

average DI for those with nine television stations is 705; the average DI for those with ten television stations is 635; the average for those with fifteen television stations is 595; and the average DI for those with twenty television stations is 612. That is, markets with nine or more television stations today are very much un-concentrated.

329. Beginning in markets with nine licensed television stations, the Commission sees that, on average, the change in DI that would result from a television owner acquiring a radio group consisting of the maximum number of radio stations permissible under the Commission's local radio rule is only 64 points. If instead it were the owner of a daily newspaper acquiring that radio group, the DI change would be 198 points, leaving the market below 1000 DI. If the owner of a daily newspaper were to purchase a television station instead of a large radio group in a market of this size, the DI would increase only 86 points. Indeed, the largest combination possible in the market—a combination that would include a daily newspaper, a television duopoly, and a large radio group—would result in a DI increase of 473 points, taking the average nine television market to a base DI of under 1200 points, only marginally in the range that the Commission would consider moderately concentrated.

330. This analysis is premised on the creation of very large combinations of media properties at the local level. Even so, the results show that markets with nine or more television stations are un-concentrated today and are unlikely to become highly concentrated even in the absence of cross-media limits. Section 202(h) requires that the Commission justify broadcast ownership limits on more than supposition or inchoate fears; the Commission's governing law requires that the Commission targets its structural limits at real and demonstrable harms. Based on the foregoing, the Commission cannot, therefore, justify cross-media restrictions in markets with nine or more licensed television stations.

331. The tiers adopted in the R&O, "at-risk" markets, "small to medium size" markets, and "large" markets—are derived from the Commission's DI analysis and our independent judgment regarding market operation and the effect of various combinations on diversity. The Commission's diversity concerns are greatest in at-risk markets and the Commission has accordingly prohibited all forms of cross-media combinations in those markets. In small to medium markets the Commission has imposed specific limitations on

particular kinds of combinations that would, in its estimation, most likely result in unacceptable harm to viewpoint diversity. In large markets, the Commission's analysis indicates that no cross-media limit is necessary, nor can one be justified, given the large number of outlets and owners that typify these markets and the operation of its intra-service television and radio caps.

332. *Conclusion.* Although the Commission generally prohibits television-radio, and newspaper-broadcast, cross-ownership in at-risk markets, and the Commission limits newspaper-broadcast combinations in small to medium size markets, the Commission recognizes that special circumstances may render these cross-media limits unnecessary or counter-productive in particular markets. Accordingly, the Commission will continue to entertain requests for waiver of these cross-media limits and, in particular, will give special consideration to waiver requests demonstrating that an otherwise prohibited combination would, in fact, enhance the quality and quantity of broadcast news available in the market.<sup>31</sup> In addition, of course, the Commission will review its entire local broadcast ownership framework, including its new cross-media limits, beginning next year, in the 2004 biennial review. The Commission will not, however, permit collateral attack upon its rules in individual cases on diversity grounds based upon more particularized showings using the DI in a given market. The rules adopted in the R&O are rules of general applicability. The lines that have been drawn and the judgments that have been made reflect the Commission's conclusions regarding the probable effects of given transactions in the run of cases. Those conclusions necessarily rely upon generalizations, approximations, and assumptions that will not hold true in every case. Indeed, many of these assumptions would not be true in a particular context or specific market. The Diversity Index itself is a blunt tool capable only of capturing and

measuring large effects and general trends in typical markets. It is of no use, therefore, for parties to attempt to apply the DI to a particular transaction in a particular market.

#### *D. Grandfathering and Transition Procedures*

333. *Grandfathering Provisions.* There may be some existing combinations of broadcast stations that exceed the new ownership limits due to the modifications of both the local TV and the local radio ownership rules. In addition, there may be instances in which a party currently owns a radio/television combination that may not comply with the new cross-media limits.<sup>32</sup>

334. The Commission is persuaded by the record to grandfather existing combinations of radio stations, existing combinations of television stations, and existing combinations of radio/television stations. The Commission will not require entities to divest their current interests in stations in order to come into compliance with the new ownership rules. As suggested by commenters, doing so would unfairly penalize parties who bought stations in good faith in accordance with the Commission's rules. Also, the Commission is also sensitive to commenters' concerns that licensees of current combinations should be afforded an opportunity to retain the value of their investments made in reliance on our rules and orders. The Commission also agrees with the commenters that argue that compulsory divestiture would be too disruptive to the industry. On balance, any benefit to competition from forcing divestitures is likely to be outweighed by these countervailing considerations.

335. While commenters overwhelmingly support grandfathering existing combinations, many nonetheless argue that grandfathering will create competitive imbalances which favor existing group owners—those that assembled combinations under the current rules—and disfavor those that cannot assemble competing combinations because of new ownership restrictions. Like all grandfathering decisions, some disparity will exist between grandfathered owners and non-grandfathered owners. The Commission does not believe this fact outweighs the

<sup>31</sup> As is the case with our new local television ownership rules, we will require that a licensee who obtains a waiver of our cross-media limits show at renewal time the benefits that have accrued to the public as a consequence of the waiver. At the end of the broadcast station's (or stations') license term(s), the licensee of the station(s) must certify to the Commission that the public interest benefits of the Commission's grant of the waiver are being fulfilled. This certification must include a specific, factual showing of the program-related benefits that have accrued to the public. Cost savings or other efficiencies, standing alone, will not constitute a sufficient showing.

<sup>32</sup> While we are not aware of any existing newspaper/broadcast combinations that have been previously grandfathered or approved by the Commission that would be barred under the new rules, to the extent such combinations do exist, they will be subject to the grandfathering and transferability provisions described in this section.