations for non-network programming.

Stations also compete among themselves to acquire programming through affiliation with a broadcast network. In general, each network attempts to form a primary affiliation with one station in each DMA. Stations located in separate DMAs therefore do not compete for network affiliation. In most instances, each commercial station within a DMA can compete for network affiliation against all other commercial stations in the DMA. In a few instances, even stations located in the same DMA may not compete for affiliation. ABC, CBS and NBC each has more than one primary affiliate in a few DMAs, typically those in which a second affiliate can significantly improve the network's coverage of the DMA.

Competition among broadcast stations and other video distributors for rights to distribute programming in a local market tends to increase the prices paid for programming rights in that market. If all the broadcast stations and other video distributors in a local market were owned by a hypothetical monopsonist, the price

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51 Broadcast stations are prohibited from acquiring non-network programming rights that would prevent a broadcast station in a community located more than 35 miles away from broadcasting the same programming. The 35-mile limit can be exceeded if the station against which the rights would be exercised is located in the same hyphenated market. *See* 47 CFR § 73.658(m).

paid for video programming rights in that market would probably be reduced. In purchasing local rights to national programs, the price reduction in a single market would have a negligible effect on the quantity of national programming available to a typical broadcast market. The price reduction would occur because of an increase in bargaining power that a hypothetical single buyer would have compared with multiple competing buyers.[52] Stations and others may also purchase rights to a relatively small amount of programming produced specifically for the local market. For such programming, a reduction in the price paid would probably reduce the amount or quality of such programming. However, this effect is best analyzed as a potential reduction in the quality of programming offered to attract viewers (see Section II) rather than as monopsonistic behavior.

As noted, stations within the local market do not compete against stations outside the market for the purchase of programming. As a consequence, joint ownership of stations in different local markets cannot increase concentration or market power in any local market. However, multiple station ownership can decrease the price of programming for pro-competitive reasons because a station group can offer several benefits to the program seller. Each seller of programming incurs transactions costs in dealing with individual stations. When stations in different markets have a common owner, it is possible for the seller to reduce transactions costs by dealing with a single owner instead of multiple individual stations. In addition, the program seller's risk that the program will be a commercial failure can be reduced substantially by a purchase commitment from a station group. Station groups recognize the transaction cost savings and risk reduction that the seller receives, and may negotiate with the seller to share the benefits. For this reason, the group-owned stations may pay a lower price for programming than they would have paid were they not part of a group. The lower price for programming results not from anticompetitive behavior, but from the ability of a group-owned station to offer benefits which a single station does not offer. These transaction cost savings are the kind of efficiencies that market forces should be permitted to encourage, and which can be lost through excessive regulation. The efficiencies from group ownership are discussed further in Section VI.B.

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52 Bargaining power affects only the distribution of profits and not output, and is distinct from market power, which affects resource allocation. Defined this way, there is no economic basis for policy concern with bargaining power.

D. Concentration

1. National market

Precise figures on shares of purchases of national video rights are not available. However, even under conservative assumptions, video purchases are not concentrated.

Total 1994 expenditures on programming, net of distribution fees, are estimated in Table 6. One could construct an HHI that would vastly overstate actual concentration by assuming ABC, CBS and NBC each had an equal share of purchases, and assuming that each type of programming purchaser listed in the table represented a single purchaser. The resulting calculation yields an HHI of approximately 1,500. Even this grossly overstated concentration level would not qualify as highly concentrated under the DOJ/FTC *Merger Guidelines*.

Table 6 Expenditures on video programming net of distribution fees[53]

	Expenditures ($ millions)	Share of total expenditures (percentage)
Total ABC, CBS and NBC	3,447	28.1
Fox	689	5.6
Syndication	2,897	23.6
Basic cable	1,618	13.2
Pay cable	1,255	10.2
Home video	2,365	19.3
Total	12,271	100.0

A somewhat more refined concentration estimate can be prepared by estimating the shares of individual firms within the categories of syndication, basic cable, pay cable and home video. An HHI based on commonly-owned purchasers of video programming is less than 800, well within the range that the DOJ/FTC *Merger Guidelines* consider unconcentrated. See Appendix G.

53 Source: See Appendix G.

54 Source: See Appendix G.

These estimates show that concentration among national purchasers of video programming is low. As noted earlier, broadcast stations do not participate in this market because they do not purchase national exhibition rights. It is conceivable that a group of stations could become sufficiently large and geographically dispersed that it would seek to purchase national exhibition rights for the entire station group. One way to estimate the effect of such a hypothetical development on the concentration of programming purchases would be to assume that the new station group would purchase approximately as much programming as the Fox Network currently purchases, and that all this programming would displace purchases made by the smallest syndicators. Even under these assumptions, the hypothetical new company would have a share of under 6 percent, and the HHI estimated above would increase by only about 20.

2. Local markets

Commercial broadcast television stations compete to some extent with non-commercial stations and cable operators in the purchase of programming. For some programming such as Telemundo or home shopping that may be carried on cable or a broadcast station, local cable systems clearly compete with broadcast stations. There are examples of programming being shown both on commercial stations and on public stations or cable. For instance, first-run episodes of *I'll Fly Away* aired on NBC affiliates, and then were distributed by PBS.[55] *Beakman's World* is an example of a first-run syndicated show that ran simultaneously on broadcast television and The Learning Channel, a cable network.[56] Both cable and non-commercial stations could compete with commercial stations to cover local events. Most cable operators have public access channels for which programming is produced or purchased. In addition, some cable operators produce news or other programming to show on a cable channel. In principle, local program rights could also be purchased for carriage on an MMDS system or a VDT system. The possibilities for competition that commercial stations may face from non-commercial stations, cable operators and others in purchasing programming make it appropriate to reflect the presence of these purchasers in evaluating local concentration. The concentration analysis that follows

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55 *I'll Fly Away*, NEW YORK, Oct. 11, 1993, at 79.

56 Steve Coe, *Learning Channel to Share "Beakman's World,"* BROADCASTING, Aug. 31, 1992, at 17.

assumes that these other purchasers can be represented as the equivalent of an additional commercial broadcast station.

Information on the programming purchases of broadcast stations and others, were it available, would be extremely complex. Stations and other local program purchasers not only make monetary payments to acquire programming from syndicators and from local producers, they also turn over advertising time to networks and syndicators as payment in kind for programming received. It would be very difficult to translate this advertising time into dollars that could be compared across program purchasers, since the programming itself affects the value of the advertising time, and because prices for spot advertising are not public.

Two alternative approaches may be used in place of programming purchase shares. For both approaches, it is assumed that broadcast television stations compete to purchase programming only with other stations located in a 35-mile radius. Concentration estimates would be lower if all stations in the DMA were included, as may be more appropriate in considering competition for network affiliation or for non-network programming in hyphenated markets. The first approach recognizes that since all broadcast stations have to obtain enough programming to fill the broadcast day, stations acquire or produce approximately the same number of hours of programming, although the programming differs in value. An HHI can be calculated based on the simple assumption that all stations in a market (plus an additional "station" representing purchases by cable and others) make the same video purchases. This HHI is presented in Table 7 for five illustrative cities. Because it fails to account for differences in the value of programming purchased, this HHI probably understates concentration.

A second approach, also shown in Table 7, uses stations' viewing shares as a proxy for their shares of video purchases. These HHIs also include an additional "station" representing cable and other local program purchasers. Actual viewing of cable is largely attributable to cable networks and overstates the viewing importance of locally purchased programming. Instead of its actual viewing share, the cable "station" is assigned a share based on the rating received by the lowest-rated broadcast station in the 35-mile area. A station's viewing share may overstate or understate its importance in purchasing programming. For instance, suppose two very similar independent stations are competing to affiliate with a broadcast network. The station that obtains the affiliation will likely begin to have higher ratings than the unaffiliated station. However, their divergent ratings may not reflect a significant advantage or disadvantage in competing to renew the affiliation. For this reason, viewer shares may not accurately reflect stations' relative significance in competing for video programming. Overstating the differences between stations may cause the HHI based on viewing shares to be overstated. Consequently, the HHIs in Table 7 probably bracket the correct values.

Table 7 Estimated video purchase HHIs in five illustrative cities[57]

DMA	**Number of full-power commercial broadcast stations in 35-mile radius**	**Equal shares HHI, broadcast stations and cable**	**Viewing shares HHI, broadcast stations and cable**
New York	8	1,111	1,622
Cleveland	8	1,111	1,978
Portland	6	1,429	2,107
Richmond	5	1,667	2,655
Amarillo	4	2,000	2,504

E. No current market power

The difficulties of coordinating a reduction in the competition to purchase programming are essentially the same as those discussed in Section II in connection with competition to attract viewers. These difficulties make it unlikely that stations could coordinate their actions to reduce the price paid for programming. In a typical local market, there is significant competition among broadcast stations and others to purchase video programming. Nothing in the foregoing analysis suggests that any station group under common ownership has or is likely to acquire market power in the purchasing of video programming.

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57 Source: See Appendix C.

58 Source: See Appendix C.

F. Conclusion

The purchase of national rights to video programming by networks, syndicators, station groups and others is unconcentrated. It is extremely unlikely that television station groups would obtain or exercise market power in purchasing video programming. Television stations also compete in local markets for video programming rights. Though concentration among stations and other local purchasers is higher in some local areas, the exercise of monopsony or oligopsony power is unlikely.

V. DIVERSITY

A. Introduction

The Commission has invited comment on the “diversity markets” relevant to evaluation of the ownership rules. Although it must be acknowledged that diversity is an issue that transcends economics, this section attempts to apply the tools of economic analysis to the questions posed by the Commission. Two conclusions are reached. First, for the Commission to mandate greater diversity than what a competitive market supplies is necessarily to reduce consumer economic welfare. The Commission should take account of this possible cost of its policies. Second, sensibly-defined “diversity markets” are likely to be broader and less concentrated than relevant economic or antitrust markets. Thus, a transaction that passes muster under the standards of competition policy is likely also to pass muster under any reasonable diversity standard.

In the Further Notice, the Commission identifies three relevant types of diversity: viewpoint, outlet and source.[59] Viewpoint diversity apparently is synonymous with diversity of program content, because the Commission uses its now-defunct program content regulations to illustrate “direct” regulation of viewpoint diversity.[60] These “direct” regulations required broadcasters to offer minimum amounts of various program types, and to present a variety of viewpoints, but did not require broadcasters to offer access to others. Outlet diversity “refers to a variety of delivery services (*e.g.*, broadcast stations) that select and present programming directly to the public.”[61] Source diversity “refers to ensuring a variety of program producers and owners.”[62] Finally, according to the Commission, its “core concern with respect to diversity is

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59 FNPRM, *supra* note 1, 54–80.

60 *Id.* 57–59.

61 *Id.* 61.

62 *Id.*

news and public affairs programming especially with regard to local issues and events."[63]

The Commission's diversity concerns are thus at bottom content concerns; diversity of outlets and sources is a proxy for measuring or a tool for achieving content diversity. Source diversity in particular does not appear to be deeply implicated by the ownership rules. Hypothetical problems of monopsonization with respect to program sources could in principle result from increased concentration of outlets. See Section IV. But there is no reason to suppose that this would affect content diversity. (A monopsonist might buy fewer programs or pay less for them, but if the monopsonist operates in the competitive output market it might have to produce the same degree of diversity as a non-monopsonist.) Therefore the focus here is chiefly on outlet and viewpoint diversity.

The Commission's objective of ensuring diversity of viewpoints, especially with respect to local news and public affairs, is not on its face an economic goal. The role of economic analysis with respect to this issue is therefore somewhat circumscribed. It is unclear, for example, whether the Commission seeks a degree of diversity greater than what an efficient competitive private market would provide, and if so, what the basis may be for sacrificing consumer economic welfare to that end. Does the Commission believe that an unregulated (as to ownership) competitive market would, in this industry, reflect imperfections resulting in a less-than-efficient degree of diversity? What imperfections would produce this result?

There is a literature in economics on the effect of various market imperfections, such as monopoly, on the range of products offered in a market.[64] There is no general inference that can be drawn from this literature that either competitive or monopolistic broadcasters offer an inefficiently narrow range of viewpoints. For example, a firm in control of two channels may program the two channels so as to

63 *Id.* 72.

64 *See, e.g.*, Peter O. Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 QUARTERLY JOURNAL OF ECONOMICS 194 (1952); L. Rothenberg, *Consumer Sovereignty and the Economics of TV Programming*, 4 STUDIES IN PUBLIC COMMUNICATION 45 (1962); BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS 26–99 (1992). Bruce Owen is president of Economists Incorporated.; JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 115 (1988).

reach different audiences, whereas two single-channel competitors may each seek to reach the larger audience, and thus duplicate programming.

A related point is that there is no clear connection between viewpoint diversity and consumer welfare. The Commission in the past has often assumed that more voices are better than fewer, in spite of the possibility that consumer welfare might be enhanced with fewer, for the reasons just stated. A more straightforward example of the connection between diversity and consumer welfare may lie in the ownership rules themselves. To the extent that the ownership rules prevent the broadcasting industry from operating at minimum cost, for example, costs are imposed on consumers in exchange for putative increases in diversity. There seems to be no evidence, or basis for an assumption, that consumers would regard this price as worth paying.

Indeed, if the present rules are a binding constraint on ownership concentration, it follows that they do sacrifice efficient production.[65] The reason for this conclusion follows. Broadly speaking, there are two reasons why broadcast groups, for example, might survive or grow: (1) because to do so increases market power with respect to some group of customers or suppliers, or (2) because to do so lowers costs or increases service quality and hence demand. For the reasons set out elsewhere in this Report, an increase in group ownership that lies within the standards of the *Merger Guidelines* seems unlikely to increase anyone's market power. Similarly, an increase in local concentration that does not violate the *Merger Guidelines* is unlikely to confer market power. It follows that the impact of the rules is chiefly to impose an inefficiently small form of organization on the broadcasting industry.

In spite of these reservations and limitations, the discussion that follows attempts to apply the tools of economic analysis to the diversity issues raised by the Commission in the Further Notice. It is a given that local news and public affairs is the chief focus of diversity concerns. Then, using the framework of antitrust analysis to the extent it is applicable, it is necessary to ask what "markets" are relevant to the analysis of the ownership regulations, what degree of concentration is present in these "markets," and what if any effect the ownership rules have on the performance of these "markets."

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65 A discussion of the efficiencies and advantages of group ownership appears in Section VI. B., *infra*.

B. Analytical framework

In order not to continue putting the word "market" in quotation marks throughout this section, it is important to emphasize here at the outset that market in the antitrust sense is not intended. An antitrust market is a collection of products or services in a defined geographic area that it would be profitable to monopolize. Thus, in an antitrust market, consumers find products outside the market insufficiently close substitutes for those in it, and outside suppliers or suppliers of other products cannot in sufficient numbers switch to the manufacture of the products in question. Further, entry is difficult, and all of this is true even after a hypothetical monopolist of the market has raised prices or reduced quality.

When speaking of the marketplace of ideas or diversity markets the proper test for market definition involves service quality rather than price. An analytical approach to the diversity market asks that one imagine a particular group of media, controlled by a hypothetical monopoly or cartel that has begun to produce news and public affairs programming with a monolithic viewpoint (*e.g.*, "liberal" or "conservative"). Then one must ask what, if any, sources of alternative (in this case, political) viewpoints are available to consumers, to which they *could* turn. (For reasons explained in the next sub-section, the issue of "would" should not arise.) Similarly, on the supply side, it is necessary to ask what suppliers of other programming (*e.g.*, entertainment) could switch to the production of differing viewpoints on local news and public affairs.

The antitrust market definition paradigm can be carried about this far before it begins to encounter difficulties. For example, it is reasonable to assume that all these media seek to maximize profits. It follows that the monolithic viewpoint of the hypothetical monopolist must be profit-maximizing. Perhaps this is so because the reduction in audience demand and advertising revenue that accompanies the restriction of viewpoints is small, and does not offset the cost savings from offering fewer view-points. The *Merger Guidelines* ask whether a hypothetical monopolist could raise prices by, say, 10 percent, without inducing significant demand- or supply-side substitution or entry. There is no obvious similar test for the decreased content diversity in the broadcasts of a hypothetical media monopolist, because there is no metric of diversity. Nevertheless, assuming that the reduction in content diversity leaves an unsatisfied demand among consumers, other media stand to increase their audiences, and hence their profits, by serving it. Similarly, unsatisfied consumers will have a demand for their preferred viewpoint on other media, if other media are available. So, in a general way, the antitrust paradigm remains applicable, even though there is no rigorous test for market definition.

C. Demand-side market definition

A key question is the extent and intensity of consumer demand for alternative viewpoints, and hence the size of the potential audience available to firms responding on the supply side. Because the whole exercise of seeking to protect content diversity is futile if consumers are indifferent to alternative viewpoints, it is reasonable to assume that the demand for alternative sources would be considerable in the event that a hypothetical monopolist homogenized the viewpoints expressed by a particular collection of outlets. There has long been a tension in broadcast regulation surrounding this assumption. It is possible to view certain earlier decisions, such as *Red Lion Broadcasting v. FCC* 395 U.S. 367 (1968), as based on the opposite assumption. That is, these decisions viewed consumers as passive and therefore imposed on broadcasters an affirmative obligation to inform their audiences with respect to important issues. Whatever may have been true in the past, modern consumers, armed with computers to surf the Internet and remote controls to graze on dozens or hundreds of video channels, can be regarded as active shoppers.

Although local news and public affairs television broadcasts are the focus of the Commission's diversity concerns, it is surely the viewpoints expressed in such broadcasts that are important, rather than the format of the programming. How can a program devoted to a stand-up comic satirizing local political figures be distinguished from a panel of reporters discussing the same figures? Anyway, for the Commission to make such distinctions seems futile and dangerous. There does not seem to be any basis to deny that consumers seeking particular viewpoints on local issues can satisfy their demand with vehicles other than formal local news and public affairs broadcasts. A narrow focus on news and public affairs programs cannot be justified based upon a concern with the diversity of viewpoint expression.

Analysis of diversity that is limited to video programming (and video-displayed services such as computer networks)—perhaps based on the alleged "visual impact" of video services—is not reasonable.[66] Video programming is only one source of viewpoints for consumers, even if one focuses on viewpoints regarding local news events and public affairs issues. All media that expose consumers to viewpoints should be weighed in measuring diversity. These include television and other video services, radio, newspapers, magazines, books, direct mail, door-to-door leaflets, and live discussions.

Similarly, it makes little sense to attempt to define markets in terms of whether the medium is subject to public interest obligations.[67] Newspapers, under no such "obligations" as broadcasters, typically offer far more local news and public affairs coverage than broadcast stations. They do so because it is profitable, a far better guarantee of performance than the Commission's waning "direct" content regulation of broadcasters.

Nor does it make sense to define these markets in terms of whether the medium is "free" once the consumer has purchased reception equipment.[68] While the cost of access to substitute media is certainly a material consideration in defining markets, there is no reason to exclude media that are not "free" in the narrow sense that broadcast television is free. For example, a viewer seeking viewpoints on local affairs may be able to pick up much more information in 30 minutes with the newspaper than with 3 hours of local TV news broadcasts. That the newspaper costs 50¢ while the broadcast is "free" offers little insight into the degree of substitutability *in response to a change in the diversity of viewpoints offered in one medium.*

Further, the Commission suggests as a criterion for market definition whether the medium can deliver viewpoints within a small number of hours of an event.[69] It is difficult to see what this criterion has to do with viewpoint diversity. In any event, virtually all the media under consideration are capable of meeting this criterion, at least in certain situations. Radio stations obviously can match TV stations exactly in this respect, or better them. Many newspapers are capable of producing editions with breaking news within a few hours of events, and at most, for dailies, within about 12

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66 FNPRM, *supra* note 1, 74.

67 *Id*., 68, 74.

68 *Id*., 68.

69 *Id*., 69, 74.

hours. In any event, timeliness is but one dimension of the services in question here, and cannot be regarded as dispositive in itself.

The Commission proposes to consider, in market definition, whether the medium is actually used by more than some threshold percentage of the population, and whether it is "used by more people as their primary news source" than other media.[70] This makes no sense for two reasons. First, just because one medium is a "primary" source does not mean that other media are not important sources of diversity. Second, the Commission's proposal confuses market share with market definition. That a medium has a large share of a hypothetical market does not prove that the hypothetical market is properly defined. Nor is there any basis to require a medium to have some minimum share before it "counts" as being in the market. A market share is just that. Properly measured, a market share usually reflects the competitive significance of the medium as a demand-side substitute. A market with 19 firms, one with 10 percent and the others 5 percent each does not justify the conclusion that the 18 smaller firms don't count and that the 10-percent firm is a monopolist. Thus, there is no basis to exclude, say, MMDS or VDT media from the market because these media have small audiences; their market shares will reflect their significance, and may even understate it, for reasons discussed below.

D. Supply-side market definition

The issue that must be considered on the supply side is whether a medium that does not now produce local news and public affairs programming could or would do so in response to an opportunity to increase its audience. (The opportunity is created, in the market definition paradigm, by the behavior of the hypothetical monopolist in offering fewer viewpoints.) This question must be asked first of firms already present in the market but not offering demand-side substitutes for local news and public affairs. Going beyond such firms, there is an issue of entry: would the behavior of the hypothetical monopolist make it profitable for entirely new firms to enter the business?

As noted above, it is reasonable to assume that the demand for alternative sources would be considerable in the event that a hypothetical monopolist homogenized the

70 *Id.*, ¶74.

viewpoints expressed by a particular collection of outlets. That is, assuming that the pre-monopolization spectrum of content diversity was efficient, the paradigm of political freedom as well as the ease with which today's consumers can consider alternatives require the assumption that consumers, deprived of this spectrum, would actively seek out alternatives. It follows that all local media with low costs of making format changes would be able and willing to respond to the hypothetical restriction of viewpoints. This includes, for example, all radio stations, whether or not they had an all-news format at the outset. Similarly, there does not seem to be any basis to exclude independently-controlled local cable channels, actual and potential. (That is, it would be reasonable to include currently-unleased leasable cable capacity.)

If the Commission's concern is primarily with local news and public affairs,[71] then the market must include the following outlets: broadcast stations (full power and low power), cable systems, MMDS, radio stations, local newspapers and national magazines and newspapers that have local editions. In the case of cable systems, only PEG, leased access and locally originated cable news channels should be counted, as national cable networks cannot offer local content. There is at least an argument that videocassettes should also be included. Since most households (84 percent) have VCRs, the distribution of videocassettes provides a potential means of expression with respect to local news and public affairs. In some circumstances, video cassettes have provided an important medium of anti-establishment political and cultural expression.[72]

E. Geographic market definition (outlets)

For different issues or rules, the relevant areas from which consumers can obtain viewpoints would be international, national, regional and local.

1. Local markets

The Commission states that for the local ownership rule the relevant market in which to measure diversity is local. The same apparently is true for the radio-TV cross-

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71 *Id.*, ¶¶72.

72 *See, e.g.*, Sharif Imam-Jomeh, *Iran Seizes Satellite Dishes, Lifts VCR ban*, Reuters News Service – Middle East, Feb. 17, 1994 (on-line); Marjorie Olster, *Palestinians Document Their Uprising on Video*, Reuters News Service – Middle East, May 31, 1989 (on-line); *Oman: Plans for Censor Office at SEEB airport*, TIMES OF OMAN, Jul. 18, 1994.

ownership rule.[73] Local must mean the areas to which the local news and public affairs programming that forms the Commission's chief focus is applicable. The local geographic market would therefore start with the area served by the station in question (to which one of the ownership rules is to be applied) and the viewers or listeners within it. The media available to those consumers include those located within that area and serving it or capable of serving it, as well as those outlets that are outside the area but serving it or capable of serving it.

2. National market

The Commission states that for the national ownership rule the relevant market in which to measure diversity is national, and the question is whether there is sufficient diversity of outlets in the nation as a whole.[74]

With respect to both local and national markets, there is an issue of how to treat media whose geographic reach is limited. For example, most cable systems do not reach all of the area served by a broadcast station. Some magazines and cable networks are regional. This is largely a question of measurement rather than market definition. Within a relevant market, it is perhaps most useful to ask how many alternatives are available to a representative or average viewer, or even to describe the whole spectrum of consumers according to the number and types of choices they face. Often, this will solve the problem of partial coverage. For example, though many magazines or cable networks are regional, the average consumer probably has about the same number of regional choices in various parts of the country, even though they are not the same choices. Similarly, because cable coverage is so ubiquitous, consumers everywhere are likely to have access to the alternatives available on cable systems, even though no single cable system serves the whole market.

On the national level, these considerations lead to the conclusion that all national media should be included in the relevant geographic market, as well as all local media capable of covering national news and public affairs. But because local media in one area are not available to consumers in others, it is important not to count local media

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73 *See* FNPRM, *supra* note 1, ¶¶76, 78.

74 *Id.*, ¶75.

cumulatively. As indicated, the issue is how many outlets are available to the representative consumer.

F. Measurement of concentration

There is no natural metric of content diversity. Measurement requires the assumption that outlet diversity implies content diversity. Further, for purposes of measuring diversity there seems to be no basis for weighting the outlets available to any given consumer differently.

The weight given to a medium in measuring diversity should not depend on the number of consumers who actually *use* it. One should count all outlets and viewpoints that are reasonably *available* to consumers—not just the outlets expressing currently popular viewpoints. Thus, there is no justification for the Commission's dismissal of newspapers as a source of diversity relating to news.[75] This issue has already been discussed above, in terms of avoiding a confusion of market share with market definition.

A related point that bears emphasis is that current market share is not necessarily an adequate measure of the competitive significance of a medium. Typically, media can readily expand their coverage of local news and public affairs. Further, media generally are available to all consumers—for example, cable passes 97 percent of all television households, and DBS obviously is available to nearly everyone. The same is true of most newspapers and magazines. Thus, the market share of a given medium can respond dramatically to inadequate performance by others. In light of this, it seems most reasonable to give all independent media equal weight for purposes of measuring the diversity of outlets.

G. Effects of the ownership rules on diversity

Antitrust analysis of any proposed increase in broadcast station concentration would typically focus on various advertising markets. The question would be whether there exists a significant category of advertiser that would be disadvantaged.

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75 *Id.*, ¶74.

Because antitrust analysis of the economic market effects of a given transaction probably would not treat all media as having equal weight, local markets typically will be more concentrated for economic purposes than for diversity purposes. See, for example, Table 7, where the equal shares column illustrates the effects of the approach to diversity suggested here. In addition, antitrust markets typically would be narrower than diversity markets. For example, antitrust analysis probably would focus on local advertising markets and thus exclude, say, retail videocassettes. If the transaction involved TV stations, some would argue that third-class mail advertising or billboards should be excluded, and so on. Hence, the application of antitrust standards to the problem of local media concentration will indirectly imply a higher standard for diversity purposes because the antitrust laws will operate to stop concentrations for economic reasons long before they pose significant diversity risks. In sum, it appears there is little reason to be concerned with diversity if local ownership is governed by the incipiency standard in Section 7 of the Clayton Act.

VI. National Ownership Rule

A. Introduction

The Commission's national ownership rule permits a single entity directly or indirectly to own, operate or have a significant interest in up to 12 VHF and UHF television stations, provided that those stations operate in DMAs containing cumulatively no more than 25 percent of the television households in the country. For the latter purpose, ownership of a UHF station results in the attribution of 50 percent of the television households in the relevant DMA. The 12 station and 25 percent caps are replaced by 14 station and 30 percent caps in the case of minority control.

As the Commission has requested in its Further Notice, Section VI of this report applies the analysis and conclusions of Sections II through V to determine whether the preservation of competition in delivered video programming, advertising or video program acquisition or concerns over diversity provide a justification for the national ownership rule.

For the reasons examined below, there is in fact no such justification for a rule limiting the number or household coverage of television stations in different local markets that can be owned by one group. Stations in different local markets do not compete with each other for viewers, for advertisers, for programs or for network affiliations. At most they compete with each other for such things as station managers and used equipment, but the markets for those are national and generally not limited to commercial television stations.

Suppose, however, for the sake of argument that all stations did compete with each other. In light of the fact that there are 1,033 full-power commercial television stations located in 211 DMAs, the "market" would be extremely unconcentrated. Clearly there would be no reason to limit ownership to 12 or any similar number of stations.

Similarly, there would be no reason to limit the DMA coverage of television households of a group's stations to 25 percent or any other number below 100 percent. The average television household lives in a DMA with 8.66 full-power commercial television stations. Thus, if one adds up the DMA household coverage of each station, there is a total coverage of 866 percent of television households (8.66 times 100 percent; see Table 8). If the national ownership rule were eliminated, and if for some reason one wanted to compute an HHI based on DMA household coverage, that HHI could not exceed 831.[76] There are so many television stations that each of eight hypothetical station groups could own stations covering over 80 percent of all television households (see Table 9), and yet there would be enough stations left over for 9 other owners each to have 24 percent coverage. With that configuration, the HHI based on DMA household coverage would be only 768. The current rule, which limits VHF coverage to 25 percent (or 30 percent for minorities), limits each owner of VHF stations to a 2.9 (or 3.5) percent share of all stations based on DMA television household coverage.

Moreover, since stations in different local markets have different viewers, common ownership of stations in different local markets cannot adversely affect diversity. While there is some signal overlap between stations in the case of certain adjacent DMAs, this does not provide diversity-based grounds for concern about common ownership, for two reasons. First, there is no reason to believe that common ownership would reduce incentives to broadcast local programs in each area. Second, there is unlikely to be any reason for the Commission to prevent common ownership on diversity grounds where such ownership would be permitted based on an analysis of competition consistent with Section 7 of the Clayton Act (see Section V.G of this report).

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76 This assumes that any given station group owns no more than one station in a given DMA. Suppose one owner bought one station in every DMA, giving it 100 percent coverage, a second owner bought one station in every market with two or more stations, giving it 99.5 percent coverage, a third owner bought one station in every market with three or more stations, giving it 97.1 percent coverage, and so on up to the seventeenth owner, which would have 5.2 percent coverage. This is the configuration that would give the highest possible HHI based on DMA household coverage for group ownership of broadcast stations in different DMAs. The DMA household coverage of a station might be regarded as a measure of capacity. An HHI based on station revenue shares could be higher.

Table 8 DMA coverage of TV households by full-power commercial stations[77]

Number of stations in DMA	DMA coverage of television households (percent)
1 or more	100.0
2 or more	99.5
3 or more	97.1
4 or more	92.4
5 or more	81.0
6 or more	68.7
7 or more	59.8
8 or more	49.0
9 or more	44.9
10 or more	41.2
11 or more	36.1
12 or more	32.1
13 or more	27.6
14 or more	16.5
15 or more	7.5
16 or more	7.5
17 or more	5.2
Total	866.1

77 NIELSEN MEDIA RESEARCH, NIELSEN STATION INDEX, DIRECTORY 1993–94, at 19–31. VHF and UHF stations are treated as equivalent in Tables VI–1 and VI–2.

78 NIELSEN MEDIA RESEARCH, NIELSEN STATION INDEX, DIRECTORY 1993–94, at 19–31. VHF and UHF stations are treated as equivalent in Tables VI–1 and VI–2.

Table 9 Potential DMA coverage by equal-size station groups[79]

Number of equal-size station groups	Potential DMA coverage of television households by each group* (percent)
1	100.0
2	99.7
3	98.9
4	97.2
5	94.0
6	89.8
7	85.5
8	80.9
9	76.9
10	73.4
11	70.0
12	66.8
13	63.8
14	60.4
15	56.9
16	53.8
17	50.9

*Assumes it is possible to allocate stations so that groups have equal DMA coverage.

The present section of this report addresses the following questions: What are the benefits of group ownership for competition and diversity? What is the evidence that the current rule limits the ability of station group owners to achieve efficiencies? Does the national ownership rule have positive or negative effects on delivered video programming, advertising, video program production and diversity? Can television broadcasting be distinguished from cable television distribution, where the Commission recently issued a rule that will prohibit one owner from having an attributable

79 *Id.*

80 *Id.*

interest in cable systems serving more than 30 percent of cable subscribers nationwide?

B. Benefits of group ownership for competition

While there is no reason to believe that the national ownership rule has benefits for competition or consumers, the rule is likely to have deleterious effects on competition and consumers by preventing efficient ownership and management of broadcast stations. The rule is likely to hobble broadcast television in competing with other media. There are a number of reasons that common ownership of broadcast television stations may lead to lower costs and hence increased quality and output for viewers and advertisers.

At the outset, it is clear that a variety of different types of companies realize benefits from owning groups of stations. Group owners include:

- Television programming services, including ABC, CBS, Fox, Home Shopping Network (Silver King Communications station group),[81] Infomall TV Network (Paxson Communications), NBC, Telemundo, Trinity Broadcasting Network, United Paramount Network (Chris-Craft Industries/BHC Communications/United Television and Viacom), Univision (Perenchio TV) and ValueVision.

- Companies that own a variety of combinations of television stations, radio stations, newspapers, magazines, cable systems, cable networks and/or DBS systems, including Clear Channel Television, Cox Enterprises, Gannett, Hubbard Broadcasting, Meredith, Pulitzer Publishing, Tribune Broadcasting, The Washington Post and Westinghouse Group W.

- Companies that own not only a variety of other media businesses but also have television program syndication businesses, including Tribune Broadcasting and Westinghouse Group W.

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81 At the end of 1992 Home Shopping Network distributed to its shareholders the stock of its former subsidiary Silver King Communications. Home Shopping Network, *1993 Annual Report*, at 21.

- Hollywood studios that are also syndicators, including Fox, New World and Paramount/Viacom.

- Television station group owners without other major media interests, including Renaissance Communications and LIN Broadcasting (McCaw Cellular/AT&T).

- Investment companies, including ABRY Broadcasting and Argyle Television, which buy and resell stations.[82]

It is also clear that there are benefits from common ownership of a wide variety of types of stations, including:

- Strong independent stations including superstations in larger DMAs, in the case of Tribune Broadcasting, six of whose stations (including superstation WGN) are now WB affiliates.

- Fox affiliates, in the case of New World, which has twelve, and Renaissance, which owns five in ADIs ranking between 16 and 44.

- ABC, CBS and NBC affiliates, in the case of Gannett, Westinghouse Group W, LIN Broadcasting, Pulitzer Publishing, The Washington Post and Young Broadcasting.

- Stations in medium-size markets, in the case of Pulitzer Publishing, which owns stations in ADIs ranking from 23 to 73.

- Stations in leading Spanish-language markets, in the case of Telemundo and Univision.

- Primarily VHFs in major markets, in the case of ABC, CBS, NBC and Fox.

- Primarily weaker independent UHF stations in, or on the fringes of, major markets in the case of television retailers. Typically these stations had limited broadcast audiences prior to being purchased by television retailers. HSN's

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82 *Donaldson Lufkin to See Huge Return on Sale of Stake in Television Stations*, WALL STREET JOURNAL, May 26, 1994, at A–3; and Martin Peers and Joe Flint, *Run on Nation's Stations*, VARIETY, Feb. 20–26, 1995, at 193.

> twelve stations are in ADIs ranking from 1 to 22.[83] ValueVision's five stations reach New York from Bridgeport, Cleveland from Akron, Houston from Baytown, Hartford from New London and Washington, D.C., from Manassas.[84] Paxson owns or has announced plans to acquire seven stations, and it has time brokerage agreements for stations in three additional local markets. All carry the Infomall Network. With one exception, the relevant ADIs rank from 4 to 25.[85]

There is evidence of numerous types of benefits from group ownership. For expositional purposes, it is useful to divide these benefits into efficiencies for stations and efficiencies for program producers, syndicators and programming services. However, all benefits are likely to be shared among these parties as well as with viewers and advertisers. For example, a reduction in costs or risks for programming services will lead to an expansion of higher quality programming, which benefits not only the programming services but also stations, program producers, viewers and advertisers. A reduction in the costs of selling national spot advertising would increase competition in advertising and benefit advertisers.

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83 Home Shopping Network, *1993 SEC Form 10–K*, at 7.

84 ValueVision International, *1994 SEC Form 10–KSB,* at 5, states that "the Company does not consider conventional measures of a station's performance, such as over the air coverage, advertising revenues, audience share, programming or demographics, to select stations for acquisition. Rather, the Company focuses on the Areas of Dominant Influence ("ADI") of the market in which the station is located and the number of cable households within such ADI."

85 Paxson Communications, *Press releases*, Jan. 18, 1995, and Feb. 10, 1995.

1. Efficiencies for station groups[86]

- Sharing of corporate overhead expenses ranging from research departments, to personnel with special expertise, to personnel and equipment used to cover news events.

- Economies in purchasing capital equipment, products and services, ranging from studio equipment, to research services, to syndicated programming. Because of lower costs in selling to groups, suppliers charge lower prices on group purchases relating to a number of markets.[88] CBS/Broadcast Group reports that it obtained discounts of 18 percent to 28 percent on a range of equipment because it purchased for a group of stations. CBS/Broadcast Group also obtains quantity discounts on such things as video tapes and repair parts.

- Greater ability to attract and retain talented employees.[89]

- Efficiencies from operating an internal market for used equipment, which is transferred among stations.

- Ability of successful owners to share their superior management and their experience and expertise with stations in additional local markets.

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86 In addition to the efficiencies discussed below, see OLIVER E. WILLIAMSON, ANTITRUST ECONOMICS 107–19 (1987) for an argument that conglomerates, of which station groups are one example, may mitigate capital market imperfections, as a result of which corporate management might otherwise be inadequately policed and resources might otherwise not be allocated to the projects with the highest returns.

87 In addition to the efficiencies discussed below, see OLIVER E. WILLIAMSON, ANTITRUST ECONOMICS 107–19 (1987) for an argument that conglomerates, of which station groups are one example, may mitigate capital market imperfections, as a result of which corporate management might otherwise be inadequately policed and resources might otherwise not be allocated to the projects with the highest returns.

88 For example, it is more efficient for research suppliers to negotiate with and bill a station group than to deal with each station individually. As a result, research suppliers offer discounts to station groups for deals covering a number of stations. The same is true for security services.

89 For example, a station group may be able to attract superior personnel because the group may offer greater opportunity for advancement within the organization. Also, a station group is in a position to obtain reliable information on a larger groups of people who are being considered for advancement.

- Lower costs of negotiating affiliations with programming services. This occurs not only for O&Os but also for station groups such as New World and Group W.

- Lower costs and lesser problems faced by stations in contracting for sale of national spot advertising, purchase of rights to syndicated programs and development of original programs, as explained further below:

  Sale of national spot advertising. In a number of cases, larger station groups act as their own national advertising sales representatives. For example, after it acquired additional stations, in 1994 New World replaced the outside advertising representation firms it had used for a number of years with an in-house operation selling national advertising on its stations and its syndicated programs. According to New World, the in-house operation "will enable the Company to structure advertising packages that are more closely customized to individual advertisers' needs."[90] Similarly, Tribune Broadcasting formed an "unwired" network known as Tribune Plus to sell national advertising by linking its two superstations and four other major market independent stations with Turner's TBS superstation. Group W offers national advertisers time on its five stations,[91] CBS sells national advertisers time on its group of O&Os, and Group W and CBS have entered into a joint venture agreement that contemplates that a single entity will sell national spot advertising on stations owned or controlled by Group W and CBS.[92]

  Purchase of rights to syndicated programs. Cost savings may arise from avoiding the difficulty of negotiating and enforcing contracts with suppliers for products that are risky or where content may be difficult to specify with precision.[93]

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90 New World Communications Group, *1993 SEC Form 10–K*, at 3.

91 Chuck Reece, *The Gutting and Rewiring of Television Sales*, CHANNELS, Apr. 1989, at 28–29.

92 CBS, *1994 SEC Form 10–K*, at 3.

93 Franklin M. Fisher, *The Financial Interest and Syndication Rules in Network Television: Regulatory Fantasy and Reality*, in ANTITRUST AND REGULATION: ESSAYS IN MEMORY OF JOHN J. MCGOWAN (F. M. Fisher, ed., 1985).

Development of original programs. There are numerous cases in which a station group has undertaken to produce, or has contracted for the production of, a television program, in some cases with the intention of seeking national syndication if the program is a success. The Chris-Craft station group aired *Premier Story* on five major market stations before giving the program a production commitment and seeking national distribution.[94] Various combinations of CBS-owned stations have joined in producing programs such as *Studio 22* and *Cristina*, which were produced by the CBS Television Stations division, and *Dr. Fad*, which was produced at WCBS-TV. According to a press report, dealing in part with A.H. Belo Corp., which owns stations in Dallas, Houston, Tulsa and New Orleans:

> Belo and other major station group owners are using their outlets as a springboard for more ambitious program and production ventures that can be offered to other stations, and for such new opportunities as second cable channels in the same markets for niche programming, feeding regional cable channels and supporting regional production centers.[95]

- Construction of new UHF stations. A rule limiting station ownership may deter groups from constructing new stations that expand viewing and advertising options even when there are unused channel assignments. For example, Home Shopping Network constructed its UHF station in Tampa,[96] and it provided financing for the construction of a minority-owned UHF station to carry its programming in Washington, D.C.[97]

The Commission's national ownership rule forces companies to choose between two different types of efficiencies that can be realized by group ownership. First, some of the efficiencies from group ownership may be greatest in the case of television stations that are in the *same* region of the country. Second, group ownership of

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94 Thomas Tyrer, *Three Strips Report Good Test Results*, ELECTRONIC MEDIA, Aug. 29, 1994, at 2.

95 Diane Mermigas, *The Race is on in Hot TV Station Market*, ELECTRONIC MEDIA, Apr. 11, 1994, at 1.

96 Home Shopping Network, *1987 SEC Form 10–K*, at 5–6.

97 Home Shopping Network, *1990 SEC Form 10–K*, at 8.

stations in *different* regions of the country may be the most efficient way for owners to mitigate certain risks. According to Pulitzer Publishing:

> Pulitzer's media operations are geographically diverse, placing the company in the Midwest, Southwest, Southeast and Northeast regions of the United States. Due to the close relationship between economic activity and advertising volume, the Company believes that geographic diversity provides the Company with valuable protection against regional economic variances.[98]

The Commission's national ownership caps limit the ability of a group owner to realize both the efficiencies from ownership of a group of stations in a given region of the country and the efficiencies from ownership of a group of stations in different regions of the country. To realize the cost savings from owning a group of stations in one region, a group owner must forgo the benefits of regional diversification. To achieve the benefits of regional diversification, a group owner must forgo the cost-savings from owning a regional group. Either way, the national ownership rule is likely to increase the costs of broadcast television to the detriment of viewers, advertisers, stations and programmers.

2. Efficiencies for program producers, syndicators and programming services

- Reducing transactions costs associated with obtaining, retaining and replacing affiliates. By owning a station, a programming service can avoid the costs of periodically negotiating affiliation agreements. It can also avoid uncertainty and costs involved in finding a new affiliate when an existing affiliate decides to change its affiliation. In 1994, more than 60 stations changed their affiliations.[99]

- Reducing transactions costs of obtaining clearances, including clearances during a uniform time period.[100] The NTIA pointed out in 1992 that "it has long been recognized that such vertical integration [between programming

98 Pulitzer Publishing, *1993 SEC Form 10–K*, at 5.

99 Christopher Stern, *Small Investments Yield Big Benefits*, BROADCASTING & CABLE, Oct. 17, 1994, at 26.

100 FCC, NETWORK INQUIRY SPECIAL STAFF, AN ANALYSIS OF THE NETWORK-AFFILIATE RELATIONSHIP IN TELEVISION 242-44, 247-53, 257-68 (1980) addresses barriers to maximization of joint profits by networks and non-owned affiliates.

services and stations] may create efficiencies by reducing transactions costs, and is critical to operation of a viable broadcast network."[101] For example, according to a press report, Univision "is said to have made the deal to buy WGBO [in Chicago] because it was unable to get all the network's programming cleared without delays at WCIU," its previous Chicago affiliate.[102]

- Reducing risks associated with the production of programs and the provision of programming services, including the development of new programs and programming services. The decision to move from a pilot to production of a syndicated series is often made when station groups agree to carry the program. The incentive to form station groups and consortia of station groups to produce or contract for the production of syndicated programs has recently been described as follows:

> Program suppliers are devising new ways to enter the risky first-run syndication business. Deep pocketed players such as Warner Bros. Domestic Television Distribution...will continue with big national rollouts....Other studios are reducing their risk...through alliances with station groups. Stations are also linking for limited tests of programming they have a financial interest in. "The most important element of a station alliance is that it gives you momentum, and when it comes to selling and launching shows, it's all about percentage of the U.S., the quality of the time periods and the quality of the lineup," said Greg Meidel, president of Twentieth Domestic Television. "Syndication is no different than building a network. You put the distribution in place and the programming will come," he added....Station owners are entering into consortiums to fund and test their own series, like the...Partner Stations Network.[103]

The Partner Stations Network, formed in 1993, is an example of a consortium too large to be owned by a single entity under the Commission's national ownership rule. It was announced that:

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101 *Comments of the National Telecommunications and Information Administration,* in the Matter of Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91–221, FCC, Aug. 24, 1992, at 10–11, citing FCC, NETWORK INQUIRY SPECIAL STAFF, NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION 399 (1980).

102 Univision Television Group, MEDIAWEEK, June 13, 1994, at 8, brackets added.

103 Thomas Tyrer, *Cutting Risk Name of Game in First-Run*, ELECTRONIC MEDIA, Sept. 5, 1994, at 1.

> Five groups that own a total of 26 commercial TV stations have formed Partner Stations Network L.P. (PSN) to produce first-run TV programs for themselves and syndication. Goal is to reduce costs, said Michael Lambert, pres. of general partner Lambert TV Management. He said PSN also will provide a cost-effective proving ground for new shows, since members can conduct short trials on their stations before committing to full seasons.[104]

- Facilitating entry of new networks. Both ownership of O&Os and the ability to obtain carriage commitments from station groups owned by others have facilitated the entry of new networks, including the Fox network, the United Paramount Network and the Warner Brothers WB Network. The WB Network launched in January 1995 with 80 percent national coverage, thanks in part to affiliations with six Tribune stations, including superstation WGN, which provides coverage of 18 percent of television households in the form of unduplicated cable carriage in areas without WB affiliates.[105] Separately, Warner Brothers Domestic Television Distribution launched its syndicated Prime Time Entertainment Network (PTEN) in 1993 with the support of station groups including Chris-Craft and Renaissance. PTEN was founded as an *ad hoc* network to distribute prime-time syndicated programming, such as *Kung Fu: The Legend Continues*. In 1993 PTEN had 146 stations with 92 percent coverage of U.S. television households.[106]

These efficiencies for program producers, syndicators and programming services are explained by New World:

> The Company's overall business strategy is to become a vertically integrated television company capable of developing, producing and distributing television programming....The Company's current goal is to...[increase] the number of stations held by the Company to twelve in total, the maximum currently permitted by law....As an integrated enterprise, the company will attempt...to lessen the financial risk associated with the operation of television development, production and broadcasting businesses as stand-alone en-

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104 *Partner Stations Network Formed*, PUBLIC BROADCASTING REPORT, Sept. 10, 1993.

105 *New WB Network (WB) Launches*, COMMUNICATIONS DAILY, Jan. 11, 1995; Richard Katz, *WB Net Aims for Broadcast as Well as Cable Carriage*, MULTICHANNEL NEWS, Jan. 16, 1995, at 10. Tribune has an equity interest in the WB Network. Thomas Tyrer, *WB Putting Weight Behind Kids Shows*, ELECTRONIC MEDIA, Apr. 24, 1995, at 21.

106 Thomas Tyrer, *Deal Change Spurs PTEN Expansion*, ELECTRONIC MEDIA, May 31, 1993, at 1; Diane Mermigas, *Chris-Craft Creates New Post*, ELECTRONIC MEDIA, Feb. 22, 1993, at 30.

> terprises....[I]f the Company is able to make the contemplated acquisitions, its owned stations will by themselves provide approximately one-fourth of the reach, or "clearance," needed to syndicate programming on a national basis. With these owned stations as a base, the Company believes that New World will have a greater ability to develop and produce programming which has been pre-cleared for broadcast not only by the Company's owned stations but also by other stations on a national basis through syndication arrangements....The Stations should also experience benefits from these relationships since New World is expected to increase its efforts to develop relatively low-cost programming, such as game shows, soap operas, reality programming and talk shows, which meets the needs of these stations and is suitable for syndication.[107]

In 1994, New World made a deal with Fox in which Fox paid $500 million for a 20 percent interest in New World and 10-year affiliation agreements with its stations, and New World received guarantees that it would supply programming to Fox O&O's and the Fox network.[108]

Evidence of efficiencies from station group ownership as well as economies of scope between programming services and stations that carry that programming is provided by the number of broadcast programming services that are station group owners.[109]

Additional confirmation of the efficiencies of common ownership of broadcast programming services and stations is provided by evidence of efficiencies from the common ownership of cable television programming services and cable systems. Cable MSOs have at least partial equity interests in many programming services. Ownership of cable networks benefits cable operators by increasing the supply of

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107 New World Communications Group, *1993 SEC Form 10–K*, at 2–3. When Ron Perelman announced that New World's production companies and film libraries would be combined with the seven-station SCI Television group, "media industry specialists argued that the upcoming deal will help improve the value of Perelman's entire media stable. 'There are economies of scale and efficiencies that go along with having more stations, so a deal like that makes sense,' argued Bear Stearns analyst Ned Zacher." *Perelman to Buy TV Properties*, MERGERS & ACQUISITION REPORT, Jan. 24, 1994.

108 *A Lot for a Little*, BROADCASTING & CABLE, Oct. 17, 1994, at 28.

109 Additional evidence of efficiencies from joint ownership of programming services and stations carrying that programming is provided by recent changes in station ownership by Viacom, which—along with Chris-Craft Industries—owns the United Paramount Network. After acquiring Paramount's station group, Viacom sold Paramount's three Fox affiliates and purchased independent stations, including superstation WSBK, that would carry the new UPN programming. Viacom *Unit Set to Buy Two Independent TV Stations*, MEDIA DAILY, Oct. 17, 1994; *Viacom to Purchase Superstation WSBK*, MULTICHANNEL NEWS, Dec. 5, 1994, at 98.

programming available for use in attracting and retaining subscribers, viewers and advertisers. Common ownership with cable systems benefits cable networks by providing greater assurance that their programming will be carried, and thus reducing risks.[110]

C. The national ownership rule constrains growth of a number of groups

The national multiple station ownership rule currently constrains a number of companies (see Table 10). In some cases, including Capital Cities/ABC and Tribune, the cap on reach of 25 percent limits further growth. In other cases, the cap of 12 on number of stations limits growth. Silver King Communications has 12 stations; Providence Journal Broadcasting, Trinity Broadcast Network, Perenchio TV, Lee Enterprises and New World, 11 each; Young Broadcasting, Viacom, Gannett Broadcasting, Clear Channel Television and Pulitzer Publishing, 10 each. A spokesman for Univision said “the group is looking to acquire a 12th station to bring it up to the FCC-mandated ownership limit.”[111] Blackstar, a minority-owned station group, is planning to increase its number of stations from 3 to 14.[112] In talking about the national ownership rule, the owner of New Vision Television, which owns 8 stations, stated, “those of us in broadcasting, including myself, would like to own 20 stations.”[113]

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110 Cable systems are now prohibited from having an attributable interest in more than 40 percent of the first 75 cable programming services they carry. This restriction was imposed because of concerns about discrimination by cable systems against nonaffiliated programming services. Even if such concerns were justified in the case of cable, there would be no basis for such concerns in the case of broadcast television, for the reasons discussed in Section VI.I.

111 Univision Television Group, MEDIAWEEK, June 13, 1994, at 8.

112 *A Lot for a Little*, *supra* note 99, at 28.

113 Stern, *supra* note 90, at 26.

Table 10 Number and coverage of group-owned stations[114]

Group Owner	Number of stations	Percent coverage
A. Richard Benedek	9	
AT&T/LIN Broadcasting	9	8.1
Better Communications Inc.	9	
Capital Cities/ABC	8	23.6
CBS Inc.	7**	21.5
Chris-Craft/United/BHC	8	19.5
Clear Channel	10	5.5
E.W. Scripps	9	9.8
Gannett Co.	10	10.0
General Electric/NBC	7	20.7
Hubbard Broadcasting Inc.	9	
Le Sea Broadcasting Co.	9	
Lee Enterprises Inc.	11†	
New World	11	13.7
NewsCorp./Fox	8	23.3
Park Communications Inc.	9	
Perenchio TV Inc.	11†	
Providence Journal	11	5.8
Pulitzer Publishing Co.	10**	
Silver King Communications Inc.	12	
Stauffer Communications Inc.	9	
Tribune	8	24
Trinity Broadcasting Network Inc.	11	
Viacom	10	17.1*
Westinghouse/Group W	5	9.6
Young Broadcasting Inc.	10	

Table includes groups with 9 or more stations or coverage of over 9 percent of television households.
*Includes Paramount's coverage. **Excludes satellite stations.
† TELEVISION & CABLE FACTBOOK, STATIONS, 1995

114 Number of stations is from A.C. Nielsen (March 1995), except where noted; percent coverage is from Telerep (Jan. 5, 1995). Percentages do not reflect UHF discount. As of late 1994, Marty Pompadus ran nine television stations owned by Television Station Partners, ML Media Partners and ML Media Opportunity Partners. With the sale of four stations to Smith Broadcasting, the latter now has nine stations. *TSP TVs Go For 12 Times Cash Flow*, BROADCASTING & CABLE, Apr. 24, 1995, at 42.

115 Number of stations is from A.C. Nielsen (March 1995), except where noted; percent coverage is from Telerep (Jan. 5, 1995). Percentages do not reflect UHF discount. As of late 1994, Marty Pompadus ran nine television stations owned by Television Station Partners, ML Media Partners and ML Media Opportunity Partners. With the sale of four stations to Smith Broadcasting, the latter now has nine stations. *TSP TVs Go For 12 Times Cash Flow*, BROADCASTING & CABLE, Apr. 24, 1995, at 42.

An indication of economies of scale that may be fully realized only by owning significantly more than 12 stations is provided by the Partner Stations Network, which is discussed in Section VI.B.2 above. There are indications that single ownership of the group, which would not be permitted by the Commission because of its 12 station limit, would increase efficiency. PSN is having trouble,[116] and some station groups do not believe the consortium approach can work:

> Some of the station groups that recently formed their own production and distribution arms aren't interested in the consortium idea. For instance, Scripps Howard Productions argues that consortia lead to too much creative interference in a national show's development, and scare away the series' actual producers. Scripps Howard President David Percelay and head of entertainment Michele Brustin say that's what led to their decision to have *Rockford Files* executive producer Roy Huggings bring his new first-run action hour *Diamond Head* to Scripps Howard. "Each [independently owned] local station has a very different agenda and set of needs, and any attempt to try to overlay a common programming strategy onto the needs of those individual markets will inevitably hurt somebody or a number of stations," he said. "When you try to create, develop, produce and run a show, there can only be one voice."[117]

There is empirical confirmation that the 1984 relaxation in the national ownership rule permitted a more efficient allocation of resources. According to Fournier and Campbell, relaxation of the rule was accompanied by an increase in television station prices, suggesting "the larger pool of potential bidders included some with higher marginal valuations than before."[118] Since there is no basis for a belief that increased station ownership increased anyone's ability to exercise market power, it follows that the 1984 relaxation of the national ownership rule permitted a reallocation of stations to group owners who were able to use the stations in more productive ways and were therefore willing to pay more for them.

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116 Michael Freeman, *Stations' Syndication Stumble*, MEDIAWEEK, Jan. 9, 1995, at 6, and David Tobenkin, *PSN Adds Weeklies to its Plate*, BROADCASTING & CABLE, Mar. 6, 1995, at 26.

117 Thomas Tyrer, *Cutting Risk Name of Game in First-Run,* ELECTRONIC MEDIA, Sept. 5, 1994, at 1.

118 Gary M. Fournier and Ellen S. Campbell, *Shifts in Broadcast Policy and the Value of Television Licenses*, 5 INFORMATION ECONOMICS AND POLICY 100 (1993).

D. Benefits of group ownership for diversity

The Commission states that its principal diversity concern relating to ownership of broadcast television stations involves local news and public affairs programming.[119] As a result, the present report addresses evidence on how group-owned stations compare to non-group stations in terms of quantity and quality of local programming—particularly local news.

It appears that group owners typically give local stations autonomy in local news programming and devote substantial resources to local news, which accounts for a major share of station advertising revenues.[120] For example, group owner Pulitzer Publishing reports:

> The local management of each of the Company's broadcasting properties are partially compensated based on the cash flow performance of their respective stations. Senior management believes that the success of a local television station is driven by strong local news programming....The Company believes that its stations are particularly strong in local news programming, an important revenue source for network-affiliated stations. Local news programs generate approximately a quarter of each station's revenues....Strong local news programming is an important factor for the competitive position of the Company's television stations.[121]

According to group owner Scripps Howard:

> In addition to network programs, the Company's ABC-, CBS-, and NBC-affiliated stations broadcast local news programs, other locally produced programs, syndicated programs, sports events, movies, and public service programs. Local news is the focus of each of these station's locally produced programming and is an integral factor in developing the station's ties to its community and viewer loyalty. Advertising revenues relating to local news

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119 *See* FNPRM, *supra* note 1, ¶72.

120 *See Report and Order*, 100 FCC 2d 34 (1984), which also observed at 31 that group-owned stations are more likely than independent stations to editorialize. *See* also *Comments of CBS, Inc.*, In the Matter of Review of the Policy Implications of the Changing Video Marketplace, MM Docket No. 91–221, FCC, Aug. 21, 1992, at 10–11, which reports that each CBS-owned station has an independent local newsroom and news operation, and *Comments of National Broadcasting Company, Inc.*, In the Matter of Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Gen. Docket No. 83–1009, FCC, 1984, at 9, 131.

121 Pulitzer Publishing, *1993 SEC Form 10–K*, at 14, 17, 19.

> and information programs generally represent approximately 30% of these station's revenues.[122]

Group owner New World states:

> NW Television has focused on research to determine viewer preferences regarding local news and information programming in its markets and opportunities to develop programming and the promotional image of the Stations to match those preferences....In addition, NW Television has placed emphasis on expense management, resulting in reduced expenses in many areas of Station operations. NW Television has reallocated certain of these savings to the expansion of...news and local programming....Since the 1987 Acquisition, these efforts have generally resulted in improved audience viewing shares and revenues in locally programmed time periods for the Original Stations.[123]

In the 1984 proceeding on the national ownership rule, the National Association of Broadcasters presented a study of programming during 1982 on 107 commercial television stations in 29 markets. The NAB study found that for group-owned stations, the percentages of time between 6 a.m. and midnight on an average broadcast day devoted to various types of programming were: news, public affairs and other informational programming, 18 percent; local programming, 10 percent; and total non-entertainment (including talk, religious and educational) programming, 32 percent. The corresponding figures for non-group stations were lower: 13 percent, 7 percent and 25 percent, respectively.[124]

Also in the 1984 proceeding, NBC presented data on the amount of time devoted by NBC's five O&Os and all top-25 market stations to local news and public affairs programming in 1979. NBC-owned stations devoted 12 percent of their time between 6 a.m. and midnight to local news and public affairs programming, compared to 9 percent for all stations in the top 25 markets. Between 6 p.m. and 11 p.m., the figures

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122 Scripps Howard Broadcasting, *1992 SEC Form 10–K,* at 5.

123 New World Communications, *1993 SEC Form 10–K*, at 3, 9.

124 National Association of Broadcasters, *Public Service Programming by Group-Owned and Non Group-Owned Television Stations*, attached to *Comments of the National Association of Broadcasters*, In the Matter of Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Gen. Docket No. 83-1009, FCC, Jan. 19, 1984. The findings did not hold for a comparison of 17 group and 3 non-group stations in markets ranked 101+.

were 13 percent for NBC-owned stations and 9 percent for all stations in the top 25 markets.[125]

E. Effects of the rule on markets for delivered video programming

Section II of this report provides a competitive analysis of delivered video programming. As the Further Notice recognizes, group ownership of stations in different local markets has no adverse effect on the number of television stations in a local market, on competition for viewers, or on the quality of television programming delivered to viewers.[126] Thus, there is no competitive justification for the national ownership rule that relates to the markets in which stations compete to attract viewers. On the contrary, to the extent that the national ownership rule increases costs or risks for stations or programmers, the rule causes a reduction in the quality of television programming.

F. Effects of the rule on markets for advertising

Section III of this report provides a competitive analysis of advertising. Group ownership of stations in different local markets does not reduce competition for advertising at either the national or local level. A broadcast station sells access to households in one local area. Stations in different local areas do not sell access to the same households, and hence they do not compete in selling advertising. Stations in Richmond do not constrain the price charged for advertising by stations in Cleveland. As a result there should be no concern about the effect of common ownership of

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125 *Comments of National Broadcasting Company, Inc.*, *supra* note 110, at 132–33. In its *Report and Order*, 100 FCC 2d 17 (1984), in that proceeding, the Commission also noted a study showing that group-owned stations had significantly higher ratings on their local news programming than did non-group stations. The study is Allen M. Parkman, *The Effects of Television Station Ownership on Local News Ratings*, REVIEW OF ECONOMICS AND STATISTICS 289-95 (1982). The Commission also noted an NAB study that compared group-owned and individually-owned television stations in six markets and that concluded: “Commonly-owned media have larger news staffs, do more news programming, and are less dependent on the wire services and networks for news than singly-owned media....Commonly-owned media are perceived by business and community leaders as providing greater validity and depth of news coverage, better quality programs, more public service.” The study is George H. Litwin and William H. Wroth, *The Effects of Common Ownership on Media Content and Influence: A Research Evaluation of Media Ownership and the Public Interest* (1969). It is described in *Comments of the National Association of Broadcasters*, *supra* note 114.

126 *See* FNPRM, *supra* note 1, at ¶¶83-85.

stations in different markets on the price of either national or local advertising. The national advertising HHIs presented in Table 4 assume that the spot advertising supplied by stations should be attributed to firms that were assumed to represent stations in selling national advertising. Consequently, common ownership of all stations represented by a given representative firm would have no effect on concentration.[127] This conclusion holds no matter how broadly or narrowly one defines the relevant product market in which national spot advertising competes. While group ownership has no adverse effect on competition in advertising, it has procompetitive effects to the extent there are efficiencies from group ownership.

The Commission offers and apparently rejects a suggestion that ownership of a group of stations with greater household coverage may give a company increased "bargaining power" in the sale of national spot advertising.[128] The Commission is right to reject the suggestion that this could represent a competitive problem. Even if ownership of additional stations gave a company a larger share in a relevant national advertising market, in light of the number of suppliers of national spot advertising and the many substitutes for national spot advertising, there is no danger that a station group owner would have market power in the sale of national advertising.

The Commission also suggests that "a group owner might use any market power it might have in one local advertising market to subsidize anti-competitive efforts in another advertising market."[129] As the Commission recognizes, individual broadcast stations do not have market power in local markets. Consequently, the proposed theory could not provide a basis for concern about group ownership. In the 1960s the federal antitrust authorities sometimes challenged "conglomerate" mergers—mergers between companies operating in separate markets that are not vertically related—in some cases based on concerns about alleged increases in the likelihood of predatory pricing. However, there is no empirical support for this theory, and more than two

127 For concentration in national advertising to be affected by common ownership of stations in different DMAs, there would have to be common ownership between these stations and other media supplying national advertising.

128 FNPRM, *supra* note 1, ¶86. Presumably the Commission is referring to market power. Bargaining power, which affects only the distribution of profits, is distinct from market power, which affects resource allocation. There is no economic basis for policy concern with bargaining power that does not reduce output. *See* also the discussion of bargaining power and monopsony power in Section IV.C.2, *supra*.

129 FNPRM, *supra* note 1, ¶87.

decades ago the federal antitrust authorities ceased investigating and challenging conglomerate mergers.[130]

There are 211 DMAs, many station groups of different sizes, and many stations that are not owned by groups. Consequently, if group size had an adverse effect on advertising rates at the company or DMA level, it should be possible to produce statistical evidence of this effect. Any party supporting national ownership limits based on a concern about advertising rates should therefore bear the burden of showing such an effect. The Commission notes, however, that studies have found no empirical evidence that group ownership has an adverse effect on advertising rates.[131]

G. Effects of the rule on the market for video programs

Section IV of this report provides a comparative analysis of video program acquisition. There is likely to be a national market for video programming that includes at least broadcast television, cable television, DBS and other satellite services, and video cassettes. Concentration among firms buying national rights to this programming is very low; the HHI is under 800 (see Appendix Table G–7). No firm has a sufficiently large share of purchases to exercise market power. If the national ownership rule were eliminated, no station group that might emerge would have monopsony power. In any event, enforcement based on the standard in Section 7 of the Clayton Act would prevent an increase in concentration before there was a threat to competition. Thus, the issue of monopsony power in the purchase of national rights to video programs does not provide a rationale for the national ownership rule.

H. Effects of the rule on diversity

Section V of this report provides an analysis of diversity issues. The Commission's principal diversity concern is with viewpoint (content) diversity in local news and public affairs programming. The national ownership rule for the most part does not intersect with this concern. Common ownership of stations in two or more local markets has no effect on the number of outlets and hence no effect on outlet diversity

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130 So-called conglomerate mergers with alleged effects on potential competition are really horizontal mergers. Conglomerate merger policy is discussed in ROBERT H. BORK, THE ANTITRUST PARADOX 246–62 (1978).

131 *See* FNPRM, *supra* note 1, ¶88.

in any local market. Any effect on viewpoint diversity would have to arise, not from effects on outlet diversity, but from effects on the behavior of particular outlets attributable to their group ownership. In this respect, group ownership might increase viewpoint diversity with respect to news and public affairs if group owners have lower costs or face lesser risks in providing such programming. For example, a group owner may have less need to be deferential to any particular local political or other establishment than would a single-station owner.

Relaxation of the national ownership rule should have no significant adverse effect on diversity at the national level because, for the reasons discussed in Section V.G above, antitrust concerns would stop increases in concentration long before they threatened diversity values. Further, measurement of diversity in viewpoints and outlets on the national level cannot reasonably be restricted to broadcast stations.

I. Distinctions between multiple television station and cable system ownership

The Commission recently issued a rule that, when implemented, will prohibit any cable MSO from having an attributable interest in cable systems serving more than 30 percent of cable subscribers nationwide. The rationales offered for that rule, whatever their merits in the cable context, have no relevance for ownership of broadcast television stations, even if broadcast stations compete in narrow product markets.

With minor exceptions, each television household is passed by one cable system. Some have expressed concern that a large MSO that has an equity interest in cable programming services might attempt to foreclose the entry of competing programming services by denying them carriage. Some have also expressed concern about so-called “horizontal” concentration in ownership of cable systems nationwide. In the 1992 Cable Act, Congress required the Commission to deal with these issues and the Commission’s cable rules are intended to address them. Even assuming the validity of these concerns in the case of cable, there is no basis for such concerns in the case of broadcast stations because the broadcast industry is structured differently than the cable industry.

Cable television systems are multichannel video service providers; in many cases they are the only local multichannel video service providers. Rightly or wrongly, Congress and the Commission have chosen to categorize them at this time as monopolists in the “market” for multichannel video services. It is on this basis that official concern for possible monopsony power or foreclosure in the market for cable programming rests. In contrast, in no significant local market is any broadcaster a monopsonist in the purchase of video programming, simply because there is almost always more than one local broadcaster. Therefore the basis for concern over vertical integration, foreclosure and monopsony in the cable industry does not exist in broadcasting.

To illustrate broadcast stations' or groups' lack of power to foreclose competition in the supply of programs, consider the fact that the average television household is located in a DMA with 8.66 full-power commercial television stations. Thus, even a vertically-integrated owner of stations covering 100 percent of television households would have *no ability* whatsoever to foreclose entry by programming services during non-network dayparts. Suppose one thought that a new programming service would have to obtain affiliations with stations covering 80 percent of television households. There are enough television stations so that 8 separate owners could have 80 percent coverage (Table 9). Thus, there is no basis for concern that station groups could foreclose entry either unilaterally or cooperatively.

Also, even if there were some reason, unrelated to vertical foreclosure of competing programming services, to be concerned about "horizontal" concentration of ownership of cable systems, there would be no basis for such concern in the case of ownership of broadcast stations in different markets. If the national ownership rule were eliminated, the HHI based on DMA household coverage could not exceed 831 (see Section VI.A). Clearly, even if an HHI for stations nationwide measured something of competitive significance, an HHI this low would raise no competitive concerns.

J. Conclusion

The analyses in Sections II through VI of this report lead to the conclusion that neither the preservation of competition nor concern for diversity provides any basis for restricting the number or reach of broadcast stations in different local markets owned by a single entity. However, there is evidence that such restrictions reduce the efficiency of resource allocation by preventing stations from being owned by the entities that are in a position to put them to their most valuable uses. Thus, any rule that restricts national station ownership is likely to make stations, programming services, viewers and advertisers worse off. The existing rule should be eliminated.

The standards embodied in the antitrust laws provide an adequate remedy for any competitive problems that might be alleged based on a different analysis of the industry. There are no special competitive considerations that might require tougher antitrust standards for television stations than for other industries. The rationales that have been offered for limitations on the ownership of cable systems by a single MSO do not apply to broadcast stations.

Diversity concerns do not alter these conclusions because the relevant players from the perspective of diversity are far more numerous than those included in markets used for analysis of competitive problems.

VII. LOCAL OWNERSHIP RULE

A. The present policy is overly restrictive

Preservation of adequate competition in local markets is a highly desirable goal. However, the walls erected to protect competition should not be so high that they prevent competitively-neutral mergers, much less those mergers that could yield competitive benefits through greater efficiencies. The Commission prohibits joint ownership of stations that have overlapping Grade B contours. The discussions of local markets for viewers (Section II), for advertising (Section III) and for the purchase of video programming (Section IV) amply demonstrate that competitive conditions vary widely across markets. The preservation of competition in a local market must take account of local conditions, following established antitrust principles. Competitive analysis would show that the existing rule preventing overlapping Grade B contours is unnecessarily restrictive in most or all cases. In some markets, even the Commission's proposed rule based on Grade A contours would prevent mergers that have no adverse effect on competition.

1. Effects on local markets for delivered video programming

The Commission has tentatively concluded that broadcast television stations compete to attract an audience against cable, DBS, wireless cable, SMATV and, in the future, VDT. As explained in Section II, the relevant product market is at least this broad, and probably should include the viewing of video cassettes as well, not to mention non-video forms of entertainment.

The viewer share of broadcast stations is likely to decline over time as alternative video delivery systems increase in popularity. Even with current viewer shares as measured in Section II, there appear to be many instances in which common ownership of stations in adjacent DMAs or even stations within a DMA could occur without raising significant competitive concerns. As described in Section II, the station with the largest Grade B contour in each of 5 illustrative cities was paired for analysis with the station in a nearby city having the largest Grade B overlap without a Grade A overlap. This analysis found one overlap as small as 4 percent of the households covered by the first station and no overlap as large as one third. This suggests that stations with no Grade A overlap are unlikely to have enough potential viewers in common to be considered significant competitors. Joint ownership of such stations would have little or no impact on the competition for viewers.

Such a relaxed standard, while an improvement, would still be too restrictive in many cases. In DMAs where there is now vigorous competition among many televisions stations, cable operators and other providers, joint ownership of stations could occur without reaching levels of concentration that would raise competitive concerns. In New York and Cleveland, for example, even the station with the largest viewership share could acquire another station in the same DMA without exceeding the safe harbor concentration levels of the DOJ/FTC *Merger Guidelines*. Many mergers of smaller stations in these and other DMAs would likewise be within the safe harbor.

Joint ownership of stations within a DMA is even less likely to present a competitive problem if there prove to be individual cases where the geographic market for viewers is larger than the DMA. Given the large number of stations and the relatively small size of ownership groups, a market that was found to be broader than a DMA would very likely involve station owners not found in the DMA and have a lower concentration than a market limited to the DMA.

2. Effects on local markets for advertising

Evidence was presented in Section III that television stations do not significantly compete in the sale of advertising with television stations located outside the DMA. This evidence included the practice of advertisers and television stations to rely on audience data based on DMAs. If the local advertising market in which television stations compete is no larger than their DMA, then the Commission’s current rule prohibiting joint ownership of stations with overlapping Grade B contours is excessively restrictive with respect to competition in the sale of advertising. There is no significant competitive effect from a merger of stations in separate markets, and no competitive rationale for prohibiting such mergers.

Considerable evidence was also presented in Section III indicating that the advertising market in which broadcast stations compete includes cable television and other media such as radio, newspaper, direct mail, yellow pages and outdoor advertising. Even in smaller markets, concentration measured using either local advertising sales or total advertising sales is low. Within many markets, joint ownership of broadcast stations would not increase concentration in the sale of advertising to levels that warrant competitive concern.

3. Effects on local markets for purchasing video programming

The effect of the local ownership rule on competition to acquire programming is heavily influenced by other Commission rules. These rules place specific limits on the geographic area in which a broadcast station can enforce exclusive exhibition rights for non-network programming. For practical purposes, a broadcast station does not compete in acquiring non-network programming against stations located outside the area in which it can exercise exclusive rights. Except in the case of hyphenated markets, this area extends 35 miles from the station's home community.

The current local ownership rule clearly prohibits some mergers of firms that do not compete in acquiring non-network programming. The Commission has stated that Grade B contours are generally 50 to 70 miles in radius.[132] Two stations located approximately 100 to approximately 140 miles apart could therefore have a Grade B overlap, and would be prevented from merging. These distances greatly exceed the 35-mile radius in which most stations can exercise exclusive non-network program distribution rights. Grade A contours usually have a radius of about 30 to 45 miles.[133] A rule prohibiting joint ownership of stations with overlapping Grade A contours could also be overly restrictive, since it could prevent the merger of stations located approximately 60 to 90 miles apart which would not compete to acquire non-network programming.

The present rule is also ill-suited to protect competition among stations to affiliate with broadcast networks. Because networks seek to obtain affiliates in all DMAs, stations located in one DMA do not compete for network affiliation against stations located in another DMA. Joint ownership of stations in separate DMAs would not affect the competition for affiliations, but would be prohibited in many cases because of overlapping Grade B contours.

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132 See FNPRM, supra note 1, ¶116 n.144.

133 *Id*.

A case-by-case analysis of competition in the purchasing of programming is preferable to a rule. Such an analysis would examine whether the stations in a proposed merger actually compete to acquire programming. If the stations are located in the same DMA, it would also examine whether the stations are likely to compete for network affiliation. If the two stations are found to compete in acquiring programming, the analysis would then determine whether the concentration in the purchasing of programming would be significantly increased by the proposed merger, and if so, whether that portends a reduction in competition.

B. Replacing the current policy with an antitrust approach would permit efficiencies of joint ownership

Hard evidence of the efficiencies that would be realized through joint ownership of stations with overlapping Grade B contours obviously is not available, since joint ownership under these circumstances has not been permitted. Merging stations in adjacent DMAs would realize efficiencies of the type discussed in Section VI.B, as well as efficiencies related to regional news coverage, other regional programming and regional advertising sales. Through combining certain operation, they would also likely achieve savings in supervisory and administrative personnel. Joint ownership of stations within a single DMA, which could occur in some markets without raising competitive concerns, would likely result in even greater cost savings than would be realized from the joint ownership of more distant stations.

The potential for efficiencies from joint ownership of television stations is supported by research on joint ownership of AM and FM radio stations in the same market. Anderson and Woodbury compared the prices paid for AM-FM combinations to the estimated prices these stations would have received had they been purchased and operated separately.[134] They found that combinations sold for a price that was 24 percent higher than if the stations had been sold separately. This statistically significant difference was attributed to the efficiencies arising from joint ownership.

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134 Keith B. Anderson and John R. Woodbury, *Efficiencies from Common Ownership of Local Broadcast Media: The Case of AM and FM Radio Stations*, Appendix to *Reply Comments of the Staff of the Bureau of Economics of the Federal Trade Commission* in MM Docket No 91–140, Sept. 5, 1991.

C. Antitrust standards will ensure adequate diversity

The Commission has identified its core diversity concern as local news and public affairs programming.[135] Evaluating the effect of the local ownership rule on diversity requires an understanding of what it means to be "local," a term the Commission has not defined in this context and which perhaps cannot be defined in any strict sense. As noted in Section VII.A.3, stations with overlapping Grade B contours can be up to 100-140 miles from each other. It is questionable whether the news considered local by one group of viewers would also be considered local by viewers separated from the first group by such distances. There may be viewers located midway between the stations that would consider the news from each station to be local in some sense. Even for these viewers, however, it is doubtful that the local news carried by the two stations would be considered substitutes, because they would largely be concerned about different sets of "local" events and issues. It is difficult to argue that joint ownership of stations with a Grade B overlap could reduce the diversity of a news product if they do not even supply the same news product.

Whatever the properly-defined "local" area is, it is clear that the diversity of news is not limited to what is offered on broadcast television. Local news is provided not only by broadcast television but also by radio and newspapers. In some communities, cable television and magazines are additional sources of local news. Any policy for preserving local diversity, if needed at all, should consider all sources of diversity in the relevant local setting.

D. Conclusion

The Commission's rule banning joint ownership of television stations whose Grade B contours overlap but whose Grade A contours do not overlap appears to lack support, either in competition policy or in terms of protecting diversity. The relaxed rule proposed by the Commission, which would permit joint ownership of stations unless there is an overlap of Grade A contours, would permit many mergers that would have no adverse effect on diversity or competition. In some situations, even mergers between television stations with overlapping Grade A contours would not raise competition or diversity concerns, and should be allowed.

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135 *See* FNPRM, *supra* note 1, ¶72.

VIII. Radio-Television Cross-Ownership Rule

A. The Commission's one-to-a-market rule and waiver policy

This section applies the economic analysis considered in sections II through V above to the issue of the Commission's one-to-a-market rule. The analysis suggests that the present rule is over-broad, in that it prevents combinations that pose no threat to competition or to diversity. Consequently, the rule should be replaced by enforcement based on antitrust standards.

The Commission's one-to-a-market rule generally prohibits common ownership of a television station and a radio station in the same local market. The Commission "looks favorably" on requests for waivers of this rule to allow radio-television combinations involving not more than one AM station and one FM station in the top 25 television markets where there would be at least 30 separately owned, operated and controlled broadcast licensees after the proposed combination. Entities that do not own a television station are permitted to own two AM stations and two FM stations in most major markets.

The Commission now proposes to eliminate the one-to-a-market rule if it is able to conclude that television and radio stations do not compete and that they do not participate in the same diversity "markets." The standard proposed by the Commission—that television stations and radio stations *do not compete* in any market—is inappropriate. In evaluating a merger, the issue should not be simply whether the merging firms compete. The issue should be whether the merger would be likely significantly to reduce competition. Unless a merger of competitors would result in an unduly concentrated market, and other conditions are met as well, the loss of a competitor is not normally expected to reduce competition significantly or to increase the likelihood that market power will be exercised.[136] Thus, radio-television station mergers should be evaluated by applying the merger standard of Section 7 of the Clayton Act rather than being flatly prohibited. The present section of this report provides illustrations of how to analyze the effects of hypothetical radio-television station mergers on relevant markets, on diversity and on economic efficiency.

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136 See note 4, *supra.*

In fact, the Commission has already reached the tentative conclusion that television and radio compete in local advertising markets. Furthermore, there are clearly national television advertisers for whom national radio is the closest substitute, as well as national radio advertisers for whom national television is the closest substitute. Similarly, there are no doubt television viewers for whom listening to the radio is the closest substitute, and radio listeners for whom watching television is the next best way to acquire information or entertainment. In spite of this, many television-radio combinations would raise no *prima facie* competitive concerns based on HHIs, for two reasons. First, many markets have a large number of television stations, other video alternatives and radio stations. Second, there are many *other* advertisers and viewers for whom the closest substitutes for television are *not* radio stations but rather newspapers and other forms of advertising or entertainment. Similarly, there are many other advertisers and listeners for whom the closest substitutes for radio are not television stations and other video media but rather newspapers and other forms of advertising or entertainment. Such customers protect those whose choices are limited to radio and television.[137] As a result, any reasonable relevant market that includes both television and radio would also include a number of other types of advertising or leisure activities as well. Such markets typically are not highly concentrated.

In addition, one cannot reach a conclusion that the exercise of market power is likely merely because an HHI falls in the "highly" concentrated range. Sections III.E and III.F explain two important reasons one cannot rely on HHIs alone: in any narrow "market" there would be many substitutes just outside the "market," and collusion would be difficult. Also, in many markets entry would be easy.

B. Effects of the rule on markets for delivered video programming

The Commission has suggested that station ownership issues should be evaluated in a relevant market in which stations compete to "sell" programming to audiences, or in which they compete to attract audiences. The Commission has tentatively concluded that this relevant product market includes only video programming delivered to the

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137 There appears to be no practical method by which broadcasters could readily distinguish and treat differently most of those viewers, listeners or advertisers whose best alternative is a non-broadcast medium from those who regard radio and television as their closest substitutes. Hence, price discrimination cannot serve as a basis for market definition.

home. Section II of this report provides a competitive analysis of delivered video programming. One implication of a delivered video programming market is that, in the event of a small but significant reduction in the quality of video programming offered by a hypothetical monopolist, not enough viewers would switch to other activities, including listening to radio stations, to make the reduction in quality unprofitable.[138]

If the Commission's proposed delivered video programming market is the relevant market, cross-ownership of television and radio stations will not affect the quality of video programming. Thus, no radio-television cross-ownership rule could have a competitive justification relating to television programming quality.

The Commission's proposed delivered video programming market may be too narrow. However, any broader relevant market would probably include not only video programming and radio programming, but also many other types of leisure activities such as listening to audio tapes and CDs, reading the newspaper, and playing computer games. Collectively these alternatives to watching video programming may well make a small but significant reduction in the quality of video programming by a hypothetical monopolist unprofitable. Nonetheless, there is no apparent reason to believe that any one of them—such as radio alone or newspapers alone—plays a unique role in constraining video programming quality. Thus, even in a broader market, cross-ownership of television and radio would not be likely to raise concerns relating to the quality of television programming.

Some might express a concern about the effect of radio-television cross-ownership on the quality of radio programming, but the same reasoning presented above for quality of television programming would seem to apply to this issue. Indeed, regardless of how the relevant product market is defined, radio-television cross-ownership does not appear to raise competitive concerns relating to the quality of programming. Thus, concerns about programming quality cannot justify the radio-television cross-ownership rule.

138 As indicated in note 6, *supra*, throughout this report, programming "quality" is equated with programming expenditures.

C. Effects of the rule on markets for advertising

Section III of this report provides a competitive analysis of local and national advertising markets. That analysis is used in this section to evaluate the potential effects of radio-television station combinations.

1. Local advertising markets

The appropriate way for the Commission to deal with the effect of proposed radio-television combinations on advertising markets is to rely on antitrust analysis of the type demonstrated in Section III above, applying the incipiency standard of Section 7 of the Clayton Act. To do otherwise is to ban many combinations that would have no significant effect on competition but which presumptively enhance economic efficiency. Effects of proposed station mergers on concentration in advertising markets can be computed without difficulty. Examples for the five illustrative DMAs used in this report are provided here. The following hypothetical cases are analyzed:

- The advertising revenues of the median AM station and the median FM station are attributed to the median television station in the DMA—in other words, the effect of a combination of an "average" TV station with two "average" radio stations is assessed.[139]

- Beginning with the assumption that the median TV, AM and FM stations are under common ownership, the revenues of the next largest AM station and the next largest FM station are attributed to this combination—in other words, the effect of a combination of two "average" radio stations with an "average" TV station that already owns two "average" radio stations is assessed.

The results of this analysis for three alternative advertising product "markets" are presented in Table 11. The three product "markets" are the same ones used in Table 5

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139 Stations were ranked by total 1994 advertising revenue (1993 in the case of New York). Only stations with positive advertising revenues were included. In computing the pre-merger *level* of the HHI, advertising vehicles with common ownership were combined. However, in computing the *increase* in the HHI resulting from the hypothetical merger, it was assumed that the acquired radio stations were not previously owned by entities that owned other advertising vehicles in the market. Thus, the increase in the HHI for the first hypothetical merger shows the effect of combining the median TV station, a previously independent AM station with a share equal to that of the median AM station, and a previously independent FM station with a share equal to that of the median station.

to analyze concentration in local advertising. In the broadest market, the combinations have little effect on the HHIs, which remain under 700.

In the middle product “market,” the HHIs for New York and Cleveland increase by only 2–12 points as a result of the various combinations considered. The HHIs for Portland increase by only 20–44. The HHIs for all the DMAs remain in the “moderate” or “low” ranges after the combinations.

In the narrowest product “market,” the HHIs for New York and Cleveland increase by only 4–20 points as a result of the various combinations.

Table 11 HHIs for hypothetical radio-television combinations in alternative DMA advertising product "markets," 1994[140]

Product "market"	DMA	Capacity		
		Pre-merger	TV-AM/FM merger	TV-2 AM/ 2 FM merger
Video, radio, & newspaper	New York*	703	707	710
	Cleveland	1,250	1,261	1,270
	Portland	1,839	1,871	1,909
	Richmond	1,924	2,037	2,081
	Amarillo	2,505	2,585	2,625
Video, radio, newspaper, outdoor, & yellow pages	New York*	758	760	762
	Cleveland	1,106	1,112	1,118
	Portland	1,485	1,505	1,529
	Richmond	1,519	1,589	1,617
	Amarillo	1,722	1,771	1,795
Video, radio, newspaper, outdoor, yellow pages, direct mail, & miscellaneous	New York*	284	285	286
	Cleveland	418	421	423
	Portland	564	572	581
	Richmond	583	610	621
	Amarillo	632	650	660

*1993 revenue

The only circumstance in which the radio-television combinations in question would lead to antitrust investigations under current merger standards is likely to be where (1) there was reason to believe that the relevant product market includes only video, radio and newspaper advertising, *and* (2) the DMA was significantly smaller than Cleveland. In order for such an antitrust investigation to lead to action to prevent the combination, the investigation would need to lead to the conclusion that the relevant product market is limited to video, radio and newspaper advertising, that collusion is

140 Source: Appendix Tables F–1 to F–16.

141 Source: Appendix Tables F–1 to F–16.

not particularly difficult in the case of an advertising market where the HHI is in the relevant range (for example, between 1,800 and 2,625), and that entry is difficult.

While the primary purpose of these illustrative calculations is to demonstrate the relative ease of carrying out case-by-case analyses of the effects of station mergers on concentration in local advertising markets, these illustrative cases also suggest that in many situations mergers of the types analyzed would not raise competitive concerns in properly-defined local advertising product markets.

2. National advertising market

The Commission has tentatively concluded that radio does not compete with video media in selling national advertising. If that were correct, radio-television cross-ownership would have no effect on concentration in any national advertising market of relevance to the television station ownership rules.

Television stations and radio stations sell spot advertising to national advertisers. Thus, in any national advertising product market that includes both television spot and radio spot, television and radio compete much as they do in local advertising markets. Nonetheless, it is entirely possible that an increase in radio-television cross-ownership in a substantial number of DMAs would not have any effect on concentration in national advertising markets.

The HHIs for national advertising presented in Table 4 are based on an assumption that television and radio spot revenues are attributable for this purpose to station representatives. Suppose that the radio-television cross-ownership rule was replaced by enforcement based on competition policy standards. Suppose, however, that the television national ownership rule was retained in its present form. In that case, it would still be impossible for one entity to own enough television stations to be an independent participant in the relevant national advertising market by virtue of supplying national spot television advertising. (Under the assumptions underlying Table 4, by definition an “independent participant,” such as a national representative firm or a network, must be able to sell access to audiences in areas accounting for at least 75 percent of television households.) Thus, cross-ownership of television stations and radio stations would not affect concentration in national advertising.

Suppose again that the radio-television cross-ownership rule was replaced by enforcement based on competition policy standards. However, now suppose that the television national ownership rule was also replaced by antitrust enforcement. Suppose further that one entity acquired ownership of a set of TV stations, a set of AM stations and a set of FM stations, each of which covered at least 75 percent of the households in the country. This common ownership of TV, AM and FM stations could increase concentration compared to the levels in Table 4. However, the same level of concentration could be achieved without common ownership of television and radio stations, and thus without elimination of the one-to-a-market rule and the national ownership rule. This is because the station representatives to which national spot advertising revenues are attributed for purposes of the analysis summarized in Table 4 are permitted to represent both television stations and radio stations in selling advertising. In other words, elimination of the radio-television and national ownership rule would not make possible a higher level of concentration than is possible already.[142]

Suppose that as a result of either common ownership of television and radio stations or common representation of television and radio stations in the sale of advertising, it was appropriate to attribute to one entity the revenues of Broadcast Television Representative 1 and Radio Representative 1 in the analyses underlying Table 4. The increase in the HHI that would result from this combination in a national video and radio advertising "market" is presented in Table 12. The increase in the HHI is modest.

Table 12 HHIs for hypothetical radio-television combinations in a national video and radio advertising "market"[143]

	National sales	Capacity
Pre-merger	753	508
A broadcast television representative buys a radio representative	762	543
A broadcast television representative buys a second radio representative	772	597

142 However, barriers to entry might be higher with common ownership than with common representation.

143 Source: Appendix Table E–3.

144 Source: Appendix Table E–3.

Based on this analysis it can be concluded that potential effects in the market for national advertising do not justify the radio-television cross-ownership rule.

D. Effects of the rule on the market for video programs

Section IV of this report provides a competitive analysis of video program acquisition. Cross-ownership of television and radio stations has no effect on the market for video program rights, since radio stations do not participate in that market. Further, in the broader market for purchasing broadcast program inputs such as talent, concentration in a market defined to include both radio and video (and therefore other media as well) is even lower than concentration in purchases of video rights.

E. Effects of the rule on diversity

As indicated in Section V above, the effects on diversity of a combination of two outlets in the same market are likely to be less problematic than the economic effects. Diversity "markets" are likely to be broader and less concentrated than relevant antitrust markets. It follows that if the economic effects of such a combination do not offend merger standards, then the combination also should not be regarded as a significant threat to diversity. In short, a radio-television combination that passes muster under the Clayton Act should also pass muster under any reasonable diversity standard.

F. Efficiencies from radio-television combinations

A variety of potential cost savings may result from common ownership of television and radio stations in a local market. Such cost savings can be expected to lead to a larger number of radio stations, higher quality programming for viewers and listeners, and lower prices for advertisers. For example:

> Group W has recently combined its radio and television operations in Boston (WBZ-AM and WBZ-TV) under one general manager. The stations now share news and programming resources. Joint operation has resulted in a substantial increase in the amount of radio news and public issues programming. The combined resources of the WBZ radio and television news departments have allowed the radio station to more than double the number of news minutes available on the radio station each day. Sharing of programming resources has

> resulted in an increase in issue-oriented talk programs rather than music and lighter talk.[145]

The existence of efficiencies from joint ownership of television and radio stations is suggested by evidence of efficiencies arising from joint ownership of AM and FM radio stations in the same market. Anderson and Woodbury compared the prices paid for AM-FM station combinations to the estimated prices these stations would have received had they been purchased and operated separately.[146] They found that combinations sold for a price that was 24 percent higher than the sum of the estimated prices had the stations been sold separately. This difference was attributed to the efficiencies arising from joint ownership.

G. Conclusion

Neither concerns regarding competition nor concerns regarding diversity, which are analyzed in Sections II through V of this report, justify a radio-television cross-ownership rule rather than enforcement based on the standard in Section 7 of the Clayton Act. A rule that applies a flat prohibition causes harm to viewers and advertisers by preventing efficiencies of joint ownership in cases where there is no basis for competitive or diversity concerns. Such a rule cannot be justified on the ground that it saves costs of case-by-case enforcement, because no case can be made that all or most combinations would be anticompetitive. The only possible adverse competitive effects of radio-television station mergers would be in local advertising markets. As Table 11 demonstrates, it is relatively simple to compute concentration in those markets based on publicly available data.

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145 *Group W Comments Supporting Petition for Reconsideration of Capital Cities/ABC*, In the Matter of Revision of Radio Rules and Policies, MM Docket No. 91-140, FCC, June 25, 1992, at 5-6.

146 Anderson and Woodbury, *supra* note 124.

IX. CONCLUSION

This economic report has shown that the FCC's broadcast station ownership rules can usefully be addressed from the perspective of competition policy. When this is done, it becomes clear that the present rules are not necessary to protect viewers, advertisers or program suppliers from undue concentration of control. However, the present rules forbid many transactions that would not be anticompetitive. These forbidden transactions are presumptively beneficial to the economy as a whole, because they lower costs or enhance service quality. Finally, the application of antitrust merger standards to the analysis of station ownership changes is more than sufficient to protect the Commission's interest in diversity.

On the national level, analysis of competition and concentration in the two markets that have a national dimension, the sale of advertising and the demand for programming, supplies no justification for the present limitations on group ownership of stations. The relevant markets are relatively unconcentrated and would remain so after significant increases in the shares of many firms. The present rule banning common ownership of TV stations with overlapping Grade B contours is unnecessary to protect local markets from undue reductions in competition. A mere Grade B overlap is not sufficient to support an inference that two stations are competitors. In some cases even common ownership of stations with Grade A overlaps would not reduce competition. Finally, the application of merger analysis to the various types of transactions covered by the rule banning radio-TV cross-ownership in the same market suggests that in many larger markets there would be no threat to competition from the acquisition of two or four radio stations by a TV station.

Appendix A Product market definition in the Commission's delivered video services market

1. Cable television

Virtually every household in the United States now has the opportunity to obtain video programming via cable. According to recent estimates, 96.5 percent of households are passed by cable. See Appendix Table A–1. Nearly two-thirds of these households, 59 million, currently subscribe to basic cable service. In addition, cable subscribers purchase 44 million pay units.[147]

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147 Paul Kagan Associates, KAGAN MEDIA INDEX, Feb. 24, 1995, at 14.

Appendix Table A–1 **Cable service in the U.S.**[148]

Year	TV households	Homes passed	Cable subs	Homes passed per TVHH	Cable subs per TVHH
	(millions)	(millions)	(millions)	(percentage)	
1975	68.5	21.8	9.8	31.8	14.3
1976	71.2	23.1	11.8	32.4	16.6
1977	72.9	24.2	12.6	33.2	17.3
1978	74.5	26.8	14.2	36.0	19.1
1979	76.3	29.3	15.8	38.4	20.7
1980	79.9	34.9	19.2	43.7	24.0
1981	81.3	41.8	23.0	51.4	28.3
1982	81.9	49.5	27.5	60.4	33.6
1983	83.3	55.9	31.4	67.1	37.7
1984	84.9	60.5	34.2	71.3	40.3
1985	86.5	64.7	36.7	74.8	42.4
1986	87.7	69.4	39.7	79.2	45.3
1987	89.2	73.1	42.6	81.9	47.8
1988	90.9	77.2	45.7	85.0	50.3
1989	91.6	82.8	49.3	90.4	53.8
1990	90.9	86.0	51.7	94.7	57.0
1991	92.0	88.4	53.4	96.1	58.1
1992	93.1	89.4	55.2	96.1	59.3
1993	93.9	90.6	57.2	96.5	60.9
1994	94.9	91.6	59.0	96.5	62.0

Many cable networks have emerged to supply programming for resale to cable subscribers. Over 100 networks are available to cable systems throughout the nation, including 79 basic cable networks, 17 pay networks and 8 pay-per-view networks. See Appendix Table A–2. A great deal of cable programming is available to the average cable subscriber as an alternative to broadcast television.

148 Paul Kagan Associates, KAGAN MEDIA INDEX, Jan. 11, 1995, at 7, 14; Feb. 26, 1993, at 2.

149 Paul Kagan Associates, KAGAN MEDIA INDEX, Jan. 11, 1995, at 7, 14; Feb. 26, 1993, at 2.

Appendix Table A–2 **Cable networks in the U.S.**[150]

Year	National					Regional
	Basic	Pay	Pay-per view	Combina-tion	Total	Total
1976	2	2			4	
1977	3	2			5	
1978	6	2			8	
1979	14	5			19	
1980	19	8		1	28	
1981	29	9			38	
1982	30	11	1		42	
1983	31	11	1		43	
1984	36	10	1		47	
1985	40	9	4	2	55	18
1986	52	8	5	2	67	20
1987	59	9	6	1	75	24
1988	61	8	5	1	75	30
1989	60	5	4	3	72	37
1990	61	5	5	4	75	37
1991	61	7	4	4	76	39
1992	64	8	4	4	80	41
1993	73	9	7	5	94	42
1994*	79	17	8	5	109	43

*1994 data are through September.

As an advertising-supported medium, broadcast television has strong incentives to present programming that will appeal to the largest possible audience. Basic cable programming, in contrast, is typically supported, at least in part, by subscriber payments. Through these payments, narrower groups of viewers with special interests

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150 NCTA, *Cable Television Developments*, *Fall 1994*. Regional totals are from TELEVISION & CABLE FACTBOOK, SERVICES (various years).

151 NCTA, *Cable Television Developments*, *Fall 1994*. Regional totals are from TELEVISION & CABLE FACTBOOK, SERVICES (various years).

can support programming that caters to those interests, even if the programming does not appeal to mass audiences. Examples of the diverse programming available on basic cable include MTV, Black Entertainment Television, Courtroom Television Network and the Family Channel. Subscriber payments are even more important to the support of pay and pay-per-view channels. Pay cable networks include Home Box Office, Showtime and the Disney Channel. Pay-per-view channels also offer movies as well as live sports and entertainment programming. Such basic, pay and pay-per-view programming provides viewers with an alternative to the programming available on broadcast stations.

Cable systems compete with broadcast stations not only by offering distinctive programming but also by offering similar programming. A significant amount of cable programming, while not available on broadcast stations, is similar to broadcast television programming. The programming schedules of 94 basic, regional and premium cable networks were analyzed during a recent representative week.[152] Of the 12,305 hours of programming examined, 28 percent of the time was movies, 5 percent was sports, 3 percent was paid programming, and 8 percent was off-network. These are programming categories familiar to broadcast television viewers. The remaining 56 percent was programming that aired for the first time on a cable network or was originally released as syndicated programming.

The substitutability between broadcast television and cable television is further illustrated by instances in which identical programming is shown on broadcast and cable. HSN2 and ValueVision, for example, are home shopping channels that are available over the air in some areas but carried only on cable in other areas.[153] The same infomercials are shown on broadcast stations, by cable networks, and during time purchased from cable operators. Spanish language programming from Univision and Telemundo is likewise carried on broadcast stations in some localities and on cable systems in other localities.

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152 This analysis is described in Economists Incorporated, *An Economic Analysis of the Prime Time Access Rule*, March 7, 1995, MM Docket No. 94–123, at Appendix B.

153 Home Shopping Network, *1993 SEC Form 10–K*; ValueVision International, *1993 SEC Form 10–K*.

The blurred line between cable and broadcast television is encountered not only in somewhat specialized areas like those just discussed, but also in conventional entertainment programming. Television programming by the Fox network is carried on a large number of broadcast affiliates. In areas not covered by broadcast affiliates, cable operators carry this programming under the label Fox Net.[154] The recently launched WB Network reaches 80 percent of the national television audience. Superstation WGN, carried on cable systems, is used to achieve 18 percent of that reach.[155] Also, WB plans to seek cable carriage in areas in which it is unable to obtain broadcast affiliates.[156] Cable and broadcast television have also shared sports programming. Examples include the 1991 Pan Am Games, in which ABC bought the rights and sold off some rights to Turner, the 1994 Goodwill Games, in which Turner bought the rights and then bought the time on ABC, and the 1994 Winter Olympics, in which CBS sold some rights to TNT.[157]

Given the widespread penetration of cable and the large amount of programming cable offers, cable programming has had an enormous impact on television viewing habits. In the average television household, including both cable subscribers and non-subscribers, about a third of television viewing is non-broadcast programming. In the November 1994 sweeps, basic and pay cable combined had an all-day/all-week share of 35. See Appendix Table A–3.

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154 Fox Net is listed as a basic cable network in *Database: Network Subscriber Counts*, CABLEVISION, Feb. 6, 1995, at 60.

155 Elizabeth Jensen, *Building a Network: 50 Stations, 4 Shows, 1 Frog*, WALL STREET JOURNAL, Jan. 3, 1995, at A–11–12.

156 Thomas Tyrer, *New networks gear up for launch: WB putting weight behind shows, promos*, ELECTRONIC MEDIA, Jan. 2, 1995, at 34.

157 Paul Kagan Associates, CABLE TV PROGRAMMING, Feb. 25, 1993, at 2.

Appendix Table A–3 Audience shares of cable and non-cable households, Monday–Sunday, 7 a.m.–1 a.m.[158]

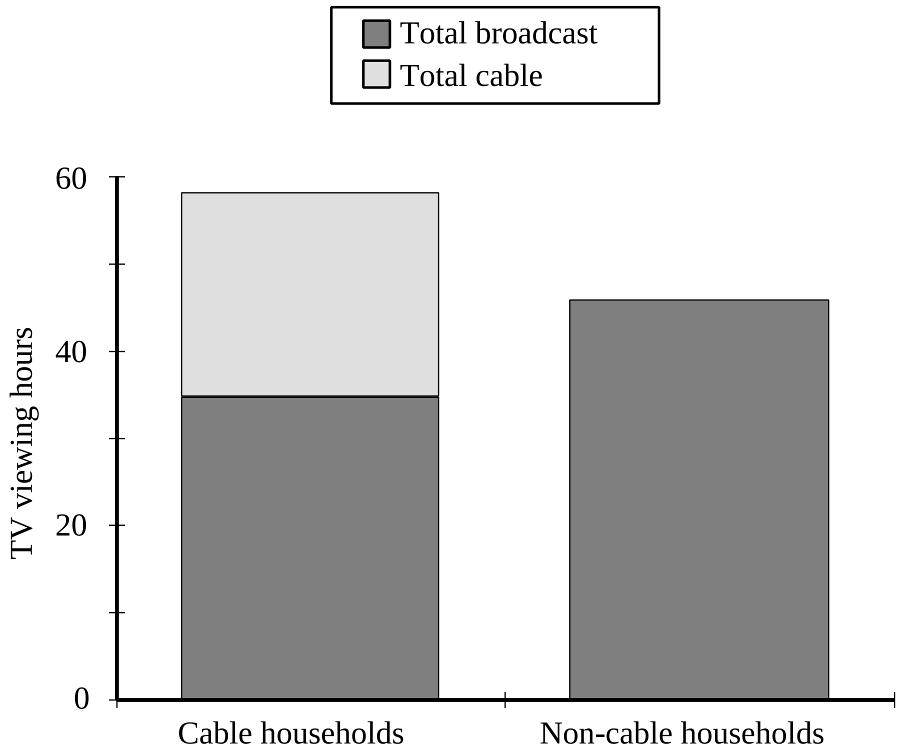
Program source	All television households	Cable television households	Non-cable television households
ABC affiliates	18	16	22
CBS affiliates	18	15	24
NBC affiliates	17	16	20
Fox affiliates	11	9	15
Independents	9	7	14
PBS	4	3	5
Basic cable	31	43	2
Pay cable	4	6	–

The substitution of cable programming for broadcast programming is suggested by comparing cable television households with non-cable television households. See Figure A–1. Households that do not subscribe to cable watch broadcast television 45.8 hours per week on average. Cable households, which have additional programming available to them, watch television an average of 58.2 hours per week. But cable viewing does not merely supplement broadcast viewing in these households, it is substituted for broadcast viewing. Cable households view broadcast television for an average of 34.8 hours per week, 11 fewer hours than non-cable households.

158 NIELSEN TELEVISION INDEX, SPECIAL ANALYSIS (Oct. 31, 1994–Nov. 27, 1994). "Share" means television sets tuned to a particular station or network as a percentage of homes using television (HUTs) in a relevant geographical area. Shares can add to more than 100 percent because homes often have more than one switched-on set.

159 NIELSEN TELEVISION INDEX, SPECIAL ANALYSIS (Oct. 31, 1994–Nov. 27, 1994). "Share" means television sets tuned to a particular station or network as a percentage of homes using television (HUTs) in a relevant geographical area. Shares can add to more than 100 percent because homes often have more than one switched-on set.

Figure A–1 **Average weekly hours of television viewing by programming source, cable and non-cable households**[160]



160 Source: Appendix Table A–4.

161 Source: Appendix Table A–4.

Appendix Table A–4 **Total hours of television viewing per week**[162]

	Cable households	Non-cable households
Total TV viewing	**58.2**	**45.8**
Total broadcast	34.8	45.8
Network affiliates	24.5	30.5
Independents	8.8	12.9
Public	1.5	2.4
Total cable	23.4	
Basic	19.4	
Pay	4.0	

The Commission has long accepted that viewers consider broadcast television and cable television to be substitutes. The Commission's 1984 decision to deregulate most cable operators was based on a finding that if consumers in a cable franchise area could receive three or more signals over the air, the cable operator faced "effective competition."[164] In other words, the Commission believed that cable operators would be unable to charge unduly high rates for cable if a good substitute, in the form of broadcast television, was available to viewers.

When the Commission re-examined its effective competition standard in 1990, several statistical studies were submitted showing broadcast television and cable television to be substitutes. James Dertouzos and Steven Wildman used a stratified sample of 340 cable systems to study the impact of over-the-air television signals.[165]

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162 Source: Cabletelevision Advertising Bureau, *1994 Cable TV Facts*, at 20.

163 Source: Cabletelevision Advertising Bureau, *1994 Cable TV Facts*, at 20.

164 47 C.F.R. § 76.33(a)(2). *See Report and Order* in MM Docket No. 84–1296, 50 Fed. Reg. 18637 (1985), *Memorandum Opinion and Order* in MM Docket No. 84–1296, 51 Fed. Reg. 21770 (1986) and *Second Report and Order* in MM Docket No. 84–1296, 3 FCC Rcd 2617 (1988).

165 James N. Dertouzos and Steven S. Wildman, *Competitive Effects of Broadcast Signals on Cable*, February 22, 1990, filed with Comments of the National Cable Television Association, MM Docket No. 89–600, FCC, Mar. 1, 1990.

They found that when other factors are held constant, cable systems located in the Grade B contour of five or more broadcast stations had significantly fewer subscribers, provided significantly more basic cable channels, charged basic service rates that were significantly lower per channel, and charged significantly lower prices for premium movie channels than cable systems located in areas receiving fewer signals. Each of these effects provided evidence that cable television and broadcast television compete for viewers.

Another study, conducted by Robert Crandall, also found that broadcast television competes with cable television for viewers.[166] His study of over 2,700 cable systems found that, at least within a certain range, cable systems in areas receiving more broadcast signals had a lower price for basic service than cable systems in areas receiving fewer signals, holding other factors constant. A third study, undertaken by the National Telecommunications and Information Administration, also concluded that the more broadcast signals available in the cable system's service area, the lower the price of basic service, holding other factors constant.[167] Summarizing these three studies, the Commission reported that they "establish a statistically significant inverse relationship between basic rates and the number of broadcast signals available…."[168]

Substitution between cable and broadcast television viewing was further confirmed by an analysis presented by the staff of the Federal Trade Commission's Bureau of Economics.[169] Unlike the studies cited above, which examined how the availability of broadcast signals affected the behavior of cable systems, this study investigated how broadcast audiences are affected by the availability of cable. Specifically, the study estimated that each percentage point increase in the number of households

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166 Robert W. Crandall, *Regulation, Competition and Cable Performance*, filed with Comments of Tele-Communications, Inc., MM Docket No. 90–4, FCC, Apr. 6, 1990.

167 Mark M. Bykowsky and Timothy Sloan, *Competitive Effects of Broadcast Signals on the Price of Basic Service*, attached to Comments of the National Telecommunications and Information Administration, MM Docket No. 90–4, FCC, Apr. 6, 1990.

168 *Report*, released July 31, 1990, MM Docket No. 89–600, Appendix E, ¶ 21.

169 *Comments of the Staff of the Bureau of Economics of the Federal Trade Commission*, MM Docket No. 91–221, FCC, Sept. 24, 1992.

passed by cable was associated with a decrease of one half percentage point in the viewer shares of local broadcast stations.[170]

Statistical evidence of substitution between cable television and broadcast television, similarity of programming, and common sense all support the Commission's tentative conclusion that cable television competes with broadcast stations in attracting viewers.

2. DBS and other non-broadcast video distribution media

There are other important distributors of non-broadcast video programming in addition to cable television that compete for viewers with broadcast television. Nearly 4 million households subscribe to video programming via MMDS, SMATV or backyard satellite dishes. See Appendix Table A–5. If present trends hold, however, the total number of subscribers to each of these services could be exceeded by households subscribing to direct broadcast satellite (DBS) service.

170 *Id.* at 17–18 and Appendix. This relationship was significant at the 99 percent level.

Appendix Table A–5 **Households subscribing to video programming through backyard dishes, SMATV and MMDS** [171]

Year	Backyard dishes	SMATV (in millions)	MMDS (wireless)
1983			0.5
1984		0.4	0.4
1985		0.5	0.3
1986	0.1	0.6	0.3
1987	0.3	0.7	0.2
1988	0.4	0.7	0.2
1989	0.6	0.8	0.1
1990	0.7	0.8	0.2
1991	0.8	0.9	0.2
1992	0.9	0.9	0.3
1993	1.4	1.0	0.4
1994	2.1	1.1	0.6

DBS makes use of powerful satellites that transmit Ku-band video programming directly to households. It differs from earlier home satellite systems because the signal can be received on dish antennas that measure about 18 inches in diameter. These antennas are not only much smaller than older C-band dishes, they are much less expensive. Price ranges from $649 to $899, depending on the number of ports and features supported,[173] compared to $2,000-2,500 for traditional C-band dishes.[174] RCA, which developed the technology, is manufacturing the antennas through its

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171 Paul Kagan Associates, KAGAN MEDIA INDEX, Jan. 11, 1995, at 7, 14.

172 Paul Kagan Associates, KAGAN MEDIA INDEX, Jan. 11, 1995, at 7, 14.

173 Paula Bernier, *DBS Providers Lure Subscribers with Menus, Presentation*, TELEPHONY, June 27, 1994, at 6.

174 Danielle Bochove, *Satellite is Newest Weapon in TV Broadcast Wars*, ST. LOUIS BUSINESS JOURNAL, June 13, 1994, at 4B. Note that Primestar, another supplier of video programming to home dishes, leases rather than sells its dishes. C. Thomas Veilleux, *EchoStar DBS Alternative to Bow*, HFD-THE WEEKLY HOME FURNISHINGS NEWSPAPER, Nov. 14, 1994, at 84.

Thomson Consumer Electronics subsidiary. RCA has already licensed Sony to begin manufacturing after Thomson has sold 1 million units, which is expected by mid-summer 1995.[175]

DirecTV, a unit of GM Hughes Electronics, and USSB, a division of Hubbard Broadcasting, both commenced DBS service in June 1994. DirecTV offers 40 cable networks, 40 to 50 pay-per-view movie channels, and 20 channels of à la carte programming, chiefly sports. Subscriptions range from $5.95 to $21.95 per month. USSB offers up to 30 channels, including basic cable channels plus multiple versions of HBO, Showtime, The Movie Channel and Cinemax, charging from $7.95 to $34.95 per month.[176]

Sales of DBS dishes have exceeded expectations. Over 350,000 subscribers signed up by the end of 1994.[177] USSB forecasts sales of 2.5 million units by the end of 1996. DirecTV expects 3 million by the end of 1996 and 10 million by 2000.[178]

Two other firms plan to offer DBS service in the near future. EchoStar expects to launch its first DBS satellite in Fall 1995, begin service as early as November 1995, and launch a second satellite in Summer 1996.[179] PrimeStar, owned by a consortium of cable companies, now provides C-band services on 3-foot dishes, and hopes to reach 1 million subscribers in 1995.[180] It plans to offer Ku-band DBS service by 1996.[181]

DBS is a significant addition to video distribution not only because it is available everywhere, but because it will likely increase video programming options beyond

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175 Jeffrey A. Trachtenberg, *Marketing & Media: Sony to Challenge Thomson's Unit's 18" Satellite Dish*, TELEVISION DIGEST, Nov. 7, 1994, at 4.

176 Bernier, *supra* note 155.

177 Kent Gibbons, *DBS: We're Walking the Walk*, MULTICHANNEL NEWS, Jan 16, 1995, at 3.

178 Michael Burgi, *RCA Dishes Up DBS Rollout*, MEDIAWEEK, Oct. 3, 1994, at 10.

179 Veilleux, *supra* note 156.

180 Gibbons, *supra* note 159.

181 *PrimeStar Signs DBS Deal*, TELEVISION DIGEST, Nov. 7, 1994, at 4.

those available from broadcast and cable television.[182] New video programming is also planned for video dial tone (VDT) services. Pacific Telesis Group, Bell Atlantic and NYNEX Corp. have formed a venture to develop their own branded programming, hiring away the president of CBS.[183] VDT services are now in the pilot stages with six of the seven RBOCs as well as GTE and a number of other independent telephone companies.

3. Video cassettes

Unlike VDT, which will likely have a significant impact in the future, home viewing of video cassettes is already an important means for distributing video programming material that competes for viewers with broadcast and cable television. Approximately 89 percent of television households have a VCR. This high penetration rate is particularly remarkable because VCRs had only a 2 percent penetration as recently as 1980.[184] VCR penetration is projected to exceed 91 percent of television households by early 1996.[185]

While VCRs can be used to record broadcast or cable television programming for later viewing, they are also extensively used to view commercially prepared video cassettes. In a 1993 survey of households with both cable and a VCR, 90 percent used their VCR to watch rented video cassettes and 68 percent watched purchased video cassettes.[186] A 1992 survey of VCR households found that the median household had rented 11-20 video cassettes in the previous 12 months, and that only 12 percent of the households had not rented any in that period.[187] In another poll, 31 percent of adults reported they had rented a pre-recorded videocassette in the past week.[188] U.S. households spent over $5 million to purchase video cassettes in 1994. Another $9.4

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182 DBS service providers expect to obtain programming from producers not now selling to cable or television networks. *See DBS Systems Expected to Seek New Programming Sources*, SATELLITE WEEK, Sept. 26, 1994.

183 Jon Layafette, *Stringer Heads to Media Co*., ELECTRONIC MEDIA, Feb. 25, 1995, at 1.

184 Paul Kagan Associates, KAGAN MEDIA INDEX, Oct. 31, 1994, at 2.

185 Paul Kagan Associates, KAGAN MEDIA INDEX, Feb. 24, 1995, at 8.

186 Survey by Roper Organization, for TVSM, Inc., Mar. 6–29, 1993.

187 Survey by L.H. Research, for Phillip Morris Companies, Feb. 7–26, 1992.

188 Survey by Barna Research Group, Jan. 1993.

million was spent on video cassette rentals. See Appendix Table A–6. Expenditures on purchases and rentals together averaged $170 per VCR household in 1994.

Appendix Table A–6 U.S. video cassette expenditures[189]
(consumer rentals and sales in millions of dollars)

Year	Households with VCRs (millions)	Household video cassette expenditures	Household video cassette rental revenue	Total household video cassette revenue	Video cassette revenue per household
1983	9.4	218	1,065	1,283	136
1984	16.9	381	1,827	2,208	131
1985	27.5	656	2,910	3,566	130
1986	38.1	853	4,173	5,026	132
1987	47.6	1,108	5,245	6,353	133
1988	55.3	1,591	6,377	7,968	144
1989	61.3	2,258	7,052	9,310	152
1990	66.0	2,829	7,616	10,445	158
1991	71.2	3,229	7,770	10,999	154
1992	76.1	3,739	8,230	11,969	157
1993	80.5	4,386	8,840	13,226	164
1994	84.5	5,008	9,389	14,397	170

The distribution of movies provides an excellent example of the substitution possibilities among broadcast television, cable television and video cassettes.[191] It has long been the practice to make motion pictures available to broadcast television after one or more "runs" in theaters. Starting in the 1970s, some movies were released to cable television networks such as HBO before being released to broadcast television. In the 1980s, as VCRs became common, distributors began to release movies in video cassette form, often before release to cable networks. Movies are also available through syndication to individual broadcast stations. Some movies have

189 Paul Kagan Associates, KAGAN MEDIA INDEX, Dec. 29, 1994 at 14; Jan. 11, 1995, at 7.

190 Paul Kagan Associates, KAGAN MEDIA INDEX, Dec. 29, 1994 at 14; Jan. 11, 1995, at 7.

191 For a discussion of movie release windows, *see* OWEN & WILDMAN, *supra* note 58, at 29ff. Recent changes in movie release windows are described in Jim Benson, *Glut of hours busts rates for blockbusters*, VARIETY, Apr. 17–23, 1995 at 25–6.

their first release as cable movies or broadcast movies, and still others are released directly as video cassettes. The order in which a movie is released to various distribution media, and the timing and lengths of the release windows, are affected by competition among the distribution media. All these distribution outlets are available to movie distributors because audiences use them all to obtain video programming.

Appendix B Geographic market definition in the Commission's delivered video services market

Television stations, cable systems, MMDS, DBS and other satellite services, and video rental and sales outlets provide video programming to consumers across the country. For an individual consumer, however, the set of relevant suppliers are those providing service in the consumer's local area. The purpose of defining a geographic market is to identify those firms to which a consumer can reasonably turn.

In analyzing questions involving the ownership of television stations, the relevant groups of consumers are those that are served by each of the stations being analyzed. For purposes of this discussion, the area in which these viewers reside will be referred to as a station's service area.

As with the product market for viewers, the geographic market can be defined conceptually to include those firms to which viewers in the service area would turn if the station(s) were to decrease significantly the quality of programming for a significant period of time. For most stations, the service area is covered more or less completely by the service area of other television stations. Each of these stations provides an alternative to which viewers would likely turn, and each is therefore included in the geographic market.

A station's service area may be covered by several cable operators. If each cable service area is small relative to the station's service area, it is possible that a hypothetical decrease in programming quality would not cause the station to lose a significant number of viewers to any individual cable operator. However, if the cable operators taken together provide service in a large part of the station's service area, then cable television provides an alternative to which most viewers could turn in response to the hypothetical decrease in quality. (Actual and potential subscribers help to protect the interests of those television households not passed by cable.) These operators should collectively be included in the relevant geographic market.

MMDS service available to a significant portion of the service area should also be included in the geographic market. DBS and other satellite services, though not provided by local firms, are included in the geographic market because they are reasonably available to viewers in the station's service area. VDT service, when it becomes available to a significant portion of viewers in the service area, will also be included in the geographic market. Suppliers of video cassettes for home use available to viewers in the service area, whether for rental or purchase, also belong in the market.

The next step in defining the geographic market is to determine whether firms located outside the service area should also be included. For instance, the market may also include video cassette suppliers far from the service area if the viewers in the service area would significantly increase purchases by mail. Of particular interest are television stations which have a service area that overlaps part of the service area of the station being analyzed. Analytically, stations located outside the service area should be included in the market if a hypothetical decrease in quality by all the firms located in the service area would cause so many viewers to turn to stations outside the service area that the decrease in quality would be unprofitable.[192]

The percentage of viewers that would turn to stations outside the service area depends critically on the percentage of viewers that can receive signals from these stations with adequate quality whether over the air or via cable. This will vary from market to market, and for any given station it can differ depending on which station outside the service area is considered. For this reason, the proper geographic market cannot be defined except on a case-by-case basis. It is clear, however, that the assumption that any two stations with overlapping Grade B contours are necessarily in the same market, implicit in the Commission's current rule, is unlikely to be correct.

The Commission has traditionally used a station's Grade B contour to approximate the area in which most consumers can receive the station's signal with an acceptable

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192 Note that DBS providers and mail-order sellers of video cassettes cannot practically decrease the quality of their programming in the service area relative to other areas. This feature of the market makes it less likely that collective action by the programming providers actually located in the service area would be successful. If they chose to abandon uniform national pricing, it is conceivable that they could increase the price of their programming offerings in the local area and so participate in the hypothetical anticompetitive behavior.

quality level. For instance, the Commission proposed to deem a station's broadcast signal to be "available" to a community if the entire community were located within the station's Grade B contour.[193] In the absence of better information, this discussion will assume for the sake of argument that a television station's viewers are contained within the station's Grade B contour. Under this assumption, the percentage of viewers that could turn to outside stations becomes a question of the percentage of viewers in the service area that are located within the Grade B contours of stations outside the viewing area.

Some guidance on the percentage of viewers in a station's service area that can receive another station located outside the service area can be obtained by examining actual overlaps in each of five market areas. The method used to choose these five areas was intended to identify a small number of DMAs that would be "illustrative." All DMAs were ranked according to number of television households. The list was then divided into quintiles, each of which included DMAs covering 20 percent of television households. For each quintile, a DMA was selected that was close to the median for the quintile based on number of television households, number of full-power television stations, cable penetration and VCR penetration. The selection of the five DMAs among those close to the median values in each quintile was also influenced by an attempt to achieve broad geographic diversity. The DMAs chosen were New York, Cleveland, Portland, Richmond and Amarillo.

A specific Grade B overlap was investigated for each of these DMAs. For each DMA, the station with the largest Grade B contour located in the DMA's main city was paired with the station located outside the city having the largest Grade B overlap with the in-city station without any overlap between the two stations' Grade A contours. Such station pairs are of particular interest because their joint ownership would be prohibited under the current Commission rules, but would be permitted under the Grade A overlap standard which the Commission has proposed. Using 1990 Census information at the county level, the number of households in the entire service

193 FCC, Further Notice of Proposed Rule Making, MM Docket No. 90–4, released Dec. 31, 1990, ¶24.

area of the first station was measured and compared with the number of households in the overlap area.[194] The results are shown in Appendix Table B–1.

Appendix Table B–1 **Households in Grade B area and maximum overlap area in five illustrative cities**

City	Station	Households in Grade B contour	Overlap station	Households in overlap area	Overlap as percent of Grade B
New York	WNYW	6,891,000	WTNH	1,532,000	22
Cleveland	WEWS	1,613,000	WTOL	70,000	4
Portland	KOIN	803,000	KEZI	100,000	12
Richmond	WTVR	501,000	WTKR	153,000	31
Amarillo	KAMR	125,000	KAMC	11,000	9

These illustrative cases suggest that relatively little of the audience that can view one station can also view another station outside the service area with the type of overlap described. The smallest overlap was found in Cleveland, where an estimated 4 percent of households lie in the Grade B overlap area. Even in Richmond, where the largest overlap was found, less than one third of the households in the Grade B contour of the Richmond station also lie within the Grade B contour of the non-Richmond station. It is important to note that the station pairs analyzed in Appendix Table B–1 were chosen to find the maximum overlap of the type described. In many or most cases, the actual Grade B overlap between stations in separate cities will be less than is shown here.

Even data such as those developed in Appendix Table B–1 do not completely answer the question of whether stations located outside a city should be included in the same

194 The choice of stations to include in the analysis and the household estimates were based on a visual inspection of Grade B contour maps published in TELEVISION & CABLE FACTBOOK, TV STATIONS, 1995 and Grade B contour maps on file with the Commission. To estimate the number of households within the Grade B contour for each city, each county in the area received a weight equal to 0 if it was entirely outside the Grade B contour and equal to 1 if it was entirely inside the contour. If the contour boundary passed through the county, a weight between 0 and 1 was assigned to correspond to the percentage of the county area within the contour. The county household totals were multiplied by their respective county weights and summed to obtain the estimated total households in the contour area. A similar procedure was used to estimate the number of households in the overlap area.

relevant geographic market for viewing as those located inside. Ideally, one would want to know what portion of the audience located in the overlap area would turn to stations outside the city if all providers of video programming in the city were to reduce programming quality by a small but significant amount. As is often the case in defining relevant markets, this information is not likely to be available. Several general points can be made, however. First, the percentages stated above do not represent the portion of the audience that could be lost. Presumably, the audience in the overlap area watches both of the available stations to some degree. That part of the audience that is already watching the outside station cannot be "lost" in response to a decrease in quality. For this reason, the percentages in Appendix Table B–1 overstate the maximum audience loss that a station could experience. Second, while some of the audience in the overlap area would presumably turn to the outside station, it is unlikely that all the audience would be lost. In other words, the potential loss is likely to be considerably larger than the actual loss that would be expected. These points reinforce the suggestion that stations with the type of overlap described are likely to be in separate viewing markets.

Appendix C Estimating viewer shares in five illustrative DMAs

All-day ratings during November 1994 were obtained from Nielsen for five illustrative DMAs: New York, Cleveland, Portland, Richmond and Amarillo. The analysis included all full-power stations in each DMA achieving a rating of 0.1 (after rounding). City of origin and affiliation were identified in *Nielsen Station Index Directory 1994-1995*. All cable viewing in each DMA was aggregated together and treated as a single entity in each DMA. Cable viewing is understated in Richmond and Amarillo, since cable networks with a rating of below 0.1 were not reported and no summary rating for cable was provided.

A separate tabulation compiled for each DMA included only those commercial stations included in the first list that are located within 35 miles of the principal city in each DMA, plus cable. These stations were assigned the rating that they achieved in the entire DMA. Cable was assigned a rating equal to the rating of the lowest-rated station within the 35-mile radius.

Appendix D Evidence on advertising product markets

A. Evidence used to define antitrust markets

There is abundant evidence of competition between different types of advertising media. As is typically the case when one is defining markets that are relevant for antitrust analysis, there are no econometric studies that demonstrate quantitatively the extent of substitution by advertisers among various types of advertising in response to changes in relative prices.[195] It would be very difficult to conduct such a study because transactions prices for alternative media, as well as non-price terms, are negotiated for each advertising contract and are not publicly available. When definitive statistical evidence is not available, the practice in antitrust analysis is to rely on other types of information to define relevant markets. In the case of advertising, relevant markets are often defined with the assistance of information obtained in interviews with advertisers and executives at advertising agencies. Since these are the people that make decisions about which media to use for advertising campaigns, their beliefs about substitutability among media in fact determine the extent of substitution that will take place. These people are not mere bystanders. Similarly, the materials that sellers of advertising use to market their services shed light on the extent to which various media are substitutes, because sellers of advertising often compare their media with what advertisers consider to be alternative advertising media. Facts in company documents, including public documents such as SEC Forms 10-K, and in the trade press also shed light on competition among advertising media.

B. National spot and network advertising compete

National spot advertising refers to sales of advertising time as well as time for infomercials and other paid programming by station groups, national sales representatives of stations, and "unwired" networks, on the one hand, to national advertisers, their advertising agencies or media buyers, on the other.[196] Contrary to

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195 *See* comments on Seldon and Jung, *supra* note 28.

196 Unwired networks package spot advertising time on a set of stations broadcasting different programs and sell the packages in the up–front advertising marketplace. *See* Reece, *supra* note 82, at 26–30.

the Commission's tentative conclusion, national spot competes in the national advertising market with broadcast network, cable network and syndication advertising, not to mention non-video advertising.

The Commission's tentative conclusion is particularly surprising in light of the fact that Commission staff and the Commission itself have concluded on a number of occasions during the past four decades that national spot is a substitute for network advertising.

- In 1991, Commission staff interviewed advertising agency executives and reported that "national spot advertising is considered a substitute for network and national cable advertising."[197]

- In 1984, the principal authors of the Commission's 1980 Network Inquiry Special Staff report concluded that national spot was the closest substitute for network advertising.[198]

- In the late 1950s, in determining that the networks should not be permitted to represent their affiliates in selling national spot advertising, the Commission found that network and national spot were in the same market. Moreover, this finding was based on empirical evidence from advertising agencies:

  > National spot, of all the alternative means of advertising, is the closest substitute for networking. While national spot is not a complete substitute for network advertising, the two methods of reaching a national audience are sufficiently similar to be included in the same market. Advertising agencies agree almost unanimously that when network time is not available, national spot is the next best alternative.[199]

Spot and network advertising are substitutes both for suppliers and for many buyers. On the supply side, as a result of market forces, one expects that advertising time on network programs tends to be shared between networks and stations so that, at the

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197 Setzer and Levy, *supra* note 35, at 127.

198 STANLEY M. BESEN, ET AL., MISREGULATING TELEVISION: NETWORK DOMINANCE AND THE FCC 79–80 (1984).

199 *Network Representation of Stations in National Spot Sales*, 27 FCC 697, 716 (1959), quoting FCC, NETWORK STUDY STAFF, REPORT ON NETWORK BROADCASTING 176 (1957).

margin, additional network advertising time yields the same profits as additional spot advertising time for all affiliates clearing the program.[200] The relative quantities of network and spot advertising are also affected by changes in the number of hours programmed by the networks and in the number of hours that affiliates clear network programming.[201]

On the demand side, the same national advertisers typically use both network and spot advertising.[202] The extent to which a given advertiser uses one versus the other depends on trade-offs between cost and reach. The advantage of national spot to national advertisers is that an advertising campaign can be focused on, or supplemented in, the geographic areas where viewers are most likely to purchase the advertised product. Although the cost per thousand viewers is likely to be lower for an advertisement carried by a broadcast network than for a set of spots with the same reach,[203] a network buy often involves some wasted coverage of parts of the country where the advertiser has few if any outlets or for other reasons has poor sales prospects.[204]

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200 The interdependence between network and spot prices is explained in FCC, NETWORK INQUIRY SPECIAL STAFF, THE MARKET FOR TELEVISION ADVERTISING, PRELIMINARY REPORT 7 (1980).

201 Total hours of programming offered by ABC, CBS and NBC declined by 25 hours per week between 1977 and 1994. Economists Incorporated, *supra* note 138, at 90.

202 *See* Appendix Table E–11.

203 There is disagreement in the literature regarding the relative costs of reaching television households nationwide using network and spot advertising, and that literature is dated. Most studies indicate that media and transactions costs for spot advertising exceed those costs for network advertising with the same reach. Using published rate cards, Peterman found only slight differences in the costs of reaching equivalent audiences with network and spot advertising. John Peterman, *Differences between the Levels of Spot and Network Television Advertising Rates*, 52 JOURNAL OF BUSINESS 549–61 (Oct. 1979). However, based on company documents from the 1970s, Hilke and Nelson concluded that the cost of spot advertising exceeded the cost of network advertising with the same coverage by over 30 percent. John Hilke and Philip B. Nelson, *An Empirical Note from Case Documents on the Economies of Network Television Advertising*, REVIEW OF INDUSTRIAL ORGANIZATION (1989). Similarly, David Poltrack, CBS Exec. VP-Research and Planning, reported that the cost of a network buy was about the same as the total cost of a national spot buy limited to the top 50 markets, which had about 67 percent of television households. DAVID POLTRACK, TELEVISION MARKETING 294 (1983).

204 POLTRACK, *supra* note 184, at 293–96.

Thus, if one were to evaluate a number of advertising campaigns by national advertisers, one would find:

- In some cases, it is important to an advertiser that its campaign cover the entire country. In such cases, network advertising is likely to be cheaper than national spot advertising.
- In other cases, a national spot buy limited to areas of the country that an advertiser is interested in reaching will be significantly lower in cost than a network buy.
- Many cases will fall between the preceding two possibilities. That is, at existing prices for network and spot advertising, an advertiser will be close to indifferent between a network advertising campaign, on the one hand, and a national spot campaign limited to those parts of the country where the value of exposure exceeds the spot price, on the other. For these advertisers, network and spot advertising are close substitutes.
- Also, it is common for an advertiser to buy both network advertising and spot advertising for a given campaign. The advertiser buys network advertising to provide a base level of coverage nationwide. The advertiser then buys additional coverage of markets where per capita sales are relatively high and where network affiliates have relatively low viewing shares. In such cases, at existing prices for network and spot advertising, an advertiser will be close to indifferent between an extra dollar spent on network advertising, on the one hand, and an extra dollar spent on national spot advertising in certain areas of the country, on the other.

Models have been developed by advertising agencies, media planners, and others to determine an advertiser's optimal allocation between network and spot advertising. For example, CBS developed a model that allocates a television advertising budget between network and spot advertising according to the prices of network and spot advertising as well as network and spot audience delivery and the sales potential of the advertiser's product in each local area.[205] The fact that the allocation between

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205 *Id.* at 296.

network and spot advertising depends on the relative prices of these two types of advertising implies that they compete.

The Network Television Association recently produced a network television planning guide that compares network advertising with national spot advertising as well as with syndication, cable, radio, newspaper and magazine advertising. See Appendix H. Additional evidence of competition between network and spot advertising is presented in Section III.E in the body of this report.[206]

According to a 1987 publication by the CBS/Broadcast Group:

> National Spot Television is also a competitor to network television for the national advertiser's dollar. As the unit prices of network commercials have grown many advertisers have found the threshold entry level prohibitively expensive. Instead of attempting to spread their limited dollars too thin in a national network campaign they have concentrated spending in those markets of greatest potential for them....But, as with barter syndication and national cable advertising, national spot advertising remains vulnerable to the lowering of network prices. In the Fourth Quarter of 1986 and the First Quarter of 1987 it was apparent that the networks were also winning back dollars from national spot television.[207]

Competition between network and spot advertising is also confirmed by the following trade press report from late 1987:

> The Proctor & Gamble Co. shied away from network price increases and cut two unwired deals. Tribune Broadcasting Co. linked its six independent stations [including superstations WPIX and WGN] with another superstation, Turner Broadcasting System's SuperStation TBS, to form Tribune Plus, which sold a package of ad time to P&G for a reported $10 million. The same month, Katz Television [a representative firm that sells national spot] cut a deal—also worth a reported $10 million—with P&G.[208]

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206 *See* the discussion that cites Walley, *supra* note 41, at 2.

207 The report states that the networks lowered rates in 1986. CBS/Broadcast Group, NETWORK TELEVISION IN TRANSITION, Aug. 1987, at 25–26.

208 Reece, *supra* note 82, at 28, brackets added.

The evidence discussed above supports a conclusion that national spot advertising competes in the relevant market with broadcast network, syndication and cable network advertising.[209]

C. Barter-syndication competes with network and national spot advertising

Many syndicated programs have coverage rates comparable to network programs. Examples of syndicated programs that are cleared by stations with combined coverage rates of 90 to 99.5 percent of television households are listed in Appendix Tables D–1 and D–2. By comparison, ABC, CBS and NBC programs have an average clearance rate by their affiliates of 89.7 percent in non-prime time and 97.7 percent in prime time.[210]

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209 *See* OWEN & WILDMAN, *supra* note 58, at 153–57.

210 Economists Incorporated, *supra* note 138, at Appendix Table D–1. Network percentages are calculated for affiliates in markets with three or more commercial broadcast stations. The clearance data do not reflect areas where the networks do not have affiliates or areas with fewer than three commercial stations.

Appendix Table D–1 **Coverage of syndicated programs, week ending Feb. 12, 1995**[211]

Program	Coverage	Rating
Wheel of Fortune	99	14.4
Jeopardy!	99	11.7
Oprah Winfrey Show	99	9.2
Entertainment Tonight	94	8.2
Star Trek: Deep Space Nine	99	8.2
Baywatch	97	7.9
Wheel of Fortune - Wknd.	90	7.8
Roseanne	96	7.1
Hard Copy	95	6.7
Inside Edition	93	6.7
Simpsons Combo 1	85	6.7
Family Matters	94	6.4
Fresh Prince of Bel-Air	87	6.2
Married…With Children	93	6.2
Wrestling Network	93	5.7
Cops	95	5.5
Ricki Lake	97	5.5
A Current Affair	95	5.3
Journeys of Hercules	93	5.3
World Wrestling Fed. PR	90	5.2

211 Source: A.C. Nielsen data, reported in VARIETY, Feb. 27–Mar. 5, 1995, at 53. Rating is for nonduplicated viewing for multiple airings of the same show.

Appendix Table D–2 **Coverage of top five first-run children's programs, November 1994**[212]

Program	**Coverage**	**Rating**
VR Troopers	81	6.9
Aladdin	91	6.8
Gargoyles	86	4.1
Bonkers	90	3.7
Goof Troop	89	3.4

In many cases, syndicated programs have higher coverage rates than network shows during the same or other dayparts. In the case of first-run programs, it is reported that "syndicated talk shows such as Sally Jesse Raphael, Regis & Kathie Lee and Geraldo, now dominate the pre-noon hours of Daytime, where network coverage has fallen to 83%."[213] The coverages for these three syndicated shows are: Sally Jesse Raphael, 95 percent; Regis & Kathie Lee, 98 percent; and Geraldo, 92 percent.[214] Some of the animated programs that make up the Disney Afternoon have high clearance rates on weekday afternoons (see Appendix Table D–2). Syndicated programs such as *Wheel of Fortune* and *Jeopardy!* dominate the prime-time access period (see Appendix Table D–1). In 1993/94 there were fourteen hour dramas in first-run syndication.[215] These were often aired by independent stations during prime-time and by affiliates in the weekend access period. For example, in the case of *Kung Fu: The Legend Continues* and *Babylon 5*, 76 percent and 71 percent, respectively, of coverage was during prime time.[216]

212 Source: Paul Kagan Associates, TV PROGRAM INVESTOR, Jan. 18, 1995. Kagan analysis of A.C. Nielsen Cassandra Ranking Report for Equivalent National Ratings, Vol. B, Nov. 1994.

213 ADVERTISER SYNDICATED TELEVISION ASSOCIATION, SYNDICATION: FIFTH NETWORK, GUIDE TO ADVERTISER-SUPPORTED SYNDICATION, 1994, at a–6 (hereinafter ASTA).

214 A.C. Nielsen, National Station Index, Nov. 1994.

215 ASTA, *supra* note 194, at a–4.

216 A.C. Nielsen, National Station Index, Nov. 1994.

In the case of both first-run and off-network programs with high coverage rates, syndicators bundle ads together with programs, arrange their broadcast by stations across the country, and sell the ads to national advertisers. Data on barter-syndication include the new United Paramount and WB networks. In their first month United Paramount and WB reportedly "cleared several program nights in stations representing more than 75% of TV households."[217]

Advertising sold by syndicators clearly competes in the national advertising marketplace with network and national spot advertising. Most barter syndication advertising revenue is probably earned by programs that have high national coverage. In any case, advertising on syndicated programs with lower coverage can be supplemented with spot advertising in any desired areas that are not covered. There are 160 syndicated programs, with an average household rating of 2.3, that reach more than 50 percent of television households.[218]

Sellers of syndication, network and national spot advertising see each other as close competitors.[219] For example:

- The networks monitor competition from syndicated advertising. For example, one of the networks produces a quarterly review of syndication that compares the network's programs with syndicated programs along dimensions that are relevant to advertisers: coverage of television households, time of day of clearances, ratings for demographic groups targeted by advertisers, minutes of commercials per program, and advertising expenditures broken down by advertiser on each program.

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217 Paul Kagan Associates, *First-Run Hitting a Home Run with Stations*, TV PROGRAM INVESTOR, Feb. 1, 1995.

218 Paul Kagan Associates, *Syndication Season: New Shows Stage a Comeback*, TV PROGRAM INVESTOR, Jan. 18, 1995.

219 *See also*, *New Kids in the Animation Block*, BROADCASTING, Nov. 4, 1985, which reports: "Syndicated animation has been taking a bite out of children's programming advertising revenue that the three television networks have traditionally had largely to themselves. The increase in the number of shows like Thundercats and He-Man is contributing to flat or [only] marginally increased prices for advertising in the networks' Saturday morning schedules."

- The marketing materials for network advertising explicitly compare network advertising with syndicated advertising. Several excerpts from ABC's and NBC's marketing materials are included at Appendix I.

- In a 1987 publication, the CBS/Broadcast Group states:

> There is widespread disagreement about whether national advertisers' barter syndication advertising dollars come from network television budgets or national spot television budgets. The answer is probably that they come partially from both. In 1986, when independent stations suffered through a tough fourth quarter, they realized that all of the barter advertising in their children's programming had eroded their traditional Christmas season toy [national spot] advertising market.[220]

- According to a syndicator:

> We find that there is a certain segment of advertisers moving more money into syndication," said Harvey Gamm, vp advertising sales at Television Program Enterprises, a New York-based syndicator. "The networks are out with strong (price) increases but are not guaranteeing the same ratings that they did in previous years, and some (media buyers) won't want to pay those prices. The result will be additional money going into syndication." Gamm, like other syndicators, reports record sales.[221]

- In an advertising supplement to *Advertising Age*, the Advertiser Syndicated Television Association (ASTA) positions syndication as the fifth network for national advertisers:

> In terms of programming, ratings, coverage and demographics, syndication offers advertisers media benefits comparable to the traditional networks....Having virtually taken over early Daytime and Kids, and dominating Early Fringe/Early Prime, it is moving into Prime Time with programming competitive with the best of network....This is why it deserves to be considered "The Fifth Network."[222]

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220 CBS/Broadcast Group, *supra* note 188, at 25.

221 Steve Brennan, *Syndication Boom Alive, Well at Lower Volume, Kagan Says*, THE HOLLYWOOD REPORTER, June 25, 1990.

222 ASTA, *supra* note 194, at a–5.

- The same ASTA supplement features a discussion with television media buyers that contains the following interchange:

  > Tim Duncan (ASTA): Syndication is a big part of a lot of the changes that have gone on in television. What role does it play in your media plans?
  >
  > Rino Scanzoni (Exec. VP, Televest): We really look at it as just part of the overall national broadcast landscape. We don't section it out as a separate venue.
  >
  > Bob Silberberg (Exec. VP, Backer Spielvogel Bates): ... What we would prefer to see them [our clients] do...is look at the options in media in terms of the target demographics. It would then cut across network or syndication or even cable.
  >
  > Duncan: You're saying it's all television. It's not specifically network and syndication or cable.
  >
  > Scanzoni: Right.[223]

The evidence discussed above supports a conclusion that barter syndication advertising competes in the relevant product market with broadcast network, national spot and cable network advertising.

D. Competition between cable and broadcast television advertising

The Commission tentatively concludes that national cable network advertising competes with broadcast network advertising. This is certainly correct, particularly in the case of cable networks that reach a large share of cable subscribers.[224] Approximately 92 percent of cable network advertising revenue is earned by the 16

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223 *Id*. at a–9.

224 It is sometimes suggested that national advertisers want a minimum of 75 percent coverage for many ad campaigns. According to New World, "programming should reach a minimum of approximately 75% to 80% of the total national market in order to interest national television broadcast advertisers." New World Communications Group, *1993 SEC Form 10-K*, at 2. However, like broadcast national spot, advertising on cable networks that reach lower shares of cable subscribers competes in the national advertising market, because advertisers will make such buys at an appropriately discounted price.

national advertising-supported basic cable networks that reach 80 percent or more of cable subscribers (Appendix Table E–9).[225]

In addition to advertising sold by cable networks, advertising is sold by cable systems to national advertisers as national spot and to local advertisers as local spot. In order to sell spot advertising a cable system must install equipment to insert commercials into a network's local availabilities[226] or into local programming. Cable systems serving 93 percent of the cable subscribers that receive advertising-supported cable networks have equipment to insert spot ads in at least some programming services,[227] on average 13 in 1993.[228] In 1993, an estimated 74 percent of cable spot advertising revenue was from availabilities on five networks: ESPN (20.2 percent), CNN (20.0 percent), USA Network (14.3 percent), Turner Network Television (12.4 percent) and Lifetime (7.3 percent).[229]

Spot cable advertising is becoming a closer substitute for broadcast television spot advertising because of clustering of cable systems owned by MSOs[230] and the development of cable interconnects,[231] which reduce the transactions costs of buying cable time over a geographic area comparable to that covered by a broadcast station. Advertisers buying time through an interconnect can buy time on either some or all of the systems affiliated with the interconnect. Paul Kagan Associates estimates that in

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225 Subscriber numbers for Dec. 31, 1994, are from Paul Kagan Associates, CABLE TV ADVERTISING, Jan. 25, 1995, at 8, and KAGAN MEDIA INDEX, Feb. 24, 1995, at 14. Cable network advertising revenue figures are from Paul Kagan Associates, CABLE TV ADVERTISING REPORT, 1994, at 23. In addition to national cable networks, there are many regional networks. Cabletelevision Advertising Bureau, 1994 CABLE TV FACTS, at 8, reports 1994 advertising revenue for regional sports and news networks of $185 million, compared to $2.99 billion for national cable networks and $4.43 billion for cable national and local spot.

226 "Availabilities" are commercial time slots in network programming available to be sold by local affiliates.

227 Data from Paul Kagan Associates, KAGAN MEDIA INDEX, Feb. 24, 1995, at 14.

228 Paul Kagan Associates, THE CABLE TV ADVERTISING REPORT, 1994, at 26.

229 *Id*., at 25.

230 See, for example, Paul Kagan Associates, *Time Warner: King of Clusters*, CABLE TV ADVERTISING, Feb. 28, 1995, at 8, which reports that if current cable system deals are completed, about 8 million, or 75 percent, of Time Warner's subscribers will be in 33 clusters with 100,000+ subs in each cluster.

231 For data on interconnects and their advertising revenues, see Paul Kagan Associates, *Cable TV Interconnect Ad Sales Survey*, CABLE TV ADVERTISING, Dec. 31, 1994, at 1–5.

1994 there were 74 interconnects that covered 29.7 million cable subscribers and had gross revenue of $399 million.[232] Moreover, a cable system is able to offer advertising time on a number of cable networks in order to enlarge the audience it sells.

MSOs and interconnects in major markets as well as regional networks sell national spot advertising through national sales representatives. The two large representatives are National Cable Communications (NCC), in which four MSOs (Comcast, Continental Cablevision, Cox and Time Warner) have a combined 50 percent ownership, and Cable Networks, Inc. (CNI), owned by Cablevision Systems. According to a senior vice-president, CNI has done "a fair amount of spadework in our industry to position ourselves as severe competition to the broadcasters."[233] Paul Kagan Associates estimates that cable national spot revenue was $200 million and that cable regional sports network revenue was $174 million in 1994.[234]

At the local level, as the National Association of Broadcasters has noted, "cable systems are aggressively selling advertising in competition with local broadcasters."[235]

The following points provide further evidence of competition between cable and broadcast advertising:

- The Cabletelevision Advertising Bureau promotes cable television advertising as an alternative to broadcast television advertising. See Appendix J.

- The Television Bureau of Advertising (TvB), whose goal is to increase sales of spot advertising on broadcast television, supplies its member stations with publications that promote spot compared to cable. Three examples are *The*

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232 Paul Kagan Associates, THE CABLE TV ADVERTISING REPORT, 1994, at 5, 28.

233 The breakdown for projected 1993 ad revenue was National Cable Advertising (NCA), $70 million; CNI, $68 million; and Cable Media Corp. (CMC), $24 million. In 1994, NCA and CMC merged to form NCC. Linda Moss, *Rival Reps Slug It Out*, MULTICHANNEL NEWS, Apr. 19, 1993, at 1A.; Linda Moss, *NCA-CMC Merger Sparks Reaction*, MULTICHANNEL NEWS, July 4, 1994, at 3.

234 Paul Kagan Associates, THE CABLE TV ADVERTISING REPORT, 1994, at 1, 4.

235 *Comments of the National Association of Broadcasters*, in Review of the Policy Implications of the Changing Video Marketplace, MM Docket No. 91–221, FCC, Nov. 21, 1991, at 9.

World According to Cable and a Second Opinion (1994), *For Political Advertisers Who Are Thinking of Using Cable* (1993) and *The Pricing of Cable vs. Broadcast Television* (1994). See Appendix K.

- The materials produced by the networks to sell network advertising explicitly compare broadcast network advertising with cable network television advertising. Several excerpts from ABC's and NBC's marketing materials are included in Appendix I and Appendix L.

- In a 1987 publication, the CBS/Broadcast Group states:

  > We expect barter syndication and national cable advertising to continue to grow at a rate greater than network television. However, in 1986 both of these competitors proved to be vulnerable to a lowering of network prices. As the networks found their market softening, they were able to effectively win back some money from these competitors by lowering rates. As a result the revenue growth of both barter syndication and national cable television slowed appreciably in 1986.[236]

There is also confirmation of competition between cable and broadcast television for advertising dollars from anecdotal evidence:

- According to a press report, when the Fox affiliate in Kansas City dropped Fox's kids programming in 1994, children's advertisers turned to advertising on children's programs on cable.[237]

- In numerous local areas, including Phoenix, when broadcast stations shuffled their network affiliations in 1994, creating uncertainty about the audiences they would deliver, advertisers such as United Airlines reportedly moved money to cable advertising.[238]

- In response to the Major League Baseball Strike in 1994, cable systems and interconnects reportedly targeted advertisers who had bought heavy baseball

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236 CBS/Broadcast Group, *supra* note 188, at 25.

237 Linda Moss, *Operators Cash In On Station Affiliation Switches*, MULTICHANNEL NEWS, Oct. 24, 1994, at 20.

238 *Id.*

> schedules on broadcast television, and "the Boston interconnect has already brought over a major pizza chain from broadcast. 'Even before the strike, we began to work on diverting those (broadcast) dollars,' Sohinki [Jeff Sohinki, general manager of the Boston interconnect] said. 'We checked the Nielsen Monitor Plus Reports to see who was buying (Boston Red Sox) baseball regionally.' Adlink [the Los Angeles interconnect] did a similar check of MediaWatch, formerly known as Broadcasting Advertisers Reports, and has brought over some broadcast accounts such as auto and oil companies." The general manager of Cable AdNet, the Pittsburgh interconnect, indicated that he hoped that 25 percent of his company's sports advertising revenue would be accounted for by advertisers that switched from broadcast.[239]

Data on television advertising expenditures include not only commercials typically lasting between 15 and 120 seconds, but also paid programs such as infomercials lasting 30 minutes and home shopping programs sometimes lasting several hours at a time. Cable clearly is a major competitor with broadcast stations in sales of time for infomercials and home shopping programs. Infomercial companies purchase time for exactly the same programs on broadcast stations, on cable networks, and on local cable systems. Of the $226 million that was spent buying media time for infomercials in the fourth quarter of 1994, 35 percent was spent on national cable and 4 percent was spent on satellite and regional cable, while the balance of 61 percent went to television stations.[240]

Already in the mid-1980s, when cable viewing was much lower than at present, the staff of the Federal Trade Commission argued that cable television advertising constrained the pricing of broadcast television advertising.[241]

The evidence discussed above supports a conclusion that cable network and cable national spot advertising compete in the relevant market with broadcast television,

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239 Linda Moss, *Local Cable Tries to Profit from Ball Strike*, MULTICHANNEL NEWS, Aug. 29, 1994, at 22.

240 David Nagel, *The ResponseTV Long-Form Media Index*, RESPONSETV, April 1995, at 6–10.

241 *Reply Comments of the Bureaus of Consumer Protection, Economics, and Competition of the Federal Trade Commission*, In the Matter of Amendment of 47 C.F.R. §73.658(j): The Syndication and Financial Interest Rule, BC Docket No. 82–345, FCC, Jan. 27, 1983, at 31.

national spot, and syndication advertising, as well as a conclusion that cable local spot advertising competes with broadcast television local spot advertising.

E. Evidence on local advertising from advertising agency interviews

Economists Incorporated interviewed seven advertising agency executives and one media consultant on a confidential basis to obtain information on competition between advertising sold to local advertisers by broadcast television stations and other advertising media in a certain urban area. The individuals interviewed were at advertising agencies that spend significant sums of money on broadcast television advertising in that urban area.[242]

All advertising agency executives noted that advertising budgets are allocated among media based on cost-effectiveness. The driving forces are effectiveness, price per eyeball or ear, and coverage. Discussions with these individuals revealed that if broadcast television advertising rates increased, some local advertisers would move to cable television, radio and to a lesser extent newspapers and other print media. One media planner noted that if broadcast television prices are too high, she would take money out of that medium and increase each other medium's share of the advertising budget. One executive noted that she would absolutely move advertisements to radio. Another noted that radio is the closest substitute for broadcast television. Another noted that she would move small clients out of television into radio and print. Another would redirect money from broadcast television to radio and cable. Another would buy radio very heavily, buy cable and buy outdoor. Yet another would reduce broadcast television and use other media such as radio, cable television, print, direct mail and outdoor.

The executives uniformly noted that the nature of the adjustment to an increase in broadcast television advertising rates would depend on each specific client's objective, budget and needs. Since each client is different, it is hard to generalize about what will happen in response to an increase in broadcast television advertising rates. For instance, one media consultant noted that cable does well for certain types of advertisers, but not for all.

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242 For brevity, the media consultant will be referred to as an advertising agency executive.

Three of the executives that were interviewed provided specific examples of competition :

- One person cited his recent experience in an urban area where the price of broadcast television spots increased. This executive responded by negotiating annual deals with the stations in order to achieve better rates and moving some advertising dollars from television to radio.

- Two executives mentioned a recent attempt by the local newspaper to raise rates to certain local advertisers. Some advertisers responded by pulling out of print and putting their money into broadcasting.

Many media planners initially allocate a portion of the advertising budget to print and another portion to broadcast, based on cost and effectiveness. A buyer then allocates the broadcast budget among broadcast television, radio and cable television. If the price of broadcast television advertising increases, the broadcast media buyer will reallocate the broadcast advertising dollars with an increased emphasis on radio and cable. If the price increase persists, the buyer will ask the media planner whether the allocation of the total advertising budget between broadcast and print media is efficient. The media planner will then determine whether to shift dollars out of broadcast and into print. Hence, the initial movement of dollars in response to a broadcast television advertising rate increase is likely to be largely to radio and cable television. After the rate increase has persisted for some time, and media planners perform their quarterly or semi-annual reviews, there may be an adjustment of the media mix between print and broadcast. The longer the price increase persists, the more adjustments can be made.

The basic message from the interviews was that many options are available to most local advertisers, and that television stations have to price competitively in order to maintain sales. Advertising agency planners look at the cost, effectiveness and coverage of the different media, and if there are changes in relative costs among the media then they move money. However, since each client is different, the response is not uniform across advertisers.

F. Non-video advertising competes with video advertising

The Commission has tentatively concluded that radio and print compete with television in local advertising markets but not at the national level. This might make sense if there were no national radio networks, no national newspapers, no national magazines, and no equivalent for radio stations, newspapers and magazines of national spot television advertising. In fact, however, there are national radio networks, national newspapers, national magazines, "unwired" networks that sell advertising on radio stations and local newspapers across the country, and national advertising representatives handling radio, newspapers and other media. Thus, there is no basis for a conclusion that video and non-video media that clearly compete in sales to local advertisers do not similarly compete in sales to national advertisers.

Advertising competition between broadcast television and non-video media is confirmed by the interviews with advertising agency executives discussed in the preceding section of this appendix and by the materials used to convince potential advertisers that one medium is better than another. The Television Bureau of Advertising (TvB), whose members are broadcast stations, and the Cabletelevision Advertising Bureau, whose members are cable companies, prepare materials about the benefits of their media *vis-à-vis* non-video media. Their members use these materials and materials they prepare themselves in selling advertising. The following examples of such material produced by the TvB, whose mission is to promote spot television advertising, confirm advertising competition between broadcast television and radio, newspapers, magazines and yellow pages. Copies can be found in Appendix K and Appendix M.

- *Competitive Media Pros/Cons*, which addresses cable, radio, newspaper, yellow pages, outdoor and direct mail.
- *Radio is Sound, but...*
- *Citizen Kane is Still Alive...or How Newspapers Use Smoke & Mirrors to Hide the Facts: A Rebuttal to Newspapers' Claims*
- *Putting the Finger on Yellow Pages Advertising*

- *1990 Media Comparisons Study,* a household survey which, according to the TvB, shows the "tremendous advantage television enjoys" over radio, newspapers and magazines.

Some additional examples are:

- In selling advertising time on WMAQ-TV Chicago, Harrington, Righter & Parsons uses material that compares broadcast television, cable network, cable spot, radio, newspaper, free standing insert, magazine and direct mail advertising. See Appendix N.

- The Radio Advertising Bureau provides comparisons of the reach of radio, television and newspapers and of advertising prices for radio, television, newspaper, magazine, direct mail and outdoor. See Appendix O.

- Newspapers publish advertisements on their own behalf that are designed to convince advertisers to switch from television to newspapers. A number of such ads together with a response from a television station are included in Appendix P.

- Promotional material published by the Outdoor Advertising Association of America explicitly compares the cost efficiency of outdoor advertising with broadcast television, radio, newspaper and magazine advertising.[243] See Appendix Q.

Furthermore, using data for 1977, Fournier and Martin found that the number of competing television stations located in an ADI had no effect on transaction prices for advertising sold by television stations or on station profits. They concluded that "there is substantial evidence in this study to reject the notion that market power is present in the non-network [that is, spot] market....Neither vertical arrangements, such as network ownership of stations, nor horizontal concentration in local markets enables stations to raise prices significantly." Because this study, and another by Fournier, used data from a period in which there was little cable television advertising, these

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243 OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, OUTDOOR. IT'S NOT A MEDIUM, IT'S A LARGE, 1993, at 16.

studies suggest that advertising rates for local stations are constrained by non-video media.[244]

In commenting on the competitive position of daily newspapers, Tewlow noted: "In most communities the competition for the reader's time and attention and the local advertiser's dollars is fearsome. There are a whole host of competitors including television, cable TV, national and regional dailies, weeklies, shoppers, magazines and yellow pages directories. And the number of media choices is expanding."[245]

1. Radio

Radio supplies both national and local advertising. National radio advertising is supplied by national radio networks, by unwired radio networks, and by national radio advertising representatives that sell radio national spot advertising.[246] However, the majority of radio advertising is sold as spots to local advertisers (see Table III–1). All of the advertising agency executives that were interviewed indicated that local radio is high on the list of substitutes for local television.

2. Newspapers

Newspaper advertising breaks down as follows: national, 12 percent; local, non-classified, 53 percent; and classified, 35 percent.[247] In dealing with newspaper advertising, this report limits consideration to non-classified advertising.

National newspaper advertising is not limited to newspapers with a national reach, such as *The Wall Street Journal* and *USA Today*.[248] There are several newspaper

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244 These studies also suggest that, even where there were few stations, the stations compete rather than collude, tacitly or otherwise, to raise prices. Fournier and Martin, *supra* note 42. *See also* Gary M. Fournier, *The Determinants of Economic Rents in Television Broadcasting*, 31 ANTITRUST BULLETIN 1045–66 (Winter 1986). Fournier and Martin were members of the Commission's Network Inquiry Special Staff.

245 Jules S. Tewlow, *Are Newspapers in Trouble? Observations on Some Trends and Developments in the Newspaper Business*, Harvard University Center for Information Policy Research, Aug. 1991. An example of the expanding number of media choices is the emergence of advertising that reaches consumers via personal computers.

246 BROADCAST & CABLE YEARBOOK 1994, Stations Volume, at G–36 to G–53.

247 Newspaper Association of America, *supra* note 23.

248 EDITOR & PUBLISHER INTERNATIONAL YEARBOOK, at I–448.

magazine networks, including Parade Publications, Sunday Magazine Network and USA Weekend.[249] These sell advertising reaching a large number of local areas and thus compete for national advertising.[250]

Also, "unwired" networks of local newspapers, group owners and national newspaper representatives sell national advertising in local papers.[251] In 1993 the Newspaper Association of America formed the Newspaper National Network (NNN), a marketing group that promotes national advertising in 527 newspapers by offering one-stop shopping.[252] The Department of Justice explicitly concluded that the NNN may "have the procompetitive benefit of enabling newspapers better to compete with other media for national advertising."[253] As of April 1995, the NNN had booked $13.5 million in sales for the first half of 1995 to advertisers such as Coors, Chrysler, Bayer, Ford and Glaxo Wellcome.[254]

Newspapers First was established in 1990 as a national advertising sales representative firm. In 1993 it offered national advertising in Knight-Ridder and other newspapers accounting for 25 percent of daily newspaper readership in the U.S.[255] Its Big & Easy Network offers national advertisers buying in three or more major markets discounts from regular prices charged by the local newspapers, and focuses its sales efforts on pharmaceutical advertisers because they advertise heavily but make limited use of newspapers. In 1994 the Big & Easy Network sold $18 million in advertising to pharmaceutical companies.[256] According to a press report, The New York Times "probably will join the Newspapers First network and definitely will join

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249 Information on the newspapers that carry these magazines is available in EDITOR & PUBLISHER INTERNATIONAL YEAR BOOK, *Id.*, at V–13 to V–17.

250 *Id*. at V–13.

251 *Id*. at VII–13 to VII–37.

252 Michael Krantz, *The Papers Chase 2000*, MEDIAWEEK, May 2, 1994, at 9; Alice Z Cuneo, *Drumming Up Demand for One Order/One Bill*, ADVERTISING AGE, Apr. 24, 1995, at S–4.

253 Debra Gersh Hernandez, *Ad Sales Plan Wins Approval of Justice Dept.*, EDITOR & PUBLISHER, Dec. 18, 1993, at 11.

254 *NNN Captures $3M Buy from Glaxo Wellcome*, ADVERTISING AGE, Apr. 17, 1995, at 49.

255 In 1994, however, the Times Mirror papers left Newspapers First. Dorothy Giobbe, *Times Mirror Leaves Newspapers First*, EDITOR & PUBLISHER, May 7, 1994, at 17.

256 Dorothy Giobbe, *'Big & Easy' Ad Sales Service Topping '94 Biz*, EDITOR & PUBLISHER, April 1, 1995, at 28.

NAA's network [NNN], said Lance Primis, president and chief executive of the New York Times Co. Primis said the Times was eager to help lure advertisers from television, magazines and direct mail. Even if it means lowering rates, Primis said, 'The Times will play its part to make the industry move along.'"[257]

Local newspapers often increase their household reach and provide a closer substitute for broadcast television stations by offering "total market coverage" service, which involves the delivery of free standing advertising to non-subscribers.

According to Knight-Ridder:

> All of the company's newspapers compete for advertising and readers' time and attention with broadcast and cable television, radio, magazines, non-daily suburban newspapers, free shoppers, billboards and direct mail.[258]

Chrysler recently moved millions of dollars of its advertising from cable TV to newspapers because of improvements in the services provided by newspapers to advertisers. According to Robert Coen of McCann-Erickson, food advertisers temporarily shifted money from newspapers to network television during the 1994 Olympics and political campaigns.[259]

Using published data for 1976, Ferguson found that an increase in the number of radio and television stations in a city significantly decreased newspaper national and local advertising rates.[260]

3. Magazines

While some larger urban areas have local magazines, virtually all magazine advertising is national. According to the director of consumer marketing for BankAmericard, most advertising agencies have developed indices that compare the

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257 George Garneau, *Inducing National Advertisers to Use Newspapers*, EDITOR & PUBLISHER, Oct. 9, 1993, at 22-23.

258 Knight-Ridder, *1993 SEC Form 10–K*, at 7.

259 Leah Rickard, *Snaring Ad Share from Broadcast TV*, ADVERTISING AGE, Apr. 24, 1995, at S–11, S–16.

260 James M. Ferguson, *Daily Newspaper Advertising Rates, Local Media Cross-Ownership, Newspaper Chains, and Media Competition,* 26 JOURNAL OF LAW & ECONOMICS 635–654 (October 1983).

effectiveness per member of the audience for advertising in different media, for example, a 30-second broadcast television spot compared to a full-page, four-color ad in *Readers Digest, National Geographic, Time, Newsweek, U.S. News & World Report, Better Homes & Gardens and Playboy*. He reported that BankAmericard considered such a magazine ad to be 16 percent more effective than such a spot televised in prime time, and yet the cost (CPM for a target audience of adults, age 25-54) for the magazine ad was between half and two-thirds that of television. He stated that the effectiveness indices "were generated over a long period of time and reflect averages generated by literally hundreds of test situations."[261] Materials produced by the Television Advertising Bureau to promote use of television advertising include information on magazine advertising rates (see Appendix M), and materials produced by Harrington, Righter & Parsons to promote use of television advertising include information on magazines, including *TV Guide, Reader's Digest, Better Homes and Gardens* and *National Geographic* (see Appendix N).

4. Outdoor

Outdoor advertising revenues are roughly equally divided between national and local advertising (see Table III–1). One of the leading suppliers of outdoor advertising states that it "competes in each of its markets with other outdoor advertisers as well as other media, including broadcast and cable television, radio, newspapers and direct mail marketers."[262] Two of the seven advertising agency executives interviewed by Economists Incorporated mentioned outdoor advertising as an alternative to spot television for some clients.

Most outdoor advertising is supplied by national chains. Of total annual revenues from outdoor advertising of roughly $1.0 billion to $1.5 billion in 1993,[263] Gannett accounted for net revenues of around $231 million; 3M, $280 million; GE's Patrick Media, $190 million; and Outdoor Systems, $49 million. Gannett operates in 17

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261 Jim Baker, *Magazines*, MEDIA DECISIONS, July 1976, at 88.

262 Outdoor Systems, *1993 SEC Form 10–K*, at 6.

263 *See* Table 3 for McCann-Erickson data and Teresa Andreoli, *From Retailers to Consumers: Billboards Drive Message Home*, DISCOUNT STORE NEWS, Sept. 19, 1994, at 14, for Outdoor Advertising Association of America figure.

major U.S. local markets. Outdoor Systems operates in eight, and has more than half of all outdoor displays in four of those markets.[264]

6. Yellow pages

The Yellow Pages Publishers Association provides its members with competitive information on television, radio, newspaper, magazine, outdoor and direct mail advertising (see Appendix R). SIMBA Information, which tracks the yellow pages industry, reports that yellow pages faces "stiff competition from cable, direct mail and other fast-growth media."[265]

7. Direct mail and other direct response media

Broadcast and cable television direct-response advertising, infomercials and home shopping programs that encourage viewers to call an 800 number to order a product or service compete directly with other forms of direct marketing, including direct mail, direct response ads on radio and in newspapers and magazines and telemarketing. For example, the Direct Marketing Association provides its members with comparisons between the merits of direct response advertising on television and radio and use of direct mail, magazines and in-store media.[266] Direct mail is presumably a close substitute for at least direct response advertising using other media, including television. According to data in Appendix Table D–3, $256 million was spent on direct response advertising on television in 1992. This does not include infomercials and home shopping programs; $226 million was spent buying media time for infomercials alone in the fourth quarter of 1994.[267] Nonetheless, the bulk of direct response advertising and marketing was through direct mail and telemarketing.

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264 R. Craig Endicott, *Leading Media Companies*, ADVERTISING AGE, Aug. 8, 1994, at S–2; Gannett, *1993 SEC Form 10–K*; Outdoor Systems, *1993 SEC Form 10–K*, at 1, 2, 4. The dollar figure for Gannett includes Canada.

265 MEDIA DAILY, Nov. 21, 1994, reporting on SIMBA INFORMATION, YELLOW PAGES 2000: FORECAST & ANALYSIS. MEDIA DAILY is published by SIMBA.

266 Direct Marketing Association, STATISTICAL FACT BOOK 1993–94, 1993, at 22–24.

267 Nagel, *supra* note 221.

Appendix Table D–3 **Direct response advertising/marketing expenditures, 1992***

Media	$ million	percent
Network TV	73	0.1
Spot TV	90	0.1
Syndicated TV	27	0.0
Cable TV	32	0.0
Network radio	37	0.0
National spot radio	4	0.0
Newspapers	477	0.4
Newspaper preprints	6,741	5.8
Magazines	616	0.5
Yellow pages	9,325	8.0
Outdoor	1	0.0
Direct mail	25,450	21.9
Telemarketing	73,085	63.0
Total	115,958	100.0

* ARNOLD L. FISHMAN, PORTABLE MAIL ORDER INDUSTRY STATISTICS, 1993 (1994).

G. Promotion competes with advertising

A 1987 CBS/Broadcast Group publication provides evidence of substitution between advertising, including television advertising and promotion:

> Before marketers can decide how much to invest in television advertising, they must decide how much to invest in advertising.... Historically marketers had split their marketing funds between advertising and promotion. As the 1980's progressed that balance began to shift in favor of promotion. Three underlying developments accelerated this shift:
>
> — The range of promotional options increased with the introduction of sophisticated direct mail programs and the free-standing newspaper insert business.
>
> — The increasing pressure for maximizing short-term results favored the immediate return from promotional devices such as couponing, rebate

> programs, discount airline tickets and low-cost financing programs over the longer term development of brand franchise promised by advertising.
>
> — The conversion to scanner-based inventory management and product movement tracking highlighted the short-term impact of promotional programs and put further pressure on the manufacturer to assure the retailer quick turnover.
>
> By 1986 promotion was getting almost two dollars of the marketer's investment for every one garnered by advertising compared to approximately a 50/50 split during the 1970's. The marketers most likely to move dollars from advertising to promotion were the large package goods companies that had historically provided the foundation of the network television market....One thing is for certain [—] the television networks will have to devote some marketing muscle to the enhancement of the primary demand for advertising.[268]

An article in *Business Week* postulates that there has been a structural change in advertising and marketing. The article notes that recently advertising, particularly in mass media, has been declining relative to other marketing expenditures. Today's technology makes it possible to pin-point a company's potential customers, and companies have been shifting their marketing dollars out of advertising to direct marketing, promotions, contests and couponing.[269]

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268 CBS/Broadcast Group, *supra* note 188, at 20–21.

269 Mark Landler, et al., *What Happened to Advertising?*, BUSINESS WEEK, Sept. 23, 1991, at 66–72.

Appendix G Concentration of national video programming purchases

The purpose of this appendix is to estimate the concentration of purchases of national video program rights in the United States. This appendix also explains how the data were prepared, including sources, assumptions and methods of estimation.

The starting point is data on the 1994 revenues of U.S. distributors of television programs and television rights to theatrical films, broken down by category of media outlet. Only entertainment programming has been considered; news, sports and other non-entertainment programming are excluded. Appendix Table G–1 presents a breakdown of these expenditures.

Appendix Table G–1 Expenditures on video programming

	Expenditures ($ millions)	Share of total expenditures (percentage)
Total ABC, CBS and NBC	3,447	23.0
Fox	689	4.6
Syndication	3,695	24.6
Basic cable	1,618	10.8
Pay cable	1,255	8.4
Home video	4,300	28.7
Total	**15,004**	**100.0**

Source: See text.

ABC, CBS and NBC each provided data on their 1994 program expenditures for relevant television programs and for broadcast rights to theatrical films. Aggregated across these three networks, such expenditures totaled $3,447 million. This figure includes $696 million, aggregated across the three networks, associated with programming produced internally. Expenditures of Fox Broadcasting Company on television programs and films were estimated at $689 million in 1993.[270] Fox's total expenditures were assumed to have remained at this same level for 1994.

The 1994 expenditures of basic cable networks on relevant television programs were estimated at $1,618 million. This is based on an estimate by Paul Kagan Associates, Inc. (*Cable TV Programming*, May 23, 1994) that 29 basic cable networks spent $2,417 million on programming in 1994. It was assumed that news programming accounted for $297 million of this, based on Kagan's estimate for combined expenditures of CNN, Headline News, CNBC and The Weather Channel. Further, it was assumed that sports programming accounted for $502 million based on Kagan's estimate for expenditures by ESPN and Prime Sports Channel America. Programming expenditures of $0.3 million by the Prevue and Sneak Prevue channels also are excluded.

All remaining data in Appendix Table G–1 are based on estimates obtained from Wilkofsky Gruen Associates. The syndication expenditure figure includes barter syndication.

Appendix Table G–2 reports expenditures on programming after subtracting estimated expenses associated with distribution. In the case of expenditures by broadcast networks, basic cable networks and pay cable networks, it is assumed that none went to distribution fees. Distribution fees were assumed to absorb 40 percent of U.S. distributor revenues in the case of domestic syndication (excluding barter syndication) and 45 percent in the case of home video. The 45 percent figure is based on an estimate by Paul Kagan Associates, Inc. that the studios receive about 55 percent of the gross revenues from factory sales of pre-recorded video cassettes.

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270 Paul Kagan Associates, Inc., TV PROGRAM INVESTOR, Oct. 31, 1994.

Appendix Table G–2 **Expenditures on video programming net of distribution fees**

	Expenditures ($ millions)	Share of total expenditures (percentage)
Total ABC, CBS and NBC	3,447	28.1
Fox	689	5.6
Syndication	2,897	23.6
Basic cable	1,618	13.2
Pay cable	1,255	10.2
Home video	2,365	19.3
Total	**12,271**	**100.0**

Source: See text.

To estimate the concentration of purchases of video programming, total net expenditures in Appendix Table G–2 were allocated among individual commonly-owned purchasing groups, to the extent possible. ABC, CBS and NBC were assumed each to have made one third of their combined network broadcasting programming expenditures. Estimated programming expenditures for 22 basic cable networks were allocated among the owners of these networks according to their ownership interests. See Appendix Table G–3. Estimated programming expenditures by pay cable networks were divided among 12 networks according to each network's subscriber count, and these expenditures were then allocated among the owners of these networks according to their ownership interests. See Appendix Table G–4. Estimated expenditures by syndicators were allocated using the viewership of 31 syndicators, measured in gross households per week during November 1994, and these syndicators were grouped by owner. Syndicators with fewer than 1 million gross households per week were aggregated together as "other." See Appendix Table G–5.

Approximately 92 percent of estimated expenditures by video cassette distributors could be attributed to the ten largest owners of video cassette distributors, based on their 1993 revenues. (Warren Publishing, Inc., *Buena Vista Leads Overall Market Share List*, VIDEO WEEK, Feb. 28, 1994.) See Appendix Table G–6. It was assumed that the remaining video cassette expenditures were made by a single unknown "other" firm with no other video expenditures except the "other" expenditures made by relatively small syndicators.

Using the information in Appendix Tables G–3 through G–6, total estimated video purchases were calculated for 55 separate commonly-owned purchasing groups in Appendix Table G–7. The HHI for these purchasers was 738.