

top four-ranked stations only in the largest markets and permit certain top four-ranked combinations in smaller markets, would serve the public interest. The top four-ranked combinations are likely to harm competition in the DVP market, and are less likely to produce offsetting public interest benefits.

141. The Commission believes that a more targeted approach to account for possible harms of application of the top four-ranked restriction is to establish a waiver standard tailored to the top four-ranked restriction. This approach will preserve competition in the DVP market while accommodating those instances where application of the top four-ranked restriction would harm the public interest.

142. Belo takes a nearly opposite approach, proposing that the Commission permit same-market combinations provided that they satisfy our top four-ranked standard, but eliminate our voice test. The Commission agrees that, as it is used in our modified rule, a top four-ranked prohibition is an appropriate means of protecting against combinations that would have an enhanced ability or incentive to engage in anticompetitive conduct.

143. NAB proposes that the Commission permit combinations where at least one of the stations has had, on average over the course of a year, an all day audience share of ten or less (the "10/10" proposal). NAB asserts that the audience share data used for this calculation should include viewing of out-of-market broadcast stations and cable networks, to account for competition from these sources. NAB proposes that the Commission treat the 10/10 standard as a presumption, and urges us to consider proposed combinations that do not meet this standard (including same-market combinations of three stations) on a case-by-case basis, considering factors which the Commission discusses along with other waiver proposals. NAB urges the Commission to allow broadcasters to transfer combinations created pursuant to the 10/10 standard even if one or both stations has increased its viewing share above the ten threshold at the time of such transfer. NAB asserts that requiring licensees to find separate purchasers will be disruptive and will tend to discourage investment in broadcast stations. Of the commenters who support the 10/10 proposal, some support the proposal as advanced by NAB; others support it with modifications; others suggest it be used only as a safe harbor, allowing for many other types of combinations.

144. The record in this proceeding supports a rule that will allow financially weak stations to combine with each other or with stronger stations in order to realize efficiencies. The 10/10 proposal, however, would permit mergers between financially strong stations, including top four-ranked stations, in a significant number of markets. Neither the record nor standard competitive analysis justifies a rule that will permit such mergers. The Commission's analysis suggests that combinations among the top four rated broadcast stations would create welfare harms. The Commission also finds that the proposal does not adequately justify the use of ten as a threshold. The record demonstrates that in many markets ten is the average share for any given station, sometimes even the very highest rated stations, in the market. In addition, the proposal provides no clear rationale to justify why, for example, a combination involving two stations with respective audience shares of 25 and 9 should be permitted, although a combination involving two stations with respective audience shares of 12 and 11 should be prohibited. For these reasons, the Commission rejects the 10/10 approach.

145. Hearst-Argyle advances an alternative proposal that would permit common ownership of any number of television stations in the same market provided that the stations' combined audience share does not exceed 30%. Combinations that would result in an audience share above 30% would be subject to an Audience Market Index ("AMI") cap that is calculated in a manner similar to an HHI, but uses audience share data rather than advertising share data. If a combination would result in AMI below 1000, the combination would be permitted, regardless of the increase in concentration. A combination resulting in an AMI between 1000 and 1800 would be permitted if the increase in AMI is less than 100 points, and a combination resulting in an AMI above 1800 would be permitted only if it increases AMI by less than 50 points. Hearst-Argyle asserts that by using an audience share metric, its proposal objectively measures and protects both diversity and competition. Hearst-Argyle contends that its proposal also is likely to survive judicial scrutiny because its 30% hard cap and AMI analysis are both based on antitrust law and analysis. In addition, Hearst-Argyle contends that its proposal avoids several pitfalls of the NAB 10/10 proposal.

146. The Commission does not agree with Hearst-Argyle that simply because courts have accepted presumptions of

30% market share as demonstrating market power in the context of the antitrust statutes, it should establish a presumption that 30% is an appropriate audience share limit. The Hearst-Argyle proposal does not place specific limits on the number of broadcast television stations an entity could own in a local market. An entity could acquire any combination of stations in a local market as long as its audience share is 30 percent or less, and the AMI cap is satisfied. In many markets, this approach would permit an entity to own four, five, six or more stations. The Commission does not believe that consolidation in a market of a large number of stations with low audience share is in the public interest. Although an individual station may currently have a small audience share in the DVP market, each station's audience share has the potential to change over time. The number of stations a firm owns is a measure of its capacity to deliver programming. This capacity can be as important a factor in measuring the competitive structure of the market as is its current audience share. Moreover, much like the 10/10 proposal, the AMI test will frequently result in common ownership of stations ranked among the top four in the market. It will also permit common ownership of three stations in many more markets than will our modified rule—including some very small markets. As shown by one of Hearst-Argyle's own examples, under certain circumstances, the AMI test would even permit common ownership of three of the top four-ranked stations in a market with just five full-power television stations. Because of the anticompetitive harms that would result from combinations allowed by the AMI test, the Commission will not adopt Hearst-Argyle's AMI proposal.

147. NAB proposes an alternative that would combine the 30% audience share cap of the AMI test with a ban on common ownership of more than three stations in any market, and a ban on common ownership of more than two top four-ranked stations in the same market. For similar reasons, the Commission does not accept this proposal. The Commission believes that (1) a ban on combinations among the top four-ranked stations is necessary to promote competition; (2) a 30% share cap would permit combinations that undermine that goal; and (3) ownership of three television stations in markets with fewer than 18 stations would harm competition by consolidating capacity in the hands of too few owners. The Commission's modified rule better