

facie case in antitrust suits. By allowing firms to own multiple stations, but prohibiting combinations among the top four-ranked stations, the Commission enables the market to realize efficiency gains and improve the quality of product in the video programming market while mitigating the risk of harmful coordinated or unilateral competitive harms.

126. One reason that combinations involving top four-ranked stations are less likely to yield public interest benefits such as new or expanded local news programming is that such stations generally are already originating local news. Some commenters contend that the Commission has never demonstrated that top four-ranked stations are generally the market's news providers. Yet the data provided by some of these very commenters confirms that this is the case. Further, the Commission has determined that, because there are less than four stations in some markets, the total number of top four-ranked stations is 779. Therefore, fully 85% of top four-ranked stations offer local news. Because top four-ranked stations already provide local news programming, a combination involving more than one top four-ranked station is less likely to result in a new or enhanced local news offering than would a combination involving only one top four-ranked station.

127. The Commission has also determined that same-market combinations yield efficiencies that may expedite a station's transition to DTV. However, combinations involving more than one top four-ranked station also are less likely to provide public interest benefits in the form of new DTV service. The financial position of top four-ranked stations makes the transition to DTV more affordable for these stations. Top four-ranked stations also are more likely to have made the transition to DTV than other stations. The Commission therefore concludes that it is less likely that allowing same-market combinations involving more than one top four-ranked station will expedite the provision of DTV service to the public.

128. Permitting combinations among the top four would reduce incentives to improve programming that appeals to mass audiences. The strongest rival to a top four-ranked station is another top four-ranked station. Because top four-ranked stations typically offer programming designed to attract mass audiences, as opposed to niche audiences, a new popular program offered by one top four-ranked station will have a substantial negative impact on the audience shares of the other top four-ranked stations. The enormous

potential gains associated with new popular programs provide strong incentives for top four-ranked stations to develop programming that is more appealing to viewers than the programming of their closest rivals. The large number of viewers looking for new programs with mass audience appeal are the direct beneficiaries of this rivalry. When formerly strong rivals merge, they have incentives to coordinate their programming to minimize competition between the merged stations. Such mergers harm viewers.

129. The Commission's decision to allow common ownership of two television stations in markets with fewer than twelve television stations will result in levels of concentration above our 1800 HHI benchmark in markets with fewer than 12 television stations. The Commission permits this additional concentration because the economics of local broadcast stations justify graduated increases in market concentration as markets get smaller.¹² The record demonstrates that owners of television stations in small and mid-sized markets are experiencing greater competitive difficulty than stations in larger markets. Moreover, Congress and the Commission previously have allowed greater concentration of broadcast properties in smaller markets than in larger markets precisely because the fixed costs of the broadcasting business are spread over fewer potential viewers. The limits the Commission adopts in the R&O for local television ownership replicate this graduated tradeoff between optimal competition in the delivered video market (six station owners) and recognition of the challenging nature of broadcast economics in small to mid-sized markets.

130. Thus, the Commission must avoid an oversimplified application of the DOJ/FTC Merger Guidelines. In particular, the analysis suggests that anticompetitive harms may result from allowing the largest firms to merge, and that the Commission might lose welfare enhancing efficiency gains by

¹² For purposes of applying the Commission's cross media limits, which are diversity based, it found that markets with nine or more television stations have a sufficiently large number of media outlets that viewpoint diversity will be protected by its caps on local television and local radio ownership. Measuring the extent of diversity in a market is a separate question from measuring the extent of competition among a particular class of outlets, such as local television stations. Thus, a market with ten television stations can be characterized as "large" from a viewpoint diversity standpoint because of the substantial number of media outlets available in such markets, but "small to mid-sized" when considering solely competition in the delivered video market (which excludes outlets such as radio, newspaper, and the Internet).

disallowing mergers between stations with large audience shares and stations with small audience shares. To allow the market to realize these efficiency gains and prevent potential harms from undue increases in concentration, the Commission therefore allow combinations of two stations provided they are not both among the top four-ranked broadcast stations in the local market. In markets with at least 18 television stations, the Commission further allows a firm to own up to three stations (thus ensuring a minimum of six owners) provided that only one of them is ranked among the top four.

131. *Proposals to Retain the Existing Rule in its Current Form or With Minor Modifications.* A number of commenters urge the Commission to retain the existing rule, or make minor modifications. Children Now proposes that the Commission modify the existing rule by prohibiting common ownership of television stations with overlapping Grade B contours in the same market, as it did prior to its 1999 revisions to the rule. Other commenters urge the Commission to retain the existing rule, but to count only those voices that actually provide local programming. Children Now, among others, states that if the Commission chooses to revise the current rule by expanding the types of media voices that are considered for purposes of the local television ownership rule, it should raise the threshold voice count required to form a same-market combination.

132. The Commission has determined that retaining our current rule does not comport with our statutory mandate under section 202(h) on competition, diversity, or localism grounds. For the same reasons, the Commission disagrees with commenters who contend that an equally restrictive or more restrictive ownership rule is necessary in the public interest. Although our modified rule does not rely upon a "voice test," it calculates the number of stations one can own in a market based, in part, on the number of stations within that market. However, our decision to "count" only broadcast television stations is based on the likely responses of participants in the DVP market to changes in local market concentration, and is aimed at achieving competition in local markets.

133. Another commenter proposes that if the Commission relaxes the rule, it should prohibit common ownership of more than one station affiliated with a top four network. The Commission's revised rule prohibits common ownership of stations that are among the top four in terms of audience share. Although such stations are often