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

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

# PETITION FOR RECONSIDERATION CONSUMER FEDERATION OF AMERICA AND CONSUMERS UNION

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## SUMMARY

The Consumer Federation of America (CFA) and Consumers Union (CU) have been active participants in the media ownership proceeding through all four rounds of comments and in the closely related cable Horizontal Limits Proceeding. We respectfully petition the Commission to reconsider and revise each of the major rules affecting television broadcasting that the Commission has linked together in this omnibus rulemaking. The Order was developed through a flawed administrative process, reflects a partial, selective and faulty reading of the evidentiary record, applies faulty analytic reasoning that is inconsistent with generally accepted principles of antitrust and economic analysis, is riddled with internal contradictions, and is based on a misinterpretation of the law.

**Deficiencies in the Process:** The decision to allow newspaper-TV cross ownership in the overwhelming majority of local media markets in America is based on a new analytic tool, the Diversity Index, that was pulled from thin air at the last moment without affording any opportunity for public comment. The Diversity Index played the central role in establishing the markets where the FCC would allow TV-Newspaper mergers without any review. It produces results that are absurd on their face. The broadcast ownership rules are based on similarly radical assumptions about the way to measure concentration in those markets that were never revealed to the public prior to the final rule. None of the notices or discussion of TV-TV mergers provides analysis of triopolies. The idea that a single entity would be allowed to own three licenses in a market materialized at the last moment in the final rule and was never subject to public scrutiny or comment.

**Failure to Consider Substantial Evidence and Faulty Analysis Underlying the Decision to Relax Broadcast Limits:** The Commission arrives at its erroneous decision to raise the national cap on network ownership to 45 percent and to triple the number of markets in which multiple stations can be owned by a single entity because it incorrectly rejected source diversity as a goal of Communications Act. The Commission ignored the mountain of evidence in the record that the ownership and control of programming in the television market is concentrated and extensive evidence of a lack of source diversity across broadcast and non-broadcast, as well as national and local markets. Allowing dominant firms in the local and national markets to acquire direct control of more outlets will enable them to strengthen their grip on the programming market, which undermines diversity and localism. As a smaller number of owners controls a larger share of the market they gain greater and greater leverage in the bargaining with independent producers. The Commission has ignored the evidence that shows that there is a clear link between concentration of ownership and reduced localism and diversity in programming.

**The Diversity Index Produces Absurd Results:** The easiest way to judge the Diversity Index is by the results it produces. In the New York City area, Shop at Home Incorporated TV, the Dutchess Community College TV and Multicultural Radio Broadcasting Inc. (with three radio stations) each has been given more weight than the New York Times. Again in New York, Univision TV has more weight than ABC Inc., NBC/GE, Viacom or News Corp., even when Viacom's and News Corp.'s radio stations and newspapers are included. Univision is three times as important as the New York Times. In the Tallahassee DMA, the Thomasville Tribune with daily circulation just under 10,000 per day is given equal weight with the Tallahassee Democrat, with more than 50,000 daily circulation, and twice as much weight as the local CBS affiliate, which has over 50,000 viewers a day, and 59 percent of the TV market.

**Faulty Analysis Underlying the Virtual Elimination of the Ban On TV-Newspaper Cross-ownership:** This distorted picture of media markets flows from a variety of illogical conclusions and sloppy analyses that riddle the Order. Above all, the FCC ignores the audience of the individual outlets that will actually merge and swap. In other words, the FCC's Diversity Index never considers the actual market share of these media outlets in the market. The FCC decision to abandon this fundamental tenet of sound economic analysis has no basis in the professional literature. The FCC uses a weighting scheme in the cross media analysis that

underweights TV and daily newspapers and vastly overweights weekly newspapers, radio and the Internet, giving them more than twice the weight they deserve, because the FCC failed to ask the right questions. In fact, its own experts and the evidentiary record, demonstrated that the Internet should not even be included as a local news source.

**Inconsistencies in the Counting of Outlets:** The Commission treats the same outlets differently under different rules. The Commission concludes that for purposes of the duopoly rule weaker signals and therefore lesser coverage of UHF stations require them to be discounted. However, it ignores these conclusions when it comes to the cross-ownership rules. In other words, voices that cannot easily be heard and therefore are not counted for the purposes of one set of rules suddenly can be heard and are then counted for the purposes of another set of rules.

**Contradictions in the Economic Analysis:** The FCC tries to justify abandoning market shares in the cross-ownership rule because entry into the market is easy and the production of news can be expanded at little marginal cost. Yet, in the duopoly rule, mergers were justified for exactly the opposite reason. In other words, in one part of the order news is easy and cheap, in another part it is difficult and expensive. The FCC claims that patterns of usage also support the decision not to rely on market shares. It does so on the basis of claims about the substitution between media. This claim is contradicted by its own data and analysis in other parts of the order. In each of the competition analyses the evidence on competition in advertising media markets indicates that the different media are separate products. In contrast, the FCC claims that the evidence on the use of media for diversity purposes in the marketplace of ideas indicates they are one large market. The econometric evidence in the record supports the opposite conclusion. Substitutability between media for advertising purposes, although not great, is much larger than the substitutability of the media for usage purposes.

**Inconsistencies in Market Power Analysis:** The FCC concludes that the dominant firms – the top four local stations and the four major national networks – should not be allowed to merge with each other, in part because they form a "strategic group." The FCC identifies a host of dangers in such mergers and little potential public interest benefit from them. The correct public policy conclusion should have been that the dominant firms in the "strategic group" should not be allowed to grow through any merger. This would have created a greater likelihood that new entities could penetrate and weaken the "strategic group." More importantly, each and every one of the reasons given to ban mergers between dominant entities in TV markets is a valid reason to ban a merger between a dominant TV station and a dominant newspaper in the local media market. A merger between a dominant TV station and a dominant newspaper results in an entity that dwarfs its nearest competitors in terms of control of news production. The dominant firm would control a large percentage of the reporters in the market. It would have a diminished incentive to compete (especially across media types), an increased incentive to withhold product, and can leverage its market power in cross promotion. The public interest benefit is likely to be small because these are the most profitable entities in their local market and not likely to add product that promotes the public interest.

**Measuring Audiences and Types of Programming is Not Unconstitutional**: The FCC declares that measuring audiences or identifying stations that broadcast news and information

programming would somehow run afoul of constitutional prohibitions on content regulation. Yet, it admits that much more direct regulation of content – such as a requirement to air a certain amount of a specific type of programming – are constitutional. The mistakes made in the construction of the Diversity Index and the nonsensical results that it produces cannot be blamed on this feeble and incorrect constitutional argument.

**The Communications Act and First Amendment Jurisprudence Compels the FCC to Set Higher Standards in Merger Review:** The FCC claims that its duty to promote the public interest under the Communications Act is merely to prevent the complete suppression of an idea. The FCC has incorrectly abandoned the principle clearly enshrined in First Amendment jurisprudence and Communications Act policy that its job is to promote "the widest possible dissemination of information from diverse and antagonistic sources." The bold aspiration for the First Amendment sets a high standard under the Communications Act that the Order fails to live up to. The standard for reviewing mergers set by the FCC is far too lax to carry out the purpose of promoting the public interest. The FCC defends its decision to give blanket approval to mergers with reference to the Department of Justice and the Federal Trade Commission *Merger Guidelines*. CFA/CU have shown that because of the importance of mass media in democratic debate and civic discourse, the Communications Act warrants higher standards. Unfortunately, the FCC has gone in exactly the opposite direction. In over half the scenarios for broadcast-newspaper mergers the FCC has offered blanket approval to mergers that would violate the *Merger Guidelines* by a substantial margin. The same is true for TV-TV mergers, with the typical TV-TV merger to which the FCC gives blanket approval violates the *Merger Guidelines* by a factor of five. The Communications Act and First Amendment jurisprudence compel the FCC to protect the public interest much more vigorously.

**Blanket Approval of Mergers Undermines the Public Interest:** The desire to provide certainty to the industry with a bright line test may be a laudable goal, but it certainly should not trump the public interest standard of the Communications Act. The Commission's repeated claim that the evidentiary record does not support a blanket prohibition on mergers does not justify its rules that are virtually a blanket approval of mergers. It has missed the middle ground of a case-by-case approach with a high First Amendment standard. The imbalance in the Order is further demonstrated by the FCC's decision to afford the industry the opportunity to make the case that mergers banned by it's the rules would be in the public interest, but it fails to provide the public the opportunity to demonstrate that mergers that would be allowed are not in the public interest.