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PROMOTING THE PUBLIC INTEREST THROUGH MEDIA OWNERSHIP LIMITS:

A CRITIQUE OF THE FCC'S DRAFT ORDER BASED ON RIGOROUS MARKET STRUCTURE ANALYSIS AND FIRST AMENDMENT PRINCIPLES

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COURTS SUPPORT PUBLIC INTEREST STANDARDS TO PROMOTE DIVERSITY IN MEDIA MARKETS; THEY WANT COHERENT POLICY ANALYSIS

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

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

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

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

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

APPLYING HIGH STANDARDS IN RIGOROUS MARKET STRUCTURE ANALYSIS

While the goal of promoting diversity under the Communications Act is broader than the goal of protecting competition under the antitrust laws, the *Merger Guidelines* of the Department of Justice and the Federal Trade Commission are a useful starting point for analysis of media markets. For two decades the antitrust authorities have used these

Guidelines – which are based on extensive theoretical and empirical evidence – to categorize markets for purposes of merger analysis.

- A market with the equivalent of 10 or more equal-sized firms is defined as **unconcentrated.**

- Markets with fewer than the equivalent of 10 but more than 6 equal-sized firms are considered **moderately concentrated**.

- Markets with the fewer than 6 equal-sized firms are **highly concentrated**.

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

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

MEDIA MARKETS ARE ALREADY CONCENTRATED

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

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

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

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

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

THE FCC PROPOSAL EFFECTIVELY REPEALS THE PUBLIC INTEREST STANDARD, AFFORDING LESS PROTECTION FOR MEDIA MERGERS THAN THE ANTITRUST LAWS

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

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

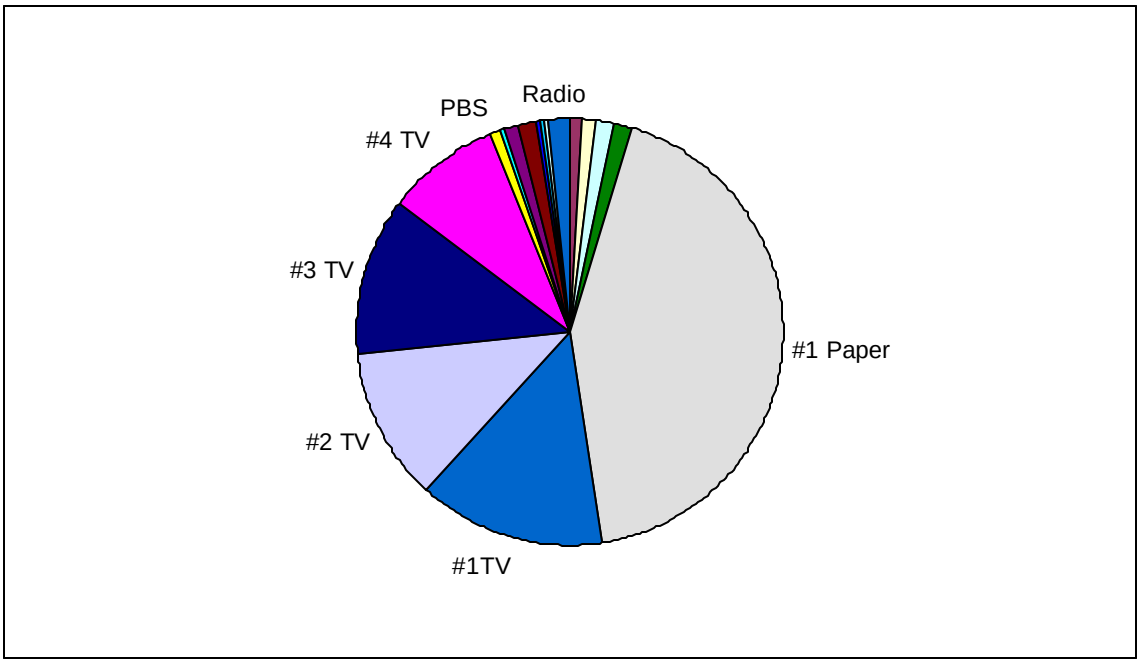
The result will be to allow markets to become extremely concentrated and the local news markets to be dominated by one huge media giant. There is no chance for effective competition between TV-newspaper combinations in as many as three-quarters of the markets in which such mergers would be allowed because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

- In one-paper cities, the local media giant would have a 90 percent share of the newspaper circulation, one-third of the TV audience, and one-third of the radio audience. No second entity could come close to matching this media power.

- In the typical two-paper town, the dominant firm would have four-fifth of newspaper market, and one-third of the TV and radio markets. The second firm would have a paper with only one-seventh of the circulation. In most of these markets, the TV market is also highly concentrated.

EXHIBIT ES-1: IMPACT OF NEWSPAPER-TV MERGERS IN ONE-PAPER CITIES
(Based on TV Entertainment HHI and Newspaper Circulation HHI)

Pre-Merger Market



Post-Merger Market

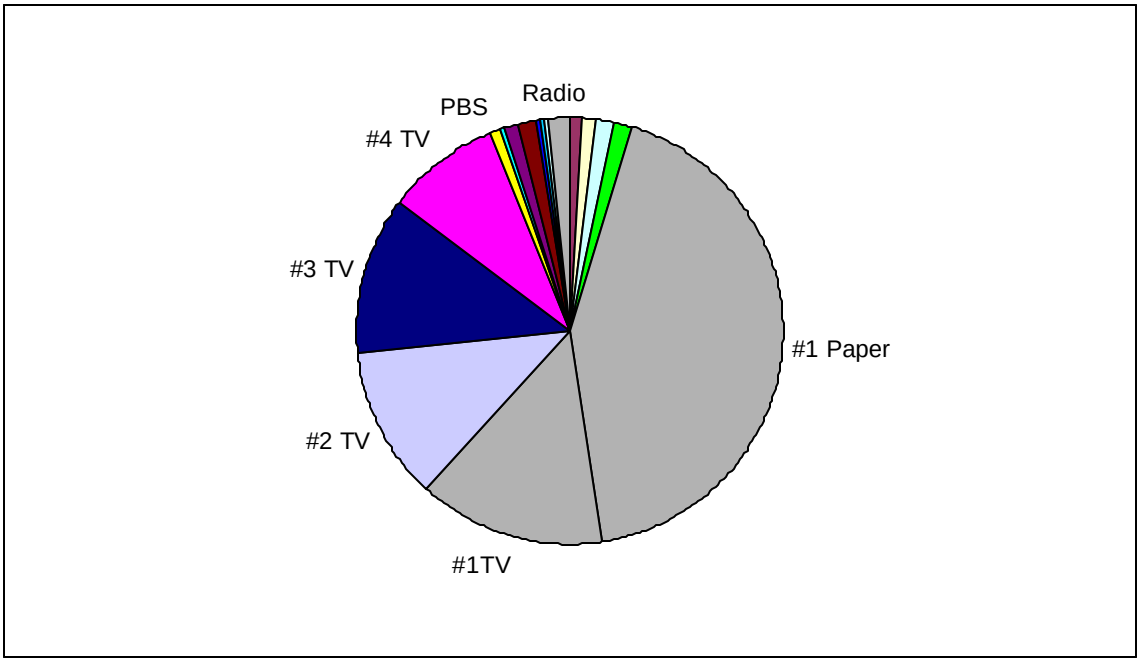
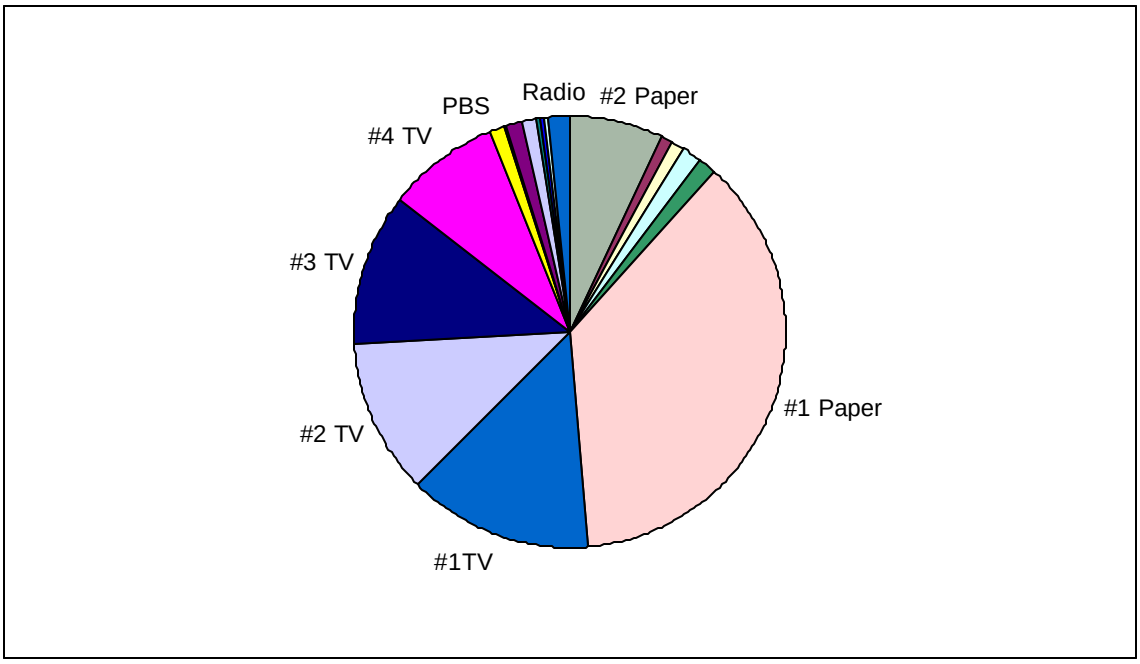
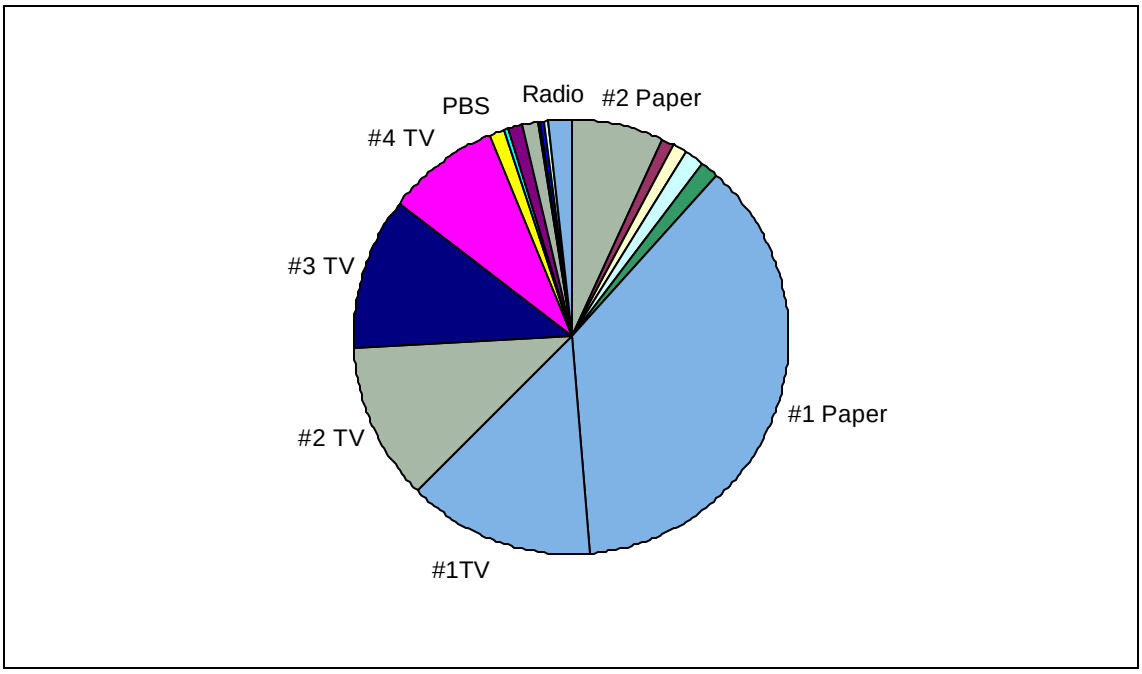


EXHIBIT ES-2: IMPACT OF NEWSPAPER-TV MERGERS IN TWO-PAPER CITIES
(Based on TV Entertainment HHI and Newspaper Circulation HHI)

Pre-Merger Market



Post-Merger Market



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

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

In one-paper cities, the pre-merger market is highly concentrated and the merger would raise the HHI by approximately 1200 points. The antitrust authorities believe mergers that raise the HHI by merely 50 points in a market such as this "are likely to create or enhance market power or facilitate its exercise." The increase in concentration that would pass the FCC's scrutiny is over twenty times the level that triggers antitrust concerns.

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

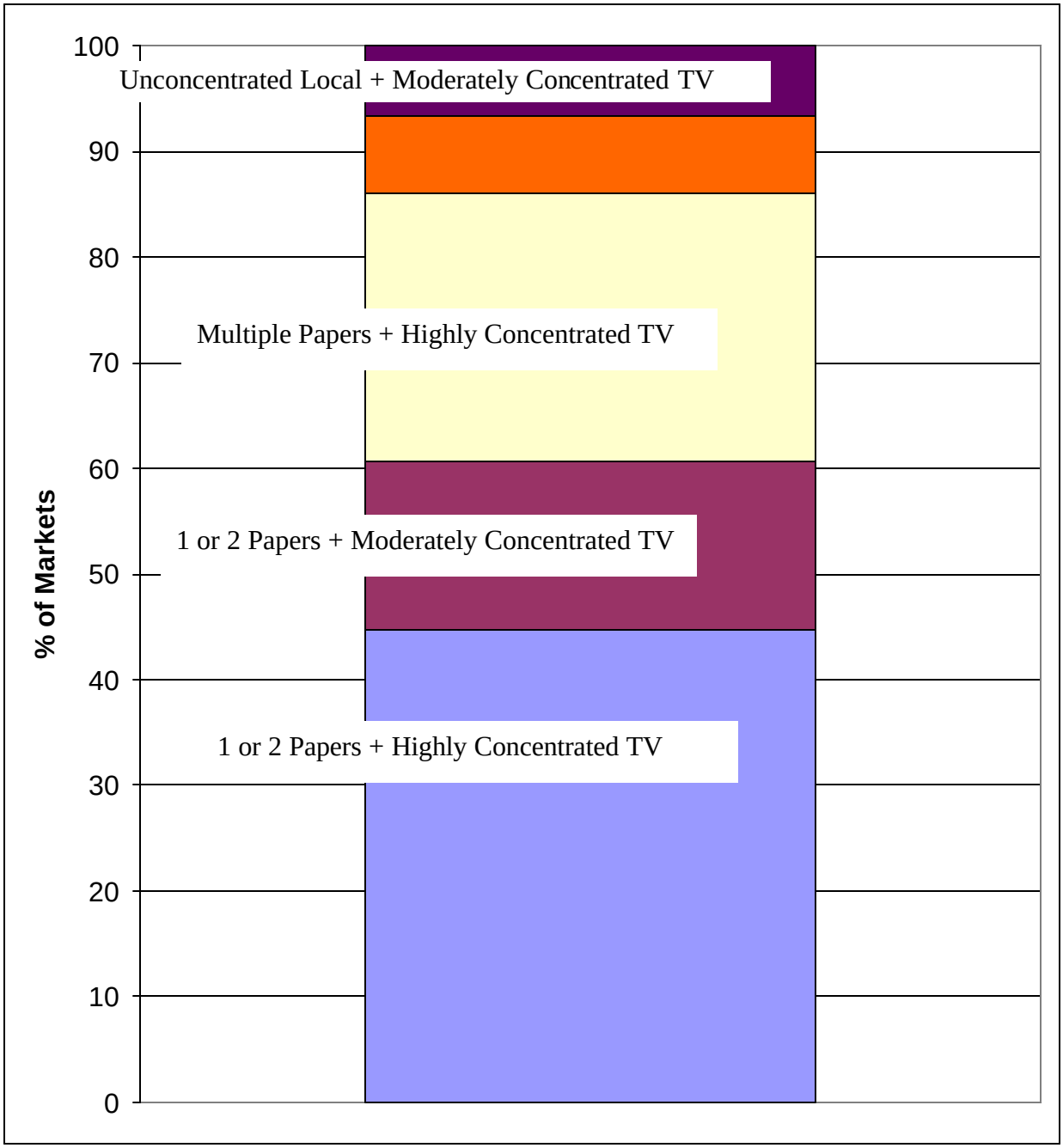
A RESPONSIBLE APPROACH

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

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

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

EXHIBIT ES-3: CONCENTRATION OF TOP 150 MARKETS



I. LEGAL AND ANALYTIC FRAMEWORK

THE EVIDENCE SUPPORTS LIMITS ON MEDIA OWNERSHIP

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

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

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

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

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

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

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

- **Newspapers are the second most important source of information and play a unique watchdog role, providing in-depth and investigative reporting.**

- **All newspaper markets are highly concentrated and virtually all newspaper-TV markets are already concentrated.**

- **Newspaper-TV combinations should not be allowed in all but a handful of media markets because they would drive media concentration above already unacceptably high levels and allow excessive control over the production of news content in local media markets.**

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

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

THE COURTS SUPPORT CONGRESSIONALLY MANDATED PUBLIC INTEREST STANDARDS TO PROMOTE DIVERSITY IN MEDIA MARKETS; THEY WANT COHERENT POLICY ANALYSIS

The Fox and Sinclair Circuit Court decisions affirm First Amendment principles

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

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

> An industry with a larger number of owners may well be less efficient than a more concentrated industry. Both consumer satisfaction and potential operating cost savings may be sacrificed as a result of the Rule. But that is not to say the Rule is unreasonable because the Congress may, in the regulation of broadcasting, constitutionally pursue values other than efficiency – including in particular diversity in programming, for which diversity of ownership is

> perhaps an aspirational but surely not an irrational proxy. Simply put, it is not unreasonable – and therefore not unconstitutional – for the Congress to prefer having in the aggregate more voices heard, each in roughly one-third of the nation, even if the number of voices heard in any given market remains the same.[6]

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

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

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

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

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

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

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

While some of the structural limits on media ownership are being reviewed at the direction of the Appeals Court, others are being evaluated as part of a biennial review process mandated by the Telecommunications Act of 1996 under the standard in section 202(h).[10] There the FCC must "determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest."[11]

Simply put, the public interest still prevails in the 1996 Act.[12] The Act does not embrace competition for competition's sake, nor did it change the definition of the public interest when it comes to media ownership policy. The public interest is the master that competition must serve; the FCC must find that competition is sufficient to promote the public interest before it repeals or modifies these rules. It can certainly find that stronger rules are necessary to promote competition – under the first prong of 202(h) – or the public interest – under the second prong of 202(h).

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

A HIGH STANDARD IS NECESSARY TO SERVE THE PUBLIC INTEREST

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

First Amendment policy is broader than antitrust

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

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

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

Economic analysis under the Merger Guidelines restricts mergers

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

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

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

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

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

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

PROMOTING THE PUBLIC INTEREST THROUGH UNCONCENTRATED MEDIA MARKETS

Local Media Markets Should not be Concentrated

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

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

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

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

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

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

Given these difficulties in product and geographic market definitions, the FCC should be extremely cautious about thresholds. By combining products that are not good substitutes

and do not compete head-to-head in the market we are likely to overestimate the extent of actual competition. Therefore, based on strict economic grounds we should be cautious in the thresholds.

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

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

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

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

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

III. RIGOROUS ANALYSIS OF MEDIA MARKETS

MARKET STRUCTURE ANALYSIS MUST RECOGNIZE DIFFERENCES BETWEEN MEDIA IN FUNCTION, REACH, IMPACT AND AUDIENCE

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

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

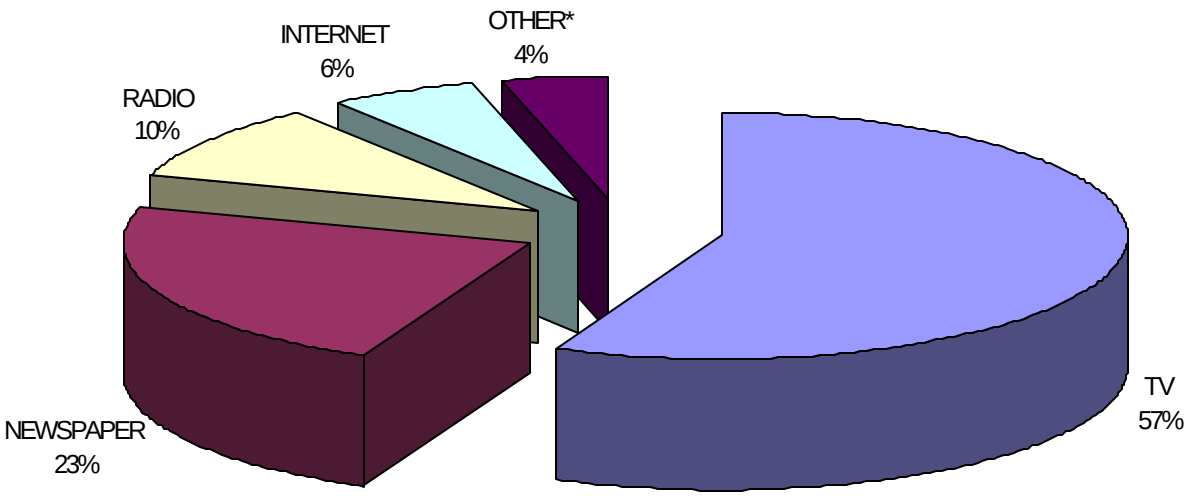
TELEVISION AND NEWSPAPERS SHOULD BE THE FOCAL POINT OF ANALYSIS

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

THE ANALYSIS OF NEWS AND INFORMATION, AS OPPOSED TO ENTERTAINMENT OR AD MARKETS, SHOULD BE THE PRIMARY BASIS OF MARKET STRUCTURE ANALYSIS.

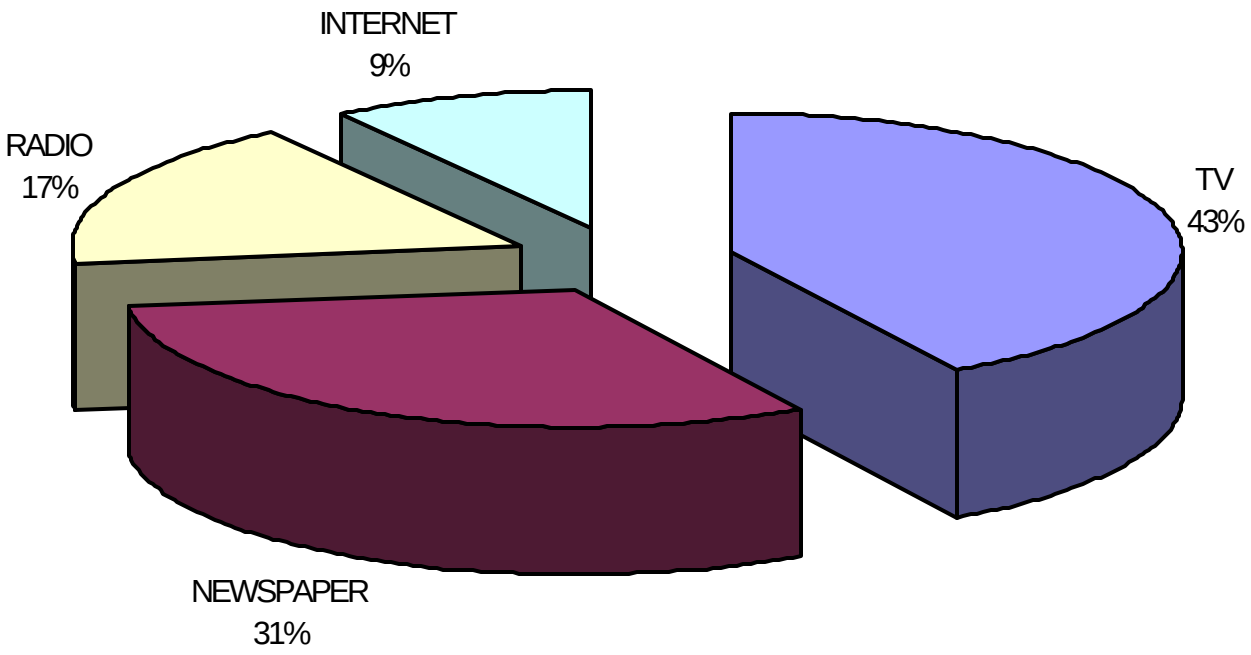
Much of the FCC's previous analysis has focused on entertainment and advertising markets. The evidence before the Commission now shows that news and information is a distinct product market. Many broadcast stations do not provide news whatsoever. Radio has all but abandoned news (see Exhibit 3). As a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

EXHIBIT 1: TV AND NEWSPAPERS ARE THE PUBLIC'S MOST IMPORTANT SOURCE OF ALL NEWS



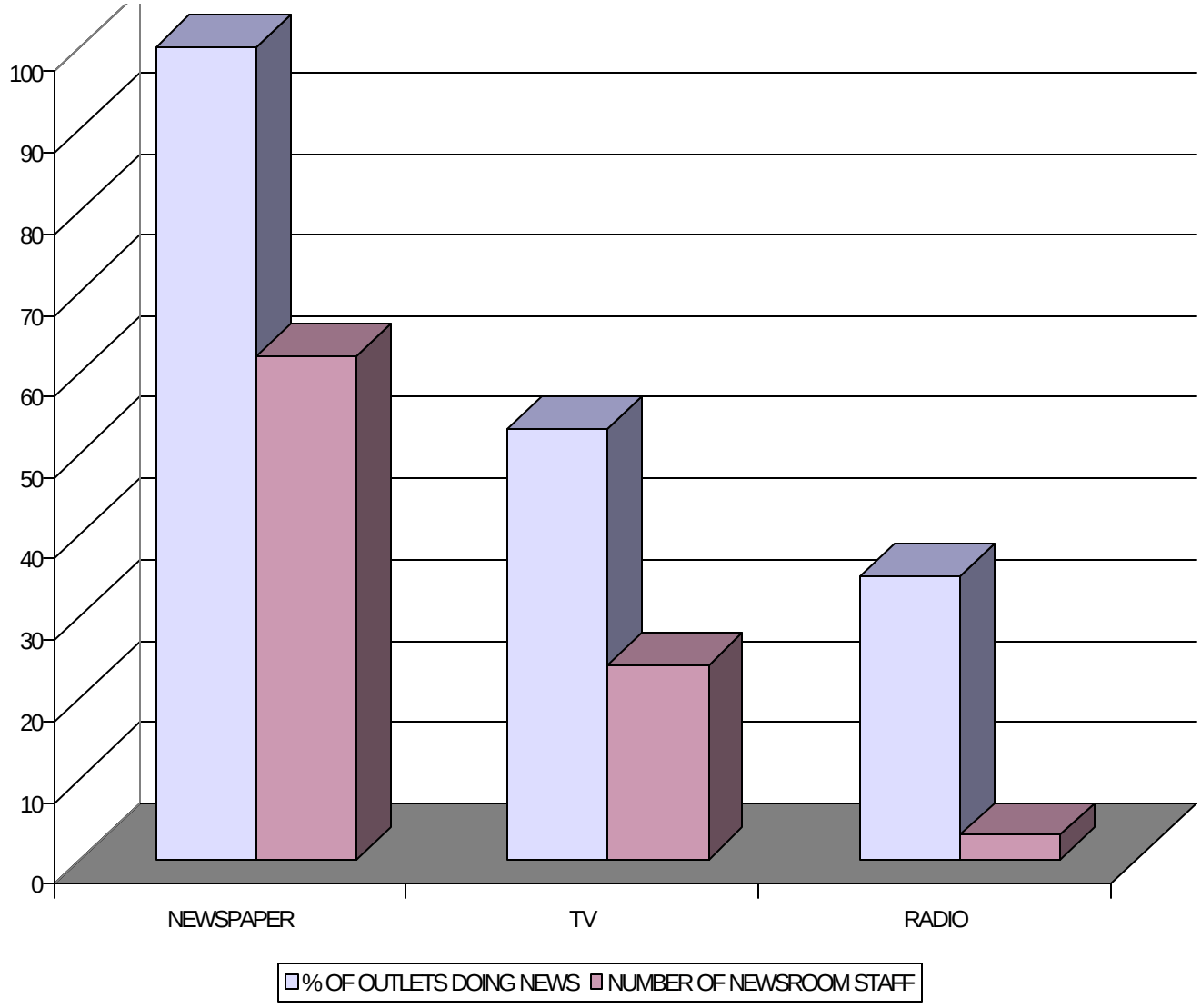
SOURCE: Federal Communications Commission, Study 8, *Consumer Survey on Media Usage*, prepared by Nielsen Media Research, September 2002, Question 10.

EXHIBIT 2: TV AND NEWSPAPERS DOMINATE AS LOCAL NEWS SOURCES



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

EXHIBIT 3: COMPARING NEWS CAPABILITIES: NEWSPAPERS PRODUCE THE BULK OF LOCAL NEWS



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

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

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

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

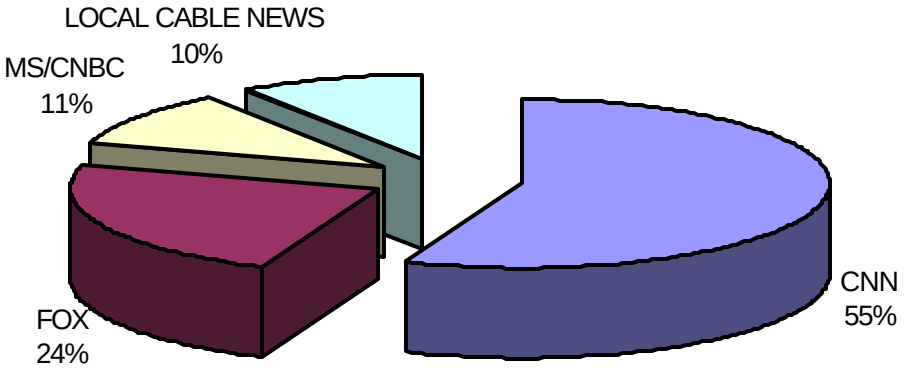
CABLE, SATELLITE AND THE INTERNET PROVIDE LITTLE, IF ANY, LOCAL NEWS AND INFORMATION

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

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

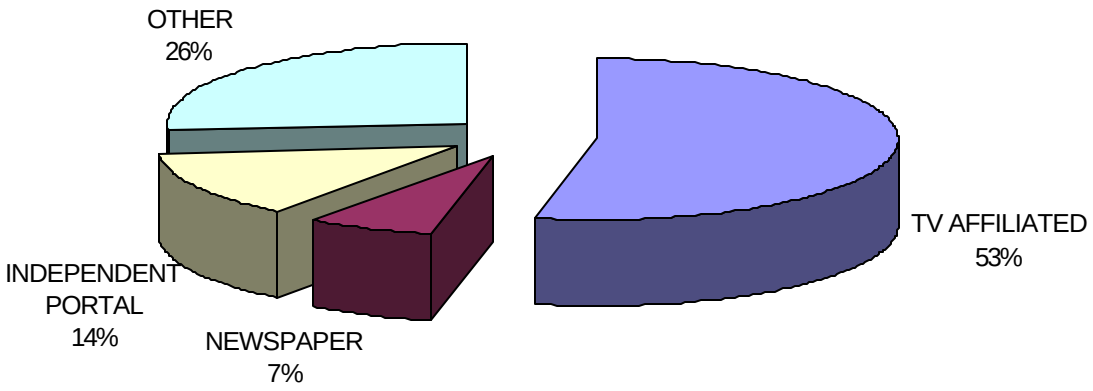
The Internet's role as an independent source of news is even smaller. The web sites of the dominant TV outlets and newspapers dominate as sources on the Internet (see Exhibit 5). Even the 6 percent of respondents who say it is their primary source of news are more likely to say they use the web sites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

EXHIBIT 4: FEW CABLE VIEWERS GET THEIR LOCAL NEWS FROM LOCAL CABLE CHANNELS



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

EXHIBIT 5: MOST INTERNET USERS VISIT WEB SITES OF THE MAJOR TV NEWS OUTLETS AND NEWSPAPERS



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

MEDIA MARKETS ARE ALREADY CONCENTRATED

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

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

IV. PROPOSED FCC RULES HAVE NO ANALYTIC OR LEGAL BASIS

FLAWS IN THE FCC RULES

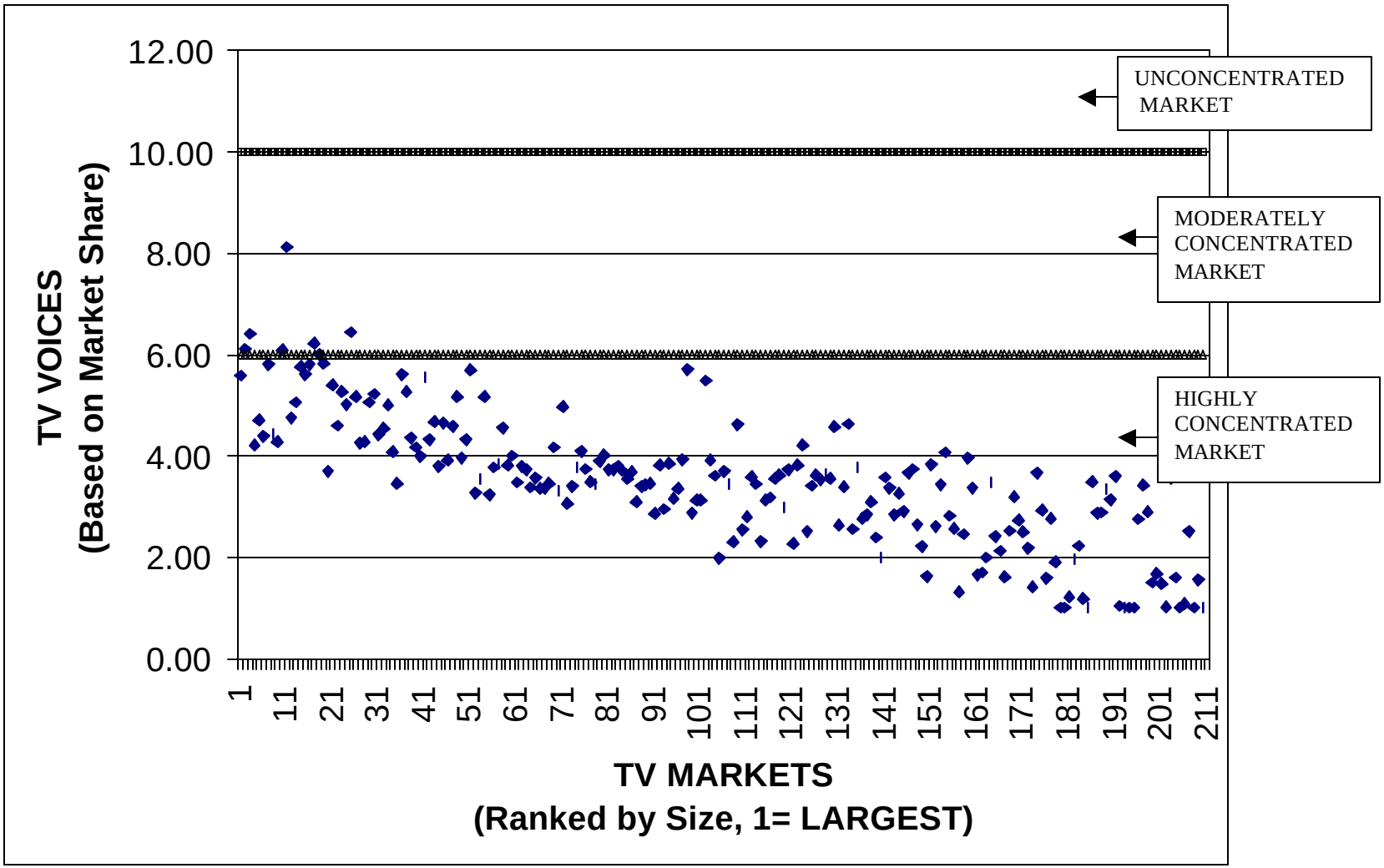
According to press accounts, the FCC appears to be headed in a very different direction than the above approach. The analytic framework adopted by the FCC is not rigorous. It is apparently based on a simple voice count of all TV stations. Thus, it addresses neither the product market in question, nor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

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

In short, the FCC is

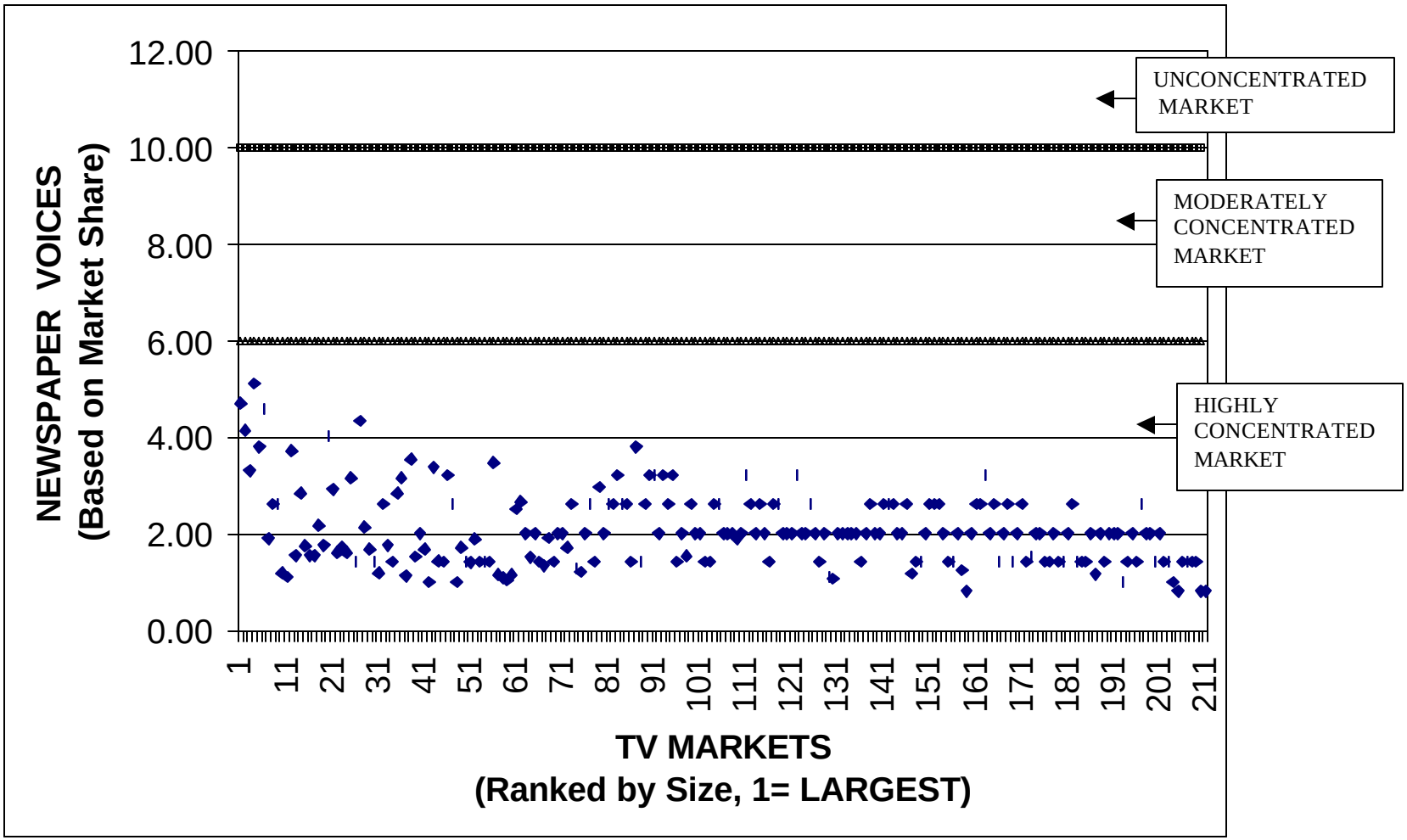
- looking at the wrong product (entertainment),
- analyzing the wrong market (national news),
- doing the market structure analysis incorrectly (not considering market shares), and
- choosing a dangerously low standard.

EXHIBIT 6: BROADCAST TV VOICE COUNT



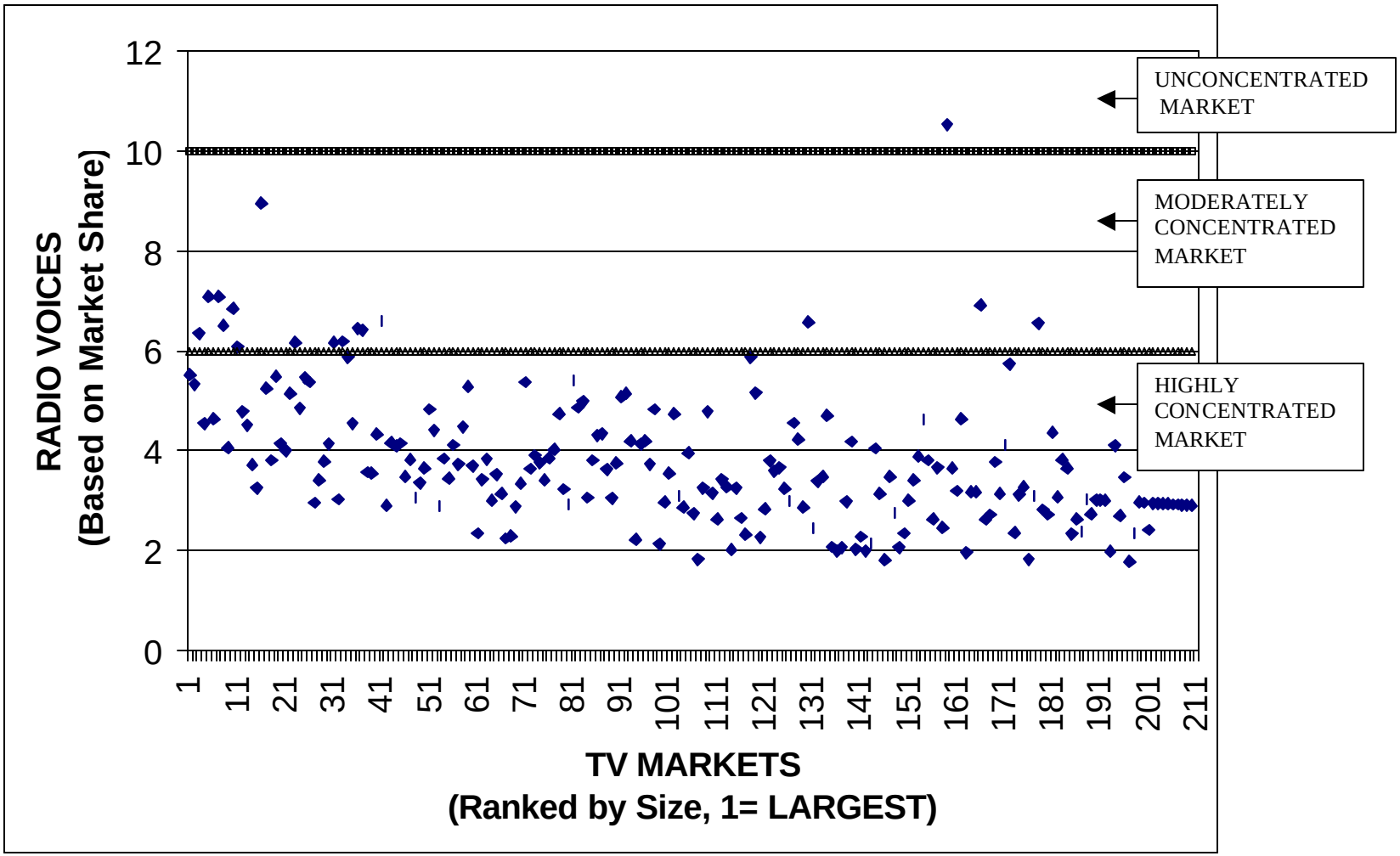
SOURCE: BIA Financial, *Television Market Report: 2000.* Year 2000 broadcast TV viewing data for all 211 DMAs.

EXHIBIT 7: NEWSPAPER VOICE COUNT



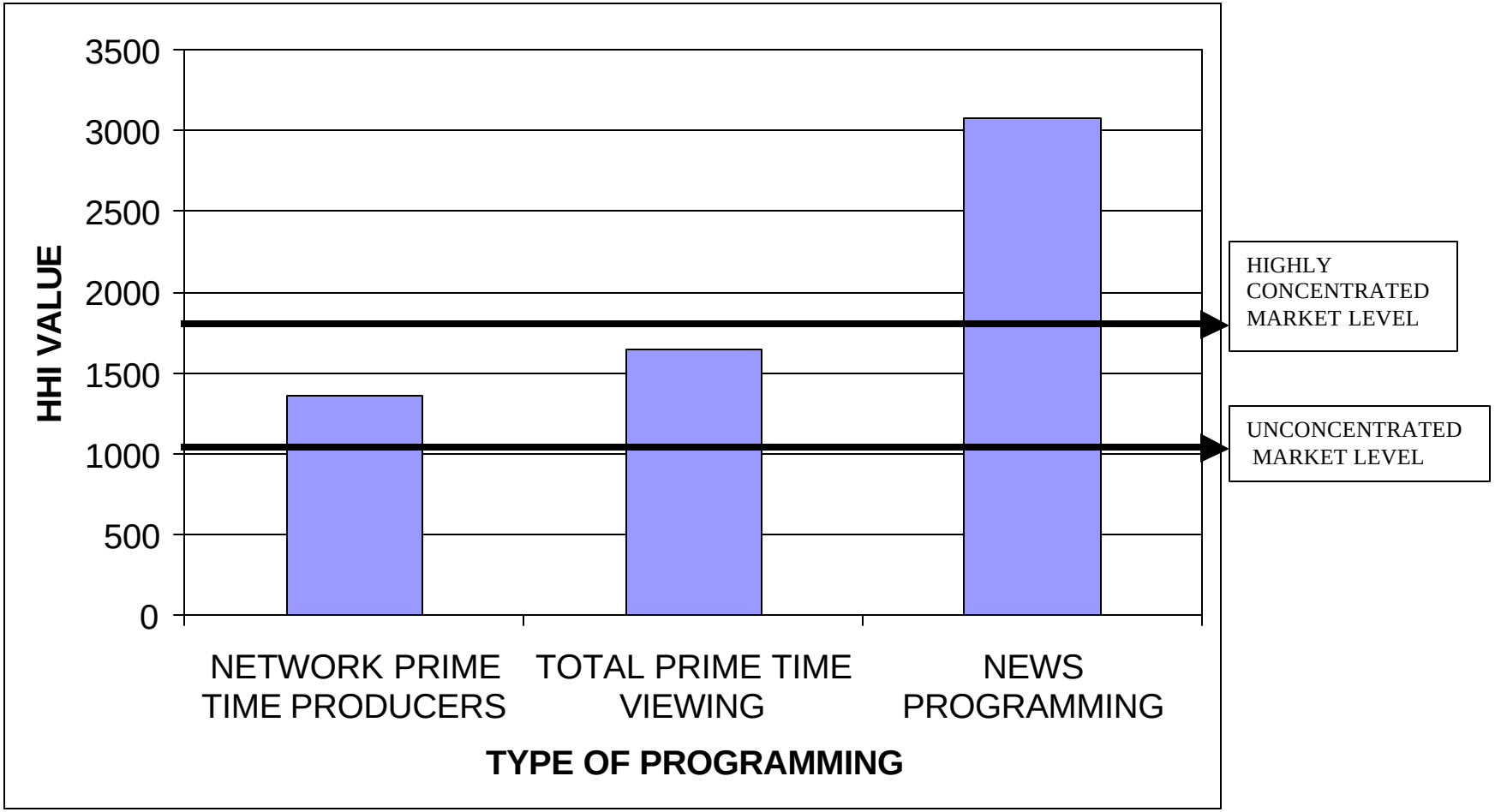
SOURCE: Market profiles from *Editor and Publisher* and *Media Week*, various issues; "Initial Comments of the NAA," and Initial Comments of Hearst Argyle, Exhibit 1, "Selected Media "Voices" by Designated Market Areas," In the Matter of Cross-Ownership of Broadcast Stations and Newspapers; Newspaper-Radio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

EXHIBIT 8: RADIO VOICE COUNT



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

EXHIBIT 9: CONCENTRATION OF NATIONAL PROGRAMMING MARKETS



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

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

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

- UHF stations appear to be counted as one-half for the purposes of the national cap, but a full station for purposes of the cross-ownership and the duopoly rule. This inconsistent treatment biases the rules toward greater concentration and less diversity.

- Similarly, the FCC recognizes the importance of major TV voices by banning a duopoly merger between two TV stations ranked in the top four in any market. However, the FCC does not recognize the importance of newspapers for broadcast newspaper cross-ownership. It fails to impose a similar restriction on a top four TV station combining by a newspaper.

THE FCC PROPOSAL GUTS THE PUBLIC INTEREST STANDARD FOR MEDIA OWNERSHIP UNDER THE COMMUNICATIONS ACT.

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

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

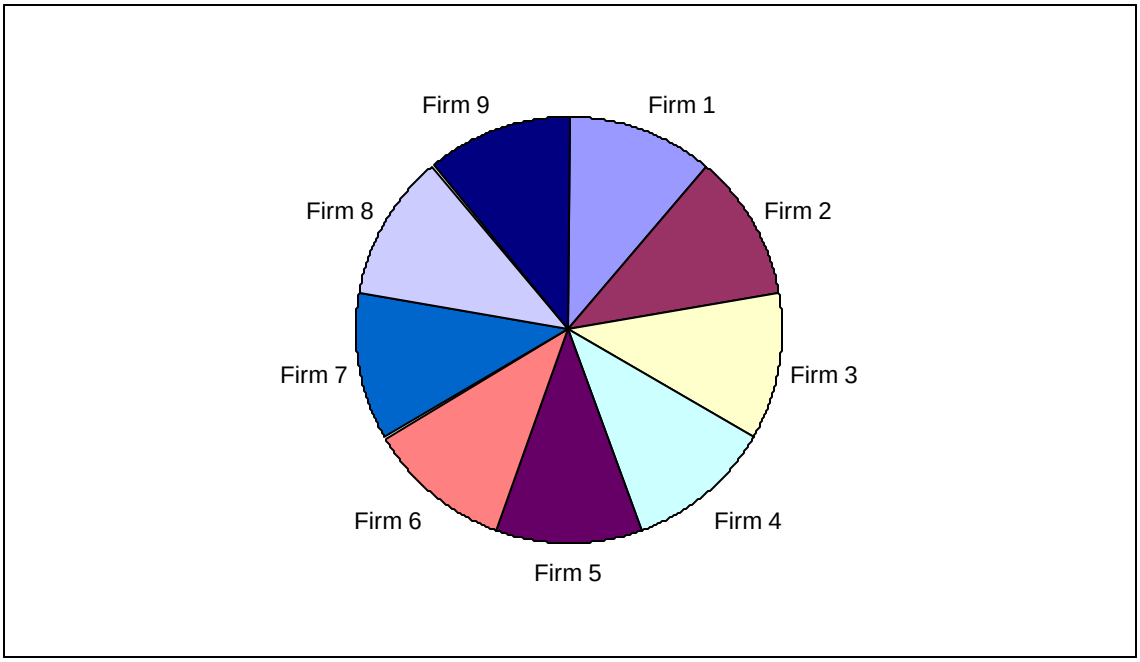
Of the 140 misclassified markets, 36 are one-newspaper towns. That is, the second newspaper has a market share of less than five percent. Another 55 are two newspaper towns. Thus approximately two-thirds of these markets would have one or two newspaper-TV combinations.

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

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

EXHIBIT 10: GRAPHIC REPRESENTATION OF CONCENTRATED MARKETS

Moderately Concentrated Market (Nine Equal Sized Competitors)



Highly Concentrated Market (Five Equal Sized Competitors)

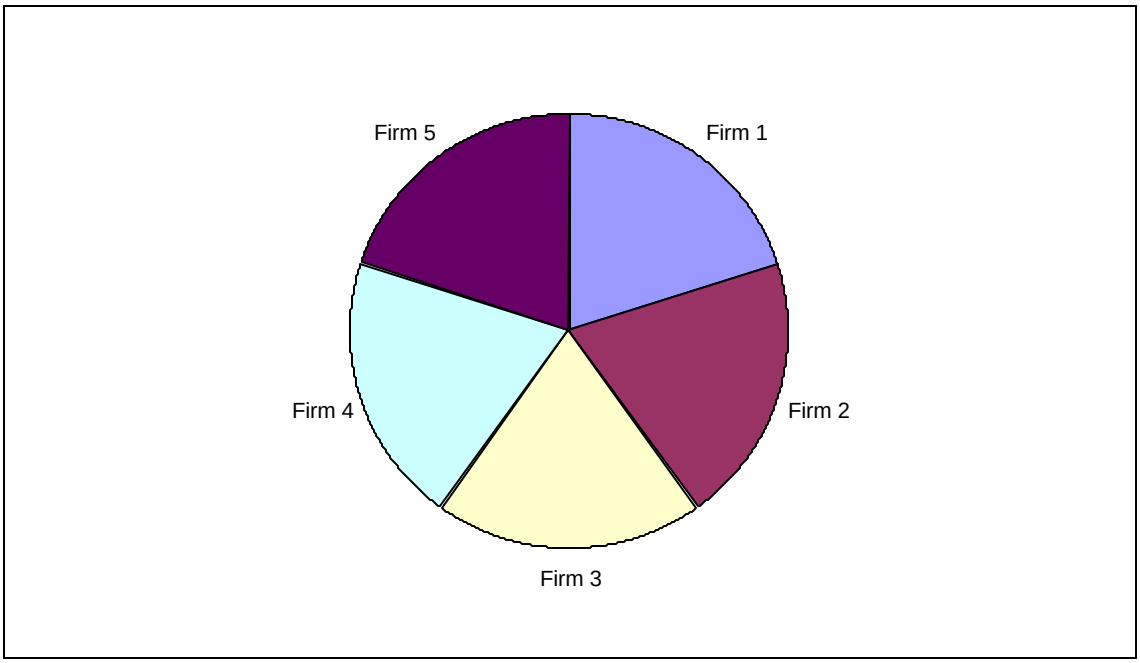
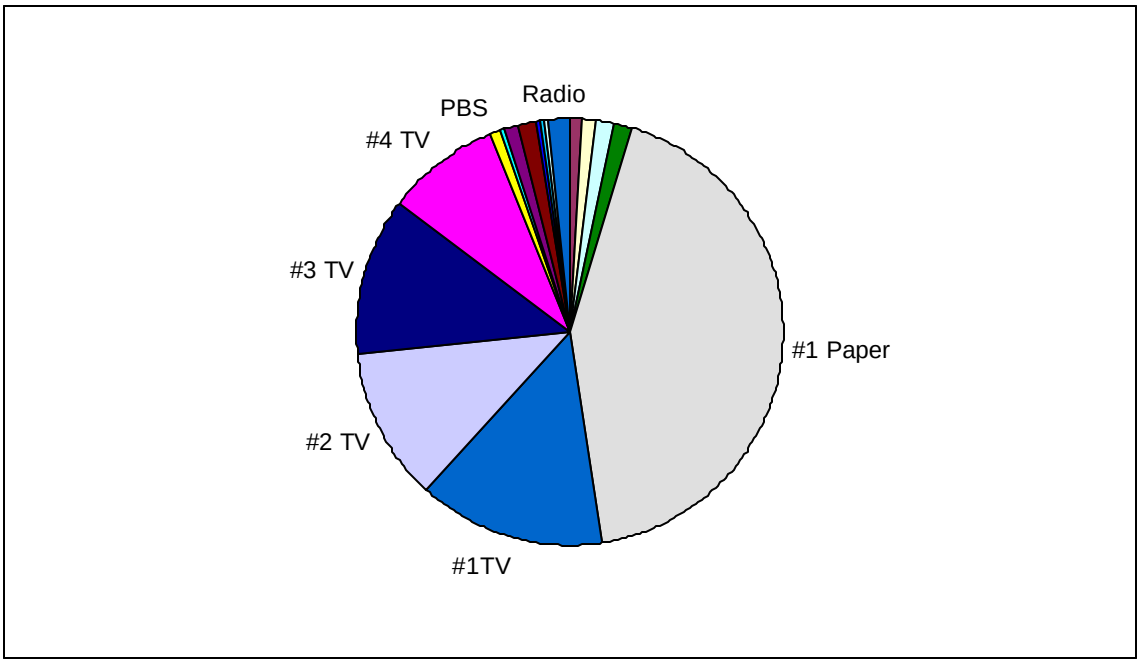
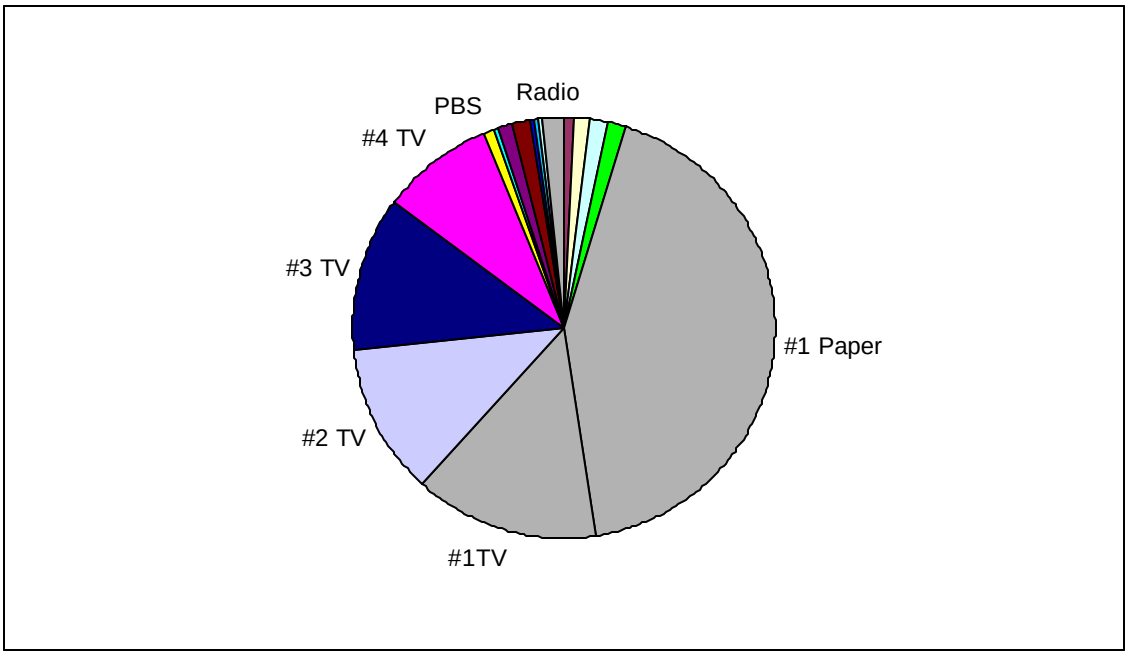


EXHIBIT 11: IMPACT OF NEWSPAPER-TV MERGERS IN ONE-PAPER CITIES
(Based on TV Entertainment HHI and Newspaper Circulation HHI)

Pre-Merger Market



Post-Merger Market



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

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

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

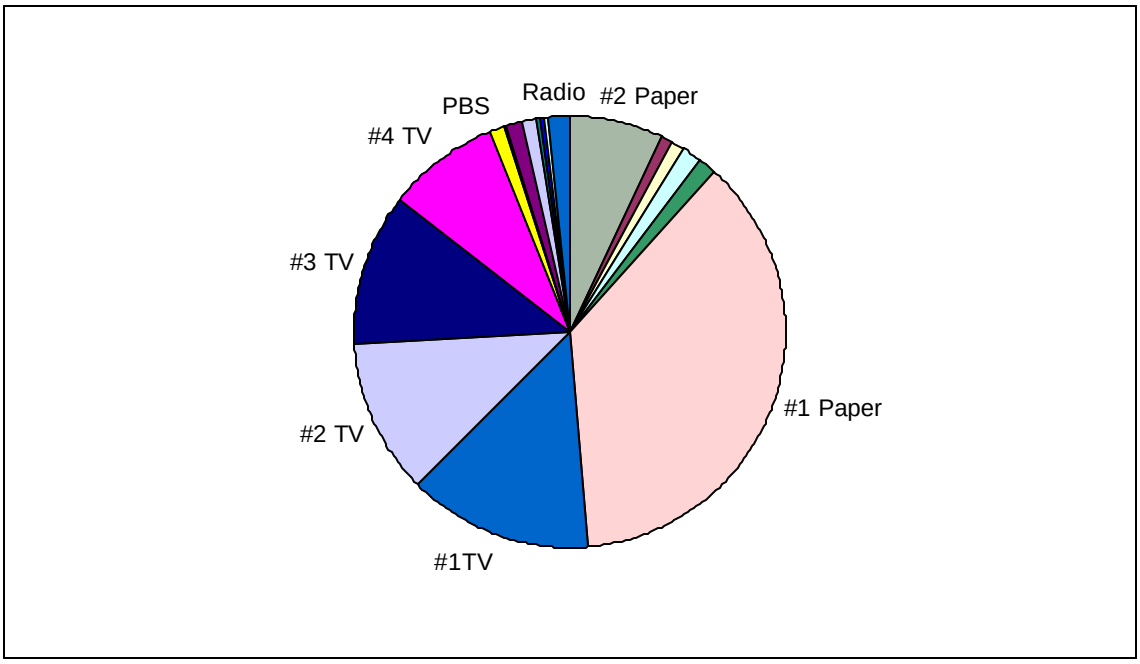
This pre-merger market would fall in the just below the highly concentrated threshold. The merger would raise the HHI by about 1000 points. This is over nine times the level that triggers antitrust concerns.

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

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

EXHIBIT 12: IMPACT OF NEWSPAPER-TV MERGERS IN TWO-PAPER CITIES
(Based on TV Entertainment HHI and Newspaper Circulation HHI)

Pre-Merger Market



Post-Merger Market

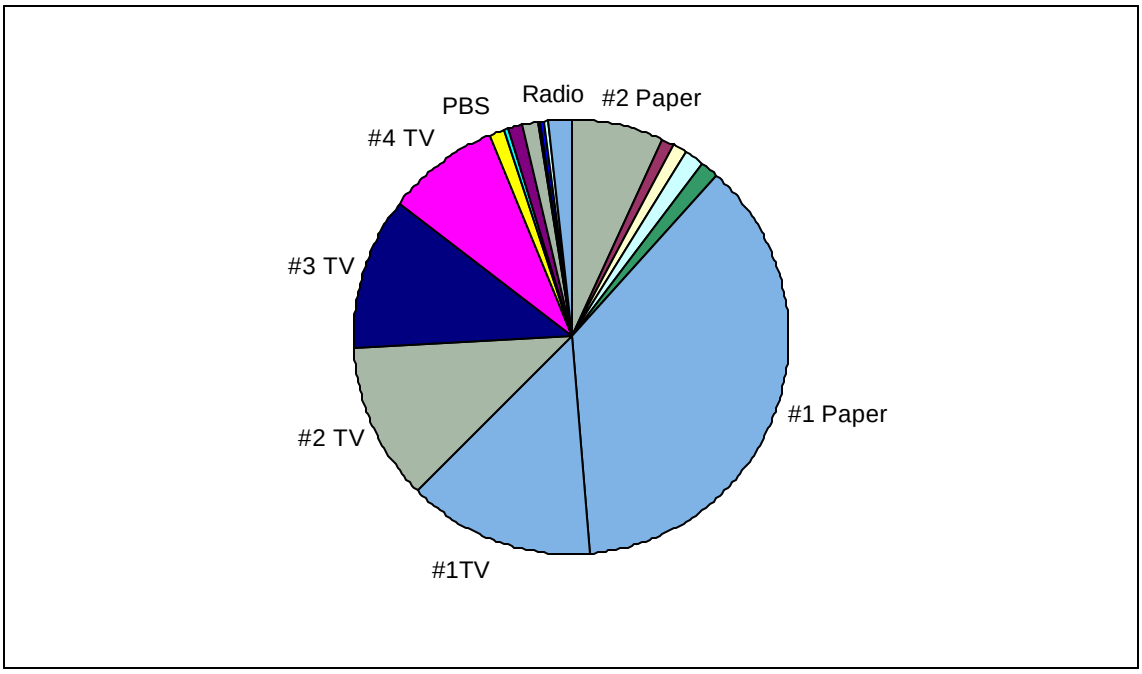


EXHIBIT 13: INCREASE IN HHI CAUSED BY LEADING PAPER-TV STATION MERGERS (Based on TV Entertainment HHI and Newspaper Circulation HHI)

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

EXHIBIT 14: MOST CONCENTRATED NEWS MARKETS FOR TO CROSS-OWNERSHIP UNDER THE FCC DRAFT ORDER

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

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

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

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

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

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

V. A RESPONSIBLE APPROACH TO OWNERSHIP LIMITS

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

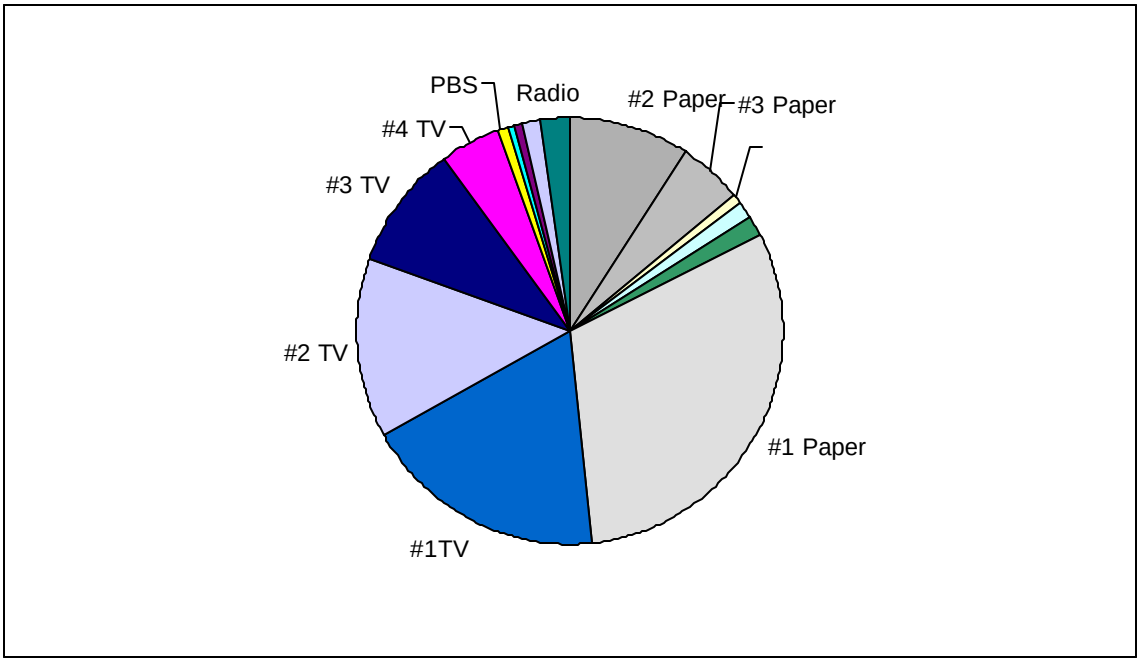
- No mergers between TV stations and newspapers should be allowed if the overall media market in a locality is or would become concentrated as a result of the merger.

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

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

EXHIBIT 15: IMPACT OF NEWSPAPER-TV MERGERS IN CITIES WITH THREE PAPERS AND THREE OR FEWER TV STATIONS PROVIDING NEWS

Pre-Merger Market



Post-Merger Market

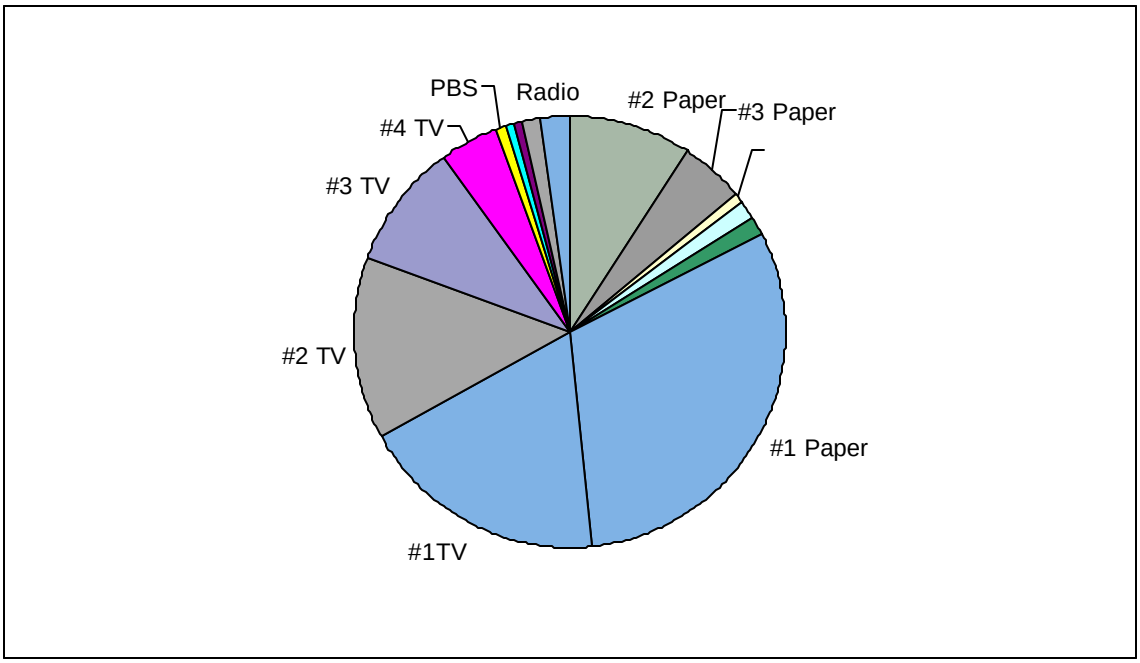
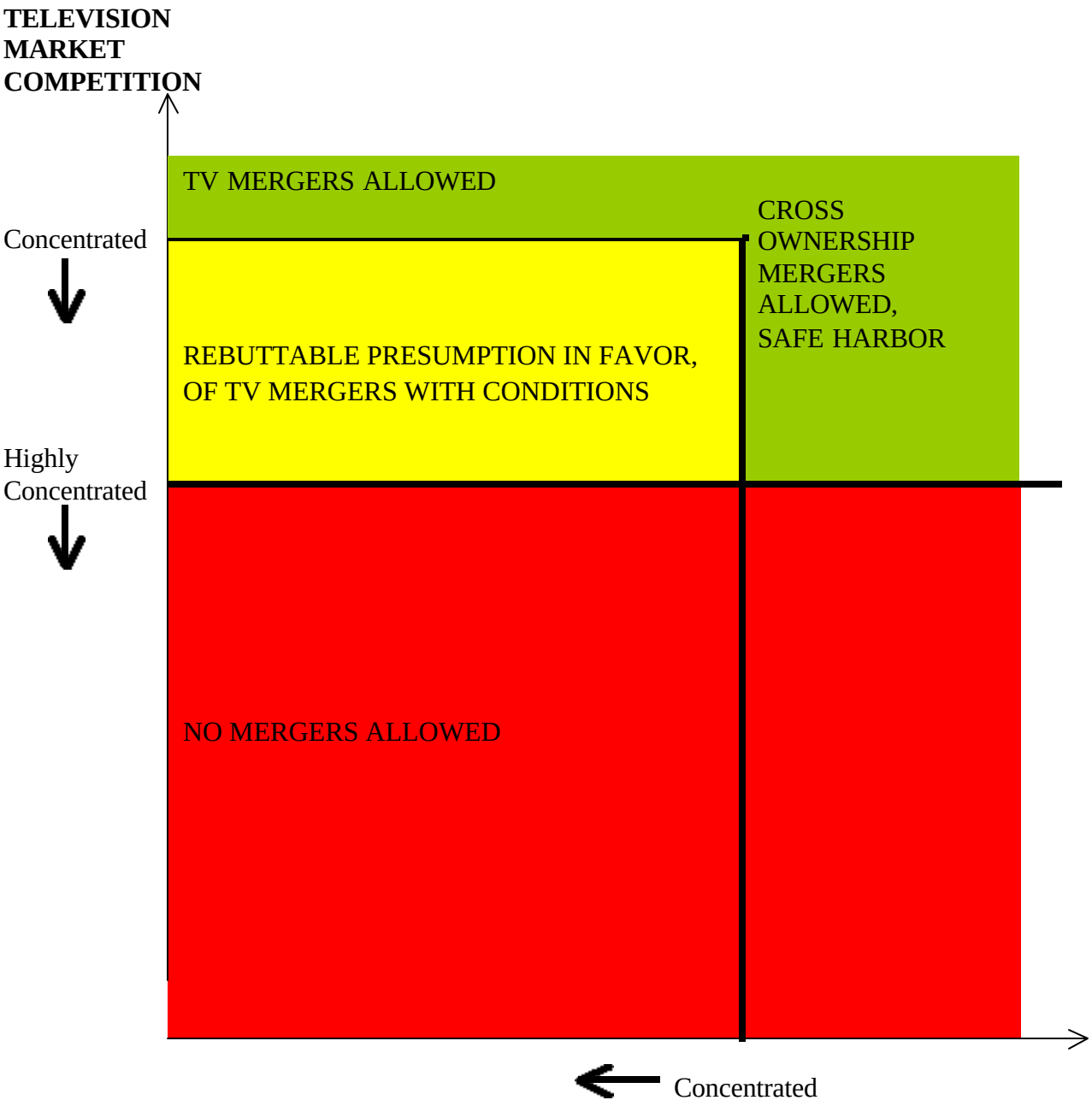


EXHIBIT 16: MEDIA MARKET CATEGORIZATION FOR MERGER REVIEW



COUNTING VOICES IN A TOTAL MEDIA MARKET

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

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

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

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

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

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

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

This is a generous estimate of the voice count for three reasons. First, in many markets there is at least some cross-ownership of radio stations by newspapers and TV broadcasters. This should be taken into account by increasing the adjustment factor. In the above example, the adjustment was .8, based on .1 for radio and .1 for Internet and other. If the radio holdings of broadcasters and newspapers have a market share of 40 percent of the radio market, then the adjustment for radio would be decreased to .06. The voice count would

be (7/.84=8.33). Second, as noted above, the typical geographic market definitions used are too broad. Third, the Internet and other categories do not represent independent sources of local news.

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

REASONABLE ADJUSTMENTS TO COUNTING OF VOICES

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

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

A diminimus exception should be allowed to promote civic discourse

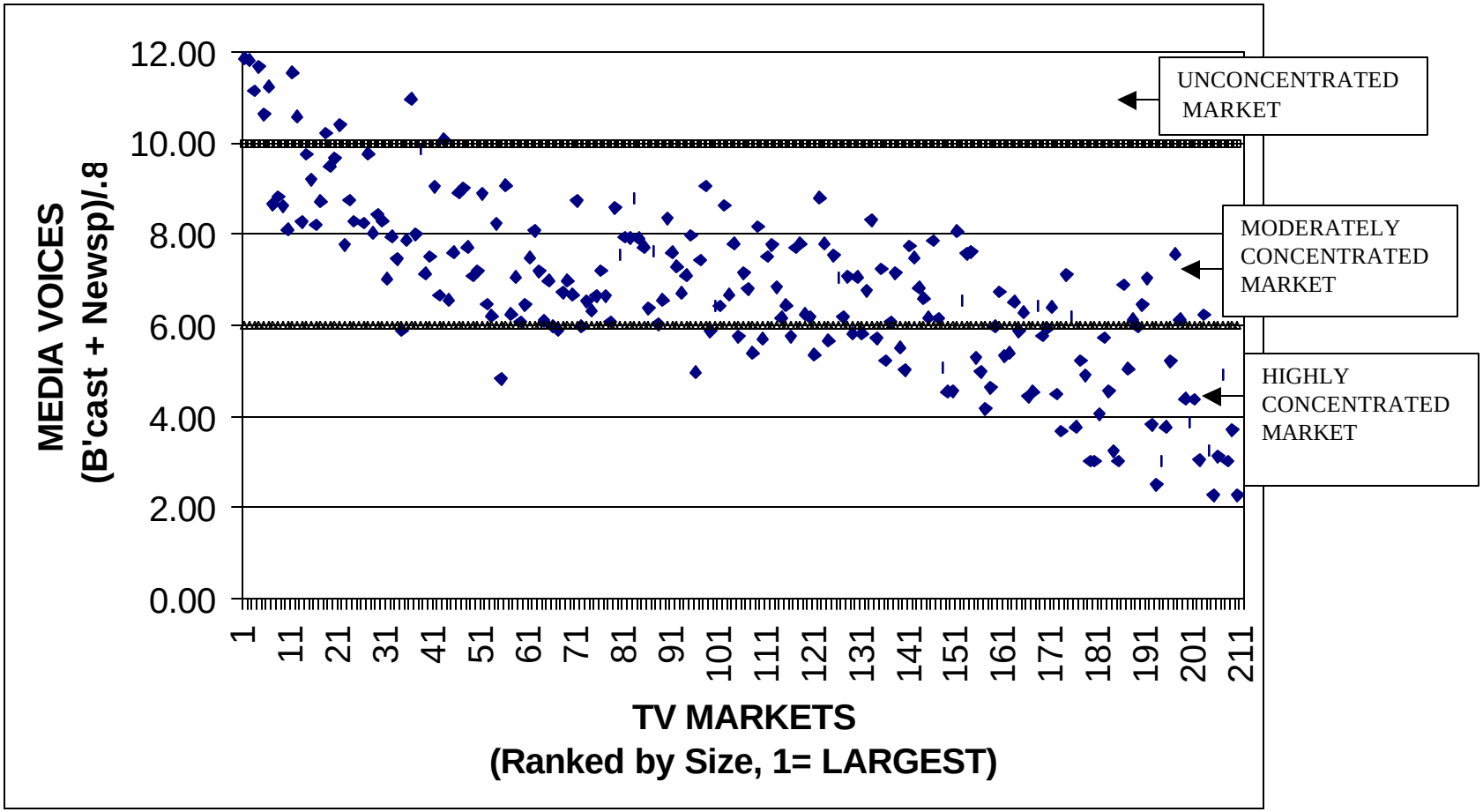
Relatively small newspaper or television outlets (less than five percent market share) should be exempted from the above rules. To the extent that larger media outlets seek to obtain cross technology partners, this should be allowed as it can increase the availability of important voices.

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

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

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

EXHIBIT 17: TOTAL MEDIA VOICES



SOURCE: See previous Exhibits.

ESTABLISHING THRESHOLDS AND MARKET SCREENS

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

Market-share based analysis

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

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

Simple Voice Counts vs. Market Share Weighted Voice Counts

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

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

EXHIBIT 18: TWO-PRONGED MARKET STANDARD FOR CROSS-OWNERSHIP

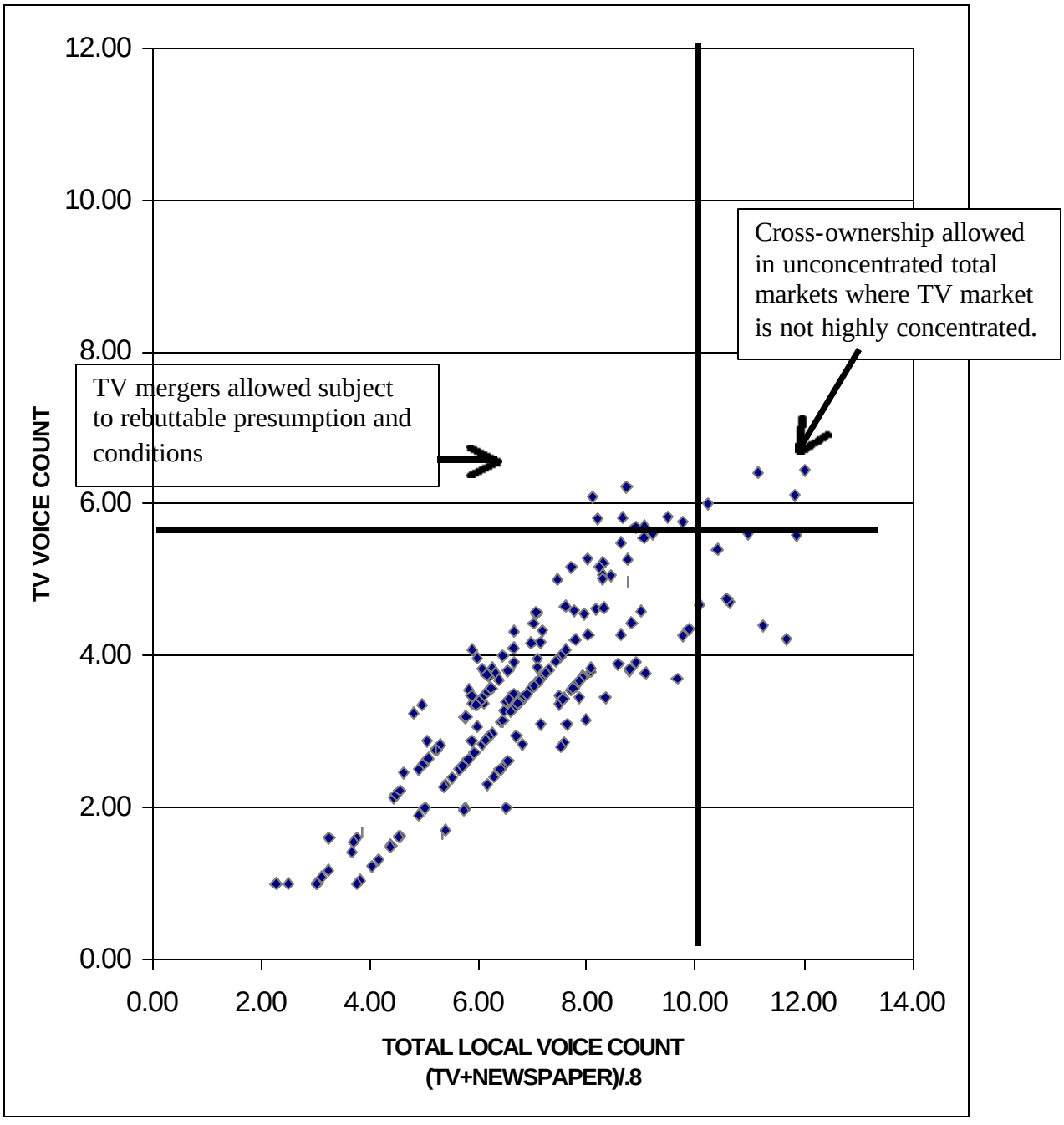
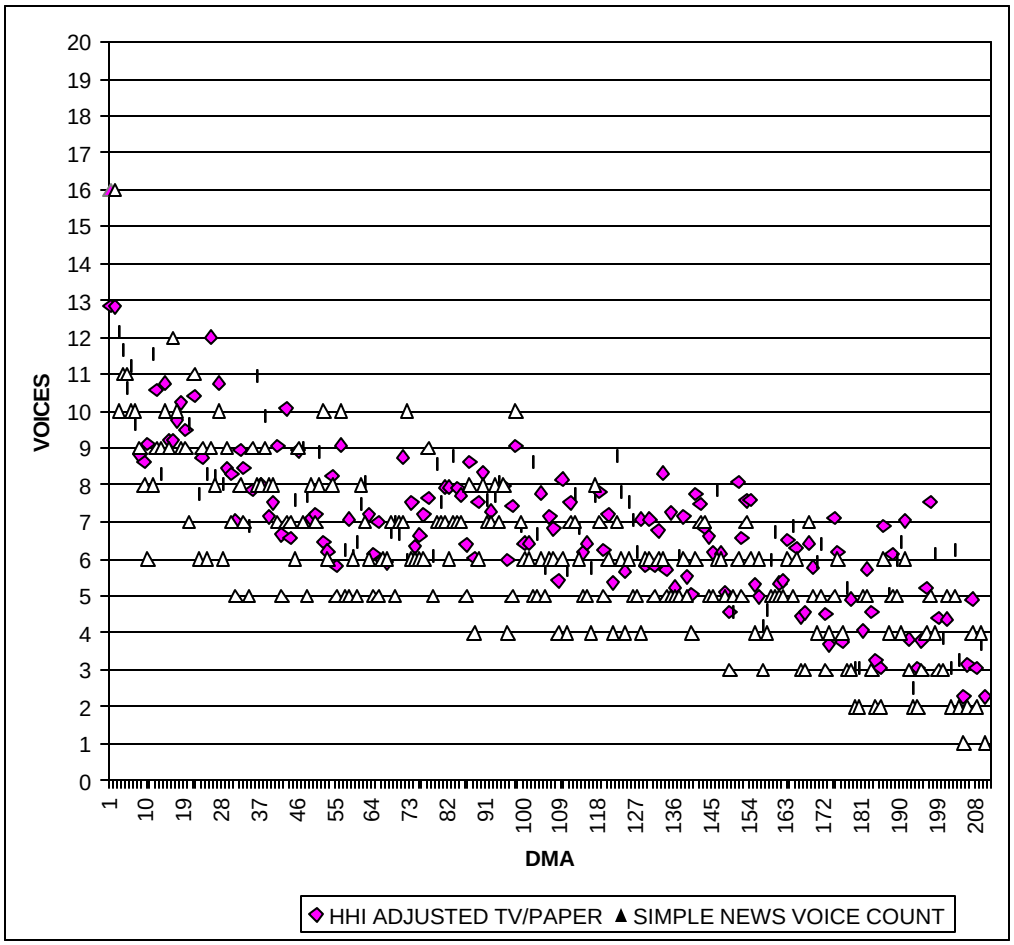


EXHIBIT 19: SIMPLE NEWS VOICE COUNT VS. MARKET-SHARE BASED, ADJUSTED VOICE COUNT [(TV+NEWSPAPER)/.8]



Source: Newspaper voice count, "Initial Comments of the Media," In the Matter of Cross-Ownership of Broadcast Stations and Newspapers; Newspaper-Radio Cross-Ownership Waiver Policy: Order and Notice of Proposed Rulemaking, MM Docket No. 01-235, 96-197. Television voice count, Bruce Owen, Michael Baumann and Allison Ivory, "News and Public Affairs Programming Offered by the Four Top-Ranked Versus Lower Ranked Television Stations," Comments of Fox, Economic Study A.

EXHIBIT 20: MARKET ELIGIBLE FOR CROSS-OWNERSHIP MERGERS
(Cities Surpassing Threshold on Two or More Screens)

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

CONCLUSION

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

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

We conclude that the "empirical gap," to which D.C. Appeals Court referred in the Sinclair decision has been closed.[21] The hard data and evidence on the record does not support the rules the FCC has proposed. A set of rules that restricts merger activity to a small number of markets is well justified on the basis of the empirical data. If the empirical record shows anything, it shows that lax antitrust enforcement and First Amendment policy have allowed media markets to become far too concentrated. Democratic discourse demands many more media voices.

ENDNOTES

[1] Associated Press v. United States, 326 U.S. 1, 20 (1945).
[2] Associated Press v. United States, 326 U.S. 1, 20 (1945).
[3] *Sinclair Broadcasting, Inc. v. FCC*, 284 F.3d 148 (D.C. Circ. 2002) (hereafter Sinclair).
[4] *Fox Television Stations, Inc., v. FCC*, 280 F.3d 1027 (D.C. Circ. 2002) (hereafter Fox v. FCC); Sinclair.
[5] Fox v. FCC, pp. 12-13.

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

[6] Fox v. FCC, p. 13.
[7] Sinclair, p. 15.
[8] 395 U.S. 388 (1969).
[9] Sinclair, p. 11.
[10] The ongoing proceedings include *Cross-Ownership of Broadcast Stations and Newspapers*, MM Docket No. 01-235; *Newspaper/Radio Cross Ownership Waiver Policy*, MM No. 98-82; *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, MM Docket No. 01-317.
[11] Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996), 202(h).
[12] Fox erroneously establishes a far more stringent legal test than actually contemplated by Congress in enacting Section 202(h). First, Fox improperly treated the 2000 Biennial Review Report as reviewable agency action. Second, Fox treated Section 202(h) as creating a different review standard than would otherwise be required under the Administrative Procedure Act (APA) for review of an agency decision not to repeal a rule. Third, the Fox decision ignored the clearly defined framework of the statute in vacating the Commission's cable-broadcast cross-ownership rule. The only remedy contemplated by Section 202(h) upon a finding that a regulation no longer serves the public interest is a rulemaking to determine what rule, if any, would be appropriate. The net effect of the Fox decision is to undermine the public's rights under the APA by denying the opportunity to create a record to justify a particular rule in response to a targeted Notice of Proposed Rulemaking. The D.C. Circuit Court in Fox found that protecting diversity and safeguarding competition can be the proper basis for promulgating and preserving media ownership rules, but insisted that the Commission must present better evidence for those rules if the burden of §202(h) is to be met. We agree with the FCC's interpretation of the statute set forth in its *Petition for Rehearing or Rehearing En Banc* in Fox: the D.C. Circuit court has misapplied §202(h), creating a counter-intuitive and nonsensical situation where there is a higher standard to retain an existing rule than to adopt it in the first instance. As the FCC correctly notes, this misguided interpretation would impose a "substantial and continuing burden on the agency that threatens administrative paralysis. This result is not compelled by the language of the statute or by its legislative history." *Id.* at 2.
[13] Judge Sentelle," Concurring and Dissenting in Part," *Sinclair Broadcast Group, Inc. v. Federal Communications Commission*, April 2, 2002. The *Washington Post* echoed this concern, offering the following observation on things to come under the headline *Narrowing the Lines of Communications*, February 24, 2002.

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

[14] The difference between simple economics under the antitrust law and civic discourse under the Communications Act is woven into the fabric of the statutes. Under the antitrust laws, mergers may be "prohibited if their effect may be substantially to lessen competition or to tend to create a monopoly," or "if they constitute a contract, combination…, or conspiracy in restraint of trade," or "constitute an unfair method of

competition" (U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, 1997, section 0); The standard under the Communications Act is higher, reflecting the special role of communications and mass media in our democracy. The Federal Communications Commission is charged to transfer cable, broadcast and telecommunications licenses only upon a "finding by the Commission that the public interest, convenience and necessity will be served." (USC, 47, 310 (b).

[15] William G. Shepherd, *The Economics of Industrial Organization* (Englewood Cliffs, NJ: Prentice Hall, 1985), p. 389, gives the following formula for the Herfindahl-Hirschman Index (HHI):

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

where
n = the number of firms
m= the market share of the largest firms (4 for the four firm concentration ratio)
S_i = the share of the ith firm.

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

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

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

[18] Id., section 0.1.

[19] Sinclair, p. 5.

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

[21] Sinclair, p. 5.