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Federal Communications Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:	)	
	)	
1998 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules Pursuant to Section 202 of the Telecommunications Act of 1996	)	*MM Docket No. 98-35*
	)	
Newspaper/Radio Cross-Ownership Policy	)	*MM Docket No. 96-197*
	)	*MM Docket No. 98-35*
	)	

COMMENTS OF WEST VIRGINIA RADIO CORPORATION ON NAA PETITION FOR EMERGENCY RELIEF

Respectfully submitted,

WEST VIRGINIA RADIO CORPORATION

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SUMMARY

West Virginia Radio Corporation ("WVRC"), a broadcast licensee with common ownership of a publisher of a daily newspaper, supports the petition for emergency relief filed by the Newspaper Association of America ("NAA") filed on August 23, 1999. As a grandfathered newspaper-broadcast entity, WVRC is precluded from acquiring any additional radio stations in its market, and must stand by watching its competitive position in the marketplace continue to erode due to artificial barriers imposed by government regulation.

WVRC shares the belief of NAA that, unless the newspaper-broadcast cross-ownership ("NBCO") rule is immediately suspended so as to permit newspaper publishers to acquire broadcast properties in their own market, irreparable harm will occur. If the rule is ever eliminated in due course, at that point the benefits will be insubstantial, as opportunities for newspaper-broadcast combinations will have been snapped up in the "land rush" that is predicted to follow shortly as a result of the Commission's recent deregulation of the television duopoly and one-to-a-market rules.

Both the realities of today's media marketplace, and the Commission's own recent deregulatory moves establish a complete basis for immediate suspension of the NBCO rules, followed by complete repeal. The NBCO rules are no longer needed to achieve media diversity, and their continued retention is counterproductive, contributing to the continuing decline of both the number of daily newspapers in this country as well as overall circulation.

Finally, WVRC wishes to stress that the NBCO rules are totally inconsistent with the provisions of the First Amendment. These rules permit the government to specify who shall, and who shall not be speakers in a marketplace. Whatever may have been adequate grounds for ownership restrictions more than two decades ago, are no longer so. The Constitution demands that outmoded laws restricting freedom of expression be eliminated.

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To: The Commission

COMMENTS OF WEST VIRGINIA RADIO CORPORATION ON NAA PETITION FOR EMERGENCY RELIEF

Comes now WEST VIRGINIA RADIO CORPORATION ("WVRC"), by Counsel and pursuant to Sections 1.41 and 1.401(a) of the Rules [47 CFR §§1.41, 1.401(a)], hereby respectfully submits these Comments in support of the "Emergency Petition for Relief of the Newspaper Association of America." In support whereof, the following is shown.

I. PRELIMINARY STATEMENT

A. THE NAA PETITION

1. On August 23, 1999 the Newspaper Association of America ("NAA") filed a pleading entitled, "Emergency Petition for Relief of the Newspaper Association of America." The Petition requested the Commission to take the steps necessary to repeal its long outdated rule prohibiting the common ownership of a daily newspaper and a radio or television station in the same market.[1] In that Petition, NAA argued

[1] 47 CFR §73.3555(d) (*hereafter*, "Newspaper/Broadcast Cross Ownership" or "NBCO" rule.

that (1) the Commission has not fulfilled its legal obligation to repeal or modify *all* of those ownership rules that no longer serve the public interest; (2) the FCC's failure to act will serve to irreparably exclude newspaper publishers from participating in the consolidation opportunities created by the Commission's new local television ownership rules; and (3) the factual and legal underpinnings of the NBCO rule have been eliminated by marketplace developments and the Commission's own actions.

2. WVRC agrees with NAA, and supports its Petition. By dealing with its ownership rules in piecemeal fashion, the Commission has created a situation that is harmful and prejudicial to newspaper publishers who seek to acquire broadcast properties in the same market. To rectify this situation, the Commission should issue an emergency *Order* immediately suspending enforcement of the NBCO rules.

B. WVRC'S INTEREST.

3. WVRC is a West Virginia corporation and licensee of Radio Stations WAJR (AM) and WVAQ (FM), Morgantown, West Virginia, and WSSN (FM), Weston, West Virginia.[2] The principals of WVRC own 100% of the stock of West Virginia Newspaper Publishing Company, publishers of the Morgantown DOMINION POST, a daily newspaper having general circulation in the city of Morgantown, West Virginia.[3] Two of the three shareholders of the newspaper Publishing company sit on the boards of directors of both the Publishing company and the WVRC broadcasting companies. Apart from this level of participation, the newspaper company and broadcasting companies share no staff and no operating facilities. News gathering and reporting

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[2] Through affiliated companies, principals of WVRC have ownership interests in radio broadcast licensees in Charleston, West Virginia (WCHS-WKWS, WCAW-WVAF, and WSWW AM, Charleston, WV and WKAZ (FM), Miami, WV), Clarksburg, West Virginia (WFBY), and WAJR-FM, Salem, WV.

[3] Paid circulation of the DOMINION-POST is approximately 20,120 (Source: 1999 EDITOR & PUBLISHER *MARKET GUIDE*, p. II-448). The newspaper-broadcast combination is a "grandfathered" facility under 47 CFR §73.3555(d), having been in existence prior to 1975.

staffs and facilities of the two companies are completely separate and do not interact. Nor is there a joint sales staff. The two entities (publishing and broadcasting) have historically been operated completely separately.

4. Morgantown is in close proximity to both Fairmont, West Virginia, and Clarksburg, West Virginia.[4] Each of these three communities has its own daily newspaper. Clarksburg is served by the Clarksburg EXPONENT-TELEGRAM, a daily newspaper having a combined morning and evening circulation in excess of 19,195.[5] Fairmont is served by the Fairmont TIMES-WEST VIRGINIAN, a group-owned daily newspaper having a paid circulation in excess of 15,800.[6] Both the daily newspapers and radio stations licensed to the communities compete for listeners/readers and advertising dollars in all three communities. The West Virginia counties of Preston and Monongalia (in which Morgantown is located) are included in the Pittsburgh Television DMA (Nielsen Designated Market Area, #19), which has thirteen (13) television signals. The Clarksburg-Weston DMA (#164) has three (3) television signals.[7]

5. Based on engineering studies conducted on behalf of WVRC in 1993 and 1994, it was determined that there are at least 21 commercial radio stations placing a city-grade signal over one or more of these communities. Under the current local radio ownership rules contained in the Telecommunications Act of 1996 and

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[4] The three communities make up the "Morgantown-Clarksburg-Fairmont" Radio Market, ranked by Arbitron as #187 in the Fall of 1998. SOURCE: BROADCASTING & CABLECASTING Yearbook, 1999, p. D-699.

[5] 1999 EDITOR & PUBLISHER YEARBOOK *MARKET GUIDE*, p. II-445.

[6] *Id.*, p. II-446.

[7] BROADCASTING & CABLECASTING YEARBOOK, 1999, pp. B-170 (Clarksburg-Weston, #164), B-214 (Pittsburgh, #19).

implemented by the Commission,[8] WVRC could own up to six commercial radio stations, four of which could be in the same service–*but for* the newspaper-broadcast crossownership rules.

6. As a grandfathered newspaper-radio combination, WVRC thus has a direct interest in the outcome of this proceeding, and supports the adoption of policies by the Commission that would promote diversity through the immediate lifting of artificial barriers on the ownership and control of electronic Communications entities which inhibit the full and robust exercise of freedom of expression by these entities.

7. More specifically, WVRC shares NAA's belief that the Commission's Newspaper-Broadcast Cross-Ownership Rule should be eliminated in its entirety or *substantially* relaxed to permit joint ownership, joint operating agreements, or other joint ventures of commercial radio stations and publishers of daily newspapers in all but "egregious cases," in order to take advantage of economies of scale in the marketplace.[9]

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[8] *Order*, FCC 96-90, released March 8, 1996, effective March 15, 1996 (61 FED. REG 10689), amending 47 C.F.R. §73.3555(a).

[9] If the Commission decides not to eliminate the NBCO rules completely with respect to radio broadcasting, WVRC believes that both the rule as well as the waiver policy needs to be changed in order to achieve the necessary result. To require a waiver showing, for example, in *every* case of a proposed combination, even when there are a multitude of other radio and television signals as well as other media sources, would be an unwise and extremely wasteful utilization of the Commission's resources. As noted above, failure to provide immediate relief in the form of an immediate suspension of the NBCO rule, will cause irreparable harm to newspaper publishers. The alternative, as outlined by NAA, would be to stay the effective date of the new television local ownership rules.

II. THE NEWSPAPER/BROADCAST CROSSOWNERSHIP RULES SHOULD BE IMMEDIATELY REPEALED OR ENFORCEMENT SUSPENDED

8. WVRC respectfully submits that continued enforcement of the NBCO rule no longer serves the stated public interest goals of promoting competition and diversity, is counterproductive to effective competition among media, and places significant and unjustified barriers to the exercise of First Amendment rights. The following analysis is advanced to support this thesis.

9. Section 202(h) of the Telecommunications Act of 1996 authorized, and, in fact *required,* the Commission to review *all* of its ownership rules biennially as part of its regulatory reform review under the newly-amended Section 11 of the Communications Act of 1934. More specifically, the Commission was directed to:

> [D]etermine any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.[10]

The Commission has yet to meet its obligation under this Section with respect to the NBCO Rule.

A. IMMEDIATE REPEAL OF THE NBCO RULE IS WARRANTED

10. WVRC shares the concern of NAA[11] that the Commission's recent action relaxing the television duopoly and one-to-a-market rules[12] will create a "land rush" for television and radio owners that excludes participation by newspaper-broadcast

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[10] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, §202(h) (1996).

[11] NAA Petition, pp 6-11.

[12] *Review of the Commission's Regulations Governing Television Broadcasting,* FCC 99-209, MM Docket Nos. 91-221 and 87-8 (Report and Order) ("*1999 Television Ownership Order*").

owners.[13] It is clear that, with respect to the revised television duopoly rule, late-comers will find themselves locked out, as television consolidation reduces the number of independently-owned stations in markets to fewer than eight. This amounts to patent discrimination against newspaper owners, since the same rationale used by the Commission to justify relaxation of the television ownership rules, clearly applies to the newspaper-broadcast crossownership rule as well.

B. MARKETPLACE DEVELOPMENTS AND AGENCY ACTIONS HAVE ELIMINATED BOTH THE FACTUAL AND LEGAL RATIONALE FOR THE NBCO RULES

1. The NBCO Rules are No Longer Needed to Achieve Media Diversity

11. In 1978, the Supreme Court upheld the Commission's NBCO rule as a "reasonable administrative response to changed circumstances in the broadcasting industry."[14] The Court made reference to the Commission's statement in the *Order* adopting NBCO[15] that at one time, the Commission had actually encouraged co-ownership of newspaper and broadcast facilities because of a shortage of qualified license applicants. However, by 1975, the Commission had concluded that a sufficient number of qualified and experienced applicants other than newspaper owners was now available. In addition, at that time the number of new channels open for new licensing had diminished substantially.

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[13] "FCC Will Permit Owning 2 Stations in Big TV Markets: 'Land Rush' is Expected," NEW YORK TIMES, Aug. 6, 1999 at A1, C5. That the Commission itself expects such a "land rush" is evidenced by its recent *Public Notice* seeking comment on how the Commission should choose between same-day filed assignment applications where the order of approval would by necessity preclude the grant of one of the applications due to the reduction in the minimum number of "voices" required by the new rules. *See, "Commission Seeks Comment on Processing Order for Applications Filed Pursuant to the Commission's New Local Broadcast Ownership Rules."* (FCC No. 99-240).

[14] *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

[15] *See, Newspaper Broadcast Cross Ownership Policy*, 50 FCC 2d 1046, 32 RR 2d 954, 1032 (1975).

12. From a public policy perspective, a significant basis for overturning the regulatory constraints against newspaper-broadcast cross ownership is that *changed circumstances* warrant their elimination. Since "changed circumstances" was the basis for the Supreme Court finding the NBCO Rules reasonable over twenty years ago, the same rationale must be used today to justify their immediate repeal. The record already compiled in MM Docket Nos. 96-197 and 98-35 is replete with more than adequate documentation and analysis.[16]

13. Two decades after the adoption of the NBCO Rules, it has become very clear that changed circumstances had eliminated the need for the rules, and that their continued enforcement was exacerbating the problem of declining newspaper ownership and readership as an alternative media. Between 1975 and 1987, for example, the number of dailies had declined from 1,756 to 1,645–a reduction of 111 newspapers. And, while total circulation of dailies during the same period had increased by approximately 2.2 million, it had declined as a ratio of population growth, from 28.15% to 25.93%.[17]

14. Based upon the data collected *since* 1987, WVRC concludes that the trend is not slowing down, but accelerating. Between 1987 and 1998, for example, 136 more dailies ceased operation, bringing the total down from 1,645 to 1,489.[18] Even more alarming is the fact that U.S. daily newspaper circulation since 1987

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[16] *See,* NAA Petition at pp 15-16. *See also,* MM Docket No. 98-35, "Comments of West Virginia Radio Corporation," filed July 21, 1998.

[17] As shown by statistics from subsequent years set forth below, this increase in circulation was short-lived.

[18] SOURCE: Newspaper Associate of America, *Facts About Newspapers, 1999*, p. 11.

actually *decreased* by over *six million,*[19] having declined every year, in fact, between 1987 and 1997, except for 1991.[20] When one compares this negative trend with the phenomenal growth of the electronic media (which has continued unabated since 1987), a significant case can continue to made–in fact more telling since 1987–that the NBCO Rules are not only no longer necessary but actually may be hastening the demise of the local daily newspaper.

2. *Continued Enforcement of the NBCO Rules is Counterproductive.*

15. From the above statistics, it may be concluded that continued enforcement of the NBCO Policy is counterproductive to the stated goals of "diversity." The print media has taken a disturbing downturn since the adoption of the Policy. In an attempt to keep daily newspapers viable, Congress in 1970 enacted the NEWSPAPER PRESERVATION ACT.[21] The Act exempted newspaper joint operating agreements from the application of the federal antitrust laws, if, at the time of the arrangement, not more than one of the newspaper publications involved in the performance of such an

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[19] In 1987, total daily (*i.e., morning and evening*) circulation was at an all-time high of 62,826,273. By 1997, total daily newspaper circulation had dwindled to 56,727,902, a loss of 6,098,371. SOURCE: NAA, *Facts About Newspapers, 1999, supra*, at 12.

[20] *Id.* According to the Audit Bureau of Circulations, an independent publication circulation verification firm, daily newspaper circulation for the six-month period ending March 31, 1999 decreased slightly, by 0.5% compared with the same period a year ago. Sunday circulation for the same period decreased by 1%. SOURCE: NAA, "The Audit Bureau of Circulations (ABC) *Fas-Fax* Report showed a slight circulation dip for dailies," www.naa.org/circulation/index.html

[21] PUBLIC LAW 91-353, 15 U.S.C. §1801.

arrangement was likely to remain or become a financially sound publication.[22] There are presently 14 joint operating agreements in effect.[23]

16. Continued enforcement of the NBCO Policy is thus in conflict not only with the Commission's policy of diversity but the public policy expressed by Congress in the implementation of the NEWSPAPER PRESERVATION ACT as well.[24] WVRC respectfully submits that continued enforcement of a policy which tends to reduce diversity and effective competition is directly and fundamentally contrary to the public interest.

17. Continued enforcement of the NBCO Policy will continue to diminish broadcast program service. In its initial Rule Making adopting the NBCO Policy, the Commission acknowledged that stability of the industry and continuity of ownership served important public interest purposes because they encouraged commitment to program quality and service.[25] That co-located newspaper-broadcast combinations had provided "undramatic but nonetheless statistically significant superior" program service in a number of program particulars was too clear in the record to be denied by the Commission.[26]

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[22] *See* 15 U.S.C. §§1801-1803.

[23] NAA, *Facts About Newspapers, 1999 ("Newspaper Joint Operating Agreements"), supra*, p. 26.

[24] That Congress apparently acted inconsistently with the Act, by prohibiting in its 1987 appropriations bill the FCC from conducting Rule Making proceedings to repeal the NBCO Policy, is explained by the political motivations of the Congressional Leaders at the time. Based upon the remarks of some U.S. Senators during the debate, it was clear that the appropriations rider was retaliatory in nature against Rupert Murdoch (whose newspapers had been highly critical of Senator Kennedy and others), and an attempt to suppress free speech. *See, NewsAmerica Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988).

[25] *See, Newspaper Broadcast Cross Ownership Policy, supra*, Note 15.

[26] *Id.*

18. The Commission has also recognized in other contexts that the amount of available capital has a significant relationship to the quality of program service provided. Although one might argue that the acquisition of a troubled newspaper by a radio broadcast licensee (or *vice versa*) would necessarily diminish the capital available to the broadcaster, the opposite is true. Greater economies of scale through a greater revenue base and considerations of space, consolidation, and accounting would yield additional financial resources made available for both programming and newspaper circulation without jeopardizing editorial independence. Accordingly the elimination of the Newspaper-Broadcast Cross Ownership Policy would serve to enhance broadcast service and have the added public interest benefit of providing additional economic stability to the print media.

C. CONTINUED ENFORCEMENT OF THE NBCO RULES IS INCONSISTENT WITH THE FIRST AMENDMENT.

19. The ownership regulations that broadcasters must observe were put in place to maximize outlets for local expression and ensure diversification of programming. Unfortunately, the regulations no longer effectuate these policies. Eliminating the stringent ownership rules would allow radio broadcasters to compete more effectively with other media, thereby ensuring quality and diversity in programming for the public. The ownership rules not only stifle productivity, but also infringe upon broadcasters' First Amendment rights: radio broadcasters are prevented from freely selecting the media to present their programming to the public, and are also denied the ability to bargain for better programming. The structural limitations placed on broadcasters thus eliminate from particular markets and the public major providers of information.

20. To be constitutional, governmental regulations which favor certain classes of speakers over others must be supported with a compelling state interest.[27] In *Turner Broadcasting Systems, Inc. v. FCC*, 114 S. Ct. 2445, 2468, 75 RR 2d 609 (1994), the Court reaffirmed that "[r]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." Regulation which restricts the speech of some elements of society in order to enhance the relative voice of others is presumed invalid. *Buckley v. Valeo*, 424 U.S. 1 (1976). Such discrimination constitutes an indication that the rule's purpose is to regulate the message provided by certain speakers, and is highly suspect. The fact that the restrictions may operate against only a small group of speakers is irrelevant.[28] The scarcity and diversity rationales do not adequately justify such rules in light of the enormous amount of programming and information available to consumers.

21. From a First Amendment perspective, radio broadcasting can hardly be considered unique when compared to other mass media information sources. The First Amendment would be better served by placing broadcasters on equal footing

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[27] *Home Box Office*, 567 F.2d at 47-48 (D.C. Cir. 1977).

[28] *C&P Telephone*, 76 RR 2d at 995.

with other information providers.[29] In short, "[T]he public interest in diverse . . . options is best served by deferring to the marketplace."[30]

22. Moreover, it has long been held that regulations that impose First Amendment burdens on speech must be closely tailored to further an important government interest.[31] If diversity is the interest served by the ownership rules, then the regulations are overinclusive. One has only to look at the diversity of programming and sources in most major markets to realize that these concerns are overstated.

23. For the reasons advanced above, the continued enforcement of the Newspaper-Broadcast Cross-ownership rule no longer serve the public interest and raise serious questions of consistency with First Amendment principles. It is clear that, absent a sufficiently important and continuing compelling governmental interest, regulations which either directly abridge freedom of expression or, by their application restrict such expression, are constitutionally suspect. *United States v. O'Brien, supra.*

24. There can be no dispute over whether NBCO restrictions impinge upon the newspaper publisher's and broadcaster's First Amendment rights. Although the regulation professes to be content neutral, restricting only common ownership of

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[29] The incredible explosion of electronic mass media outlets, including Cable TV with audio channels, Direct Audio Radio Services ("DARS"), Direct Broadcast Television Service ("DBS"), MDS, IVDS, electronic billboards compact disks, video games for home computers, telephone dial-up audio programming services, local computer bulletin board services ("BBS"), and the vast reaches of cyberspace *via* the Internet–all new and competing technologies since the adoption of the NBCO Rules in 1975–has placed the information consumer in a position of having too many, not too few, choices to obtain information and other programming. All of these "real time" information sources compete for the attention and dollars of the information consumer, who only has 24 hours in a day to partake of these varied services.

[30] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (1985).

[31] *United States v. O'Brien*, 391 U.S. at 377 (1968).

broadcast facilities and daily newspapers in the same market, and not the content of their expression, those regulations discriminate among speakers in the mass media market, based on the nature of the medium used for speech, and are thus highly suspect. Further, the entire *basis* for the rule is the assumption, by the Commission, that common ownership will necessarily mean common editorial and other policies—clearly a *content*-based regulation. It necessarily follows that restrictions on ownership impinge directly on freedom of expression by determining who may speak and who may not. The rules dictate where a broadcaster may exercise his freedom of expression, which is contrary to the well established principle that government may not condition the receipt of a public benefit on the relinquishment of a constitutional right – especially the right to freedom of expression.[32] Moreover, given the current availability of programming and other information sources, it cannot be concluded that the present multiple ownership rules are sufficiently narrowly tailored to meet the standards set forth in *United States v. O'Brien, supra.* Certain broadcasters are denied the right to acquire additional broadcast licenses solely because the government is trying to promote goals that have already been achieved – diversity of opinion and marketplace competition.

25. A government regulation which restricts or otherwise has an adverse impact on an individual's or group's freedom of expression is justified only to the

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[32] *See, Perry v. Sinderman*, 408 U.S. 593, 597 (1972); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Shapiro v. Thompson*, 394 U.S. 618 (1968). *See also, Buckley v. Valeo*, 424 U.S. 1 (1974), wherein the Court held that forced choices in the Federal Election Campaign Act which limited expenditures of individuals or groups supporting a candidate were held to be an unconstitutional abridgment of freedom of speech. In striking down that part of the legislation, the Court rejected the notion that Government, under the Constitution, could act to equalize the relative ability of individuals and groups to influence the outcome of elections. Rather, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment..." 424 U.S. at 48-49.

extent that (a) it furthers an important or substantial governmental interest (*i.e.*, one that addresses an evil that the government has the right to prevent), (b) is unrelated to the suppression of content of speech, or (c) the incidental restriction upon freedom of expression caused by enforcement of the regulation is no greater than necessary to achieve that interest. *United States v. O'Brien, supra.*

26. The two primary reasons why the FCC adopted numerical ownership restrictions and the duopoly and one-to-a-market rules were to further the policy of promoting diversity of viewpoints in media markets, and prevent monopolistic practices within the broadcast industry. Both goals were in turn based upon the scarcity rationale, and the need to ensure that all markets were provided with a sufficient diversity of viewpoints. Under the circumstances existing when the rules were first promulgated, the rules were justified under the *O'Brien* test set forth above.[33] However, given the fact that the Commission has officially proclaimed that the goal of diversity has been achieved in virtually all media markets, it must follow that restrictions on freedom of expression can no longer be justified by reference to such a goal. It has been observed that scarcity is an inappropriate basis for broadcast regulation of First Amendment speech.[34] Even assuming that scarcity should serve

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[33] *See also, Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Mt. Mansfield Television v. FCC*, 442 F.2d 470, 21 RR 2d 2087 (2d Cir. 1971).

[34] In *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 61 RR 2d, 330, *reh. denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987), the court noted that use of the scarcity rationale as an analytic tool in connection with new technologies inevitably leads to strained reasoning and artificial results.

> "It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of Broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce . . . Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion." (*footnotes omitted*)

as a standard for government oversight, it is well established that the scarcity rationale no longer exists. The Commission has, on numerous occasions, emphasized that there is a sufficient increase in the number and diversity of program outlets to warrant a variety of deregulatory actions.[35] Except for a handful of "egregious cases," where antitrust considerations might warrant some scrutiny of media ownership, such diversity guarantees an absence of monopolization of the means of expression in a given media market. Whatever validity the current NBCO rules may once have had, it no longer exists.

27. Where the underlying public interest consideration for a regulation is no longer valid, the rule cannot withstand constitutional scrutiny. *See, Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) ("Even a statute depending for its validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears."); *Home Box Office v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977) ("[R]egulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." [citations omitted]). Accordingly, WVRC submits that the Newspaper-Broadcast Cross-ownership rules that presently restrict common ownership of daily newspapers and commercial broadcast stations be eliminated.

28. Alternatively, WVRC would recommend that the Commission narrowly tailor its NBCO rules to prohibit newspaper-radio cross-ownership only in "egregious

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61 RR 2d at 337.

[35] *See, e.g., Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC 2d 17 (1984), *recon.*, 100 FCC 2d 74 (1985) (revising the seven-station rule to permit ownership of up to twelve stations); *Fairness Doctrine Alternatives*, 2 FCC Rcd 5272 (1987), *recon.*, 3 FCC Rcd 2035 (1988), *aff'd. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989) (eliminating the fairness doctrine as unnecessary because of the diversity of voices and opinion in broadcast and other media).

cases," *i.e.*, those radio markets[36] where less than two (2) other independently-owned mass media voices[37] would continue to exist following the acquisition or merger. WVRC acknowledges that few, if any markets would have so few outlets, which is simply to acknowledge that the goal of diversity of voices has already been met. To restrain newspaper-owned broadcast media, where other electronic and print media have no such restrictions, is to warp the playing field, giving a competitive advantage to those other media. It is time to level that playing field, and to let the market decide which voices will prevail, both economically, and in the hearts and minds of the people.

CONCLUSION

29. Equitable principles and administrative due process requires the Commission to treat all of its regulatees fairly. It is clear that, by adopting amendments to the television ownership rules contained in the *1999 Television Order*, without simultaneously relaxing or repealing the NBCO rule, the Commission has engaged in a kind of discrimination that will ultimately have the effect of making any subsequent relaxation of the NBCO rule a hollow gesture.

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[36] The definition of radio market is, obviously, imprecise. WVRC would propose that the Commission adopt the definition that is contained in §73.3555(a) of the Rules pertaining to local radio ownership.

[37] Since the NBCO rules pertain to a form of mass media crossownership, logic dictates that the counting of other independent "voices" in such a market should not be limited merely to commercial radio stations, but should include commercial *and* noncommercial radio and television stations, cable television systems, MDS licensees, and other daily newspapers having significant circulation within the defined market.

WHEREFOR, the above premises considered, WVRC respectfully urges the Commission to issue an Order directing that the Newspaper-broadcast crossownership rule be immediately SUSPENDED, and AMENDING Section 73.3555 of the Rules by DELETING subsection (d) thereof, and take such other steps as are consistent with the relief requested herein.

Respectfully submitted,

WEST VIRGINIA RADIO CORPORATION

By: _____
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CERTIFICATE OF SERVICE

I, David M. Hunsaker, a Member of the Law Firm of **Putbrese Hunsaker & Trent, P.C.**, hereby certify that I have on this 17th day of September, 1999, caused to be sent, by United States Mail, postage prepaid, a true copy of the foregoing "**Comments of West Virginia Radio Corporation on NAA Petition for Emergency Relief**" upon the following:

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