
THE FCC'S TELEVISION DUOPOLY RULE: IS THE THIRD TIME THE CHARM?*

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I. INTRODUCTION

Almost since its inception, the Federal Communications Commission (“FCC” or “Commission”) has employed its broad authority under the public interest standard of the Communications Act of 1934, as amended,¹ to impose limits on the ownership of broadcast stations.² Always controversial, Commission broadcast ownership policies have come under Supreme Court review on three occasions³ and led to congressional intervention on many others.⁴

The debate about whether and to what extent the public interest requires or permits these limits in today’s video marketplace has now resurfaced. In

* Cf. *Covad Communications Co. v. FCC*, 450 F.3d 528, 531 (D.C. Cir. 2006) (upholding FCC unbundling rules under 47 U.S.C. § 251, and concluding that “the Commission’s fourth try is a charm”).

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¹ Communications Act of 1934, 47 U.S.C. §§ 307, 309 (2000).

² See, e.g., *In re Genesee Radio Corp.*, Flint, Mich. Application For Construction Permit, *Statement of Facts, Grounds for Decision, and Order*, 5 F.C.C. 183, 186–87 (Mar. 2, 1938). See generally Herbert H. Howard, *Multiple Broadcast Ownership: Regulatory History*, 27 FED. COMM. B.J. 1, 3–4 (1974).

³ See *Nat’l Broad. Co. v. United States*, 319 U.S. 190 (1943) (limiting network ownership of stations in the same area); *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956) (limiting to seven the number of AM, FM, and television stations that could be owned nationwide); *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775 (1978) (noting the prohibition on newspaper-broadcast cross-ownership).

⁴ See, e.g., Second Supplemental Appropriations Act, Pub. L. No. 98-396, § 304, 98 Stat. 1369, 1423 (1984); Consolidated Appropriations Act, Pub. L. No. 108-199, 118 Stat. 3, 99 (2004); Telecommunications Act of 1996, Pub. L. No. 104-104, § 202, 110 Stat. 56, 110–12.

July 2006, the Commission released an order, as required under the biennial (now quadrennial) review process established by Congress in the Telecommunications Act of 1996 (“1996 Act”),⁵ launching its third such review of the limits on broadcast ownership.⁶ This debate promises to be no less controversial than it was the last time around, when Commissioner Copps exclaimed:

Don't tell me that those of us who feel strongly about this are being too emotional As for the emotion, I have seen the concern, the deep feeling and outright alarm on the faces of people who have come out to talk to Commissioner Adelstein and me all across this broad land. Are they emotional? You bet. And I think they are going to stay that way until we get this right.⁷

However the Commission resolves this review process, running the judicial gauntlet thereafter will not be easy. Following the Commission's initial 1998 Review, the D.C. Circuit rejected the basis for two of the Commission's rules and went so far as to direct the Commission to repeal a third, based on challenges that they were insufficiently deregulatory.⁸ Following the Commission's 2002 Review, the Third Circuit invalidated the underlying basis for much of the Commission's decision,⁹ this time in light of concerns that a different Commission had been *too* deregulatory.¹⁰ In-

⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 110-11.

⁶ *In re* 2006 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets, *Further Notice of Proposed Rulemaking*, 21 F.C.C.R. 8834 (June 21, 2006) [hereinafter *2006 Notice*]. The Commission's first review began in 1998. *See In re* Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, *Report and Order*, 14 F.C.C.R. 12903 (Aug. 5, 1999) [hereinafter *1998 Review*]. The Commission's second review began in 2002. *In re* 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownerships Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area, *Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13,620 (June 2, 2003) [hereinafter *2002 Review*], *aff'd in part and remanded in part*, Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004), *certs. denied*, 125 S. Ct. 2902-04 (2005).

⁷ *2002 Review*, *supra* note 6, at 13,955 (Copps, Comm'r, dissenting).

⁸ Fox Television Stations, Inc. v. FCC, 280 F.3d 1027 (D.C. Cir. 2002) (*Fox I*), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002) (*Fox II*); Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002).

⁹ Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004), *certs. denied*, 125 S. Ct. 2902-04 (2005).

¹⁰ *Id.* In the view of the Commission minority, the agency had “empower[ed] America's new Media Elite with unacceptable levels of influence over the media on which our society

deed, that court took the extraordinary step of preserving its stay of the Commission's decision indefinitely, "pending our review of the Commission's action on remand, over which this panel retains jurisdiction."¹¹ In doing so, the Third Circuit has imposed a substantial further stay of any changes to the very rules that Congress requires the Commission to revisit.¹²

In its 2006 Review, the Commission will reassess a number of different broadcast ownership rules,¹³ some of which seem destined for substantial relaxation. In the 2002 Review, the Commission recognized the need for significant relief from its limits on cross-ownership of newspaper, radio, and television stations, and the Third Circuit did not appear unreceptive to such relief if structured consistently and articulated rationally.¹⁴ While some speculate that these cross-ownership limits are now less of a priority for large media firms, which are concentrating much of their attention on

and our democracy so heavily depend." *2002 Review*, *supra* note 6, at 13,951 (Copp, Comm'r, dissenting).

¹¹ *Prometheus*, 373 F.3d at 435. The Third Circuit's directive raises the interesting question of whether challenges to the 2006 review will be transferred to it under 28 U.S.C. § 2112(a)(5). Ordinarily, transfer is appropriate following remand of "the same or [an] interrelated proceeding," where necessary "to maintain continuity." *See, e.g.*, *Eschelon Telecom, Inc. v. FCC*, 345 F.3d 682, 682 (8th Cir. 2003) (order granting request for transfer) (quoting *Public Serv. Comm'n for New York v. FPC*, 472 F.2d 1270, 1272 (D.C. Cir. 1992)). Here, however, the 2006 review will address not only the Third Circuit's remand, but also a statutory mandate for a quadrennial review proceeding in light of the current state of competition, independent of the remand order. It was for that reason that the Third Circuit itself rejected the argument for continuity and consistency, made by the FCC and other parties seeking a transfer to the D.C. Circuit based on that court's 2002 remand of the previous review of the same rule. *Prometheus Radio Project v. FCC*, No. 03-3388, at 4 (3d Cir. Sept. 15, 2003) (order denying transfer motion). The panel majority rejected Chief Judge Scirica's reliance in dissent on "the fundamental jurisprudential underpinning that agency decisions on remand should be reviewed by the remanding court." *Id.* at 7.

¹² The extension of this stay was not accompanied by any of the usual findings required for equitable relief. Such relief seems in tension with the statutory requirement of periodic review of these rules in section 202(h) of the 1996 Act, and the established principle that "the function of the reviewing court ends when an error of law is laid bare." *See FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 792 n.15 (1978) (quoting *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952)); *see also FCC v. Pottsville Broad. Co.*, 309 U.S. 134 (1940) (dissolving writ of mandamus issued following FCC's decision to implement different result following remand); *NLRB v. Food Store Employees Union, Local 347*, 417 U.S. 1, 9-10 (1974); *Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 817-26 (1973).

¹³ The Commission has solicited comment on the local television and radio ownership rules, the limits on newspaper/broadcast and radio/television cross-ownership, and the dual network rule. *2006 Notice*, *supra* note 6, ¶¶ 11-33. The quadrennial review no longer includes the national television ownership limits, but the Commission has asked whether the new proceeding may and should reconsider the UHF discount used in calculating compliance with those national limits. *Id.* ¶ 34-35. *See also Prometheus*, 373 F.3d at 396-97 (3d Cir. 2004), *certs. denied*, 125 S. Ct. 2902-04 (2005).

¹⁴ *Prometheus*, 373 F.3d at 402-03.

Internet-based strategies for delivering video programming,¹⁵ the television duopoly rule remains an open question. That rule, which is the focus of this analysis, generally bars common ownership of any two of the top four rated television stations in a single market, or any two stations in markets with fewer than eight independently-owned full power television stations.¹⁶ Incumbent television broadcasters in smaller markets will be particularly concerned over whether the Commission will be able to provide them meaningful relief from the television duopoly rule in its 2006 Review, especially in light of these prior court decisions.¹⁷

A lot will be riding on the answer to this question. Whatever the financial health of the “giants that own the TV networks and the cable systems,”¹⁸ the future faced by owners of television stations in smaller markets is quite different.¹⁹ These smaller-market firms are challenged by increased competition for advertising revenues from cable, direct broadcast satellite operators, and other emerging multichannel providers.²⁰ They face changing advertising demands based upon widespread Internet penetration.²¹ Their traditional compensation payments from ABC, CBS, Fox, and NBC have been reversed, and they are losing their traditional exclusive local distribution rights for popular network programming.²² Finally, they are incurring substantial expenses associated with the 2009 Digital Television (“DTV”) transition,²³ without thus far being able to deploy DTV

¹⁵ See Frank Ahrens, *As FCC Digs Into Ownership, Big Media No Longer Cares*, WASH. POST, June 29, 2006, at D1. *But see In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee, Memorandum Opinion and Order*, 21 F.C.C.R. 8203, 8366 (July 13, 2006) (Copps, Comm’r, dissenting) (“Believe me, this party is far from over.”).

¹⁶ 47 C.F.R. § 73.3555(b) (2002) (codification of the duopoly rule).

¹⁷ See Letter from David K. Rehr, President & CEO, Nat’l Ass’n of Broadcasters, to the Honorable Kevin J. Martin, Chairman, Fed. Commc’ns Comm’n (Feb. 8, 2006) [hereinafter *Rehr Letter*], available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518324593.

¹⁸ *2002 Review*, *supra* note 6, at 13,953 (Copps, Comm’r, dissenting). See also *id.*, at 13,981 & n.17 (citing 70% prime time share collectively held by five media conglomerates: Viacom, Disney, AOL Time Warner, NewsCorp, and NBC/GE); *id.* at 13,982 (Adelstein, Comm’r, dissenting) (“It is not the Commission’s job to make sure every big television network makes money . . .”).

¹⁹ See *Rehr Letter*, *supra* note 17 (citing “unprecedented financial pressures” on smaller market television broadcasters).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* (noting loss of network compensation along with DTV transition as substantial expenses).

channel capacity to create new revenues of the kind that provide their largely unregulated cable competitors with what the Commission has recognized to be a significant “competitive advantage.”²⁴

In the face of these industry trends, even the Commission minority that strongly opposed other deregulatory aspects of the 2002 review did not seem to dispute the majority’s conclusion that broadcasters’ ability “to compete successfully in the delivered video market is meaningfully and negatively affected in mid-sized and smaller markets.”²⁵ Moreover, in past reviews, opponents of duopoly relief have focused their attention on the prospects of “triopolies”²⁶ and on other ownership rules, such as the newspaper cross-ownership ban and the national ownership cap. With respect to the duopoly rule, Commissioner Adelstein recognized in dissent that “common ownership may be appropriate . . . in the smallest of markets where proven localism gains may outweigh the diversity harms.”²⁷

Still, there is no doubt that, at least for mid-sized markets, there remains substantial opposition to further relaxation of the duopoly rule. This opposition stems from views about the “special role” that local television stations are perceived to play in our society, as “the primary source of news and information.”²⁸ It also reflects fears about the irreversibility of consolidation and “homogenized” programming based on the “Clear Channelization” of radio after the 1996 Act.²⁹ In Commissioner Copps’ view, that experience “should *terrify* us as we consider visiting upon television and newspapers what we have inflicted upon radio.”³⁰ Ultimately, the dispute here may also reflect what has been identified as “the tension between satisfying and shaping media experiences.”³¹

These competing views pose a real challenge for the Commission’s 2006 Review of the television duopoly rule, particularly in light of the close judicial scrutiny of the Commission’s prior efforts and the inevitability of further appeals this time around. This article highlights five key topics that the Commission will inevitably face in this exercise, as to which it has not always taken a consistent view. The Commission must first decide what,

²⁴ 2002 Review, *supra* note 6, ¶ 62.

²⁵ *Id.* at ¶ 201. See also 2002 Review, *supra* note 6, at 13,953 (Copps, Comm’r, dissenting); *id.* at 13,982 (Adelstein, Comm’r, dissenting).

²⁶ See 2002 Review, *supra* note 6, ¶ 186 (permitting common ownership of three stations in markets with at least 18 stations).

²⁷ *Id.* at 13,998.

²⁸ 1998 Review, *supra* note 6, ¶ 18 & n.34, ¶ 58, ¶ 68 & n.119. Such views about “the most influential of all communications media” are deep-seated. See *In re* Amendment of Section 73.636(a) of the Commission’s Rules relating to Multiple Ownership of Television Broadcast Stations, 5 Rad. Reg. 2d (P & F) 1609, ¶ 6 (June 21, 1965) (proposing a “top fifty” policy).

²⁹ 2002 Review, *supra* note 6, at 13,952, 13,988 (Copps, Comm’r, dissenting).

³⁰ *Id.* at 13,952.

³¹ Ellen Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1395 (2004).

exactly, Section 202(h) means in the face of uncertainty about the future effects of duopoly relief. It must then articulate more clearly its vision of an economic market for “delivered video programming,” and explain how that market differs from the “marketplace of ideas.” Its updated competition and diversity analyses must avoid the internal inconsistencies of its past efforts, and its diversity analysis must address the dangers of relying on the popularity of broadcast voices as a justification for legal restrictions on them. Finally, the Commission must pay closer attention to the record in assessing the need for a ban on top four station duopolies in the smaller markets.

Since both the D.C. Circuit and the Third Circuit have made clear that they will pay close attention to how the Commission’s position does or does not conform to its earlier views on these questions, it is important to address each of them in light of the analytical framework relied upon by the Commission in its 1998 and 2002 Reviews.

II. THE COMMISSION’S 2006 REVIEW OF THE TELEVISION DUOPOLY RULE

A. Presumptive Deregulation: What Exactly Does Section 202(h) Mean in the Face of Uncertainty About the Future?

In *Fox Television Stations* and *Sinclair Broadcasting Group*,³² the D.C. Circuit essentially concluded that the Commission had posed the wrong question in its 1998 Review. Instead of asking whether there existed any persuasive basis to *keep* the rules at issue, the agency had adopted a “wait-and-see approach” in order to gather data as to whether there was a persuasive basis for revising or eliminating them.³³ Due to the absence of certainty as to what the effects of greater media consolidation might be on competition and diversity, the court’s shifting of this burden of persuasion is an important one.³⁴ As with the prior reviews, a threshold question in

³² *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (*Fox I*), modified on reh’g, 293 F.3d 537 (D.C. Cir. 2002) (*Fox II*); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

³³ *Fox I*, 280 F.3d at 1042, 1044, 1048; *Sinclair*, 284 F.3d at 164.

³⁴ For example, while the study commissioned by the FCC for the later 2002 review “provide[d] evidence of substitution by consumers” among different media, it concluded that it “cannot completely answer the question” about intermedia substitution for news and information. Joel Waldfoegel, *Consumer Substitution Among Media 3* (Fed. Comm’n Comm’n, Media Ownership Working Group, 2002). Similarly, the correlation between ownership and viewpoint is one whose degree, the Commission found, “cannot be established with any certitude.” *2002 Review*, *supra* note 6, ¶ 364.

any anticipated court challenge to the Commission's 2006 Review will be how section 202(h) of the 1996 Act affects the allocation of this burden in the face of such uncertainty.³⁵ And here, that question is complicated by the different perspectives of the D.C. and Third Circuits.

The D.C. Circuit's colorful metaphor for section 202(h)—that it is akin to Admiral Farragut's directive to "Damn the torpedoes! Full speed ahead"³⁶—is obvious hyperbole. That section directs the Commission to repeal—or modify—an ownership rule only if it is able to determine that the rule is no longer in the public interest.³⁷ The Third Circuit has upheld,³⁸ and it is likely that the D.C. Circuit would now find reasonable,³⁹ a FCC determination that the Commission may keep an ownership rule if it is merely useful, rather than indispensable, to the agency's discharge of its public interest mandate.⁴⁰

But how much discretion the Commission continues to have under section 202(h) in determining that a rule meets this "useful" test is less clear. Could the Commission make such a determination on a theory that eliminating or relaxing it may have adverse effects that the Commission is still unable to predict with any degree of certainty? Of course, the Commission cannot obtain a free pass from its section 202(h) obligation by "simply cry[ing] 'diversity!'"⁴¹ Nor can it do so because, unlike Admiral Farragut, the Commission wants to "observe the effects" of taking a more modest deregulatory speed.⁴² Indeed, the D.C. Circuit went further in *Sinclair* and specifically rejected the decision not to deregulate based upon the existence of "unresolved questions" about intermedia substitutability.⁴³ That

³⁵ Quite apart from section 202(h), in a case involving *cable* multiple ownership limits (to which that section does not apply), the D.C. Circuit appeared to view such limits through the lens of the First Amendment, justifying unusually probing standards of judicial review. *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001). In analyzing the 1998 review of the duopoly rule, however, the court rejected similar arguments for more than rational basis review of that rule as incompatible with prior Supreme Court decisions governing *broadcast* regulation. *Sinclair*, 284 F.3d at 167–69. This distinction underscores the oddity of continuing to view broadcasting as a First Amendment stepchild, in an era when viewing of cable and DBS programming has now surpassed that of local broadcast stations.

³⁶ *Fox I*, 280 F.3d at 1044.

³⁷ Telecommunications Act of 1996, Pub. L. No. 104–104, § 202(h), 110 Stat. 56.

³⁸ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 390–95 (3d Cir. 2004), *certs. denied*, 125 S. Ct. 2902–04 (2005).

³⁹ *Fox Television Stations, Inc. v. FCC (Fox II)*, 293 F.3d 537, 540 (D.C. Cir. 2002); *Cellco P'ship v. FCC*, 357 F.3d 88 (D.C. Cir. 2004) (deferring to FCC interpretation of virtually identical language in 47 U.S.C. § 161, the regulatory reform provision of which the section 202(h) reviews are expressly made a "part"); *Prometheus*, 373 F.3d at 393–95 (analyzing *Cellco*).

⁴⁰ *Prometheus*, 373 F.3d at 391–92.

⁴¹ *Sinclair*, 284 F.3d at 170 (Sentelle, J., dissenting in part).

⁴² *Fox I*, 280 F.3d at 1042.

⁴³ *Sinclair*, 284 F.3d at 164–65.

court did not view this rationale as any more acceptable than the “wait and see approach” it rejected in *Fox*.⁴⁴

The Third Circuit has not squarely addressed how the Commission should deal with the problem of uncertainty, or whether a Commission “determin[ation]” that a rule continues to serve “the public interest” under the language of section 202(h)⁴⁵ could be justified where there is uncertainty about the effects of further deregulation. That court has suggested, however, that all section 202(h) does is extend the same requirement of reasoned analysis, applicable to a decision to issue a new rule, to “the Commission’s decision to retain [an] existing [one].”⁴⁶

This view seems premised on the erroneous position that, prior to the enactment of section 202(h), the agency had no such obligation “periodically to justify its existing regulations.”⁴⁷ As other courts have recognized in dealing with FCC ownership restrictions, “where the factual assumptions which support an agency rule are no longer valid, agencies ordinarily must reexamine their approach.”⁴⁸ Thus, whether it has merely a “deregulatory tenor” or rises to the level of a “deregulatory presumption,”⁴⁹ section 202(h) must have been intended to mean something more than what existing administrative law principles already required.⁵⁰ And at some point, particularly in light of the extensive opportunity the Commission has had to assess the effects of local marketing agreements (“LMAs”) on local television markets,⁵¹ it becomes more difficult to justify continued regulation on the basis of uncertainties that the Commission has not taken the initiative to resolve. Indeed, in its 2002 Review, the Commission already seemed to conclude that LMAs had not “facilitat[ed] the exercise of market

⁴⁴ *Id.*

⁴⁵ Telecommunications Act of 1996, Pub. L. No. 104–104, § 202(h), 110 Stat. 56 (“The Commission . . . shall determine whether any [ownership rules] are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.”).

⁴⁶ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 390–95 (3d Cir. 2004), *certs. denied*, 125 S. Ct. 2902–04 (2005).

⁴⁷ *Id.*

⁴⁸ *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 767 (6th Cir. 1995) (citing *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1979), *cert. denied*, 506 U.S. 816 (1992)). *See also* *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979); *accord.*, *In re* 1998 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Notice of Inquiry*, 13 F.C.C.R. 11,276, 11,302 (Mar. 12, 1998) [hereinafter *1998 NOI*] (separate statement of Comm’r Furchtgott-Roth).

⁴⁹ *Prometheus*, 373 F.3d at 445 (Scirica, C.J., dissenting).

⁵⁰ The cardinal principle of statutory construction that presumes that Congress does not legislate superfluously has particular force with respect to the regulatory review provisions of the 1996 Act, the overriding purpose of which was “to provide for a pro-competitive, deregulatory national policy . . .” H.R. REP. NO. 104-458, at 113 (1996).

⁵¹ *See Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) (describing the Commission’s approach to LMAs).

power” against advertisers, and had actually increased the likelihood of local news coverage.⁵²

In any event, a Commission decision *not* to ‘wait and see’ in the face of such uncertainties should be able to withstand judicial scrutiny, assuming that it is based upon an adequate record and carefully and consistently explained.⁵³ The Supreme Court, in the leading case involving the scope of judicial review of deregulation, has held: “[A]n agency may . . . revoke a standard on the basis of serious uncertainties if supported by the record and reasonably explained.”⁵⁴ In other words, repeal or relaxation of a rule need not require an affirmative demonstration that the status quo is wrong; it can simply be based on a showing that “there is no cause to believe that the status quo is right.”⁵⁵

Although reversing the Commission’s 2002 Review, the Third Circuit itself acknowledged this point.⁵⁶ It upheld the Commission’s rejection of a blanket ban on newspaper-broadcast combinations, on the basis that “the Commission reasonably concluded that it did not have enough confidence in the proposition that commonly owned outlets have a uniform bias” to warrant sustaining that ban.⁵⁷ Thus, in its 2006 Review, the Commission similarly should be free to resolve legitimate uncertainties about the need for the duopoly rule as presently drafted in favor of modifying it, however section 202(h) is interpreted.

B. The Marketplace of Ideas Versus the Market for “Delivered Video Programming”

For many years the Commission identified two justifications for its broadcast multiple ownership rules: a desire to maximize diversification of program and service viewpoints, and a concern about “undue concentration

⁵² 2002 Review, *supra* note 6, ¶ 159.

⁵³ *Prometheus*, 373 F.3d at 389–90 (court will defer to an agency’s decisions so long as the agency provides a reasonable explanation for its action).

⁵⁴ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51–52 (1983). The Court so held even after rejecting MVMA’s argument that the Administrative Procedure Act embodied a presumption in favor of deregulation. However, just as continued regulation cannot be premised on the existence of uncertainties that the agency takes no reasonable efforts to resolve, the Court cautioned that the agency must supply a justification for eliminating a rule without first “engaging in a search for further evidence.” *Id.* at 52. As noted above, the Commission has undertaken to include further studies in its 2006 review that will continue that search.

⁵⁵ *Ctr. for Sci. in the Pub. Interest v. Dep’t of the Treasury*, 797 F.2d 995, 999 (D.C. Cir. 1986).

⁵⁶ *Prometheus*, 373 F.3d at 399–400.

⁵⁷ *Id.*

of economic power.”⁵⁸ In the 2002 Review, the Commission decided to grant only limited relief from the duopoly rule because of competition, not diversity, concerns.⁵⁹

The debate about “how much diversity is enough” will undoubtedly continue in the 2006 Review of this rule, given updated data reflecting more recent marketplace developments.⁶⁰ Yet the Commission addressed that question definitively in the 2002 Review of the duopoly rule.⁶¹ While it declined to equate the benefits of greater program diversity from a duopoly combination with what it viewed as greater opportunities for viewpoint diversity from separate ownership, the Commission acknowledged that duopolies have led to greater investment in news and other informational programming of the kind that forms the touchstone of its diversity analysis.⁶² The Commission also relied heavily on other media outlets in supplying viewpoint diversity. It noted that there are “countless other sources of news and information available to the public,”⁶³ that “data strongly suggest

⁵⁸ *In re* Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, *Report and Order*, 18 F.C.C. 288, 291–92 (Nov. 25, 1953). *Accord*, *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978); *1998 Review*, *supra* note 6, ¶ 15 (“‘twin goals’ of competition and diversity”). The Commission has more recently added concerns about “localism” to the mix. *See 2002 Review*, *supra* note 6, ¶¶ 73–79. By “localism,” the Commission refers not to local ownership (an earlier FCC policy) but to what are at least arguably program content judgments: “the selection of programming responsive to local needs and interests, and local news quantity and quality.” *Id.* ¶ 78. While this addition appears to have reflected concerns that media consolidation would diminish the quantity or quality of local programming, the 2002 review found essentially the opposite to be the case. *Id.* ¶¶ 157–69. Ownership regulation is a clumsy way to address such concerns, and the Commission has a separate proceeding designed to address them, through “behavioral rules that promote localism, regardless of identity of ownership.” *In re* Broadcast Localism, *Notice of Inquiry*, 19 F.C.C.R. 12,425, ¶ 5 (June 7, 2004) [hereinafter *Broadcast Localism NOI*]. The Democratic minority have sought to resolve that proceeding as a condition to any changes to the ownership rules. *2006 Notice*, *supra* note 6, at 2 (Adelstein, Comm’r, concurring in part and dissenting in part).

⁵⁹ *2002 Review*, *supra* note 6, ¶¶ 620–21.

⁶⁰ Those developments have suggested to one observer that the problem today is not a lack of sufficient viewpoints, but limits on viewers’ capacity to absorb them all, together with new tools allowing viewers to screen them out. Goodman, *supra* note 31, at 1395.

⁶¹ The Third Circuit cautioned that “the degree to which the Commission can rely on cable or the Internet” for viewpoint diversity “is limited,” based on the prior record. *Prometheus*, 373 F.3d at 415. *See* discussion *infra* Part II.D.

⁶² *2002 Review*, *supra* note 6, ¶¶ 157–69. These issues about the relative advantages and disadvantages of group ownership are not new. *See* Howard, *supra* note 2, at 35–39 (summarizing testimony at FCC’s 1958 network study hearings), 47–56 (consideration of proposed top 50 policy), 59–60 (NAB study opposing one-to-a-market proposal). *See also In re* Amendment of Sections 73.34, 73.240, and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM, and Television Stations, *Second Report and Order*, 50 F.C.C.2d 1046, 1063–65 (Jan. 28, 1975) (subsequent history omitted) (discussing the benefits of newspaper cross-ownership).

⁶³ *2002 Review*, *supra* note 6, ¶ 178.

that media can be viable substitutes for one another for the dissemination of news, information and viewpoint expression,”⁶⁴ and that “the majority of markets have an abundance of viewpoint diversity.”⁶⁵

A much more interesting feature of the 2002 Review of the duopoly rule was its new wrinkle on the traditional competition analysis. The Commission concluded that “some limitations on local television ownership are necessary to promote competition,”⁶⁶ even though unnecessary for diversity reasons.⁶⁷ Traditionally, the Commission’s competition analysis had centered on only two economic markets, both of which involve products that television stations actually sell (advertising) or buy (programming).⁶⁸ In the 2002 Review, the Commission decided essentially to ignore these traditional markets and to focus almost entirely on a third ostensible economic market for delivered video programming (“DVP”), something that local broadcast stations neither sell nor buy.⁶⁹

In the Commission’s view, the participants in the DVP market—which it also referred to as the market for “watching television”⁷⁰—included fewer and less robust competitors than those in the broader marketplace of ideas that formed the basis of its diversity analysis.⁷¹ Because the Commission’s analytical distinction between these two was essential to its decision in retaining the duopoly rule largely unaltered as it applies to smaller markets,⁷² it warrants a careful reexamination in the 2006 Review. Perhaps the distinction was designed to finesse the more elusive question about how to measure viewpoint diversity,⁷³ allowing the Commission to point out that it was maintaining stricter limits for competitive reasons and thereby moot-ing diversity issues.⁷⁴ As noted below, however, it can be argued that this analysis failed to identify either the real participants in the relevant economic market, those who may have actual market power in it, or those who

⁶⁴ *Id.* ¶ 405.

⁶⁵ *Id.* ¶ 171.

⁶⁶ *Id.* ¶ 133.

⁶⁷ *Id.*

⁶⁸ *Id.* ¶ 60.

⁶⁹ The Commission’s discounting of the advertising market seems to have been based in large part on the fact that it is an attenuated measure of viewer preferences that does not reflect the intensity of those preferences. *Id.*

⁷⁰ *Id.* ¶ 142.

⁷¹ *Id.* ¶¶ 142, 179.

⁷² See *Prometheus Radio Project v. FCC*, 373 F.3d 372, 386–87 (3d Cir. 2004), *certs. denied*, 125 S. Ct. 2902–04 (2005).

⁷³ See *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 796 (1978); see also 2006 Notice, *supra* note 6, ¶ 32 (“[W]e recognize that some aspects of diversity may be difficult to quantify.”); 1998 NOI, *supra* note 48, at 1304–05 (separate statement of Comm’r Michael Powell); 1998 Review, *supra* note 6, at 12,987–89 (separate statement of Comm’r Michael Powell).

⁷⁴ 2002 Review, *supra* note 6, ¶ 178.

have the potential ability to fill any programming needs that local broadcasters might ignore.

The Commission first raised the idea of a DVP market in a 1995 notice.⁷⁵ It was based on the observation that, over a thirty-year period, a relatively constant share of Americans' leisure time has been devoted to watching television,⁷⁶ even though "the price of subscribing to cable and DBS has increased faster than the rate of inflation."⁷⁷ This phenomenon led the Commission to conclude in its 2002 Review that there are no adequate substitutes for video programming, and thus that the relevant product market is "no broader than" DVP.⁷⁸ The Commission's next step in the analysis was not entirely clear. Finding it unlikely that a television station duopoly "would affect the competitive strategy of a national cable network" in light of the latter's national focus,⁷⁹ the Commission concluded that unilateral or coordinated actions by local stations "may result in potential competitive harms."⁸⁰

This competition analysis raises a number of issues. As a threshold matter, it seems inconsistent with the Commission's recognition that duopolies have in fact resulted in *more* and *better* programming in the larger markets where they are permitted.⁸¹ Another oddity about relying on an economic market for watching television is that it seems to replicate the Commission's diversity analysis, by assessing what kinds of programming choices viewers may have. The Commission itself had previously raised concern that these two concepts may not really differ,⁸² and elsewhere in the 2002 Review it seemed to conflate them, acknowledging not only the abundant sources of viewpoint diversity but also "the myriad sources of *competition*"

⁷⁵ *In re* Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, *Further Notice of Proposed Rulemaking*, 10 F.C.C.R. 3524, app. C ¶ 24 (Dec. 15, 1994).

⁷⁶ In 1970, 46.5% of Americans' leisure time was spent watching television; in 1998, the figure was 15.3%. *Id.* ¶ 24. In the 2002 review, the Commission updated this data to reflect a figure of 46.1% (as of 2000). *2002 Review*, *supra* note 6, ¶ 142 n.284. *See also In re* 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets, *Notice of Proposed Rulemaking*, 17 F.C.C.R. 18,503, ¶¶ 89–91 (Sept. 23, 2002) [hereinafter *2002 NPRM*].

⁷⁷ *2002 Review*, *supra* note 6, ¶ 142.

⁷⁸ *Id.*

⁷⁹ *Id.* ¶ 191.

⁸⁰ *Id.* ¶ 145; *see also id.* ¶ 191.

⁸¹ *See supra* note 76 and accompanying text.

⁸² *2002 NPRM*, *supra* note 76, ¶ 92.

to local television stations⁸³—including “competition from other sources of DVP.”⁸⁴

The notion of identifying an economic market, in which *broadcasters* possess market power in offering a product for free, based on the fact that viewers continue to watch television despite *cable* price hikes, is also somewhat counterintuitive. The idea does not appear to have had any record support. Dr. Bruce Owen, upon whose statement the Commission purportedly relied in its 2002 Review,⁸⁵ did not say that local television stations compete in such a market.⁸⁶ Indeed, he argued that the Commission should abandon entirely its effort to prescribe economic markets in establishing broadcast ownership rules, asserting that it is an exercise that unnecessarily duplicates the antitrust laws and ignores competing alternatives.⁸⁷ In a world in which “consumers have demonstrated their willingness to adopt new media,” Owen concluded that the Commission’s economic markets analysis “makes no more sense . . . than for King Canute to order away the ocean’s waves.”⁸⁸

The term “delivered video programming” originated from completely different concerns about the power of cable operators,⁸⁹ in a market recog-

⁸³ 2002 Review, *supra* note 6, ¶ 133.

⁸⁴ *Id.* ¶ 212. The absence of any “coherently defined market” suggests “motivations for the broadcast ownership rules beyond purely economic objectives.” Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371, 389, 392 n.111 (2006). *See also* Goodman, *supra* note 31, at 1395 n.11 (“[C]ompetition is desired for noneconomic reasons, [because] it duplicates the diversity goal.”).

⁸⁵ *See* 2002 Review, *supra* note 6, ¶ 141.

⁸⁶ The 2002 review cited this report’s reference to “ordinary commercial markets for the sale of advertising, the purchase of programming, and (*in the case of multichannel video program distributors, certain internet service providers, and print media*), the compilation of content packages and the provision of transmission services for sale to customers.” *See id.* at 13,671 n.280 (citing *In re* 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownerships Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area, *Comments of Fox Entm’t Corp. Inc., Fox Television Stations, Inc., Nat’l Broad. Co., Inc. and Telemundo Commc’ns Group, Inc., and Viacom* [hereinafter *Fox/NBC/Viacom Comments*], *Statement of Bruce M. Owen*, MB Docket Nos. 02-277, 01-235, 01-317, 00-244, at 1–2 (Jan. 2, 2003) [hereinafter *Owen Statement*] (emphasis added). As this statement implicitly recognizes, local television stations do not compete in providing such compilations, and they do not charge for such programming.

⁸⁷ *Owen Statement*, *supra* note 86, at 2.

⁸⁸ *Id.* at 3. *Cf.* Shelanski, *supra* note 84, at 402–19. Although Professor Shelanski identifies limits on the ability of antitrust analysis to address efficiency issues in media mergers, a number of those issues are common to problems with the Commission’s analysis identified above.

⁸⁹ 47 U.S.C. § 521 (2000) (findings of the Cable Television Consumer Protection and Competition Act of 1992).

nized to include only multichannel video programming distributors (“MVPDs”). In the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”),⁹⁰ Congress directed the Commission to file annual reports on the status of competition “in the market for the delivery of video programming.”⁹¹ This market was never viewed (then or now) as one that would include broadcast television stations. Indeed, for purposes of cable rate regulation, the 1992 Cable Act repealed the Commission’s prior definition of effective competition for cable operators, which had been based on the number of local broadcast stations, in favor of a definition that includes only DBS and other MVPDs as competitors.⁹² The Commission’s video competition reports since that time have consistently reflected this same policy. While recognizing that broadcast stations may have a potentially constraining effect on cable market power, the Commission concluded that “there is no close substitute for that steadily-expanding complement of specialized program services offered by the typical cable system,”⁹³ and that “broadcast television as a transmission medium is insufficient to constrain cable market power.”⁹⁴ The Commission’s most recent video competition report continues to define the video programming market as one for distribution of *multichannel* video programming.⁹⁵

Thus, the Commission’s observation that the relevant economic market may be “no broader” than all video programming begs four questions. First, if the analysis turns on ability to raise prices, why is the relevant market not the *narrower* one in which MVPDs charge for such programming, as Congress and the Commission have previously recognized?⁹⁶ Second, if cable operators have been able not only to increase their rates but also to do so while surpassing the audience share enjoyed by local tele-

⁹⁰ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.).

⁹¹ 47 U.S.C. § 548(g) (2000).

⁹² § 543(a)(1).

⁹³ *In re* Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *First Report*, 9 F.C.C.R. 7442, ¶ 43 (Sept. 19, 1994).

⁹⁴ *In re* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Second Annual Report*, 11 F.C.C.R. 2060, ¶ 115 (Dec. 7, 1995).

⁹⁵ *In re* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Twelfth Annual Report*, 21 F.C.C.R. 2503, ¶ 143 (Feb. 10, 2006) [hereinafter *Twelfth Video Competition Report*].

⁹⁶ The Commission noted that MVPDs’ subscriber-based business model is “a competitive dynamic for which our competitive analysis should account.” *2002 Review*, *supra* note 6, ¶ 64. Strangely, however, it sought to account for this “competitive advantage” over broadcasters by adding broadcasters into the same market and then finding that they may have market power in that market, notwithstanding their competitive disadvantage. *Id.* ¶¶ 61–62.

vision stations,⁹⁷ why did the Commission conclude that its competitive concern should be with local television stations, which are made subject to the duopoly rule, rather than with local cable operators, which are not? Third, why would the Commission focus its competition analysis on the indifference of national cable *networks* to program choices made by local television stations, when in its diversity analysis the Commission recognized, consistent with its prior views, that cable *operators* can provide local viewers with alternative programs and viewpoints? And what about the ability of other television stations in the market to do so? Fourth, as noted above, how can there be concerns about the lack of competitive constraints on television stations' delivery of video programming if duopolies have in fact led to more and better programming?

By ignoring cable operators in this competition analysis of the DVP market, the Commission also failed in the 2002 Review fully to address the concerns of the D.C. Circuit in *Sinclair*.⁹⁸ In that case, the D.C. Circuit declined to consider whether the requirement of eight independent voices in a local television market was "plucked out of thin air,"⁹⁹ warning that it would "leave [that consideration] for another day."¹⁰⁰ What it found fatal was the fact that the Commission had counted voices differently for the cross-ownership rule than it did for the duopoly rule.¹⁰¹ Although the Commission had determined that the inclusion of radio, cable, and newspaper outlets for purposes of the former rule "more accurately reflects the actual level of diversity *and competition* in the market,"¹⁰² it excluded these outlets for purposes of the duopoly rule.¹⁰³ In its 2002 Review, the Commission only partially addressed this inconsistency. As noted above, it concluded that media outlets other than television stations "contribute to viewpoint diversity in local markets."¹⁰⁴ But the Commission confined *Sin-*

⁹⁷ The 1988 data relied upon by the Commission indicated that local television stations enjoyed over four times the viewing of cable networks. By the 2004–05 television season, the combined audience share of all nonbroadcast networks had *exceeded* that of local television stations by a substantial margin (59% vs. 41%). *Twelfth Video Competition Report*, *supra* note 95, ¶ 165. To be sure, a local station's share will generally exceed that of any one cable network, many of which serve very niche audiences. But the issue here is whether a cable *operator* can adjust its programming selections to meet any viewer needs unfulfilled by local broadcast stations. *Id.*

⁹⁸ *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

⁹⁹ *Id.* at 162. The Commission had earlier suggested that six, not eight, should be adequate for this purpose. *Id.* at 153. In the 2002 review, it abandoned this voice test entirely (for duopolies). As noted below, the Third Circuit remanded that issue, although its analysis appears to have centered on concerns about the voice test for triopolies. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 418–20 (3d Cir. 2004); *2006 Notice*, *supra* note 6, ¶¶ 13, 16, 18 (seeking comment on validity of outlet rather than audience share test).

¹⁰⁰ *Sinclair*, 284 F.3d at 162.

¹⁰¹ *Id.*

¹⁰² *Id.* at 164 (quoting *1998 Review*, *supra* note 6, ¶ 107) (emphasis added).

¹⁰³ *Id.*

¹⁰⁴ *2002 Review*, *supra* note 6, ¶ 133.

clair's relevance to its diversity analysis.¹⁰⁵ This reading of *Sinclair*, which had found the role of other outlets inconsistently addressed in both the Commission's "diversity and competition" analyses, was incomplete.¹⁰⁶

In short, the competitive concerns that led the Commission to permit only very limited duopoly relief in smaller markets reflected a market analysis that raises a number of questions. For example, what constitutes the market for 'watching television'? Who are the sellers in that market, and how able are they to respond to program choices made by local television stations? Have the programming choices made by duopolies provided any evidence of power in this putative market? The Commission's market analysis also attempted to finesse the *Sinclair* court's concern about ignoring local cable outlets for competition as well as diversity purposes. Since the 2002 Review's basis for continuing duopoly restrictions turned primarily on the Commission's conclusions about this DVP market, the 2006 Review should include a careful look at these questions.

C. Competition in the Video Advertising Market

Another traditional focal point of the Commission's multiple ownership analyses has been the competitive effect of consolidation on advertisers. In its 2002 Review, the Commission found that the then existing duopoly rule was "not necessary to promote competition in the video advertising market"; its primary concern involved competition in the DVP market described above.¹⁰⁷ The Commission was concerned with the impact of duopolies on the advertising market only secondarily, to the extent that competition in this market "adds an extra level of protection."¹⁰⁸ It is thus unclear how much the Commission intended to rely on its competition analysis of this market, but because that analysis reflects the kinds of internal inconsistencies that the courts have found troubling in the past, the approach warrants rethinking in the 2006 Review.

On the one hand, the Commission was not persuaded by economic studies demonstrating that advertisers rely on cable and other outlets including broadcast television stations. Instead, the Commission viewed television stations as able to price discriminate against those advertisers who do not

¹⁰⁵ *Id.* ¶ 171.

¹⁰⁶ *Sinclair*, 284 F.3d at 164. In its earlier review, the Commission had deemed its eight station test to be "necessary for two reasons." First, it was concerned about the unique role of television for diversity purposes. Second, it was "unable to reach a definitive conclusion" about substitutes for television stations "in the advertising and delivered video programming markets." Thus, the restriction was imposed to ensure "that markets remain sufficiently diverse and competitive." 1998 Review, *supra* note 6, ¶¶ 68–70 (emphasis added). See also 2002 Biennial Review, *supra* note 76, ¶ 76.

¹⁰⁷ 2002 Review, *supra* note 6, ¶¶ 141, 151.

¹⁰⁸ *Id.* ¶ 151.

view these other outlets as adequate substitutes.¹⁰⁹ This view was not based on contrary economic studies; in fact, the Commission's own study "d[id] not attempt to address whether cable television . . . compete[s] with local television . . . for local advertising dollars."¹¹⁰ A survey of actual interviews with "media buyers and agency representatives" showed that they "almost unanimously discounted the possibility" of such price discrimination.¹¹¹ The Commission, however, took the position that only broadcasters, and not their local cable competitors, have a keen understanding of advertisers, based on their repeated interaction.¹¹²

The Commission had previously indicated an inclination to include cable in the same advertising market,¹¹³ and elsewhere in the 2002 Review the Commission acknowledged a study suggesting that it is cable that "may have market power over some local advertisers."¹¹⁴ It also cited with approval two other studies demonstrating that joint operation of stations through LMAs is "unlikely to result in any competitive harm to local advertisers."¹¹⁵ The Commission must address this issue with more consistency in the 2006 Review.

The Commission will also presumably address cable's growing share in of the viewing audience¹¹⁶ as well as its growing ability to compete more effectively in the advertising market by clustering.¹¹⁷ Even in 2002, the Commission's staff study recognized that cable advertising had been "growing much faster" than broadcast advertising.¹¹⁸ Moreover, the Commission's most recent video competition report notes that cable operators' local advertising revenues have increased by 12% in each of the last two years.¹¹⁹ And local online advertising is predicted to grow by 31% in 2007,

¹⁰⁹ *Id.* ¶ 152, nn. 298–99.

¹¹⁰ C. Anthony Bush, FCC Media Ownership Working Group, *The Substitutability of Local Newspaper, Radio, and Television Advertising in Local Business Sales 4* (2002). The Commission did cite the statement of Hearst-Argyle that television stations have advantages over "niche boutique cable network offerings." *2002 Review, supra* note 6, at n.296 (citing Bear Stearns Comments). Here, again, however, the relevant comparison is to local cable operators, not cable networks.

¹¹¹ Comments of Sinclair Broadcast Group, Inc. ex. 8, at 30 (Jan. 2, 2003), *cited in 2002 Review, supra* note 6, at nn.298–99.

¹¹² *2002 Review, supra* note 6, at 13,676 n.299.

¹¹³ *2002 Biennial Review, supra* note 76, ¶ 87.

¹¹⁴ *2002 Review, supra* note 6, at 13,676 n.297.

¹¹⁵ *Id.* ¶ 153.

¹¹⁶ *See Twelfth Video Competition Report, supra* note 95, ¶ 165.

¹¹⁷ *1998 Review, supra* note 6, ¶ 37.

¹¹⁸ Jonathan Levy, *et al.*, *Broadcast Television: Survivor in a Sea of Competition 12* (FCC Office of Plans and Policy, Working Paper No. 37, 2002) [hereinafter *OPP Study*].

¹¹⁹ *Twelfth Video Competition Report, supra* note 95, at tbl.4. This trend has continued, and is expected to continue at least through 2009. *See* NCTA, *Cable Advertising Revenue: 1985–2006*, available at <http://ncta.com/ContentView.aspx?contentId=70>; *Comments of NBC Universal, Inc. and NBC Telemundo License Co.*, MB Docket No. 06-121, at 8–9 (Oct. 23, 2006).

to \$7.7 billion.¹²⁰ In light of these trends, it is certainly worth examining whether there remain significant numbers of advertisers “that do not have good substitutes for broadcast television.”¹²¹

D. Intermedia Substitutability

As noted above, the Commission found in its 2002 Review of the duopoly rule that “media outlets other than television stations contribute significantly to viewpoint diversity in local markets,” and that competitive forces would ensure program diversity.¹²² The principal fear of many opponents of greater duopoly relief in smaller markets is that there are generally fewer television stations in these markets and that, notwithstanding the proliferation of other media voices, the public still depends upon local television stations as its primary sources of local news and information.¹²³ The D.C. Circuit rejected the basis for this factual assumption in the 1998 Review as undocumented.¹²⁴ In fact, ascertaining the extent of reliance upon local television stations for news and informational programming has proven extraordinarily difficult for the Commission.¹²⁵

More than twenty years ago, the Commission concluded that it should include radio, cable, other video media, and print media in assessing “the information market relevant to diversity.”¹²⁶ Given the far greater number of information sources available to the public today and their use as complements rather than substitutes,¹²⁷ it is unclear why reaching a conclusion

¹²⁰ See Borell Associates, Outlook for 2007: Pac-Man Pace for Local Online Ads (Executive Summary, Sept. 2006), at 2, available at <http://www.borrellassociates.com/report.cfm> (free registration required for download).

¹²¹ 2002 Review, *supra* note 6, ¶ 152.

¹²² *Id.* ¶¶ 176–82.

¹²³ *Id.* ¶¶ 173–75. Of course, this fear also assumes that duopolies will reduce the diversity of viewpoints expressed (or potentially expressible) by local stations. This is a much debated point. *Id.*

¹²⁴ *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 163–64 (D.C. Cir. 2002). The 1997 Roper poll relied upon by the Commission for this proposition did suggest that (back then) viewers preferred broadcast over cable programming. But the court noted that the Roper poll said nothing about viewers’ preferred sources of news. *Id.*

¹²⁵ See 1998 Review, *supra* note 6, ¶ 33 (noting the “unresolved questions” about “intermedia substitutability”); see also Shelanski, *supra* note 84, at 393 nn.113–14, 403–04 nn.142–46.

¹²⁶ *In re* Amendment of Section 73.3555 [formerly Sections 73.35, 73.240, and 73.636] of the Commission’s Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, *Report and Order*, 100 F.C.C.2d 17, ¶ 25 (July 26, 1984); *In re* Amendment of Section 73.3555 [formerly Sections 73.35, 73.240, and 73.636] of the Commission’s Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, *Memorandum Opinion and Order*, 100 F.C.C.2d 74 (Dec. 19, 1984) [hereinafter *Amendment of Section 73.3555*].

¹²⁷ According to a recent Pew survey, “[h]alf of the public uses multiple news sources on a typical day.” PEW RESEARCH CTR. BIENNIAL NEWS CONSUMPTION SURVEY; ONLINE

as to their relative usage rates is necessary for purposes of the duopoly rule.¹²⁸ Relative usage rates may have some bearing on how to set the number of radio versus newspaper outlets in a market that can be co-owned with a television station for purposes of the cross-ownership rule. In fact, it is within that context that the Commission developed the Diversity Index reflecting its judgment about substitutability.¹²⁹ In contrast, the Commission's diversity analysis for the duopoly rule in its 2002 Review continued to rely on the fact that "countless other sources of news and information" are "available," regardless of whether, or to what extent, they are actually used.¹³⁰

Even in calculating the Diversity Index for purposes of the cross-ownership rule, the Commission was neither definitive nor internally consistent on this point. It adopted a usage measure as one of its "conservative assumptions" about viewpoint diversity.¹³¹ It then weighted various different media by usage data derived from one of the studies it commissioned.¹³² Yet the Commission declined to weight outlets within the same medium (e.g., all local television stations) on a usage basis because "current behavior is not necessarily an accurate predictor of future behavior," and "media outlets can change the amount of news and current affairs that they offer" in response to competitive conditions "at very low marginal cost."¹³³ In this context, the Commission relied not on the content citizens actually access, but on what viewpoints "have an opportunity to reach" them.¹³⁴ Then, in the case of the Internet, the Commission reverted to a usage test to differentiate telephone and cable modem subscribers.¹³⁵

Not surprisingly, these inconsistencies proved fatal for the Diversity Index in the Third Circuit's review. Rejecting the idea that a community college television station could "mak[e] a greater contribution to viewpoint diversity than a conglomerate that includes the third-largest newspaper in

PAPERS MODESTLY BOOST NEWSPAPER READERSHIP 11 (2006), available at <http://people-press.org/reports/pdf/282.pdf> [hereinafter *2006 Pew Survey*].

¹²⁸ *Amendment of Section 73.3555*, *supra* note 126, ¶ 20 ("The fact that the various media may not be perfect substitutes for one another does not negate their status as competing, antagonistic sources of information for the purposes of diversity analysis").

¹²⁹ *2002 Review*, *supra* note 6, ¶ 409.

¹³⁰ *Id.* ¶ 178 (emphasis added).

¹³¹ *Id.* ¶ 399. Another of these assumptions was to disregard cable news channels and news sources over the Internet that are national in scope. The Commission has recognized, however, that such information can be no less critical to an informed citizenry than purely local information. See *Broadcast Localism NOI*, *supra* note 48, ¶ 14 (citing *In re Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, *Memorandum Opinion and Order*, 104 F.C.C.2d 358, ¶ 15 (May 1, 1986)).

¹³² Nielsen Media Research, FCC Media Ownership Working Group: Consumer Survey on Media Usage, 8 tbl.8 (2002) [hereinafter *MOWG Study 8*].

¹³³ *2002 Review*, *supra* note 6, ¶ 423.

¹³⁴ *Id.* ¶ 425.

¹³⁵ *Id.* ¶ 426.

America,¹³⁶ the court seemed to call for a usage test rather than an availability test. But as those who would apply market analysis to the marketplace of ideas have recognized, market share is a concept ill-suited to measuring viewpoints.¹³⁷ As long as viewpoints are not suppressed, there would seem to be no failure in the marketplace of ideas—unless one subscribes to the notion that the FCC should strive to ensure some sort of ideological parity, under which “all ideas should be equally popular.”¹³⁸ That notion would seem at odds with established doctrine that “the best test of truth is the power of the thought to get itself accepted in the competition of the market”¹³⁹

Indeed, a duopoly rule that reflects “concer[n] with the communicative impact” of one speaker as compared to another would seem to raise substantial First Amendment concerns if it is based on the speaker’s content.¹⁴⁰ It may not be fatal to limit the outlets one firm may own in a market without reference to content, “in order to enhance the relative voice of others,”¹⁴¹ at least under the current First Amendment model for broadcast regulation.¹⁴² But “pick[ing] winners and losers in the marketplace to serve

¹³⁶ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 408 (2004), *certs. denied*, 125 S. Ct. 2902–04 (2005).

¹³⁷ Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249, 275–78 (2001).

¹³⁸ *Owen Statement*, *supra* note 86, at 8–9.

¹³⁹ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes & Brandeis, JJ., dissenting). See also Shelanski, *supra* note 84, at 386–87 nn.81–82. For an interesting perspective on the difficulties of the less circulated thought to “get itself accepted” in today’s Information Age, see Philip J. Weiser, *The Ghost of Telecommunications Past*, 103 MICH. L. REV. 1671, 1692–93 (2005) (describing network effects of more popular programs on public discourse).

¹⁴⁰ *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 658 (1994). Concerns about “Big Media,” or the “drumbeat of one-sided talk shows,” or “pumped-in, homogenized, syndicated programming,” also seem to border on such qualitative judgments. *2002 Review*, *supra* note 6, at 13,957, 13,959 (Copp’s, Comm’r, dissenting), 13988 (Adelstein, Comm’r, dissenting).

¹⁴¹ *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976). See also *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 790–91 n.31 (1978) (“[T]he fact that advocacy may persuade the electorate is hardly a reason to suppress it”). *Accord*, *Amendment of Section 73.3555*, *supra* note 126, at 20 (“The fact that the government may fear the persuasive power of this organ of the press does not mean that the First Amendment allows it to act on those fears.”).

¹⁴² See *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 799–800 (1978). The analysis holds for cable as well. See *Time Warner Entm’t Co. L.P. v. United States*, 211 F.3d 1313, 1323 (D.C. Cir. 2000) (rejecting facial challenge to cable horizontal cap and channel occupancy limits); *U.S. WEST, Inc. v. United States*, 48 F.3d 1092, 1100 (9th Cir. 1994), *vacated and remanded on other grounds*, 516 U.S. 1155 (1996) (refusing to apply strict scrutiny in striking down former statutory ban on telephone company provision of cable service).

some hazy notions of diversity” is an exercise the Commission should think carefully about embarking upon in the context of the duopoly rule.¹⁴³

Nevertheless, in light of the Third Circuit’s decision, factual questions about the availability and use of other local news and information outlets will be a key part of the 2006 Review. As noted above, such questions have proven difficult to resolve in the past. Last time around, the FCC commissioned a study that purported to address such questions more specifically than the 1997 Roper poll criticized in *Sinclair*. The Commission ultimately found the results of that study, too, to be unreliable.¹⁴⁴ The study reported that of those who got their local news from television, 67% watched it on “broadcast television channels” and 58% watched it on “cable or satellite news channels.”¹⁴⁵ However, the Commission refused to credit this data, because it found that cable subscriber respondents may have misunderstood the source of local broadcast news programs received over cable, and because the data did not line up with the low audience ratings for local cable channels.¹⁴⁶ Accordingly, because of the absence of accurate data, and in order “to simplify [its] general analysis,” the Commission excluded cable from that analysis.¹⁴⁷ It undertook to review the matter more carefully in its next review,¹⁴⁸ and the Third Circuit upheld this decision.¹⁴⁹

The Commission has taken these data limitations to heart and will undertake additional surveys in the course of its 2006 Review in order to refine the information and update it in light of market developments. One key question is how meaningful the importance of television news really is for these purposes. The most recent biennial Pew survey of news consumption, released in July 2006, confirms that television remains the most popular source of news, and that regular use of local television news (54%) is still about the same as it was six years ago (56%).¹⁵⁰ However, local content does not appear to be as important a reason for watching television as it is for reading the newspaper.¹⁵¹ Moreover, those who follow local government news cited newspapers (53%) over television (45%) as their pre-

¹⁴³ See *In re Evaluation of the Syndication and Financial Interest Rules, Report and Order*, 6 F.C.C.R. 3094, 3242 (Apr. 9, 1991) (Quello, Comm’r, dissenting), *vacated sub nom.*, *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992). See also Shelanski, *supra* note 84, at 411 n.172.

¹⁴⁴ See *2002 Review*, *supra* note 6, ¶ 413 (suggesting data from the study to be unreliable).

¹⁴⁵ *MOWG Study 8*, *supra* note 132, at tbl.8. Cf. *2002 Review*, *supra* note 6, ¶ 413 (using the figure of 46.4%, rather than 58%, for cable).

¹⁴⁶ *2002 Review*, *supra* note 6, ¶ 414.

¹⁴⁷ *Id.* ¶ 408.

¹⁴⁸ *Id.*

¹⁴⁹ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 404–08 (3rd Cir. 2004), *certs. denied*, 125 S. Ct. 2904 (2005).

¹⁵⁰ *2006 Pew Survey*, *supra* note 127, at 11–12, 56–59, 62.

¹⁵¹ *Id.* at 30.

dominant source for local content.¹⁵² That preference was even stronger for those who follow news about people and events in their community (61% for newspapers versus 34% for television).¹⁵³ According to the Pew survey, the public appears to rely on television much more for national and international news as well as weather, sports, and breaking news.¹⁵⁴

Another important issue for the 2006 Review will be how many cable subscribers now have access to local cable news channels. As of 2002, the figure was only about one-third.¹⁵⁵ Even then, however, the Commission noted that local news programming available on cable channels had been increasing, and that “cable . . . is becoming a more important source of local news and information.”¹⁵⁶ The FCC staff study relied upon by the Third Circuit confirmed this point, noting that cable news was “increasingly moving into smaller markets” in light of “the lower cost of digital production,” and that “many predict that regional news programs could become a significant competitive force in the video programming marketplace.”¹⁵⁷ According to the Commission’s most recent annual report, there are now forty-five regional cable news networks.¹⁵⁸

The Commission also included the Internet as an informational source for purposes of its Diversity Index, albeit a minor one, noting the “virtual universe of information sources on the Internet.”¹⁵⁹ Here again, its position did not survive judicial review because the court found it inconsistent with the Commission’s own statements—about counting only media outlets that provide local news, and only those that perform an “aggregator” and a “distillation” function.¹⁶⁰ This time, the Commission will need to provide a better explanation if it wants to include the Internet in its analysis.¹⁶¹

In doing so, it should ask whether its prior analysis of the Internet may have been too narrow. Even as of two years ago, a Harris poll indicated that 36% of those adults who go online do so to obtain local news.¹⁶² But in

¹⁵² *Id.* at 28.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 27–28.

¹⁵⁵ 2002 Review, *supra* note 6, ¶ 414 n.924. The Third Circuit relied heavily on this same data, but using a 30% figure. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 415 (3rd Cir. 2004), *certs. denied*, 125 S. Ct. 2902–04 (2005).

¹⁵⁶ 2002 Review, *supra* note 6, ¶ 413.

¹⁵⁷ *OPP Study*, *supra* note 118, at 125–26.

¹⁵⁸ *Twelfth Video Competition Report*, *supra* note 95, ¶ 185 tbl. C-3.

¹⁵⁹ 2002 Review, *supra* note 6, ¶ 427.

¹⁶⁰ *Prometheus*, 373 F.3d at 406–07. *See also Twelfth Video Competition Report*, *supra* note 95, ¶ 138.

¹⁶¹ *Prometheus*, 373 F.3d at 408. *See also 2006 Pew Survey*, *supra* note 127, at 15. In light of the Third Circuit’s criticism, the Commission may find relevant this recent survey indicating that Internet “news aggregators such as Google News, Yahoo News, and AOL News are now a major source of online news.” *Id.*

¹⁶² HarrisInteractive, The Harris Poll #35 (May 19, 2004), available at http://www.harrisinteractive.com/harris_poll/index.asp?PID=464.

any event, as the Supreme Court has recognized, Internet content is “as diverse as human thought.”¹⁶³ In his Third Circuit dissent, Chief Judge Scirica suggested that the Commission rethink “the emphasis on local news,” which ignores the value of the Internet as “an important source for the dissemination of diverse information.”¹⁶⁴ The Commission itself has recognized—even before the advent of the ubiquitous Internet—that “programming that addresses local concerns need not be produced or originated locally to qualify as ‘issue-responsive’ in connection with a [broadcast] licensee’s program service obligations.”¹⁶⁵

Whatever the problems associated with measuring use rather than availability, or with treating complementary products as substitutes, the Commission obviously should update the record in light of the public’s increasing reliance on Internet content. The Commission’s prior study indicated that the Internet led all other outlets as the news source that survey respondents would be more likely to use in the future.¹⁶⁶ Recent data also reveal that the percentage of Americans who regularly get news online has now increased from 23% to 31% between 2000 and 2006, with even stronger growth among those aged twenty-five to sixty-four.¹⁶⁷ Indeed, as of December 2005, another Pew survey reported that 50 million Americans turn to the Internet for news on a typical day.¹⁶⁸ This sea change in access to and use of the variety of news and information provided by the Internet cannot be ignored in the 2006 Review.

E. The Top Four Restriction

In the 2002 Review, the Commission concluded that competition concerns, principally in the DVP market, required some restraint on duopolies. Accordingly, it continued to bar duopolies between any two top four-rated stations in a market as “necessary to promote competition.”¹⁶⁹ As noted above, that competition analysis is questionable and appears inconsistent with *Sinclair* for ignoring other media as competitive outlets. There is also reason to question whether such a top four restriction is (or remains) a justifiable response to such concerns even if they continued to be legitimate, particularly in light of the sweeping effects of such a restriction. The restriction precludes a wide range of duopolies, including any relief in any of

¹⁶³ *Reno v. ACLU*, 521 U.S. 844, 852 n.7 (1997) (citing *ACLU v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996)).

¹⁶⁴ *Prometheus*, 373 F.3d at 469 (Scirica, C.J., dissenting).

¹⁶⁵ *Broadcast Localism NOI*, *supra* note 48, ¶ 14.

¹⁶⁶ *MOWG Study 8*, *supra* note 132, at 72 (tbl.70), 73 (tbl.71), 74 (tbl.72), 75 (tbl.73), 76 (tbl.74).

¹⁶⁷ *2006 Pew Survey*, *supra* note 127, at 2–3.

¹⁶⁸ Pew Internet & American Life Project, *Online News*, Mar. 22, 2006, http://207.21.232.103/pdfs/PIP_News.and.Broadband.pdf.

¹⁶⁹ *2002 Review*, *supra* note 6, ¶ 220. *See also id.* ¶ 212.

at least eighty markets with less than five commercial stations.¹⁷⁰ As still unresolved petitions for reconsideration of the 2002 Review have pointed out, the top four restriction was thus difficult to square with the Commission's repeated acknowledgements that it is in such smaller markets that broadcasters have the most pressing need for duopoly relief,¹⁷¹ and in which Commissioner Adelstein recognized there is the greatest likelihood of "proven localism gains" warranting such relief.¹⁷²

The Third Circuit upheld this "line-drawing" exercise as "not unreasonable."¹⁷³ That holding certainly does not preclude the Commission from reexamining the issue in light of current market conditions, as required by section 202(h). Such a reexamination makes sense, because the 2002 Review's analysis proceeded largely from a perspective of how profitable the top four stations are in the *largest* markets. Given the recognized difficulties of stations in the smaller markets, the 2006 Review should take greater care to differentiate among markets of different sizes. In doing so, it should focus on four issues raised in the 2002 Review.

First, as the Third Circuit recognized, the top four restriction was premised upon "welfare harms" in creating a new largest firm in the market.¹⁷⁴ A top four restriction appears to be an overbroad way of addressing that concern.¹⁷⁵ As such, it prevents the leading station from acquiring a much weaker-performing fourth-ranked station. It also prevents weaker third and fourth-ranked stations from merging to compete with a dominant first-ranked station. In fact, in the vast majority of markets below the top seventy-five, combining the market shares of the third and fourth ranked stations would *not* displace the top ranked station.¹⁷⁶

¹⁷⁰ See REED BUSINESS INFORMATION, BROADCASTING & CABLE YEARBOOK B132–215 (2006). See also *In re* 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Petition for Reconsideration of LIN Television Corporation and Raycom Media, Inc.*, at 8–9 att.A (Sept. 4, 2003) (accessible via FCC Electronic Comment Filing System) [hereinafter *LIN/Raycom Petition*]. In 2002, the average number of stations was no more than four in all 110 markets below the top 100. *In re* 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Ex Parte Communication of Nat'l Ass'n of Broadcasters*, chart 3 (Apr. 30, 2003).

¹⁷¹ See, e.g., *LIN/Raycom Petition*, *supra* note 170, at 3–13. The Commission recently invited parties to update the record on pending petitions for reconsideration. *2006 Notice*, *supra* note 6, ¶ 36.

¹⁷² *2002 Review*, *supra* note 6, at 13,998.

¹⁷³ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 417 (3rd Cir. 2004), *certs. denied*, 125 S. Ct. 2902–4 (2005).

¹⁷⁴ *Id.* at 416.

¹⁷⁵ See *id.* at 416; *2002 Review*, *supra* note 6, ¶ 195.

¹⁷⁶ *Prometheus*, 373 F.3d at 417 n.49 (citing *Ex Parte Filing of Nat'l Ass'n of Broadcasters*, MB Docket No. 02-277 (May 22, 2003) (accessible via FCC Electronic Comment Filing System)).

Second, the top four restriction assumed that such mergers would not be capable of bringing local news programming to the market, because “top four-ranked stations already provide local news programming.”¹⁷⁷ That was not true in small markets then, and, given current financial trends, it is even less likely to be true today. The data relied upon by the Commission in 2002 showed that 111 top four-ranked stations did not offer local news.¹⁷⁸ The vast majority of those stations were in smaller markets.¹⁷⁹ And the record actually indicated that more than half of all markets (107 out of 210) had fewer than four independent local newscasts.¹⁸⁰

Third, the Commission’s conclusion that top four-ranked stations are all significantly more profitable than others was perplexing. It was based on data supplied by National Association of Broadcasters (“NAB”) that demonstrated that this was true only by averaging all four network affiliates, and only in the top 50 markets.¹⁸¹ Such data ignored what NAB noted was “a significant decline in financial performance” for top four affiliates “in medium and small markets which were not ratings leaders in their markets.”¹⁸² NAB’s study demonstrated that the average low-rated affiliate of one of the top four networks actually showed *negative profitability* in 2001 in markets 51–175, and that even the average high-rated affiliate of one of these top four networks experienced flat or declining profitability in markets 51–100 and 126–150.¹⁸³ Oddly, the Commission itself used this same NAB data to conclude that ability “to compete successfully” is “meaningfully (and negatively) affected in mid-sized and smaller markets.”¹⁸⁴

Fourth, the Commission saw a bright line distinction between the audience shares of the fourth and fifth-ranked networks, which it found to be reflected generally in local market rankings of their affiliated stations. *National* network data, however, is heavily skewed by the top twenty-five

¹⁷⁷ 2002 Review, *supra* note 6, ¶ 198. See also 1998 Review, *supra* note 6, ¶ 66.

¹⁷⁸ 2002 Review, *supra* note 6, ¶ 198 (finding 668 of 779 top four stations offered local news). See also *LIN/Raycom Petition*, *supra* note 170, at 9–10.

¹⁷⁹ See *Fox/NBC/Viacom Comments*, *supra* note 86, at Economic Study A table A1.

¹⁸⁰ *Id.* at 3–4. Although 18 of the smaller DMAs included in this figure had fewer than four rated stations, in 13 of those 18 markets a rated station did not carry local news. *Id.* at 4. See also *Ex parte* filing of Gray Television, Inc. att. A (May 29, 2003) (120 out of 210 markets).

¹⁸¹ 2002 Review, *supra* note 6, at 13,697 n.417 (citing *Ex parte* filing of NAB, April 30, 2003, at 2, Chart 1).

¹⁸² *Ex parte Letter of Nat’l Ass’n of Broadcasters*, MB Docket No. 02-277, at 1 (April 30, 2003) (accessible via FCC Electronic Comment Filing System).

¹⁸³ *In re* 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Comments of the Nat’l Ass’n of Broadcasters*, MB Docket No. 02-277, MM Docket No. 01-235, MM Docket No. 01-317, MM Docket No. 00-244, at 74 and att.C (Jan. 2, 2003). See also *LIN/Raycom Petition*, *supra* note 170, at 10–11.

¹⁸⁴ 2002 Review, *supra* note 6, ¶ 201.

markets.¹⁸⁵ In addition, drawing this line between the fourth- and fifth-ranked stations ignored the problems of the third- and fourth-ranked stations (particularly but not only in four-station markets). The record showed that the fourth-ranked station, for example, trailed the third-ranked station by 34% in audience share and 26% in revenue share.¹⁸⁶ Any such line-drawing in the 2006 Review should examine the separation between second-, third-, and fourth-ranked stations as well, using updated information.

Under the mandate of section 202(h), the top four restriction clearly warrants reexamination in the 2006 Review. To the extent any restriction on small market duopolies continues to be warranted, one alternative that ought to be considered is an audience share cap, which was intended to serve as a “backstop” when the Commission first allowed radio duopolies¹⁸⁷ and was proposed as such an alternative by small market television owners in the 2002 Review.¹⁸⁸ An important aspect of any such standard would be whether—in light of the growing audience and advertising shares of MVPDs—it should include nonbroadcast viewing. Another alternative would be a tiered system reflective of the significant financial difficulties faced by smaller market stations—e.g., a top four test in larger markets, a top three test in middle markets, and a top two test in the smallest markets.¹⁸⁹ While the top four standard withstood judicial scrutiny as “not unreasonable” the last time around, the Commission is obligated to take a harder look at that question in light of the foregoing concerns, and the current state of broadcast television in smaller markets.

III. CONCLUSION

In its approach to the 2006 Review of the television duopoly rule, this Commission will undoubtedly look back with envy at its predecessors. Justice Frankfurter vested the agency with sweeping “public interest” authority in light of “the complicated factors for judgment in such a field,” and intended that authority to serve as “a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out

¹⁸⁵ *Id.*

¹⁸⁶ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 417 n.50 (2004), *certs. denied*, 125 S. Ct. 2902–04 (2005).

¹⁸⁷ *See 2002 Review*, *supra* note 6, ¶ 301. *See also* In re Revision of Radio Rules and Policies, *Report and Order*, 7 F.C.C.R. 2755, ¶ 40 (Mar. 12, 1992).

¹⁸⁸ *See Ex parte Letter of LIN Television Corp., Raycom Media, Inc., Waterman Broadcasting Corp., and Montclair Comm., Inc.*, MB Docket No. 02-277 (May 15, 2003) (accessible via FCC Electronic Comment Filing system) (endorsing 30% test).

¹⁸⁹ *Prometheus*, 373 F.3d at 417 n.49 (citing *Ex Parte Filing of Nat'l Ass'n of Broadcasters*, MB Docket No. 02-277 (May 22, 2003) (accessible via FCC Electronic Comment Filing System)).

its legislative policy.”¹⁹⁰ Fifty years ago, a very different D.C. Circuit also authorized the Commission “to consider diversification of control . . . and to attach such significance to it as its judgment dictates.”¹⁹¹ As recent appellate decisions in this area make clear, these governing precepts are no longer in vogue. The First Amendment standards applicable to corporate speech are much more searching, the communications sector has become much more important to the national economy and thus to Congress, and the “well-known principles of deference accorded to agency decision-making”¹⁹² seem to be viewed with greater skepticism.

To surmount these obstacles after two failed attempts will be a challenge. The one consistent theme from the courts has been the inconsistency of the Commission’s analysis, both internally and as compared to its prior decisions. Some of these inconsistencies reflect policy differences among different Commissions, which are certainly acceptable if explained forthrightly and consistent with the 1996 Act.¹⁹³ Others seem to be a feature of a decision-making process that tries to accomplish too much at one sitting, requiring compromises that end up as vulnerabilities on judicial review. Still other inconsistencies, like the ill-fated Diversity Index and the DVP market analysis, seem based on understandable but ultimately problematic efforts to quantify the unquantifiable nature of viewpoint diversity, or to avoid addressing its “elusive” nature.

The prospect of a Commission confined to a cycle of never-ending section 202(h) reviews and subsequent court challenges is a serious problem for those smaller market television owners whose difficulties the Commission has long acknowledged, yet whose fate seems tied to the larger debates about “Big Media.” For them, a fourth try would not be a charm,¹⁹⁴ because their competitive environment is changing too quickly. They need the finality and reliability of a resolution that will hold up under judicial scrutiny.

The Commission can maximize the chances for resolving this issue successfully in its upcoming review by reference to a few key guideposts, in addition to updating its prior record, an important statutory requirement in light of the rapid pace of change in this industry. The Commission should engage in a more rigorous analysis of the extent to which, in today’s multimedia environment, local television stations can realistically be viewed as

¹⁹⁰ FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940). *Accord* Nat’l Broad. Co. v. United States, 319 U.S. 190, 216 (1943); FCC v. WNCN Listeners Guild, 450 U.S. 582, 593 (1981).

¹⁹¹ McClatchy Broad. Co. v. FCC, 239 F.2d 15, 18 (D.C. Cir. 1956).

¹⁹² Prometheus Radio Project v. FCC, 373 F.3d 372, 435 (3d Cir. 2004) (Scirica, C.J., dissenting in part, concurring in part), *certs. denied*, 125 S. Ct. 2902–04 (2005).

¹⁹³ See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., Burger, C.J., Powell, J., & O’Connor, J., concurring in part and dissenting in part).

¹⁹⁴ Cf. Covad Commc’ns Co. v. FCC, 450 F.3d 528, 531 (D.C. Cir. 2006).

holding any market power over viewers or advertisers. It should avoid the same form of “managed competition” in the marketplace of ideas that it finally was forced to discard in the market for local competition in the telecommunications sector, after almost a decade of litigation.¹⁹⁵ And the Commission should commit to a much more granular analysis regarding the effect of any proposed duopoly rule on television stations operating in the difficult financial environment of smaller markets, without untested assumptions about the value of network affiliations in those markets.

Finally, the Commission should demonstrate that it has taken a truly hard look at the salient problems¹⁹⁶ that have served to animate so many of the opponents of the 2002 Review. The Commission may well conclude that there is “an alternative regulatory scheme or set of rules” apart from ownership limits to “better address” those problems, such as localism concerns.¹⁹⁷ It may also be able to ultimately reach closure on the issue of minority ownership, using constitutionally sustainable tools that do not detract from any needed reforms of the duopoly rule.¹⁹⁸

The Commission may also conclude that the public interest standard may warrant a wholly different approach to viewpoint diversity concerns. Some have argued that there is “a large difference between the public interest and what interests the public.”¹⁹⁹ There are obvious First Amendment perils in prescribing medicine for an unwilling viewing public that now possesses

¹⁹⁵ See J. Gregory Sidak & Daniel F. Spulber, *Deregulation and Managed Competition in Network Industries*, 15 YALE J. ON REG. 117 (1998); Michael K. Powell, Comm’r, Fed. Commc’ns Comm’n, Technology and Regulatory Thinking: Albert Einstein’s Warning, Address Before the Legg Mason Investor Workshop (Mar. 13, 1998) (transcript available at <http://www.fcc.gov/Speechies/Powell/spmcp804.html>). See generally JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 92–108 (2005).

¹⁹⁶ Fla. Cellular Mobil Commc’ns Corp. v. FCC, 28 F.3d 191, 196 (D.C. Cir. 1994), cert. denied, 514 U.S. 1016 (1995) (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971)).

¹⁹⁷ 2006 Notice, *supra* note 6, ¶ 4.

¹⁹⁸ The Third Circuit directed that the Commission’s “rulemaking process” on remand “address these proposals at the same time.” Prometheus Radio Project v. FCC, 373 F.3d 372, 390–95 (3d Cir. 2004), cert. denied, 125 S. Ct. 2902–04 (2005). The 2006 Notice has solicited further comment on them. While the court’s instruction was not clear as to whether or how regulatory reform should be tied to action on these proposals, that mandate should be read in light of the Supreme Court’s observation that agencies “should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.” FCC v. Pottsville Broad. Co., 309 U.S. 134, 143 (1940); accord. Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543–44 (1978). See also 47 U.S.C. § 154(j) (2000); GTE Serv. Corp. v. FCC, 782 F.2d 263, 273–74 n.12 (D.C. Cir. 1986) (“inherent powers of an agency to control its own docket”).

¹⁹⁹ Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 501 (2000). But see *In re Deregulation of Radio, Memorandum Opinion and Order*, 87 F.C.C.2d 797, ¶ 19 (July 30, 1981) (“In our view, it is completely reasonable to conclude that individuals will make choices and will seek out and listen to that programming that corresponds with their needs.”).

the tools to avoid taking its prescription. As one commentator has urged, however, if attention deficit disorder rather than viewpoint diversity is now the problem we face in the Information Age, there may be more constructive ways for the Commission to address it, or to suggest that Congress do so, than by restricting ownership.²⁰⁰ As always, whether in regulating or in deregulating, the Commission should consider any such alternatives seriously advanced for its consideration, and provide defensible reasons if it determines to reject them.²⁰¹ Getting this question right is vital if broadcast television is to remain as a “survivor in a sea of competition.”²⁰²

²⁰⁰ Goodman, *supra* note 31, at 14, 57–60.

²⁰¹ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46–51 (1983) (Rehnquist, J., Burger, C.J., Powell, J., & O'Connor, J., concurring in part and dissenting in part).

²⁰² *OPP Study*, *supra* note 118, at 1.

