

MONOLITH OR MOSAIC: CAN  
THE FEDERAL COMMUNICATIONS  
COMMISSION LEGITIMATELY PURSUE A  
REPETITION OF LOCAL CONTENT AT THE  
EXPENSE OF LOCAL DIVERSITY?

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TABLE OF CONTENTS

Introduction.....	597
I. The Commission's 2003 Media Ownership Decision .....	598
II. The Core Principles of Localism & Diversity .....	601
III. The Commission's Consideration of Local Diversity.....	603
A. The FCC Adopted Diversity and Localism as Its Core Goals.....	604
B. The FCC's Analysis of Television and Newspapers Prefers Consolidation Over Competing Local Points of View .....	605
C. The FCC Did Not Support Its Conclusion That The Internet Furthers Local Diversity.....	607
D. The FCC Treated Local Media Inconsistently .....	609
E. The FCC Disserved Local Diversity.....	610
Conclusion .....	611

INTRODUCTION

In June 2003, the Federal Communications Commission adopted an historic and controversial order, reconsidering and drastically

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scaling back a wide number of previously existing limits on the size and ownership interests of media companies. Historically, the FCC has interpreted its animating legislation, the Communications Act, to embrace two fundamental goals—that the American media should be comprised of many competing owners (called “diversity”) and that media should serve local interests (“localism”). The 2003 Media Ownership Order mouths the words of diversity and localism, but adopts many policies that undermine them. Specifically, as this essay explains, the analysis in the FCC’s decision will deprive local communities of a vibrant and competing news environment filled with many owners in favor of repetition from a single source.

The FCC’s recent media ownership decision attempted to promote diversity and localism in media. However, the decisions of the Commission in fact divorced localism and diversity, and explicitly promoted an increased quantity of local programming to the exclusion of any other objective—including diversity. As this essay demonstrates, the logic employed by the Commission places a higher value on a television station that repeatedly broadcasts the same local television program than it does on multiple stations producing multiple local shows from different viewpoints. Despite the Commission’s stated attempts to pursue both localism and diversity, its decision demonstrated a failure to pursue those goals. Although the Commission recognized the importance of diversity in media to democracy, it inexplicably ignored that much of democracy takes place at the local level.

This Essay will consider this targeted aspect of the Commission’s decision. The decision is important because it focuses on a central component of our democracy and a long-standing justification of media regulation. Moreover, the Commission adopted an absurd conclusion—that diversity of voices has no place in local news outlets, and that repetition of local content is preferable to multiple distinct local voices. As the Commission and academia further consider media diversity and the multiple ways to measure it, local diversity must not be overlooked.

#### I. THE COMMISSION’S 2003 MEDIA OWNERSHIP DECISION

In September 2002, the Federal Communications Commission initiated its most recent “biennial review.” As mandated by the 1996 Telecommunications Act, the FCC commenced a proceeding to review its media ownership rules and to determine whether any of these rules are “necessary in the public interest as the result of meaningful economic competition between providers of such

service.”<sup>1</sup> Although this provision was adopted in 1996, the 2002 biennial review represented the first review of its kind. Specifically, this was the first review of the 1996 provision since the courts had reviewed the provision and significantly increased the evidence required of the FCC in support of its rules and the degree of scrutiny given to the FCC’s analysis.<sup>2</sup>

After less than ten months of public comment on a vast record including a dozen new FCC studies, the Commission adopted an order implementing the most significant revisions to its media ownership rules in more than twenty years. Virtually without exception, the order relaxed ownership rules, allowing the largest companies to grow larger, allowing companies to own multiple media outlets in the same community (such as a television station and a newspaper), and, for the rule changes that might have required divestiture, allowing current combinations to remain in place, grandfathering them indefinitely.<sup>3</sup>

The FCC addressed and scaled back virtually all of its rules limiting ownership of broadcast outlets in this country.<sup>4</sup> Because television and newspapers are a core source of local news, the ownership rules governing these stations have particular applicability to citizens’ ability to receive local information from diverse sources. Thus, the rule changes most on point were the Commission’s decision to raise limits on local television ownership and to end most restrictions on co-ownership of a local television station and a newspaper in the same geographic community.

With respect to the local television rule, the old rule permitted ownership of more than one station as long as there were at least

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, § 402, 110 Stat. 129, 161 (1996).

2. See *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002), *modified*, 293 F.3d 537 (D.C. Cir. 2002). The *Fox* Court rejected the FCC’s contention that the biennial review orders were not reviewable and demanded significant factual support for FCC conclusions far beyond those traditionally required. *But see* *Cellco P’ship v. FCC*, 357 F.3d 88, 90 (D.C. Cir. 2004) (finding that the biennial review provision encompasses the traditional public interest standard).

3. See *generally* Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets, 18 F.C.C.R. 13,620 (2003) [hereinafter 2003 Broadcast Ownership Order].

4. See *id.* ¶¶ 2-4. These Rules revised several established standards including: the national television rule which previously limited the reach of a single television owner to thirty-five percent of the country, the local radio rule limiting the number of radio stations a single owner can own in a local market, local television rules that limit the number of television stations a single owner can own in a local market, and rules that prohibited the joint ownership (so-called “cross-ownership”) of a radio or television broadcast outlet and a daily newspaper in the same local market. *Id.*

eight independently owned and operated broadcast television stations in the market, and provided that at least one of the jointly owned stations was not among the top-four stations in the market.<sup>5</sup> In revising the rule, the FCC retained the “top-4” restriction, but it changed the limit. The new rules would allow a single entity to own two television stations in markets with seventeen or fewer television stations and up to three television stations in markets with eighteen or more television stations.<sup>6</sup> Thus, the FCC replaced the old rule guaranteeing multiple separately-owned local outlets in favor of a rule allowing many more jointly-owned outlets.

The Commission eliminated old rules which prohibited a broadcast outlet, either radio or television, from owning a major weekly newspaper in the same local community. Instead, the Commission adopted a “cross-media limit” calculated by creating a “diversity index.” Under the Commission’s new cross-media limit, the prohibition on cross-ownership remains only for television markets with three or fewer television stations.<sup>7</sup>

The Commission developed the completely novel “diversity index” in an attempt to measure diversity across markets.<sup>8</sup> The Commission considered which media were meaningful local sources of diversity and then attempted to create an exchange rate and a measure for that diversity. As described below, the FCC’s treatment of local media, however, was vastly inconsistent. The Commission excluded cable television and magazines as a source of local content, but it included the Internet despite a dearth of evidence. The Commission also concluded that repetition of children’s programming was inappropriate while it emphasized repetition of local news and public affairs programming.

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5. *Id.* ¶ 132.

6. *Id.*

7. The Commission also adopted some limits in markets with four to eight television stations. Specifically, a single owner may possess two television stations and a newspaper, but no more, and an owner with all three types of media may not exceed half of the existing individual local media caps. *See id.* ¶ 466. The Commission will consider and grant waivers of these rules if the owner shows that it will produce program-related benefits to the public. *See id.* ¶ 481 (asserting that the “Commission recognizes that special circumstances may render these cross-media limits unnecessary or counter-productive in particular markets”).

8. MARK COOPER, CONSUMER FEDERATION OF AMERICA, ABRACADABRA! HOCUS POCUS! MAKING MEDIA MARKET POWER DISAPPEAR WITH THE FCC’S DIVERSITY INDEX 4-6 (July 2003), at <http://www.consumerfed.org/abra.pdf> (on file with the American University Law Review).

## II. THE CORE PRINCIPLES OF LOCALISM & DIVERSITY

The Communications Act's emphasis on localism and diversity are historically linked, and both are grounded in the promotion of democracy and the American cultural values of pluralism and federalism. Localism was already a policy objective prior to the adoption of the Communications Act of 1934, as earlier legislation, such as the Radio Act of 1927, incorporated localism as a core goal.<sup>9</sup>

Conceptually, localism is a fundamental principle of American federalism, which values devolution of power to the local level.<sup>10</sup> Moreover, policies favoring localism can be seen as promoting the diversity of a country built by people hailing from many lands and countries of origin. As the Carnegie Commission stated when it evaluated the need and potential of a public broadcasting system in the United States:

American society has been proud to be open and pluralistic, repeatedly enriched by the tides of immigration and the flow of social thought. Our varying regions, our varying religious and national and racial groups, our varying needs and social intellectual interests are the fabric of the American tradition.<sup>11</sup>

In particular, local media coverage of issues is critical if citizens are to play the role designated for them within a democratic society. For citizens to vote with intelligence and to serve their own needs, the public must be informed about critical issues of the day, and citizens must know which candidates will best meet their own goals. Local media, therefore, has often served an important democratic function.<sup>12</sup> While many policies that directly promoted localism have been abandoned over the last twenty years,<sup>13</sup> the legal foundation for

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9. See PHILIP M. NAPOLI, FOUNDATIONS OF COMMUNICATIONS POLICY: PRINCIPLES AND PROCESS IN THE REGULATION OF ELECTRONIC MEDIA 203 (2001) (explaining that the Radio Act of 1927 was created to provide "fair, efficient, and equitable radio service" to all states, cities, and local communities seeking such service).

10. See, e.g., *id.* at 205-06 (noting that localism was a significant principle in "the design and operation of political institutions" for many democratic theorists). It was thought that citizens would be more actively involved and informed about a political process whose power was localized. *Id.* at 206.

11. THE CARNEGIE COMMISSION ON EDUCATIONAL TELEVISION, PUBLIC TELEVISION: A PROGRAM FOR ACTION 14 (1967). The Carnegie Commission successfully developed the theoretical and practical foundation of public broadcasting and retains wide respect today.

12. See generally FELIX OBERHOLZER-GEE & JOEL WALDFOGEL, ELECTORAL ACCELERATION: THE EFFECT OF MINORITY POPULATION ON MINORITY VOTER TURNOUT (Nat'l Bureau of Econ. Research Working Paper No. 8252, 2001), at <http://papers.nber.org/papers/w8252.pdf> (on file with the American University Law Review). The authors argue that media coverage is linked to voting patterns. For example, Black-oriented newspapers can lead to increased African American participation in elections. *Id.* at 6-8.

13. See, e.g., NAPOLI, *supra* note 9, at 211-15 (describing the elimination of various

such policies remains solid<sup>14</sup> and in some instances localism is currently experiencing some revitalization.<sup>15</sup>

Similar to localism, the pursuit of viewpoint diversity by federal media policy is grounded in democratic principles. As stated by the Commission in its 2003 Media Ownership Order, “A diverse and robust marketplace of ideas is the foundation of our democracy.”<sup>16</sup> The Commission reaffirmed the soundness of its historic assumption that ownership influences viewpoint expression, and concluded that seeking to preserve multiple owners through structural regulation was an appropriate means to promote viewpoint diversity.<sup>17</sup>

Diversity policies under broadcasting further the First Amendment in a manner different from what might be considered “traditional” First Amendment jurisprudence. Whereas American law is typically seen as protecting the speaker’s unfettered right to speak, in broadcasting the government takes steps to ensure that multiple voices are heard. Both applications of the First Amendment serve its ultimate Madisonian goal—to educate citizens by exposing them to multiple points of view.<sup>18</sup>

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localism requirements such as local origination for cable systems, studio location rules, and the ascertainment requirement for radio and television broadcasters). *See generally* ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS, CHARTING THE DIGITAL BROADCASTING FUTURE: FINAL REPORT OF THE ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS 17-33 (1998) (repealing primary localism ascertainment tools and outlining significant deregulation to impact diversity and localism), *available at* <http://www.ntia.doc.gov/pubintadvcom/piacreport.pdf> (last visited Feb. 1, 2004).

14. *See, e.g.*, Motion Picture Ass’n of Am., Inc. v. FCC, 309 F.3d 796, 804 (D.C. Cir. 2002) (upholding the FCC’s ability to promote localism through its rules and orders).

15. Under former Chairman Bill Kennard, the FCC created a new low power radio service which promotes localism in several ways. *See* In the Matter of Creation of Low Power Radio Service, Report and Order, 15 F.C.C.R. 2205, ¶ 1 (2000). First, these stations possess a service area of only a few square miles, creating an inherently local service. *Id.* ¶¶ 4-5. In addition, applications for licenses receive a preference if they promise to offer eight hours of locally originated programming per day. *Id.* ¶ 144. More recently, Chairman Powell announced an initiative to assess localism in media, although the proceeding is still pending and its findings and implementation remains to be seen. Press Release, FCC, Chairman Powell Announces Intention to Form a Federal Advisory Committee to Assist the Federal Communications Commission in Addressing Diversity Issues (May 19, 2003) [hereinafter Powell Press Release] (discussing the role of the Diversity Committee, which includes advising the FCC on practices to increase diversity in the communications sector and reporting periodically on its progress), *at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-234645A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-234645A1.pdf) (on file with the American University Law Review).

16. 2003 Broadcast Ownership Order, *supra* note 3, ¶ 19.

17. *See id.* ¶ 20.

18. *See generally* FCC v. Nat’l Citizens Comm. for Broad., 436 U.S. 775 (1978) (recognizing the connection between the FCC’s duty to serve the public interest and the First Amendment goal of acquiring “the widest possible dissemination of information from diverse and antagonistic sources”) (citing Associated Press v.

In the Madisonian view, a deliberative democracy is the cornerstone of the institution. Citizens, through exposure to each other and new ideas and through conversation, develop new ideas and general consensus about important political issues. The Supreme Court has historically drawn on these Madisonian ideas when it considers appropriate regulation of mass media. The Supreme Court has upheld congressional action when it has “generally been to secure the public’s First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern.”<sup>19</sup> This is so because news and information perform a special role in a democracy. Quality news and information ensures that elected leaders perform as their constituents intend, unearth fraud and corruption, and enhance democratic decision-making. Benefits accrue to society even if very few individuals actually use the news and information themselves. For example, politicians and corporations leaders fear scandal and thus alter their behavior, some constituents will hold politicians accountable when they break their promises, and some citizens will learn about public issues and evaluate them, thus enabling them to educate others and to vote for high-quality leaders. Democracy’s need for news and information makes them central to our evaluation of media regulation and the First Amendment.

### III. THE COMMISSION’S CONSIDERATION OF LOCAL DIVERSITY

As demonstrated in this section, the Commission adopted diversity and localism as its core goals, but through its analysis omitted consideration of a primary concern—diversity at the local level. The Commission favored repetition over multiple owners in newspaper and television. And unfortunately the FCC did not find a new source of local content to compensate for the consolidation it allowed between local television stations and newspapers. The Commission’s analysis relied heavily on the Internet as a source of diversity, but the Commission produced *no* evidence showing that the Internet employs any reporters or news producers who are not simultaneously employed by a local television station or newspaper. The Internet does not yet supply owners who are independent of the current broadcast and newspaper owners. The Commission’s treatment of these issues was inconsistent with other parts of its decision—elsewhere the Commission proved itself capable of determining

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United States, 326 U.S. 1, 20 (1945)).

19. FCC v. League of Women Voters of Cal., 468 U.S. 364, 381 (1984).

whether certain media were appropriate to rely upon as local sources, and concluded that mere repetition or rebroadcast of identical content must be prohibited when the Commission is seeking to promote production of that content.

*A. The FCC Adopted Diversity and Localism as Its Core Goals*

The Commission did not abandon the historic goals of diversity and localism in the 2003 Media Ownership Order. The Commission reaffirmed its intent to promote localism, finding it to be one of the important policy goals of its media ownership rules.<sup>20</sup> The Commission recognized the historic roots and statutory emphasis “on ensuring that local television and radio stations are responsive to the needs and interests of their local communities” as embodied in the Act.<sup>21</sup> It acknowledged that the Commission originally assigned broadcast spectrum to ensure that each community, as much as possible, received a broadcast outlet, and relied upon Supreme Court opinions supporting those decisions.<sup>22</sup>

The FCC also acknowledged that to achieve diversity, different owners must control different outlets. It found a “single owner still retains ultimate control over programming content, who is hired to make programming decision, what news stories are covered, and how they are covered.”<sup>23</sup> It rejected the idea that a single owner could serve diversity by counter programming several outlets, finding that it could not “rely exclusively on the economic incentives that may or may not be created by ownership of multiple television stations to ensure viewpoint diversity.”<sup>24</sup> The FCC adopted multiple owners as the essence of diversity. Most important, the Commission recognized that local diversity is in more danger. The Commission found national diversity to be more robust than local diversity, stating, “the diversity of viewpoints by national media on national issues is greater than that regarding local issues.”<sup>25</sup>

As it moved toward implementing these lofty goals, the Commission faltered. When the FCC decided how to measure localism, it decided to rely on two measures: “the selection of programming responsive to local needs and interests, and local news quantity and quality.”<sup>26</sup> The Commission did not look to whether

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20. 2003 Broadcast Ownership Order, *supra* note 3, ¶¶ 73-79.

21. *Id.* ¶ 74.

22. *Id.* ¶ 74.

23. *Id.* ¶ 174 (internal quotations omitted).

24. *Id.*

25. *Id.* ¶ 35.

26. *Id.* ¶ 78.

local media would offer diverse viewpoints on local topics. Beyond measurement, the Commission artificially separated considerations of localism and diversity throughout its analysis, segregating them into separate sections. It concluded that rules that increase the amount of local programming regardless of its originality are preferable to rules that ensure multiple viewpoints, sources, and outlets for local programming. The FCC's analysis explicitly rejected policies that promote multiple points of view at the local level in favor of a simplistic increase in distribution and quantity of the same, repeated information.

*B. The FCC's Analysis of Television and Newspapers Prefers Consolidation Over Competing Local Points of View*

Despite the Commission's concern with localism and diversity, it cited outlets that produce the same news and information and utilize the same reporting staff as improvements for localism and diversity. Virtually all of the benefits cited by the Commission involve two stations sharing news staff and producers to some extent, if not completely.<sup>27</sup>

In fact, the FCC pursued an increased *amount* of local news to the exclusion of *diversity* in local news. Specifically, it rejected the concerns of one commenter advocating for local diversity, stating, "although . . . the subject stations no longer produce news independently, this does not necessarily translate into 'less' local news."<sup>28</sup>

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27. See *id.* ¶ 159 & nn.320 & 322 (2003) (explaining that Seattle stations share news staff but have separate producers while two stations in Spokane use the same co-producers but retain separate news anchors and news producers). Nexstar also describes a wide array of news programming jointly produced and gathered for two stations in its comments. See Comments of Nexstar Broadcasting Group, L.L.C. and Quorum Broadcast Holdings, LLC, 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 Docket Nos. 01-235, 01-317, 00-244, at 2-6, 11, app. A at A-1 to A-4 (Jan. 2, 2003) (describing shared services agreements between jointly owned stations in various markets); see also Comments of Coalition Broadcasters LIN Television Corporation, et al., 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 Docket Nos. 01-235, 01-317, 00-244, at 18-23 (Jan. 2, 2003) (discussing the benefits of Raycom's joint-ownership in two markets).

28. 2003 Broadcast Ownership Order, *supra* note 3, ¶ 163.

In a similar vein, the Commission concluded that the newspaper/broadcast cross-ownership rule is unnecessary because broadcasters co-owned with newspapers have the potential to produce more local news coverage even though such news is produced by the same staff.<sup>29</sup> The Commission also concluded that efficiencies derived from shared support staff and conservation of resources in commonly-owned radio and television stations do not automatically result in a reduction in local news.<sup>30</sup> While this may be true, it does not begin to address the fact that, although news may be transmitted on more outlets, diversity is limited because the same source creates that news. Nor does it justify ignoring the societal benefits that result from diverse ownership.

When the Commission evaluated the merits of the previous newspaper/broadcast rule, it omitted any discussion of the benefits of independent ownership.<sup>31</sup> Thus, while the Commission adopted independent ownership as a touchstone of diversity, it evaluated the prior rule solely by looking at efficiencies that come from jointly-owned enterprises. The discussion does not acknowledge, let alone explain, why elimination of an independent outlet is acceptable in light of the Commission's articulated diversity goal. The Commission does not point to any increase in, or preservation of, the number of independently-owned outlets that will result from the Commission's elimination of the newspaper/broadcast rule. Its analysis was almost entirely comprised of enunciating the efficiencies of common ownership. The analysis concluded that common ownership between television broadcasters and newspapers might allow broadcasters to offer a more comprehensive news program, or may help a struggling newspapers to remain profitable.<sup>32</sup> It found that newspapers and broadcasters with common ownership have the potential to increase

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29. *See id.* ¶ 342 (asserting that newspapers are better able to provide local news coverage than many local broadcasters, and that newspapers provide more local coverage).

30. *Id.* ¶ 383. The Commission asserted:

The record in this proceeding, in fact, includes evidence . . . that efficiencies and cost savings realized from joint ownership may allow radio and television stations to offer more news reporting generally, and more local news reporting specifically, than otherwise may be possible [and] that station owners will use additional revenue and resource savings from television-radio combinations to provide new and innovative programming, provide more in-depth local interest programming, and provide better service to the public, including locally oriented services.

*Id.*

31. *See id.* ¶¶ 355-358 (discussing exclusively the benefits of common ownership and how common ownership will not affect viewpoint diversity in the media).

32. *See id.* ¶ 356 (stating that common ownership could lead to an increase in the number of sources providing news and information).

news flow through the creation of Internet sites and other information outlets.<sup>33</sup> In each of these cases, the news sources are one and the same and contribute nothing to diversity. The Commission did not acknowledge the inherent tension in these findings.

*C. The FCC Did Not Support Its Conclusion That The Internet  
Furtheres Local Diversity*

Perhaps the most irrational of the Commission's considerations on this issue is its analysis of the Internet. The Commission concluded that the Internet was a meaningful, independently-owned source of local news. Unfortunately, the Commission did not conduct any systematic analysis of separately-owned, local Internet content. Its 2003 Media Ownership Order, in fact, did not cite a single example of independently-created Internet content.<sup>34</sup>

Although the Internet continues to rapidly change the distribution of *existing* content, the Internet currently does not provide a meaningful source of *new* content.<sup>35</sup> Few web sites employ their own reporters, and by far, the vast majority of local news content on the Internet comes from existing news sources, local television stations, and local newspapers.<sup>36</sup>

The Commission's analysis of local Internet resources unfortunately relied on generalities and seems to presume that the Internet cannot be measured. The Commission dismissed concerns that local television stations or local newspapers own most web sites offering local news.<sup>37</sup> It ignored the problem by pointing to national news sources on the web, such as MSNBC, FoxNews, CNN, and the major broadcast networks.<sup>38</sup> The Commission did not cite *one*

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33. *Id.* ¶ 367.

34. *See* Reply Brief for Citizen Petitioners and Intervenors at 17-18, Prometheus Radio Project v. FCC, Nos. 03-3388, 03-3577, 03-3578, 03-3579, 03-3580, 03-3581, 03-3582, 03-3651, 03-3665, 03-3675, 03-3708, 03-3894, 03-3950, 03-3951 & 03-4073 (3d Cir. filed Dec. 8, 2003) (describing how the Commission made presumptions about local content on the Internet), *available at* <http://www.mediaaccess.org/CitizenPetitionerIntervenorReplyBrief.pdf>.

35. *See id.* (disputing the notion that the Internet offers unique and non-duplicative content).

36. *Id.*

37. *See* 2003 Broadcast Ownership Order, *supra* note 3, ¶ 427 (disagreeing, without analysis, with the critique by some commenters who argue that the Internet does not add to the diversity of viewpoints because most people use the Internet to access their already subscribed newspapers and broadcast stations).

38. *See id.* ¶ 365 & n.836 (listing as evidence websites offered by major media providers such as MSNBC, Fox news, but failing to list websites operated by independent media providers). The Order also cites non-national sources such as the Drudge Report and Salon. *See id.* ¶ 427.

independently-owned Internet web site and ignores the fact that most of the cited sources offer national news which is irrelevant for the purpose of analyzing local news coverage protected by the local newspaper/broadcast rule. The Commission did not attempt to evaluate the amount of local, independently-owned news on the Internet. The evidence proffered by the Commission and the deregulatory petitioners contained solely content offered by existing, not independently-owned, outlets.<sup>39</sup>

Even when under fire in litigation, the Commission could not produce examples of meaningful sources of independent Internet content. In its briefs before the U.S. Court of Appeals for the Third Circuit defending its 2003 Media Ownership Order, the Commission resorted to relying upon information not cited in its Order, but was instead buried deep in the record.<sup>40</sup> Even the information cited, which purported to be an analysis of all local content available in six markets, was devoid of independent locally-produced content. The cited information in this example provided a total of nine independent web sites in the “local news/weather” category out of hundreds of sites that it evaluated.<sup>41</sup> Furthermore, of those nine web sites, none were programmed with news gathered by professional journalists, and only one included content produced solely for that web site.<sup>42</sup> One market had no independent local news Internet sites

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39. See *id.* ¶ 365 & n.836.

40. Brief for Respondents at 74, *Prometheus Radio Project v. FCC*, Nos. 03-3388, 03-3577, 03-3578, 03-3579, 03-3580, 03-3581, 03-3582, 03-3651, 03-3665, 03-3675, 03-3708, 03-3894, 03-3950, 03-3951 & 03-4073 (3d Cir. filed Dec. 8, 2003), available at <http://www.fcc.gov/ogc/briefs/03-3388-Brief.pdf>. Instead of citing specific examples of independent Internet content, the Commission referred to “scores of local websites that could be expected to provide a wide range of local news and information.” *Id.* (emphasis in original) (citing Comments of Media General, Inc., 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 Docket Nos. 01-235, 01-317, 00-244, at apps. 9, 12 (Jan. 2, 2003) [hereinafter 2003 Media General Cross-Ownership Comments]).

41. See 2003 Media General Cross-Ownership Comments, *supra* note 40, at apps. 9-14 (detailing media outlet availability in six markets: Tampa/St. Petersburg, Florida; Roanoke-Lynchburg, Virginia; Panama City, Florida; Tri-Cities, Tennessee/Virginia; Florence-Myrtle Beach, South Carolina; and Columbus, Georgia).

42. Two of the web sites, <http://www.allfloridanews.com> and <http://gotricities.com>, provide a gateway to existing local news sources. Some web sites included were commercial sites only such as <http://www.panamacity.com>, a vacation planning web site and <http://www.mindspring.com/vtstanfield>, a long-distance telephone service. One site, <http://columbus-georgia.areaguides.net/news.html>, provides links to national wire stories but does not access local wire stories. One site, <http://pol!aews.com>, could not be found and two sites did not appear to

at all.<sup>43</sup> Taking at face value the Commission's reference in its brief to "scores" of local websites, these "scores" of web sites could not hope to serve the thousands of communities in this country, let alone the 210 television markets identified by the Commission. Nor could these examples counteract a merger between the only major daily newspaper and the top-ranked television station in a community.

*D. The FCC Treated Local Media Inconsistently*

Not only did the FCC's 2003 Media Ownership Order fail to promote local diversity, but it also treats local media inconsistently.<sup>44</sup> Whereas the FCC's analysis encourages the repetition of local news programming in lieu of diversity, the FCC prohibited repetition in the case of children's programming.

The Commission relied heavily upon the Internet as a local news source, but it rejected cable television and magazines as local media sources. While the Commission rejected the idea that people might view the same content already available from their local television or newspaper on the Internet, the Commission did not include cable television as a local news source because some people might be counting local television news channels they view over cable.<sup>45</sup> The Commission also similarly rejected magazines as a meaningful source of local information.<sup>46</sup>

In direct contrast to the FCC's treatment of news, it adopted protections to ensure that mergers between local television stations would not result in the loss of children's programming. The Commission found it unacceptable, under statutory obligations in the

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be independently operated. The first, [www.timesnews.net](http://www.timesnews.net), states that it is run by Kingsport Times-News, a regional newspaper in East Tennessee, and the other, <http://www.zwire.com/site/news> is run by a local newspaper operated by PowerOne Media, Inc. Only one site, [www.baydomain.com](http://www.baydomain.com), contained original content. This web site is a volunteer-run site discussing local art and music. *See id.* (websites verified Feb. 1, 2004).

43. *See id.* at app. 10 (showing availability of media outlets in Roanoke-Lynchburg, Virginia).

44. The FCC, like other federal agencies, is subject to the Administrative Procedure Act which makes arbitrary decision-making a violation of the law.

45. 2003 Broadcast Ownership Order, *supra* note 3, ¶¶ 413-414 (analyzing reporting data on the extent to which viewers get their local news from cable television and concluding that some evidence indicates that people may have confused cable channels with local channels that are transmitted by cable or satellite).

46. *Id.* ¶ 407 (contending that most magazines have a national focus because few people cite magazines as their primary source of news). Relying on the findings of an independent study and its own study, the Commission concluded that the combination of local and national magazine sources neither permitted the Commission to identify local sources nor enabled it to assign any weight to magazines. *Id.*

Children's Television Act, for two commonly-owned stations to rely on the same children's programming to fulfill their obligation to air three hours of children's programming per week.<sup>47</sup> The FCC found that the goal of the Children's Television Act was to increase the amount of children's television programming available. Similarly, the Commission's goal under the Communications Act is to increase the amount of local news and public affairs programming. Thus, the Commission reached inconsistent findings when it rejected airing of the same program on two commonly-owned stations under the Children's Television Act, but accepted the airing of the same news programming on commonly-owned stations under the Communications Act.

The Commission was arbitrary in its decision to allow repetition and consolidation, and in its decision to carefully scrutinize some media but not others. Unfortunately, the Commission demonstrated it is capable of common sense analysis based on the facts, but it did not pursue that course when it analyzed local diversity.

*E. The FCC Disserved Local Diversity*

Much of the Commission's error seems to be rooted in its separate consideration of its two stated goals. In each part of its analysis, the Commission first considered diversity and then considered localism. The decision explicitly describes an increase in the amount and quality of local news as promoting the goal of localism but did not recognize that independently owned outlets are equally important at the local level. Future analysis of this question cannot rightly consider diversity and localism as two separate goals that are analytically distinct.<sup>48</sup>

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47. *See id.* ¶ 183 (finding that the airing of the same children's programming in the same market on commonly-owned stations will reduce the diversity of educational and informational programming and therefore conflict with the objectives of the Children's Television Act). *See also* 47 U.S.C.A. § 609 (amended by § 303a(2)) (defining "[a]s part of their obligation to serve the public interest, television station operators and licensees should provide programming that serves the special needs of children.")

48. *Cf.* Press Release, FCC Chairman Michael Powell, FCC Chairman Powell Launches "Localism in Broadcasting" Initiative (Aug. 20, 2003), at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-238057A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-238057A1.pdf). (on file with the American University Law Review). Chairman Powell attempted to divorce these concepts even further after the June 2003 decision. He was strongly criticized for doing so. *See* Press Release, FCC, Copps Criticizes Willingness to Let Media Consolidation Continue (Aug. 20, 2003), at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-238079A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-238079A1.pdf) (on file with the American University Law Review).

Although the Commission, in some places, acknowledged losses to diversity in small markets,<sup>49</sup> ultimately the Commission explicitly allowed greater concentration in smaller television markets because it preferred efficiency to diversity.<sup>50</sup> It decided to allow mergers below the competitive threshold in markets with fewer than twelve television stations on the justification that small market stations ostensibly face more difficult financial circumstances.<sup>51</sup> In this discussion, however, the Commission ignored the loss of diversity. The Commission did not balance its goals of diversity and efficiency but simply elevated one above the other.

Under the FCC's analysis, the public receives the same benefit from two television stations, or a television station with its own web site, repeating one public affairs program over and over every day as the public receives from two commonly-owned independent stations covering the same issues using competing news staffs and program formats. This action directly conflicted with the FCC's findings that it should promote multiple, diverse sources of local news. It also conflicted with the Commission's analysis, elsewhere in its 2003 Media Ownership Order, of local children's television programming, of cable television, and of magazines.

#### CONCLUSION

Many areas of controversy will swirl around the FCC's media ownership decision of 2003. In some respects, however, the 2003 FCC finally started down a path that may some day result in a meaningful and systematic analysis of media diversity and localism in the United States. However, that day has not yet come, as the Commission's analysis at this time still suffers from significant flaws.

The Commission explicitly failed in its treatment of local diversity when it separated the concepts of localism and diversity and rejected local diversity in favor of the so-called "efficiency" of local repetition. To preserve democracy at every level, citizens require multiple points of view on local issues, just as they require multiple points of view on

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49. See 2003 Broadcast Ownership Order, *supra* note 3, ¶ 449 ("[W]e continue to believe that unacceptable diversity losses can occur in very small markets when the principal distribution platforms for local news content come under common ownership and control.").

50. *Id.* ¶¶ 198-199 (comparing economic data from stations in larger markets to stations in smaller markets and finding that a graduated increase in smaller markets will improve the competitive position of stations in those markets).

51. *Id.* ¶ 201 (relying on evidence that "owners of television stations in small and mid-sized markets are experiencing greater competitive difficulty than stations in larger markets").

national issues. As the Commission recognized, diversity is even rarer and more threatened at the local level than at the national level.<sup>52</sup> Yet, this more threatened diversity received scant protection and attention from the agency as it focused on national concerns.

The Commission placed great weight on the Internet as an off-setting source of local information even though it lacked data to substantiate that finding. The Commission valued repetition of local content over new and independent local voices. Whatever else the Commission did right or wrong, these cannot be the appropriate policies upon which to base media regulation. When the Commission further considers these issues—for the sake of consistency and the preservation of vibrant federalism and democracy—it must take a further and more careful look at the intersection of diversity and localism.

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52. See 2003 Broadcast Ownership Order, *supra* note 3, ¶ 35 (determining that the multiplicity of perspectives by the media on issues affecting the country is more abundant than that of issues deemed as “local”).