

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of:)
)
Broadcast Localism) MB Docket No. 04-233
)

COMMENTS OF THE BRENNAN CENTER FOR JUSTICE, CONSUMER FEDERATION OF AMERICA, ACTION COALITION FOR MEDIA EDUCATION, ALLIANCE FOR A MEDIA LITERATE AMERICA, AMERICAN COUNCIL ON CONSUMER AWARENESS, ASSOCIATION OF INDEPENDENT VIDEO & FILMMAKERS, CHICAGO CONSUMER COALITION, COLUMBIA CONSUMER EDUCATION COUNCIL, CONSUMER ACTION, CONSUMER ASSISTANCE COUNCIL, CONSUMER FEDERATION OF THE SOUTHEAST, CONSUMERS FOR AUTO RELIABILITY AND SAFETY, THE CONSUMERS VOICE, DEMOCRATIC PROCESS CENTER, THE DOWNTOWN COMMUNITY TELEVISION CENTER, FLORIDA CONSUMERS ACTION NETWORK, FREE PRESS, HARLEM CONSUMER EDUCATION COUNCIL, HARLEM LIVE, INDEPENDENT PRESS ASSOCIATION, LISTEN UP!, MASSACHUSETTS CONSUMERS COALITION, MEDIA ALLIANCE, MEDIA EMPOWERMENT PROJECT OF THE OFFICE OF COMMUNICATION, INC. UCC, NEW AMERICA FOUNDATION, NORTH CAROLINA CONSUMERS COUNCIL, INC., PRIVACY CLEARINGHOUSE, TEXAS CONSUMER ASSOCIATION TRUCE, USA ACTION, UTILITY CONSUMERS' ACTION NETWORK, AND THE VIRGINIA CITIZENS CONSUMER COUNCIL

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SUMMARY

Serving local communities – “localism” – is a fundamental goal of American broadcast policy. Localism means providing residents of local communities with diverse cultural programming, opportunities for self-expression, and access to the solid, in-depth public affairs programming about local and national affairs that is essential to democracy. Congress has repeatedly asserted the importance of localism in promoting the goals of the First Amendment for the electronic media, and the courts have steadfastly upheld efforts to promote localism.

While the national networks and media chains see localism as quaint and outdated, the Congressional support for and Supreme Court acceptance of policies that promote localism is deeply embedded in our federalist political system. “All politics are local,” because in our federal system all elections are state and local. Governors, senators and Electoral College members are chosen on a statewide basis, while members of the House of Representatives are chosen on the basis of single member districts. We pride ourselves on a structure that allows policies affecting education, public health and safety, and community development to be set at the local level.

The importance of localism rests on practical sociological and psychological grounds as well. Local communities promote social trust and shared values, help form individual identities, and preserve cultural diversity. Mobilization of the public to participate in decision-making is best accomplished through local efforts to “get out the vote.” The convergence of political decision-making and processes of civic participation at the local level should be celebrated as a strength of our political system. In this sense, localism in the media

and the diversity inherent in thousands of units of local government remain critical to a vibrant democracy.

The immensely important role of television in democratic discourse reinforces the need for public policies to promote localism and diversity. Television is the primary source of news and information for the public, especially in local elections. Television is also the primary means of influencing the public through advertising. The news production process deeply affects the pattern of political dialogue.

Yet, from the beginning of federal broadcast regulation, there has been a tension between this policy goal of localism and the profit-maximizing ethic of media corporations that became the primary beneficiaries of the licensing system. Requiring commercial media corporations to fulfill public interest obligations to provide diverse political and educational programming in exchange for their valuable license to exploit the commonly owned airwaves has long been the assumed solution to this problem. But imposing such obligations has always been a tense and difficult business, and at best has resulted in only short-lived and marginal improvements. Requirements have been minimal and inconsistent over time, and even so, licensees have often been reluctant to comply.

This tension has reached crisis proportions. Responding to a philosophy of “de-regulation” over the past few decades, the Commission has relaxed broadcast companies’ public interest obligations. At the same time, the apparent goal of promoting efficiency has led the FCC and other agencies to allow a wave of mergers that have concentrated local media markets, consolidated outlets into regional chains, and conglomerated different types of media under one roof. These trends have combined to weaken localism and diminish diversity in radio and television content. Hypercommercialism in the media has swamped civic discourse.

Among the ill effects are that racial and ethnic minority groups are underserved, while community-based nonprofit voices struggle for access to the major media of mass communication.

The time has come for a major shift in broadcast policy. While the longstanding concerns about excessive concentration of media ownership (outlet diversity) and the promotion of public interest programming in the commercial mass media (program diversity) should continue, the Commission should use this fresh look at the issue of localism to promote three additional, and critical, forms of diversity and localism in the media – source diversity, institutional diversity, and viewpoint diversity. A balance must be sought between the civic and the commercial in the broadcast media by promoting independent sources of media content and noncommercial outlets for diverse points of view.

The groups joining in these Comments – media reform advocates, other public interest organizations, and nonprofit community media producers – urge the Commission to initiate the following basic structural changes:

- (A) Assign more broadcast licenses to nonprofit, independent media that serve the needs and interests of diverse social, economic, ethnic, and racial groups within local communities. This should include, but not be limited to, more licenses for low power broadcasting, and more spectrum availability for unlicensed community broadcasting.
- (B) Simultaneously, deny license renewals to commercial broadcasters that are not serving the public interest in localism and diversity, and prevent commercial broadcasters from continuing to expand their geographic coverage areas.
- (C) Develop a system of community access or channel leasing whereby commercial broadcasters are required to provide airtime and facilities to nonprofit independent media.
- (D) Establish mechanisms for strengthening and supporting nonprofit, independent media, so that they can become meaningful alternatives to

commercial broadcasters. This would include a “localism and diversity” fund created with proceeds of spectrum auctions and licensing fees.

The Commission has both the power and, given present circumstances, the obligation to move now toward a new system in which for-profit broadcasting, driven by advertising, beholden to its giant corporate owners, and dominated by commercial entertainment, is balanced by smaller, community-based nonprofits that will provide the cultural and viewpoint diversity so lacking in our current mass media environment, and that will have a genuine commitment to serving local needs.

COMMENTERS

The organizations joining in these Comments collectively represent a very diverse set of public interest organizations and producers of nonprofit community media. They share the fundamental view that media policy is a central concern to all citizens and groups because the mass media deeply affect the pattern of democratic discourse in our society. Because the ability of all groups, no matter what the focal point of their policy concerns, to get their message out and participate in political dialogue will be affected by these proceedings, these groups have a direct interest in the outcome of this investigation.

The Brennan Center for Justice at NYU School of Law, founded in 1995, unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. The Center's Free Expression Policy Project engages in research, advocacy, and litigation in the fields of media reform, intellectual property, and other issues affecting the diversity and breadth of expression available to Americans.

The Consumer Federation of America (CFA) is a non-profit association of some 280 pro-consumer groups, with a combined membership of 50 million. It was founded in 1968 to advance the consumer interest through advocacy and education.

The Action Coalition for Media Education (ACME) is a strategic network linking media educators, health advocates, media reformers, independent media makers, community organizers and others, to promote media literacy, examine the corporate media system, advocate independent media-making as a critical part of a democratic society and vibrant culture, and support local, state, and national media reform efforts.

The Alliance for a Media Literate America (AMLA) has a longstanding commitment to the issues of diversity and localism. In its upcoming National Media Education Conference, "Giving Voice to a Diverse Nation", AMLA is emphasizing the importance of giving all of our citizens the opportunity to participate fully in our information- and media-saturated culture; be accurately represented in and by media; and have the skills, access, and opportunities to tell their stories and hear their stories told. In a society where the power to govern resides in the people, it is essential for broadcasters to meet the needs of local communities for programming that supports the democratic process.

American Council on Consumer Awareness is a 35-year-old non-profit public interest research organization and long term organizational member of the Consumer Federation of America. Kenneth J. Benner, its President, is also a retired radio broadcast talk-show host, news producer and commentator.

The Association of Independent Video & Filmmakers (AIVF) is a membership organization serving local and international film and videomakers, from documentarians and experimental artists to makers of narrative features. AIVF enhances the growth of independent media by providing services and resources, including seminars and networking events, essential books and directories, including *The AIVF Guide to International Film & Video Festivals* and *The AIVF Self-Distribution Toolkit*, and media advocacy for independent artists.

Chicago Consumer Coalition is a network of local and community-based consumer groups in the Chicago Metropolitan Area. Present areas of focus include communications, food, finance and housing policies/practices of government and industry.

The Columbia Consumer Education Council seeks to disseminate educational information to consumers, document unfair business practices, and distribute consumer information publications, particularly to low income consumers.

Founded in 1971, Consumer Action works on telecommunications, privacy and banking issues through its national network of 7,300 community based organizations. Its focus is representing the needs of low and moderate income consumers, people of color and recent immigrants.

The Consumer Assistance Council is a nonprofit agency working with the Massachusetts General Attorney's Office of Consumer Protection to provide consumers with information and mediate complaints.

The Consumer Federation of the Southeast (CFSE) is a not-for-profit consumer advocacy group founded in 2003 and dedicated to consumer advocacy in the Southeastern United States. Established to promote the rights of all consumers, in harmony with the general welfare, through city, county, regional, state, national and international groups; to stimulate, coordinate, and provide consumer programs and activities in such areas as: public utilities, rate setting, product pricing, quality, servicing and guarantees, advertising, regulatory agencies, credit insurance, etc.

Consumers for Auto Reliability and Safety is a national nonprofit auto safety and consumer advocacy organization. CARS is dedicated to preventing motor vehicle-related fatalities, injuries, and economic losses.

The Consumers Voice is a national, member-supported non-profit 501 (c) 4 consumer organization headquartered in Lincoln Nebraska that focuses on food safety, access to health care and rights of consumers in the information society. They seek to educate their members

through newsletters and action alerts and ask them to participate in public policy debates. The organization has joined in a number of Federal Communications Commission proceedings through letters and comments on issues such as telecommunications and broadband competition, consumer digital rights and fair use and media concentration and ownership.

Democratic Processes Center, Tucson, AZ, is a non-profit educational organization dedicated to working with disenfranchised and alienated youth and young adults. The DPC engages in consumer education activities with a focus on consumer rights and responsibilities.

The Downtown Community Television Center (DCTV) is an independent nonprofit media center which believes that expanding public access to the electronic media arts invigorates our nation's democracy. Founded in 1972, DCTV has fostered a diverse and inclusive media arts community for over 30 years. DCTV pursues its educational mission by introducing members of the community to the basics of electronic media through hundreds of free or low-cost production courses and access to broadcast-quality production equipment.

Florida Consumers Action Network (FCAN) is the state's largest consumer organization with 40,000 members from Key West to Tallahassee. FCAN works on utility, insurance, health care and environmental issues.

Free Press is a national nonpartisan organization working to increase informed public participation in crucial media policy debates, and to generate policies that will produce a more competitive and public interest-oriented media system with a strong nonprofit and noncommercial sector.

The Harlem Consumer Education Council focuses on making sure that low-income consumers receive fair treatment in society. HCEC is volunteer-staffed and administers workshops, seminars and classes designed to develop awareness of consumer-oriented issues.

Harlem Live is an Internet publication created, presented, and represented by teens in Harlem and throughout New York City. It broadens young people's view of the world using technology and journalism while fostering understanding through diversity.¹ Its core purpose is to empower youth of color to be productive, creative and thoughtful leaders who will be responsible caretakers of our future.

The Independent Press Association is a 500-member nonprofit advocacy group that aims to amplify the power of independent publications not owned by large corporations so as to foster a more just, open and democratic society. Consolidation of the airwaves hurts its members in two ways: first, because some of its members also produce radio or television shows, and struggle to find space on accessible airwaves as well as financial supporters of their broadcasts; and second, because advertisers overlook its member publications in favor of cheaper buys offered by consolidated broadcast stations and affiliated newspapers. This makes it more difficult for its members, 25% of which are ethnic publications serving immigrant and African American communities, to survive.

Listen Up! is a youth media network that connects young video producers and their allies to resources, support, and projects with the goals of developing the field and achieving an authentic youth voice in the mass media.

Massachusetts Consumers Coalition (MCC) was established in 1976 by representatives of local, state and federal consumer agencies, consumer advocacy organizations and others who were concerned with protecting consumers and ensuring fairness in the marketplace.

¹ Harlem Live, TRUCE, the Downtown Community Television Center (DCTV), and Listen Up! are all community media organizations that provide educational and production opportunities to young people.

Media Alliance is a 28 year-old media resource and advocacy center for media workers, nonprofit organizations, and social justice activists. Its mission includes excellence, ethics, diversity, and accountability in all aspects of the media in the interests of peace, justice, and social responsibility.

The Media Empowerment Project of the Office of Communication, Inc., United Church of Christ, grows out of the UCC's historic commitment to civil rights in media advocacy. MEP is working in low income communities around the country with people of color, women and youth to help them think about how media can best serve their needs and advance their struggles for social justice. The Media Empowerment Project provides communities with the support and training needed to organize for meaningful, lasting change.

The New America Foundation, <http://www.spectrumpolicy.org>, is a nonpartisan, non-profit public policy institute based in Washington, D.C., which, through its Spectrum Policy Program, studies and advocates reforms to improve our nation's management of the electromagnetic spectrum.

The North Carolina Consumers Council (NCCC) is a nonprofit, statewide consumer advocacy organization that has been representing the consumers of North Carolina since 1968. NCCC is also affiliated with the Consumer Federation of America, a national consumer advocacy organization. NCCC does not represent individual consumers. Instead, we represent the consumers of North Carolina and their interests as a whole. To carry out its purposes, NCCC researches consumer issues, attends and testifies at government meetings, authors op-ed articles in newspapers, and writes letters to legislators and government officials in addition to other activities.

The Privacy Rights Clearinghouse is a nonprofit consumer information and advocacy organization based in San Diego, Calif., and established in 1992. The PRC has published privacy protection guides on many topics, available at www.privacyrights.org.

Texas Consumers Association The Texas Consumer Association is a state-wide 501 (c) 4 non-profit organization that represents small businesses and residential consumers on pocketbook issues. The organization is a state affiliate of the Consumer Federation of America. The organization has intervened on behalf of Texas consumers in state Public Utility Commission telephone proceedings involving competition and customer service as well as with proceedings at the Federal Communications Commission involving telecommunications, digital rights management and consumer fair use and media ownership and diversity.

TRUCE is an arts education and media literacy youth development program in Harlem that is committed to equipping young people with the necessary tools to become leaders in their community.

USAction is the nation's largest progressive activist organization, dedicated to winning social and economic justice for all. It represents over three million members in 34 affiliates, with statewide organizations in 24 states.

Utility Consumers' Action Network is a nonprofit consumer advocacy group based in San Diego, California. Its membership consists of over 21,000 small business and residential customers of telephone, energy and water services, most of which are based in San Diego County.

Virginia Citizen's Consumer Council, VCCC is a statewide, grass-roots, consumer education and advocacy organization that has been active for over 30 years.

I. INTRODUCTION

Broadcasting is by its nature a local phenomenon, and serving the diverse needs of local communities has long been an intrinsic part of American broadcast policy. As FCC Commissioner Adelstein has noted:

Localism is an integral part of serving the public interest. It requires stations to be responsive to the particular needs and interests of their communities. Every community has local news, local elections, local government, local weather, local culture, and local talent. Localism means providing opportunities for local self-expression. It means reaching out, developing and promoting local performing artists, musicians and other talent. It means dedicating resources to discover and address the unique needs of every segment of the community.²

The importance of localism as a core policy goal can be traced to the 1927 Radio Act.³ Over the years, not only this Commission but the Supreme Court and Congress have recognized the importance of local broadcast stations serving local communities, “as an outlet for local self-expression.”⁴ As the Supreme Court explained in 1994, “Congress designed this system of allocation to afford each community of appreciable size an over-the-air source of information and an outlet for exchange on matters of local concern. ... [T]he importance of local broadcasting ‘can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the nation’s population.’”⁵ Here as elsewhere in U.S. broadcasting policy, “the people as a whole retain their interest in free speech by radio and their collective right to have the medium

² Statement of FCC Commissioner Jonathan S. Adelstein in Notice of Inquiry, *Broadcast Localism*, MB Docket No. 04-233 (July 1, 2004), p. 25 (hereafter, “NOI”).

³ See, e.g., Philip Napoli, *Foundations of Communications Policy: Principles and Process in the Regulation of Electronic Media* 203 (2001).

⁴ *United States v. Southwestern Cable*, 392 U.S. 157, 174 (1968) (quoting H.R. Rep. No. 1559, 87th Cong., 2d Sess., 3).

⁵ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (quoting in part *U.S. v. Southwestern Cable*, 392 U.S. at 177).

function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”⁶

The goal of localism is inseparable from the other pillar of American broadcast policy: diversity. Diversity does not just mean programming from different corporate producers; it means diversity in the *content* and *viewpoint* of programming.⁷ Thus, ten or even twenty newscasts that all serve up the same superficial, if-it-bleeds-it-leads sound bites do not constitute diversity. As one observer writes: “Our 500-channel universe doesn’t mean that we are getting 500 times the examination and investigation of worthy stories. It means we get the same narrow, conventional-wisdom wrap-ups repeated 500 times.”⁸ Serving local interests is meaningless if the diverse elements in a community – cultural, social, and political – are not represented on the airwaves.

It is important also to define the geographic parameters of localism. The Commission has long equated localism with broadcast markets. But as these markets expand through increased power levels and other technological advances, the needs of local communities get lost. There are more than 80,000 government units in the U.S., including school districts, town districts, and county districts, and what happens at these local levels of governance is

⁶ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

⁷ See *Red Lion*, 395 U.S. at 389-95. .

⁸ Ariana Huffington, ““Blog Heaven,” *The American Prospect* (July 1, 2004). See also Cheryl Leanza, “Monolith or Mosaic: Can the Federal Communications Commission Legitimately Pursue a Repetition of Local Content at the Expense of Local Diversity?”, 53 *American U. L. Rev.* 597, 603, 610 (2004) (faulting the Commission’s 2003 media ownership proceedings for ignoring “diversity at the local level”; “[f]uture analysis of this question cannot rightly consider diversity and localism as two separate goals that are analytically distinct”). Evidence that increasing the number of outlets does not necessarily increase diversity can be found in A. S. Dejong and B. J. Bates, “Channel Diversity in Cable Television,” 35 *Journal of Broadcasting and Electronic Media* 159-66, 1991; A. E. Grant, “The Promise Fulfilled? An Empirical Analysis of Program Diversity on Television,” 7(1) *The Journal of Media Economics* 51-64, 1994; Heikki Hellman and Martin Soramaki, “Competition and Content in the U.S. Video Market,” 7 *Journal of Media Economics*, 1994; C. A. Lin, “Diversity of Network Prime-Time Program Formats During the 1980s,” 8 *Journal of Media Economics* 17-28, 1995; Robert Kubey, *et al*, “Demographic Diversity on Cable: Have the New Cable Channels Made a Difference in the Representation of Gender, Race, and Age?,” 39 *Journal of Broadcasting and Electronic Media* 459-71, 1995.

not often considered newsworthy to commercial broadcasters operating in large metropolitan areas. There is probably no way that radio and television can cover all of the political issues, election campaigns, and other matters of concern to people in these local units of government, but with a restructured, and more balanced, allocation of the airwaves, broadcasters could do a much better job of addressing local concerns.

In the present Notice of Inquiry, the Commission has asked for comment on a broad range of questions relating to localism. These include:

- Whether licensees are paying adequate attention to “local or national political and civic discourse,” and “what steps can be taken to encourage voluntary efforts for political and civic discourse”;
- Whether DTV broadcasters should diversify by “entering into channel leasing arrangements with programmers that intend to service a previously underserved audience,” by otherwise “narrowcasting” to such audiences on different programming streams, or even by taking advantage of enhanced audio capabilities “to air different soundtracks in different languages simultaneously”;
- Whether the Commission “needs to consider additional ways, not unique to digital television, to ensure that broadcasters serve the needs and interests of all significant segments of their communities, consistent with applicable constitutional standards,” and in particular, of minority communities;
- How the license renewal process can be strengthened to assure the licensees are serving the public interest; and
- How additional spectrum allocations, including low power broadcasting, can enhance localism and, in the words of Senator McCain, ““provid[e] the public with a locally-oriented alternative to huge national radio networks.””⁹

We address these by focusing on the overall structural deficiencies that have created the present crisis in mass communications, and on the reforms that are needed to reinstate localism as a central tenet of media policy.

⁹ NOI, p. 9, ¶22; p. 11, ¶¶25, 26; p. 17 ¶¶41-44.

These Comments are divided into three parts. Part I shows the importance of localism and local institutions to our democracy. Part II discusses the failure of the current structure to meet the needs for localism and diversity. Part III recommends a number of new initiatives that the Commission should pursue to accomplish the intertwined goals of localism and diversity in the broadcast media.

II. THE HEALTH OF OUR FEDERAL SYSTEM AND CULTURAL LIFE DEPENDS ON LOCALISM

While courts have repeatedly affirmed the constitutional and legal basis for policies promoting localism and diversity, the political commitment to these policies is constantly under attack. Moreover, because broadcasters have First Amendment rights, which are affected by policies to promote localism and diversity, it is important that there be an evidentiary basis to conclude that these policies are necessary and actually do promote the public interest.

This section demonstrates that localism and diversity remain critically important to our democracy, and that the commercial mass media have not fulfilled, and are not likely to fulfill, these fundamental goals of communications policy.

A. LOCALISM REMAINS THE CORNERSTONE OF AMERICAN DEMOCRACY

In spite of three quarters of a century of Congressional policy to promote localism in the broadcast media and Supreme Court acceptance of these policies, in the recent media ownership proceeding, the chief expert witness for the national broadcast networks declared localism to be an unjustified preoccupation of the Commission that lacks a coherent basis. In his words:

The Commission's preoccupation with localism is difficult to explain or justify. Why should the government seek to promote local content as opposed to, and especially at the expense of, any other category of ideas? One can readily imagine categories of ideas more central to the political, social, educational, aesthetic or spiritual lives of Americans. Further, to fasten on any category of ideas readily runs afoul of First Amendment values. In short, a focus on local content or local outlets appears to lack a coherent policy basis.¹⁰

This statement is wrong on every count. To begin with, a policy of promoting localism does not run afoul of the First Amendment. The Supreme Court has rejected this claim repeatedly over the past seventy-five years. Second, given our federal system, local government is in fact our central political institution. Third, we define many of our social and aesthetic values in local terms. For example, local courts and juries decide a wide range of civil and criminal issues based on what are essentially community understandings of what a "reasonable man" would think or do, depending on local conditions. We take great pride and see great strength in the local grounding of our federal system.¹¹ Having vibrant local media outlets to promote good local government and strong social ties in local communities is an essential part of our democracy.

1. Political Process

No matter how strongly national and international issues affect our society or how prominent they become, there is much truth to the saying that all politics in America are local. This is because of the fundamental federal structure of our national government.

¹⁰ Bruce N. Owen, "Statement on Media Ownership Rules," Attachment to *Comments of Fox Entertainment Group and Fox Television Stations, Inc., National Broadcasting Company, Inc. and Telemundo Group, Inc., and Viacom*, In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, MB Docket No. 02-277, MM Dockets 02-235, 01-317, 00-244, 2 January 2003, p. 10.

¹¹ Alexis de Tocqueville's well-known celebration of local associations started with "the permanent associations which are established by law under the names of townships, cities, and counties, a vast number of others are formed and maintained by the agency of private individuals," cited in Ronald J. Terchek and Thomas C. Conte, Eds., *Theories of Democracy* (Lanham, MD: Rowan & Littlefield, 2001), p. 27.

National elections are essentially local. The extreme concentration of the 2004 presidential election on so-called “battleground” states reminds us that we elect the president on a state-by-state basis. We elect senators on a state-wide basis and our representatives on the basis of small single-member districts.¹² These are local races.

More importantly, we reserve a host of public policy decisions that are vital to the quality of life and the fabric of our society – police, emergency services, education, land-use, to name just a few – for local units of government. Only defense is solely national policy. Personal transfer payments – social and income security and welfare – are also largely federal, but even income security and welfare have many state and local variations. Three-quarters or more of spending on education, police and parks and recreation is accounted for by state and local governments, most of it at the local level. About two-thirds of all government spending on community development and natural resources are spent by state and local governments, equally divided between state and local.¹³

2. Social Processes

A host of social processes are grounded in the local community. The primary referent for identity and community has traditionally been and remains significantly local.¹⁴ A primary focus on political participation and mobilization captures the most critical aspect for media policy. There are both sociological and psychological reasons why local ties support participation.

¹² Alexander Keyssar, *The Right to Vote* (New York: Basic Books, 2000).

¹³ U.S. Census Bureau, *Statistical Abstract of the United States: 2002* (Washington, D.C.: U.S. Department of Commerce, 2002), Tables 414-416, 453.

¹⁴ Jeremy Rifkin, *The Age of Access* (New York, Jeremy P. Tarcher/Putnam, 2000), pp. 7-9. John Dewey, *The Public and its Problems* (Athens, Ohio: Swallow Press, 1954); Carmen Sirianni and Lewis Friedland, *Civic Innovation in America: Community Empowerment, Public Policy, and the Movement for Civic Renewal* (Berkeley: University of California Press, 2001), especially Chapter 5.

From a practical point of view, for example, getting out the vote thrives on local connections.¹⁵ Knowledge of the local area and local individuals are vastly superior as resources for mobilizing participation. The sociability of the political participation – working together, voting together – provides social reinforcement, trust and psychological gratification.

Local media that focus on local issues, cultures, and interests are a critical part of this equation. As law professor and media scholar Edwin Baker points out, for the media to meet the diverse needs of the public, they must

perform several tasks. First, the press should provide individuals and organized groups with information that indicates when their interests are at stake. Second, the media should help mobilize people to participate and promote their divergent interests... Third, for pluralist democracy to work, information about popular demands must flow properly - that is, given the practical gap between citizens and policymakers, the press should make policymakers aware of the content and strength of people's demands.¹⁶

The broadcast media cannot fulfill this critical role if they are not rooted in local communities.

Broadcast television has an immense impact because of its key role in the social and psychological processes of democratic discourse. Broadcast television is a primary source of information, particularly for local issues.¹⁷ Television is also the premier medium for

¹⁵ John Mark Hanson, “The Majoritarian Impulse and the Declining Significance of Place,” in Gerald M. Pomper and Marc D. Weiner, Eds., *The Future of American Democratic Politics* (New Brunswick: Rutgers University Press, 2003).

¹⁶ C. Edwin Baker, “Giving Up on Democracy: The Legal Regulation of Media Ownership,” Attachment C, *Comments of Consumers Union, Consumer Federation of America, Civil Rights Forum, Center for Digital Democracy, Leadership Conference on Civil Rights and Media Access Project, In the Matter of Cross Ownership of Broadcast Station and Newspaper/Radio Cross-Ownership Waiver Policy: Order and Notice of Proposed Rulemaking*, MM Docket No. 01-235, 96-197, December 3, 2001, p. 16 (hereafter, CFA/CU Comments).

¹⁷ Mark Cooper, “When Law and Social Science Go Hand in Glove,” paper presented at the Telecommunications Policy Research Conference, October 2004.

advertising¹⁸ and efforts to influence public opinion.¹⁹ Visual images are particularly powerful in conveying messages.²⁰ The dictates of the television news production process also affect the process of issue formation and debate.²¹

B. LOCALISM DEPENDS ON DIVERSITY IN MEDIA SOURCES, OUTLETS, AND INSTITUTIONS

Localism is intrinsically related to diversity in media sources, media outlets, media institutions, and the actual content of media programming. In this section, we describe these various forms of diversity and emphasize why all are needed to advance the fundamental goal of communications policy – to provide the widest possible public access to and participation in a rich and vibrant marketplace of ideas.

Diversity and antagonism in civic discourse are neither easy to achieve nor easy to measure. Opponents of policies to enrich civic discourse complain that the imprecision of the outcome makes it difficult, if not impossible, to measure success. This merely reflects the

¹⁸ Glenn J. Hansen and William Benoit, “Presidential Television Advertising and Public Policy Priorities, 1952–2002,” 53 *Communications Studies* 285, 2002; Thomas E. Patterson, T.E., and R.D McClure, *The Unseeing Eye: The Myth of Television Power in National Politics* (New York: Putnam, 1976); Kern, M., 30 *Second Politics: Political Advertising in the Eighties* (New York: Praeger, 1988); C. L. Brians and M. P. Wattenberg, “Campaign Issue Knowledge and Salience: Comparing Reception for TV Commercials, TV News, and Newspapers,” 40 *American Journal of Political Science* 172-93, 1996.

¹⁹ Sei-Hill Kim, Dietram A. Scheufele and James Shanahan, “Think About It This Way: Attribute Agenda Setting Function of the Press and the Public’s Evaluation of a Local Issue,” 79 *Journalism and Mass Communications Quarterly* 7, 2002.; Steven Chaffee, Steven and Stacy Frank, “How Americans Get Their Political Information: Print versus Broadcast News,” 546 *The Annals of the American Academy of Political and Social Science*, 1996; Jack M. McLeod, Dietram A. Scheufele, and Patricia Moy, “Community, Communications, and Participation: The Role of Mass Media and Interpersonal Discussion in Local Political Participation,” 16 *Political Communication*, 1999. For a fuller explanation of the impact of television, see the separate Comments of the Consumer Federation of America and Consumers Union filed in this NOI.

²⁰ David Domke, David Perlmutter and Meg Spratt, “The Primes of Our Times? An Examination of the ‘Power’ of Visual Images,” 3(2) *Journalism* 131-59, Aug. 2002, p. 131. The authors present a detailed social psychological and even neurological discussion of the reasons why and ways in which visual images have a greater impact, but the politically oriented research that they cite as consistent with their findings include J. A. Krosnick and D. R. Kinder, “Altering the Foundation of Support for the President Through Priming,” 84 *American Political Science Review* 497-512, June 1990; Z. Pan and G. M. Kosicki, “Priming and Media Impact on the Evaluation of the President’s Performance,” 24 *Communications Research* 3-30, 1997; M. R. Just A. N. Crigler and W. R. Neuman, “Cognitive and Affective Dimensions of Political Conceptualization,” in A. N. Crigler (ed.) *The Psychology of Political Communications* (Ann Arbor: University of Michigan Press, 1996).

²¹ Doris Graber, *Mass Media and American Politics* (Washington, D.C.: Congressional Quarterly, 1997); Herbert J. Gans, *Democracy and the News* (Oxford: Oxford University Press, 2003).

fact that the goal of having an informed citizenry is inherently qualitative and complex. Most social and psychological relationships have numerous highly intertwined causes; there is no reason that knowledge and participation in public policy formation should be otherwise.

The Commission should define the richness of civic discourse in empirical terms to include three structural sources of diversity – outlet diversity, source diversity, and institutional diversity. These structural characteristics in turn can produce the goals of program and viewpoint diversity. The First Amendment properly restricts the government’s ability to dictate the content of speech, and especially to favor some viewpoints over others.²² Ensuring media structures that make diverse viewpoints more accessible accomplishes the compelling goal of promoting diversity without government intervention into the content of programming.

1. Source and Outlet Diversity

Source diversity refers to the different ways in which programming originates. The difference between source and outlet diversity is the difference between the number of producers of programming and the number of distributors of programming through ownership of broadcast outlets. Outlet owners may produce their own programming or buy it from independent producers. The forum for democratic discourse will be better served by a multiplicity of sources producing programming that reflects the points of view that owners choose to disseminate through the outlets they control.

²² “Content” refers to both the subject matter of programming and the point of view reflected in how that subject matter is presented. Viewpoint is thus a subcategory of content, and under First Amendment doctrine, it is the subcategory most vigorously protected against government discrimination. See, e.g., *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 828-29 (1995); *Turner Broadcasting v. FCC*, 512 U.S. 622, 641 (1994).

In the recent ownership proceeding, the Commission facilely and incorrectly rejected source diversity as a goal of Communications Act.²³ In a proceeding that focuses on localism, it should be quite apparent that promoting diversity and localism in the sources of programming is an important goal in itself, as well a reasonable and important mechanism for promoting the broader First Amendment aspiration of the “widest possible dissemination of information from diverse and antagonistic sources.”²⁴

Demonstrating that source diversity should be a focal point of public policy to promote diversity and localism in no way detracts from the simultaneous finding, at which the Commission correctly arrived, that “outlet ownership can be presumed to affect the viewpoints expressed on that outlet,” and that “a larger number of independent owners will tend to generate a wider array of viewpoints in the media than would a comparatively smaller number of owners.”²⁵

In fact, both source and outlet diversity are important. Owners’ viewpoints are expressed in the content they choose to deliver to the public through the outlets they control. Outlet owners may produce their own content or buy it from independent producers. A multiplicity of sources will serve the interests of diversity and localism better by creating competition between sources, thereby providing owners a better range of programming from which to choose. More independent sources will stimulate greater innovation and creativity

²³ Federal Communications Commission, Report and Order, *In the Matter of 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets*, MB Docket No. 02-277, MM Dockets 02-235, 01-317, 00-244 July 2, 2003, paras. 42-46 (hereafter, 2002 Biennial Review).

²⁴ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

²⁵ 2002 Biennial Review, para. 27.

and more locally oriented content.²⁶ Independent programmers can also be expected to produce more vigorous watchdog journalism.²⁷ In addition, they can be expected to produce more programming for noncommercial outlets.

Promoting source diversity may also lower the barriers to entry into the media market, since a separate market for independent programming would facilitate entry of new voices at two stages of production (programming or distribution), rather than just one (vertically integrated production and distribution). The Commission should be well aware of the independent need to promote source diversity, since it accepts more concentration in ownership of outlets in mid-size and smaller markets, based on a claim about the more demanding economics of operating a media business in these markets.²⁸ Independent production of programming could add a significant source of diversity in these markets where ownership of outlets is highly concentrated.²⁹

2. Institutional Diversity

Institutional diversity basically refers to different structures of media presentation – that is, different business models, journalistic cultures, and traditions, which in turn produce different programming and different viewpoints. Institutional diversity is grounded in the watchdog function. For example, newspapers have a tradition of in-depth investigative journalism. Concentrated ownership threatens this important watchdog function. Thus, there

²⁶ See CFA/CU Comments, *In the Matter of Cross-Ownership of Broadcast Stations and Newspapers; Newspaper-Radio Cross-Ownership Waiver Policy*: MM Docket No. 01-235, 96-197, December 3, 2001, pp. 53-57; Reply Comments of Consumers Union, Consumer Federation of America, Civil Rights Forum, Media Access Project, Center for Digital Democracy, and Civil Rights Forum,” *In the Matter of Cross-Ownership of Broadcast Stations and Newspapers; Newspaper-Radio Cross-Ownership Waiver Policy: Order and Notice of Proposed Rulemaking*, MM Docket No. 01-235, 96-197, February 15, 2002, pp. 58-59, 79-82, (hereafter, CFA/CU Reply).

²⁷ CFA/CU Reply, pp. 26-27, 83-88.

²⁸ 2002 Biennial Review, para. 201.

²⁹ For more on different types of diversity, see Robert Horwitz, “On Media Concentration and the Diversity Question,” p. 4, <http://communication.ucsd.edu/people/ConcentrationpaperICA.htm>; Philip Napoli, “Deconstructing the Diversity Principle,” 48 *Journal of Communication* 7 (1999).

is an important link between institutional diversity and the investigative role.³⁰ As Baker shows, a highly concentrated media marketplace will produce fewer and less rigorous watchdog activities. Abuses of the public trust are less likely to be uncovered and more likely to occur because the deterrent of the threat of exposure is diminished.³¹ Baker therefore sees a need to promote institutions with different structures, driven by different institutional imperatives.³²

One of the central benefits of promoting deconcentrated and diverse media markets is to provide a self-checking function on the media. The media need to be accountable to the public, but that function cannot, as a general matter, be provided by government action in our political system. It can best be provided by the media itself, as long as there is vigorous antagonism among sources of news and information.³³ That vigorous antagonism is radically diminished by the ongoing trend of conglomeration and cross-media ownership in the industry, which simultaneously creates the potential for institutional conflicts of interest.³⁴

For most analysts of the role of the media in our democracy, institutions play a critical role in mediating between individuals and the political process. Local institutions are uniquely accessible to citizens, and local media institutions are a perfect example of the value of access. The ability to communicate to local media outlets or participate in the production of local content is highly valued as a civic experience that enhances the ability of the citizen and the community to organize and represent its interests. .

³⁰ See Shah, Rajiv, J. Jay P. Kesan, *The Role of Institutions in the Design of Communications Technologies*, paper presented at the Telecommunications Policy Research Conference on Information, Communications, and Internet Policy, October 2001.

³¹ C. Edwin Baker, *Media, Markets, and Democracy* (NY: Cambridge U. Press, 2002), p. 64.

³² Baker, *Media, Markets, and Democracy* p. 120.

³³ Ronald J. Krotoszynski, Jr. and A. Richard M. Blaiklock, "Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas, *University of Illinois Law Review*, 2000, pp. 867-68.

³⁴ Charles Davis and Stephanie Craft, "New Media Synergy: Emergence of Institutional Conflict of Interest," 15 *Journal of Mass Media Ethics* 222-23, 2000.

III. LOCALISM IS NOT SERVED BY THE PRESENT STRUCTURE OF BROADCAST REGULATION

A. A SPECTRUM DOMINATED BY COMMERCIAL LICENSEES PROVIDES NEITHER DIVERSE LOCAL POLITICAL AND CULTURAL PROGRAMMING NOR SUFFICIENT OPPORTUNITIES FOR LOCAL SELF-EXPRESSION

Despite the strong federal policy of diversity and localism, licenses have, since the early days of broadcasting, been granted overwhelmingly to commercial broadcasters whose primary goal is maximizing profit, and whose primary means of doing so is the sale of advertising. Although one reason for this choice was a desire to establish a system of free, rather than subscription-based, radio and television, the result was an immediate and, over the years, growing tension between the profit-maximizing goals of commercial broadcasters and the public interest goals of localism, cultural variety, and viewpoint diversity.

Scholars have documented this unfortunate history. Paul Starr's recent study of the growth of American communications describes early debates over broadcast policy in which many viewed advertising as completely inappropriate for a medium with such vast educational potential. Ultimately, however, as Starr recounts, plans for a system of predominantly nonprofit broadcasting were defeated.³⁵ Similarly, Robert McChesney has detailed the story of broadcasting's missed potential, as commercial conglomerates were allowed to grow ever larger, in the process elevating profit and ratings over the obligation to provide diverse and in-depth information and ideas.³⁶ Patricia Aufderheide summarizes:

³⁵ Paul Starr, *The Creation of the Media* (NY: Basic Books, 2004), pp. 327-84.

³⁶ E.g., Robert McChesney, *Telecommunications, Mass Media, and Democracy: The Battle for Control of U.S. Broadcasting, 1928-1935* (NY: Oxford U. Press, 1993) (describing early proposals to reserve as much as 50% of the spectrum for noncommercial and government informational broadcasting); Robert McChesney, *Rich Media, Poor Democracy: Communication Politics in Dubious Times* (NY: New Press, 1999). See also Henry Geller & Tim Watts, "The Five Percent Solution: A Spectrum Fee to Replace the 'Public Interest Obligations' of Broadcasters" (Washington DC: New America Foundation, 2002), p. 2 (free speech advocates "argued that a common carrier approach to managing the airwaves would serve the public interest best by requiring

In the United States [in contrast to other nations], commercial enterprises were given permission, through licenses, to use ... spectrum for profit by selling advertising time. Other interests – labor unions, religious organizations, educators, and private foundations – had warned that such commercial use would eliminate community and educational use of the spectrum. And indeed, despite industry promises, within months after the passage of the Communications Act of 1934, programming time by and for these noncommercial constituencies simply dried up.³⁷

The tension that resulted, between the nation's public interest policy goals and the commercial interests of media corporations, has been a constant in the history of broadcast regulation. With today's massive consolidation of media ownership, the tension has become even greater and the policy goals even more elusive.

1. The Lack of Localism and Diversity

The growing impact of homogenization in the TV industry, stimulated by the lifting of both national ownership limits and restrictions on vertical integration, is unmistakable.³⁸

Local programming has been restricted or eliminated.³⁹ Stories of local importance are driven

broadcasters to allow anyone to buy airtime. The largest commercial broadcasters, represented by the National Association of Broadcasters (NAB), opposed common carriage ... They sought to retain editorial control over programming and to merge individual stations into national broadcast networks").

³⁷ Patricia Aufderheide, "The What and How of Public Broadcasting," in *The Daily Planet: A Critic on the Capitalist Culture Beat* (Minneapolis: U.Minn. Press, 2000), p. 88.

³⁸ Robert McChesney, *The Problem of the Media* (New York: Monthly Review Press, 2004); Ben H. Bagdikian, *The New Media Monopoly* (Boston: Beacon Press, 2004); Thomas Meyer, *Media Democracy* (Cambridge: Polity Press, 2002); J. Meyerowitz, *No Sense of Place: The Effect of Electronic Media on Social Behavior* (New York: Oxford, 1985); Thomas Kunkel and Gene Roberts, "The Age of Corporate Newspapering, Leaving Readers Behind," *American Journalism Review*, May 2001. On coverage of the 1996 Telecommunications Act see, Martin Gilens and Craig Hertzman, "Corporate Ownership and News Bias: Newspaper Coverage of the 1996 Telecommunications Act," paper delivered at the Annual Meeting of the American Political Science Association, August, 1997, p. 8; Network Affiliated Stations Alliance, "Petition for Inquiry into Network Practices" (Federal Communications Commission, March 8, 2001).

³⁹ Charles Layton, "What do Readers Really Want?," *American Journalism Review*, March 1999, reprinted in Gene Roberts and Thomas Kunkel, *Breach of Faith: A Crisis of Coverage in the Age of Corporate Newspapering* (Fayetteville: University of Arkansas Press, 2002); Bill McConnell, and Susanne Ault, "Fox TV's Strategy: Two by Two, Duopolies are Key to the Company's Goal of Becoming a Major Local Presence," *Broadcasting and Cable*, July 30, 2001; Dan Trigoboff, "Chri-Craft, Fox Moves In: The Duopoly Marriage in Three Markets Comes with Some Consolidation," *Broadcasting and Cable*, August 6, 2001; Dan Trigoboff, "Rios Heads KCOP News," *Broadcasting and Cable*, October 14, 2002; Randall A. Beam, "What it Means to Be a Market-Oriented Newspaper," 16 *Newspaper Research Journal*, 1995, "Size of Corporate Parent Drives Market Orientation," 23 *Newspaper Research Journal*, 2002; Sharyn Vane, "Taking Care of Business,"

out of the high-visibility hours or off the air.⁴⁰ Pooled news services reduce the ability of local stations to present local stories and eventually erode the capability to produce them.⁴¹

A recent study from the Project for Excellence in Journalism affirms these conclusions. Among its findings were that smaller station groups overall tended to produce higher quality newscasts than stations owned by larger companies—by a significant margin; and that network affiliated stations tended to produce higher quality newscasts than network owned and operated stations—also by a large margin. The Project concluded that “overall, 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.”⁴²

Additional evidence gathered by the Commission demonstrates how the current structure of media ownership ill-serves the intertwined goals of localism and diversity. Martin Kaplan, in testimony this summer, described a survey of more than 10,000 late news broadcasts that aired during the seven weeks before the 2002 election in the top fifty U.S. markets. Campaign ads outnumbered campaign news stories by nearly 4:1. Almost 60% of the broadcasts contained no election coverage. Nearly half the coverage that did exist focused on horserace or strategy, not issues. Stations owned by large media corporations carried a

American Journalism Review, March 2002; *The Business of News, the News About Business*, Neiman Reports, Summer 1999.

⁴⁰ E.g., Stephen Lacy, David C. Coulson, and Charles St. Cyr, “The Impact of Beat Competition on City Hall Coverage,” 76 *Journalism & Mass Communication Quarterly*, 1999; K. A. Wimmer, “Deregulation and the Future of Pluralism in the Mass Media: The Prospects for Positive Policy Reform,” *Mass Communications Review*, 1988.

⁴¹ Alger, Dean, *MEGAMEDIA: How Giant Corporations Dominate Mass Media, Distort Competition and Endanger Democracy* (Lanham, MD: Rowan and Littlefield, 1998), Chapter 6, “The Media and Politics” (NY: Harcourt Brace College, 2nd edition, 1996); Media Studies Center Survey, University of Connecticut, Jan. 18, 1999; Ken Auletta, “The State of the American Newspaper,” *American Journalism Review*, June 1998; Lisa Rabasca, “Benefits, Costs and Convergence,” *Presstime*, p. 3.

⁴² Project for Excellence in Journalism, *Does Ownership Matter in Local Television News: A Five-Year Study of Ownership and Quality*, February 17, 2003, executive summary.

lower percentage of local campaign news than the national average. Stations owned by small or medium-sized companies carried a consistently higher percentage of local news.⁴³

Updating this research in October 2004, Kaplan found similarly troubling patterns in the 2004 election. In battleground states, campaign ads have outnumbered campaign stories during local news shows – six minutes to three minutes. In non-battleground states, campaign ads occupied about 1.5 minutes, while election news stories took up just over two minutes. Even more troubling for localism, the presidential race received far more attention than local races. While 80 percent of the news stories were devoted to the presidential campaign, only 5 percent were devoted to local elections. Even where senators were running, the presidential election got 75 percent of the news coverage – 68 percent in those states where the senate races are considered a toss-up. Campaign issues (as opposed to campaign strategy and the horserace) were covered in 42 percent of the stories about local elections, but 29 percent of the stories covering the presidential election.⁴⁴ Doing the math, we find that about one-quarter of the campaign stories on the local news covered issues in the presidential campaign, but only about one-fiftieth covered local campaign issues.

A recent re-analysis of FCC data on TV news found an average of .24 hours of local public affairs programming and an average of 19.93 hours combined local news and local public affairs programming during a one-month period.⁴⁵ That is, separating public affairs from news, TV stations averaged less than ¼ hour of local public affairs programming in a

⁴³ Testimony of Martin Kaplan, FCC Broadcast Localism Hearing, Monterey, CA, July 21, 2004, www.localnewsarchive.org.

⁴⁴ Interim Report, *Local TV News Ignores Local and State Campaigns* (Lear Center Local News Archive, Oct. 21, 2004), <http://www.learcenter.org/pdf/LCLNAInterim2004.pdf>

⁴⁵ Philip Napoli, *Television Station Ownership and Local News and Public Affairs Programming: An Expanded Analysis of FCC Data*, paper presented at Annual Meeting of International Communication Ass'n, May 2003, pp. 13-14, re-analyzing data in Thomas C. Spavins, Loretta Denison, Scott Roberts and Jane Frenette, *The Measurement of Local Television News and Public Affairs Programs* (Washington, D.C.: Federal Communications Commission, 2002).

month. New analysis also indicates a broad failure of commercial TV stations to present local public affairs programming.⁴⁶ In a two week sample period, only 41 percent of the commercial stations aired any local public affairs programming. In sharp contrast, over 90 percent of public stations aired such programming. Commercial stations aired just 45 minutes of such programming in the two week period. Local stations owned by the major national networks aired just over 37 minutes of local public affairs shows, while independently owned stations aired 110 minutes.⁴⁷ Public (noncommercial) stations aired over 6 hours.

The Public Interest Coalition recently presented specific examples of how radio industry consolidation has eviscerated localism and diversity in news reporting:

Radio personalities pretend to discuss local news, make commentary on local events, and critique local nightlife and hot spots, all without ever setting foot within a thousand miles of the transmitter. ... Clear Channel audiences in Toledo and Lima, Ohio receive newscasts produced in Columbus. And Corpus Christi residents heard news of a hurricane from a Clear Channel bureau located at least a hundred miles away. ... Most disturbingly, national group owners have practiced deceptions to make programming appear local while in fact distributing a national service. ... References to time, date and location are stripped from guest interviews so that they can appear to be “live” when aired in distant locales. Listeners are urged to “call in” to pre-recorded shows.⁴⁸

⁴⁶ Michael Yan and Philip Napoli, “Market Structure, Stations Ownership, and Local Public Affairs Programming on Local Broadcast Television,” paper presented at the Telecommunications Policy Research Conference, October 2004.

⁴⁷ The finding of greater responsiveness of local media to local needs in program variety has been well documented in recent years in a series of studies of “preference externalities,” see Joel Waldfogel, *Who Benefits Whom in Local Television Markets?*, November 2001 (hereafter, “Television”); Joel Waldfogel, *Preference Externalities: An Empirical Study of Who Benefits Whom in Differentiated Product Markets*, 2000; with Peter Siegelman, *Race and Radio: Preference Externalities, Minority Ownership and the Provision of Programming to Minorities*, 2001; with Lisa George, *Who Benefits Whom in Daily Newspaper Markets?* (2000). See also “Survey Shows Solid Growth in TV News and Staffing,” *Communicator*, September 2004, p. 6 (only 759 TV stations in the U.S. offer any local news at all).

⁴⁸ Comments of the Alliance for Better Campaigns *et al.* in *Digital Audio Broadcasting Systems*, MM Docket No. 99-325 (June 16, 2004), pp. 20-21, and sources cited. See also Leon Lazaroff, “Media Firm Accused of Dodging FCC Rules,” *Chicago Tribune*, Oct. 16, 2004, <http://www.freepress.net/news/5009> (Sinclair Broadcasting, which owns more TV stations than any other company, uses “distance-casting” from company headquarters to broadcast local news, sports, and weather).

In essence, the radio industry, which has been subject to the most unfettered process of national consolidation, demonstrates how local content can be homogenized off the air.⁴⁹ The industry is focused on “perfecting the art of seeming local” without actually being local.⁵⁰

In the cultural realm, the situation is equally disturbing. A survey by the Future of Music Coalition in 2002 reported that virtually every radio music format is now controlled by an oligopoly. Consolidated control combined with shorter playlists means “few opportunities for musicians to get on the radio,” and “deprives citizens of the opportunity to hear a wide range of music.” Supposedly distinct formats have as much as 76% overlap in content, even though listeners say they want to hear longer playlists, more variety, and more local musicians.⁵¹

Additional evidence of the parlous state of local broadcasting comes from research on how well the mass media are serving racial and ethnic minorities. Greater concentration has resulted in less diversity of ownership, and diversity of ownership – across geographic, ethnic and gender lines – is correlated with diversity of programming. Studies by Joel Waldfogel and others show that overall African-American and Hispanic audiences are under-served, and that communities without African-American-oriented media have lower rates of African-American participation in elections.⁵² That is, minority owners are more likely to present

⁴⁹ Charles Fairchild, “Deterritorializing Radio: Deregulation and the Continuing Triumph of the Corporatist Perspective in America,” *21 Media, Culture and Society* 557-559, 1999; Kathy Bachman, “Music Outlets Tune in More News Reports,” *MediaWeek*, October 29, 2001.

⁵⁰ Anna Wilde Mathews, “A Giant Radio Chain is Perfecting the Art of Seeming Local,” *Wall Street Journal*, February 25, 2002, p. A1; Brent Staples, “The Trouble with Corporate Radio: The Day the Protest Music Died,” *The New York Times*, February 20, 2003 p. A30.

⁵¹ Future of Music Coalition, *Radio Deregulation: Has It Served Citizens and Musicians?* (Ric Dube and Gillian Thomson, eds.) (Nov. 18, 2002), pp. 3-5.

⁵² Felix Oberholzer-Gee & Joel Waldfogel, *Electoral Acceleration: The Effect of Minority Population on Minority Voter Turnout* (Nat’l Bureau of Econ. Working Paper No. 8252, 2001), <http://papers.nber.org/papers/w8252.pdf>; Peter Siegelman & Joel Waldfogel, “Race and Radio: Preference Externalities, Minority Ownership, and the Provision of Programming to Minorities,” *10 Advertising & Differentiated Products* 73 (Michael R. Baye & Bon P. Nelson eds., 2001). See also *Whose Spectrum is it*,

minority points of view just as females are more likely to present a female point of view, in the speakers, formats and content they put forward.

FCC Commissioner Copps recently summed up: the present situation of broadcast localism is “dismal.” Less than half of one percent of programming, he noted, is currently devoted to local public affairs.⁵³

2. The Problem of Corporate Bias

Increasingly consolidated control has revealed another serious dysfunction in the American media system: suppression of information, or biased presentation of information, by unduly powerful, highly consolidated corporations. A media company’s decision to cover some subjects and not others, to slant its news coverage, or to suppress stories that offend the political ideologies of its owners may be simply a cost of free expression in a system with many different media outlets and many alternative, and competing, sources of ideas and information. But when media control devolves into ever-fewer hands, the costs of such corporate manipulation of information become serious. The empirical evidence on news coverage of events, the ongoing battles over bias in reporting, and the use of political advertising all reinforce the longstanding opinion of the courts that ownership matters a great deal and is a good proxy for diversity in programming.⁵⁴

Anyway? A Historical Study of Market Entry Barriers, Discrimination, and Changes in Broadcast and Wireless Licensing, study prepared for the FCC by the Ivy Planning Group, Dec. 2000, http://www.fcc.gov/opportunity/meb_study/historical_study.pdf; Christine Bachen, *et al.*, *Diversity of Programming in the Broadcast Spectrum: Is There a Link Between Owner Race or Ethnicity and News and Public Affairs Programming?*, 1999 (study prepared for the FCC), http://www.fcc.gov/opportunity/meb_study/content_ownership_study.pdf; Christopher Yoo, *Architectural Censorship and the FCC*, Vanderbilt U. Law School Public Law & Legal Theory Working Paper No. 04-10, undated, <http://ssrn.com/abstract=555821>.

⁵³ Statement of FCC Commissioner Michael J. Copps in NOI, p. 24.

⁵⁴ See, *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 796 (1978); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 402 (3d Cir. 2004); *Fox Television Stations, Inc., v. FCC*, 280 F.3d 1027, 1047, modified on rehearing, 293 F.3d 537 (D.C. Cir. 2002)..

For example, when the lead singer for the pop group Dixie Chicks protested the invasion of Iraq, Clear Channel unceremoniously deleted the group from the playlists on all of its 1,200-plus radio stations.⁵⁵ When it appeared that a miniseries on the Reagans might offend political officials, Viacom/CBS pulled it from its primetime schedule.⁵⁶ In August 2004, Time-Warner/CNN refused to air an ad by the Log Cabin Republicans calling for tolerance on gay issues.⁵⁷ A month later, Viacom/CBS deep-sixed a “60 Minutes” segment that documented the Bush Administration’s misstatements about Saddam Hussein’s nuclear capabilities in garnering support for war in Iraq.⁵⁸

In 1990, three out of four broadcast stations rejected a political ad opposing military aid to El Salvador, and most major markets did not air it. One station executive explained: “we do not air material which is intended to inflame or incite unreasoned public response.” Yet the same station accepted “a wide array of emotion-laden negative campaign ads in 1988.” NBC, owned by General Electric, has slanted news reports about GE’s “shabby defense-contracting practices”; and as vertical consolidation has increased, each network has made it a practice to favor stories about its own film and TV productions in its news programs.⁵⁹

Most recently and dramatically, Sinclair Broadcasting ordered all 62 of its local stations to pre-empt their regular programming in order to air a documentary attacking John

⁵⁵ Leonard Hill, “The Hijacking of Hollywood,” in *News Incorporated* (Elliot Cohen, ed.) (NY: Prometheus, 2004), p. 225.

⁵⁶ Hill, “The Hijacking of Hollywood,” p. 224.

⁵⁷ Mark Memmott, “Gay GOP Group Criticizes CNN’s Rejection of Ad,” *USA Today*, Aug. 31, 2004, <http://www.freepress.net/news/4409>.

⁵⁸ Kate Zernike, “‘60 Minutes’ Delays Report Questioning Reasons for Iraq War,” *New York Times*, Sept. 25, 2004, p. A12; Michael Isikoff and Mark Hosenball, “The Story That Didn’t Run,” *Newsweek*, Sept. 22, 2004, <http://www.freepress.net/news/4790>; Mary Jacoby, “The Cowardly Broadcasting System,” *Salon.com*, Sept. 29, 2004, <http://www.freepress.net/news/4787>.

⁵⁹ Patricia Aufderheide, *The Daily Planet* (Minneapolis, U.Minn. Press, 2000), pp. 174, 193.

Kerry in the two weeks before the 2004 presidential election. Because of the Commission's abandonment of the Fairness Doctrine in 1987, it took the position that Sinclair was not obliged to give Kerry equal time to present his point of view.⁶⁰ An unanticipated level of public outrage, combined with advertiser withdrawals, a precipitous drop in Sinclair's stock value, and the threat of shareholder suits, caused Sinclair to back off; but this was a rare occurrence in the annals of media power. The more common, business-as-usual approach for Sinclair came earlier in 2004, when the company forbade its eight ABC-affiliated stations from airing a "Nightline" broadcast in which Ted Koppel read the names of American soldiers killed in Iraq. Sinclair said the show was "unpatriotic" and harmful to the war effort.⁶¹ There could hardly be a more dramatic illustration of broadcast journalism's abandonment of its historic role in providing information that enables Americans to make informed decisions about the wisdom of government policies.

The latest episode in this litany of large media companies' abandonment of journalistic neutrality in favor of partisan flexing of their market power was the Pappas Telecasting Companies' decision in late October 2004 to donate \$325,000 worth of air time to Republican county committees. Pappas is the largest privately held commercial broadcasting company in the U.S. in terms of national household coverage, and reaches 34% of U.S.

⁶⁰ See Jim Rutenberg, "Broadcast Group to Pre-empt Programs for Anti-Kerry Film," *New York Times*, Oct. 11, 2004; Dow Jones Newswire, "FCC Can't Do Much on Sinclair-Kerry Film Flap," Oct. 12, 2004, <http://www.freepress.net/news/4949>; Bill Carter, "Risks Seen for TV Chair Showing Film About Kerry," *New York Times*, Oct. 18, 2004m p. C1; *Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), *aff'd*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989) (decision abandoning the Fairness Doctrine).

⁶¹ Bill Moyers, "The Media, Politics, and Censorship," Common Dreams News Center, May 10, 2004, <http://www.commondreams.org/views04/0510-10.htm>.

Hispanic households.⁶² Although Pappas claimed that the air time was a personal contribution, an initial investigation by the FCC showed otherwise, because

we note that the letter dated October 13, 2004 from Pappas Telecasting Companies to the Fresno County Republican Central Committee documenting the airtime gift indicated that the time was being given by ‘Harry J. Pappas and **my affiliated entities**’ (emphasis added). The named entities include the licenses of the stations... Moreover, nothing in the record before us indicates that the stations... were paid for his use.⁶³

A Pew Research Center study, submitted to the Commission in its media ownership proceedings, reported that at all four major networks, about ¼ of journalists purposely avoided stories, and nearly as many softened the tone of stories, to benefit the interests of their employers.⁶⁴ Another study found that both media owners and sponsors pressure reporters to slant the news.⁶⁵

All of this can be seen as constitutionally protected editorial decision-making. But no individual or media corporation has a First Amendment right to overwhelm the airwaves with its singular point of view, and thereby suppress or marginalize accurate information and opposing viewpoints. To the contrary, as the Supreme Court has repeatedly affirmed, the fundamental First Amendment principle underlying American media policy is that “diversification of mass media ownership serves the public interest by promoting diversity of

⁶² Jim Sanders, “Valley Broadcaster Donates Airtime to Republicans,” *Sacramento Bee*, Oct. 26, 2004; Press release, “Paper Telecasting Companies Announces Non-Monetary In-Kind Contributions,” Oct. 26, 2004, <http://www.pappastv.com/PressReleasesdetail.asp?ID=54>.

⁶³ William H. Johnson, Deputy Chief, Media Bureau, *In the Matter of Equal Opportunities Complaint Filed by Nicole Parra Against Pappas Telecasting Companies: Order*, October 29, 2004, p. 1.

⁶⁴ Joint Appendix 4817 in *Prometheus Radio Project v. FCC*, No. 03-3388 (3rd Cir. 2004), Comments of the United Church of Christ *et al.*, in 2002 Biennial Review, p. 4.

⁶⁵ CFA Comments in 2002 Biennial Regulatory Review, p. 44 (citing Marion Just *et al.*, *News For Sale: Half of Stations Report Sponsor Pressure on News Decisions*, Columbia Journalism Review Project for Excellence in Journalism, Nov.-Dec. 2000, p. 2).

program and service viewpoints, as well as by preventing undue concentration of economic power.”⁶⁶ As Michael Burstein explains:

Where media entities act as conduits for others’ speech, the constitutional concern is not government censorship, but the ability of private sector actors to silence one another through their control of the sources and flow of information. ... The core of the Court’s holding in *New York Times Co. v. Sullivan* is that private citizens do not have an unqualified right to stifle public discourse on topics of public importance.⁶⁷

The weak competition that results from the current economic structure of media markets allows owners to earn monopoly profits and to use monopoly rents to pursue their personal agendas. The claim that ownership of the media does not matter to the selection and presentation of content is not plausible.⁶⁸ Whatever their political preferences are, media owners are in a uniquely powerful position to influence civic discourse. They can use both the economic resources made available by their market power (as can monopolists in any industry) and the unique role of the media in politics to pursue those preferences.

B. WHILE THE COMMISSION SHOULD NOT ABANDON PUBLIC INTEREST PROGRAMMING REQUIREMENTS FOR EXISTING BROADCASTERS, IT SHOULD ALSO RECOGNIZE THAT AN OVERWHELMINGLY COMMERCIAL SYSTEM CANNOT FULFILL THE POLICY GOALS OF THE COMMUNICATIONS ACT

The Commission should not abandon public interest programming requirements as an essential element of broadcast licensing.⁶⁹ But it should also recognize that these requirements alone will not satisfy the policy goals of localism and diversity, in view of the

⁶⁶ *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 780 (1978). See also *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (“assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment”).

⁶⁷ Michael Burstein, “Towards a New Standard for First Amendment Review of Structural Media Regulation,” 79 N.Y.U. L. Rev. 1030, 1054 (2004) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

⁶⁸ See Krostoszynski and Blaiklock, pp. 832, 833 (noting broadcasters’ “unique ability to influence the direction of public affairs through selective coverage” and especially to influence election outcomes “both by reporting on candidates favorably and unfavorably and through benign (or malign) neglect”).

⁶⁹ See the Comments of the Alliance for Better Campaigns *et al.* in *Digital Audio Broadcasting Systems*, MM Docket No. 99-325, pp. 59-60.

inevitable tension between these goals and the primarily profit-maximizing interests of commercial broadcasters – a tension that has only been exacerbated by consolidation of media ownership.

The tendencies of today's commercial mass media to pursue efficiency through economies of scale have reduced competition and pushed toward oligopoly or monopoly. Efficiency that results from large economies of scale, however, also leads toward fewer competitors, and can degenerate into abuse of monopoly power. In media markets, the impact reverberates powerfully in the forum for democratic discourse and tends to distort that discourse.

One negative impact of this trend is that the mass media fail to meet the information needs of non-majority groups in society. The tendency to underserve minority points of view in favor of targeting large audiences springs in part from the role of advertising, which introduces a substantial disconnection between what consumers want and what the market produces.⁷⁰ Because advertisers account for such a large share of the revenue of the mass media, the market produces what advertisers want as much as, if not more than, what audiences want. In addition, because advertising in particular, and the media in general, revolve around influencing people's choices, the industry essentially creates its own demand.⁷¹ That is, in deference to advertisers, it tends to avoid controversy and to seek a lowest common denominator in programming.

The tyranny of the majority in media markets is linked to the tyranny of the majority in politics because the media are the primary means of political communication. As Felix

⁷⁰ See Waldfoegel, *Television*, p. 1; Baker, *Advertising and a Democratic Press* (Princeton: Princeton U. Press, 1994), *passim*.

⁷¹ Cass Sunstein, *Republic.com* (Princeton: Princeton U. Press, 2001), pp. 108-09.

Oberholzer-Gee and Joel Waldfogel have found, electoral candidates tend to propose policies “that are supported by proportionately larger groups”; members of these groups, in turn, “are more likely to turn out if they find the proposed policies more appealing,” and candidates “find it easier to direct campaign efforts at larger groups because many existing media outlets cater to this audience.” Channels of communication that disseminate political information are thus rarely used “for the sole purpose of informing potential voters.” Considerations of cost and consolidated media structure mean that “channels that cater to small groups are less likely to exist.”⁷² The result is an impoverishment of political discourse and a failure to serve the information needs of a pluralistic society.

Concentration of media ownership into national chains of advertiser-driven conglomerates thus drains resources from journalistic enterprises and reinforces the tendency of the media to ignore local needs. Localism and diversity suffer at the hands of national chains. The dictates of mass audiences create a largest market share/lowest common denominator ethic that undercuts the ability to deliver culturally diverse programming, locally-oriented programming, and public interest programming. News and public affairs programming is particularly vulnerable to these economic pressures.

As Edwin Baker has concluded, because of their economic structure, media conglomerates do not produce quality programming, meet consumer preferences, or otherwise serve the informational needs of democracy. And because of these inherent deficiencies of consolidated commercial enterprises in serving broadcast policy goals, there is a pressing

⁷² Felix Oberholzer-Gee and Joel Waldfogel, *Tiebout Acceleration: Political Participation in Heterogeneous Jurisdictions* (NBER 2000), pp. 36-37.

need for *nonmarket*-based alternative media.⁷³ Other scholars have come to the same conclusion – that, as Robert Horwitz writes, “a market-governed media system underproduces certain kinds of content, especially content essential to democratic deliberation and self-government,” and that a “combination of a mixed system of media and curbs on media concentration ... will best secure a diversity of viewpoints and content.”⁷⁴ Only by moving to a more balanced system, with a substantial nonprofit component, can U.S. broadcast policy satisfy the overarching goals of localism and diversity which Congress and the Supreme Court have repeatedly endorsed.

IV. SERVING LOCALISM TODAY REQUIRES A BALANCED SYSTEM IN WHICH NONPROFIT COMMUNITY BROADCASTERS PROVIDE THE POLITICAL AND CULTURAL DIVERSITY THAT IS LACKING IN COMMERCIAL BROADCASTING

The Commission has the power and duty to move toward a more balanced system of broadcast licensing. Among the initiatives the Commission should consider are: declining to renew licenses where the owner has a poor record of serving localism and diversity; assigning more spectrum to nonprofit, independent community media; expanding low power broadcasting; setting aside unlicensed spectrum for community use; expanding ethnic and racial diversity among licensees; requiring commercial broadcasters to provide air time and facilities to nonprofit independent media through a system of community access or channel

⁷³ Baker, *Media, Markets, and Democracy*, pp. 45, 50, 157, 167 (TV news), pp. 5, 12, 19, 115 (why consolidation doesn't serve democracy, produce quality or even meet consumer preferences); p. 73 (need for non-market-based media).

⁷⁴ Robert Horwitz, “On Media Concentration and the Diversity Question” (undated), p.31, 32-33, <http://communication.ucsd.edu/people/ConcentrationpaperICA.htm>. See also James Curran, “Rethinking Media and Democracy,” in *Mass Media and Society* (3rd ed.) (James Curran & Michael Gurevitch, eds) (London: Arnold, 2000), pp. 140-48 (discussing mixed system “social market” approach combining public service, professional, and community media with commercial sector).

leasing; and developing funding mechanisms for supporting nonprofit independent community media – without which it will be difficult or impossible to take advantage of increased broadcasting opportunities.

A. THE COMMISSION SHOULD DENY COMMERCIAL LICENSE RENEWALS WHERE APPROPRIATE, SHOULD ASSIGN MORE LICENSES TO NONPROFIT, INDEPENDENT COMMUNITY MEDIA, AND SHOULD MAKE SPECTRUM AVAILABLE FOR UNLICENSED COMMUNITY BROADCASTING

The first and most obvious way to begin redressing the imbalance in our system of mass communications is by increasing the broadcast outlets available to nonprofit, independent community media and the local audiences that they serve. This can be done by granting full power radio and television licenses where appropriate; expanding the low power licensing program; and assigning unlicensed spectrum for community use. In the process, and through careful attention to diversity, the Commission can also increase the likelihood that broadcasting will serve the needs of all social, economic, ethnic, and racial groups.

1. Licensing to Nonprofits

The Notice of Inquiry asks whether the Commission’s current license renewal practices are too passive, and whether more teeth should be put into the renewal process, including audits of “issues and program lists and other contents of the public file.” It also asks whether the 1996 Telecommunications Act limits its authority in license renewal proceedings.⁷⁵

Under the Communications Act, even as amended in 1996, the basic qualification for license renewal remains whether the applicant has served the “public interest, convenience,

⁷⁵ NOI, p. 17, ¶¶41, 42.

and necessity,” and the Commission retains broad discretion in applying these concepts.⁷⁶

The Commission should use this discretion to conduct rigorous review of licensee performance in all aspects of diversity and localism, from failures to carry local news and cultural programming to failure to maintain a fully staffed station in the geographical locality that is being served. Full power frequencies are still a scarce resource – there are far fewer of them than there are potential speakers who would like to communicate through the medium of broadcasting.⁷⁷ Thus, all the historical reasons for aggressive application of the “public interest, convenience, and necessity” standard still apply to licensing and license renewal decisions.

To remedy the current structural imbalance, which heavily favors commercial licensees, the Commission should establish specific goals and timetables for the reassignment of full power licenses to nonprofit community media organizations. In addition to frequencies freed up through nonrenewal of commercial licenses, the anticipated giveback of analog frequencies in the next few years will provide opportunities to license more nonprofits. While there is a need for more spectrum for non-programming uses such as cellular telephones, a substantial portion of the analog frequencies that are returned should be reserved for noncommercial broadcasting.

The Commission should include among its goals more source diversity in serving local ethnic and racial groups. Specific attention to race and ethnicity in broadcast licensing

⁷⁶ The 1996 Act extended the license term to eight years, but retained the Commission’s discretion to deny renewal if it finds that the “public interest, convenience, and necessity” would not be served, and also to grant or renew licenses for a shorter period; see 47 U.S.C. 307(c)(1), 309(k). See *National Broadcasting Co. v. United States*, 319 U.S. 190, 216-17 (1943) (“An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts.”) (quoting *FCC v. Sanders Radio Station*, 309 U.S. 470, 475 (1940)).

⁷⁷ See *Prometheus Radio Project v. FCC*, 373 F.3d 372, 401-02 (3d Cir. 2004); *Turner Broadcasting v. FCC*, 512 U.S. at 638, 663-64.

must be justified by a “compelling state interest,”⁷⁸ but as the Supreme Court’s recent decision in *Grutter v. Bollinger* establishes in the context of higher education, there is a compelling First Amendment interest in the robust exchange of diverse ideas. *Grutter* held that narrowly tailored consideration of race and ethnicity as one factor in the law school admissions process is constitutional.⁷⁹ Certainly, consideration of whether programming content adequately serves all racial and ethnic groups in a community is equally central to the compelling interest in the “widest possible dissemination of information from diverse and antagonistic sources” on which our democracy depends.

Scholarly research, including research prepared for the Commission, has established a clear link between diversity in ownership and diversity in program content.⁸⁰ As one study frankly concluded:

The relaxation of ownership caps has significantly decreased the number of small, women- and minority-owned businesses in this industry; ... The declining participation of small, women- and minority-owned businesses in this industry has resulted in diminished community service and diversity of viewpoints; ... [and t]he declining participation of small, women- and minority-owned businesses in this industry has also resulted in a loss of civic participation, democratic values and freedom of speech.⁸¹

⁷⁸ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226-27 (1995), overruled the Court’s use of intermediate scrutiny rather than the compelling interest standard in judging the FCC’s affirmative action program in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). This was the only aspect of *Metro Broadcasting* that *Adarand* overruled; thus, the Court’s observations in *Metro Broadcasting* that Congress found severe underrepresentation of minorities in the mass media and that “[s]afeguarding the public’s right to receive a diversity of views and information over the airwaves is ... an integral component of the FCC’s mission,” 497 U.S. at 566-67, remain good law.

⁷⁹ *Grutter v. Bollinger*, 539 U.S. 306, 332-33 (2003) (law school has a compelling interest in attaining a diverse student body; including “the right to select those students who will contribute the most to the ‘robust exchange of ideas,’” (quoting *Regents of the University of California v. Bakke*, 439 U.S. 265, 313 (1978))). See also *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 568 (1990) (“Just as a ‘diverse student body’ contributing to a ‘robust exchange of ideas’ is a ‘constitutionally permissible goal’ on which a race-conscious university admissions program may be predicated, ... the diversity of views and information on the airwaves serves important First Amendment values”), reversed on other grounds, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226-27 (1995).

⁸⁰ See section IIA.1, and the sources cited there.

⁸¹ *Whose Spectrum is it, Anyway? A Historical Study of: Market Entry Barriers, Discrimination, and Changes in Broadcast and Wireless Licensing*, study prepared for the FCC by the Ivy Planning Group, Dec. 2000, http://www.fcc.gov/opportunity/meb_study/historical_study.pdf, p. 3.

New attention to all aspects of diversity in the licensing process, as well as to the overriding need for more locally based community broadcasters, will be the first step toward remedying the current imbalance that plagues our mass media marketplace.

2. Low power Broadcasting

Thanks to the Commission's leadership, the last few years have seen a flowering of community-based low power broadcasting stations. Although this newly licensed, decentralized medium is not in itself sufficient to satisfy the public interest in localism and diversity, it is beginning to provide an important alternative to the highly consolidated, centralized, commercial media industry. This is just what the Commission anticipated,⁸² and the Commission should take steps to assure the continued growth of low power broadcasting.

The immense contribution that low power FM radio (LPFM) is already making to localism has been well-documented. Public interest groups including the Media Access Project and the Future of Music Coalition report that LPFM stations are "increasing diversity in programming, serving minority communities, serving local needs, and enhancing public affairs discussion." Among the examples they cite are: KOCZ in Opelousas, Louisiana, operated by a community development foundation active in the African-American community and offering public affairs shows, religious programming, and zydeco music; WFNG Community Radio in Frogtown, Georgia, broadcasting in English and Cherokee with cultural and community affairs programming; WCTI in Immokalee, Florida, operated by the a coalition of Hispanic farmworkers; and WRYP in Maryland, which was "the only station to

⁸² See Report and Order, *Creation of Low Power Radio Service*, 15 F.C.C.R. 2205 (2000); Report and Order, *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, MB Docket No. 03-185 (Sept. 9, 2004), p. 1 (low power TV stations "are a valuable component of the nation's television system, delivering free over-the-air TV service, including locally produced programming, to millions of viewers in rural and discrete urban communities").

gather all of the local candidates for an election debate during a recent campaign.”⁸³ The Prometheus Radio Project, similarly, documents numerous examples of promising LPFM projects.⁸⁴

Yet low power radio has not really begun to penetrate urban centers, where ethnic minority and other discrete communities are ill-served by the consolidated commercial radio offerings that dominate the market. Licensing has been slower than it should be, in large part because of restrictive legislation passed in 2000 in response to industry pressures. This “Radio Broadcasting Preservation Act” restricts LPFM by absolutely disqualifying any license applicant who has previously operated an unlicensed low power station, and by requiring the Commission to maintain unnecessary third-adjacent channel spacing limitations.⁸⁵ As President Clinton lamented in reluctantly signing this law, it

greatly restricts low-power FM radio broadcast. Low-power radio stations are an important tool in fostering diversity on the airwaves through community-based programming. I am deeply disappointed that Congress chose to restrict the voices of our nation’s churches, schools, civic organizations and community groups. I commend the FCC for giving a voice to the voiceless and I urge the Commission to go forward in licensing as many stations as possible consistent with the limitations imposed by Congress.⁸⁶

⁸³ Media Access Project *et al.*, “Low Power Radio – Empowering Local Voices,” July 4, 2004, <http://www.mediaaccess.org/programs/lpfm/LPFMexamplesfactsheetjoint.pdf>.

⁸⁴ Prometheus Radio Project, <http://www.prometheusradio.org>; see also *LPFM: The People's Choice*, <http://www.ucc.org/ocinc/lpfmradio>; Laurie Kelliher, “Low Power, High Intensity: Building Communities on the FM Dial,” *Columbia Journalism Review*, Sept./Oct. 2003, p. 31.

⁸⁵ D.C. Appropriations – FY 2001, Pub. L. No 106-553, §632, 114 Stat. 2762, 2762a-111. The restriction of third adjacent channels forced the Commission to cut in half the number of licenses it originally intended to issue. Kevin Dias, “Low-Power FM Stations Dealt Blow in Congress’ Budget,” *Minneapolis Star-Tribune*, Dec. 22, 2000, p. A15; Stephen Labaton, “255 Licenses Are Awarded for Low-Power FM Radio,” *New York Times*, Dec. 22, 2000, p. C5. See also Peter Tridish and Kate Coyer, “A Radio Station in Your Hands is Worth 500 Channels of Mush,” in *New Incorporated* (Elliot Cohen, ed.) (Amherst, NY: Prometheus Books, 2004), p. 301 (2000 legislation resulted in no LPFM stations licensed in any of the top fifty urban markets).

⁸⁶ White House Press Release, Statement by the President, Dec. 27, 2000 (quoted in Arthur Martin, “Which Public, Whose Interest? The FCC, the Public Interest, and Low-Power Radio,” 38 *San Diego L. Rev.* 1159, 1193 n. 237 (2001)).

The Commission's Notice of Inquiry notes important characteristics of the low power licensing program. Licensing is limited to local entities. Applicants with an established community presence and those that pledge to originate at least eight hours per day of local programming are favored.⁸⁷ In addition, the rules prohibit commercial advertising, cross-ownership, and time-sharing agreements.⁸⁸ All of these are important requirements, and should be maintained. The Commission's job now is to accelerate the licensing process, with special attention to the needs of urban areas,⁸⁹ and to press Congress to pass the McCain/Leahy "Low Power Radio Act," which would remove the third-adjacent channel spacing requirements. As that legislation states, that there has been too much radio consolidation, and "[a] commitment to localism – local operations, local research, local management, locally-originated programming, local artists, and local news and events – would bolster radio listening."⁹⁰

3. Unlicensed Community Use

Another important contribution to localism is community use of unlicensed spectrum. The Commission has already recognized the value of unlicensed spectrum, but primarily for

⁸⁷ NOI, pp. 17-18, ¶43.

⁸⁸ Report and Order, *Creation of Low Power Radio Service*, 15 F.C.C.Rcd 2205, 2213, 2217-18 (Jan. 27, 2000), amended, 16 F.C.C.R. 8026 (2001).

⁸⁹ As proposed by the Comments of the Amherst Alliance *et al.*, the Commission should also consider licensing low power AM radio because even if the third-adjacent channel spacing requirements are eliminated, there will still be few new frequencies available for low power radio in some major urban areas. See also Ben Clarke, "The Transistor Triangle: NAB, Congress, and FCC Collaborate to Keep Airwaves a Corporate Wasteland," Media Alliance, May 14, 2004, <http://www.media-alliance.org/article.php?story=20040514121048391&mode=print>.

⁹⁰ "A Bill to Implement the Recommendations of the Federal Communications Commission Report to the Congress Regarding Low Power FM Service," S. 2505, 108th Cong., 2d Sess. (June 4, 2004).

wireless computer access, cordless phones, and other devices.⁹¹ It should also recognize the potential of unlicensed spectrum for community broadcasting.

Much of the recent excitement over unlicensed, shared spectrum has focused on “WiFi” – wireless Internet access. Where this might lead, given adequate spectrum, planning, and regulation designed to minimize interference and avoid the “tragedy of the commons,”⁹² is difficult to predict. As Kevin Werbach writes, today “broadcasting is the domain of the few,” but given the technologies now at hand, “it is possible to imagine a world in which anyone can be a broadcaster.”

As each user sends out video streams, other users would relay them wherever infrastructure was available. Cognitive radios would seek out free space in the spectrum to carry the signals. Content creators could contract with operators of virtual broadcast networks who aggregated together reliable high-speed connectivity to reach an audience, creating a bottom-up division between different classes of traffic.

Who would want to have their own broadcast network? Some people would want to deliver the kinds of creative programming available on television today. These personal wireless networks would become a much more powerful version of the alternative outlets available today, such as public access channels on cable TV systems, public broadcasting stations, low-power FM radio stations, and the Web. If consolidation in the media distribution business threatened the diversity of voices available to viewers and listeners, personal broadcast networks would provide a powerful antidote.⁹³

⁹¹ See Kenneth Carter *et al.*, *Unlicensed and Unshackled: A Joint OSP-OET White Paper on Unlicensed Devices and Their Regulatory Issues*, Working Paper Series No. 39 (Washington, DC: FCC Office of Strategic Planning and Policy Analysis, May 2003).

⁹² Garrett Hardin, “The Tragedy of the Commons,” 162 *Science* 1243-48 (Dec. 1968); see the discussions in Ellen Goodman, “Spectrum Rights in the Telecosm to Come,” 41 *San Diego L. Rev.* 269, 403-04 (2004); Philip Weiser and Dale Hatfield, *Policing the Spectrum Commons*, paper presented at the 2004 Telecommunications Policy Research Conference, Oct. 2, 2004, <http://web.si.umich.edu/tpcr/papers/2004/300/policing%20spectrum%20commons.pdf>.

⁹³ Kevin Werbach, *Radio Revolution: The Coming Age of Unlicensed Wireless* (Washington, DC: New America Foundation and Public Knowledge, 2003), pp. 41-42. On the possibilities – and challenges – for unlicensed spectrum as an alternative to the centralized commercialized approach to broadcasting, see also Yochai Benkler, “Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment,” 11 *Harvard J. of Law & Tech.* 287 (1998); Ellen Goodman, “Spectrum Rights in the Telecosm to Come,” 41 *San Diego L. Rev.* 269 (2004); and the Commission’s own *Spectrum Policy Task Force Report*, ET Docket No. 02-135 (Nov. 2002).

The important role of the FCC in this yet-to-unfold process is to make adequate unlicensed spectrum available, design technical rules of the road to maximize its potential, encourage innovation, and advocate for funding mechanisms that will support nonprofit unlicensed community broadcasting.

For example, a primary source of unlicensed spectrum is the giveback of analog frequencies that was originally scheduled for 2006. The Commission, to its credit, has opposed the industry's efforts to delay this process. As the return of analog proceeds, the Commission should make sure that some of this spectrum is available for unlicensed use, including wireless community networks.

Not only ample but effective frequencies should be available for unlicensed broadcasting. The Commission is now considering regulations for the use of smart radio technologies within the TV broadcast spectrum where some frequencies are not being used.⁹⁴ Dedicated unlicensed bands, shared underlay access, and opportunistic sharing should also be considered as ways of expanding unlicensed local broadcasting.⁹⁵

Unlicensed uses should not be relegated to broadcasting Siberia. As Harold Feld of the Media Access Project points out, "Not all spectrum is equal. If the FCC really wants to advance the cause of unlicensed access, it will permit unlicensed access in the 'beachfront' of the television broadcast bands rather than in the spectrum equivalent of Florida swamplands."⁹⁶

⁹⁴ Notice of Proposed Rulemaking, *Unlicensed Operation in the TV Broadcast Band*, ET Docket No. 04-186 (May 13, 2004).

⁹⁵ See Werbach, pp. 44-45.

⁹⁶ MAP Comment on New FCC White Paper on Unlicensed Spectrum, May 21, 2004, http://www.mediaaccess.org/programs/diversity/FCCWhitePaper_MAPstatement.html.

4. Preventing Geographical Expansion

Finally, the Commission should put a stop to commercial broadcasters' use of new technical capacity to undermine localism by expanding their coverage areas in order to increase audience size and consequent advertising revenues. This has arguably been the least reported aspect of the transition to digital television.

For example, as the power of a TV transmitter increases, its geographic coverage also increases. In 1997, many UHF stations were allowed to increase their power levels significantly on their new DTV channels. This was possible because digital TV technology allows the use of previously unusable guard band spectrum. The FCC has the option to license guard band spectrum to new users or to incumbents. Obviously, the incumbents would like the rights, but their ability to expand their broadcast range in this way undermines localism.

Similarly, TV broadcasters would like the government to mandate more sensitive TV receivers, which would allow them to expand their geographic coverage. Current broadcast receivers are far less sensitive than they could be. More sensitive receivers can pick up signals at greater distances from transmitters. To maintain current geographic boundaries, the FCC should consider mandating more sensitive receivers but only with lower transmitter power levels. The same principles should apply to radio.

B. THE COMMISSION SHOULD REQUIRE COMMERCIAL BROADCASTERS TO PROVIDE COMMUNITY ACCESS AND CHANNEL LEASING OPPORTUNITIES TO NONPROFIT COMMUNITY MEDIA PROJECTS

Recognizing that a truly balanced system cannot be achieved quickly or easily, and that it will take some time for any substantial number of nonprofit independent community media organizations to attain the wherewithal for full power broadcasting, it is important both

in the interim and over the long term to open commercially licensed airwaves to some independent alternative programming that is not produced or controlled by the licensee. This can be done both through free community access requirements and through channel leasing.

Two main objections may be made to this proposal. First, it may be argued that access requirements would violate the longstanding Commission requirement that, even when leasing airtime, licensees must maintain editorial control over all broadcast content.⁹⁷ Second, there is a question of the Commission's power to impose anything approaching public or leased access requirements on broadcast channels, given the Supreme Court's 1979 ruling that the agency exceeded its jurisdiction when, without congressional authorization, it required cable TV operators to dedicate some channels to public and leased access on an "indiscriminate" basis.⁹⁸

With respect to channel leasing, or so-called brokerage arrangements, the rule requiring licensees to maintain editorial control, although long-standing, is one of the Commission's devising. Thus, the Commission can modify it where the public interest so requires. Indeed, the rule was created to assure that licensees met their public interest obligations, rather than shirking them by simply acquiring a license, then renting it out to others.⁹⁹ Where, as here, commercial licensees have been grossly deficient in satisfying the fundamental goals of localism and diversity, a requirement that they accommodate some community broadcasting which they cannot censor serves the very same purpose that originally led the Commission to *require* editorial control.

⁹⁷ See *Cosmopolitan Broadcasting Corp. v. FCC*, 581 F.2d 917 (D.C. Cir. 1978); *U.S. Broadcasting Corp.*, 2 F.C.C. 208, 225 (1935); *University of Pennsylvania*, 69 F.C.C.2d 1394, 1398 (1978).

⁹⁸ *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

⁹⁹ See *Cosmopolitan Broadcasting Corp. v. FCC*, 581 F.2d at 921, 926 (licensee must maintain control over programming "in light of the tastes and ascertained needs and problems of the community" and in order "to exercise his responsibility as a public trustee") (quoting in part *Network Broadcasting by Standard (AM) and FM Broadcast Stations*, 63 F.C.C.2d 674, 690 (1977)).

In the major case on channel leasing, in fact, there were strong indications that the licensee's practice of leasing out large chunks of airtime served rather than undermined public interest goals. The licensee leased time to foreign-language producers that provided programming for local minority groups. Vacating the Commission's decision not to renew the license, the Court of Appeals noted the "public interest in a diversity of broadcast entertainment formats," and the strong policy goal of accommodating "all aspects of contemporary culture" through the commonly-owned airwaves. Because the disappearance of the "distinctive format" of foreign-language programming might "deprive a significant segment of the public of the benefits of radio," the court instructed the Commission to weigh the competing interests before rejecting channel leasing outright.¹⁰⁰

Subsequently, the Commission has recognized that channel leasing can provide important benefits. In 1980, the Commission revised its policies on time brokerage because this arrangement "has the potential to notably increase available program alternatives," to "encourage[] minority group involvement in broadcasting," and to enhance diversity by "encouraging independently produced programming."¹⁰¹ Although the Commission in that proceeding ruled that licensees should remain ultimately responsible for the content of brokered programs, this is a policy that the Commission has the discretion to change.

The Communications Act already relieves licensees of legal responsibility where strong principles of broadcast policy require them to air speech that is not within their editorial control. Section 315(a), for example, which imposes equal opportunity requirements for electoral candidates, specifically provides that the licensee "shall have no power of

¹⁰⁰ *Cosmopolitan Broadcasting Corp. v. FCC*, 581 F.2d at 931.

¹⁰¹ *Petition for Issuance of Policy Statement or Notice of Inquiry on Part-Time Programming*, 82 F.C.C.2d 107, 107-08 (1980). This recognition that channel leasing can increase diversity in programming and serve the needs of minority groups is also reflected in the present NOI, p. 11, ¶25.

copyright over the material broadcast under the provision of this section.” It follows that in these circumstances, it is the candidate or other speaker, and not the broadcaster, who is legally responsible for the content of the speech.¹⁰² There is no reason why this same rule should not apply to channel leasing or other community access requirements that are put in place in order to remedy dysfunction in the current broadcasting system. Indeed, the Supreme Court has recognized the importance of not allowing the proprietors of television facilities censorship powers over community access programming.¹⁰³

Moving beyond channel-leasing to a more generalized requirement of community access, opponents may argue that the Supreme Court’s 1979 decision in *FCC v. Midwest Video* prevents the Commission from taking this step. *Midwest Video* held that the Commission exceeded its jurisdiction when, without congressional authorization, it required cable operators to dedicate some channels to public and leased access on an “indiscriminate” basis – that is, essentially as common carriers. Analogizing cable TV to broadcasting in this context, the Court specifically pointed to section 3(h) of the Communications Act (now 47 U.S.C. 153(10)), which states that broadcast licensees will not be considered common carriers.¹⁰⁴

In deciding that the Commission’s broad “ancillary jurisdiction” to advance the public interest did not go so far as to permit mandated public access without Congress’s go-ahead,

¹⁰² See *Farmers Educational and Cooperative Union v. WDAY*, 360 U.S. 525 (1959); *Lamb v. Sutton*, 274 F.2d 706 (6th Cir. 1960). Congress has imposed essentially the same requirements on satellite broadcasting. See 47 U.S.C. 335(a) (directing the Commission to “initiate a rulemaking proceeding to impose, on providers of direct broadcast satellite service, public interest or other requirements for providing video programming. Any regulations prescribed pursuant to such rulemaking shall, at a minimum, apply the access to broadcast time requirement of section 312(a)(7) ... and the use of facilities requirements of section 315 ... to providers of direct broadcast satellite service providing video programming”).

¹⁰³ *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 760-66 (1996) (public, educational, and governmental media nonprofits have procedures in place to assure accountability; giving cable operators censorship power runs the risk of suppressing valuable programming).

¹⁰⁴ *FCC v. Midwest Video Corp.*, 440 U.S. 689, 702-09 (1979).

the Court in *Midwest Video* thus focused on the Communication Act's specific rejection of common carrier obligations for broadcasters. But the Court did not rule out all FCC-imposed community access requirements. The key is whether the licensee is required to accept all comers, or whether some entity – not necessarily the licensee – selects independent programmers on the basis of their contribution to localism and diversity. In this scenario, a local coalition of media nonprofits could serve as the screener. Or the broadcaster could turn over all or part of a secondary channel to a non-affiliated noncommercial programmer.

Certainly, *Midwest Video* does not preclude independent community access as *one choice* that licensees might make in order to fulfill their public interest obligations from a flexible menu, as outlined in the Public Interest Coalition's recent Comments on Digital Audio Broadcasting.¹⁰⁵ As long as access requirements are not indiscriminate, thereby imposing what amount to common carrier obligations, the Commission has flexibility in this area even without specific congressional authorization.

If the Commission disagrees with this analysis and determines that legislation is needed to enable it to impose community access requirements, it should seek that authorization from Congress. Constitutional objections to such legislation would fail in light of both the Supreme Court's decision in *Turner Broadcasting*, upholding statutory must-carry requirements, and the well-established importance of broadcast regulation in advancing the public's right to "the widest possible dissemination of information from diverse and

¹⁰⁵ Comments of Alliance for Better Campaigns *et al.* in *Matter of Digital Audio Broadcasting Systems*, MM Docket No. 99-325, pp. 47-62. One choice in the menu proposed by the Coalition is for radio broadcasters to dedicate a second audio channel to a non-affiliated noncommercial entity, for example, a cable "PEG" access programmer or a group that would qualify for a low power radio license but for technical limitations. *Id.*, pp. 54-57. Although it may be prudent as a first step to limit such a proposal to secondary digital channels, there is no legal or constitutional impediment to an broadcaster's choosing – or being required – to dedicate a reasonable amount of air time to alternative noncommercial programming on an analog or primary digital channel.

antagonistic sources.”¹⁰⁶ Broadcast licenses are not property, and their terms can be modified, subject only to rulemaking procedures, “if in the judgment of the Commission, such action will promote the public interest.”¹⁰⁷

C. THE COMMISSION SHOULD DEVELOP FUNDING MECHANISMS FOR SUPPORTING NONPROFIT COMMUNITY MEDIA

A necessary predicate to redressing the current imbalance in American broadcast communications is funding. There are now many community-based independent nonprofit producers around the country, but often they cannot realize their potential because of funding shortfalls. The Downtown Community Television Center (DCTV), for example, which has joined in these Comments, sponsored a youth-produced documentary series called “IMNY,” which aired on WNYE-TV in 2002/2003 and covered youth issues ranging from employment to health to local arts opportunities. WNYE paid the bulk of the funding as a production fee; the project also had some foundation support. Unfortunately, WNYE no longer has the funds to sponsor the program, despite both its critical success (including two New York Emmy awards), and its success with audiences in New York. DCTV would like to make this production opportunity available to interested youth today, but has yet to find new funding for the project. Hence, a voluble example of community media cannot find space on the airwaves or proper funding despite its successes.

¹⁰⁶ *Associated Press*, 326 U.S. at 20; see also *Turner Broadcasting*, 512 U.S. at 663; *Metro Broadcasting*, 497 U.S. at 567; *Columbia Broadcasting System v. FCC*, 453 U.S. 367, 395-96 (1981) (there is no First Amendment impediment to requiring licensees to share their frequency with others); *Red Lion*, 395 U.S. at 390-91 (not only are right-of-reply and other public interest obligations constitutional, but the government could have in fact decreed “that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or broadcast week”). The agency’s decision in 1987 to abandon the Fairness Doctrine has no bearing on the constitutional and policy principles affirmed in *Red Lion*. See, e.g., Michael Burstein, “Towards a New Standard for First Amendment Review of Structural Media Regulation,” 79 *N.Y.U. L Rev.* 1030, 1035 n.30 (2004); Yochai Benkler, “Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain,” 74 *N.Y.U. L. Rev.* 354, 367-71 (1999).

¹⁰⁷ 47 U.S.C. 316(a)(1). See also 47 U.S.C. 304 (licensee waives any claim of right to use any particular frequency); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) (“[n]o person is to have anything in the nature of a property right as a result of the granting of a license”).

Although some of the funding mechanisms that have been suggested for nonprofit community broadcasting will require legislation, the Commission can play an important role in developing ideas, investigating different funding models, and advocating for the changes necessary to build independent locally-based alternatives to the currently dominant commercial media giants.

First and foremost, the Commission should consider the “Five Percent Solution.” Under this proposal, commercial broadcast licenses would no longer be essentially free, but would be subject to a fee equivalent to 5% of gross advertising revenues. As Henry Geller and Tim Watts explain, cable operators commonly pay municipalities up to five percent of gross revenue, and there is no good reason why commercial broadcasters should not also pay something back to the public for the power to exploit the airwaves.

Continuing the policy that allows the television broadcasting industry to occupy increasingly scarce and valuable airwaves at zero cost is unacceptable for two reasons. First, granting free spectrum to broadcasters contributes to a substantial distortion in the market for wireless and television services. Other businesses are denied access to the spectrum, while consumers lose the benefits of new and lower-cost services. Second, it means taxpayers are denied a fair return on an extremely valuable public asset – rental fees that could be reinvested in new digital assets that benefit all Americans.¹⁰⁸

The proceeds from this “5% solution” would yield an annual return of about \$2.2 billion, using 2000 figures showing on \$44 billion in commercial TV revenue.¹⁰⁹ These proceeds should be deposited in a “localism and diversity” fund that would give both grants and developmental support to local community media nonprofits.

Geller and Watts’s proposal starts with TV, but goes on to say that “[i]deally, all commercial users of spectrum, not just television broadcasters, would pay some form of rent

¹⁰⁸ Geller and Watts, p. 10.

¹⁰⁹ *Id.*, p. 4.

for their occupation of scarce space on the public's airwaves." In 2000, radio broadcasters took in about \$20 billion in advertising revenue.¹¹⁰

The Association of Public Television Stations, similarly, has proposed a "digital content trust fund" that would help ease the transition to DTV by funding "the production and distribution of a new generation of digital educational content."¹¹¹ The fund would be based on spectrum auction proceeds. The only problem with this proposal is that it contemplates funding primarily for currently licensed public broadcasters. The present public broadcasting system is an important but insufficient alternative to the commercial media, and funding for new educational programming should also be available for community media producers unaffiliated with PBS.

Building nonprofit community-based media, admittedly, has an uneven track record in America. Public and educational access channels on cable systems have produced much innovative and valuable programming – providing information on local political issues, enabling citizens to communicate with each other about them, showcasing local artists, and often airing dissenting viewpoints.¹¹² But they have also, for the most part, been stuck in a "PEG ghetto" of limited audiences and sometimes less-than-professional production standards, and they have not provided the level of civic information that was hoped for. The answer to this dilemma is not to scrap public access, however; it is to strengthen and expand

¹¹⁰ *Id.*, p. 14.

¹¹¹ Testimony of John M. Lawson Before the Senate Committee on Commerce, Science & Transportation, "Completing the Digital Television Transition," June 9, 2004. Yochai Benkler proposes a variation on this theme: a PEG access obligation for digital broadcasters combined with "a requirement to devote a percentage of fees collected from pay services, if any, to fund facilities available to those individuals and organizations who take advantage of the access channels." Yochai Benkler, "Viacom-CBS Merger: From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access," 52 *Fed. Comm. L.J.* 561, 578 (2000).

¹¹² See, e.g., Aufderheide, *The Daily Planet*, pp. 128-30.

it. One salutary reform would be to increase the role of independent nonprofit entities in the management and control of PEG stations.

Whatever funding mechanisms are developed must assure that those producing independent community programming are insulated from censorship pressures. America's recent history of political attacks on both public broadcasting and federal arts funding suggests that great care must be taken to build editorial freedom into the subsidy system. One model is suggested by legislation to create a "Digital Opportunity Investment Trust" that would finance research and development on digital education technologies and support digitization of cultural resources.¹¹³ The "DO IT" trust would be administered by a nonprofit, nongovernmental agency along the lines of the National Science Foundation. Decentralizing funding mechanisms in local independent media centers that would provide production support as well as funding is another model.¹¹⁴

Public subsidies are essential in developing nonprofit media that will provide the range of information and ideas necessary for democracy to function well. As Edwin Baker has shown in painful detail, a market-based system driven by profit cannot satisfy the public's informational needs nor even, in many instances, its entertainment preferences. The United States has a long history of subsidizing communications in order to foster public policies favoring diversity, quality, free expression, and journalistic integrity. Second class mailing privileges are one example; other, more recent, ones are public broadcasting and the

¹¹³ The Digital Opportunity Investment Trust Act, S. 1854, 108th Cong., 1st Sess. (Nov. 12, 2003). See generally Digital Promise, <http://www.digitalpromise.org>.

¹¹⁴ See Aufderheide, *The Daily Planet*, p. 131.

government resources that were devoted to developing the Internet.¹¹⁵ Such supports are necessary now if the overarching policy goals of localism and diversity are to be realized.

CONCLUSION

The Commission has already taken piecemeal steps, such as the licensing of low power radio, to address the inadequacies of our present system of broadcast regulation. It is time to take a bolder, more integrated approach to the problem by mapping out a plan for transitioning to a balanced system that truly serves the public policy goals of localism and diversity.

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¹¹⁵ Baker, *Media, Markets, and Democracy*, p. 272; see also Starr, *The Creation of the Media*; Aufderheide, *The Daily Planet*, pp. 169-70.