

PART I:

THE FCC'S INADEQUATE AND RESULTS-DRIVEN RESEARCH AGENDA

INTRODUCTION

This part of the Consumer Group Comments examines the pattern of research on media ownership at the FCC since the ill-fated effort to relax media ownership limits in 2003. It shows that the agency began to identify and explore the key policy issues in 2003-2005, but then there was a dramatic shift in the research agenda that underlies the most recent round of research. This shift in focus raises questions about its suitability as a basis for modifying the media ownership limits.⁴

This part is divided into three chapters. In the first chapter the overall pattern of research is described and the substance of the research is explored in the period between the publication of the Final Order in the omnibus Media Ownership Proceeding (June 2003)⁵ and the appointment of Kevin Martin as chairman of the Commission. Chapter II examines the research agenda laid out by Chairman Martin's first Chief Economist.⁶ It is the sharp shift in the focus of research between these two periods and the results-driven nature of the most

⁴ For eighty years the policy of the United States has been to issue licenses to broadcast over the public airwaves. Because there are many more people who would like to broadcast than licenses available, the exclusive licenses create a challenge to the fundamental notion of Freedom of Speech. Some people get licenses, while others do not. As a result, the Supreme Court has allowed Congress to require that the holders of those licenses to serve the public interest. That public interest has come to be defined as "competition, localism and diversity." When the Federal Communications Commission, which implements the will of Congress in the broadcast media, writes rules, it must do so in a manner that promotes these three goals.

⁵ *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rule and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, etc. 18 FCC Rcd 13260 (2003)

⁶ Leslie M. Marx, *Summary of Ideas on Newspaper-Broadcast Cross-Ownership* (June 15, 2006).

recent research agenda that is a source of concern. It narrowed the range of questions asked and biased the answers to the few issues that were investigated. Chapter III discusses how the research went astray as a result of the narrowing of focus, but also the failure of the agency to follow proper procedures in its review and dissemination of its own research. Proper peer review and public involvement would have identified many of the problems and allowed the agency to fix them before the research was completed.

I. UNDERSTANDING AND MEASURING LOCALISM AND DIVERSITY

OVERVIEW OF CHANGING RESEARCH FOCUS

Broadcast Localism

Even before the Third Circuit Court overturned the new media ownership rules in June of 2004 Chairman Powell recognized that there were many concerns that the agency had failed to address in its rulemaking. A couple of months after the FCC issued its new rules in the omnibus media ownership proceeding, the Commission launched a Localism in Broadcasting Initiative and created a Localism Task Force to carry it out. While Chairman Powell defended the recently adopted rules, he acknowledged that there was more work to be done.

Our exhaustive ownership review demonstrated that the United States boasts the most diverse media marketplace in the world and is by no means concentrated and the rules adopted in that proceeding are well-designed to prevent any media company from having excess power over competition or viewpoints. During the proceeding and in the months that followed, however, we heard the voice of public concern about the media loud and clear. Localism is at the core of these concerns and we are going to tackle it head on...

The Senate Commerce Committee recently held hearings and brought greater attention to the issue of localism in broadcasting. I applaud the Committee's efforts and hope to work in concert with them and the many Members of Congress who support localism...

Toward that end, the Localism Task Force will advise the Commission on steps it can take and, if warranted, will make legislative recommendations to Congress that would strengthen localism in broadcasting...

The Task Force will play a critical role in gathering empirical data and grassroots information on broadcast localism and advising [sic] the Commission on concrete steps that can be taken to promote localism. The Task Force will

- Conduct studies to rigorously measure localism and how it may be affected by existing FCC rules.
- Organize a series of public hearings on localism around the country.
- Advise the Commission on recommendations to Congress this fall relating to the licensing of thousands of additional low power FM radio stations.
- Make recommendations to the Commission within 12 months on how the Commission can promote localism in radio and television.
- Advise the Commission on legislative recommendations to Congress that would strengthen localism.⁷

It was almost a year later, however, after the new media ownership rules had been remanded by the Third Circuit Court⁸ that a Notice of Inquiry was issued “In the Matter of Broadcast Localism.”⁹

The lines of analysis and the shifts in approach to research over the five years since the Final Order are clear in the agency documents made available under pressure, partly in response to a Congressional hearing and partly in response to a Freedom of Information Act request. Exhibit I-1 lists the documents. It focuses on research and does not include announcements about localism hearings or testimonials in response to those hearings. It separates media ownership, cable and advertising research. It also excludes third party documents. It highlights the key break points in the research oriented toward media.

⁷ FCC Chairman Powell Launches “Localism in Broadcasting” Initiative,” August 20, 2003.

⁸ *Prometheus Radio Project, et al, v. F.C.C.*, 373 F.3d 372 (3d Cir. 2004).

⁹ “Notice of Inquiry,” *In the Matter of Broadcast Localism*, MB Docket No. 04-233, June 7, 2004.

Exhibit I-1: Documents in the FCC Shifting Research Agenda

MEDIA

6/15/06	Summary of Ideas on Newspaper-Broadcast Cross-Ownership Spreadsheet
Undated	The Evolving Structure and Changing Boundaries of the U.S. Television Market in the Digital Era
6/1/06	The Evolving Structure and Changing Boundaries of the U.S. Television Market in the Digital Era
Undated	Financial Health of the Newspaper Industry
6/06	<hr/>
6/05	Localism and Welfare
3/05	The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time has Passed
Spring 2005	FCC Radio Market Structure and Music Diversity Paper
Undated	FCC Radio Market Structure and Music Diversity Paper
1/14/05	Minority and Female Ownership
11/04	Political Representation, Voter Information, and Government Allocations: A Theory of Optimal Localism
8/04	Preliminary Analysis for Diversity and Localism in Radio Playlists Study
7/2/04	Localism Paper
7/04	Do Local Owners Deliver More Localism
6/17/04	Do Local Owners Deliver More Localism
5/12/04	Do Local Owners Deliver More Localism
3/29/04	Do Local Owners Deliver More Localism
3/26/04	Do Local Owners Deliver More Localism
2/27/04	Do Local Owners Deliver More Localism
2/18/04	Do Local Owners Deliver More Localism
1/15/04	Do Local Owners Deliver More Localism
3/4/04	Defining Localism from an Economics Perspective
2/27/04	Defining Localism from an Economics Perspective
12/03	Defining and Measuring Diversity and Localism
12/03	Media Diversity and Localism: Conference Report at Fordham University
12/03	Statement of Jonathan D. Levy to the conference on Media Diversity and Localism:
3/7/03	<hr/>
3/7/03	Write up re Diversity Index
Undated	Appendix A
Undated	Background on Localism in Broadcasting
Undated	Female Minority Ownership
Undated	Stages 1 through 5
Undated	Cluster Analysis Work Papers - Zip File 4.5 MB
9/03	Review of the Radio Industry, 2003
9/02	Radio Industry Review 2002: Trends in Ownership, Format and Finance
Undated	Review of the Radio Industry
9/02	A Comparison of Media Outlets and Owners for Ten Selected Markets (1960, 1980, 2000)
9/02	A Compilation of Outlets and Owners for Ten Selected Radio Markets (1960, 1980, 2000)
9/02	Broadcast Television: Survivor in a Sea of Competition
9/02	Consumer Substitution Among Media
9/02	On the Substitutability of Local Newspaper, Radio, and Television Advertising in Local Business Sales
Undated	On the Substitutability of Local Newspaper, Radio, and Television Advertising in Local Business Sales
9/02	Program Diversity and the Program Selection Process on Broadcast Network Television
9/02	Radio Market Structure and Music Diversity
9/02	The Measurement of Local Television News and Public Affairs Programs

CABLE

9/13/06	Competing on Quality: Two-Sided Markets, the Sutton Paradigm, and the Multichannel Video Industry: A Graphical Approach
Undated	Competing on Quality: Two-Sided Markets, the Sutton Paradigm, and the Multichannel Video Industry: A Graphical Approach
11/05	Vertical Integration and Market Foreclosure in the Multichannel Video Industry: An Update
Undated	Vertical Integration and Market Foreclosure in the Multichannel Video Industry: An Update
8/05	Estimation of Switching Costs: Several Methods and the Multichannel Video Industry
2/05	The Implicit Marginal Valuation of Cable Service in the US
Undated	The Implicit Marginal Valuation of Cable Service in the US
9/04	Vertical Ownership and Vertical Control: A Model of the Cable Television Industry
3/9/04	Vertical Ownership and Vertical Control: A Model of the Cable Television Industry
Undated	Buyer Size and Bargaining Power: An Experimental Analysis
Undated	Research on the United States Multichannel Video Industry at the Federal Communications Commission
Undated	The Market for Subscription Television Service in the US
2/24/03	Pivotal Buyers, Vertical Ownership, and Endogenous Most-Favored Nation Clauses in the Cable Industry
9/02	Asymmetric Bargaining Power and Pivotal Buyers
9/02	Most Favored Customers in the Cable Industry
5/1/02	Cable Model

ADVERTISING

12/03	Empirical Aspects of Advertiser Preferences and Program Content of Network Television
9/02	A Theory of Broadcast Media Concentration and Commercial Advertising
9/02	Consolidation and Advertising Price in Local Radio Markets
Undated	Consolidation and Advertising Price in Local Radio Markets
9/02	On the Substitutability of Local Newspaper, Radio, and Television Advertising in Local Business Sales
Undated	On the Substitutability of Local Newspaper, Radio, and Television Advertising in Local Business Sales

Source: <http://www.fcc.gov/ownership/additional.html>

In late 2002 and early 2003, the Commission initially started churning out updates and extensions of the research it had undertaken as part of the omnibus media ownership proceeding. The culmination was a rewrite of the Diversity Index. In late 2003 and early 2004, the emphasis shifted to the complex definition of localism and the empirical investigation of the concept. However, with the establishment of the “Broadcast Localism Initiative,” we find that in late 2003 and 2004 the FCC set out to develop a research agenda that was responsive to many concerns raised in its public forums, Congressional hearings and in the proceeding record about the FCC’s approach to oversight of the broadcast media industry. The efforts to better define and measure one of the central policy goals Congress established for the broadcast media – localism – were bearing fruit at the conceptual and empirical levels.

The December statements at the Fordham University conference on “Media Diversity and Localism: Meaning, Metrics, and the Public Interest” mark a transition. A version of the critical empirical paper “Do local Owners Deliver More Localism,”¹⁰ was presented at that conference, as a personal paper, in addition to two other statements about localism and the FCC approach to measuring diversity.¹¹

The research that appears to have been stimulated by the localism initiative reflects an effort to engage in a rich, theoretical and empirical discussion of localism and pursue issues that had not been pursued by the Commission previously. A complex definition of localism was

¹⁰ Peter Alexander and Keith Brown, “Do Local Owners Deliver More Localism? Some Evidence from Local Broadcast News,” presented to the Conference on Media Diversity and Localism: Meaning, Metrics, and the Public Interest, Donald McGannon Communication Research Center, Fordham University, December 15-16, 2003.

¹¹ Sherille Ismail, “Defining and Measuring Diversity and Localism,” Senior Counsel, Office of Strategic Planning, Federal Communications Commission, Panel 1, December 15, 2003; Royce Sherlock, “Defining and Measuring Diversity and Localism,” Federal Communications Commission, Panel 1, December 15, 2003. More information is available at <http://www.fordham.edu/images/undergraduate/communications/conferencereport.pdf>.

offered in a working paper¹² that seems to have synthesized prior FCC policy on localism, as well as reflecting the concerns expressed in comments about localism. The “Broadcast Localism Notice of Inquiry” uses many of the concepts from the paper, as well as those from earlier commission inquiries.

The paper prepared by the Industry Analysis Division of the Media Bureau entitled “Defining Localism from an Economics Perspective” presents an interesting contrast to the later, narrow focus of the Chief Economist. It identified a dozen “Basic Types of Concerns Expressed about Localism” and ten “Examples of ‘local’ programming”.¹³ Combining the two lists, we find about two dozen aspects of localism. “Defining Localism from an Economics Perspective” went on to identify four factors that might result in a failure of the market to adequately supply localism.

This line of analysis was formalized in another FCC paper “Political Representation, Voter Information, and Government Allocations: A Theory of Optimal Localism”¹⁴ and a published paper that acknowledges interaction with and encouragement from the FCC (“Localism and Welfare”).¹⁵

The empirical research that appears to have been pursued over the course of the next two years started to address several of these more refined aspects of localism – quantitatively

¹² Daniel Shiman, “Defining Localism from an Economics Perspective,” IAD, Media Bureau, March 4, 2004.

¹³ Id., Pg. 6-8.

¹⁴ Nodir Adilov, Peter J. Alexander and Keith Brown, “Political Representation, Voter Information and Government Allocations: A Theory of Optimal Localism,” November 29, 2004. Two of the authors are identified as employed by the media bureau, but the document contains a disclaimer that the ideas are those of the authors “and do not necessarily reflect those of the Federal Communications Commission staff or Commissioners.”

¹⁵ Simon P. Anderson, “Localism and Welfare,” June 2005.

assessing several aspects of the localism issue, in particular, the quantity of local news, and the issue of local-on-location were investigated.

While several versions of “Do Local Owners Deliver More Localism” were presented and published,¹⁶ it became the center of controversy in 2006. The paper was never released by the FCC, but a copy was obtained by Senator Boxer.¹⁷ As described below, the paper found that local ownership increases localism and that consolidation does not, conclusions that conflicted with the inclination of the FCC to relax ownership limits. The failure of the agency to publish the paper led to charges that the research was being suppressed.

Chairman Powell, who had initiated the broadcast localism efforts, resigned in late January 2005 and was replaced by Kevin Martin in March 2005. At this time, all of these developments came to a halt. The studies were never published, leading to the controversy over “suppression” of the studies and, more importantly, the research ceased for about a year. The research agenda, set by Chairman Martin’s first appointed Chief Economist, which emerged a year later, headed in a very different direction.

The new research agenda that emerged in 2006, as the FCC released its Notice of Proposed Rulemaking, abandoned the earlier lines of analysis and set out on a radically different agenda with a laser focus on eliminating the newspaper-TV cross-ownership rules. In the rush to get rid of the newspaper-TV cross-ownership rule, the new research agenda devoted little attention to defining and operationalizing the goals of the Communications Act. This tunnel

¹⁶ See for example, “Do Local Owners Deliver More Localism? Some Evidence from Local Broadcast News,” presented to the Conference on Media Diversity and Localism: Meaning, Metrics, and the Public Interest, Donald McGannon Communication Research Center, Fordham University, December 15-16, 2003.

¹⁷ John Eggerton, “Boxer Produces Another Unpublished Report,” *Broadcasting & Cable*, September 18, 2006, available at <http://www.broadcastingcable.com/article/CA6373194.html>.

vision ignored interesting efforts by the FCC to understand its policy goals in the period after the court remanded its new media ownership rules. The agenda led to research projects that are results-driven. Simply put, the Commission started from the result it wanted and worked backwards.

Other Shifts in Research Focus

There were several other shifts in focus beyond the clear shift in the localism research that are notable when compared to the new research agenda. Another shift in the approach to research appears in the studies of the radio market that were conducted in 2004 and 2005. The FCC shifted from its earlier analysis of formats to analyzing radio play lists. These studies pointed in a direction similar to the localism studies. Consolidation diminished diversity of play lists in some aspects. This line of analysis was largely abandoned after Chairman Martin took over.

There are other notable aspects of the pattern of research. Advertising research stopped in 2003. It, too, was pointing in directions that were a challenge to the agencies deregulatory agenda. These, too, were never published and this line of analysis was abandoned.

There is very little research on minority issues in the list of documents. A separate Advisory Committee on Diversity for Communications in the Digital Age was established in mid-2003 to “make recommendations to the Federal Communications Commission regarding policies and practices that will further enhance the ability of minorities and women to participate in the telecommunications and related industries.”¹⁸ It heard numerous presentations and adopted a long list of recommendations (few of which have been adopted by the Commission) but conducted little research.

¹⁸ Advisory Committee on Diversity for Communications in the Digital Age: Charter.

Before we analyze the new media research agenda laid out in the Martin era, it is important to understand the substance of the body of research that was emerging at the FCC in late 2003 through early 2004.

A BROAD AND NUANCE DEFINITION OF BROADCAST LOCALISM

Conceptualizing Localism

“Defining Localism from an Economics Perspective” divided about two-dozen different localism concerns into three categories, Local Coverage, Tastes of the Community, Local Origination.¹⁹ We see a fourth category – Local Political Discourse. In Exhibit I-2 the different types of localism concerns are allocated across these four categories. The Broadcast Localism NOI identifies nine major areas of concern – Communications with Communities, Nature and Amount of Community Responsive Programming, Political Programming, Underserved Audiences, Disaster Warnings, Network Affiliation Rules, Payola and Sponsorship Identification, Voice Tracking and National Playlists. There is a parallel in this list to an effort by the Commission to identify the various aspects of broadcast policy over 40 years earlier. The FCC made reference to this earlier undertaking in the Broadcast Localism Notice of Inquiry, as did a background localism document.²⁰ The earlier inquiry was more broadly defined so it included concerns about entertainment, children’s programming and service to minorities.

¹⁹ Daniel Shiman, “Defining Localism from an Economics Perspective,” IAD, Media Bureau, March 4, 2004.

²⁰ “Background on Localism in Broadcasting,” which became the introductory material for the Broadcast Localism NOI.

Exhibit I-2: Localism as a Complex Set of Concerns

	<u>Coverage of local affairs</u>	<u>Sensitivity to local tastes</u>	<u>Opportunity for local involvement</u>	<u>Facilitation of local political discourse</u>
2004 Localism Paper	Community news police, traffic, weather, sports Emergencies & events Education about local institutions Local religious Local advertising PSAs in public interest	What listeners want Avoid offence Tailored to local taste	Local control in Use of local resources Working in industry Locally originated programming Outlet for local talent	Public affairs Expression of group interests Community, political, religious group discussions Local political view Local call-in and talk Public access
1960 <i>En Banc Inquiry</i>	Weather, sports & market reports News programs Children's, religious & entertainment	Service to Minority groups	Development and use of local talent	Public affairs Opportunity for local self-expression Political Broadcasts Editorializing by licensees

Sources: 2004 Localism paper = *Defining Localism from an Economics Perspective*, Daniel Shiman, IAD, Media Bureau, March 4, 2004; 1960 En Banc Inquiry = *Report & Statement of Policy Res: Commission En Banc Programming Inquiry*, 44 F.C.C. 2303, 2314 (1960) cited in Broadcast Localism NOI, note 32.

While some of the programming issues identified in the earlier inquiry can be defined as single issues (e.g. children's programming), the service to minorities concerns cut across a number of the "localism" concerns and the diversity issues appear both in localism and diversity. While the Commission was handling these issues separately, the Broadcast Localism Order identifies underserved audiences as a concern within the scope of localism. Thus, a parallel set of minority concerns would cover the same issues as identified for localism, but focused on minorities, for example,

- minority targeted programming,
- that is sensitive to local minority tastes,
- opportunities for minority employment in the media,
- minority ownership and control of outlets

- use of minority talent,
- origination of minority programming,
- opportunities for minority groups to express themselves, and
- have their issues presented in the media

Based on ‘Defining Localism from an Economic Perspective’ and the Broadband Localism NOI, Exhibit I-3 identifies approximately 100 issues/community/media concerns that the localism and diversity policy can address. Arguably, one might look at the impact of competition policy on each of the localism and minority issues. To capture the importance of competition, we list it as a separate category that “crosses” localism and minority concerns broadly.

“Defining Localism from an Economics Perspective” went on to identify four factors that might result in a failure of the market to adequately supply localism (see Exhibit I-4).

The conclusion to “Defining Localism from an Economics Perspective” was ambivalent about the answer to the question “Is Localism under-produced?”

Note that in some areas, the free market probably produces sufficient localism e.g. there are stations that specialize in providing local news, weather and sports. Economic theory suggests that in certain areas of broadcasting, there could be less localism than is desirable.²¹

A similarly ambiguous conclusion was reached by “Localism and Welfare.”

²¹ Shiman, 2004, p. 21.

EXHIBIT I-3: THE MULTIFACETED AND INTERACTING CONCEPTS OF BROADCAST LOCALISM, DIVERSITY AND COMPETITION

LOCALISM		DIVERSITY		
		Underserved Groups		
	TELEVISION	RADIO	TELEVISION	RADIO
<p><u>Coverage of local affairs</u> Community news (police, traffic, weather, sports) Emergencies & events Education about local institutions Local religious Local advertising PSAs in public interest</p> <p><u>Sensitivity to Local tastes</u> What listeners want Avoid offence Tailored to local taste</p> <p><u>Opportunity for local involvement</u> Local ownership/control Use of local resources Working in industry Locally originated programming Outlet for local talent</p> <p><u>Facilitation of local political discourse</u> Public affairs Expression of group interests Community, political, religious group discussions Local political view Local call-in and talk Public access Editorializing</p>				
<p>COMPETITION</p> <p>Market structure News & public affairs Children's programming Entertainment Advertising Affiliate relations Payola, Voice tracking Playlists</p>				

Exhibit I-4: Why Markets May Not Meet the Need for Broadcast Localism

<u>Merit goods</u>	<u>Single price</u>	<u>Scale economies</u>	<u>Externalities</u>
Intrinsically non-market goods	Inability to price discriminate Uneven value of local or infrequent programming Competition can reduce attention to local issues	Cost of tailoring Infrequent, important events	Free riders Undervalue some local goods (e.g. emergency)

Sources: 2004 Localism paper = *Defining Localism from an Economics Perspective*, Daniel Shiman, IAD, Media Bureau, March 4, 2004;

In each market, the mass producer advertises more and has a larger market share, so the disparity is largest in the smallest markets. For a given number of markets served by local producers, the equilibrium quality may be too low, suggesting that inducements to improve quality may be beneficial. However, there is not a clear-cut case that the global producer makes it too difficult for local producers to compete; indeed, the converse may be the case because the global producer is too soft in competing in local markets. The argument for intervention may therefore have to be made on the grounds of positive externalities created by the provision of local broadcasting.²²

Another conceptual paper identified institutional reasons that localism is important.

Local voter-relevant information is particularly important in representative democracies such as the United States, for several reasons. First, the locally representative United States Congress is separate from the Executive Branch. Unlike most European parliamentary democracies where the representative branch and executive branch are the same, the locally elected US congressional representatives serve in a different body than the national elected US executive. Second, the United States is large and extremely diverse, and the locally elected representatives therefore serve far more divergent interests than locally elected representatives in many other representative democracies. These interests can also diverge heavily from those of the national elected executive, even if the representative and executive belong to the same political party. Finally, the United States Congress is bicameral, with two equally-powerful legislative bodies, the House of Representatives and the Senate. One of those legislative bodies, the Senate, gives equal representation to each of the fifty states, regardless

²² Simon P. Anderson, "Localism and Welfare," June 2005.

of their size... Thus certain institutional and demographic attributes in the United States imply a need for information that is locally relevant.²³

This political explanation for the importance of localism rests on the complex structure of the national government and the great diversity of a large continental nation. It does not note additional factors such as the federal structure and the relatively great importance that the U.S. places on local government to set policies that affect people's lives.

The analysis focuses on "a system of 'asymmetric'" political representation such as exists in the United States. Noting in particular, the division of political representation in the United States between the Senate and House of Representative," it compares

a model of voters' media access and government allocations. This allows us to model the pattern of media access across political jurisdictions that generates the optimal distribution of government expenditure. We compare this to an equilibrium that reflects basic features of political representation in the United States, and find, perhaps surprisingly, that greater media access can lower social welfare in some cases, if politically "over-represented" citizens have "too much" media access.²⁴

Whether one states the proposition as 'politically "over-represented" citizens with "too much" media access' or as 'politically "under-represented" citizens with "too little" media access, it is clear that media and political structure matter. The central policy goal has been to strive for a media system that affords access to the media in a manner that allows local groups to identify and express their needs and have those needs met.

Localism Research

This broad conceptualization influenced the empirical work that was undertaken in this period. "Do Local Owners Deliver More Localism?" cites the "Localism Task Force"

On August 20, 2003, the Federal Communications Commission (FCC) announced the launch of a "Localism Task Force" to evaluate the performance of

²³ Adilov, Alexander and Brown, 2004.

²⁴ Id., p. 4.

broadcasters in local markets. At that time, FCC Chairman Michael Powell stated:

I created the Localism Task Force to evaluate *how broadcasters are serving their local communities*. Broadcasters must serve the public interest, and the Commission has consistently interpreted this to require broadcast licensees to air programming that is responsive to the interests and needs of their communities (Italics added)...

One of the challenging questions facing media policymakers today involves reaching firm conclusions regarding the relationship between ownership characteristics and programming provisions that can effectively guide policy decision making. In short, very little is known about the effect of ownership structure on content, and even less about the effect of ownership structure on the local focus of content.

To help fill this void, we construct a measure of localism, analyze the actual output of local broadcast stations, and relate our measure of local content back to ownership structure.²⁵

The new research included an effort to measure the ideas of localism and diversity in a more comprehensive and precise way. The data set underlying the suppressed study was actually used to address two different television output measures. One output measure was the quantity of local news. The second output measure was the diversity of the output of local and national news. Essentially, the database counted the number of minutes devoted to different types of stories. The localism measures are straightforward counts— the number of total news seconds, the number of local news seconds and the number of local-on-location news seconds.

The diversity measure is more controversial. The primary variable used was actually much more a measure of variety than diversity. If one station devoted 30 seconds each to two different stories, both were counted as contributing to variety. However, if two stations devoted 30 seconds each to the same story, that was not counted as contributing to diversity at all. Only if a station that “duplicated” the coverage of a story devoted more time to it, did it count as diversity and only the incremental time counted. “[I]f any two or more local news stations

²⁵July 2004 version, p. 1.

broadcasts cover the same story on the same day only the seconds beyond the collective average of the respective overlapping broadcasts are counted as adding to diversity.”²⁶ This is at odds with the fundamental definition of diversity as the Supreme Court interprets it. “Antagonistic” reporting of the same events is essential to creating the “cross-lights”²⁷ that reveal truth. This measure severely undercounts that essential concept. Nevertheless, it too contradicts the FCC’s conclusions.

In some specifications, a more appropriate measure of diversity was used. This “total DMA diversity” “counts the total time devoted to all unique stories covered.”²⁸ This measure of diversity produced even more robust results confirming the negative effect of concentration on diversity.

The primary finding of the localism study was that local ownership matters in the production of local news:

The estimates presented in Section 4 suggest that local ownership may have significant implications for local content. In particular, local ownership appears to increase total, local and local on-location news seconds. Moreover, the

²⁶ Peter J. Alexander and Brendan M. Cunningham, “Same Story, Different Channel: Broadcast News and Information,” October 4, 2004.

²⁷ This is Judge Learned Hand’s characterization of the issue in the District Court decision that led to the Supreme Court ruling in *Associated Press*. “It is only by cross lights from varying directions that full illumination can be secured.” Justice Frankfurter elaborated in his concurrence in *Associated Press*: I find myself entirely in agreement with Judge Learned Hand that ‘neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive, for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. The interest is closely akin to, if indeed not the same as, the interest protected by the First Amendment: it presupposes that right conclusions are more likely to gathered out of a multitude of tongues, then through any authoritative selection. To many this is, and always will be, folly, but we have staked upon it our all.’”

²⁸ Alexander and Cunningham, p. 15.

increase in total news seconds from local ownership appears to be almost entirely driven by an increase in local news.²⁹

Owned-and-operated broadcast television stations produce less local news, but do not air significantly less total news or local on-location news. Therefore, it appears that owned and operated stations substitute non-local news for local news (that is not on location). This might indicate substitution of network feeds for on-location content.³⁰

Consolidation in the national television market does not improve the performance of the broadcast station owners. This finding emerges in both the localism and diversity studies:

As a local owner acquires television stations in more DMAs, they produce less total news. The large (albeit statistically insignificant) point estimates from the local news and on-location local news regression indicate that the decrease in total news may be primarily driven by decreases in local and local on-location news seconds.³¹

In short, our estimate suggests that increasing concentration appears to diminish diversity in local broadcast news both at the firm and market level. This result is robust to the measure of diversity used in estimation and emerges after controlling for possible endogeneity in market structure.³²

Conglomeration across media types does not improve the performance of the broadcast station owners:

While newspaper ownership is not a significant factor, a local television station owner who owns a within-DMA radio station appears to produce significantly less local news, possibly because they substitute local radio news for local television news.³³

Our theoretical research suggests that media variety allows consumer to insure against the idiosyncratic nature of information from particular sources. Moreover, the empirical evidence we have assembled suggests that concentrated media markets exhibit more homogeneity in the information conveyed to consumers.

²⁹ Anonymous, "Do Local Owners Deliver More Localism? Some Evidence from Local Broadcast News" (Federal Communication Commission, draft dated June 17, 2004), p. 14.

³⁰ *Id.*, p. 15.

³¹ *Id.*, p. 15.

³² Peter J. Alexander and Brendan M/Cunningham, "Diversity in Broadcast Television: An Empirical Study of Local News," *International Journal of Media Management* 6:177.

³³ "Do Local Owners Deliver More Localism? Some Evidence from Local Broadcast News," p. 14.

Such concentration can, therefore, inhibit the ability of individuals to derive a more stable payoff from media consumption.

This finding implies that regulatory policy designed to protect and encourage competition simultaneously helps satisfy a second policy objective: diversity.³⁴

Specifically, using the relative station-level diversity metric, we find that as the structure of the market becomes more concentrated, relative diversity of local news content is diminished. Importantly, this result is not robust to an instrumental variables specification. However, using the total market diversity metric, HHI is significant in OLS and robust to instrumental variable transformation. Since the total market diversity metric is arguably superior to the incremental metric as a measure of overall diversity, this result is useful – it suggests that total diversity within a DMA is sensitive to the level of concentration. Since we find that market structure plays an equally important role in determining product variety in national broadcasts, we are fairly confident of this finding.³⁵

The final sentence of the above citation indicates that the negative impact of concentration on diversity in local news also occurs for national news, even though the weak definition of diversity is used: “In particular, we find that concentration displays a negative and significant relationship with national news broadcast variety.”³⁶

One can hardly imagine a clearer set of findings that suggest that consolidation has a negative effect on localism and diversity. These findings take on added significance because they were a re-analysis of a data set that had received a great deal of attention in the media ownership proceeding. The Project on Excellence in Journalism had originally compiled the data set and done some analysis, which was filed in the proceeding.³⁷ The data was re-interpreted and

³⁴ Peter Alexander and Brendan M. Cunningham, “Public and Private Decision Making: The Value of Diversity in News,” in Philip Napoli (Ed.), *Media Diversity and Localism: Meaning and Metrics* (Lawrence Earlbaum, 2007), p. 94.

³⁵ Peter J. Alexander and Brendan M. Cunningham, “Same Story, Different Channel: Broadcast News and Information,” October 4, 2004, p. 24.

³⁶ *Id.*, p. 20.

³⁷ Project for Excellence in Journalism, “Does Ownership Matter in Local Television News: A Five Year Study of Ownership and Quality,” April 29, 2003; “Economists Inc.’s ‘Critique’ of the Recent Study on Media Ownership: A Response by the Project for Excellence in Journalism”.

attacked by various parties. PEJ complained that the FCC had misinterpreted the results in its decision.

The PEJ study was dismissed by the Commission as follows: “Whether or not the PEJ study is unbiased, its result appear statistically insignificant, the underlying data have not been made available, and therefore, cannot be considered reliable or convincing evidence.”³⁸ Having dismissed the study as fundamentally flawed, the FCC cautioned, when it cited the study in the cross-ownership discussion that “ We use PEJ’s filing here solely as a source of anecdotal evidence, not as a statistical study, and do not base our conclusions regarding the newspaper/broadcast cross-ownership rule upon it.”³⁹ The irony of the Commission even mentioning a study it had so brutally criticized is magnified by the fact that in original and the reply comments the PEJ reached exactly the opposite conclusion that the FCC did,

The closest the PEJ Study comes to what the FCC might or might not do is this rather general observation: “The data strongly suggest regulatory changes that encourage heavy concentration of ownership in local television by a few large corporations will erode the quality of news Americans receive.”⁴⁰

The re-analysis by the FCC economist was just the type of statistical analysis that the PEJ had done and it supported the PEJ’s own conclusions, pointing in the opposite direction from the earlier FCC interpretation.

There is a direct link between the advertising research and the localism research. This was made clear in one of the academic versions of the localism research

Stromberg (2004b) found that the expansion of radio in the 1930s helped rural Americans capture an increasingly greater percentage of government transfers, whereas Stromberg (2004a) suggested that advertiser supported, increasing returns to scale technology (e.g. television) induces the production of news targeted to large groups that are valuable to advertisers while ignoring smaller

³⁸ Order, ¶573.

³⁹ Order, ¶345.

⁴⁰ Reply Comment, “Economists Inc.’s ‘Critique’ of the Recent Study on Media Ownership: A Response by the Project for Excellence in Journalism,” March 18, 2003, p. 1.

fringe groups. George and Waldfogel (2002) document a similar phenomenon for newspapers in which consumption reflects strong preference externalities. Because these media are the means by which politicians convey information to voters, preference externalities can introduce bias into public policy.⁴¹

Advertising Research

The advertising argument here is a variant on one of the market structural reasons that the marketplace may generate inadequate production of local news and coverage. The general proposition was

Programs that are particularly valuable to a small part of the community, or are very valuable to everyone on an irregular basis, will be socially desirable (benefits > costs), but not produced.⁴²

The advertising variant of the statement in the last of the advertising studies at the FCC is as follows:

In this paper, we explore an as-yet empirically unexplored market imperfection in media markets, namely that arises out of advertisers preferences for programming. If advertisers prefer certain types of programming, then many viewers may not receive their preferred programming from advertiser-supported media. Depending on the advertisers' welfare gain and the viewer[s] welfare loss, this may lead to a suboptimal pattern of programming. This unique market distortion has important public policy implications for two reasons:

1. The advertiser-supported broadcast television market is a dominant source of mass entertainment and advertising in the U.S. In 2002, there was over \$41 billion in broadcast television advertising revenue in the U.S. alone.
2. The broadcast television market represents the largest private provision of a public good in the modern United States.⁴³

⁴¹ Peter J. Alexander and Brenden M. Cunningham, "Diversity in Broadcast Television: An Empirical Study of Local News," *International Journal of Media Management* 6 (3&4), p. 177.

⁴² Shiman, 2004, p. 12.

⁴³ Keith S. Brown and Roberto J. Cavazos, "Empirical Aspects of Advertiser Preferences and Program Content of Network Television," December 2003, p. 4.

Focusing on advertising and entertainment programming, the authors do not mention the important link to public policy that flows from the fact that television is the primary means of mass political communications. The pattern of communications that is set by the entertainment driven market structure affects the availability of communications for political discourse. The finding of the advertising study provides empirical evidence of the link:

We find that, even when adjusting for audience size and demographic composition, advertisers pay a premium for spot advertising on sitcoms, and pay a discount for advertising on “darker” programming like news magazines and police dramas. As a result, the television broadcast networks air a disproportionately high amount of sitcoms.⁴⁴

Another particularly important finding of the advertising research is that “The estimated elasticities of substitution show weak substitutability between local media.”⁴⁵

This parallels an evaluation of substitutability between media for consumers offered in the published version of “Do Local Owners Deliver More Localism.” The FCC economist who was the author of the above observations on diversity and localism characterized the FCC’s weak findings on substitutability in an academic article as follows:

Perhaps surprisingly, empirical evidence regarding substitutability between various media (e.g. television, radio, Internet, newspaper) for media consumers is scant... Waldfoegel finds statistically significant positive relationships, implying complementarities, in his data, noting that people who use media of one type tend to use more total media in general.

The significant coefficient from Waldfoegel’s (2002) six regressions of media substitutability yield the following results: (a) 1 hour of Internet use subtracts, on average, approximately 4 minutes of broadcast television viewing; (b) for each instance of Internet news use, broadcast television news use is reduced by approximately 2½ minutes; (c) for every 1% increase in the cable penetration rate, the rate of increase in daily newspaper circulation per capita decline by 18%; and (d) if daily newspaper circulation increases in number by 1, weekly newspapers decrease in number by 8.

⁴⁴ Id., pp. 4-5.

⁴⁵ C. Anthony Bush, *On the Substitutability of Local Newspaper, Radio and Television Advertising in Local Business Sales*, September 2002, p. 2.

The strongest results from Waldfogel's (2002) effort suggest that consumers may substitute between broadcast television and Internet use, although the magnitude of substitution appears to be modest.⁴⁶

CONCLUSION: A MULTI-FACETED, EMPIRICALLY-BASED CONCEPT OF LOCALISM AND DIVERSITY

The research stimulated by the "Broadcast Localism Initiative" produced,

- a multifaceted conception of localism,
- a theoretical framework that identified a variety of explanations of why markets might not produce the optimal level of localism, without reaching a definitive conclusion on whether markets would fail, and
- substantial empirical evidence that the concerns about inadequate localism and the impact of market structure on localism are well founded.

After a year hiatus, under the new chairman and a new Chief Economist, the research agenda changed dramatically, as described in the next section.

⁴⁶ Peter Alexander and Brendan M. Cunningham, "Public and Private Decision Making: The Value of Diversity in News," in Phil Napoli, (Ed.), *Media Diversity and Localism: Meaning and Metrics* 2007, pp. 83-84. This is the published version of the paper presented at the December 2003 Fordham University diversity conference.

II. A NEW, RESULTS-DRIVEN RESEARCH AGENDA

CHOOSING THE RESULTS FIRST

A paper authored by the FCC's then Chief Economist, Leslie M. Marx, obtained in response to a Freedom of Information Act data request, shows that rather than continuing these lines of research, the agency set out to prove what it wants. The paper entitled "Summary of Ideas on Newspaper-Broadcast Cross-Ownership,"⁴⁷ starts from the premise that the cross-ownership restrictions should be relaxed declaring "**This document is an attempt to share some thoughts and ideas I have about how the FCC can approach relaxing newspaper-broadcast cross-ownership restrictions.**"⁴⁸ The question of whether the ownership restrictions should be relaxed was not broached in the document. As discussed below, the Chief Economist's analysis was riddled with biased assumptions and framing of research questions.

The purpose of the Chief Economist's paper was to frame the issue and design research intended to support the foregone conclusion. The section entitled *Economic Studies to Support Newspaper-Broadcast Cross-ownership Limits* makes no bones about the purpose of the studies, opening with the following sentence: "**In this section I discuss some studies that might provide valuable inputs to support a relaxation of newspaper-broadcast ownership limits.**"⁴⁹

Moreover, after presenting a strategy for framing the analysis in a manner that is most conducive to the foregone conclusion, it identified specific studies that would best accomplish the task. Many of the thoughts and ideas put forward by the Chief Economist are really interpretations and arguments that belong in a final rule. By putting them up front and using

⁴⁷ Leslie M. Marx, "Summary of Ideas on Newspaper-Broadcast Cross-Ownership," June 15, 2006.

⁴⁸ *Id.*, p. 3.

⁴⁹ *Id.*, p. 14.

them to structure the research, the whole process becomes tainted. In short, the research is results-driven not an objective analysis.

As a consequence of this results-driven approach, key assumptions and hypotheses are biased in favor of finding what the Chief Economist wanted (see Exhibit II-1).

The Chief Economist's paper went on to identify researchers who might be recruited for the job. In the end, several of the studies and the researchers that the Chief Economist identified ended up on the list of studies that the FCC has commissioned.

Perhaps the ultimate irony is that the results that the Chief Economist at the FCC wanted were, in fact, contradicted by existing research that the FCC had conducted in the wake of the judicial rejections of its efforts relax the cross-ownership restriction. In essence, this was a determined effort to match its own science.⁵⁰

The Chief Economist's paper was divided into two main sections after the introduction – Overall Approach and Economic studies to support newspaper-broadcast cross-ownership limits. This remainder of this chapter follows that framework, identifying the key biases in each section.

⁵⁰ The expression was used by Vice President Cheney in the course of an intervention in an environmental dispute, in which the Vice President pushed a strategy that urged the Environmental Protection Agency to “match the science” as a basis for reversing a policy on water use. Jo Becker and Barton Gellman, “Leaving No Tracks,” *Washington Post*, June 27, 2004, Available at http://blog.washingtonpost.com/cheney/chapters/leaving_no_tracks/index.html.

EXHIBIT II-1: BIASED ASSUMPTIONS, RESEARCH HYPOTHESES AND CONTRARY EVIDENCE

INCORRECT OR BIASED HYPOTHESIS/ASSUMPTION	ALTERNATIVE HYPOTHESIS/ASSUMPTION	CONTRADICTIONARY EVIDENCE
Overall Approach		
Focus on a narrowing the range of medium-sized markets where limits might apply	Analyze full range of possibilities	
Selecting low threshold based on antitrust		Supreme Court rulings indicate that the Communications Act has a different standard
Using averages to set bright line thresholds and a lax standard lead to claim that ¾ of TV markets are competitive	Case by-case approach	Average challenge (HHI =3712) affords much less protection than no average challenge (HHI=2472); Even FTC applies different standards to different industries (oil industry HHI=1400); Using tradition standards, three-quarters of TV markets are highly concentrated; almost none are unconcentrated
Assuming competition. “If a TV market is competitive, the whole market is competitive”	The competitiveness of the whole market depends on the relative importance of the market segments and the structure of the non-TV markets	The large number of newspaper monopoly and near monopoly markets and the importance of newspapers call this incorrect assumption into question
Individual Studies		
Focus on quantity and quality	Focus on competition, diversity and localism	Suppressed study shows negative impact of concentration
Find “no harm”	Promote “widest possible dissemination”	
“A study that shows that few consumers use newspapers and TV (or radio) as their primary and secondary sources of information for local public affairs would suggest that newspaper-TV (or newspaper radio) cross-ownership would have little effect on the diversity of information available in consumers’ primary and secondary sources of information”		The Nielsen data shows that TV and newspapers are overwhelmingly the dominant sources of news and information The assumption of substitution between media is contradicted by prior FCC research Key role of newspapers in supply-side of the news market is ignored
“A study that finds evidence that TV stations in small markets tend to shut down their news divisions would suggest cross-ownership in small markets would not reduce and would potentially increase dissemination of local news”	The link between cross-ownership and “avoided” curtailment is entirely conjectural, not empirical	Some stations in large and small markets have curtailed news, while others in large and medium markets have increased news, so the assumed linkage between market size and quantity of output is questionable.

THE OVERALL APPROACH

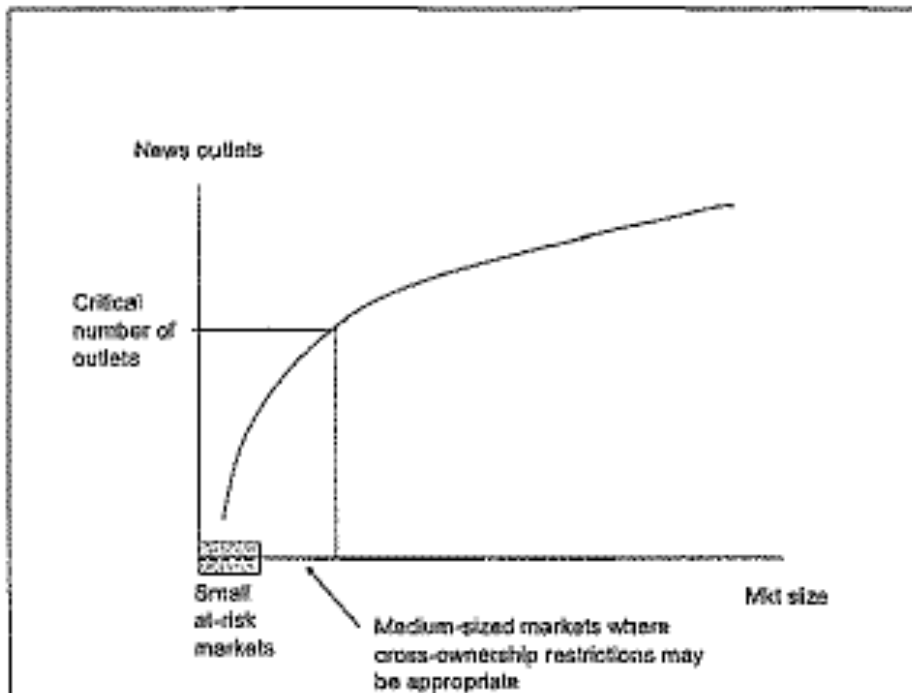
Narrowing the Focus to Get Rid of the Rule

The overall approach was defined as follows:

In markets with a large number of independent media outlets (particularly news outlets), we would not expect cross-ownership to harm competition, diversity or localism. And, in very small markets, cross-ownership may be necessary to guarantee the survival of the news outlets that currently exist. This leaves us with the question of whether cross-ownership restrictions are appropriate for medium-sized markets.

The Chief Economist considered two scenarios. The first identifies a small range of medium-sized markets where cross-ownership might be prohibited because there is not enough competition (as in large markets) and survival of the TV news operations is not in doubt (as in small markets) (see Exhibit II-2).

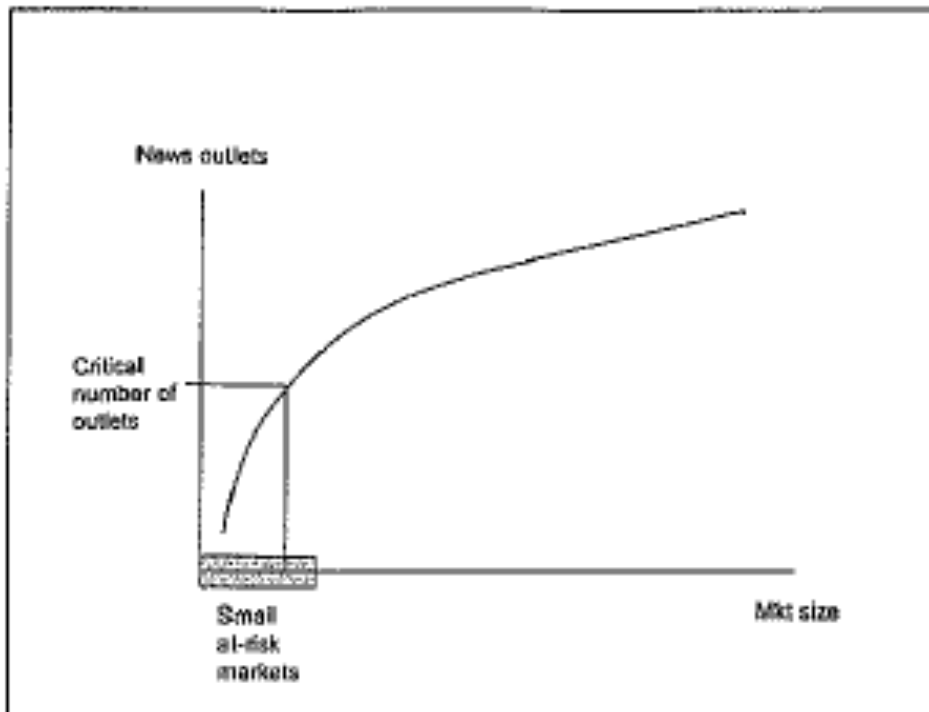
Exhibit II-2: Small Number of Middle-Sized Markets Appropriate for Cross-Ownership Restriction Contemplated by the Chief Economist



Source: Leslie M. Marx, "Summary of Ideas on Newspaper-Broadcast Cross-Ownership," June 15, 2006, p. 4.

The second scenario kept the same threshold for the critical number of outlets for competition but assumed the range of small markets at risk would be much larger, thereby eliminating the medium-sized markets where cross-ownership restrictions may be appropriate (see Exhibit II-3).

Exhibit II-3: No Markets Where Cross-Ownership is Appropriate Scenario Contemplated by the Chief Economist



Source: Leslie M. Marx, “Summary of Ideas on Newspaper-Broadcast Cross-Ownership,” June 15, 2006, p. 5.

Explaining this scenario, the Chief Economist wrote:

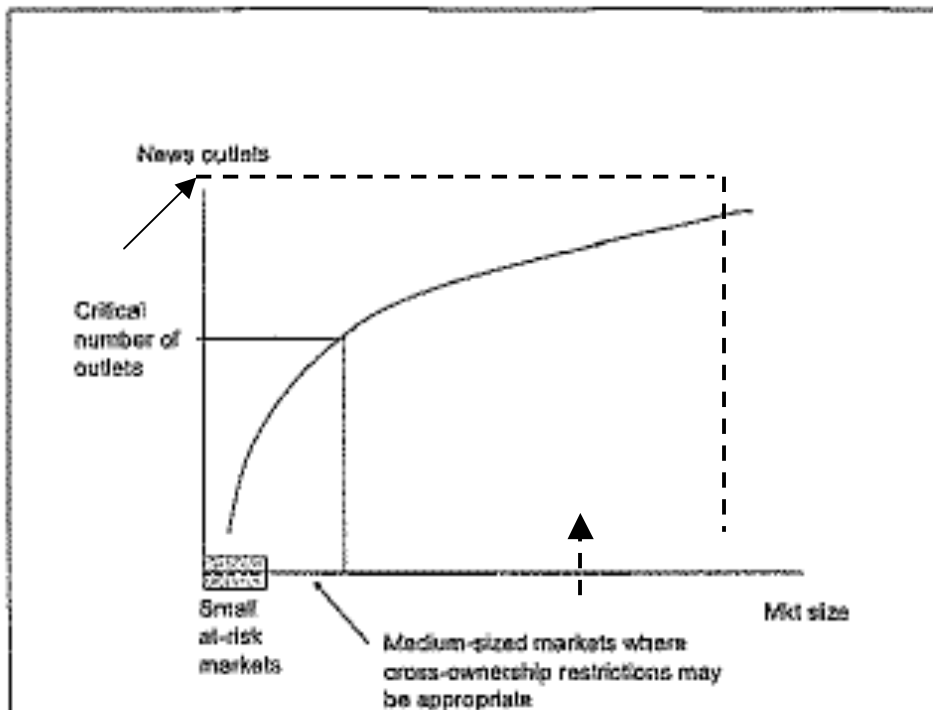
In the case of the above figure, there is no range of market sizes where cross-ownership restrictions are appropriate. The very small markets are at risk for media failures in the absence of cross-ownership, and the larger markets have sufficient numbers of media outlets that cross-ownership would not be expected to have a detrimental effect on competition, diversity or localism.⁵¹

⁵¹ Marx, p. 5.

The Other Possibility

Having presented these two cases, the Chief Economist declared” [w]e need to determine which figure applies, and if it is the former, we must define the boundaries of medium sized markets.”⁵² The Chief Economist never considered the third possibility that the critical number of outlets necessary to ensure competition, diversity and localism might be higher, thereby expanding the range of middle-sized markets where cross-ownership limits may be appropriate (see Exhibit II-4). In fact, it is possible as shown below, that by standard definitions of competition, there are few, if any, markets in which cross-ownership would not harm competition, diversity and localism.

Exhibit II-4: Scenario Ignored by the Chief Economist: Higher Critical Number of Outlets Necessary to Ensure Competition, Diversity and Localism



⁵² Marx, p. 5.

The reason that the Chief Economist never considered the third case may have been that she assumed that an extremely small number of outlets are necessary to ensure competition, as will be shown in the next section

Identifying the “critical number of outlets”: Selling Democracy Short

The Chief Economist begins the discussion of the critical number of outlets to define a competitive market by acknowledging the existence of the Department of Justice/Federal Trade Commission *Merger Guidelines*,⁵³ but then blows past the *Guidelines* to identify an extremely small number of outlets that are necessary to find a market competitive.

Ironically, the Chief Economist only mentions that the *Merger Guideline* “describes markets with HHIs greater than 1800 as highly concentrated.” The HHI,⁵⁴ measure, used to describe market concentration is calculated by taking the market share of each firm in the market, squaring it and summing all the results. The Chief Economist cites the relevant language about mergers in highly concentrated markets as follows:

Mergers producing an increase in the HHI of more than 50 points in highly concentrated markets post-merger potentially raise significant competitive concerns, depending on the factors set forth in Section 2-5 of the Guidelines. Where the post-merger HHI exceeds 1800, it will be presumed that mergers

⁵³ Department of Justice/Federal Trade Commission *Merger Guidelines*, 1997.

⁵⁴ William G. Shepherd, *The Economics of Industrial Organization* (Englewood Cliffs, NJ: Prentice Hall, 1985), p. 389, gives the following formula for the Herfindahl-Hirschman Index (HHI):

$$H = \sum_{i=1}^n S_i^2 \times 10,000$$

where

n = the number of firms

S_i = the share of the ith firm.

The HHI is calculated based on ratios rather than percentages and the decimals are cleared by multiplying by 10,000. For ease of discussion the Court adopts the convention of describing the calculation in percentages.

producing an increase in HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise.⁵⁵

The Chief Economist never mentions the threshold for moderately concentrated markets and the relevant language about mergers in that region that the *Guidelines* offer:

b) Post-Merger HHI Between 1000 and 1800. The Agency regards markets in this region to be moderately concentrated. . . Mergers producing an increase in the HHI of more than 100 points in moderately concentrated markets post-merger potentially raise significant competitive concerns depending on the factors set forth in Sections 2-5 of the *Guidelines*.⁵⁶

The Chief Economist expresses no interest in ensuring markets that are unconcentrated.

Instead she moves in the opposite direction:

This suggests that an HHI of 1800, or rounding up a bit, perhaps 2000 might be a reasonable threshold. However, recent articles by Malcolm Coate of the FTC show that the FTC tends not to follow the guidelines, but rather tends to use higher thresholds for the competitiveness of a market. In Coate's data, the average post-merger HHI for the mergers that were challenged based on the theory of "collusion" was 3775, and the average for mergers that were not challenged was 2472. This suggests that perhaps an HHI above 3000 is an appropriate threshold. Coate states, "a collusion case with a post-merger HHI of 3712 has a 50% chance of a challenge."

The Chief Economist settles on an HHI of 3700 as the threshold below which cross-ownerships mergers are to be allowed, over twice the highly concentrated threshold and almost four times the moderately concentrated threshold:

In order to have a concrete number to work with, in what follows I use an HHI of 3700 as the threshold for markets to be competitive (markets with lower HHIs would be considered competitive and markets with higher HHIs would not). Obviously, the analysis could be repeated using different thresholds.⁵⁷

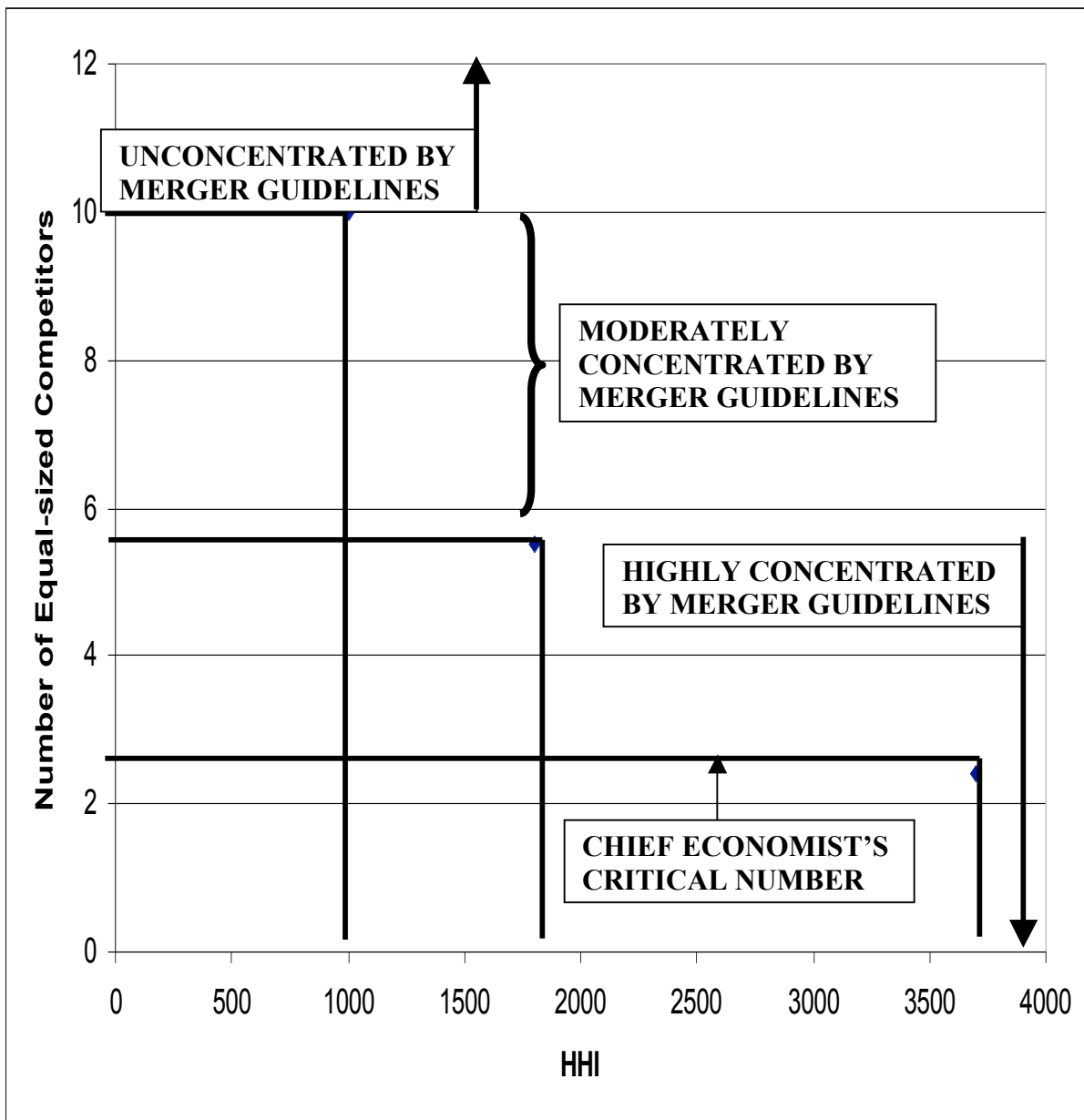
In essence, what the Chief Economist has done is declared that markets with the equivalent of 2.4 equal-sized outlets are sufficiently competitive to find that cross-ownership is not a threat to competition, diversity or localism, as shown in Exhibit II-5.

⁵⁵ U.S. Department of Justice, *Horizontal Merger Guidelines*, revised April 8, 1997.

⁵⁶ *Id.*

⁵⁷ Marx, p. 8.

Exhibit II-5: Choosing an Extremely Low Threshold for Competition



The HHI index can be converted to a number of equal-sized firms by simple arithmetic.⁵⁸

For example, in a market with 10 equal-sized firms, each firm would have a 10 percent market

⁵⁸ The HHI can be converted to equal-sized equivalents as follows:

$$\text{Equal-sized voice equivalents} = (1/\text{HHI}) * 10,000.$$

share. The HHI would be 1,000, which is the threshold for a moderately concentrated market. The threshold for a highly concentrated market falls at approximately at the equivalent 5.5 equal-sized firms. It is important to remember that it is not only the number of firms that counts, but their size. A market with one firm that had a 55 percent market share, four firms with 10 percent each and one with 5 percent would have an HHI of 3450, almost twice the level of 5.5 equal-size firms ($HHI = (55)^2 + (10)^2 + (10)^2 + (10)^2 + (10)^2 + (5)^2 = 3450$).

The Chief Economist never questions whether it is right or wrong for the FTC to ignore its own *Guidelines*. Even if a case could be made that a “collusion theory” is appropriate for the FTC under the Clayton Act, it is highly doubtful that a “collusion theory” is appropriate for the FCC under the Communications Act. The Supreme Court has declared a very aggressive goal for and standards by which FCC regulation of media outlets is judged – “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”⁵⁹ In cases leading up to the current proceeding, the courts have declared that the efficiency criteria that are paramount in antitrust cases, like the ones conducted by the FTC, can take a back seat to concerns about democracy. As the D.C. Circuit stated in remanding the FCC’s duopoly rule,

An industry with a larger number of owners may well be less efficient than a more concentrated industry. Both consumer satisfaction and potential operating cost savings may be sacrificed as a result of the Rule. But that is not to say the Rule is unreasonable because the Congress may, in the regulation of broadcasting, constitutionally pursue values other than efficiency – including in particular diversity in programming, for which diversity of ownership is perhaps an aspirational but surely not an irrational proxy. Simply put, it is not unreasonable – and therefore not unconstitutional – for the Congress to prefer having in the aggregate more voices heard.⁶⁰

⁵⁹ *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (hereafter *Associated Press*).

⁶⁰ *Fox v. FCC*, pp. 12-13.

The standard of 2.4 equal-sized firms is remarkably low if the aspiration is the “widest possible dissemination of news and information from diverse and antagonistic sources,” as suggested by Exhibit II-6. The first column of Exhibit II-6 locates the Chief Economists threshold in comparison to the *Merger Guidelines*. The threshold is well above the highly concentrated level. The second column in Exhibit II-6 locates the threshold in terms of general market structural characterizations found in the general literature.⁶¹ The Chief Economist's threshold is a very tight oligopoly, barely more than a duopoly.

The Impact of Choosing a Low Threshold

The implication of the extremely low threshold for the policy conclusion is readily apparent in the Chief Economist's discussion of actual television market HHIs, as shown in Exhibit II-7. The HHIs shown are for TV advertising revenue. The Chief Economist chose TV because “I would argue that if a TV market, taken by itself, is competitive, then the market for local news and information, which would include TV as well as local newspapers and radio, is certainly competitive.”⁶² This assumption will be challenged below, but for the moment, we

⁶¹ William G. Shepherd, *The Economics of Industrial Organization* (Englewood Cliffs, NJ: Prentice Hall, 1985).

⁶² Marx, p. 5.

Exhibit II-6: Describing Market Structures

Department Of Justice Merger Guidelines Concentration	Type Of Terms Of Equal	Equivalents In Typical Sized Firms	HHI In Share	4-Firm Media Markets
	Monopoly	1 ^a	5300+	~100
Chief Economist Threshold →	Duopoly	2 ^b	3000 - 5000	~100
↑ High	Dominant Firm	4<	>2500	
		5	2000	80
Moderate	Tight Oligopoly	6	1800	60
			1667	67
↓ Unconcentrated	Loose Oligopoly	10	1000	40 ^c
	Atomistic Competition	50	200	8 ^c

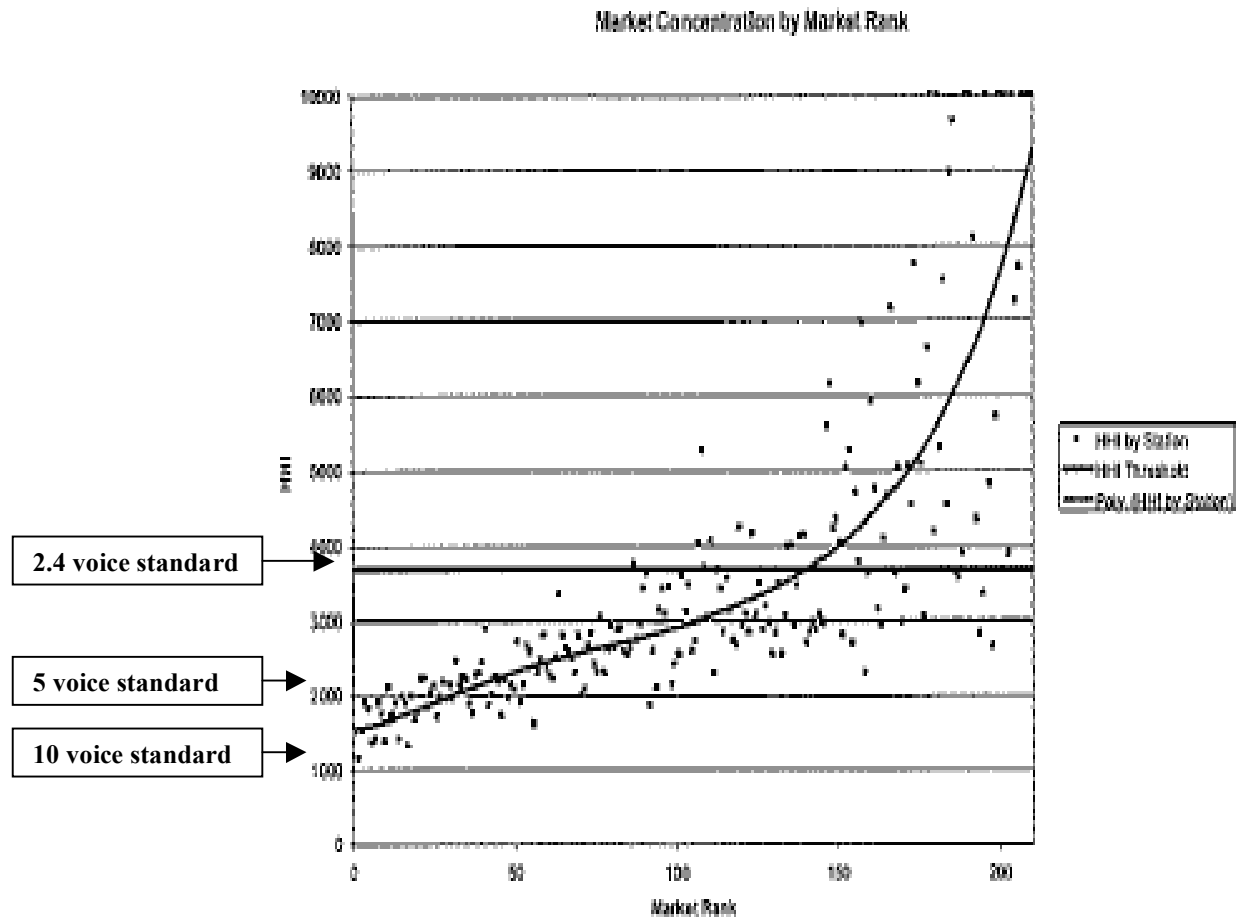
a = Antitrust practice finds monopoly firms with market share in the 65% to 75% range. Thus, HHIs in “monopoly” markets can be as low as 4200.

b = Duopolies need not be a perfect 50/50 split. Duopolies with a 60/40 split would have a higher HHI.

c = Value falls as the number of firms increases.

Sources: U.S. Department of Justice, “Horizontal Merger Guidelines,” revised April 8, 1997, for a discussion of the HHI thresholds; William G. Shepherd, *The Economics of Industrial Organization* (Englewood Cliffs, NJ: Prentice Hall, 1985), for a discussion of four firm concentration ratios.

Exhibit II-7: The Impact of an Extremely Low Threshold for Competition



Source: Leslie M. Marx, “Summary of Ideas on Newspaper-Broadcast Cross-Ownership,” June 15, 2006, p. 8.

examine the implications of the choice of threshold for the policy conclusion based on the Chief Economists calculation of HHIs.

By the standard of 2.4 equal-sized voices, only the 60 smallest markets would not be considered competitive. However, by a standard of an HHI of 2000 (5 equal-sized voices), which the Chief Economist mentions as consistent with the *Merger Guidelines*, but dismisses quickly, one reaches a very different conclusion. By that standard, approximately 180 markets would be considered non-competitive. If the unconcentrated threshold is considered the standard, there are no markets that would be considered competitive.

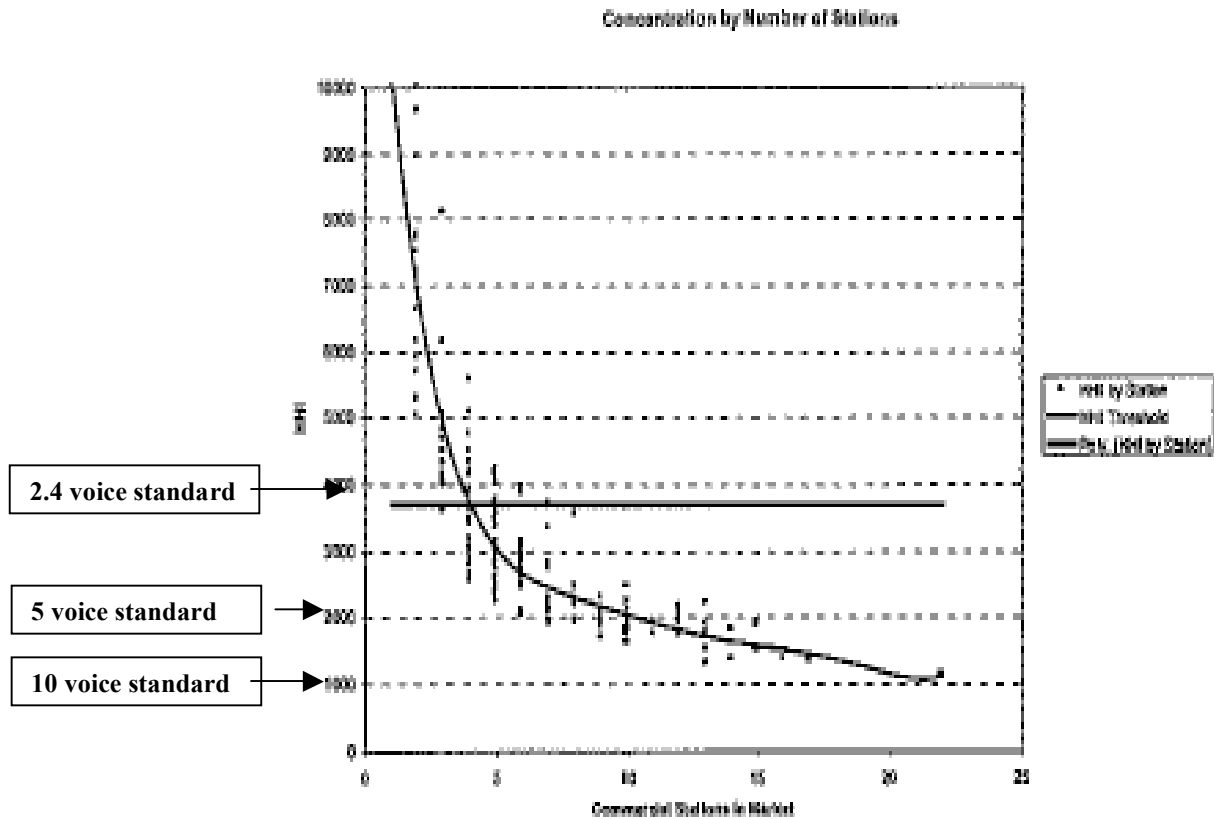
After discussing HHIs, the Chief Economist then examines the relationship between the number of stations in a market and the HHI, in an effort to draw a bright line. Instead of having to calculate the HHI, the FCC would simply declare that in markets with more than some number of stations, cross-ownership is allowed. The Chief Economist chooses six stations because there appear to be only a couple of markets with six or more stations that fall above the target HHI of 3700 (see Exhibit II-8). Note, however, that the vast majority of markets fall above a target HHI of 2000 and all markets fall above a target of 1000. Note also, how important it is to actually take market shares into account when analyzing market structures. For example, consider the markets with 10 TV stations. The HHIs range from about 1500 to 2500, with a mean of about 2000. The average HHI in these 10 station markets is twice as high as it would be in a market with 10 equal-sized stations, suggesting that each market has stations with larger and smaller market shares. Counting stations without taking audiences into account misrepresents market structure and got the FCC in trouble in the last round of this proceeding.⁶³

The Chief Economist's reliance on a backward looking study of FTC challenges to set a forward looking threshold of presumed competitiveness is fundamentally flawed for a number of reasons in addition to the fact that it sets a standard that is inappropriately low under the Communications Act.

The FTC proceeds on a case-by-case basis, examining mergers individually and deciding whether to challenge and/or litigate. The backward looking average of cases where there was a challenge is just that, an average. Many cases were challenged where the HHI fell below the average. Indeed, the Chief Economist notes that the average for cases where the FTC did not

⁶³ Mark Cooper, "When Law and Social Science Go Hand in Glove: Usage and Importance of Local and National News Sources – Critical Questions and Answers for Media Markets," in Philip Napoli (Ed.) *Media Diversity and Localism* (2007).

Exhibit II-8: Competitive Thresholds Defined by Number of Stations



Source: Leslie M. Marx, “Summary of Ideas on Newspaper-Broadcast Cross-Ownership,” June 15, 2006, p. 9.

challenge was 2472.⁶⁴ The Chief Economist is setting a bright line in which the FCC will not examine cases that fall on one side of the line. If the Chief Economist wanted to play it safe, i.e. not allow mergers to go forward in markets where competition was at risk, she should have chosen the no challenge threshold (an HHI of 2400 (rounding down for caution’s sake)). That would have had a dramatic impact on the recommendations. Looking back at Exhibit II-7, that would have moved the threshold from markets ranked above 150 to approximately markets ranked above 60.

⁶⁴ Marx, p. 8.

A document in the FCC database entitled “Merger Challenges Data, Fiscal Years 1999-2003,”⁶⁵ shows that using the backward looking average to set a forward looking bright-line would automatically approve many mergers that should be challenged, even using the lax threshold proposed by the Chief Economist and the FTC economic criteria. Of the 1263 mergers challenged, 29% have a post-merger HHI of less than 3000 and 43 percent have a post-merger HHI of less than 4000, which would be equivalent to the Chief Economists proposal. In other words, the bright line would have given approval to 43 percent of the mergers that the FTC challenged.

Moreover, the FTC treats different industries differently because of their characteristics. For example, in the oil industry the FTC challenged four-fifths of the mergers where HHI’s fell in the range of 1400 to 1799.⁶⁶ It would seem that citizens deserve at least the level of protection for democratic discourse as consumers of gasoline receive. Giving citizens and democracy a little more protection than gasoline, suggests that using the unconcentrated threshold seems reasonable (HHI=1000).⁶⁷

ANALYZING MARKET STRUCTURE

As noted above, the Chief Economist tries to simplify the analysis by focusing on TV markets. This is ironic, since the FCC has had its rules overturned because it failed to

⁶⁵ Federal Trade Commission and the U.S. Department of Justice, December 18, 2003.

⁶⁶ Federal Trade Commission, *Mergers, Structural Change and Antitrust Enforcement* (2004), Table 2-6.

⁶⁷ In Mark Cooper, “The Failure of Federal Antitrust Authorities to Protect American Energy Consumers From Market Power and Other Abusive Practices,” *Loyola Consumer Law Review*, 19:4, 2007, I argue that level of enforcement provided by the FTC to protect gasoline consumers was inadequate because the severe market fundamentals in the oil industry. I show that market power can be exercised in the range of 1000-1400.

systematically look at all sources of information in the market.⁶⁸ The simplification in the Chief Economist's argument biases the analysis toward relaxing the rule.

The central premise of the overall approach is incorrect. The claim that "if a TV market, taken by itself is competitive, then the market for local news and information, which would include TV as well as local newspapers and radio, is certainly competitive," is wrong.⁶⁹ The status of competition in the overall market depends on the relative importance of the other outlets and the structure of the other market segments. A few simple examples demonstrate why this is an empirical question, not something that can be assumed (see Exhibit II-9).

Consider a market with four TV stations with equal market share. This is certainly beyond the Chief Economist's "competitive" level. Assume a monopoly newspaper market, a very common situation in America. Assume that newspapers have a 60 percent weight in the marketplace of ideas, while television has a 40 percent weight. Although the television market is competitive, the combined media market would not be competitive. As shown in section A of Exhibit II-9, its HHI would be above 4000, well above the threshold declared by the Chief Economist.

The assumption that TV market competition ensures overall market competition is incorrect in another sense. Recall that the *Merger Guidelines* are based on **post-merger** market concentration, not pre-merger concentration. Even if the combined pre-merger market is

⁶⁸ *Sinclair Broadcast Group v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

⁶⁹ Marx, p. 5.

Exhibit II-9: Competitiveness of the Overall Market Cannot be Assumed Based on the Competitiveness of the TV Market

A. MARKET SEGMENTS		COMBINED MARKET (60/40 Newspaper/TV)	
TV Market	Newspaper Market		
TVA = 25%	NPa = 100%	TVA = 10%	
TVB = 25		TVB = 10	
TVC = 25		TVC = 10	
TVD = 25		TVD = 10	
		NPa = 60	
HHI = 2500	10000		4000
B. MARKET SEGMENTS		COMBINED MARKET (50/50 Newspaper/TV)	
TV Market	Newspaper Market	Pre-merger	Post-merger
TVA = 25%	NPa = 100%	TVA = 12.5%	TVB = 12.5%
TVB = 25		TVB = 12.5	TVC = 12.5
TVC = 25		TVC = 12.5	TVD = 52.5
TVD = 25		TVD = 12.5	
		NPa = 50	NPa/TVA = 62.5
HHI = 2500	10000	3125	4375
C. MARKET SEGMENTS		COMBINED MARKET (50/50 Newspaper/TV)	
TV Market	Newspaper Market	Pre-merger	Post-merger
TVA = 25%	NPa = 90%	TVA = 12.5%	TVC = 12.5%
TVB = 25	NPb = 10	TVB = 12.5	TVD = 12.5
TVC = 25		TVC = 12.5	NPa/TVA = 57.5
TVD = 25		TVD = 12.5	NPb/TVB = 17.5
		NPa = 45	
		NPb = 5	
HHI = 2500	6800	2675	3925

competitive, that does not mean that the post-merger market would be competitive. Section B of Exhibit II-9 assumes TV and newspapers have equal weight in the marketplace of ideas (which is roughly what our survey results show).⁷⁰ In that case the pre-merger market is competitive by the Chief Economist’s standard, but allowing a cross-ownership merger drives the overall market

⁷⁰ Mark Cooper, *Abracadabra! Hocus-Pocus! Making Media Market Power Disappear with the FCC’s Diversity Index*, July 2003.

concentration above the competitive threshold of a 3700 HHI. Section C of Exhibit II-9 introduces a small second paper into the market. In two newspaper markets, where one newspaper dominates, a similar post-merger effect would occur if both papers were to enter into combinations with TV stations. Again the post-merger market would be above the Chief Economist's threshold, even though the pre-merger TV and combined markets are below the threshold. If the threshold were set at a lower HHI, the number of instances in which the claim that a competitive TV market ensures a competitive overall market or competitive post-merger markets would be much smaller.

In fact, there are a large number of U.S. media markets that look like these two. Many newspaper markets are dominated by a single paper. In our comments to the FCC, we identified 67 markets with one or two newspapers and TV markets that were highly concentrated (by antitrust standards).⁷¹ There were only 10 markets on our list that overlapped with the list of 60 markets that Marx found to have HHIs greater than 3700. In short, correcting the assumption about the relationship between TV market competition and overall market competition could double the number of markets that would be considered at competitive risk from a relaxation of the ban on newspaper-TV cross-ownership.

ECONOMIC STUDIES: ERRONEOUS ASSUMPTIONS AND EFFORTS TO “MATCH THE SCIENCE”

The fact that the four studies outlined by the Chief Economist all were included in the studies commissioned by the FCC suggests that the ideas and thoughts affected the research program. This section examines some of the critical assumptions and formulation of the research hypotheses that set the scope of what can be found.

⁷¹ Id.

Study 1: Consolidation and Ownership Affect Competition, Diversity and Localism

The Chief Economist starts with the assumption that cross-ownership matters, but misrepresents the issue:

In what follows, I assume that cross-ownership has the potential to decrease the quantity or quality of news coverage of local public affairs available in local media. If it does not, then one could justify dropping or significantly relaxing the cross-ownership restriction on those grounds alone.⁷²

Note that the Chief Economists attempts to switch the standard from competition, diversity (antagonism) and localism to the quantity and quality of news coverage and local public affairs. Quantity and quality are important, but if it is homogeneous and out-of-town, it fails to accomplish the goals of the Communications Act. Dropping “competition, diversity and localism” from the measure of outcome biases the framing of the question in a fundamental way. Mergers mean that an independent voice is lost, even if the quantity of output increases.

Note also that the statement weakens the standard. Instead of promoting diversity and localism, the Chief Economist settles for not harming quantity and quality. The research hypothesis, as stated by the Chief Economist, is framed incorrectly:

Incorrect framing

Does cross-ownership harm quantity and quality

Correct framing

Does Cross-ownership increase competition or improve diversity and localism

We might write off this switch of measures of policy outcomes, attributing it to a slip of the pen, but the Chief Economist used the correct policy outcomes – “competition, diversity and localism” – half a dozen times in the paper. When the variables for the study are specified, they include “hours of relevant programming, ratings of relevant programming, awards won and local voter turnout,”⁷³ but nothing about diversity or localism.

⁷² Marx, p. 3.

⁷³ Marx, p. 16.

This omission is notable, since the suppressed study and the destroyed database had addressed this very issue. It had labored to define the correct variables for competition, localism and diversity. Note, too, that the statement is a market level statement. The issue is news available in the market, not news produced by a particular station.

Study 2: Media Usage

The above biases in the framing of research issues and questions affect the fabric of the research in a manner that favors finding that the rules can be relaxed. Following from this bias, the substance of the studies is repeatedly framed to point in the same direction. For example, the media utilization study is framed as follows:

A study that shows that consumers use multiple sources of information for news about local public affairs, particularly sources such as the Internet or cable that would not be affected by cross-ownership between a newspaper and a local TV or radio station, would suggest that cross-ownership, even if it did reduce ownership diversity, would not have a significant detrimental effect on consumers. In addition, a study that shows that few consumers use newspaper and TV (or radio) as their primary or secondary sources of information for local public affairs would suggest that newspaper-TV (or newspaper-radio), cross-ownership would have little effect on the diversity of information available in consumers' primary and secondary sources of information.⁷⁴

This formulation implicitly assumes that the sources of information are substitutable, which is unsupported on both the supply and demand sides of the market.

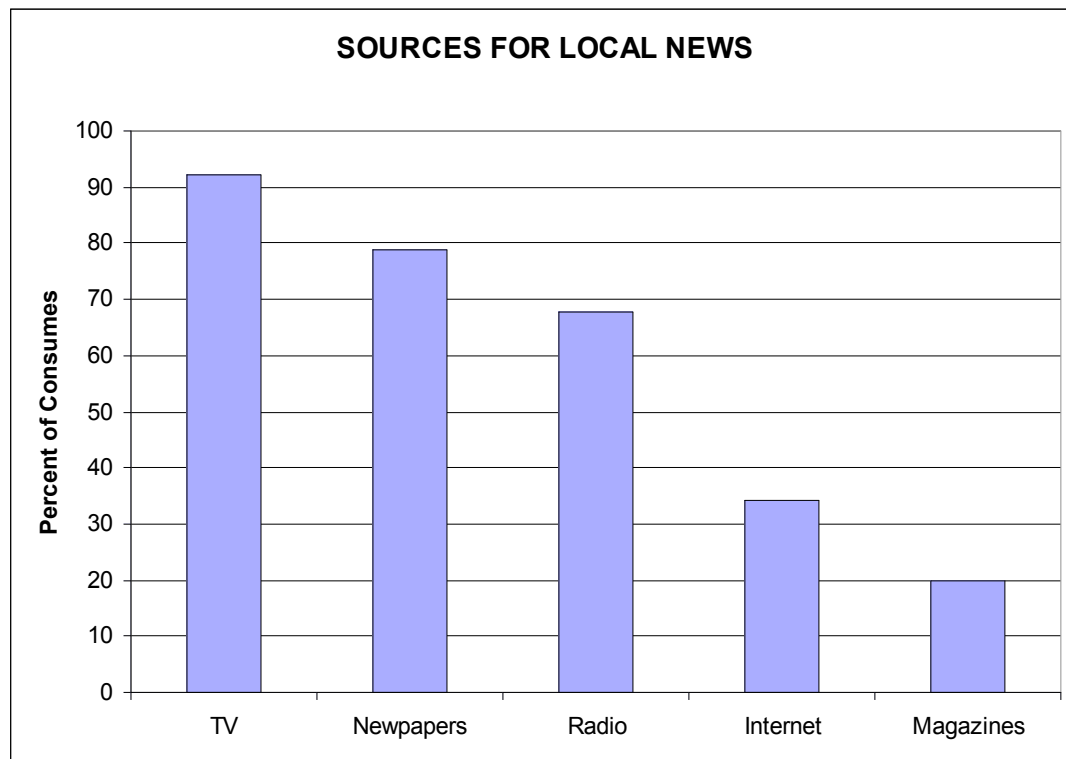
On the demand side, the FCC tried to show substitution between different types of media, but failed, as noted above.

At the same time, the Chief Economist's anticipated outcome flies in the face of the existing evidence. In the FCC's study of usage, newspapers and television were the most frequent source of local news and information (see Exhibit II-10).

⁷⁴ Marx, p. 15.

The Chief Economist notes that the research should focus on primary and secondary sources, but the statement of the hypothesis contradicts the evidence in the record. In 2003, CFA placed in the record evidence on the primary and secondary sources of local news and information, which showed that newspapers and TV are even more dominant when viewed in that manner.⁷⁵

Exhibit II-10:



Source: Leslie M. Marx, *Summary of Idea on Newspaper-Broadcast Cross-Ownership*, June 15, 2006, p. 17, citing the FCC's Nielsen survey.

On the supply-side, the Chief Economist's formulation ignores the fact that newspapers are frequently the primary original source of information for cable, broadcast and the Internet.⁷⁶ The dominance of newspapers in the production of news was demonstrated in the proceeding,

⁷⁵ Mark Cooper, *Abracadabra! Hocus-Pocus! Making Media Market Power Disappear with the FCC's Diversity Index*, July 2003.

⁷⁶ See Chapter VI for evidence of Internet outlets reliance on traditional media for local news.

where we estimated that the typical newspaper has 65 newsroom staff, the typical TV station has 20 newsroom staff and the typical radio station has 3 newsroom staff.⁷⁷ The Chief Economist implicitly assumes that the newspaper cross-ownership combination would not affect the ability of the other distribution channels to gain access to the news that had been made available to other sources. However, one of the synergies claimed for cross-ownership is better access to the news. One of the concerns about cross-ownership is the smaller number of entities that do investigative journalism. If cross ownership creates a dominant news operation in a market, it may reduce the number of entities that engage in journalistic activities, reducing both the quantity and diversity of news available in the market.

Study 3: News Operations

The earlier discussion focused a great deal of attention on the question of the competitive threshold that would set the upper limit of the range of middle-sized markets where cross-ownership limits would be necessary. The Chief Economist also discusses the lower limit of that range – the small markets where cross-ownership is hypothesized to be necessary to preserve news outlets. This is the second important element in relaxing the cross-ownership limit, which is to define small markets at risk of losing news production:

A study that finds evidence that TV stations in small markets tend to shut down their news divisions would suggest that cross-ownership in small markets would not reduce diversity and would potentially increase the dissemination of local news.⁷⁸

The Chief Economist analyzed a data set of curtailments in TV news output. As the Chief Economist put it:

⁷⁷ Mark Cooper, *Abracadabra! Hocus-Pocus! Making Media Market Power Disappear with the FCC's Diversity Index* (July 2003).

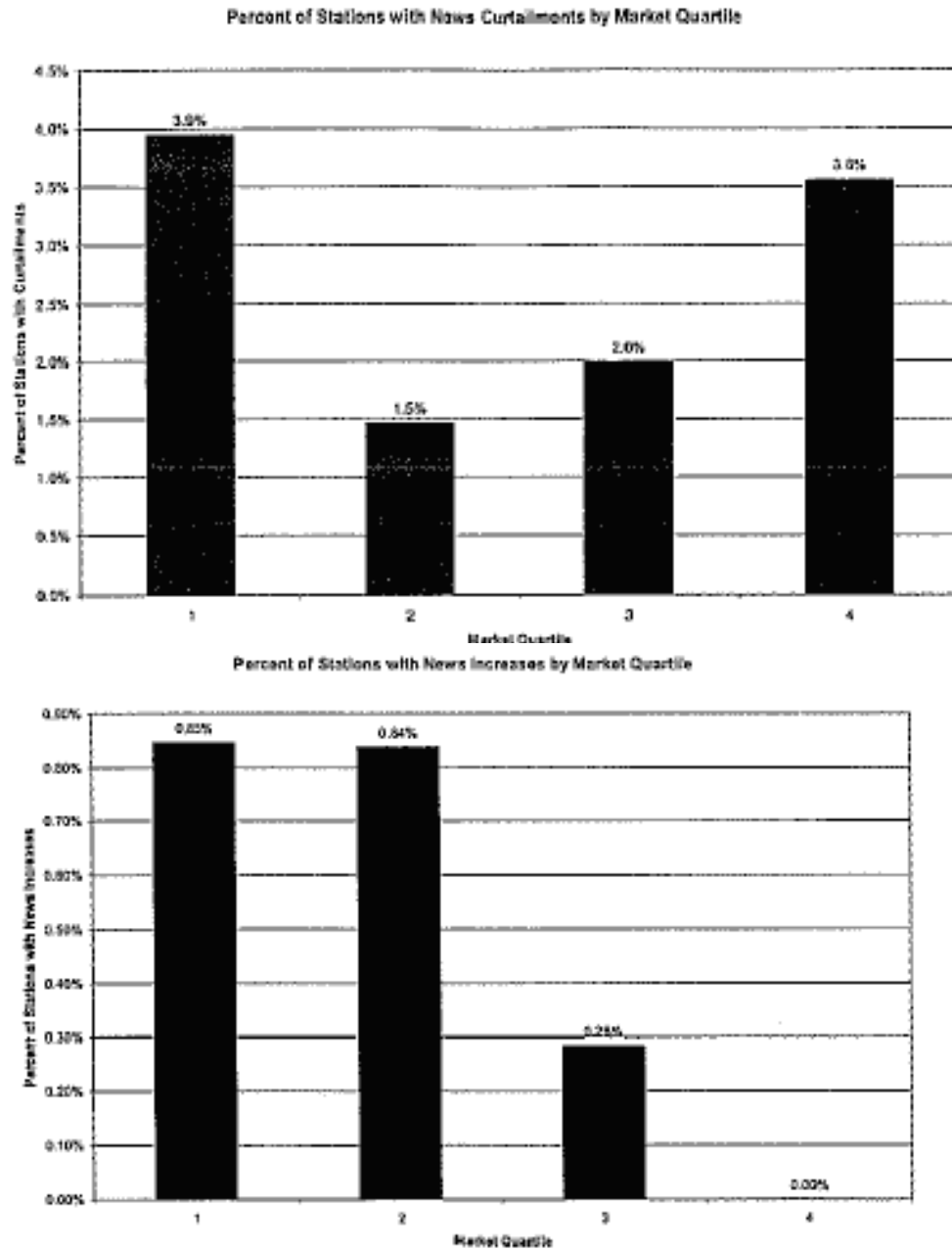
⁷⁸ Marx, p. 15.

[T]here is evidence that local television news is being curtailed in these markets because of the small size of the market, in which case joint ownership between a local newspaper and a local TV station might provide benefits to consumers by preventing further curtailment of television news.⁷⁹

There are several flaws in this framing of the issue. The link between cross-ownership and avoided curtailments is entirely conjectural, not empirical. The description of the study that is supposed to address this issue does not indicate in any way that this problem will be addressed. The presumed gain in television news output could come at the cost of newspaper output. CFA comments in the proceeding make a strong case that this is a concern. More importantly, the data cited by the Chief Economist leaves critical questions unanswered and the research design proposed does not answer them. Curtailments occur in large and small markets, so the link between market size and curtailments is moderate or weak at best (see Exhibit II-11). Expansions have occurred in large and medium markets, so the link between market size and resources for news is moderate or weak, at best. Although the connection between market size and the curtailment/expansion is modest at best and its link to cross-ownership unproven, the Chief Economist tries to extract the conclusion necessary to eliminate the cross-ownership rule.

⁷⁹ Marx. p. 11.

Exhibit II-11: Curtailments and Increases by Market Size

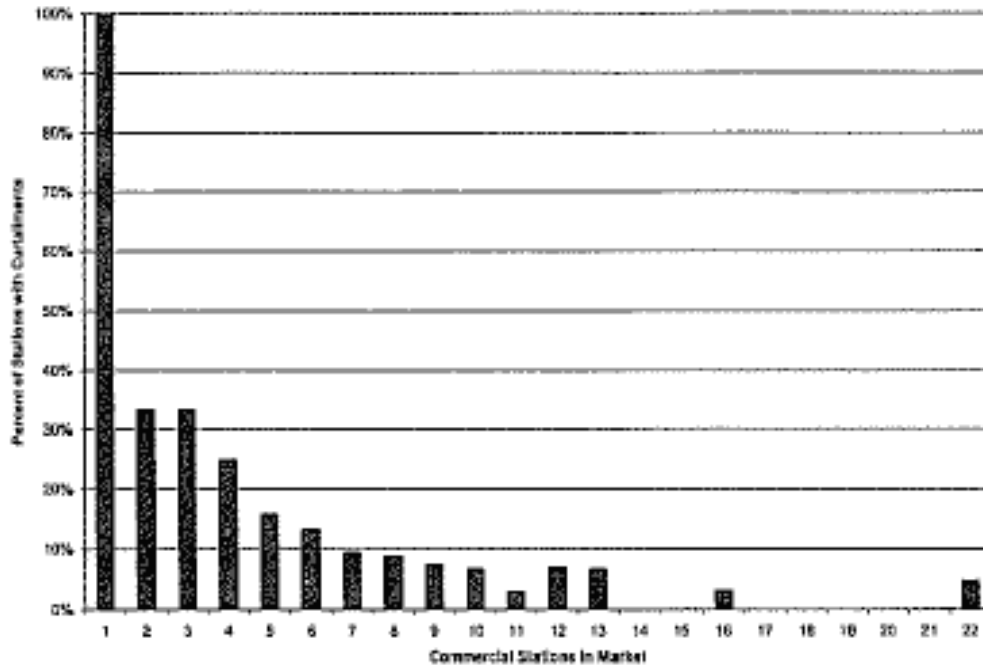


Source: Leslie M. Marx, "Summary of Ideas on Newspaper-Broadcast Cross-Ownership," June 15, 2006, p. 12.

Looking at the distribution of curtailments by the number of the stations in a market (see Exhibit II-12), the Chief Economist argues:

[M]arkets with six or more commercial TV stations are sufficiently competitive that cross-ownership is not a threat to competition, localism and diversity; and stations in markets with fewer than six commercial stations are at risk for news curtailments, which could potentially be prevented by allowing cross-ownership.⁸⁰

Exhibit II-12: Market Size and the Incidence of Curtailments



Source: Leslie M. Marx, “Summary of Ideas on Newspaper-Broadcast Cross-Ownership,” June 15, 2006, p. 12.

Looking at Exhibit II-12, it is not clear why the threshold of markets with six stations is chosen, other than the fact that it accomplishes the goal of eliminating the newspaper-TV cross-ownership. The obvious break point is markets with only one station. This represents about a half-dozen markets only. One might argue that markets with 2 and 3 stations are a distinct group. This would raise the total to less than three-dozen markets. Beyond markets with one station, the function is continuous and the incidence of curtailments is about 30% or less.

⁸⁰ Marx. p. 13.

In defining the study of curtailments, the Chief Economist has overreached in assuming the conceptual foundation of the study and the thresholds that are suggested. Since the competitive threshold was set at markets with six or more stations and the “at risk” markets are defined as those with five or fewer stations, the cross-ownership rule conveniently disappears.

Study 4: Viewpoint Diversity

The fourth study is a reprise of an earlier study by Pritchard that was heavily criticized for weak methodology. The study design is intended to correct many of the flaws in the earlier study by building a large sample. However, it is explicitly aimed at national, not local news, and is dependent on development of measures of slant or bias.

“For each newspaper/TV pair (both cross-owned and non-cross-owned), determine whether the outlets exhibited similar or divergent slants in covering a particular national political event. Develop a method for evaluating and scoring the slant of each newspaper and TV station.”⁸¹

Focusing on national events fails to provide a proper basis for analyzing the impact of cross-ownership for a number of reasons. First, the analysis should focus on localism. Second, as we have shown in our comments, media owners may behave very differently when they have direct ownership interests at stake. This is much more likely to be the case with local events (like funding a stadium). Third, national events tend to “compel” coverage, whereas local events can be ducked.

CONCLUSION

The results-driven nature of the research agenda is so blatant; it is almost unimaginable that the Commission would proceed with such a bias plan. Of course, the agency intended that this agenda remain hidden in all aspects. The Chief Economist’s paper was only disgorged in

⁸¹ Marx, p. 26.

response to a Freedom of Information Act Request. The existence of the key research study was only made known after the study was slipped under the door of a U.S. Senator.

III. POLICY, PROCESS AND METHODOLOGICAL FLAWS IN THE FCC MEDIA OWNERSHIP RESEARCH

The transformation and corruption of the research agenda described in the previous two chapters has a direct impact on the research that was conducted, beyond the fact that specific studies were chosen to accomplish specific tasks in relaxing or eliminating the newspaper-TV cross-ownership limit. The overall approach biases the outcome in a number of ways. The FCC's approach to research in this proceeding is fundamentally flawed in three areas – policy substance, administrative process, and methodology. From start to finish, the conduct of the agency has been nothing less than disgraceful.

POLICY SUBSTANCE: THE FAILURE TO ADDRESS THE IMPORTANT POLICY ISSUES

The tunnel vision of the Chief Economist's research agenda produced a very narrow range of studies. Exhibit III-1 locates the substantive studies commissioned by the FCC in the matrix of issues derived from the Broadband Localism proceeding. The studies address about one-tenth of the concerns. Moreover, as the analysis below shows, even this small number of issues is not handled well in the studies. The definition of the outcomes and the policy variables considered fail to address the basic concerns that arise in the public policy. Even if the research had led to dispositive answers on this handful of issues, which it did not, the large number of unexplored concerns would leave the impact of policy changes unclear. The Commission lacks the basis for concluding that relaxation of ownership limits promotes the public interest.

As shown in the remainder of these comments, the tunnel vision also undermines the validity of key findings in research that has been conducted on this limited number of issues. It

EXHIBIT III-1: THE MULTIFACETED CONCEPT OF COMPETITION, LOCALISM AND DIVERSITY

v.

THE FCC’S NARROW RESEARCH AGENDA

ISSUES

	COMMUNITIES/MEDIA			
	TELEVISION	NON-MINORITY RADIO	TELEVISION	MINORITY RADIO
<u>Coverage of local affairs</u>				
Community news (police, traffic, weather, sports)	Study 3, 6			
Emergencies & events				
Education about local institutions				
Local religious				
Local advertising				
PSAs in public interest				
<u>Sensitivity to local tastes</u>				
What listeners want				
Avoid offence				
Tailored to local taste				
<u>Opportunity for local involvement</u>				
Local ownership/control			Study 2, 7, 10	Study 2, 7, 10
Use of local resources				
Working in industry				
Locally originated programming				
Outlet for local talent				
<u>Facilitation of local political discourse</u>				
Public affairs		Study 4.2		
Expression of group interests				
Community, political, religious group discussions				
Local political view				
Local call-in and talk				
Public access				
Editorializing	Study 6			
COMPETITION/MARKET STRUCTURE				
News & public affairs	Study 3, 4.1, 4.3	Study 4.2, 4.4, 10		
Children’s programming				
Entertainment	Study 3	Study 5	Study 3	
Advertising		Study 10		
Affiliate relations				
Payola,				
Voice tracking		Study 5		
Playlists				

- plays down the role of market concentration,
- focuses on outlets, rather than market level outcomes,
- narrows the range of variables used to measure policy relevant outcomes, and
- misdefines the variables that are operationalized.

The pursuit of a simple, bright line to allow mergers leads to fundamental analytic mistakes including

- an assumption of equal market shares for outlets,
- a focus on averages, rather than the distribution of markets and,
- a shift in the standard from promoting the public interest to showing no harm.

The resulting research suffers from bias in two fundamental ways. It's tunnel vision-like focus on eliminating the newspaper-TV cross-ownership rule caused it to

- miss obvious alternative explanations or interpretations of the data and
- ignore broader implications of the research for public policies that are supposed to promote the public interest.

There is no doubt that the FCC has produced a series of highly sophisticated statistical analyses, but it is the quality of the questions that really matters, not the sophistication of the answers. Indeed, there is an important sense in which the set of studies commissioned by the FCC provides complete and total vindication for the suppressed study on media ownership. These studies adopt precisely the same methodology and approach as the suppressed study. The only difference is that the suppressed study was not biased by the new research agenda of the FCC. It asked the right questions and found inconvenient answers. Because the new studies had asked a biased set of questions, they simply do not contradict the earlier findings. Moreover, the target policy variables analyzed in the recent FCC studies are defined

differently, with much less direct relevance to the policy goals of the Communications Act, than the earlier studies. In this sense, the current studies do not confront the earlier studies head on.

The result is a record of research at the FCC that does not provide a sound basis for policy decision-making.

ADMINISTRATIVE PROCESS

The flip-flop on policy substance and the suppression of studies discussed in the previous Chapters calls into question the administrative process through which the agency has conducted the research. This type of flip-flop frequently escapes under the rubric of expert agency discretion. Agencies are allowed to change their mind. However, they are also supposed to explain why they did so, and to have a reasoned basis for this change.⁸² Moreover, when a formal proceeding is initiated that takes comments from the public, such as the “Broadcast Localism Initiative,” the agency is not supposed to waste the public’s time. It is supposed to give consideration to those comments in its decision-making. The “Broadcast Localism Initiative” has not yet concluded, so the agency may explain itself at some point, although it certainly should do so before it writes new policies on media ownership. Timing is important. The results of the “Broadcast Localism Initiative” should have helped the public form their opinions about specific proposals to change the media ownership rules. The

⁸² *Cf.* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

Inspector General’s report casts considerable light on an important piece of research that plays a role in the “Broadcast Localism Initiative.”⁸³

While the Broadcast Localism proceeding may still be unfolding and subject to agency discretion, the same cannot be said of the FCC’s peer review of the ten studies it commissioned. Here, under the Administrative Procedure Act and the Data Quality Act, the agency had specific legal obligations about public notice and transparency that it failed to implement.⁸⁴ The Administrative Procedure Act requires the Commission to base any rule modifications on reasoned analysis and substantial evidence, but it is unlikely the Commission could rely on its studies as substantial evidence or reasoned analysis when it so blatantly disregarded its own guidelines and the OMB’s guidelines regarding the Data Quality Act. Whether or not the FCC failed to follow the Data Quality Act, the FCC’s chosen administrative procedure has a purpose; the failure of the FCC to follow the spirit of the Data Quality Act has had major consequences. It is important to understand how the flawed procedure contributed to the current state of the record, to the extent that the FCC’s research is likely to play an important part in the FCC’s decision making. That certainly was the case with the media ownership working group studies.

The FCC’s research has suffered mightily as a result of these flaws and the public has been denied the opportunity it deserves to comment on the peer review process. Had the

⁸³ See Chapter III – Office of Inspector General, “Report of Investigation into Allegations that Senior Management Ordered Research Suppressed or Destroyed,” October 4, 2007.

⁸⁴ See Complain Under the Data Quality Act, of Consumers Union, Consumer Federation of America and Free Press, *In the Matter of 2006 Quadrennial Regulatory Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, September 11, 2007 (seeking the institution of a credible peer review process)

agency followed the law in the peer review process, a great deal of light would have been shed much sooner on the corrupt agenda the agency was pursuing.

The FCC has violated the Data Quality Act in the peer review of the 10 media ownership studies because it failed to comply with OMB's "Final Information Quality Bulletin for Peer Review." The agency conducted this peer review in secret, when it was supposed to do so as part of a public and transparent process. It sprung the peer reviews after the dissemination of "influential scientific information," when it is clearly the intent of the Guidelines to have peer review prior to dissemination so it can inform the research process, not just evaluate the results.

The agency has belatedly declared the 10 studies to be "influential scientific information." Therefore, the OMB Guidelines apply to the 10 research studies.

Finally, the Bulletin does not directly cover information supplied to the government by third parties (e.g. studies by private consultants, companies and private, non-profit organizations, or research institutions such as universities.) However, if an agency plans to disseminate information supplied by a third party, (e.g. using this information as the basis for an agency's factual determination that a particular behavior causes a disease), the requirements of the Bulletin apply, if the dissemination is 'influential'.⁸⁵

The OMB Memorandum also points out that "peer review of economic and social science information should have as high a priority as peer review of health, ecological and engineering information."⁸⁶

The final version of the bulletin makes it clear "that important scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal government."⁸⁷

⁸⁵ 70 FR 2667.

⁸⁶ Id., at 2666.

⁸⁷ Id., at 2665.

Influential scientific information is supposed to be peer reviewed subject to a clearly articulated agenda that provides notice to the public about the structure and conduct of the review. No such agenda was published and no such notice was given.

Peer Review Planning

Section V requires agencies to begin a systematic process of peer review planning for influential scientific information (including highly influential scientific assessments) that the agency plans to disseminate in the foreseeable future.

A key feature of this planning process is a Web-accessible listing of forthcoming influential scientific disseminations (i.e. an agenda) that is regularly updated by the agency...

The agency shall provide its prediction regarding whether the dissemination will be “influential scientific information” or a “highly influential scientific assessment,” as the designation can influence the type of peer review, as well as the use of deferrals....

For each entry on the agenda, the agency shall describe the peer review plan. Each peer review plan shall include: (i) A paragraph including the title, subject and purpose of the planned report, as well as an agency contact to whom inquiries may be directed to learn the specifics of the plan; (ii) whether the dissemination is likely to be influential scientific information or a highly influential scientific assessment; (iii) the timing of the review (including deferrals); (iv) whether the review will be conducted through a panel or individual letters (or whether an alternative procedure will be exercised); (v) whether there will be opportunities for the public to comment on the work product to be peer reviewed, and if so, how and when these opportunities will be provided; (vi) whether the agency will provide significant and relevant public comments to the peer reviewers before they conduct their review; (vii) the anticipated number of reviewers (3 or fewer; 4-10; or more than 10); (viii) a succinct description of the primary disciplines or expertise needed in the review; (ix) whether reviewers will be selected by the agency or by a designated outside organization; (x) whether the public, including scientific or professional societies, will be asked to nominate potential peer reviewers...

Agencies should update their peer review agendas at least every six months. However, in some cases--particularly for highly influential scientific assessments and other particularly important information--more frequent updates of existing entries on the agenda, or the addition of new entries to the agenda, may be warranted. When new entries are added to the agenda of forthcoming reports and other information, the public should be provided with

sufficient time to comment on the agency's peer review plan for that report or product. Agencies shall consider public comments on the peer review plan.⁸⁸

It is quite clear in the OMB discussion that peer review is intended to influence the research process throughout.

The critique provided by a peer review often suggests ways to clarify assumptions, finding, and conclusions. For instance, peer reviews can filter out biases and identify oversights, omissions and inconsistencies. Peer review also may encourage authors to more fully acknowledge limitation and uncertainties. In some cases, reviewers might recommend major changes to the draft, such as refinements of hypotheses, reconsideration of research design, modification of data collection or analysis methods, or alternative conclusions.⁸⁹

Although there were over nine months between the announcement of the studies and their release, there was never any peer review agenda published or any other public notice of ongoing peer review that would have made the process public.

Moreover, it is apparent that the intention is for peer review to take place before influential scientific information is disseminated. Thus, the OMB Guidelines recognizes that in some instances, the draft report may be made publicly available as part of the peer review. It urges caution here.

In cases where a draft report or other information is released by an agency solely for the purposes of peer review, a question may arise as to whether the draft report constitutes an official 'dissemination' under information-quality guidelines. Section I instructs agencies to make this clear by presenting the following disclaimer in the report:

“THIS INFORMATION IS DISTRIBUTED SOLELY FOR THE PURPOSE OF PRE-DISSEMINATION PEER REVIEW UNDER APPLICABLE INFORMATION QUALITY GUIDELINES. IT HAS NOT BEEN FORMALLY DISSEMINATED BY [THE AGENCY]. IT DOES NOT REPRESENT AND SHOULD BE CONSTRUED TO REPRESENT ANY AGENCY DETERMINATION OR POLICY.”⁹⁰

⁸⁸ Id., at 2672-3.

⁸⁹ Id., at 2665.

⁹⁰ Id., at 2667.

None of the documents disseminated by the FCC included this disclaimer. The agency clearly disseminated influential scientific information prior to peer review.

The intention of the guidelines is also to make the process transparent.

[The Bulletin] also establishes a transparent process for public disclosure of peer review planning, including a Web-accessible description of the peer review plan that the agency has developed for each of its forthcoming influential scientific disseminations.⁹¹

In sum, the 10 studies are “influential scientific information” disseminated prior to peer review. The agency never predicted what their informational status would be. The peer review was never placed on an agenda and made known to the public. The public never was afforded the opportunity to comment on the peer review plan.

ANALYTIC METHODOLOGY

Because the agency started with a biased research agenda and failed to conduct a proper peer review, the studies suffer from numerous methodological problems. Taken together, the discussion of the methodologies contained within the ten studies and the critiques in the post-dissemination peer reviews present a picture of a research program that is a muddled mess of

- Unrepresentative samples
- Poorly or incorrectly defined and incompletely described variables
- Missing variables
- Inconsistent and questionable statistical models
- Failure to report or analyze the magnitude of effects
- Theoretically questionable assumptions
- Incomplete analysis or failure to explain puzzling findings

For each of these eight broad categories there are several different specific examples of the problem, with three dozen in all. Because the FCC chose to use a single reviewer for

⁹¹ Id., at 2666.

each study, the quality of the reviews of the study was very uneven. Several of the reviewers did a great deal, others virtually nothing. Many of the criticisms offered by the more conscientious reviewers apply to the studies reviewed by the less conscientious reviewers (see Exhibit III-2).

Exhibit III-2: Methodological Problems in the FCC’s TV Output Studies

	Study 3	Study 4.1	Study 6
Unrepresentative samples⁹²			x
Poorly defined variables⁹³	x	x	x
Missing variables⁹⁴	x	x	x
Questionable Statistical Models⁹⁵	x	x	x
Failure to report effect magnitudes⁹⁶	x	x	x
Questionable assumptions⁹⁷	x		
Incomplete analysis⁹⁸	x	x	x

⁹² Representativeness of samples (Leslie II, p. 1; Sweeting, p. 3)

⁹³ Prime time (George, p. 5 (15)) Ownership variable (George, p. 4 (11); Leslie, p. 1)

Aggregation into networks (George, p. 5 (13))

Local v. national news (Leslie, p. 2)

Incomplete reporting of descriptive statistics (George, p. 2, Leslie II, p. 3)⁹³

Means, medians, standard deviations, extreme percentiles

outliers (George, p. 4 (3))

Heteroscedasticity (George, p. 4 (3))

Non independence of standard errors (George, p. 4 (3))

⁹⁴ Cable, ratings discussed but not included (George, p. 2)

Audience/market share (Leslie, p. 1)⁹⁴

Quality v. quantity (Leslie II, p. 2)

Cable carriage (Waterman)

⁹⁵ Robustness to alternative operationalizations (George, p. 1, 4 (1); Leslie, p. 3,

Leslie II, p. 2)

Values vs. percentages (George, p. 1, 4 (1); Leslie, p. 2)

Categorization of variables (Violent programming, p. 1, 5 (10))

Fixed effects specifications (Leslie, p. 2)

Aggregation of stations into networks (George, p. 4 (13))

Clustering (George, p. 4 (4)⁹⁵; Leslie, p. 2)

Time varying market effects (George, p. 4 (4))⁹⁵

Variables on both sides of equation (George, p. 5 (8))

Fallacy of multiple specifications

Probability of significance tests (Sweeting, p. 2)

Improper specifications (Sweeting, p. 2)

Expanding numbers of observations (Sweeting, p. 2)

Failure to report coefficients in models (Leslie II, p. 4)

Correlation v. causation (Leslie II, p. 3; Sweeting, p. 2)

⁹⁶ George, p. 4(6),⁹⁶ Leslie, p. 3

⁹⁷ Advertising (George, p. 3, 5 (16))

⁹⁸ Leslie, p. 3; Leslie II, p. 4; Sweeting p. 5

THE INSPECTOR GENERAL'S REPORT

The Inspector General has recently concluded that the localism study was not suppressed. It was just hung up in an intensive internal review of its methodology.⁹⁹ Ironically, and more importantly, the methodology used in the “delayed” paper is precisely the same methodology used by the statistical research studies commissioned by the FCC two years later. Perhaps the higher ups in the agency who “delayed” the study were just out of touch with the state of the art in the field, but one cannot help but wonder if it would have encountered such heavy weather if it had agreed with the thrust of what the agency had tried to do in the 2002 Final Order relaxing media ownership limits. Whether it was bias or ignorance, the handling of the “delayed” study does not speak well for the agency and its results still contradict the policy the Commission had pursued and the agenda that the Chief Economist laid out.

The Inspector General's (IG) report on the “suppressed” studies claims that it could find no smoking gun, but we are not convinced. At a minimum, it demonstrates gross incompetence and bias in the conduct of research by the agency.

The Media Bureau imposed entirely different standards on the Localism paper that it would not publish than it used on the ten Studies that it recently published. The only difference between the two is that the “suppressed” study contradicted the publicly stated preferences of the Chairman.

The criticism that the IG claims prevented publication of the localism study can be lodged in varying degrees against every one of the statistical studies that were published, but

⁹⁹ Office of Inspector General, Federal Communications Commission, “Report of Investigation into Allegations that Senior Management Ordered Research Suppressed or Destroyed,” October 4, 2007.

the agency chose not to do so. Indeed, for some of the studies that were published, the criticism could be even more severe.

The IG report notes three times the different specifications of the model. Ironically, Study 6, recently released by the Commission has been subject to even larger changes (see Exhibit III-3). Both the localism study and Study 6 involve the coding of news broadcasts. Almost two months after it was published, the author published a revised version with a different set of specifications for the most important variables in the model and these variables involve much wider spreads. Yet the Commission claims that this is “Influential Scientific Information.” It just so happens that the research supports the agency’s preconceived notion about the policy.

Exhibit III-3: Variation in Estimates of Effects, Localism Study compared to Study 6

	Initial	Second	% Change	Initial	Second	% Change
Localism Study (Minutes)						
	4	5.5	+37.5			
	5	3	-40.0			
	3	6.5	+117			
Study 6 (Coefficients)		Model 4			Model 5	
Total News	99.1	131.7	+32.9	65.7	55.4	+18.6
Local News	91.6	131.4	+43.4	78.8	85.1	+8
Local News(exlc s/w)	25	96.6	+286.4	26.6	70.3	+457.9
Local Politics	26.3	53.1	+101.9	24.9	45	80.7
Speaking Time	8	5.7	-28.75	9.6	5.8	-39.6
Coverage	18.6	18.3	-1.6	21.8	16.5	-24.3
Issue Coverage	-14.3	-4.9	+65.7	-13.7	-4.9	+64.2
Poll Coverage	3.6	3.0	-16.7	3	-.05	-101.7
Diff. Speaking Time	-5.2	-4.2	+19.2	-5.4	-4	+25.9
Diff. Cand. Coverage	-9.8	-8.2	+16.3	-5.4	-4.0	+25.9
Diff. Issues Coverage	-6.2	5.4	+187.1	-6.6	5.0	+175.8
Diff. Poll Coverage	-3.3	-1.4	+57.6	-3.0	-1.1	+63.7

Not only are there wild swings in the estimates depending on the specification, but in some cases the signs actually change. The agency appears to have failed to provide the same intensive oversight before publishing the studies with which it agrees as it did to the study with which it disagreed.

The IG report fails to acknowledge that the challenges about the choice of markets, dates and stations to study, which appear to be amongst the key criticisms that the authors of the study could not resolve, was not in the control of the authors of the study. Indeed, the IG report ignores entirely the regulatory role of the underlying database, which was described in Chapter II. This is ironic, and suspect, since the IG notes that there was concern about intellectual property involving the original study that was based on the data.

The IG concludes that none of the higher ups in the agency knew anything about the controversy. There were eight drafts, a cross bureau peer review, complaints about poor performance, and the head of the Bureau knew nothing about it? Sounds like substandard management to us. Of course, the fact that the creation of the Localism Task Force (LTF) and the initiation of a “Media Bureau Staff Research Papers Series” “overlapped substantially and at times the lines of authority and management were blurred” did not help matters.¹⁰⁰ The fact that the “Co-chair of the LTF...was also the Deputy Chief of the Media Bureau...appears to have given rise to confusion as to whether the project went forward as an LTF, or simply a Media Bureau Staff Research Paper Series, project” may have helped this controversy to escape the attention of the senior Bureau management.¹⁰¹

¹⁰⁰ Id., p. 5-6.

¹⁰¹ Id., p. 6.

While the Bureau head was ignorant of the localism analysis, he appears to have been involved in the decision not to publish the radio study. Here at least we have a smoking gun.

The then-Chief stated that he:

[was] not inclined to release this one unless the story can be told in a much more positive way. This is not the time to be stirring the “radio consolidation” pot... [Given that the reports in the series had been issued at uneven intervals in the past]. It would hardly seem odd if we did not release one this year... particularly given that we just did a big radio order as part of the biennial... All in all this is a really bad time to release something like this. If we can change the focus and make it more positive... then we can do something like this again, but this will take more than just regurgitating last year’s report with new numbers.¹⁰²

The intent here is not to produce valid and objective information but to spin the data in a way that supports the preconceived notion of the agency heads. The IG admits that this statement could be interpreted as a biased attempt to suppress the research, but chose to put a more benign interpretation on it.

The statement that the report might be done again if the focus could be more positive could be seen as an indication of a desire to twist or conceal facts. We found no evidence of such an intent, however, and accept that this statement was a policy-maker addressing the natural framing of issue and argument. The statement that it “is not time to be stirring the ‘radio consolidation’ pot” can similarly be viewed negatively as an apparent desire to avoid legitimate debate on a controversial Commission decision.¹⁰³

The IG concludes that “we believe this to be in part a reflection of the Bureau Chief’s oft-expressed concern that staff’s efforts and work product focus on matters actively before the Commission and the Media Bureau.”¹⁰⁴ The Chairman had launched the Broadcast Localism Initiative in September of 2003 and the consolidation of radio into national chains

¹⁰² Id., p. 15.

¹⁰³ Id.

¹⁰⁴ Id.

was front and center in that debate. The IG’s acceptance of this excuse is as lame as the excuse itself, if not more so.

The IG does conclude that at least one person “thought the instruction basically was to lie,” when asked about the report.¹⁰⁵ The bottom line is that the Bureau is given a pass,

We do not feel that the evidence is strong enough to establish with certainty that any improper or illegal acts to conceal the Draft 2003 Radio Report took place and therefore this cannot be a matter for referral. We suspect that, were the then-Media Bureau Chief still in place, we would refer matter to the Chairman for administrative consideration.¹⁰⁶

The IG then goes on to claim that since management has changed, there is nothing to worry about. “Given that different management is in place and that during our investigation we have not heard reports of similar situations, we do not see it necessary to refer this matter.”¹⁰⁷ Our analysis has shown that the bias in the agency against “stirring the consolidation pot” is still quite strong in the agency.

A criminal act was committed at the Agency with the destruction of data that cost the agency 550 professional hours to produce, but the Inspector General could not find out who committed the crime.¹⁰⁸ The report, however, does not demonstrate in any way that the agency did not deep-six research that it did not like. On the contrary, the shenanigans at the agency reinforce our suspicion.

Parts II and III demonstrate the price paid as a result of the breakdown of a proper research process. In Part II, we extract the usable data from the flawed, results-driven research framework and show that properly defined and executed analysis contradicts the

¹⁰⁵ Id., p. 16.

¹⁰⁶ Id., p. 17.

¹⁰⁷ Id.

¹⁰⁸ Id., p. 6.

original findings of the research. It certainly does not support the Chief Economist's campaign to get rid of the newspaper-TV cross-ownership limits.

TRANSPARENCY AND PUBLIC COMMENT

The abuse of the administrative process continued after the release of the studies.¹⁰⁹ Having taken over nine months to prepare and release 10 studies, the FCC established a 60-day comment period with 15 days for replies. The peer reviews, which could have helped to guide public comments, were not released by the agency until thirty days into the public comment period.

Worse still, final documents and data relied on by the studies was not fully available when the papers were released. Major changes were made in at least one case forty days into the comment period. All of the data in usable form was not available until 50 days into the comment period. The FCC jiggered the comment period, allowing only 30 days from the full availability of the research studies and data, but only 7 days for replies. Given the quantity of materials made available and the complexity of the research, the original comment and reply period of 60/15 was inadequate. The final 30/7 is grossly inadequate.

Given the meager time allowed for comments and replies, these comments focus on the flaws in the quantitative models and methods. As suggested above, a broader review of the record would show that the studies were framed with little reference to the body of

¹⁰⁹ See also Complain Under the Data Quality Act, of Consumers Union, Consumer Federation of America and Free Press, *In the Matter of 2006 Quadrennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, September 11, 2007 (seeking the institution of a credible peer review process)

evidence before the Commission and are contradicted by the prior work of the Commission.

We have not had sufficient time to develop that line of analysis.