

news programming on one of the commonly-owned channels. Second, the acquisition of multiple licenses in a local market by a single firm may lead to "coordinated effects." That is, the increase in concentration may induce a joint change in competitive behavior of all the market participants in a manner that harms viewers.

120. The Commission recognizes the importance of competition from cable networks in the market for DVP. Nevertheless, in formulating our revised ownership rules, the Commission continues to draw a distinction between television broadcast stations and non-broadcast DVP outlets. This is because television broadcast stations and cable programming networks have different incentives to react to a change in local market concentration, which suggest differing levels of unilateral and coordinated effects. In particular, cable networks are almost exclusively offering national or broadly defined regional programming. Therefore, the profit-maximizing decisions of a national cable programmer reflect conditions in the national market. It is improbable that a change in concentration in any single local market would affect the competitive strategy of a national cable network. In contrast, the Commission needs to consider the possible competitive responses from other DVP outlets in local markets, which are almost exclusively television broadcast stations. Because of the differing footprints of cable networks and television broadcast stations, any possible competitive harms are more likely to arise from changes in the behavior of stations. Thus, the Commission's rules to promote local television competition are focused on ownership of television broadcast stations.

121. *Welfare Enhancing Mergers in Local Delivered Video Markets.* The standard approach to evaluating the competitive harms of an increase in horizontal market concentration is outlined in the DOJ/FTC Merger Guidelines. The DOJ/FTC Merger Guidelines recognize the HHI level of 1800 as the maximum level of "moderate concentration." The Commission chooses this threshold rather than the lower limit of 1000 because it recognizes the competitive pressures exerted by the cable networks. The 1800 threshold corresponds to having six equal-sized competitors in a given market. The DOJ/FTC Merger Guidelines however, are written not for a specific industry, but rather as guidelines intended for application across all industries. The Commission's rules are formulated for a specific

market—the delivery of video programming—and are based on an extensive record on the extent of competition in this market and the effect of our current local TV ownership rule. This record allows the Commission to craft a more finely-tuned rule for this industry.

122. First, the nature of the DVP market is such that there is constant product innovation with new program choices each season. In such a market, a firm's market share is more fluid and subject to change than in other industries. Hence a firm's "capacity" to deliver programming can be as important a factor in measuring the competitive structure of the market as is its current market share. Second, as each broadcast station requires a license, the number of licenses that a firm controls in a market is the measure of its capacity to deliver programming. Therefore, as a starting point, a simple application of the DOJ/FTC Merger Guidelines six-firm threshold suggests that, a single firm holding three licenses in a market with 18 or more licenses, or a firm holding two licenses in a market with 12 or more licenses, would not raise competitive concerns. However, given the structure of the DVP market, a strict, overly simplistic application of the DOJ/FTC Merger Guidelines would potentially prohibit some welfare enhancing mergers and allow some anticompetitive mergers.

123. In local markets, there is a general separation between the audience shares of the top four-ranked stations and the audience shares of other stations in the market. A review of the audience shares of stations in every market with five or more commercial television stations (*i.e.*, 120 markets) indicates that in two-thirds of the markets, the fourth-ranked station was at least two percentage points ahead of the fifth-ranked station. Two percentage points represents a significant difference in audience share because for a station to jump from, for example, an eight share to a ten share, it would have to increase its audience share by 25%. Thus, although the audience share rank of the top four-ranked stations is subject to change and the top four sometimes swap positions with each other, a cushion of audience share percentage points separates the top four and the remaining stations, providing some stability among the top four-ranked firms in the market. Nationally, the Big Four networks each garner a season to date prime time audience share of between ten and 13 percent, while the fifth and sixth ranked networks each earn a four percent share. While there is variation in audience shares within

local markets, these national audience statistics are generally reflected in the local market station rankings. The gap between the fourth-ranked national network and the fifth-ranked national network represents a 60% drop in audience share (from a ten share to a four share), a significant breakpoint upon which the Commission bases the rule.

124. The Commission's analysis of the top four local stations is related to its analysis of the four leading broadcast networks in connection with the dual network rule. There the Commission concludes that Big Four networks continue to comprise a "strategic group" within the national television advertising market. That is due largely to those networks' continued ability to attract mass audiences. It is this network programming that explains a significant portion of continued market leadership of the top four local stations in virtually all local markets. Thus the continued need for the Dual Network rule to protect competition at the network level also supports our decision to separate ownership of local stations carrying the programming of Big Four networks.<sup>11</sup>

125. Permitting mergers among top four-ranked stations also would generally lead to large increases in the HHI. Although the Commission believes that mechanical application of the *DOJ/FTC Merger Guidelines* may provide misleading answers to competitive issues in the context of local broadcast transactions, as a general matter, sufficiently large HHIs establish a *prima*

<sup>11</sup> The local television ownership rule is consistent with a key aspect of the Commission's national television ownership rule in recognizing competitive disparities among stations. The national television ownership rule recognizes competitive disparities between stations through use of the UHF discount, while the local television ownership rule recognizes competitive disparities between stations by prohibiting mergers of the top four-ranked stations in the market. The national ownership rule is an audience reach limitation, so it makes sense to adjust that limitation based on the diminished coverage of UHF stations. The local ownership rule, on the other hand, places a limitation on the number of stations that one entity may own in a market. Thus, that rule limits mergers of the top four-ranked stations in a market. Furthermore, in the local television ownership rule, we take account of a station's UHF status in considering certain waiver requests, as discussed further below. Finally, the Commission notes that the top-four merger restriction in the local television ownership rule and the UHF discount in the national television ownership rule, while analogous, are not identical and do not serve exactly the same purpose. The UHF discount is premised, in part, on promoting the development of new and emerging networks. This rationale does not apply in the local television ownership context because ownership of multiple stations in a market does not promote development of new networks. The top-four limitation in the local television ownership rule, in contrast, is premised on competition theory, which is not the basis for the national television ownership rule.