

compete in economic terms in separate and distinct product markets. Both radio and television outlets, however, inhabit the larger speech market, as do several other types of entities. For example, MOWG Study No. 8, a consumer survey on media usage, reveals that, when asked to identify their primary source of all news and information—both local and national—approximately 40% of Americans responded that broadcast television was their primary source and approximately 10% of Americans responded that radio was their primary source. However, nearly 24% of respondents identified daily newspapers as their primary source of news and information, 18% identified cable news networks, 6% identified the Internet, and 2% identified weekly newspapers or magazines. Other studies confirm that, today, Americans substitute among and between many different sources for news and information on a regular basis. The record reflects, in short, that the “viewpoint” market in which television and radio stations participate is broader than the economic product markets, as defined by standard competition theory, in which either competes. As a result, intra-service caps designed to ameliorate competition concerns necessarily also will protect against undue concentration of speech outlets for diversity purposes.

301. The Commission’s diversity index helps to illustrate this point. Pursuant to the Commission’s new local radio rule, no single owner, even in the smallest markets, will own more than 50% of the radio outlets. In larger markets, the percentage of radio outlets that can be held by any one entity is considerably smaller. Thus, using the most extreme set of facts, and using Altoona, Pennsylvania, as the Commission’s test case, the diversity index focused on local news and information alone (again, the most conservative assumption) reveals a relatively minimal impact on viewpoint diversity even should the radio outlets become split between only two owners. The current base case DI for local news and information for Altoona is 960. If the local radio market were to become restructured into a duopoly, the DI would rise to only 1,156. This hypothetical posits the most extreme restructuring of radio outlets in the smallest market among those in the Commission’s test cases. The change in the diversity index will be far smaller as a result of radio transactions in larger markets or where the restructuring is less extreme.

302. Similarly, pursuant to the Commission’s new local television rule,

no single owner will be permitted to own more than two television outlets in most markets. Using a set of randomly sampled markets of varying sizes, the average change in DI as a result of an owner of one television property buying another to create a television duopoly in a small market with only five licensed television stations is 91. In markets with twenty licensed television stations the change in DI as a result of the creation of a television duopoly is only six.²² Thus, although the Commission’s intra-service television and radio caps are designed to protect and promote competition, they have a corollary benefit of also guarding against concentration in the viewpoint markets, at least with respect to intra-service combinations.

303. The Commission recognizes, however, that cross-media combinations that may impact the range and diversity of voices in local markets will not be captured by its television and radio caps. The Commission therefore adopts new cross-media limits targeted specifically and solely at the types of transactions that would give it the most concern and which are not already prohibited by its intra-service caps.

304. *Foundations of the Cross-Media Limits.* The Commission begins with the proposition that, because this rule will limit the speech opportunities not only for broadcasters, but also for other entities that may seek to own and operate broadcast outlets (including those with the fullest First Amendment protection—newspapers), the Commission should draw the rule as narrowly as possible in order to serve its public interest goals while imposing the least possible burden on the freedom of expression. The Commission also recognizes that the tools that the Commission is using to evaluate market diversity involve as much art as science. “Diversity” is not susceptible to microscopic examination; it cannot be mapped with any known formal system or reduced to mathematical equations. Although the Commission attempts to measure it and assign some quantitative value to it in order to understand relative diversity of different types of markets, it recognizes that this process is inherently approximate.²³ The

²² The local television ownership cap includes a prohibition on top-four combinations. This will have the effect of prohibiting combinations of the local television stations most likely to produce and carry significant local news programming. Thus, although the top-four restriction is based on competition theory, the rule will also have beneficial effects on local diversity.

²³ Using the Diversity Index allows the Commission to see different market characteristics in markets of different sizes. It has also found, however, that differentiating markets by the number

Commission must exercise great care, therefore, before categorically prohibiting any particular transaction or set of transactions as a prophylactic matter.

305. Nonetheless, it is apparent, based on the record in this proceeding, that certain types of transactions in certain markets present an elevated risk of harm to the range and breadth of viewpoints that may be available to the public. Using the Commission’s diversity index analysis and its independent judgment regarding desired levels of diversity, the Commission first identifies “at-risk” markets that might already be thought to be moderately concentrated for diversity purposes. It then identifies the types of transactions that pose the greatest risk to diversity, and imposes specific limits on those transactions in at-risk markets. Finally, because certain transactions in less concentrated markets pose a high risk of rapid concentration, the Commission imposes separate restrictions on transactions outside of the at-risk markets.

306. *Identifying At-Risk Local Markets.* The Commission begins by identifying those markets most susceptible to high levels of viewpoint concentration; *i.e.*, those markets where its diversity concerns cut most deeply. At the outset, consistent with the Commission’s past practice and precedent, the Commission focuses in this regard on local, not national, viewpoint market(s). Evidence in the record before us supports the conclusion that the number of outlets for national news and information is large and growing, and that government regulation is thus unnecessary to protect it.

307. With respect to local markets, the Commission’s ten city study and its DI test cases reveal that most local markets today are well-functioning, healthy markets for speech. Not all voices, however, speak with the same volume. Using its Diversity Index, the Commission has examined the concentration of media outlets in the ten markets that were the subject of its Ten City Study using weighted voices. New York has a base DI for local news and information of 373; Lancaster, Pennsylvania, has a DI of 939; and Myrtle Beach, South Carolina, has a DI of 989. Indeed, the average DI for all ten markets, which range from the largest to near the smallest, is 758. A DI of 758 is the equivalent of 13 equally-sized firms.

of newspapers present is too blunt while differentiating markets by the number of radio stations is too fine. Therefore, the Commission uses the number of television stations as an identifier of market size.