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MEDIA OWNERSHIP

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

OCTOBER 2, 2003

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

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MEDIA OWNERSHIP

THURSDAY, OCTOBER 2, 2003

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

The Committee met, pursuant to notice, at 9:33 a.m. in room SR–253, Russell Senate Office Building, Hon. John McCain, Chairman of the Committee, presiding.

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

The CHAIRMAN. Good morning. Today the Committee meets again to examine media ownership limits with the Federal Communication Commission's controversial revision of these limits having been stayed by a court, the Senate having voted recently to invalidate the FCC's new rules, this Committee having reported out a bill that would also undo the FCC's recent actions, and the Appropriations Committee inappropriately having inserted a rider on an appropriations bill regarding one aspect of the FCC's rules, the question of media ownership limits remains a pressing one.

There seems to be widespread sentiment that the FCC drew the line in the wrong place. While the seven hearings the Committee has held this year on media ownership have made me a firm believer that a clearly drawn line is necessary, I still don't know where it should go.

The Commerce Committee and the full Senate have loudly rejected the ownership limits adopted by the FCC, but these measures merely invalidate the unpopular Commission proposal and take the media ownership limits back to where they were before Congress and the courts ordered the Commission to revise them. But was the status quo ante? I don't know.

I hope the witnesses before us today will help us answer the question of where media ownership limits should be drawn to best serve the public interest. The question may sound simple, but the answer, as the FCC can attest, is extremely complex.

Before issuing its new rules on media ownership, the FCC commissioned 12 studies of the media marketplace and hosted a roundtable to hear testimony from academics and industry analysts. Three of today's witnesses were participants in these activities. We will hear from all these witnesses about their research on concentration in the media marketplace and the effects of such concentration. I appreciate our witnesses for joining us today, and I look forward to hearing their views and research findings.

Our witnesses today are Dr. Mark Cooper, President, Consumer Federation of America; Mr. Victor B. Miller IV, Senior Managing Director, Equity Analyst, Broadcasting, Bear, Stearns & Company; Dr. Eli M. Noam, Director, Columbia Institute for Tele-Information, Professor of Finance and Economics at Columbia University; and Dr. Philip Napoli, Assistant Professor of Communications and Media Management at Fordham University.

I thank you all for appearing this morning. Obviously, we have very busy times and a lot of things going on, but I think our witnesses would agree, before we begin, that this is a bit of a phenomenon. This issue sort of came from—if not nowhere, certainly from grassroots, and struck some kind of a cord among several million Americans that has raised the visibility of this issue from somewhat of an academic one, in all due respect to our academics here, to one that has attracted widespread attention. When I go on the talk shows back in Arizona and other places, if there's any period of time, usually we get a call on this issue.

So I want to thank you all for being here. Before we begin, I wonder if my friend, Senator Burns, from Montana, has any comments.

STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MONTANA

Senator BURNS. I have no statement. I have to go. I will see what these gentlemen have to say. But carry on.

The CHAIRMAN. Thank you very much, Senator Burns. And I think you would agree with me, this issue has been rather surprising in the amount of attention that it's gotten.

Senator BURNS. It sure has. I appreciate the hearings. I will just submit a statement. Mr. Chairman, I appreciate your interest in it, because all of America has an interest.

The CHAIRMAN. Without objection.

Thank you.

[The prepared statement of Senator Burns follows:]

PREPARED STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MONTANA

I thank the Chairman for convening today's hearing concerning the critical and timely topic of media consolidation. I am confident today's hearing will be particularly instructive given that it will go into great detail about the data used to assess media concentration. Given the weight of the issue before the Committee today, which is so central to our democracy, it is key to determine whether the methods of analysis used to judge media concentration are appropriate and effective.

On June 2, the Federal Communications Commission decided to significantly ease limits on media ownership.

While I appreciate the difficulty of analyzing the current media marketplace in light of the rapid pace of technological change, I still feel strongly that this decision was fundamentally flawed. I fear that the Commission's sweeping ruling could lead to a wave of media consolidation that would imperil media diversity and localism in rural America.

While there has been much talk about the "500-channel universe" we now all supposedly live in, the simple fact of the matter is that Montana is not Manhattan. The reality in rural America in particular is that the vast majority of consumers still receive vital local news and public safety information through free, over-the-air television. It is for this reason that I simply do not believe that the significant relaxation of the national cap on television broadcast ownership from 35 percent to 45 percent is in the public interest.

I believe that any further movement from this level of ownership tips a delicate balance and grants excessive leverage to the networks, turning local broadcast affiliates into simple generic outlets for national programming. I feel that the best way to make sure that localism is protected is to reinstate the 35o/o national cap on television broadcast ownership. I certainly do not believe that a relaxation of the cap is in the public interest. Many of my colleagues on the Committee share my concern, which was evidenced by the passage of Sen. Stevens' bill to reimpose the 35 percent) cap out of Committee.

In recent years we have witnessed a remarkable evolution in the media landscape—technological advances have changed the way in which we access information and services. This transformation has also brought about an undeniable increase in video programming choices available to the consumer—direct satellite, cable services, on-demand video programs over the cable or Internet, are all options that have contributed to this tremendous growth.

It is important to remember, however, that the vast majority of these services are produced and marketed at a national level. There is little room, if any, to cater to programming of local interest. Local broadcast television has filled this important niche, and we must ensure that any change in policy not jeopardize this valuable programming content for our citizens. The situation is even more critical in rural communities, where the absence of local broadcast television would mean only a choice between different national distribution networks.

I look forward to the testimony of the witnesses on this

The CHAIRMAN. Dr. Cooper, welcome.

STATEMENT OF DR. MARK N. COOPER, DIRECTOR OF RESEARCH, CONSUMER FEDERATION OF AMERICA

Dr. COOPER. Thank you, Mr. Chairman.

This is, indeed, one of the most important issues that the Committee deals with, for a simple reason—it involves both an important area of economic commerce and a forum for democratic discourse in our society.

For over 50 years, the Supreme Court has expressed a bold aspiration for the First Amendment in the electronic age, based on two fundamental principles. First, the court has declared that the widest possible dissemination of information from diverse and antagonistic sources is essential to the public welfare. Second, the court has recognized that broadcast licenses create powerful voices, particularly for television, and they are scarce. Because of interference, there are far fewer licenses than people who would like to hold them, so the holders of the licenses must serve the public interest.

Unfortunately, with its most recent ruling, the FCC has turned its back on this aspiration, declaring instead that its job is not to promote the widest possible dissemination, but simply to prevent the complete suppression of ideas. And taking this narrow view, the FCC refuses to look at the actual market shares, the actual audience of media outlets. The result is to completely distort its analysis.

Two examples: In Tallahassee, Florida, the PBS station operated by Florida State University, with less than 1 percent of the TV audience, counts as much as the number-one commercial TV station, with 60 percent of the audience. In New York City, the Duchess County Community College Educational TV Station counts more than the *New York Times.*

In TV markets, the FCC ignores the fact that every network is now at the core of a vertically integrated television conglomerate. The national market is dominated by six entities that account for three-quarters of the prime-time, almost three-quarters of the writing budgets, three-quarters of the programming expenditures, 80 percent of prime-time shows, and virtually 100 percent of news viewers. Yet the FCC will allow these entities to reach larger markets.

Antitrust practice cannot deal with this problem. To put the matter simply, antitrust officials do not do democracy; they do economic efficiency and profit, while the First Amendment is about understanding and truth. They may be able to tell you whether a merger between two TV stations will raise the price of advertising, but they do not examine if it lowers the quality of civic discourse.

Using traditional economic methods and antitrust principles, we conclude that over 95 percent of the newspaper markets, 90 percent of the TV markets, and 85 percent of the radio markets in this country are highly concentrated. Local and national news markets are even more concentrated. And even defining media markets broadly, including all of the outlets, we conclude that over 90 percent of media markets in this country are concentrated.

There is no public-policy purpose served by granting blanket approval to TV/newspaper combinations in approximately 180 markets where 95 percent of the American people live to directly allow networks to control an additional 10 million households, or to permit a single entity to own multiple licenses when so many millions of Americans can't even own one.

The FCC declared, in a remarkable statement, that it is not, quote, "particularly troubling that media properties do not always, or even frequently, avail themselves to others who may hold contrary opinions, nor is it necessarily healthy for public debate to pretend as though all ideas are of equal value entitled to equal airing." I submit this is why you have a grassroots revolution, because this narrow view of democratic debate in our society is offensive to the vibrant tradition of civic discourse we have in America.

I do not claim that ideas are of equal value, as the Commission wrongly implies, but we do insist that, in our democracy, ideas have an equal opportunity to be heard.

By abandoning the bold aspiration for the First Amendment, the FCC will allow massively powerful media owners of multiple outlets to decide which ideas are broadcast widely and which merely leak out to the public. The rules violate this basic tenet of our democracy, and that is what has triggered this grassroots revolution.

Now, I'm confident that the courts will overturn these rules, but that will only send them back to the agency, which, in my opinion, has spent 2 years misreading the empirical record, misinterpreting the law, and mangling the analysis. The national cap was enacted by Congress. The cross-ownership ban is a bright-line test that has been upheld by the courts. The evidentiary record supports both, and I believe that Congress needs to do so, as well.

Thank you.

[The prepared statement of Dr. Cooper follows:]

PREPARED STATEMENT OF DR. MARK N. COOPER, DIRECTOR OF RESEARCH, CONSUMER FEDERATION OF AMERICA

Mr. Chairman and Members of the Committee,

My name is Mark Cooper. I am Director of Research of the Consumer Federation of America.[1] I greatly appreciate the opportunity to appear before you today to discuss media ownership rules. This is the single most important issue confronting the Federal Communications Commission (FCC) because it deeply affects the fundamental structure of the forum for democratic debate in our society, in addition to affecting an extremely important area of economic commerce.

For two years we have urged the FCC to engage in rigorous market structure analysis and to adopt a high First Amendment standard for its media rules. It has completely failed to do so. The FCC has adopted a remarkably narrow view of the public interest under the Communications Act and abandoned the most elementary principles of market structure analysis. The result is a set of rules that bear no relationship to the reality of American media markets. The FCC's is wrong on the facts, wrong on the law and the resulting rules are entirely unreasonable. That is why Congress must step in and restore order.

The Facts

Illogical Assumptions in the Newspaper-TV Rule [2]

The FCC refuses to look at the actual audience of a media outlet in calculating its Diversity Index. The Index underlies the decision to grant blanket approval to TV-newspaper combinations in over 80 percent of all markets where over 95 percent of all Americans live. Refusing to recognize reality leads to absurd results.

For example, under the FCC's analysis, in Tallahassee Florida the PBS station operated by Florida State University, which captures less than I percent of the TV audience, counts as much as the number one TV stations, which captures almost 60 percent. Community Newspapers Holdings Inc., which owns the Thomasville Times Enterprise and the Valdosta Daily Times, counts twice as much as the Tallahassee Democrat, even though its newspapers have less than half the circulation. Under the FCC rules, the leading newspaper and the leading television station in Tallahassee would be given "no questions asked" approval to merge, even though the resulting company would have almost 60 percent of the TV audience, 70 percent of newspaper readers and control nearly two-third of the news room staff in the market.

The documents I have submitted for the record provide dozens of similar examples in markets of all sizes. These range from New York, where the Dutchess County Community College educational TV station counts more than the *New York Times,* to Lexington Kentucky, where the *Corbin Times* with a circulation of 5,000 is equal to the *Lexington Herald,* with a circulation of 115,000, and even more important than the CBS duopoly, which has over 60 percent of the TV market.

Unrealistic Analyses in the TV Rules [3]

The TV rules are based on similarly unrealistic assumptions. For example, the FCC campaign to raise the national cap on direct network ownership of TV stations by national networks as a tool to save "free TV" ignores the fact that every one of the broadcast networks is embedded at the core of a vertically integrated television conglomerate. The recent acquisition of Vivendi's U.S. entertainment assets by NBC means that all five owners of broadcast networks (CBS, ABC, Fox and Time Warner (WB) in addition to NBC) all own film production, film libraries, TV production and cable networks in addition to their broadcast networks. Four of the five own publishing and theme parks as well.

The synergies and economic power that result from internalizing production, initial distribution, syndication and repurposing are the hallmark of the television industry in today's multichannel environment This integration of production and distribution has been reinforced by legal rights that allow the media giants to gain car-

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[1] Consumer Federation of America (CFA) is a non-profit association of 300 pro-consumer groups, which was founded in 1968 to advance the consumer interest through advocacy and education.

[2] I have submitted for the record a study entitled Abracadabra' Hocus-Pocus! Making Media Market Power Disappear With The FCC's Diversity Index in which we examined over a dozen state capitals that demonstrates the FCC's analysis is riddled with these absurdities. (Available at *www.consumerfed.org/abra.pdf*)

[3] I have submitted for the record a document entitled *Free TV Swallowed by Media Giants"* demonstrating the flaws in this save free TV reasoning. (Available at *www.consumerfed.org/free-tv.pdf*)

riage on cable systems, which have enabled the parent corporations of the broadcasters to capture a large share of the non-broadcast video market. As a result, the network owners have used their cable offerings to recapture between two-thirds and three quarters of the audience they claim to have been losing for over-the-air TV.

These five firms and a sixth close ally[4] account for almost three quarters of the TV audience, programming expenditures and writing budgets of the entire industry and own over four-fifths of the prime time shows. More importantly, the five owners of the broadcast networks capture virtually 100 percent of the television news audience. In market structure analysis, five firms, even if they are equal in size, is not considered a large number. In fact, by the Merger Guidelines of the Department of Justice, which have been used for over twenty years to indicate where mergers create an anticompetitive concern, such a market is considered highly concentrated.

In economic terms, the national TV market is a tight oligopoly. And, the industry is financially healthy; the FCC's own analysis said so. Advertising rates are going through the roof. Advertising revenues performed better in the 1990s, the decade when multichannel video was supposed to be undermining broadcasting, than the previous two decades.

There is no public policy purpose to be served by allowing these entities to become larger and more powerful in either the national or local TV markets, yet that is exactly what the FCC proposes, allowing the networks to directly control stations that reach an additional 10 million households. The new rules expand the number of markets in which a single entity would be allowed to hold the license for two stations from about 50 to about 150. For the first time, it would allow a single entity to hold the licenses for three stations in one city.

The Law

The FCC Defined Its First Amendment Duties Too Narrowly[5]

Any discussion of media ownership rules must start from the recognition that, above all, they are based on the First Amendment right of the people to speak. For over sixty years the Supreme Court has expressed a bold aspiration for the First Amendment in the electronic age that rests on two fundamental principles.

First, the Court has declared that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Second, broadcast licenses, which create powerful electronic voices, especially for television, are scarce. "Because of the problem of interference between broadcast signals, a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public." Therefore, the Supreme Court has repeatedly concluded that there is no "unabridgeable right to hold a broadcast license where it would not satisfy the public interest."

With its most recent rulings on media ownership, the FCC has turned its back on this First Amendment jurisprudence. Instead of accepting the challenge of the Supreme Court's bold aspiration for the First Amendment to promote "the widest possible dissemination of information from diverse and antagonistic sources," the FCC has adopted the narrowest vision imaginable. It has declared that it is concerned only with ensuring that ideas can leak out and avoiding "the likelihood that some particular viewpoint might be censored or foreclosed, *i.e.,* blocked from transmission to the public." If the distribution of media ownership undermines a robust exchange of views, the FCC is unconcerned, declaring: "Nor is it particularly troubling that media properties do not always, or even frequently, avail themselves to others who may hold contrary opinions . . . nor is it necessarily healthy for public debate to pretend as though all ideas are of equal value entitled to equal airing."

We do not claim that all ideas are of equal value, as the Commission wrongly implies, but we do insist that in our democracy ideas have an equal opportunity to be heard. By abandoning the bold aspiration for the First Amendment and adopting these remarkably lax rules, the FCC will allow massively powerful owners of multiple media outlets to decide which ideas are broadcast widely and which merely leak out to the public. There is a grass roots rebellion growing against the media concentration that these rules would spawn because the narrow view of the First Amendment adopted by the Commission is offensive to the traditions of vibrant civic discourse that the American people have always embraced. The rules violate the basic tenets on which our democracy stands and on which it has thrived.

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[4] Liberty has major financial interests in and business joint ventures with several of the big five.

[5] I have submitted for the record the first chapter of my book entitled *Media Ownership and Democracy in the Digital Information Age* which outlines the First Amendment principles that should govern media ownership policy. (Available on line at no charge under a creative commons license at *http://cyberlaw.stanford.edu/blogs/cooper/archives/mediabooke.pdf*)

Antitrust Practice Is Ill-Equipped to Deal with First Amendment Analysis of Media Markets [6]

The FCC claims that the confines of its narrow concept of the First Amendment prevent it from using the most fundamental information in market structure analysis, the shares of the firms in the market. Specifically, it has refused to look at the actual, real world audiences of media outlets, claiming that it must treat every outlet as if it had the same audience.

By this twisted logic, the Communications Act, which is clearly intended to provide greater protection than the antitrust laws for the public interest in media markets because of their important role in democratic debate, is gutted. Under the FCC's new standard for the First Amendment, citizens get less protection from media corporations' accumulation of market power than consumers do under antitrust laws. By the FCC's own analysis, in over half the scenarios for broadcast-newspaper mergers that it considered the FCC would give blanket approval to mergers that would violate the antitrust *Merger Guidelines* by a substantial margin.

Antitrust law cannot deal with these problems. First, over the past two decades every major relaxation of structural limits on media ownership-deregulation of cable, repeal of the Financial and Syndication Rules, lifting the cap on radio ownership, and the TV duopoly rule—has been followed by a swift merger wave. Although some have argued that antitrust was intended to and should consider citizen issues, antirust practice has moved far toward pure economic considerations. Antitrust is about economic efficiency and profit; the First Amendment as it relates to the media is about understanding and truth. To put the matter simply, antitrust officials do not "do" democracy. As Justice Frankfuter put it almost sixty years ago in the seminal case, "truth and understanding are not wares like peanuts and potatoes." Antitrust officials can tell you when a merger between TV stations will raise the price of advertising; they do not examine if it lowers the quality of civic discourse.

Reasonable Rules

Rigorous Market Structure Analysis Shows Media Markets to be Concentrated [7]

Over a year ago, the Consumer Federation of America presented a framework for examining media markets to the Commission that would allow it to apply rigorous market structure analysis within a framework of high First Amendment principles. Last spring we presented a detailed analysis of media markets based on traditional economic approach, a thorough review of the First Amendment jurisprudence and the empirical record before the FCC.

- Considered as separate products, which the empirical evidence indicates they are, we find that over 95 percent of the newspaper markets, 90 percent of the TV markets and 85 percent of radio markets are highly concentrated by antitrust standards.
- Local and national TV news markets are more concentrated than entertainment markets.

Although it is difficult to combined different types of media outlets in a single framework, for cross media analysis we treated newspapers and TV broadcasters as dominant co-equals in media markets. TV dominates on the demand-side-being cited by about twice as many people as their dominant source of news. But, newspapers dominate on the supply-side, with almost twice as many newspaper newsroom staff in daily newspapers as there are newsroom staff at broadcast TV stations. Newspapers also produce a great deal more news copy than TV stations and they are frequently the source of ideas for TV news stories.

In response to survey questions, 80 percent or more of respondents cite newspapers and TV as the primary source of news and information, particularly about elections. Therefore, we assumed that other sources (radio/Internet/weekly) [8] account

[6] I have submitted for the record the second chapter of my book entitled *Media Ownership and Democracy in the Digital Information Age,* which discusses the weakness of economic analysis for First Amendment policy. (Available on line at no charge under a creative commons license at *http://cyberlaw.stanford.edu/blogs/cooper/archives/mediabooke.pdf*).

[7] I have submitted for the record our analysis entitled *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.* (Available at *www.consumerfed.org/divindex.pdf*)

[8] The network claim that the Internet gives the average citizen an electronic voice equal to a broadcast license misrepresents the power of broadcast video as a distribution medium. Television is a powerful push medium; the Internet is still a weak pull medium. There may come a time when the Internet and widely available unlicensed spectrum may give citizens powerful

Continued

for 20 percent. The FCC failed to ask the proper questions and botched the analysis. It vastly overestimated the importance of these sources, giving them a 45 percent weight, almost equal to newspapers and TV.

- We concluded that, even by our broad definition, over 90 percent of all media markets in this country are concentrated.
- In the handful of markets that are unconcentrated, most could only sustain one or two mergers before they, too, would become concentrated, but the FCC would allow multiple mergers within and across media in these markets.

Rigorous Market Structure Analysis Informed by High First Amendment Principles Promotes the Public Interest[9]

Traditional antitrust practice defines a market as concentrated if it is has the equivalent of fewer than 10 equal sized competitors. Because media markets are so vital to democratic discourse, we recommended that the FCC adopt this standard as a bright line test, refusing to approve mergers in concentrated markets or that would create concentrated markets.

Public policy should not allow cross media mergers in markets that are concentrated, with an exception for conditions of financial distress or deminus acquisitions. Preserving the institutional independence, competition and antagonism between newspapers and television in every city in America is one of the most critical ways to ensure a robust exchange of views.

Public policy should not allow TV-TV mergers in markets that are highly concentrated. When hundreds of millions of Americans who would want a license cannot hold even one, it is difficult to justify allowing media conglomerates to own two, not to mention three in the same market.

Given the high degree of vertical integration in the television industry and the penetration of cable by broadcasters, the 35 percent ownership limit, which is actually a traditional antitrust level for monopsony power analysis (*i.e.,* networks as buyers of programming exercising market power over sellers), is generous. In the early 1990s two fundamental public policy changes were made for broadcast television. The Financial and Syndication rules which limited the ability of networks to own prime time programming were repealed and broadcasters were given must carry/retransmission rights. The results are clear. Independent production of prime time programming has virtually disappeared and vertically integrated giants dominate the industry. At this stage of the game, rather than increasing the ownership cap to 45 percent, Congress should be considering whether to drop the cap back to 25 percent, or reinstituting the FinSyn rules.

Inconsistencies and Contradictions in the FCC Analysis

The FCC rules are also riddled with internal contradictions. The FCC justifies getting rid of the ban on cross ownership on the basis of a discussion of the market share, or the "strength," or "influence" of individual outlets. Yet, when it comes to writing the new rule, it declares that market share, strength and influence do not matter.

The FCC defends mergers in its competition analysis, claiming that the production of news programming is difficult and expensive. Then it claims it does not have to consider market shares in its diversity analysis because the production of news programming is easy and cheap.

The FCC concludes that the top four local stations and the four major national networks should not be allowed to merge with each other because such mergers would increase economic market power, create dominant firms that are much larger than their nearest rivals, diminish the incentive to compete, and produce little public interest benefit because the merging parties are likely to be healthy and already engaged in the production of news and information products. Every one of these is a valid reason to ban a merger between dominant TV stations and dominant newspapers in the local media market. The FCC failed to apply this reasoning to cross-ownership mergers and ban dominant firm combinations.

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electronic voices that rival the booming quality of the broadcast media, but that certainly has not happened yet. If the networks truly believe that the Internet equalizes the media landscape, they should be willing to turn back their licenses and distribute their programming over the Internet (they already supplement their broadcast licenses with websites). Let them advertise their URL and have the public log onto their prime time shows and give let the broadcast licenses be enjoyed by someone else.

[9] I have submitted for the record our *Petition for Reconsideration,"* which outlines the important roles that source diversity has in ensuring "widest possible dissemination of information from diverse and antagonistic sources." (Available at *www.consumerfed.org/recon.pdf*)

I am confident that the Court will overturn the rules, but that will only send them back to the agency, which has spent two years misreading the record, misinterpreting the law and mangling the analysis. Congress should take action. The national cap was enacted by Congress. The cross-ownership ban is a bright line test that has been upheld in the courts. The evidentiary record supports both; the Congress needs to do so, as well.

The CHAIRMAN. Thank you, Dr. Cooper.
Mr. Miller, welcome.

STATEMENT OF VICTOR B. MILLER IV, SENIOR MANAGING DIRECTOR, EQUITY ANALYST, BROADCASTING, BEAR, STEARNS & COMPANY, INCORPORATED

Mr. MILLER. Thank you.

Good morning, Mr. Chairman, Members of the Committee. I was pleased to accept your invitation to appear before you today to provide my perspective of the FCC's June 2 media ownership rulemaking.

I am Victor Miller, the Broadcast Equity Analyst for Bear, Stearns. I have covered the broadcast industry for 16 years in lending and in equity research.

Today, I would like to concentrate my remarks on two issues. First, I would like to address the effect of the long-term health of free over-the-air broadcasting and related markets. Second, I would like to provide a market perspective of the FCC's June 2 order.

On the factors affecting the long-term viability of free over-the-air television, one, TV is a robustly competitive business, with ten broadcast networks, 1,372 commercial TV stations, 287 national and 56 regional cable networks. Intense competition has taken its toll on over-the-air broadcast ratings and ad shares.

Two, local TV players are facing a consolidating cable business. In 15 of the top 25 media markets, one MSO controls at least 75 percent of the local market's wire-line subscriber base. Increasing MSO concentration could adversely affect local broadcasters' retransmission discussions with MSOs and will create meaningful competition to local TV's ad dollars and programming franchises such as news and sports.

Three, some estimate that devices with ad-skipping technology could reach sufficient mass by 2005, threatening free TV's only revenue stream, advertising. If TV's single ad-only revenue stream broke down entirely, monthly cable subscriber fees would have to increase by $46 per month to replace the lost ad revenues.

Four, the broadcast TV network business is becoming less and less profitable. From 2000 to 2002, in totality, we believe the big-four networks generated only $2 billion of profits on approximately $39 billion in revenue, which is a 5 percent margin. Now, if you exclude NBC, the most profitable network, the margins fall to 1 percent, $250 million in profit on $26 billion in revenue.

Five, because the TV business has significant levels of fixed cost, declines in revenues have created extremely strong effects on cash-flow. For example, in 2001, local TV station industry revenues fell by 15 percent, cash-flow fell by 25 to 35 percent.

Turning briefly to the newspaper market, there are 17 percent fewer daily newspapers, 9 percent less circulation in the industry since 1975, despite 45 percent growth in households since 1975. Newspaper's share of measured media advertising has declined to

30 percent in 2002, from 45 percent in 1975. Newspapers have lost nearly 50 percent of one of their very highly profitable help-wanted businesses in just the last 3 years, going from $8.4 billion to $4.3 billion. From a market perspective, this likely shows the reality that there has been no change in the structure of the newspaper business in 28 years.

Now, turning to the second topic, in general, Wall Street viewed the market impact of the order to be modest. First, from a market perspective, an upward revision in the national TV ownership rules should improve the overall health of the free over-the-air TV market. Healthy broadcast networks beget healthy local TV stations, and vice versa. We hope, too, that the networks will try to acknowledge the checks and balances that their affiliates seek in relation to the networks.

Second, the FCC loosened duopoly rules and introduced triopolies into the largest TV markets. Duopolies have improved station economics, and 87 percent of duopoly stations support new broadcast networks, such as Univision, Telefutura, WB, and UPN. And except for one market, obvious triopoly candidates capture less than 1 percent of local viewing and ad share in the other ten potential duopoly markets. Triopoly rules will likely create a new viable TV entity, or preserve an existing one. However, in general, the market was disappointed that duopoly relief was not provided more widely to small and mid-sized markets.

Third, turning to the radio rule, we believe that the new geographic market-based rules of the order tightens potential local radio ownership. Our review of all 286 metropolitan areas suggest there are 214 noncompliant radio stations in 109 different radio markets owned by 47 different broadcasters. We approximate that 94 of the 214 noncompliant stations are owned by 36 private radio groups, and that these noncompliant stations represent 15 percent plus of these private stations radio groups in 13 of those groups.

Fourth, we believe there will be a modest level of deal-making that will done after the rules go into effect. We do not anticipate meaningful deal-making opportunities in the networks in the near term. We anticipate a reduce in merger activity in radio. We believe that the large national multi-media players are not interested in newspaper assets, and neither are pure-play TV and pure-play radio companies. And from a market perspective, radio stocks have declined nearly 40 percent since January 1, 2000. Local TV stocks have declined by 36 percent during that time. In both cases, local TV and local radio industry revenues in 2003 will be lower than the revenues that were achieved in 2000 for the industry, in general.

Last, I hope I can be a resource to this Committee. I have had 16 years of experience covering media, and like any analyst that works for a Wall Street firm, our firm does have relationships with several players in this industry. But my obligation is to provide investors unbiased views, and I am proud that investors have acknowledged that effort by ranking me the as number-one most trusted broadcast analyst in the Greenwich Association poll last year.

Thank you, Mr. Chairman and distinguished Senators of the Committee, for allowing me to submit this testimony.

[The prepared statement of Mr. Miller follows:]

PREPARED STATEMENT OF VICTOR B. MILLER IV, SENIOR MANAGING DIRECTOR, EQUITY ANALYST—BROADCASTING, BEAR, STEARNS & CO., INC.

Opening

I am Victor Miller, the broadcasting Equity analyst for Bear Steams. I have covered the broadcasting industry for 16 years in lending and equity research.

I appreciate the opportunity to provide my perspective of the Federal Communications Commission's June 2, 2003 Media Ownership Rulemaking.

We believe that the FCC sought to achieve two basic changes in its June 2, 2003 media ownership rulemaking:

First, we believe the FCC's rules sought to provide opportunities for local TV, local radio and local newspapers to respond to the competitive pressures of a consolidating cable business and large national media players.

Second, we believe that the FCC sought to address concerns regarding the long-term health of "free-over-the-air" TV.

Ultimately, we believe that the FCC responded to mandates placed upon it by Congress and the Courts and changes in the media marketplace. Explicitly by:

- The Telecommunications Act of 1996, which requires the FCC to "repeal or modify any regulation it determines to be no longer in the public interest" as part of its Biennial review;
- Pressures created by the D.C. District Court's decisions to remand the national TV station ownership and TV duopoly rules back to the FCC and to create policy consistent with the D.C. Court's decision to strike down the most offensive local cross-ownership rule, the cable (multiple system operator)-broadcast rule.
- Concerns relative to the longer-term health of "free-over-the-air" television.

Elaborating on the last point, I believe that there are five factors that could affect the long-term viability of free TV.

One, TV is a robustly competitive business, with 10 broadcast networks, 1,372 commercial TV stations [1] and 287 national and 56 regional cable networks.[2] Intense competition has taken its toll on "over-the-air" broadcast ratings and ad shares.

Two, local TV players are facing a consolidating cable business; in 15 of the top 25 media markets, one MSO controls at least 75 percent of the local market's wireline subscriber base.[3] Increasing MSO concentration could adversely affect local TV broadcaster's retransmission discussions with MSOs and will create meaningful competition to local. TV's ad dollars and programming franchises (local news, sports). One cable operator already captures more ad revenue than does ABC's owned and operated TV group, we believe.

Three, some estimate that devices with ad skipping technology could reach sufficient mass by 2005, threatening free-TV's only revenue stream, advertising. If TV's single ad-only revenue stream broke down entirely, monthly cable subscriber fees would have to increase by $46 per month to replace lost ad revenues.[4]

Four, the broadcast TV network business is becoming less and less profitable. From 2000 to 2002, we believe that the "big four" (ABC, CBS, NBC and Fox) networks generated only $2 billion in profits on approximately $39 billion in revenue, a 5 percent margin. Excluding the most profitable network, we believe that margins would fall to 1 percent.[5]

Five, because the TV business has significant levels of fixed costs, declines in revenue can have negative effects on cash flow. For example, in 2001, local TV station industry revenues fell by approximately 15 percent,[6] but cash flow plummeted by 25 percent to 35 percent.[7]

On the newspaper front, we believe that the FCC acknowledged the reality that the industry had not seen any deregulatory relief in 28 years. There are 17 percent fewer daily newspapers and 9 percent less daily circulation in the industry since

[1] BIA Investing in Television-4th Edition 2002, page 6

[2] Federal Communications Commission-Office of Planning and Policy Working Paper Series 37: "Broadcast Television: Survivor in a Sea of Competition September 2002, page 40

[3] Bear, Steams & Company-Television Industry Summit 2002, page 71; BIA Financial Networks—2001

[4] Bear, Steams & Company-Television Industry Summit 2002, page 42

[5] Bear Steams & Company estimate from industry sources

[6] Television Bureau of Advertising Estimate

[7] Bear Stearns "Television Industry Summit 2002" November 26, 2002, page 73; Company reports

1975 despite 45 percent growth in households since 1975.[8] Newspaper's share of measured media has declined to 30 percent in 2002 versus 45 percent in 1975.[9] Newspapers have lost nearly 50 percent of their highly profitable help wanted ad business in the last three years.[10]

Given these operating pressures combined with the deregulatory tone set by the statute and the courts, we were not surprised to see newspaper-broadcast cross-ownership relief, an upward revision in the national TV station ownership rule and changes to duopoly rules. But, in general, Wall Street regarded the relief as modest.

First, the only national rule changed by the FCC was an upward revision in the national TV ownership rule. If one believes that the long-term preservation of "free-over-the-air" TV is important, then the FCC's decision to raise the ownership cap is an essential piece of the broadcast-TV preservation puzzle. Networks essentially cross-subsidize poor network economics by owning more profitable local TV stations.

The ability for networks to at least have the option to increase station ownership is important to preserve broadcast TV's "ecosystem". Networks and their local stations are married to the same terrestrial system. Healthy broadcast networks beget healthy local TV stations and vice versa. Having said this, there are many important checks and balances that are of great concern to local broadcasters in their relationship with the networks and we continue to hope that these will be resolved.

Second, there have been some concerns voiced with the concept of duopolies and triopolies. Currently 80 percent of duopolies support the Univision, Telefutura, WB, UPN and independent TV stations. And, except for one market, obvious triopoly candidates capture less than 1 percent of local viewing and ad share in the other ten potential triopoly markets. Triopoly rules will likely create a new viable TV voice or preserve an existing one.

Third, turning to the radio rule, we believe that the new geographic market based rules that is part of the June 2 Order, tightens potential local radio ownership. Our review of radio's 286 metropolitan areas suggest that there are 214 non-compliant radio stations in 109 different radio markets owned by 47 different operators. We approximate that 94 of the 214 non-compliant stations are owned by 36 private radio groups and that these non-compliant stations represent 15 percent-plus of the stations of 13 of these private operators' groups. [11]

This reality combined with the fact that radio groups were legally assembled under the Telecom Act was the guiding force for the FCC's decision to "grandfather" non-compliant stations, we believe.

Fourth, there has been some concern with the level of deal-making that may be done after these rules go into effect. We believe that the FCC's new rules would lead to modest incremental deal activity:

- The increase in the cap is unlikely to lead to meaningful deal-making opportunities; ABC, thus far, has shown little interest in expansion, Fox seems focused on satellite TV, and NBC's and CBS's affiliates are owned by companies committed to broadcasting for the long run and which are unlikely to sell.
- Changes in radio rules probably will reduce merger and activity in radio relative to the old rule regime. M&A activity had already slowed; only 8 percent of all post-Telecom Act radio deals were done in the last three years.[12]
- We believe that large national multi-media players are not interested in newspaper assets and that newspaper ownership will remain unchanged in the vast majority of the top 100 markets.
- Deals that create undue levels of concentration will likely run afoul of the FCC's Diversity Index or Department of Justice standards.

From a market perspective, radio stocks have declined nearly 40 percent since January 1, 2000 and local TV stocks have declined by 36 percent. In both cases, local TV and local radio industry revenues in 2003 will not reach those achieved in 2000.

What is often lost in the recent debate of the FCC's new media ownership rules is that many aspects of Congress' Telecom Act of 1996 and other FCC policies have been quite successful and have served the public interest. Driven by the FCC's 1993 retransmission/must-carry rules, Congress' Telecommunications Act of 1996 and duopoly rules adopted in August 1999, the average home can view 150 percent more broadcast networks, 87 percent more local TV stations and has 725 percent more

[8] Newspaper Association of America Facts About Newspaper—2003
[9] McCann-Erickson Worldwide; Bear, Stearns—Television Factbook—August 2003
[10] Newspaper Association of American; Bear, Stearns Estimates
[11] Bear Steams & Co., Inc. "FCC on Radio" July 23, 2003
[12] Bear, Steams & Co., Inc.—Radio Fact Book—May 2003

viewing options on a national level now than in 1980. While duopolies seem controversial, they have been instrumental in creating new broadcast networks; 80 percent of existing duopolies and local marketing agreements support emerging networks such as Telefutura, WB and UPN.[13]

And the FCC's 1992 radio duopoly rules combined with the Telecom Act of 1996 helped permanently preserve the radio business; 50 percent-60 percent of radio stations' recorded operating losses *in* 1991. And radio can now compete more effectively with all other media.

There has been some considerable debate on the presence of minority operators in the broadcast business. Fortunately, some progress is being made again, thanks to Congress' Telecommunications Act of 1996 and more robust capital markets. Many companies, such as Rad1o One (urban broadcasting), Univision (Spanish-language), Hispanic Broadcasting (Spanish-language), Entravision (Spanish-language), Spanish Broadcasting (Spanish-language), Radio Unica (Spanish-language), Telemundo (Spanish-language), Salem Broadcasting (Religious) and Paxson Communications (Religious/Family Values) took advantage of the Telecommunications Act of 1996, accessed the capital markets and have assembled significant broadcast platforms. The enterprise value of these aforementioned companies currently stands at approximately $20-plus billion. Most were not public companies or were a fraction of their size in 1995. Having said that, Chairman McCain's bill should continue to build momentum in minority access to media assets.

Lastly, I want to state that I hope I can be of help to this Committee. I have had 16 years of experience covering media and I have been fortunate enough to be ranked #1 in the Institutional Investor poll during the last two years and to be ranked as the #1 most trusted analyst in the Greenwich Associate survey last year. I hope you will get the sense that my obligation is to provide investors with unbiased views and that investors have acknowledged that effort. I was asked to testify in front of the Chairman Kennard led Commission in January 1999 and by the Chairman Michael Powell-led Commission in February 2003 and have been asked to testify in front of the Senate Commerce Committee here today. Again, I hope I can helpful in today's discussion.

Thank you, Mr. Chairman and distinguished Senators of the Commerce Committee for allowing me to submit this written testimony.

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[13] Bear, Stearns—Television Industry Summit 2002, pages 90–91

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The CHAIRMAN. Thank you very much, Mr. Miller.

Dr. Noam?

STATEMENT OF ELI M. NOAM, PROFESSOR OF FINANCE AND ECONOMICS; DIRECTOR, COLUMBIA INSTITUTE FOR TELE-INFORMATION, GRADUATE SCHOOL OF BUSINESS, COLUMBIA UNIVERSITY

Dr. NOAM. Thank you very much, Mr. Chairman.

Ladies and gentlemen, good morning. I'm Eli Noam. I run the media management program at Columbia University. In my former life, I also served as a public service commissioner for the State of

New York, and so I have particular appreciation for the problems that the FCC Chairman is facing, who, I think, it should be said, in my view, is a good man with good values.

Now, you've asked me to provide some numbers to the debate. We've got, at Columbia, perhaps the best data set on media ownership and market shares, covering about 100 information industries over 20 years. So some findings for your consideration are relevant, and we'd be very happy both for the majority and the minority to answer, using our data base, additional questions you might have in the future.

Now, what we find is that the concentration of broadcast television, the most contentious issues in this debate, is a very mixed bag. We found local television station ownership on the national level, the national share of the top-four firms went up by 75 percent over the last 20 years, from 12 percent to 21 percent. But 21 percent, by the standards of the U.S. Justice Department, is still clearly within the range of unconcentrated. Now, this is not to say that those antitrust standards should be the governing standard, but they provide some relevant yardsticks.

Now, at the same time, the local concentration of broadcast television, based on our analysis of 30 representative markets, has actually declined, rather than increased, as many people believe, due to the shift of viewership away from the affiliates of three networks, and, later, four networks, to a much broader participation of stations, and I'm not even including cable television in that—that would reduce the market share still further. And furthermore, much of that decline has happened over the last 5 years.

Now, in contrast, concentration has grown considerably for radio stations. Today, with no national ownership ceiling, the top-four station groups account for 34 percent of stations by revenues, more than four times that of two decades ago. And while that is, by national antitrust standards, still not too high, what is important is the startling rapidity of that change.

Now, arguably, local concentration is the most important issue to worry about. And for radio, the four-firm concentration ratio has grown from 53 percent of the audience, held 20 years ago, to 84 percent in 2002, well into the range of highly concentrated industry.

Looking at it in perspective, local concentration of media has actually been highest for local newspapers. While the concentration of newspapers, on a national basis, is moderate, but rising, it is, on the local level, actually quite astonishingly high. Whichever index one uses, local newspapers are at the top of the list for local media concentration. But you won't read many editorials of that.

To get an overall picture, we can report the aggregate—the aggregation of these various trends before local mass media—TV, radio, newspapers, and local magazines and periodicals. And if we do that, the composite local concentration index is shaped like a big "U." From 1984 to 1996, it declined somewhat, and subsequently it rose again to a level that is somewhat higher than 20 years ago.

The CHAIRMAN. Why did that happen?

Dr. NOAM. Well, it happened after the 1996 Act, and that kind of accelerated some of the concentration of media, particularly on the radio front.

The question is, how should the FCC rules—how would the FCC rules affect media concentration now, nationally or locally? We did, last night, I have to confess, some calculations. They're still a bit preliminary—it's a work in progress—but here's what we found. If we extend the reach of the top-four television firms to 45 percent from the present 35 percent, the four-firm concentration index rises from a present 21 percent—in terms of audiences and revenues, not in terms of stations—to about 27 percent, as the worst-case scenario. This is from 21 to 27 percent. It is an increase. It's not a dramatic increase, however.

Second, the effect of duopoly and triopoly relaxation would be to raise overall local media concentration of TV, newspapers, radio, and magazines from today's HHI index of 1409 to 1483. This is some increase on an overall local media concentration, but it is still not a huge one.

In contrast, if we add to this effect of newspaper/television cross-ownership following the FCC ruling, assuming a worst-case scenario in which every one of the large TV stations buys a newspaper, or vice versa, until none are left in the city, that impact is actually quite large. It would rise from a composite local media HHI of 1409 today to 1945 for such a hypothetical situation. This would be a considerable increase.

Now, as a practical matter, the worst-case scenario is not likely to happen. Even so, I would be troubled by the potential, and I would be troubled, therefore, by the potential impact of such a cross-ownership rule on local concentration.

On the other hand, I would be much less troubled by the increase of national TV concentration due to the rise of the ceiling to 45 percent from the present 35 percent based on the data that I've reported.

Now, I'd be very happy to discuss also the proper limits on ownership, what they should be, and I can do this either now or in the question period.

[The prepared statement of Dr. Noam follows:]

PREPARED STATEMENT OF ELI M. NOAM, PROFESSOR OF FINANCE AND ECONOMICS; DIRECTOR, COLUMBIA INSTITUTE FOR TELE-INFORMATION, GRADUATE SCHOOL OF BUSINESS, COLUMBIA UNIVERSITY

Chairman McCain, Senator Hollings, Senators, ladies and gentlemen, I am grateful to join you in discussing the important issue of media concentration and ownership rules.

Let's start by agreeing that we all share an intense desire not to let the diversity of media voices be strangled by a few big companies. The ownership of news and entertainment media is important to the health of democracy. But the debate over it must be healthy, too, and relate to facts rather than be driven by some dark fears.

When it comes to concentration, views are strong but numbers are weak. We've got at Columbia perhaps the best data set on media ownership and market shares, covering about a hundred information sector industries, and going back about 20 years. We are therefore able to provide some empirical findings on trends, and we ran last night some simulations into the future that might be helpful to your considerations.

The concentration of broadcast television is the most contentious issue in the debate. So let's look at the facts. For local TV station ownership, the national share of the top 4 firms about doubled, from 12 percent in 1984 to 21 percent in 2001/2. By the standards of the U.S. Justice Department, it is still firmly in the range of "unconcentrated". This is not to say that those guidelines should be the governing standards for media, but they provide some relative yardstick. If we let the top 4 firms be permitted to reach 45 percent instead of 35 percent of national population, as the FCC ruled, then the 4 firm concentration rises to 27 percent.

At the same time, *local* concentration of broadcast TV, based on our analysis of 30 representative markets, declined rather than increased, as many have feared, due to the shift of viewership away from the affiliates of 3 networks to a wider range of broadcast stations. Whereas the largest 4 stations in a local market accounted for 90 percent in 1984, that number had declined to 73 percent 20 years later. Furthermore, most of that decline was in the past 5 years. In terms of HHI, it fell from 2,460 to 1,714. (And I am not even including cable channels in that analysis, since they do not tend to provide their own news. If we included them, the market share drop would be much higher.)

In contrast, concentration grew considerably for radio stations, where the ownership rules until the 1990s kept an industry of 12,000 stations highly fragmented, with any firm from owning no more than a few stations. Today, with no national ownership ceilings, we've gone in the opposite direction, and the top 4 station groups account for 34 percent of stations by revenues, more than four times the 8 percent of 2 decades ago.

Arguably, local concentration is the most important issue to worry about. For radio, it has grown from an average of 53 percent of the audience held by the top 4 station owners in each local market 20 years ago to 84 percent in 2002, well into the range of "highly concentrated industries". (HHI=2,400)

For multichannel TV (cable and satellite), the 4-firm concentration rose nationally from 21 percent to 60 percent. But just as important is the extent of local concentration. Here, cable used to be for a long time the only option, wielding considerable gatekeeper power. Today, with satellite TV a viable option for national programs, cable's share has declined to a still considerable 78 percent and keeps sliding.

Local concentration of media has actually been highest for newspapers. While newspaper national concentration is moderate but rising (27 percent, up from 22 percent twenty years ago), its local concentration levels are astonishingly high. Whichever index one uses, local newspapers are at the top of the list for local media concentration, with the top firm on average accounting for a market share of 83 percent, 3 percent higher than 20 years ago.

To get an overall picture, we can report the aggregation of these various trends for 4local mass media, TV, radio, newspapers, and local magazines and periodicals. We use here the HHI index, for aggregation purposes, and weigh them by the FCC's and Nielsen Media Research's determination of people's usage of the medium as a source for local news and current affairs. This composite local HHI is shaped like a big U. From 1984 to 1996, it declined somewhat, and subsequently rose to a level somewhat higher than 20 years ago.

Now the question is, how would the new FCC rules affect media concentration, nationally and locally? We did last night some preliminary calculations.

1. If we extend the reach of the top 4 firms to 45 percent, the 4-firm concentration index rises from 21 percent to 27 percent, as a worst case scenario. The HHI would rise from a very low 152 to a still low 227.
2. The effect of duopoly and triopoly relaxation would be to raise overall *local* media concentration of TV, newspapers, radio, and magazines from today's HHI of 1865 to 1933. This is an increase, but not a huge one.
3. In contrast, if we add to this the effect of newspaper-TV cross ownership, if following the FCC rule, and assuming a worst case scenario-that every one of the large TV stations buys a newspaper, until none are left in that city, is quite large. It would rise from a composite local media HHI of 1865 today to 3551. This would be a substantial increase.

Therefore, I would be troubled by the impact of such a newspaper -TV cross ownership rule on local concentration. But I would not be troubled by the increase of national TV concentration due to the rise in the national ceiling to 45 percent. On the local duopoly, the numbers indicate somewhat of an increase in concentration, but not a sharp one.

At this point, you probably want to know what the proper limits on ownership should be. There are basically 3 ways to determine this. One is the incremental approach: gradually raise ownership levels and see what happens. And if the sky does not fall in, you loosen up a bit more. The problem with this pragmatic approach is that if things go wrong, it might not be possible to turn things back. Just look at what happened in Italy where the media winner became a political power.

The second approach is to set a number of limits for each media industry, largely unconnected to each other. That's basically the system we have now.

And a third approach, which I would support, would be to have an overall local measure that takes into account all local media of TV, radio, newspaper, magazines. Because the number of newspapers in a city makes a difference, for example, to the question of how many TV stations another company should be able to own.

How high should such a composite local HHI be? Partly this is a policy question for you, not for an economist. What are we comfortable with? We could look at any past year and decide that its media concentration has been comfortable in democratic and economic terms, and maintain that level. That would be the HHI that would be a threshold, and an acquisition that would go over that line would be scrutinized closely. If we weigh the different local media firms by the attention to their news, as given by the FCC, then the average local media HHI, over the past 20 years, has been about 1708.

Such a local media HHI level would realistically be different for different city sizes. Large cities are able to sustain a larger number of voices, and their often greater diversity and number of issues also requires them. The larger the city in population, the smaller the media concentration should be expected to be. So we can actually establish a formula, with the product of population and HHI being some constant K. It would be a benchmark. How large should it be? If you determine that in the largest 20 of media markets the number of voices should be 15—TV stations with news programs, radio news and talk stations, newspapers, city magazines, local cable news channels. That translates to an HHI of about 700. If the market is medium sized, to maintain the same constant K the HHI could rise to 1,000, or about 10 equal sized voices. You'd get that from about 5 TV companies, 3 radio companies with news content, one newspaper and a local magazine.

With this approach, as new media emerge and smaller media grow, or some of the larger firms stay stable in size, the others can own more, since its not their size or holdings that is constrained but only the overall market concentration.

This would not be a hard-and-fast rule, but a threshold for greater scrutiny. It would also let local communities take a look at their own media situation and find out whether they stand. If you are interested in this approach, I will be glad to flesh it out.

None of this should suggest that local media concentration is low or that there is no need for vigilance. But it's quite another matter to call it a burning crisis and a relentless trend, as many have done in the heat of the battle. That has not been the case, and, without the newspaper-TV cross ownership rule, is not likely to become one.

Senators, thanks you for your attention.

The CHAIRMAN. Why don't you go ahead now.

Dr. NOAM. OK.

There are basically three ways to do this. One is an incremental approach. You raise the ceiling to raise the limit somewhat, and you see if the sky falls, you see what happens. And if the sky does not fall in, you loosen it up a bit further. And that's basically the approach we've been using for easily 20 or 30 years.

The second approach is to set a limit for each media industry separately, those industries one can regulate, and largely unconnected to each other. That is the approach also we've been using—something for the radio, something for the TV, and so on.

And a third approach which I would propose would be to have an overall local concentration measure that takes into account all local media—TV, radio, newspapers, and magazines. Because, for example, the number, the concentration of newspapers in a city is relevant to the extent of concentration in the television or radio markets that we would be comfortable with.

Now, how to do that. First, kind of, how high should such a composite local HHI be? This is partly—this is mostly a policy question for you, not for an economist. But what are you comfortable with? We could look at any past year and decide when media concentration has been comfortable to us in democratic and economic terms, and maintain that overall level. That HHI would be at the threshold level, and an acquisition that would go over that line would be scrutinized more closely than an acquisition that would not cross that line.

Such a local media HHI level would realistically be different with different city sizes. Large cities are able to sustain a larger number of voices, and their often greater diversity and number of issues require a greater number of voices. The larger the city's population, the smaller media concentration could be expected to be. So we can actually establish a formula, with a product of population and HHI being some form of a constant. And the policy question for FCC or Congress would be to give some guidelines on what that number ought to be, what the comfort level is, in terms of voices.

I would say, for example, that the number of voices in a medium-sized market should be around ten. That translates to an overall HHI of about 1,000, and you get that from about five television companies independent of each other, three radio companies independent, with news content, one newspaper and a local magazine.

This approach, to conclude, as new media emerge and smaller media grow, or some of the larger firms stay stable in size, others can own more, since it is not their size or holdings that is constraining but the overall market concentration.

I can flesh this out gladly, and I'll be happy to work with you, Mr. Chairman, with the minority and the majority staff on these issues, and I thank you for the attention.

The CHAIRMAN. Thank you, sir.

Dr. Napoli?

STATEMENT OF DR. PHILIP M. NAPOLI, DIRECTOR, DONALD MCGANNON COMMUNICATION RESEARCH CENTER, ASSISTANT PROFESSOR OF COMMUNICATIONS AND MEDIA MANAGEMENT, FORDHAM UNIVERSITY, GRADUATE SCHOOL OF BUSINESS

Dr. NAPOLI. Thank you, Mr. Chairman.

My name is Phil Napoli. I'm the Director of the Donald McGannon Communication Research Center at Fordham University, where I'm an Assistant Professor of Communications and Media Management in the Graduate School of Business.

I'd like to emphasize today that the analysis of the media ownership rules should place a very high priority on the diversity and localism principles and their role in assuring the effective functioning of our media system and our democracy.

While economic analysis is also vital to guiding this inquiry, it's also the case that the unique characteristics and functions of media industries require that the analytical perspective extend beyond economics. And the key question from this perspective, then, is whether ownership limits are necessary to preserve and promote the diversity and localism principles.

In recent years, efforts to answer this question have focused on exploring the relationship between media ownership characteristics and media performance. I wish to stress that we do not have, at this point, a very thorough understanding of this relationship. I think it's very important that the Committee recognize that this is a relatively new and, consequently, not particularly well-developed area of inquiry. It's only been within the past decade or so that policymakers predictive judgments regarding the relationship between media ownership and media performance have been called into question, particularly by the courts. As a result, policy analysis has not focused on such questions with the intensity that they deserve, and this field of inquiry is, consequently, not nearly as well-developed as traditional economic analysis.

I think this point is fairly well illustrated by the 12 studies commissioned by the FCC in conjunction with the media ownership proceeding. A close reading of these studies, and of our outside parties' subsequent analysis of these studies, showed that, for the most part, those studies that focus on economic issues, such as market concentration, were quite rigorous, from both the theoretical and methodological standpoint.

In contrast, much of the research that addressed non-economic policy concerns, such as diversity and localism, was less sophisticated and less rigorous from both a theoretical and methodological standpoint.

I think the FCC's diversity index provides another example at this point. FCC Chairman Powell undertook the admirable, but very difficult, task of creating an HHI for diversity. The HHI used an economic analysis is a measure that helps policymakers determine when a market has become concentrated enough that there's a legitimate danger of anti-competitive behavior. And this index is, of course, the outgrowth of a body of research that demonstrated that HHI scores are, in fact, useful predictors of anti-competitive behavior. There is a body of knowledge that gives meaning to an HHI of 1800.

In contrast, the FCC diversity index has no comparable underlying body of knowledge yet. As a result, what does a diversity index score of 1800 really mean? It's really nothing but an arbitrary measure without an accompanying body of research that tells at what point on the index particular harms associated with a lack of diversity arise. And that's the other issue that we haven't developed particularly well yet, which is, "What are the particular harms that we need to be keeping in mind?"

But, in any case, if the new diversity index had been demonstrated to be a useful predictor of when the performance of media outlets in particular media markets declines in some way, then it would be a comparable analytical utility to the traditional HHI. Hopefully, in the future we'll be able to develop a sufficient body of knowledge to have an HHI for diversity that can truly stand alongside the traditional HHI. However, we're not there yet. And to treat the current diversity index as if it has all the analytical power of the traditional HHI would be a mistake.

The question then is, do we know enough at this point to feel confident that the relaxation of the ownership rules will not result in significant harms for our media system, particularly in terms of both the diversity and the localism principles? My own work that has addressed the relationship between ownership characteristics and media performance hasn't yet produced the results that I would say are conclusive. For instance, one study found evidence that locally owned television stations, in fact, provide more public-affairs programming than stations that are not locally owned. The same study did not find any evidence that the size of a station-group owner, in terms of national audience reach, bears any relationship to the amount of public-affairs programming that an individual station provides. Of course, these findings represent only one fairly superficial mechanism for investigating the relationship between ownership characteristics and media performance, and they don't answer the question, the very difficult question, of whether a 35 percent cap or a 45 percent cap, or, for that matter, a 25 percent cap is most appropriate. Nor has the broader research on the relationship between media ownership and performance provided a consensus that could definitely guide answering that question.

In conclusion, though, we need to recognize that diversity and localism likely have value that may not lend itself to empirical analysis that is on par with economic analysis. When we talk about diversity and localism, we're ultimately talking about preserving particular decision-making structures, structures in which a greater number and diversity of individuals or organizations make determinations as to the information and entertainment available to us, and in which the individuals and organizations making these decisions are more closely tied to the communities that they serve. These structures have value independent of the extent to which they measurably affect content. This value extends from the relationship between these structures and a media system that reflects and embraces First Amendment and democratic principles. To weaken these structures on the basis of the result of economic analysis and the results of a fairly undeveloped systems of diversity and localism analysis strikes me as potentially dangerous.

Thank you.

[The prepared statement of Dr. Napoli follows:]

PREPARED STATEMENT OF DR. PHILIP M. NAPOLI, DIRECTOR, DONALD MCGANNON COMMUNICATION RESEARCH CENTER, ASSISTANT PROFESSOR OF COMMUNICATIONS AND MEDIA MANAGEMENT, FORDHAM UNIVERSITY, GRADUATE SCHOOL OF BUSINESS

I would like to emphasize that the analysis of the media ownership rules should place a high priority on the diversity and localism principles and their role in assuring the effective functioning of our media system and our democracy. While economic analysis is vital to guiding this ownership inquiry, it is also the case that the unique characteristics and functions of media industries require that the analytical perspective extend beyond economics.

The key question in this case is whether ownership limits are necessary to preserve and promote the diversity and localism principles. In recent years, efforts to answer this question have focused on exploring the relationship between media ownership characteristics and media performance. I wish to stress that we do not have, at this point, a very thorough understanding of this relationship. I think it is very important that the Committee recognize that this is a relatively new, and, consequently, not particularly well-developed area of inquiry. It has only been within the past decade or so that policymakers' predictive judgments regarding the relationship between media ownership and media performance have been called into question (particularly by the courts). As a result, policy analysis has not focused on such questions with the intensity that they deserve and this field of inquiry is not nearly as well-developed as traditional economic analysis.

I think this point is fairly well illustrated by the 12 studies commissioned by the FCC in conjunction with the media ownership proceeding. A close reading of these studies, and of outside parties' subsequent analysis of these studies, showed that, for the most part, those studies that focused on economic issues such as market concentration were quite rigorous from both a theoretical and a methodological standpoint. In contrast, much of the research that addressed non-economic policy concerns, such as diversity and localism, was less sophisticated and less rigorous from both a theoretical and a methodological standpoint.

The FCC's Diversity Index provides another example of this point. FCC Chairman Powell undertook the admirable, though difficult, task of creating an "HHI for Diversity." The HHI (Herfindahl-Hirschman Index) used in economic analysis is a measure that helps policymakers determine when a market has become concentrated enough that there is a legitimate danger of anticompetitive behavior. This index is the outgrowth of a body of research that demonstrated that HHI scores were effective predictors of anticompetitive behavior. Thus there is a body of knowledge that gives meaning to an HHI of 1800.

In contrast, the FCC's Diversity Index has no comparable underlying body of knowledge. As a result, what does a Diversity Index score of 1800 really mean? It is really nothing but an arbitrary measure without an accompanying body of research that tells us at what point on the index particular harms associated with a lack of diversity arise. If the new Diversity Index had been demonstrated to be a useful predictor of when the performance of media outlets in particular media markets declines in some way, then it would be of comparable analytical utility to the traditional HHI.

Hopefully, in the future we will be able to develop a sufficient body of knowledge to have an HHI for Diversity that can stand alongside the traditional HHI. However, we are not there yet, and to treat the current Diversity Index as if it has all of the analytical power of the traditional HHI would be a mistake.

The question, then, is do we know enough at this point to feel confident that the relaxation of ownership rules will not result in significant harms to our media system—particularly in terms of both the diversity and localism principles. My own work that has addressed the relationship between ownership characteristics and media performance has not yet produced results that I would say are conclusive. For instance, one study found evidence that locally-based television stations provide more public affairs programming than stations that are not locally based. This same study did not find any evidence that the size of a station group owner bears any relationship to the amount of public affairs programming that an individual television station provides. These findings represent only one fairly superficial mechanism for investigating the relationship between ownership characteristics and media performance and they certainly don't answer the difficult question of whether a 35 percent cap or a 45 percent cap, or, for that matter, a 25 percent cap is most appropriate. Nor has the broader research on the relationship between media ownership and performance provided a consensus that can definitively guide policymaking.

In conclusion, we need to recognize that diversity and localism likely have value that may not lend itself to empirical analysis that is on par with economic analysis. When we talk about diversity and localism we are ultimately talking about preserving particular decision-making structures—structures in which a greater number and diversity of individuals or organizations make determinations as to the information and entertainment available to us, and in which the individuals and organizations making these decisions are more closely tied to the communities they serve. These structures have value independent of the extent to which they measurably affect content. This value extends from the relationship between these structures and a media system that reflects and embraces First Amendment and democratic principles. To weaken these structures on the basis of the results of economic analysis and the results of fairly undeveloped systems of diversity and localism analysis strikes me as potentially dangerous.

The CHAIRMAN. Thank you very much, Dr. Napoli.

I want to thank all the witnesses. From your testimony, no matter where you've come at this issue, it seems to me that the issue of cross-ownership—newspapers, television, radio—has significantly greater impact than the issue of the relaxation of the national ownership cap from 35 percent to 45 percent. Would you agree with that, Dr. Cooper, no matter where you stand on the issue?

Dr. COOPER. Oh, absolutely. The separation between the print and the video media——

The CHAIRMAN. Good.

Dr. COOPER.—and the antagonism that exists is absolutely critical, and we devoted most of our attention in the comments to looking at that proposition.

The CHAIRMAN. Dr. Miller, would you agree with that?

Mr. MILLER. I am not a doctor, but I like that.

[Laughter.]

The CHAIRMAN. Well, after your——

Mr. MILLER. I'd have to do a lot more——

The CHAIRMAN.—accolades——

Mr. MILLER. I'd have to do a lot more schooling——

The CHAIRMAN.—accolades from being ranked number one maybe earned you a doctorate.

[Laughter.]

Mr. MILLER. Well, thank you.

I would say that, from a market-based perspective—I don't do policy——

The CHAIRMAN. Yes. Yes.

Mr. MILLER.—and I'm not an economist——

The CHAIRMAN. Yes.

Mr. MILLER.—that the cross ownership is reflecting the reality of a decline, an overall decline, in the newspaper business——

The CHAIRMAN. I'm asking about the degree of impact——

Mr. MILLER. The most impactful——

The CHAIRMAN. Yes.

Mr. MILLER.—on a relative basis, I would say that's true. On a relative basis.

The CHAIRMAN. Dr. Noam?

Dr. NOAM. Absolutely.

The CHAIRMAN. Dr. Napoli?

Dr. NAPOLI. I would say to the extent that we need to concern ourselves with local markets more importantly than at the national level, from a diversity and localism standpoint, that, yes, that's where we see greater cross-ownership.

The CHAIRMAN. The reason why I mention that is because there are a lot of layers to this onion. We now have the Appropriations Committee, as I mentioned earlier, inappropriately relaxing the—or rolling back the 45/35 percent rule, but not including the cross-ownership. We all agree, and I strongly agree that the cross-ownership issue is far more impactful. I mean, I'm far more worried about Gannett owning the Arizona Republic, Channel 12, Channel 10, Channel 5, Channel 3, seven radio stations, and a cable company, than I am about, very frankly, moving from 35 to 45 percent ownership in a particular market. But the Appropriations Committee has addressed the 35 to 45 percent issue, not the cross-ownership issue. Why? The National Association of Broadcasters supports the relaxation of the 35 to 45 percent, and opposes the cross-ownership rule. It's the height of hypocrisy to address one aspect of this issue and not the other.

Now that I've gotten that off my chest——

[Laughter.]

The CHAIRMAN. When I asked the five Commissioners, there was disagreement, obviously, as you know, between viewpoints of the five Commissioners on this whole issue of relaxation. But the five Commissioners agreed on one issue, and that is that there is too much concentration in radio. I think—was it you, Mr. Miller, in your statement, that there—or Dr. Noam—Mr. Miller, Dr. Noam—that there has been a startling rapidity of concentration in radio. First of all, do you agree with that? And, Mr. Miller, you can just agree factually or not. And in the case of the other witnesses, what impact does this have on this whole issue of media concentration?

We'll start with you, Dr. Cooper, and go down.

Dr. COOPER. Well, I think the radio market tells us a lesson that we actually look at in our comments, and we've looked at four major relaxation of ownership and regulatory rules across these industries. And in every case, what you saw after the rules were relaxed was a rapid concentration and merger wave. The Fin-Syn rules, the duopoly rule, we looked at the number of mergers that took place, the radio rule, and cable deregulation. So there's a simple proposition here, "If you let them, they will merge."

The fact that radio went quickly was, in part, I think, because Congress set that. And so Congress sort of did it, and they sent a clear signal that mergers would be allowed. The second important point is that antitrust will not stop it. This is Communications Act public policy, and that's why this Committee needs to think about it, as opposed to simply saying, "Let the antitrust laws take care of it."

The CHAIRMAN. Thank you.

Mr. Miller?

Mr. MILLER. In terms of radio—I'm sorry, I impolitely had my phone on here—local radio is about 37 percent of the revenue for the top five players. That compares very poorly with music, at 85 percent, MSOs, at 72 percent, and the movie business, at 75 percent. That's from a national standpoint.

On the local standpoint, Department of Justice head, Klein, in December——

Senator DORGAN. Would you repeat those numbers for me again?

Mr. MILLER. Sure. Local TV, the top-five players in revenue was 37 percent of the industry. The top-five players in local radio were 37 percent of the revenue of the industry. And the top-five newspapers was about 36 percent. So it's a lot of the circulation—I don't have the revenue numbers for those—relative to music, at 85, the multiple system operator, cable operators, at 72 percent, and the movie business, at 75 percent.

On the radio side, obviously, Department of Justice head, Klein, made some specific comments on this in 1998 about this, and basically forced billions of dollars of divestitures and set a theoretical 30 to 35 percent revenue test for the markets, which has been the effective——

The CHAIRMAN. So you don't agree that——

Mr. MILLER.—it has been an effective control——

The CHAIRMAN.—there has been a period of rapid consolidation?

Mr. MILLER. I believe there has been a rapid consolidation, but the radio business only has 8 percent of the entire revenue base, TV's got 15 percent, newspapers at 16 percent, and they have ten times the radio stations that there are television stations, it really made this market into a viable competitor with local TV and with local newspapers, I believe, and it also gave birth to a lot of new companies, such as Citadel, Cox, Emmis, Entercom, Radio One, and a lot of minority-based ones, like Salem, Spanish Broadcasting, Univision, Hispanic Radio One, and Paxson. So I do think that there are some upsides that came out of this, as well. And, at the end of the day, we had 60 percent of all radio stations not healthy in 1992. And through the original duopoly rules the FCC passed in

1992, plus the ones in the Telecom Act, I think you might have a much healthier, robust marketplace.

My stockholders, in the early 1990s, valued radio at a mid-single-digit multiple of cash-flow, and now it's a mid-teen multiple of cash-flow, reflecting the robustness and——

The CHAIRMAN. I can certainly understand that——

Mr. MILLER.—of the marketplace.

The CHAIRMAN. I can certainly understand that, Mr.

Miller. If one——

Mr. MILLER. And I'm just bringing a marketplace perspective.

The CHAIRMAN.—one organization owned every radio station in America, I think that multiple would go up even more dramatically.

Mr. MILLER. Actually——

The CHAIRMAN. Dr. Noam?

Mr. MILLER. OK.

Dr. NOAM. Well, I'm somewhat less sanguine. I would say that the industry, at some point, was perhaps overly fragmented. That is, that we had 12,000 radio stations nationally, and nobody could own more than a handful. And so maybe it was just about the least concentrated industry of just about anything in the United States.

But now we've kind of gone the other direction, and now we have the marketshare, on average, for the top four companies in the 30 markets that we've studied is 84 percent, which strikes me as very high.

The CHAIRMAN. Wall Street would like to see it at 100 percent. Profits would be even higher, Mr. Miller.

Mr. MILLER. It has not translated to that, because the radio business actually has less revenue than it does in 2003 than it did in 2000. The stocks are down——

The CHAIRMAN. So your multiples——

Mr. MILLER.—46 percent.

The CHAIRMAN.—are higher, because they're doing worse, Mr. Miller? I didn't——

Mr. MILLER. Well, the multiple——

The CHAIRMAN. I was born at night, but not last night.

[Laughter.]

Mr. MILLER. Well, the——

The CHAIRMAN. Go ahead, Mr. Miller.

Mr. MILLER.—the multiples were higher in the year 2000, by about ten multiple points, than they are now. So—well, not ten; maybe six to seven multiple points higher then than they are today, reflecting the fact that industry revenues are only going to be up about one-and-a-half to 2 percent this year, after being down 8 percent in 2001. So we have not been able to see—you would think that advertisers would be the one complaining about radio concentration. And right now——

The CHAIRMAN. Oh, not at all. Advertisers love radio concentration, because they only have to make one contract,

Mr. MILLER. Again, I wasn't——

Mr. MILLER. But the——

The CHAIRMAN.—born last night.

Mr. MILLER.—but the radio industry has not been able to—there's no market power with a radio station saying the only way you're going to get on is to pay 5, 10 percent more, because the industry revenues are proving——

The CHAIRMAN. Mr. Miller——

Mr. MILLER.—that over the last 3 years they're actually down.

The CHAIRMAN. Mr. Miller, if it's the only game in town, you have to go to the only game in town, and if you control, as in the case of Minot, North Dakota, every radio station, you only get—it's one-stop shopping. And, therefore, the parent corporation is going to make more money. This is fundamental economics.

And so please don't—you know, I respect your views. They're just not logical, nor are they reflected in reality. I've noticed that disconnect between Wall Street and Main Street on other occasions on other issues.

Mr. Noam?

Dr. NOAM. I would add that while, of course, radio is smaller than the other media that Mr. Miller described, that in certain time periods, such as drive time, and it's really, for most people, the only connection to news and media, and so, in that window at least, there is definitely influence in market power.

The CHAIRMAN. Dr. Napoli?

Dr. NAPOLI. I think it's important that we remember that, I think, of all the mass media, radio has been the one best able to serve and reflect the needs and interests of local communities. And I liked it very fragmented in that regard. And in many ways, things that have happened in the past few years, such as low-power FM that have struggled to come to fruition are an effort to sort of maintain that sort of orientation to local radio. And to the extent to which that goes away, and the lack of the extent, I think, to which alternative technologies are picking up that function, I think concentration in that area is something, particularly at the local level, that we need to be very concerned about.

The CHAIRMAN. Senator Dorgan?

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

Senator DORGAN. Mr. Chairman, thank you very much.

Is it true you were born at night?

[Laughter.]

Senator DORGAN. Well, check those birth records.

[Laughter.]

Senator DORGAN. First of all, let me say to the Chairman I appreciate very much his calling this hearing. He's talked about this issue at some length and indicated he was going to hold a hearing of this type, and I think it's really important for us to try to work through, here in Congress, what we expect from the basic requirements of those who have free licenses to use the airwaves, airwaves that do not belong to them.

And the reason we have a Federal Communications Commission, Mr. Chairman, as you know, and don't just rely on antitrust legislation, for example, or antitrust laws, to deal with this issue of concentration is because this industry has a different responsibility. Otherwise, we wouldn't have an FCC. You wouldn't need it dealing with the issue of mergers and so on with respect to radio and television. You'd just say, "Well, let Justice evaluate whether there's an antitrust issue here." But we don't do that. We have an FCC. Why? Because we require certain different things from this industry—localism, competition, public interest. Those are requirements. And the FCC is supposed to be wearing a striped shirt, have a whistle in its mouth, and be calling the fouls here and be the regulator on these issues.

And I know the Chairman of the FCC has had great angst about what I have said about the FCC, and I'll repeat it again, because it is not meant to be personal to Mr. Powell, but it is meant to reflect my very strongly held view. This new set of rules caves in, in my judgment, completely and quickly to the special interest, and, in my judgment, in contravention to what I believe is the public interest.

Now, let me ask an obvious question. Someone just mentioned that radio, many years ago, was the least concentrated of these industries. What's wrong with that? It seems to me that having a less concentrated industry in which the radio station in your home town is actually owned locally, is broadcasting the baseball games, is talking about the local charity, understands what's happening in the community and what the importance of relative issues are before the city council. It seems to me that's exactly what localism is about. And so I don't see a problem with less concentration. I certainly see a problem with more concentration.

Mr. Miller, I think, is viewing concentration through the lens of dollars and cents. That's obviously one way to value things. But the issue of localism and diversity and public interest doesn't lend itself to dollars and cents, does it?

So, if I could, I'd like any of you to answer the question, What is wrong with less concentration in this industry? Is there anything wrong with that?

Dr. COOPER. There's nothing wrong. And let me make an important point, because Mr. Miller has held out the one place where we have to worry about that. And his proposition is that, and the Chairman has said it is—in his campaign to save free TV, ignoring how many people don't watch free TV anymore—but the proposition is the following, and it has always been true, that we are better off with a concentrated station, one that is bought out by someone else, than no station at all. That's their proposition. And the interesting thing is, the old rules already accommodated that situation. And that's the important point, is the old rules had a failing-firm waiver, just as the Department of Justice has. And so if you go into the FCC or the Department of Justice and say, "I'm about to go out of business. Let somebody buy me," even though it violates your standards, they will let that happen. That was good enough in this industry. Maximizing profits is not what this is about. Preventing failure of firms is okay.

So the answer to your question is, absolutely, the less concentrated the media markets, the better off we are, and if there's a financial distress situation, the old rules already accommodated that situation. There was no need to change these rules on that proposition.

Senator DORGAN. Anyone else?

Dr. NOAM. Well, Senator Dorgan, on media concentration, in radio concentration, as far as I can tell, actually, those were not—

the deregulation of radio ownership ceilings was not done by the FCC, but actually by Congress, including this Senate.

Senator DORGAN. Absolutely.

Dr. NOAM. In fact, the Chairman was one of the few people that did not vote for this Act. And so I don't think we should lay this at the doorstep only of the FCC. Now, we've learned something from it, and concentration clearly has increased, increased here quite considerably.

At the same time, we also should not romanticize localism in radio. The radios—most of the radio stations, whoever owns them, carry a variety of programs, either provided by networks that are national in origin, or providing music that essentially is provided also nationally by whoever produces the music, those five companies Mr. Miller described. And so it's not really all that local, except for some of those kind of news, and that news has also declined, and had already declined before this concentration trend, for various economic trends, which is that it is expensive to produce.

Senator DORGAN. Dr. Noam, now where do you get that information from? You say local stations, locally owned stations are really not local? There is a radical and dramatic difference between programming of those stations that are owned by a group that has 200 stations or 1,200 stations than there is with respect to the programming of locally owned stations. Are you describing some study that doesn't exist? I hope not.

Dr. NOAM. Whether the station is owned locally or owned nationally, some of the same economic pressures apply to them all. They would like to have audiences. And if the audiences crave certain type of programs, the stations will offer it to them.

Senator DORGAN. Well, let me just tell you that the previous hearings we've held here describe that the syndicators of programming that is moved nationally have a—in many ways they're joined at the hip with the same companies that own the stations. We understand what's being packaged is a homogenized programming that's sent out, and who it's sent out to. But I would say to you, if you have information that I'm not aware of that suggests that locally owned stations have essentially the same kind of programming that the stations owned in large concentration holdings, or programming—I disagree with that, but if you have information, I'd prefer that you send that to me.

Dr. Napoli?

Dr. NAPOLI. I think your question, sort of, reminded me of what I thought was a bit of a paradox in the entire analytical procedure in going into the relaxation of these rules, and that was specifically—one of the guiding forces underlying the relaxation of the various caps has been to facilitate competition, but it's particularly defined in terms of intermedia competition. As you point out, a highly unconcentrated, highly competitive radio market does sound great. And, in fact, the rationale behind allowing greater concentration in a number of these industries is, in fact, to facilitate so that, for example, broadcast can better compete with cable, or radio can better compete with newspapers in the marketplace. Yet, at the same time, very often the rationales that are also employed throughout the—particularly in terms of the report and order from June 2, emphasized that. In fact, these different media operate in different marketplaces and are not particularly substitutable for many advertisers. They're not even particularly substitutable for audiences.

So, at best, what I viewed here was there was a need to, sort of, develop some sort of cross-subsidization process for cross-media owners, not one that necessarily looked at competition the way we traditionally think about it, but really looked at trying to facilitate competition across media sectors. And I don't know if that should be as strong a policy priority as it has been.

Senator DORGAN. Let me ask Mr. Miller. According to the Federal Communications Commission, most radio markets are dominated by one or two firms, which have an average of 74 percent of the market's radio and advertising revenue. That's at odds with the answer that you gave to the Chairman that—your suggestion was, look, there's no great concentration here, it is not of great concern. But the fact is, you live in this concentrated area locally, and you buy advertising locally. And if you're a business on Main Street in a town in which two—let's say two firms, two radios or two television stations, average 74 percent of the market, is that healthy? Is that competition, in your judgment?

Mr. MILLER. Well, first of all, my statistics at 74 percent—I would like to send you my view of—I've got them for top 50, top 100, top 150 markets. I don't have that level of concentration for two players.

Senator DORGAN. Do you think the——

Mr. MILLER. But I'd like to——

Senator DORGAN.—FCC is wrong?

Mr. MILLER. Their data may be different than my data. They could have different sources than my data. They——

Senator DORGAN. You're welcome to say they're wrong.

Mr. MILLER. They could be——

Senator DORGAN. I happen to think they're wrong from time to time.

[Laughter.]

Mr. MILLER. No, it just differs from mine, and I'd certainly like to reconcile that. But in your earlier point, you've got to remember that ratings are the lifeblood of local radio stations. You cannot just ignore a local market and think that you're going to generate ratings sufficient enough to earn the advertising dollars from your local advertisers. Because, let's face it, radio is—80 percent of its revenue is local, so obviously the advertisers are very in tune with the value that a local radio station brings them, and you cannot ignore the fact that if no one is listening to the station, you won't get paid.

You know, the other thing you've got to remember—Dr. Cooper mentioned something interesting in his statement when he said that when things are failing, that's a time at which you might be able to basically have more concentration. Remember, in radio, we had so many move-ins, so many additional new radio stations were put into the marketplace in the 1980s. And you combine that with a 6 percent drop in the revenues of the business in 1991, and you had 60 percent of radio stations actually operating at a loss. So, in 1992, the Commission made a slight adjustment and allowed people to own two stations, two AMs, two FMs, in the same market, and up to 40 stations nationwide. The Telecom Act took that one step forward with the radio business—we preserved the radio industry; now we want to make it a viable competitor relative to other local media.

Now, one other thing I just want to mention on your original question was on cross-ownership. You've got to remember, the court struck down the most defensible local cross-ownership rule that I can think of, which is the cable MSO broadcast cross-ownership. So theoretically, the largest cable system, which could have 75-percent-plus of the local wire-line subscribers, which I mentioned, in 15 of the 25 markets, could buy the largest television station in the marketplace.

Now, for the other entities, for the FCC to be consistent with that and the reality of what is happening, we think, in the TV business—you may not agree with me, Dr. Cooper—and what we see in the newspaper business—again, you may not agree with my point of view—you have to be consistent with—if you're going give relief to someone that has that kind of market share, you would think that newspaper/broadcast cross-ownership, TV/broadcast cross-ownership would not be that offensive. And you often bring a chart, which you don't have today, of the media concentration in the large players.

Now, what's interesting is, you could actually say that this FCC rule is more targeted to local media, other than the cap, and I can talk to you about what my stance is on the cap later. But it was to say, OK, you've got this consolidating cable business, you have this encroaching national media marketplace, what protections can you have for the relative value—that's how we look at the market, looking at these two encroachments—the ability to have cross-ownership to preserve local TV, local newspapers, local radio, relative to the realities of the marketplace and the reality of the court's decision.

Senator DORGAN. Mr. Miller, you know, I used to teach economics, very briefly, and I was very poor at it, I'm sure, but I overcame that experience.

[Laughter.]

Senator DORGAN. And, you know, the market is a wonderful thing. It is the finest instrument, in my judgment, known to man for the allocation of goods and services. It is, of course, imperfect. Sometimes it is perverse in its result. I've told my colleagues before that, you know, a shortstop for a baseball team makes the equivalent of 1,000 elementary school teachers in a year. That's the market. Judge Judy, that out-of-sorts judge on television, makes $25 million a year. That's the market system. Judge Rehnquist makes $180,000. So, I mean, I could go through the market system at great length. It is not a perfect system, as you know.

And, interestingly enough, the discussion about the market system really has little to do with that which is important with respect to broadcasting. Because these rules and these issues have interest in what we see, read, and hear in this country of ours, which is essential to a democracy—free flow of information. And the fewer people that control that which we see, hear, and read, in my judgment, the less desirable for our democracy.

And you started by saying, for example, that "the over-the-air free TV is in jeopardy, therefore"—that's what you were implying. Let me tell you what Barry Diller says, quote, "Anybody who thinks the networks are in trouble hasn't read the profit statements of those companies. The only way you could lose money in broadcasting is if somebody steals it from you." Now, you know, I've also read some of the financial sheets of these companies. It's a hard case to make, really a hard case to make, that somehow they're impoverished.

And I just want to make one final point to you. You're talking about dollars and cents, and you're talking about cost and value. And I'm talking about public interest, localism, and diversity. And there isn't any way that you can, through that prism of yours on Wall Street, put a value on that, nor should you. That happens to be a public-policy function. And that's why this hearing is so important. Regrettably, there are very few people at this hearing. But the Chairman, I think, understands the value of these issues.

Incidentally, I agree with the Chairman that the cross-ownership piece of this is the more odious piece. Regrettably, I think, because my legislative veto, or the Congressional Review Act that passed the Senate will now likely be waylaid by the House and perhaps vetoed by the President—regrettably, I think we probably will not see success on this issue. And the cross-ownership piece that has been given us now by the FCC is probably going to stick. And I regret that very much. This FCC will be seen as having made the biggest mistake, in my judgment, of an FCC in dozens and dozens of years. And it'll have to do, yes, I think, with the 45 percent, but I think, more, it'll have to do with the cross-ownership piece, which, in my judgment, was almost un-—well, I shouldn't use this language. So let me just say it was wrong and try to imagine better language than that.

Mr. MILLER. Senator——

Senator DORGAN. Dr. Cooper——

The CHAIRMAN. Could we let Mr. Miller respond. You're——

Senator DORGAN. Yes.

The CHAIRMAN.—welcome to respond. And Dr. Noam and Dr. Napoli, if you'd——

Mr. MILLER. No, I——

The CHAIRMAN.—like to respond, you're welcome to, also.

Mr. MILLER. I am an analyst. I look at the marketplace. I look at the pressures on the marketplace. I look at pressures on the model. When you—on one of the charts that you show, which is very interesting that you always have, it shows how many different players there are and how much concentration they have, in terms of viewership. You could stand back, from my standpoint, and say, well, there's probably no other conclusion that you'd reach.

The networks are competing against a highly—or a more concentrated cable business that is saying they want to reduce programming costs. So if you're losing leverage to the cable operator, what are you likely to do? You're likely to try to add more—buy more cable networks, add more distribution so that you can counter that leverage.

Also, don't forget that in 1993, a retransmission consent agreement, I believe sponsored by the Federal Communications Commission, came into being, and every 3 years the networks are allowed to say, "I would like to get paid for my TV stations or some other form of payment." What most networks decided to do was add new programming services. So, at the end of the day, that's not a bad thing, because I think it creates value for these network players, it creates a new thing for you and I to watch, hopefully that we like, and it just makes sense from what the market pressures are.

So all I'm trying to do here is give you a sense of what pressures the market is exerting on these things, and that's why you see what you do in the marketplace.

I'm not—I do not do public policy, you're exactly right. I just want to give you my perspective to the Commission. That's it.

The CHAIRMAN. Thank you, Dr. Miller.

Dr. COOPER. Senator McCain, Senator Dorgan, the interesting thing is, obviously we lament the concentration in the cable industry, as well. And we've heard some noise out of Congress about that from time to time.

Two important points. One, first of all, the fact that the networks have used the retransmission rights and the end of the Fin-Syn rules to completely dominate the airwaves is extremely important. So what we've had is the migration from over-the-air to to-the-wire, but it's integrated within one company. And so we showed that the five owners of broadcast networks—and there are only five, you know, even though there are more networks, or major networks—had recaptured between two-thirds and three-quarters of the eyeballs they claim they're losing over the air in their through-the-wire offerings, and that is a power that you gave them through the right of must-carry and retransmission.

And so you have to analyze this industry as a vertically integrated industry in which they know they do over-the-air for prime time high advertising dollars, and then they re-purpose on their cable operations, and they produce it all themselves, and they own it all themselves now. And you simply cannot pull out free TV and say it's going to die if you don't let them own more stations, because they own the whole shebang using the powers that you folks have given them. First observation.

Second observation. An interesting suggestion, that the court overturned the cable broadcast ban—actually the only one it vacated; all the other ones have been remanded, and I think there's a difference between remand and vacate, but some people—the FCC keeps saying there is none—but they vacated that rule, and that was not on the First Amendment grounds, it was not even very well vetted in the proceeding, and we were upset about that. And the suggestion that since the court did that, "They will overturn all these other rules," is simply reading way beyond what the court said. In fact, the court said they take no position on any of the levels of these voices. They didn't tell the FCC to get rid of these rules.

Third observation, very interesting, about inconsistencies. The FCC looked out at the TV market and said, "You know, we can't let the top four TV stations in a market merge." It's a dominant-firm problem. They looked out at the national TV market and said, "We can't let the dominant national networks merge." It's a strategic-group problem. And they gave a series of reasons about too much market power, too big compared to the second competitor, no public-interest benefits. And yet they never considered the same proposition with respect to dominant TV stations and dominant newspapers, which, of course, are to a greater extent, more of a threat to local news and information, and they failed to apply that dominant firm exclusion. Had they done that, the aspect of this rule would have been completely different. But there is no reason that they failed to do that. And, obviously, that is one of the things we are going to point out to the court. Had they done a dominant-firm exclusion for cross-ownership, you would have had an entirely different debate here.

The CHAIRMAN. Thank you.

Dr. Noam, do you want to comment?

And, by the way, you've helped me answer my—I think you're helping me answer my question about how much is too much, et cetera. At least you've provided us with something to look at, as far as a formula is concerned. And I think it's very appropriate that you point out the difference between large markets and small markets. So I thank you for that.

Go ahead.

Dr. NOAM. Well, thank you very much, Senator McCain.

I think that, addressing Senator Dorgan, I doubt that there are many people who disagree with the principle that economics isn't the only thing in media, and that issues of democracy have to be considered. I just don't think that that's, kind of, the stark choice. So the question is always, kind of, the balance of the free market and free speech and the diversity of speech and so on. The question is exactly where you want to be in that continuum.

I mean, clearly we don't want to have a situation, say, like in Italy, where the winner in the media business also kind of gained political power that's not a situation we want to go to. But, at the same time, the other extreme, the 12,000 different owners of 12,000 different stations without any economies of networking and so on is probably also going too far in the opposite direction.

Therefore, this seems to me an issue that's largely a pragmatic type of issue of different market and different media that is resolvable once we, kind of, climb down from, kind of, positions in which the other side has described as anti-democracy.

The CHAIRMAN. Dr. Napoli, do you have anything to add?

Dr. NAPOLI. First of all, I thought I might pick up on the free-TV issue threat a little bit, because I think it came up before. And, to me, I think the appropriate way to think about it is to think back to when—I remember it was a number of years back when the FOX network, I believe spent a ridiculous amount of money on football, more than they could ever possibly earn back in ad revenues for the NFL broadcasts. And strategically it was described as—almost as a loss leader, that the football broadcast acted as a valuable platform for cross-promoting other content offerings. And I think it may be possible we're heading into an era when we might need to start thinking about—and, in fact, I suspect that firms are starting to think about the broadcast network business as something of a loss leader as it becomes the platform by which audience exposure and attention is generated for content that's on cable holdings and also audience exposure and interest is generated for content that is then distributed on later distribution platforms, such as cable, DVD, et cetera, which is now content—which the networks are able to maintain an ownership interest in through that stream.

So we're in the midst of a changing business model, and I, personally, wouldn't be as concerned if the networks' profits, narrowly defined, are not what they used to be, the same way I'm not concerned that apparently most films don't earn back their production costs in the theatrical box-office window anymore. There's a shift in business model, I think, that technology is creating here.

Dr. COOPER. Senator, one point. In our documents we filed for you, we adopted Dr. Noam's ten-firm limit. We applied it rigorously across markets, and we found that there would be ten markets in which you could tolerate cross-ownership mergers, 20 or 25 where you could tolerate TV mergers. We applied those rules in this record, submitted it to the Commission, and they obviously went in a very different direction.

The CHAIRMAN. Thank you.

Just a comment, Dr. Napoli. I think you would agree that that buying of the football rights basically, at least in the view of most, legitimized the entire network. So you would view it, perhaps, in the long run as a very smart investment.

Dr. NAPOLI. Right. But an investment—in other words, if you were to look strictly at what they earned on ad revenues on football——

The CHAIRMAN. Yes. So there's more to it than just economics, which I think is what Senator Dorgan—the point we're trying to make.

Go ahead, Byron.

Senator DORGAN. Well, let me say to Dr. Noam, I don't know whether you were referring to something you heard this morning, but no one talked about another side being against democracy or—what I talked about was, in my judgment, the highly concentrated industry in information is antithetical to the free flow of information, which I think is the foundation of democratic values. But I don't want you to suggest that you heard this morning somebody said, "Well, if you're on the other side of this issue, you're against democratic values." So I just didn't want your statement to lay there. Maybe you heard it somewhere else. I don't know.

Yes, proceed.

Dr. NOAM. I think the broader context is—and this is why I think people differ in their perspective here, Senator—which is, there has been, indeed, an increase in concentration in the last five, 6 years in media, cross-media, and all over the place, and it's not just in the mass media that we're, kind of, discussing here. But there has been a decline over the last 20 years, so you do you have that same U-shaped curve that is for—since 1984, even, kind of, after the AT&T divestiture, things had, kind of, come down for awhile and then climbed up again. They have not normally, in most media industries, climbed back to the level of 20 years ago. So if you look back 20 years, there is less of a problem than if you look back 5 or 6 years. So it's a bit of a glass half-full/half-empty. There's a good chance that these things will correct themselves, because some of these large media mergers are unstable. And Time-Warner and AOL, that doesn't seem to be going very well. And Vivendi is, kind of, in trouble. And who knows who's going to be next? So some of these things are self-correcting, and others you, as policymakers, are dealing with.

Senator DORGAN. Mr. Chairman, if I might, I——

The CHAIRMAN. Sure.

Senator DORGAN.—might make two additional quick comments. One, individual companies will follow the rules, and, because they serve the interest of their stockholders, will attempt to maximize profits in following the rules. It is not anyone's province to blame companies for concentration. It's the rules. And that's why the recent controversy we've had, and the votes, have been about rules themselves. What are the rules, and how shall the rules be enforced?

And, second, Mr. Miller, you were asked here because you're an analyst, so I didn't——

Mr. MILLER. I am.

Senator DORGAN.—I don't want to browbeat you because you're talking about economics. That was your job here, and I appreciate that.

Mr. MILLER. Of the marketplace, yes.

Senator DORGAN. Of the marketplace. And I——

Mr. MILLER. Equity analyst.

Senator DORGAN.—I think—I mean, that is a piece of this. I didn't say it wasn't a piece of it. I think there's——

Mr. MILLER. Absolutely.

Senator DORGAN.—another piece. And I want to just ask one question of your testimony. On page 4, you say, "On the newspaper front, we believe the FCC acknowledged the reality that that industry had not seen any deregulatory relief"——

Mr. MILLER. In 28 years.

Senator DORGAN.—"in 28 years." Yes. How can one really deregulate the newspaper industry? What are the regulations that inhibit that industry? As you know, for example, in North Dakota, I think there's one daily newspaper that is owned in the state. All the rest are part of a big chain. So I——

Mr. MILLER. Well, it's a fair—maybe it's a bad phraseology, as they say. In the newspaper business, it's the ability to have other options in linking up with a television station or a radio station, so I apologize for that. As you know, there are about 21 newspaper/TV cross-ownerships that have existed since 1975. There's 27 newspaper/radio cross-ownerships.

What's interesting is, had we seen a public outcry from these—you know, remember, every 5 years, in the old days, now 7 years, you have to go through a license renewal process. And at any point someone can say, "Hey, you know what? This relationship is unhealthy for our local market, and we're against it." But we have not seen any of those in the last three decades.

And the other thing, we did a study that showed the early news and the late news performance of a newspaper/TV cross-owned group versus the second- and the third-ranked TV station news. And, in general, the first-place news beats the second by about 50 percent, and the first beats the third place by about 200 percent. So you could reach the conclusion that newspaper/television cross-ownership, to a certain extent, improves local news meaningfully enough that it actually shows up in the ratings.

Senator DORGAN. Mr. Chairman, again, let me just observe, in a separate industry with respect to the licensing and the consumer opportunities, we've been through this with respect to railroads, and there's not much more concentrated in this country than the railroad industry, and there are, I think, nine pending rail rate complaints. You know why? It doesn't pay to complain. Nothing happens. Ever. Ever. And so when you say, you know, people have a right when the license is up, the fact is that, you know, they're going against a 500-pound gorilla, and you're not going to see a barrel full of complaints.

But, again, this has been an interesting panel. I have to be over on the floor of the Senate in just a moment, so I'm going to have to leave, Mr. Chairman. But I, again, appreciate your putting together a really interesting panel coming at this issue from different directions.

And the testimony of all of you has been very valuable, I think, to the record of this Committee.

The CHAIRMAN. Thank you, Senator Dorgan.

You wanted to wrap up, Dr. Cooper?

Dr. COOPER. Well, I just wanted to respond to this last point. Because we looked at the question of whether or not those cross-ownerships produce better news—and here's the point. It's not—he's told you that the number-one station, which is cross-owned, gets a larger share. The public-policy question is, Is there more news in that market? Because we've lost an independent voice here, and that's a cost—not an economic cost, but a public-policy voice. And we looked, and you could not show that there was more news done in those markets. What you had shown is that an entity that was cross-promoting catches more eyeballs. And that's good for economics, but I'm not sure it's good for our democracy if you can't also show me there's a lot more news in that market.

The CHAIRMAN. Mr. Miller? Go ahead, Mr. Miller.

Mr. MILLER. I believe that cross-owned stations actually produce sizably more news than other players.

Dr. COOPER. But it's the total news in the market that we worry about, you see. You're absolutely right, they produce, they drive the others out, but the question is, does that marketplace have more total news and more diverse news? And that, you can't tell. There's no doubt they produce more, but that's because they have cannibalized the other stations that can't own the number-one newspaper. And, believe me, here's the fundamental problem, is that if we could have fair and balanced competition between four combinations—but the problem is that the average number-one newspaper, which is going to own a number-one TV station, will have 60 or 70 percent of the newspaper market, 30 or 40 percent of the TV market; and the number-two guy is going to have a 10 percent newspaper and a 20 percent TV station. And that's competition that just can't get balanced.

The CHAIRMAN. Mr. Miller, before this debate continues, let me just give you an example of the kind of practical real-world situations that I'm trying to work my way through. And Dr. Noam's formulas may be helpful here. But let me just give you a specific example.

Gannett owns the Arizona Republic and Channel 12, the NBC affiliate. That's fine. I have never seen any problem at least—nor have I ever heard a complaint about it. No one has said, "Hey, I'm not getting diversity and localism out of my media outlets in the City of Phoenix," one of the larger media markets in America.

Mr. MILLER. Right.

The CHAIRMAN. Is it OK for Gannett to own Channel 12, as well, Channel 5, as well, Channel 15, as well, or one or two of those, or all of the above? This is what—I still—again, as I said, and I'll say it for the third time, perhaps Dr. Noam's formula can be helpful in here. But I don't know where the breaking point is.

Mr. MILLER. Right.

The CHAIRMAN. Now, again, and I don't mean to be combative with you, but I think if Gannett owned them all, I think that they would make more money than they do now by only owning one, because the advertisers would have no place else to go.

Setting that aside, at what point is media concentration crossover between efficiencies and economics to the point where we repeat, if not the Italian experience, certainly something that deprives average citizens of a broad variety of issues and localism and viewpoints?

Dr. COOPER. Well——

The CHAIRMAN. Dr. Cooper, I know what your opinion is.

[Laughter.]

Mr. MILLER. Well, let's look at newspaper/TV in Phoenix, specifically. I believe Phoenix actually qualifies as a triopoly market, where you could actually own three television stations in that marketplace. Now, in general, in the studies we've done, duopolies—in other words, that second station—80 percent of them capture less than 5 percent of the revenue share of the marketplace, and 80 percent of them support Univision, Telefutura, WB, FOX, pure Independents. So, in general, I think what's happened with duopolies is they've actually helped establish brand-new networks and give them firm footing to create competition against Gannett's owned and operated stations in that marketplace.

The triopoly candidates, other than in San Francisco, where you have Young Broadcasting, has a sizable independent that might be of interest to three companies.

The CHAIRMAN. In L.A., you've got——

Mr. MILLER. You have—well, Viacom has two stations, Cox has two stations, and General Electric has two stations. But, aside from that, there is a 1 percent revenue share and 1 percent——

The CHAIRMAN. But I'm not talking about revenue shares. I'm talking about——

Mr. MILLER. Well, but, in other words, they'll try to create a—hopefully what would happen is, we'd create a new entrant into the marketplace that would maybe run news 24 hours, 7 days a week, that would be of value to people in Phoenix. Now, if they go overboard, you're going to see the Department of Justice, I imagine, who's made comments with radio consolidation. I'm not a Justice Department lawyer. I'm just assuming that the Justice Department would know when enough is enough.

But Gannett, you know, if you look at their overall audience, I believe their audience, over the last 3 years, has declined amongst their station group by about 10 percent as they compete with a lot of the new entrants and the cable entities.

The CHAIRMAN. As I say, I am perfectly satisfied with the status quo. My question was, at what point do you deprive the people of the place where I live of localism, diversity, and begin to reach a danger point?

Mr. MILLER. I guess duopolies have created more viewpoints, although not——

The CHAIRMAN. So, therefore, using that logic, triopolies would be even better.

Mr. MILLER. Well, if you take a 1-percent-revenue-share and 1-percent-audience-share station and make it into a 24-hour/7-days-a-week news channel that's for Phoenix, I think that viewers in that marketplace might accept that type of concept. So that's all I'm saying. I mean——

The CHAIRMAN. I see.

Dr. Noam, do you agree?

Mr. MILLER. That's all I'm saying.

Dr. NOAM. Well, I'd say that, kind of, if you want to increase diversity, there are several ways of going about it. One is to restrict or even roll back mergers and acquisitions. The other one is to open and to provide for more voices. And that would be one way also to go about it and to think about it. For example, I mean, people want to be able to start new local low-power television stations as well as radio stations. And one way to go about this is to say, well, if the newspaper wants to own a TV station, then it should be a news station, a UHF, but, even better, a low-power station, one of those stations that haven't been, kind of, approved yet. And that would give such low-power stations instant credibility as well as, kind of, a feeder of information and news. So there are, kind of, positive ways to look at this, not only negative, not only restrictive.

Similarly, you can go through this licensing process and increase diversity by focusing also on minority-owned stations in similar ways in which you, kind of, create diversity within those news stations that you license.

The CHAIRMAN. As we all know, minority ownership of both radio and television stations has gone down, rather than up, as we have seen these consolidations. So we've been headed in the opposite direction here. Is that correct?

Dr. NOAM. That is empirically correct, and, in fact, it would, therefore, suggest that one way to go about it is not so much by limiting people buying and selling, but rather by, kind of, creating new outlets for minority ownership, and thereby establishing that diversity that has been lost through some of those consolidations.

The CHAIRMAN. Dr. Napoli?

Dr. NAPOLI. Since we're on the subject of minority ownership, we conducted a study—just to add to the challenges we're already talking about here—that examined what are the factors that affect the value of radio-station audiences, and we found two significant determining factors of the value that advertisers pay for radio-station audiences was, in fact, minority composition. That is, stations that had the greater the percentage of an audience that was either African American or Hispanic, the less stations were able to earn, on a per-audience-member basis for those stations, for those audiences. And given the fact that—some of my colleagues' research has shown that it's minority owners that tend to provide content that serves minority interest and concerns, so they have a greater likelihood of doing that, find ourselves in a situation where there is an economic hurdle to maintaining stations of this type that's addition to the hurdle that might exist to obtaining one in the first place.

The CHAIRMAN. Mr. Miller and then Dr. Cooper.

Mr. MILLER. One success of the Telecom Act is we do have public companies that are now basically only focused on minorities, which we didn't have before the Telecom Act. We have Uni-—well, Univision was a public company, but hardly at this scale. Salem Communications, as a Christian broadcaster, was not a public company. Spanish Broadcasting was not public. Radio One, which is the largest urban radio broadcaster in the country, was not a public company, and neither was Paxson, which is a religious family values programming vehicle.

So it has not been all a failure, because at least there are some companies with access to the capital markets, access to the equity markets, access to banks, that hopefully will build these groups up to be much larger than they are today. And hopefully we'll have new entrants, as well.

The CHAIRMAN. Dr. Cooper?

Dr. COOPER. Again, it's interesting. We supported the two concepts that Dr. Noam has suggested, and the example that Mr. Miller gave, because it's easy to give you an example in which he takes a small TV station that doesn't do news and says, well, Gannett's going to buy that one, and that doesn't harm the public interest, and actually we support that. The problem is that, well, Gannett might buy a big TV station that already does news under this rule. And so the sensible approach, as I've suggested, was, you have a series of situations in which you allow mergers to go forward because they—we know they will add a voice. And he's given you an example of where they add a voice. But I'm telling you, the money lies where you get market power, where you get a big newspaper that buys another big TV station, not a little TV station, or another big newspaper. And that's the problem with the rules, is that they give a blanket approval to every merger, cross-ownership merger, in 180 markets, and they don't say "only the little ones," which is the perfect example. I support that example. That's what the rule should have said. Only the little ones who don't do news, none of the——

The CHAIRMAN. Next time, Mr. Miller, we'll have two microphones there.

[Laughter.]

Dr. COOPER. We're getting friendly over here.

[Laughter.]

Mr. MILLER. Look, Mark, none of the top-four TV stations can merge in a market, so you cannot have two large stations, affiliate stations——

Dr. COOPER. They can own a newspaper.

Mr. MILLER. No.

Dr. COOPER. They didn't give me that dominant——

Mr. MILLER. No, you said two television stations that were two dominant TV stations. You can't do that. You can only own one of the top four.

Dr. COOPER. But a dominant TV station and a dominant newspaper can merge.

Mr. MILLER. Your example was adding a second TV station that was of—I just want to clarify that.

The CHAIRMAN. Well, I think we're getting down in the weeds here. I'd rather——

[Laughter.]

The CHAIRMAN.—defer to my friend, Senator Lott, but isn't it true in L.A. now? You've got the *L.A. Times* owning two of the television stations?

Mr. MILLER. Is that *Tribune*?

Dr. COOPER. I believe it is.

The CHAIRMAN. I think we're losing sight of the big picture here. Senator Lott?

At least I am.

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

Senator LOTT. Well, thank you, Mr. Chairman, for having this hearing and continuing to make sure that we are getting all the statistical and scientific information that we need to take the right positions on these FCC rules in the future in broadcast and print media.

My position's pretty clear. I feel pretty strongly about all this. And you may have even asked these questions. Let me just ask a couple of questions.

First of all, as I understood it, when the FCC Commissioners were here, and we were questioning them about how did they come up with 45 percent, the best explanation we received was, well, basically, you know, you put it, or you all put it, in the Telecommunications Act, 35 percent, after a lot of debate. It was down to 25 percent, and we settled on 35 percent. But he said, "Well, now two groups are basically over the 35 percent now, so we probably—we need to go to 45 percent." Is that all, you know, the justification for it? I mean, why 45 percent?

Senator McCain and I have talked about this, and he has made the point. Most people think that a cap, at some level, is probably a good idea. The question is, what is the level? How do you make that determination? Why 35 versus 45? Why not, you know, 37-and-a-half or 50? What is the basis for moving it up to 45? If it's just because they've gone over 35, then what are we going to do when they get to 45, 55, 65? Are we just going to keep moving it up?

So that's my question, if any of you would like to address that. What was the more substantive basis for the decision that was made to go to 45?

Dr. Cooper, you want to——

Dr. COOPER. Well, I don't think there was a substantive basis. But in my testimony today, I suggest that the 35-percent figure, given the vertical integration, which we've talked about a great deal here—given the vertical integration, given the control of cable channels that the parents of the broadcast owners have acquired, the 35-percent figure actually is a figure that turns up in the antitrust literature as a monopsony power number. Now, monopsony power is the flip side of monopoly power. That is, we worry about monopoly power, we worry about someone controlling too many products sold through the marketplace. With monopsony, the networks buy from TV producers. And if they get too big, they can control which producers sell to them. This is the control of purchases.

And so one can argue—and if you go back and look at the antitrust practice, the figure of 30 or 35 percent actually is the trigger where antitrust officials—and maybe for First Amendment, we should do better—actually start looking, worrying about monopsony power. And there will be a big debate about, you know, the kinds of products and those kinds of things.

But if you look at the literature, that's a pretty good darn place to start your concern, and then you can work up or down from there. I, frankly, think we should have gone back to 25 percent, but that's a different question.

Senator LOTT. Mr. Miller?

Mr. MILLER. Thank you, Senator Lott.

Let me tell you what the marketplace perspective is. Again, I'm a Wall Street analyst. I'm trying to look at what I think market forces are in compelling some of the changes.

First of all, the marketplace suggests that the network business has been less and less profitable. So if we look at the 3-years of revenues and profit from ABC, CBS, NBC, and FOX, we have $38 billion in revenue and $2 billion of profit, which is a 5 percent margin. Now, if we strip out NBC, we get down to $250 million on $26 billion of revenue. So it's a 1 percent margin basis.

When we look at the marketplace, we believe there are two networks at any given time, given ratings pressures, that are losing money. And, in fact, Disney, we believe, last year, between its networks and the profits it made at its stations, was breakeven. So the whole broadcast TV, the network plus the owned and operated stations was about breakeven in profit.

Senator LOTT. I wonder if they wouldn't get an idea from that, that they're not doing a good job.

[Laughter.]

Mr. MILLER. Yes, well, their——

Senator LOTT. Their product is not being enjoyed and used by the people.

Mr. MILLER. Well, their—you're exactly right—their ratings are down 36 percent in the last three seasons, so that's not particularly great.

But the bottom line is, if you have weak networks, you probably are going to have weak affiliates. It's an ecosystem. If you have healthy networks, it is great for stations; healthy stations, great for networks.

So what's interesting is that we actually saw live examples of people taking advantage of the cap because of the poor economics of the networks. The FOX network, when it went on the air in 1986, was not making a lot of money, and it didn't make a lot of money until—well, it hasn't made a lot of money, period, but it raised the ownership of its TV station base to help subsidize the losses at the network.

Viacom and then CBS only, lost 28 percent of its distribution in 1 year because of affiliation switches, where FOX stole a lot of their affiliates. And their ratings went very poor. They bought a larger TV station base that—which overall subsidized.

Now, what's interesting is, both of these networks now have the NFL. Why? Because they have so many NFL cities that they can actually make enough money on the local stations to legitimize paying $500 million to $600 million a year for these. Because you're—you know, the Monday night football is a loss leader, and FOX wrote off $800 million, I believe, of the football contract.

So why we thought 45/50 is, it doesn't allow a super voting share for the networks to dominate the affiliates, because, you know, the affiliates are worried about advertising inventory, rejecting programming, assignment, compensation. So we felt that would allow some of balance.

Now, also, if we roll back the cap to 35 percent, what's going to happen is, CBS and FOX will sell UPN affiliates, because that's the one that'll take them under the cap. Now, the UPN network is only on the air because the losses at the network are being borne by the fact that they own affiliates.

Now, what's interesting is that if you look at the composition of the demographics just of the UPN network, 65 percent of the viewership is African American. So that if you take away—if you strip out the UPN network, there's a good chance UPN will not survive. So that's why we think rolling back the cap doesn't make complete sense.

And, last, everyone talks about the largest TV groups, if you take all the owned and operated stations of Viacom and FOX—we did a study recently, we would be happy to give it to you—and you look at the sign-on/sign-off audience, so the average number of households tuning into these stations from 7 a.m. to 1 a.m., it's two million households. There's 108 million households in America. There's 1.9 percent of the total TV audience that's actually watching the specific owned and operated TV stations.

Thank you.

Senator LOTT. I don't think each one of you needs to respond. However, Dr. Noam, if either one of you would like to respond on that one, I've got another question.

Dr. NOAM. I will be very brief, Senator.

I think your question is a correct one, why 35, why 45? On some level, it's arbitrary; but at another level, it's a logical next step. What we have is, kind of, this increasing openness of media in which other channels are emerging on cable, on satellite, Internet and other ways, and as that increases we can loosen up the restrictions on the stations.

The question really is the pacing. I'm totally convinced that whatever the Senate does now, in a few years there will be 45 percent, and at some point you will support it. But the question is really the timing. That is, how much is the opening proceeding with the loosening up. And I think that's what we have to argue over.

Senator LOTT. An interesting point.

Dr. NAPOLI. I may be delivering bad news here, but maybe not. I would argue that you really can't achieve the kind of specificity that you're asking for until you develop a system that very specifically outlines and measures the kinds of diversity and localism concerns and harms that you want the cap to prevent. And this may be too much to ask, at least in the short-term, and it may, in fact, be a reflection of the fact that we're going too far in terms of applying methods of, say, antitrust analysis, that kind of analytical framework, to the diversity and localism objectives that underlie these policies. So you might have to find yourself in a position where you say, look, this cap doesn't seem to be—need to be at this level in order to prevent anti-competitive behaviors, from a traditional economic sense, but we're going to impose it anyway, on the basis of diversity and localism concerns, and we may not, in fact, even be able to measurably show why it needs to be there in the name of diversity and localism concerns, in which case then you find yourself in the position of needing to go forward and develop the rigorous First Amendment analysis that will help the cap withstand the judicial scrutiny that it would likely come under in that situation. But that's been the change of perspective I think that's taken place in recent years, and that's the enormous, sort of, empirical challenge that those who want these caps to exist for non-economic rationales face.

Senator LOTT. I think I understand that.

[Laughter.]

Senator LOTT. Now, let me ask one other question, because I know Senator McCain's chairing this and maybe has other questions, or maybe we're ready to wrap it up, but, you know, I've always had an interest in media and telecommunications, and was involved, in my early years, with radio, and I'm a big fan of radio. I'm one of those candidates for office that still believes radio is a good political tool in the campaign. A lot of people have quit doing radio and billboards. I still think those work. A lot of people listen to radio that don't even pay any attention to TV.

But, having said all of that, I have not had that big a problem with this consolidation of radio stations and, you know, one or two companies owning more and more and more, partially because there were so many other options and because our lifestyles have changed so much. I mean, I've made this speech on the floor of the Senate, I miss the old remotes, where the local radio station went to the opening of the new Market Street Furniture Store, and "Come on down and get a ticket to win, you know, a lamp." There was something really neat about that, unique. The localism is gone in my home town. You know, it's just not there. If I want to listen to music, good music, I have to listen to a station 19 miles away in Biloxi, Mississippi. And that's what the consolidation has led to.

I didn't see it as that big a problem, because, you know, we did have the options of television and media and the Internet and all these other things. But that's what happened when we basically said to the radio industry, "You can—you know, you can go ahead. You know, we deregulate. Consolidate all you want to."

Why do we think that the same thing is not going to happen if we go with what the FCC did, both in networks and with the cross-ownership? I mean, I just—I don't want to pick on, necessarily, the one newspaper in my home state, but I get a Gannett newspaper. And my home state, Jackson, Mississippi, I—I mean, does anybody really believe they're not going to buy WLBT, the biggest television station, and two or three of the biggest and best radio stations, and further dominate the news and the views that are given, which the people summarily reject in the state repeatedly? But they're going to continue to force-feed it to us, even though we don't want it, don't like the programming, don't like their editorial policy, don't like their news, just generally don't like them. But we have to buy it, because that's it. You know, you want to see what is on sale at Miss Kelly's Furniture Store, you've got to buy the Clarion-Ledger to get their whole-page ad, even though I've told them you get more bang for the buck if you do TV.

[Laughter.]

Senator LOTT. So, you know, that's what I think's going to happen. You can get into all kind of nuances of localism and ownership, and you can overanalyze it. But, in my opinion, I think that if we do what they've done here, if you go with it, you're going to have more and more and more concentration, and I don't think that's good for the general public.

Dr. Cooper, I suspect you're anxious to agree with all that.

Dr. COOPER. Well, we looked at an interesting proposition. We started down the markets and asked two questions, because Mr. Miller has made a point that some people—newspaper business is not like the shoeshine business or the vegetable business; it's a very specialized business. You need experience to get into it. And we also asked the question—we know that the major networks are not going to sell their O&Os. They spent a lot of time accumulating them, and they'd like to accumulate more. So we asked a simple question. In how many markets, in which markets, is there an available top-five TV station that's not an O&O and a corporation that has experience in the newspaper business? Because this is where the mergers are going to take place. And actually—and there won't be acquisitions. There will be lots of swaps, because there's that benefit. And you know what? We went through the top 50 markets, and we excluded one, and I'll have to go back and look at which one. The simple fact of the matter is that this market is out there, primed. It turns out that the top—there are 12 newspaper corporations in this country that also own TV stations. It turns out they own 20 percent of the newspapers and 10 percent of the TV stations already. And what they want to do is swap so they get the leverage of the cross-promotion. And so this will be a fertile field, and we do think that that will happen. It's not that they have a lot of cash. Mr. Miller will tell you they don't have a lot of cash. But if you can work a swap where you've got a top–50 TV station over here, but a newspaper over there, and you swap them, you don't have to—a lot of cash doesn't have to change hands, and you accomplish the concentration that you want.

So we do think that there is that fertile field. There won't be a tidal wave, but there will be a constant pattern. And when we are done, we would expect those deals to get done. And we stopped at 50 markets. You know, that's where 75 percent of America lives.

Senator LOTT. In the interest of time, I'd like to get the opposing view. Mr. Miller, have you got a different view?

Mr. MILLER. Well, I'd just like to—we've actually looked at the four major rules and what we think would actually occur, in terms of transactions.

First of all, in the radio business, we think there's—we did a survey of the top 280-—well, the only 286 metros there are. We looked at every radio station, every combination under the new rules. And we found that we have 214 non-compliant stations in 109 radio markets with 36 private and 11 public companies, ranging from $1,800,000 in revenue all the way up to $3.2 billion, being affected. And 13 of those private companies, who would be anywhere between 15 and 50 percent of their stations, would have to be divested under this new ownership rule. So we think that actually tightens somewhat.

On newspaper/television, we don't believe any pure-play radio operator will buy newspapers. We do not believe any pure-play TV operator will buy newspapers. We do not believe any of the companies that Senator Dorgan has on his chart will buy newspapers, because Disney had the opportunity and actually sold their—because they bought them through Cap Cities, and sold those off to Knight Ritter. They were not interested in those properties whatsoever.

Now, the problem is, you've got to remember, a lot of these newspapers have been owned for a very, very long time, and they tend to have a low tax basis. So for a family to sell a cash-flow positive thing that they've had for years and years, and then pay horrendous tax implications, will also, we think, diminish some of the activity.

So we don't believe—we think maybe a dozen of the top-100 markets that we've done in our analysis—and Dr. Cooper may have a different analysis—would potentially see some change.

On the cap, what's interesting there is, if you look at the ABC affiliates, the largest ABC affiliate is Hearst-Argyle, the second one is Scripps, the third one is Cox. CBS is Meredith, Gannett, and Belo. NBC is Gannett, Hears-Argyle, and Belo. These are the—we don't believe these are the type of companies that have any interest whatsoever in selling out to the networks. So while theoretically we'd like to see the option available to networks in the long-term, if, indeed, the model gets worse and worse and worse, if you look at the available pool, it's not very attractive.

Last, the duopoly/triopoly issue. We actually didn't think there was enough relief in the duopoly business for some of the smaller markets where you have very, very small economics relative to larger markets. So, for example, you don't—in 50 of the 100 markets, between 51 and 150, you can't do any duopolies in TV. Yet if you look at the mid-—let's look at the markets 61 through 70. They get 8.2 times less revenue than the top–10 markets, and their cash-flow is 12 times less, even though they're in same business, but their cap-X is a lot higher because the digital buildout is proportionally more impactful to them.

So we actually thought it would be helpful to preserve some of the smaller TV groups, to have more duopoly, not less. But since that didn't happen, then we'll obviously not have any deals in those 50 markets.

Other than that, there's some concern over the triopoly.

Senator LOTT. Maybe we should have done that.

Mr. MILLER. Pardon?

Senator LOTT. Maybe we should have done that. That last point.

Mr. MILLER. Well, on triopoly there's some concern—how could someone own three television stations? Well, the average triopoly candidate, other than in San Francisco, has 1 percent revenue share and 1 percent audience share. So we don't see, on balance, a lot of deal-making coming out of this rulemaking.

Senator LOTT. I guess part of my problem is, when you look at the business decision of the corporate giants that own the networks, and even some of these other—some of the other companies, and the decisions of the media companies, why would anybody have any confidence in them doing the right thing in the future? I mean, their track record is pretty abysmal, in my opinion.

Mr. MILLER. Are you talking about the networks, specifically?

Senator LOTT. I'm talking about GE and Disney and the networks, too.

Mr. MILLER. Yes. Well, what's interesting is, the people that I pointed out that would be likely candidates to buy their stations, like Hearst, a Scripps, a Cox——

Senator LOTT. And all of those——

Mr. MILLER.—they're unlikely to——

Senator LOTT. Include those, too. Yes.

Mr. MILLER.—they're unlikely—oh, include those, too?

Senator LOTT. Yes.

Mr. MILLER. Well, I mean, I have—I mean, if you look at Hearst-Argyle, Belo, Gannett, or Cox, they have some of the best news ratings in the country. They finish at the top of the heap in their affiliation versus even——

Senator LOTT. I wonder if it's because what other option do the people have? I mean, they own the big newspaper in a big town. What else are you going to read?

Mr. MILLER. Oh, I'm sorry, I was just referring to the television stations.

Senator LOTT. OK. Well, I'm——

Mr. MILLER. I'm sorry.

Senator LOTT. You know, I am going back——

Mr. MILLER. I just——

Senator LOTT.—and forth. But that does—that's kind of the——

Mr. MILLER. Yes, sir.

Senator LOTT. I'm worried about the cap, but I'm also worried about the cross-ownership.

Thank you, Senator McCain, for letting me get in there.

The CHAIRMAN. I want to thank the witnesses. This hearing has been very helpful. We'll be having more of them. This issue is not going away. But the information we received today is extremely helpful.

I thank the witnesses.

The hearing is adjourned.

[Whereupon, at 11:15 a.m., the hearing was adjourned.]

A P P E N D I X

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

Mr. Chairman:

Thank you for holding this hearing on media ownership concentration. You have been diligent in making sure that the Committee has all of the information it needs as we grapple with this controversial subject.

Today, we will hear from a panel of media market experts. The economic impacts of the media ownership rules are certainly very important.

As a former businessman, I appreciate the fact that businesses need efficiencies of scale as they try to provide a product or services that consumers want and are willing to buy. That's true for automakers and it's true for broadcasters.

But we need to remember that the airwaves constitute a *public asset* to be managed and regulated by government. There may be doubt about whether spectrum is infinite, but there is *no* doubt that it is a public asset. Because it is a *public* asset, the *public interest* must always prevail.

The need to protect the public interest is even more pronounced when one considers that the media transmit news and information.

Democracy is based on the free exchange of *plentiful* and often-times *opposing* ideas and views. Maintaining that diversity of views serves the public interest.

Share-holder concerns about profitability are secondary. It might be "efficient" from a business standpoint to allow a company like Clear Channel to dominate the airwaves, but it's *not* in the public interest.

Thank you, Mr. Chairman.

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