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PROMOTING THE PUBLIC INTEREST THROUGH MEDIA OWNERSHIP LIMITS:
A CRITIQUE OF THE FCC'S DRAFT ORDER BASED ON RIGOROUS MARKET STRUCTURE ANALYSIS AND FIRST AMENDMENT PRINCIPLES

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May 2003

EXECUTIVE SUMMARY

COURTS SUPPORT PUBLIC INTEREST STANDARDS TO PROMOTE DIVERSITY IN MEDIA MARKETS; THEY WANT COHERENT POLICY ANALYSIS

While the Federal Appeals Court for the District of Columbia has issued decisions instructing the FCC to provide better justification for its rules, it has clearly stated that public policies to promote a more diverse media landscape are constitutional, even if they reduce economic efficiency. The notion that the courts have demanded that the FCC get rid of or substantially relax media ownership rules is simply wrong. The fact that the Court of Appeals has demanded a coherent analytic framework based on empirical facts does not necessarily indicate a relaxation of the limits on ownership is warranted. To the contrary, the court recognized that the limits could go be loosened or tightened.

In *Fox v. FCC*, for example, the court noted that "it is not unreasonable – and therefore not unconstitutional – for the Congress to prefer having in the aggregate more voices heard," even though "an industry with a larger number of owner may well be less efficient than a more concentrated industry." In *Sinclair v. FCC* the court thoroughly rejected Sinclair's claim that its First Amendment rights had been harmed by the duopoly rule and reminded the parties that the Supreme Court "saw nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the 'public interest' in diversification of the mass communications media."

THE DRAFT FCC ORDER IS FUNDAMENTALLY FLAWED

Yet, to the public's great detriment, we find that the FCC is not doing the one thing the court demanded – i.e. careful analysis of media markets keeping with longstanding principles of economic analysis. For example, one of the most important media ownership rules, the newspaper-broadcast cross-ownership prohibition, the FCC is:

- Looking at the wrong product (entertainment),
- Analyzing the wrong market (national news),
- Doing the market structure analysis incorrectly (not considering market shares), and

- Choosing a dangerously low standard.

The Supreme Court has repeatedly defined the public interest for electronic mass media by expressing a bold aspiration for the First Amendment declaring **the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.**

APPLYING HIGH STANDARDS IN RIGOROUS MARKET STRUCTURE ANALYSIS

While the goal of promoting diversity under the Communications Act is broader than the goal of protecting competition under the antitrust laws, the *Merger Guidelines* of the Department of Justice and the Federal Trade Commission are a useful starting point for analysis of media markets. For two decades the antitrust authorities have used these *Guidelines* – which are based on extensive theoretical and empirical evidence – to categorize markets for purposes of merger analysis.

- A market with the equivalent of 10 or more equal-sized firms is defined as **<u>unconcentrated.</u>**
- Markets with fewer than the equivalent of 10 but more than 6 equal-sized firms are considered **<u>moderately concentrated</u>**.
- Markets with the fewer than 6 equal-sized firms are **<u>highly concentrated</u>**.

Concentrated markets like these "raise significant competitive concerns" for antitrust authorities because they create market power that can be used to raise prices, reduce quality, or retard innovation. Those charged with promoting the public interest under the Communications Act should be more than concerned if media markets become this concentrated because of the broader goals of First Amendment policy.

To the extent the Commission chooses to rely on the analysis of commercial media markets, especially if different types of media are combined, caution is necessary and should be expressed in the form of rigorous analysis and high standards. Public policy should err in favor of more competition, which translates into greater diversity, to reflect the unique importance and role of media in promoting the robust exchange of views on which democratic dialogue and debate depends.

MEDIA MARKETS ARE ALREADY CONCENTRATED

The evidentiary record before the FCC shows that the mass media have not experienced an Internet or broadband revolution. Most people still get their news and information from TV and newspapers. Further, there is no simple common "currency" by which TV viewing and newspaper reading can be measured. In other words, is a half hour of TV worth an inch of newspaper space? Citizens do not easily substitute between these media, making it even more difficult to compare them. Different media are used in different ways, have different impacts, and play different roles in civic discourse. Rigorous analysis must recognize the distinct product markets and the importance of newspapers and television.

Using the standard antitrust market definitions, we find that lax First Amendment policy implementation and weak antitrust enforcement has resulted in American media markets that are shockingly concentrated, especially in light of the bold aspiration for the First Amendment.

- **<u>Every</u>** local television and newspaper market in the country is already concentrated.
- **<u>Every</u>** local newspaper market in the country is already highly concentrated.
- Over **<u>95 percent of the TV and radio</u>** markets are **<u>highly concentrated</u>.**
- Local TV news markets are **<u>much more concentrated</u>** than entertainment markets.
- Even adding together television and newspaper outlets, we find that **<u>virtually every local market is concentrated</u>.**
- National markets for prime time entertainment programming are concentrated and **<u>national TV news markets are highly concentrated</u>.**

The evidence provides strong support to those who feel the analysis of the media under the First Amendment jurisdiction of the Communications Act cannot be reduced to simple economic terms and that further relaxation of the rules on media ownership will lead to much more concentrated markets and decreased diversity of news and information sources.

THE FCC PROPOSAL EFFECTIVELY REPEALS THE PUBLIC INTEREST STANDARD, AFFORDING LESS PROTECTION FOR MEDIA MERGERS THAN THE ANTITRUST LAWS

Unfortunately, the proposed rules circulated by the Commission are driven by political deals, not rigorous analysis or high standards.

- The Commission has failed to define the product market properly, ignoring the fact that almost half of all broadcast stations do not provide news.
- It has ignored the local market, by counting stations and outlets that do little, if any local news.
- It has failed to conduct proper market structure analysis, by failing to consider the audience (markets shares) of the media outlets.
- The FCC has set a dangerously low standard for competition in local media markets allowing the count of major media voices to decline as low as three or four in many markets.

The result will be to allow markets to become extremely concentrated and the local news markets to be dominated by one huge media giant. There is no chance for effective competition between TV-newspaper combinations in as many as three-quarters of the markets in which such mergers would be allowed because there is only one dominant newspaper. Exhibits ES-1 and ES-2 graphically depict these markets.

- In one-paper cities, the local media giant would have a 90 percent share of the newspaper circulation, one-third of the TV audience, and one-third of the radio audience. No second entity could come close to matching this media power.
- In the typical two-paper town, the dominant firm would have four-fifth of newspaper market, and one-third of the TV and radio markets. The second firm would have a

paper with only one-seventh of the circulation. In most of these markets, the TV market is also highly concentrated.

We believe that the FCC would inappropriately allow mergers in 140 of the top 150 markets. Of those 140 markets, approximately 90 are one or two newspaper towns. Approximately 45 million households reside in these types of markets. In approximately 50 markets that have three or more papers, a merger between a newspaper and a TV station would render the local news media market concentrated. Exhibit ES-3 characterizes the 150 largest markets in which the draft order would allow cross-ownership mergers. Almost one half are one or two paper cities in which the TV news market is highly concentrated. One-sixth are one or two paper markets in which the TV market is moderately concentrated. One-quarter have three or more newspapers, but the TV market is highly concentrated. In only one-fifteenth of these markets the TV market is not highly concentrated and the total local news market unconcentrated. Exhibit ES-4 shows the cities most at risk of suffering from concentrated media power as a result of cross-ownership mergers.

The absurdity of the FCC's approach is readily apparent when the mergers it would allow are viewed in terms of the *Merger Guidelines.* Based on the record, we count newspapers and TV stations as equal voices and set radios equal to one-tenth of the market.

In one-paper cities, the pre-merger market is highly concentrated and the merger would raise the HHI by approximately 1200 points. The antitrust authorities believe mergers that raise the HHI by merely 50 points in a market such as this "are likely to create or enhance market power or facilitate its exercise." The increase in concentration that would pass the FCC's scrutiny is over twenty times the level that triggers antitrust concerns.

Two-newspaper markets would be somewhat less concentrated, but the FCC would still allow excessively high levels of concentration that would not support vigorous competition. This pre-merger market would fall just below the highly concentrated threshold and the merger would raise the HHI by over 900 points. This is over nine times the level that triggers antitrust concerns.

A RESPONSIBLE APPROACH

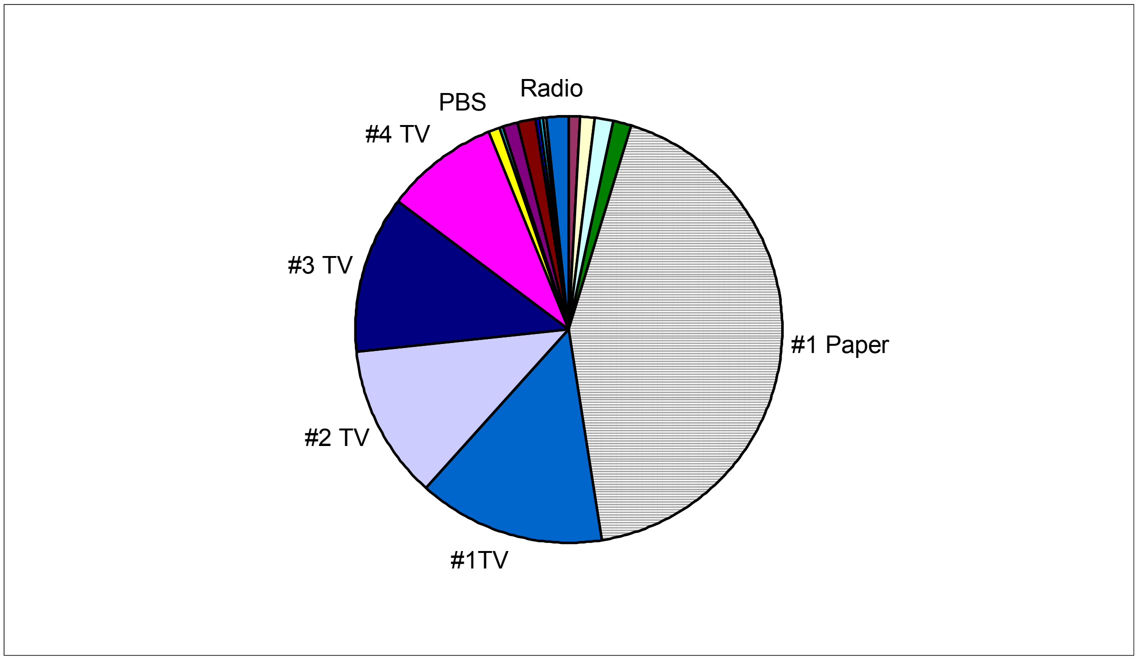
We believe that a set of rules based on rigorous analysis of the current structure in contemporary media, using careful geographic and product definitions and audience market shares, that adopts a high standard is consistent with the record in this proceeding. It would restrict merger activity to a small number of markets. Preventing the overall media market from becoming concentrated and individual product markets from becoming highly concentrated is a reasonably cautious standard.

- **No mergers between TV stations and newspapers should allowed if the overall media market in a locality is or would become concentrated as a result of the merger.**
- **No mergers involving TV stations should be allowed if the TV market in a locality is or would become highly concentrated as a result of the merger.**

This approach would allow cross-ownership mergers in ten of the largest markets.

EXHIBIT ES-1: IMPACT OF NEWSPAPER-TV MERGERS IN ONE-PAPER CITIES
(Based on TV Entertainment HHI and Newspaper Circulation HHI)

Pre-Merger Market



Post-Merger Market

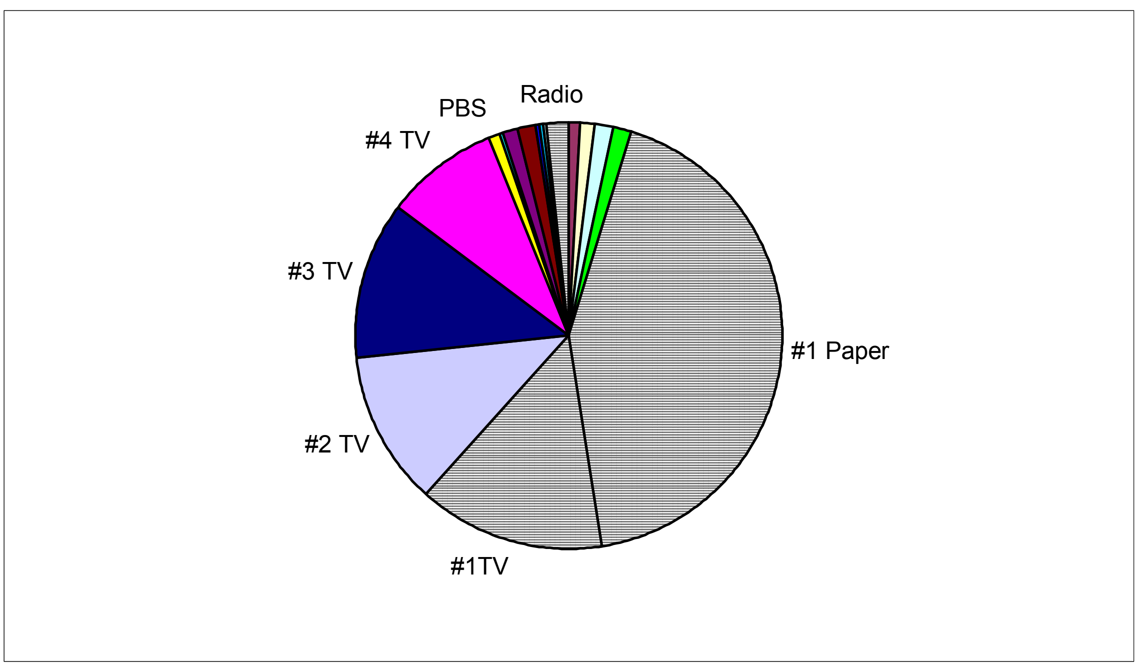
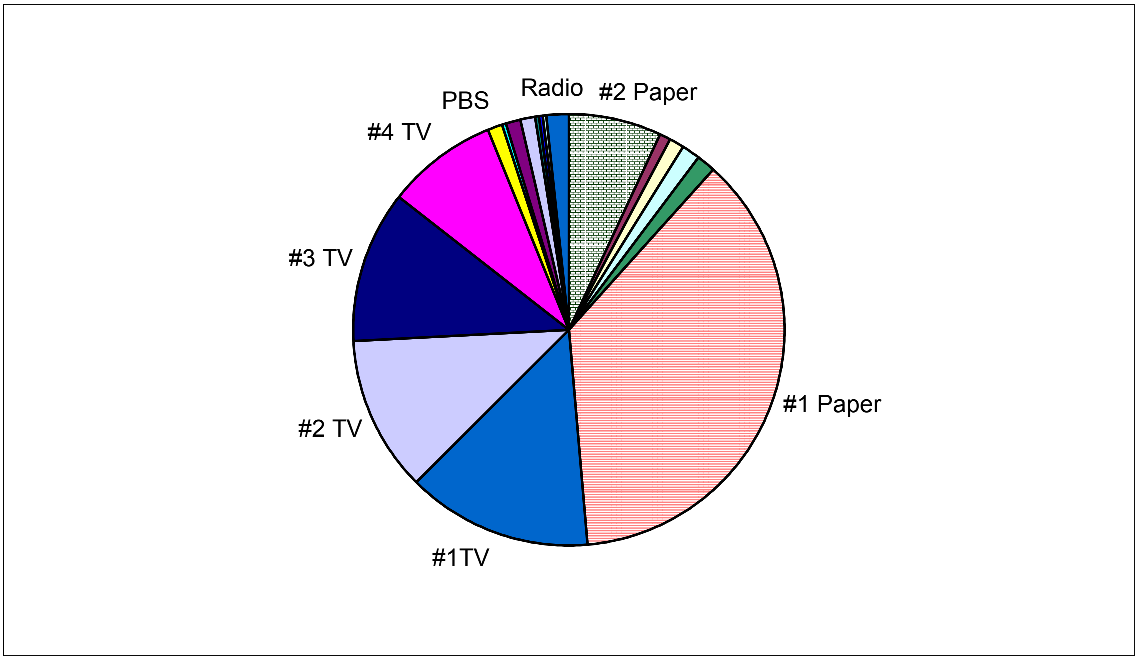


EXHIBIT ES-2: IMPACT OF NEWSPAPER-TV MERGERS IN TWO-PAPER CITIES
(Based on TV Entertainment HHI and Newspaper Circulation HHI)

Pre-Merger Market



Post-Merger Market

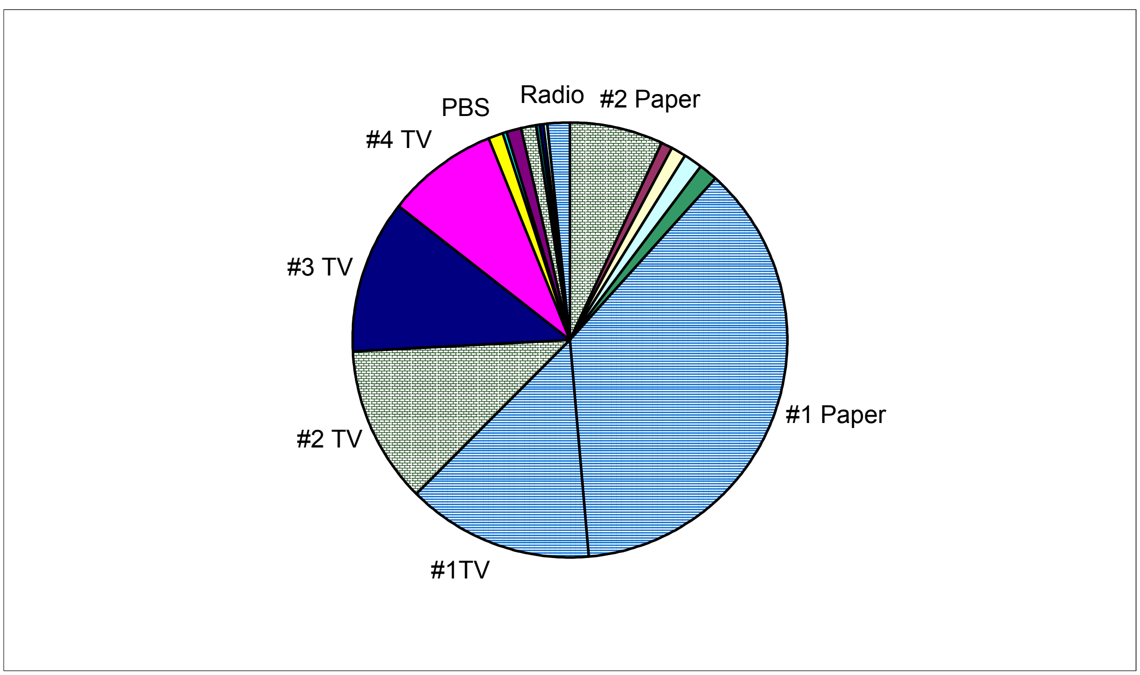


EXHIBIT ES-3: CONCENTRATION OF TOP 150 MARKETS

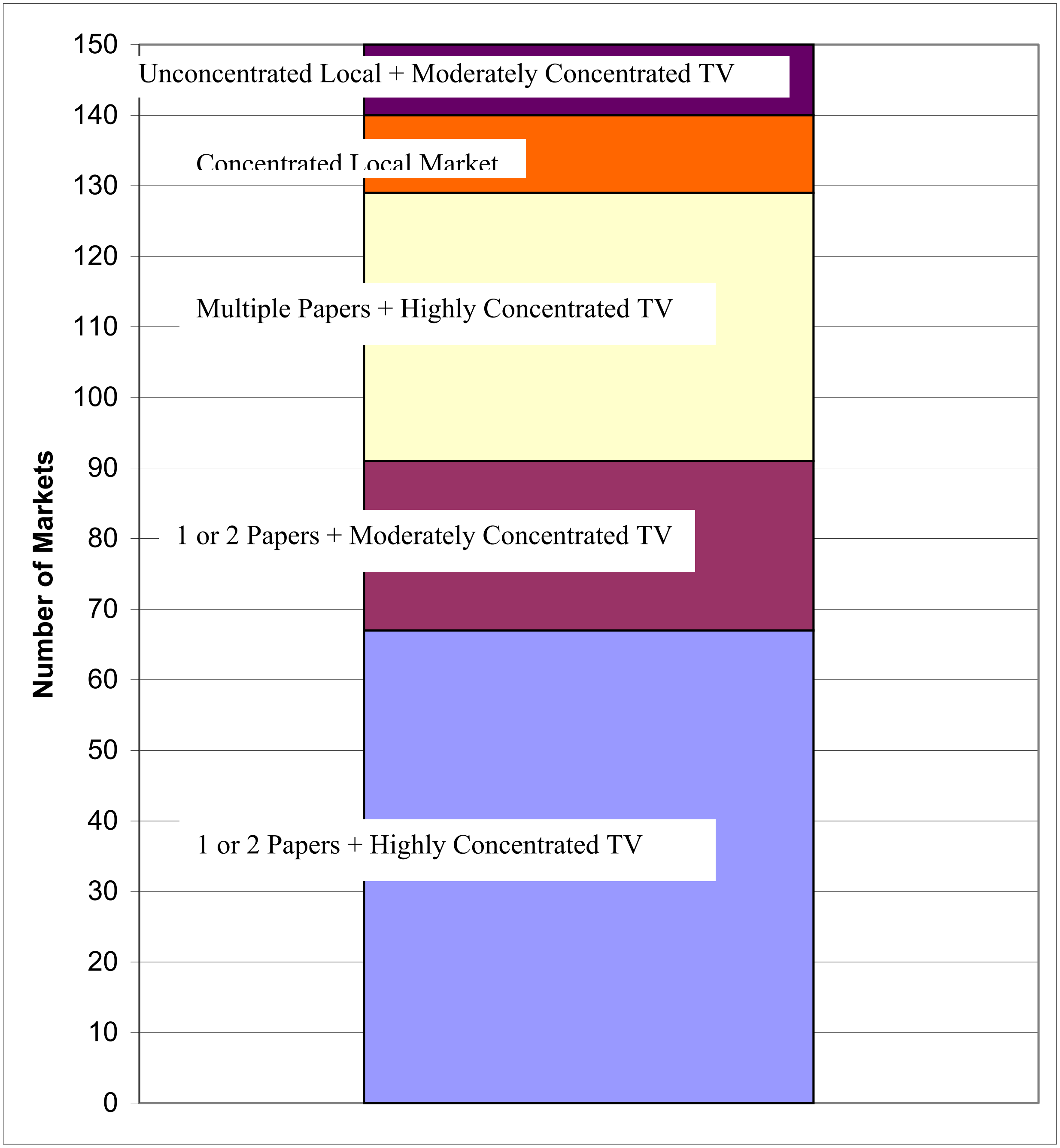


Exhibit 14: Most Concentrated News Markets For to Cross-Ownership Under the FCC Draft Order

One or Two Paper Markets Where TV News Market is Highly Concentrated

Albany, GA
Amarillo, TX
Atlanta, GA
Augusta, GA
Austin, TX
Baton Rouge, LA
Beaumont-Port Arthur, TX
Bluefield-Beckley-Oak Hill, WV
Boise, ID
Buffalo, NY
Charleston, SC
Chattanooga, TN
Chico-Redding, CA
Colorado Springs-Pueblo, CO
Columbus, GA
Columbus, OH
Columbus-Tupelo-West Point, MS
Dayton, OH
Des Moines-Ames, IA
Duluth, MN-Superior, WI
Evansville, IN
Fargo-Valley City, ND
Flint-Saginaw-Bay City, MI
Ft. Smith-Fayetteville-Springdale-Rogers, AR
Green Bay-Appleton, WI
Greenville-New Bern-Washington, NC
Harlingen-Weslaco-McAllen-Brownsville, TX
Jackson, MS
Joplin, MO-Pittsburg, KS
Knoxville, TN
La Crosse-Eau Claire, WI
Lafayette, LA
Lansing, MI
Lincoln-Hastings-Kearney, NE
Little Rock-Pine Bluff, AR
Louisville, KY
Macon, GA
Monroe, LA-El Dorado, AR
Montgomery, AL
Nashville, TN
New Orleans, LA
Norfolk-Portsmouth-Newport News, VA
Omaha, NE
Pittsburgh, PA
Portland-Auburn, ME
Reno, NV
Richmond-Petersburg, VA
Roanoke-Lynchburg, VA
Rochester, NY
Rockford, IL
Savannah, GA
Shreveport, LA
Sioux City, IA
Springfield, MO
St. Louis, MO
Syracuse, NY
Tallahassee, FL-Thomasville, GA
Terre Haute, IN
Toledo, OH
Traverse City-Cadillac, MI
Tucson, AZ
Tyler-Longview, TX
Wausau-Rhinelander, WI
West Palm Beach-Ft. Pierce, FL
Wheeling, WV-Steubenville, OH
Wichita-Hutchinson, KS
Wilmington, NC