multichannel providers, as well as with new print and computerized sources of news, information, and entertainment. Relief from the outdated cross-ownership restriction not only will help preserve broadcast stations and newspapers as viable voices, but also will spur their evolution into more diversified and innovative competitors in today's technologically advanced multimedia marketplace. Indeed, particularly in light of the recent overhaul of the radio ownership regulations and the Commission's ongoing proceedings regarding national and local television ownership and attribution, there is no logical reason to postpone a thorough review, reevaluation, and repeal of the newspaper/broadcast cross-ownership restrictions.

B. The Newspaper/Broadcast Cross-Ownership Ban Has Not Served to Promote Diversity.

As discussed above, the Commission promulgated the newspaper/broadcast cross-ownership rule with the "hope" of promoting diversity. After two decades of experience under the restriction, however, the evidence indicates that the rule has served not to further but to undermine that goal.

Indeed, in granting the Commission's consent to a permanent waiver of the rule to allow Rupert Murdoch to control both a daily newspaper and a television station in New York City, Commissioners Quello and Duggan both observed that the cross-ownership rule, by excluding local broadcast station owners as prospective buyers, had contributed to the demise of the Washington Star.[123] As Commissioner Duggan aptly

[123] See Fox Television Stations Inc., 8 FCC Rcd 5341, 5369 (1993) (Separate Statement of Commissioner Duggan).

noted, that result certainly was "[n]o victory for media diversity."[124] Unfortunately, Washington Star was not an isolated example. Between 1988 and 1993, at least 115 daily newspapers failed throughout the United States.[125] At least some of those papers might well have survived had local broadcasters been eligible to acquire struggling dailies in their home communities.

As noted above, evidence compiled by the Commission in the proceeding in which it adopted the restriction indicated that newspaper/broadcast cross-ownership fosters better local newsgathering and public affairs programming.[126] Ironically, then, the combinations banned by the Commission were shown to have done a better job of creating local non-entertainment, informational programming -- the type of programming at the very core of the Commission's diversity concerns -- than non-commonly owned stations.

This result, NAA submits, is not surprising; the FCC reached similar conclusions when it was considering whether to modify the one-to-a-market rule. There, the Commission determined that group ownership of broadcast stations enhances the availability of informational programming.[127] Further, the agency has concluded

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[124] Id.

[125] See Fox Television Stations Inc., 9 FCC Rcd 5246, 5249 n.10 (1994) (Separate Statement of Chairman James H. Quello) (Erratum).

[126] See Second Report and Order, 50 FCC2d at 1078, n.26.

[127] 1989 One-to-a-Market Decision, 4 FCC Rcd at 1748. The FCC has noted repeatedly that "combinational efficiencies derived from common ownership of radio and television stations in local broadcast markets and from common ownership of same service radio stations in local markets [are] presumptively beneficial and would
(continued...)

that group-ownership may also "enhance the quality of viewpoint diversity by enabling such stations to invest additional resources in programming and other service benefits provided to the public."[128]

There is no reason to believe that future newspaper/broadcast cross-owners would not provide excellent service to the public. Indeed, it only stands to reason that a newspaper dedicated to covering the issues and events affecting its local community would be equally committed to providing local news and programming over a commonly-owned broadcast facility. For example, in its recent request for a permanent waiver, Tribune Company identified a number of specific benefits that would result from its common ownership of the *Sun-Sentinel* and WDZL(TV).

> Under Tribune's ownership, WDZL(TV)'s 10:00 p.m. local news broadcast would be enhanced by access to Tribune's Washington, D.C. Media Center and by the resources of the *Sun-Sentinel*. Tribune would utilize the resources of the *Sun-Sentinel* and its associated Hispanic weekly publication *Exito* to broadcast monthly on WDZL(TV) new public affairs programs addressing issues of importance to the local Hispanic community. In addition, Tribune would draw upon particular resources of the *Sun-Sentinel* to develop children-oriented programming, including: (1) a weekly video version of "Next Generation" for broadcast in its new newscasts; (2) a series of one-minute viewpoint segments to be broadcast during children's programming; (3) a 30-minute news magazine for children ages 12 to 16 on "hard" news issues; (4) improved programming on parenting and children; and (5) public service campaigns concerning

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[127](...continued)
strengthen the competitive standing of combined stations." Golden West Broadcasters, 10 FCC Rcd 2081, 2084 (1995) (TV/FM/2 AM).

[128] Golden West Broadcasters, 10 FCC Rcd at 2084.

> important local issues and public safety, emphasizing child safety.[129]

Ironically, the Commission rejected Tribune's programming proposals as insufficient to satisfy the current "special circumstances" requirement, because the benefits identified by Tribune "appear to be of the type that would exist in virtually all newspaper/broadcast combinations."[130]

In sum, elimination of the newspaper/broadcast cross-ownership rule would help to enhance overall diversity by enabling more troubled local daily newspapers or stations to survive and, generally, allowing newspapers and broacasters to compete more effectively in the new multichannel information marketplace. In addition, it would help to achieve the Commission's goal of increasing the amount and improving the quality of news, public affairs, and local programming on radio and television broadcast stations.

C. Given the Explosion in the Number of Media Outlets and the Courts' Recent More Rigorous Scrutiny of Policies that Restrict Speech, the Newspaper/Broadcast Cross-Ownership Policy Is Not Supportable.

Nearly two decades ago, the FCC's newspaper/broadcast cross-ownership rule was sustained against a First Amendment challenge by the Supreme Court in FCC v. NCCB, in which the Court held that the restriction was a rational means of promoting

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[129] Tribune/Renaissance ¶ 38 (footnote omitted).

[130] Id. ¶ 49. Co-owners of multiple media outlets, moreover, have a strong economic incentive to differentiate the "products" offered on those outlets, in order to tap additional audiences or subscribership and maximize the overall reach of the commonly-owned facilities.

diversity in the mass media. As demonstrated above, however, the information marketplace in which newspapers and broadcast stations compete has changed dramatically since the Supreme Court's 1978 decision. The number of broadcast stations has increased greatly, along with the availability of a wide variety of alternative sources of information/entertainment and competing advertising outlets. Conversely, the number of daily newspapers has declined significantly.

Given these radical changes in the marketplace, NAA submits, the newspaper/broadcast cross-ownership ban is no longer justifiable.[131] Moreover, recent judicial actions such as those striking down the cable/telco ban[132] and the ban on alcohol price advertising[133] strongly suggest that the courts today would require a far stronger showing than was made in 1975 to support such a direct limitation on the free speech rights of a particular class of citizens. This dramatically changed competitive and legal environment demands that the Commission reassess not only the

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[131] Cf. Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989) ("Syracuse Peace Council"), cert. denied 493 U.S. 1019 (1990) (Court suggested that continued enforcement of the fairness doctrine may be arbitrary and capricious due to First Amendment infirmities); Bechtel v. FCC, 957 F. 2d 873, 881 (D.C. Cir. 1992) (Court directed FCC to review and explain the continuing appropriateness of the "integration" criterion used in comparative broadcast licensing cases in light of other changes in regulatory environment).

[132] Chesapeake & Potomac Telephone Co. v. U.S., 42 F.3d 181 (4th Cir. 1994) ("C & P v. U.S."), vacated and remanded sub nom., United States v. C & P, 116 S. Ct. 1036 (1996).

[133] 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996).

continued need for the rule, but also its validity under appropriate First Amendment scrutiny.[134]

1. **The Original Diversity Rationale Used to Justify the Rule Is No Longer Valid in Today's Highly Competitive Multimedia Marketplace.**

In adopting the rule in its 1975 Second Report and Order, the Commission stated that its primary concern was to promote diversity in broadcast voices.[135] Noting that its diversification policy is derived from both the First Amendment and economic sources, the FCC determined that "requiring competition in the market place of ideas is, in theory, the best way to assure a multiplicity of voices."[136] Despite the absence of any hard evidence in support of its position, the Commission adopted a prospective ban on newspaper-broadcast cross-ownership combinations and required divestiture in "egregious" cases where existing combinations were deemed to be effective monopolies.

The prospective ban and limited divestiture requirement were eventually upheld by the Supreme Court in FCC v. NCCB.[137] As the Supreme Court noted, there was

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[134] Indeed, in discussing the FCC's obligation to review its own rules, the D.C. Circuit has expressly stated that "changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so." Bechtel v. FCC, 957 F.2d at 881.

[135] 50 FCC2d at 1074.

[136] Id. at 1049.

[137] 436 U.S. 775 (1978), overturning Nat'l Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977) (in which the D.C. Circuit had found that the Commission erred in limiting the divestiture requirement to the so-called "egregious" cases).

little, if any, evidence of the exercise of market power (i.e., abuses such as maintaining artificially high advertising rates) by owners of co-located newspaper and broadcast stations.[138] The Court, however, determined that the agency "was entitled to rely on its judgment, based on experience, that 'it is unrealistic to expect true diversity from a commonly owned station-newspaper combination.'"[139]

Whatever merit the cross-ownership ban may have had two decades ago, it cannot be seriously disputed that the dramatic increase in the number of competing media and advertising outlets since 1975 has eroded the original justification for the policy. The meteoric rise in the number and variety of available voices in today's information marketplace, detailed above, compels the Commission to reevaluate this outmoded regulatory policy, which continues to single out newspaper publishers as ineligible -- as a class -- to hold licenses for broadcast stations in their local markets.

In fact, the FCC has repeatedly recognized the change in the level of competition in the mass media field in its decisions eliminating or substantially relaxing most of its other media ownership rules.[140] Moreover, the Commission has expressly

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[138] Id. at 786 ("In the Commission's view, . . . no pattern of specific abuses by existing cross-owners was demonstrated.").

[139] Id. at 776.

[140] See, e.g., Memorandum Opinion and Order and Further Notice of Proposed Rulemaking (Revision of Radio Rules and Policies), 7 FCC Rcd 6387 (1992) ("1992 Revision of Radio Rules") (noting "the dramatic increase in competition and diversity in the radio industry over the last decade" as basis for relaxation of radio ownership rules). See also, Syracuse Peace Council v. WTVH, 2 FCC Rcd. 5043 (1987) (recognizing the "explosive growth in the number and types of information sources available in the marketplace" as a factor in the unconstitutionality of the fairness doctrine); Evaluation of the Syndication and Financial Interest Rules, 8 FCC Rcd.
(continued...)

questioned the continuing validity of the notion, underlying the newspaper rule, that governmentally mandating a larger number of station owners necessarily results in greater diversity.[141]

Under such changed circumstances, NAA submits, the FCC has an affirmative obligation to reassess its cross-ownership policy. As the Court of Appeals made clear in Bechtel v. FCC, "[i]n the rulemaking context, . . . it is settled law that an agency may be forced to reexamine its approach 'if a significant factual predicate of a prior decision . . . has been removed.'"[142] In the Bechtel case, the D.C. Circuit concluded

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[140](...continued)
3282, 3288 (1993) (concluding that the increased competition facing networks and in the television programming marketplace have eliminated the danger to diversity of programming); Review of Prime Time Access Rule, 11 FCC Rcd 546, 556 (1995) (given the proliferation of outlets in the media market, repeal of PTAR would "not jeopardize the competition and diversity goals that prompted the Commission to adopt the rule in 1970").

[141] In other proceedings, the FCC has cited studies that indicate that even a monopolist would have the incentive to air diverse programming to generate the largest collective audience, in contrast to the Commission's previous view that "51 stations provide more diversity than 50." Further Notice of Proposed Rule Making (Review of the Commission's Regulations Governing Television Broadcasting), 10 FCC Rcd 3524, 3550-3551 (1995) ("But where one party owned all the stations in a market, its strategy would likely be to put on a sufficiently varied programming menu in each time slot to appeal to all substantial interests.") Id. (citation omitted). See also Revision of Radio Rules and Policies, 7 FCC Rcd 2755, 2771-72 (1992) ("In addition, commentors tend to agree with the Notice that greater combination will not harm diversity because, while competing stations might try to reach the same core audience, a single owner might try to program different stations to appeal to different audience segments in order to maximize its total audience size."); 1992 Revision of Radio Rules, 7 FCC Rcd at 6389 ("[T]he Commission concluded that relaxation of the national caps may actually enhance the quality of viewpoint diversity, as economies of scale from group ownership provide additional resources to invest in programming.").

[142] Bechtel v. FCC, 957 F.2d at 881 (quoting WWHT, Inc. v. FCC, 656 F.2d 807, 819 (D.C. Cir. 1981)).

that the FCC had an obligation to consider and explain whether its policy favoring "integration" of ownership and management in comparative hearings was still in the public interest in light of other regulatory changes. In fact, the court in Bechtel specifically cited the newspaper/broadcast rule and the wide policy latitude that the Supreme Court provided to the FCC as an expert agency in FCC v. NCCB as an example of the type of deference to agency expertise that imposes an on-going correlative duty to evaluate policy judgements over time.

> The Commission's necessarily wide latitude to make policy based upon predictive judgments deriving from its general expertise, see FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 814 (1978), implies a correlative duty to evaluate its policies over time to ascertain whether they work -- that is, whether they actually produce the benefits the Commission originally predicted they would.[143]

In rejecting Tribune's request for a waiver, the FCC asserted that the Bechtel holding was inapplicable to the newspaper/broadcast cross-ownership policy because the integration policy at issue in Bechtel had been adopted without notice and comment procedures. Although the D.C. Circuit found that the Commission's duty was "even more pressing" when the policy at issue is adopted "in a general statement of policy," the court explicitly held that the requirement that the FCC "reexamine its approach" applied "in the rulemaking context" as well.[144]

Similarly, in Cincinnati Bell Telephone Co. v. FCC, 69 F.3d 752 (6th Cir. 1995), the FCC was required by the court to reexamine its structural separation rules

[143] Id. at 881 (some citations omitted).

[144] Id.

for cellular service because "the factual predicate which justified the structural separation requirement is no longer valid."[145] In dismissing Tribune's reliance on this decision, the Commission concluded that it did not have to reach the "challenges to the constitutional and economic merits of the cross-ownership rule" since it was not involved in a "notice and comment rulemaking, as in Cincinnati Bell Telephone, where the underlying merits of a rule are properly considered."[146]

NAA respectfully submits that, when the underlying factual predicates of a policy decision have been eroded over time, the Commission has an on-going responsibility to evaluate these policies. As the Supreme Court has stated:

> If time and changing circumstances reveal that the "public interest" is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.

National Broadcasting Co. v. U.S., 319 U.S. 190, 225 (1943).

Having declined to consider Disney's and Tribune's arguments on the ground that they are properly addressed in a rulemaking, and not in individual adjudicatory proceedings, the Commission should not now continue to avoid or postpone a broad reexamination of the newspaper/broadcast cross-ownership restrictions. It is time to address the indisputable changes in both the underlying factual circumstances and in the regulatory environment that have occurred over the past two decades. Moreover, as it was directed to do in Syracuse Peace Council (FCC on remand required to reevaluate the constitutionality of its fairness doctrine), the Commission should carefully

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[145] Id. at 767.

[146] Tribune/Renaissance ¶ 54.

reevaluate the constitutionality of the anachronistic newspaper broadcast cross-ownership policy.[147] Indeed, NAA submits, First Amendment considerations must always inform the Commission's determination of the public interest. Failure to reexamine the newspaper cross-ownership ban in light of the changed circumstances over the past two decades would be patently unfair to newspaper publishers, who continue to be denied the regulatory relief that has been granted by Congress and the Commission to virtually every other media player.

2. Under the Courts' Recent More Rigorous Review of Restrictions Affecting First Amendment Interests, the Commission's Newspaper/Broadcast Policy Could Not Be Sustained.

In addition to the dramatic changes in the communications marketplace detailed above, the Commission must recognize that First Amendment jurisprudence also has evolved considerably since 1978. The courts have grown increasingly skeptical of limitations on speech that are employed to accomplish non-speech related goals such as the protection of competition. Applying even the least searching form of scrutiny applicable in cases that implicate significant First Amendment interests, the Commission's stated rationale -- that the newspaper/broadcast rule is necessary to preserve diversity and competition -- clearly fails in today's prolific mass media marketplace.

[147] Syracuse Peace Council, 867 F. 2d at 656 ("an agency could not blind itself to a constitutional defense to a 'self-generated' policy") (citation omitted).

a. The Newspaper/Broadcast Cross-Ownership Ban Could Not Be Sustained Under the "Intermediate Scrutiny" Test.

As discussed in the following section, since newspaper publishers have to date been denied the benefits of deregulatory initiatives that have eliminated or relaxed most of the FCC's former media ownership limitations, and thus are singled out for disparate treatment, the newspaper cross-ownership ban should be subjected to "strict scrutiny." Assuming that the newspaper/broadcast cross-ownership prohibition would be treated as content-neutral, however, it would still be subject to today's more rigorous "intermediate scrutiny." Under that test, the Commission would be required to show, at a minimum, that the rule "furthers an important or substantial governmental interest" and that the "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[148] NAA submits that, in view of the immense changes that have occurred in the video programming market since the rule's adoption, there no longer exits (if there ever did) any substantial governmental interest justifying an outright ban on cross-ownership.

Moreover, even if a reviewing court were to determine that the newspaper/broadcast rules are intended to further some substantial governmental interest, they could not be found to be sufficiently narrowly tailored to satisfy current judicial standards. For example, in C & P v. U.S.,[149] the Fourth Circuit found a

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[148] U.S. v. O'Brien, 391 U.S. 367, 377 (1968).

[149] 42 F.3d 181 (1994).

similar provision, the cable/telco cross-ownership ban, unconstitutional. In so doing, the court first reaffirmed that cable television service is a form of "speech" protected by the First Amendment. Because the cross-ownership provision challenged in that case impaired a telephone company's ability to engage in this form of protected speech, it was found to infringe upon the company's First Amendment rights. The court concluded that the restriction should be subject to intermediate scrutiny -- i.e., that the restriction must be shown to advance a substantial governmental interest in a narrowly tailored manner. The Fourth Circuit agreed with the United States that the government had a significant interest in (1) preventing telephone companies from discriminating against non-affiliated cable companies in the use of either telephone poles or telephone wires; and (2) preserving diversity in the market of electronic access (i.e., preserving the availability of two wires to every home). The court concluded, however, that the prohibition against local telephone companies offering cable television service was not narrowly tailored to serve the stated purposes.

On the contrary, the court concluded that there were simpler and more efficient means of guaranteeing cable companies access to telephone poles and wires. For example, Congress could have limited telephone companies' editorial control over video programming to a fixed percentage of the channels available, and required them to lease the remaining channels to other video programmers. Further, the court pointed out that the legislation did not prevent cross-subsidization from one monopolized industry to another, as telephone companies were still free to enter the video delivery service market. Finally, the court concluded that the restrictive provisions did not provide telephone companies with sufficient alternative means of communication.

Although the government argued that telephone companies still would be able to sell their programs to other cable systems or TV stations, the court rejected this contention. Unlike other video programmers, a telephone company cannot guarantee that its programming will reach the desired audience. The court concluded that, to the extent that telephone companies would be forced to rely upon other local broadcasters and cable operators for distribution, the restriction unconstitutionally regulated a telephone company's ability to compete in the video programming market.

Similarly, the Supreme Court recently invalidated a ban on liquor advertising that had the effect of increasing prices.[150] Applying an intermediate scrutiny test, the Court struck down Rhode Island's ban on all advertising of alcoholic beverage prices outside liquor stores as broader than necessary to accomplish the state's goal of lowering alcohol consumption. The Court held that there were less restrictive means of accomplishing the government's goal that did not limit speech, such as the imposition of a price floor.

In fact, applying intermediate scrutiny, the Supreme Court often has struck down regulations that impinge on protected speech interests as insufficiently narrowly tailored. For example, the Court recently held unconstitutional a federal law prohibiting beer labels from displaying alcohol content, noting that many alternatives were available that "could advance the Government's asserted interest in a manner less

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[150] See 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495.

intrusive to respondent's First Amendment rights."[151] Applying this narrow tailoring requirement, the Court has made it clear that the government may not restrict commercial speech if non-speech-restrictive alternatives are available to serve the government's interest.

NAA submits that, as in C & P Telephone and Coors, there are certainly less restrictive, more narrowly tailored alternatives available than the outright ban on newspaper/broadcast cross-ownership that is in place today. For example, even absent the newspaper/broadcast ban, newspaper publishers would remain subject to the rules limiting radio and television station ownership in general. Further, to the extent the Commission seeks to promote and preserve economic competition (e.g., for advertising revenues), it may appropriately rely on the antitrust laws and defer to the Department of Justice and/or the Federal Trade Commission for enforcement.

NAA recognizes that the Supreme Court recently upheld the must-carry provisions under the intermediate scrutiny standard in Turner Broadcasting System, Inc. v. FCC.[152] After remanding the case for additional factual findings, the Court

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[151] Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1593 (1995). See also Central Hudson Gas & Elec. Corp. v. Public Service Comm'n., 447 U.S. 557, 566 (1980) (in which the Supreme Court stated that when the government seeks to restrict speech, it has the burden of demonstrating a substantial interest, and that the restrictions imposed are "not more extensive than is necessary" to advance those interests); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 418 (1993) (in which the Court invalidated an ordinance prohibiting the use of newsracks to distribute commercial handbills, holding that "if there are numerous and obvious less burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable.").

[152] 117 S. Ct. 1174 (1997) ("Turner II").

held that the expanded record contained substantial evidence supporting Congress's predictive judgement that the must-carry provisions further important governmental interests in preserving cable carriage of local broadcast stations. The Supreme Court, however, deferred to Congress' findings on the issue, and not to long-outdated agency predictions, concluding that it "owe[d] Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power."[153] Moreover, in Turner, the Court deferred to Congress's conclusion that eliminating the restriction could endanger the very existence of broadcast voices, because "cable operators possess a local monopoly over cable households."[154] Newspaper operators, of course, have no such "bottleneck" power with respect to broadcast outlets.

Finally, the Turner Court concluded that "[t]he reasonableness of Congress' conclusion was borne out by the evidence on remand, which also reflected cable industry favoritism for integrated programmers."[155] In contrast, there was no evidence at the time of the newspaper/broadcast restriction's adoption of any harm to competition. In fact, there has never been any reliable evidence that newspaper/broadcast cross-owners pose any significant competitive threat.

In sum, when examined under the intermediate scrutiny standard, the newspaper/broadcast ban is no longer justified. There is no need to maintain a complete ban on local newspaper/broadcast cross-ownership to foster diversity in the

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[153] Id. at 1189.

[154] Id. at 1190.

[155] Id. at 1191.

marketplace. On the contrary, technological advances and growth in the marketplace already have provided the "hoped for" gain in diversity the 1975 cross-ownership ban was intended to foster. Indeed, particularly in light of the Commission's recent easing of the application of the one-to-a-market rule, which now routinely allows one entity to own at least one television station, two AM, and two FM stations, and other recent and proposed relaxations of its media ownership limitations, there is certainly no basis for the FCC to continue to preclude newspaper publishers from owning any same-market broadcast stations.

b. The Commission's Newspaper/Broadcast Rule Disproportionately Burdens Newspapers and Therefore Should Be Subject To Strict Scrutiny, Under Which It Would Surely Fail.

In the past, broadcast regulations were held to be subject to a lesser degree of constitutional scrutiny based on the notion that the scarcity of broadcast frequencies allowed a larger role for government regulation. See, e.g., Red Lion Broadcasting Co. v. FCC.[156] The media world has changed so dramatically, however, that the original spectrum scarcity rational that underlies the Red Lion doctrine no longer justifies a lower level of judicial scrutiny for broadcast regulation than for other forms of media. In fact, more than a decade ago, the Supreme Court recognized that new technology such as "cable and satellite television" -- and the resulting access to diverse

[156] 395 U.S. 367, 389 (1969).

programming that communities have -- may render the scarcity doctrine "obsolete."[157] At that time, the Court declined to reconsider the Red Lion doctrine "without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."[158] In its 1985 reexamination of the fairness doctrine, "the Commission sought to respond to the Supreme Court's invitation," finding "explosive growth of information sources -- in both traditional broadcasting sources (radio and television) and new substitutes for broadcasting such as cable TV, SMATV, VCRs, and LPTV."[159] Reviewing this agency action, the D.C. Circuit concluded that:

> In essence, the [Commission's] Report found that the "scarcity rationale," which has historically justified content regulation of broadcasting, is no longer valid.[160]

Thus, the scarcity rationale can no longer be invoked to justify any lesser degree of constitutional scrutiny of the newspaper/broadcast cross-ownership restrictions.

Moreover, because in the current regulatory environment the rules have a disparate impact on newspaper publishers, they should in fact be examined under the strict scrutiny applied to regulations that are in fact content-related. In upholding the

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[157] FCC v. League of Women Voters of California, 468 U.S. 364, 376-77, n.11 (1984). See also News America Publ'g., Inc. v. FCC, 844 F.2d 800, 811 (D.C. Cir. 1988) ("The Supreme Court ... has recognized that new technology may render the [broadcast scarcity rationale] obsolete -- indeed, may have already done so.").

[158] FCC v. League of Women Voters of California, 468 U.S. at 376-77, n.11.

[159] Meredith Corp. v. FCC, 809 F.2d 863, 867 (D.C. Cir. 1987).

[160] Id. at 867 (internal citations omitted). See also id. at 873 ("The FCC has issued a formal report that eviscerates the rationale for its existing regulations.")

newspaper/broadcast restriction in 1977, the Supreme Court concluded that newspapers were not "singled out" in violation of the First Amendment for disparate regulatory treatment because "the regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communications were already treated under the Commission's multiple ownership rules."[161] As described above, since that decision, many of the Commission's other ownership rules have been loosened, invalidated or repealed.[162] Newspaper publishers remain limited, however, by the same restrictions that were put in place two decades ago. Thus, maintenance of the newspaper/broadcast cross-ownership restrictions places newspapers at a distinct disadvantage, a situation that is particularly inappropriate in light of the special constitutional status of the press.[163] Clearly, if the ownership ban were subjected to strict scrutiny, it could not be sustained.

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[161] FCC v. NCCB, 436 U.S. at 801.

[162] See, e.g., Broadcast Radio Ownership, 61 Fed. Reg. 10689 (1996) (to be codified at 47 CFR 73.3555) (eliminating national multiple radio ownership restrictions and allowing ownership of up to eight commercial radio stations in largest markets). See also 1989 One-to-a-Market Decision, 4 FCC Rcd 1741 (1989), recon. granted in part and denied in part, 4 FCC Rcd 6489 (1989) (the Commission amended the one-to-a-market rule to specify that radio and television combinations in the Top 25 television markets will be presumed to be in the public interest if 30 independently-owned, operated and controlled broadcast licensees (radio and television "voices") will remain after the proposed combination); C & P v. U.S.,42 F.3d 181 (4th Cir. 1995) (cable/telco cross-ownership ban declared unconstitutional, prior to its repeal by the Telecommunications Act of 1996).

[163] See, e.g., New York Times v. Sullivan, 376 U.S. 254 (1964). See also Minneapolis Star & Tribune v. Minnesota Comm'n of Revenue, 460 U.S. 575, 583 (1983) (concluding that "a regulation that singled out the press" imposes "a heavier burden of justification on the State").

In sum, NAA submits that the Commission has an obligation to review the legality of its newspaper/broadcast cross-ownership ban in light of the substantial changes in the information marketplace in the two decades since the rule was adopted, as well as the increasingly stringent requirements of applicable judicial precedent.[164] Upon such review, NAA is confident that the Commission will conclude that the cross-ownership restriction may no longer be maintained.

VII. CONCLUSION

For the reasons set forth above, NAA submits that the Commission should move forward now to give broadcasters and newspaper publishers the freedom to compete effectively with cable and other multichannel providers, as well as with the host of new print and electronic sources of news, information and entertainment. Relief from the outdated cross-ownership restriction not only will help preserve broadcast stations and newspapers as viable voices, but will spur their evolution into more diversified and innovative competitors in today's technologically advanced multimedia marketplace. Accordingly, NAA submits, the Commission should promptly initiate a rulemaking

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[164] See Syracuse Peace Council, 867 F.2d 654.

proceeding to repeal the newspaper/broadcast cross-ownership prohibition now set forth in Section 73.3555(d) of the Rules.

Respectfully submitted,

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Section 73.3555(d), 47 C.F.R. § 73.3555(d), reads as follows:

(d) *Daily newspaper cross-ownership rule.* No license for an AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in:

(1) The predicted or measured 2 mV/m contour of an AM station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community in which such newspaper is published; or

(2) The predicted 1 mV/m contour for an FM station, computed in accordance with § 73.313, encompassing the entire community in which such newspaper is published; or

(3) The Grade A contour for a TV station, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.