marketplace will continue to flourish. This is especially true at the local level, where the Internet empowers any citizen to stand on a "virtual soapbox" and air his or her views to the community.

B. The Market for Delivered Audio Programming Is Already Remarkably Diverse, and New Technologies Will Soon Deliver Even More Audio Programming Choices to Consumers.

1. Virtually Every Market Has a Substantial Number of Radio Stations Offering An Ever-Expanding Array of Format Options.

As NAA demonstrated in its Petition for Rulemaking, the number and variety of broadcast radio stations have increased dramatically since 1975.[122] The total number of licensed radio stations has skyrocketed and continues to do so -- in the past year alone, the FCC licensed 148 new radio stations.[123] As a result, even in the smallest radio markets there are several radio stations available to listeners. Indeed, of the 267 Arbitron metro markets, 124 markets (46.4 percent) are served by more than 20 total radio stations, and nearly every radio market (241 of 267 or 90.3 percent) has over 10 radio stations.[124]

As might be expected, this large number of stations has resulted in a remarkable evolution in program format diversity in recent years. Broadcasting & Cable Yearbook last year recognized 91 distinct radio formats, in contrast to the fifteen formats it tracked as

[122] See NAA Petition at 18-19.

[123] There were 8,094 licensed radio stations in the U.S. in January 1975. By the end of March, 1997, the number had increased to 12,128 radio stations. As of May 1998, the Commission reported 12,322 licensed radio stations. Broadcast Station Totals as of May 31, 1998, FCC Mimeo No. 83989 (June 19, 1998) ("Broadcast Station Totals").

[124] See BIA Research Inc., Radio Market Report 1998 at Table 2.

recently as 1982.[125] BIA lists even more formats -- 209 total -- including 40 separate varieties of "news/talk" stations, the most diverse of the 17 major format categories listed.[126] With this range of available formats, it is no surprise that there are over 300 syndicated radio programmers,[127] not to mention dozens of regional radio networks and national radio programming options available to listeners as well.[128]

2. Cable, DBS, Direct Audio Satellite Service, and Internet-Delivered Audio Programming Give Consumers Many More Choices for Audio Programming Than Have Ever Before Been Available.

Besides traditional over-the-air radio programming, consumers now have several alternative means of obtaining delivered audio programming. Many cable systems have begun to offer audio programming as a subscription service. These services deliver 30 or more channels of commercial free, CD quality music, news, religious broadcasting, and information to millions of subscribers. One provider, Music Choice, claims over 4 million subscribers.[129] Another, Digital Music Express Inc. ("DMX"), now serves over 2.2 million homes and 50,000 businesses in the United States.[130] DMX also provides 30 channels of audio

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[125] See NAA Petition at 19.

[126] See BIA Research Inc., Radio Market Report 1998 at 15.

[127] See Radio Business Report; Source Guide and Directory, vol. 5, at 3-6 to 3-23 (1997).

[128] See NAA Petition at 19-20.

[129] See <http://www.musicchoice.com/frmwho.html> (visited July 10, 1998).

[130] See <http://www.dmxmusic.com/s01p10.html> (visited July 10, 1998).

programming to all subscribers of the Primestar DBS service.[131] Consumers who wish to receive DMX programming without subscribing to cable or DBS can get DMX-direct, a satellite dish system which features over 90 channels of commercial-free audio programming.[132]

Another new audio programming option for consumers is Digital Audio Radio Service or "DARS," which is slated to be rolled out nationwide next year.[133] DARS is a satellite-based radio service which can deliver an all-digital line-up of as many as 100 channels of audio programming. In April 1997, the FCC auctioned two DARS licenses for a total of $173 million to American Mobile Radio Corp. and Satellite CD Radio Inc., clearing the way for the two companies to launch their new services.[134] CD Radio plans to offer a subscription service consisting of 50 channels of commercial-free, digital quality music programming, 40 channels of news, sports and specialty programming, and 10 channels of all-Hispanic programming.[135]

But perhaps the most stunning developments in terms of diversity in the market for delivered audio programming have been on the Internet. In the past two years, real-time delivery of audio programming has become a mainstay of Internet content. Hundreds of

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[131] See <http://www.dmxmusic.com/S02/S02P03a.html> (visited July 10, 1998).

[132] See <http://www.dmxmusic.com/> (visited July 10, 1998).

[133] See Richard Siklos, David Margolese's Radio Play: Can the Man Who Dreamed Up Cellular Communications Make People Pay for Radio? Margolese Thinks He Can, and He Has Believers, The Financial Post, Mar. 7, 1998 at 18.

[134] See DARS Auction Closes, Raising $173 Million, Wash. Telecom News, Apr. 7, 1997.

[135] See CD Radio Inc., SEC Form 8-K, Current Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act Of 1934 (filed June 1, 1998).

traditional over-the-air radio stations are now rebroadcasting over the Internet. One website, the BRS Radio Directory, lists 709 U.S. and Canadian radio stations that "netcast" their programming.[136] In addition, the guide lists 478 radio stations in 80 foreign countries that Internet users can tune in on their home computers.[137]

With Internet-based audio programming, anyone, anywhere, with an audio card-equipped computer and a modem can listen. So, too, can anyone broadcast. As a result, there are already well over 100 Internet-only radio stations broadcasting on a wide range of subjects.[138] One Internet-only broadcaster, Amazon City Radio, was launched to provide "women-oriented music, talk, news, spoken word and public affairs programming" on the Internet.[139] Another Internet-only program, InetRadio, is a weekly radio broadcast for kids run by a 13-year-old webmaster.[140] A San Diego-based Internet site offers 1700 songs from local San Diego artists,[141] and another Internet-only station broadcasts all-Hawaiian music.[142]

Larger Internet audio suppliers provide a dizzying quantity of audio programming. For example, through Broadcast.com, a free Internet radio service, users have access to over

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[136] See <http://www.radio-directory.com/analysis.html> (visited July 10, 1998).

[137] See <http://www.web-radio.com/in_a.html> (visited July 10, 1998).

[138] See <http://www.web-radio.com/it_a.html> (visited July 10, 1998).

[139] See <http://radio.amazoncity.com/> (visited July 10, 1998).

[140] See <http://www.globalkids.com-us.net/inetradio/webmaster_bio.html> (visited July 10, 1998).

[141] See <http://www.ksdm.com/> (visited July 10, 1998).

[142] See <http://hotspots.hawaii.com/IRH-Home.html> (visited July 10, 1998).

50,000 hours of audio programming each week.[143] Broadcast.com is organized into 14 programming channels including news, public affairs, special interest, live radio, spiritual, sports and technology.[144] In sports, Broadcast.com directs users to live play-by-play broadcasts of over 200 teams.[145] The public affairs channel features live broadcasts from the John F. Kennedy School of Government's Arco Forum of Public Affairs;[146] speakers have included "Mikhail Gorbachev, Corazon Aquino, Bill Clinton, the Dalai Lama and many other national and international leaders from politics, public affairs, and the arts."[147] Broadcast.com also includes a CD Jukebox and the AudioBook Channel, where users can listen to any of 2000 full length CDs and audiobooks.[148]

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[143] See <http://www.broadcast.com/faq/> (visited July 10, 1998).

[144] See <http://www.broadcast.com> (visited July 10, 1998).

[145] See <http://www.broadcast.com/faq/> (visited July 10, 1998).

[146] See <http://www.broadcast.com/events/ksg/> (visited July 10, 1998).

[147] See id.

[148] See <http://www.broadcast.com/faq/> (visited July 10, 1998). Of course, the incredible richness of audio content available on the Internet should come as no surprise to the FCC; the agency itself has been offering live and previously recorded audio broadcasts of selected Commission events via the Internet since the end of 1996. See New FCC Site For Audio Broadcast Over The Internet Established, Public Notice (Dec. 13, 1996); see also <http://www.fcc.gov/realaudio/> (visited July 10, 1998).

C. In Contrast to 1975, When the Commission Adopted the Newspaper/Broadcast Cross-Ownership Restriction, Diverse Video Programming Is Now Available From a Broad Array of Providers.

1. The Variety of Available Over-The-Air Television Programming Alternatives Continues To Expand and Will Afford Viewers Even More Options With the Emergence of Digital Television.

The market for delivered video programming has changed dramatically since 1975. To start, the total number of licensed television broadcast stations has increased from 1,010[149] to 1,579,[150] an increase of more than fifty percent. But, more importantly, over-the-air television content is vastly more diverse than ever before. As NAA explained in its Petition for Rulemaking, even six years ago, when the FCC released a study of the video marketplace, 95 percent of all television households were located in markets with five television stations or more, and the majority of television households in markets with ten television stations or more.[151]

Not only are multiple over-the-air television content options universally available to viewers, but ratings data demonstrate that viewers are, in fact, receiving programming from a diverse range of television sources. Content simply is not dominated by the "big three" networks (ABC, CBS, and NBC) as it was twenty-three years ago. Indeed, the big three have become the "big four," as the Fox Television Network has emerged as a significant force in

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[149] See OPP Report, 6 FCC Rcd at 4013-14.

[150] See Broadcast Station Totals, supra n.123.

[151] See NAA Petition at 20.

the television landscape.[152] Moreover, the combined viewership of these four networks has declined significantly. In the 1993-94 television season, the four major networks maintained a combined 72 percent share of prime-time viewers.[153] That figure fell to a 58 percent share of prime-time viewers for the 1996-1997 television season -- a 19 percent drop.[154]

In addition to Fox, two new broadcast networks, UPN and WB, have emerged as significant alternative over-the-air voices. Not only are these networks widely available to viewers, but consumers are, in ever increasing numbers, choosing to watch their programming. This season, UPN and WB achieved a combined 9 percent share of prime-time viewing.[155] A seventh network, PaxNet, is scheduled to launch its brand of family-oriented programming in August, 1998, via a combination of 78 over-the-air television stations and cable systems in markets reaching more than 72 million US television households.[156]

Moreover, in the past year, it has become clear that the emergence of digital television service will create a host of new outlets for over-the-air video programming, along with a

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[152] See, e.g., Evaluation of the Syndication and Financial Interest Rules, 8 FCC Rcd 3282, 3804-05 (1993) (Second Report and Order).

[153] See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, 9 FCC Rcd 7442, 7492 (1994) (First Report)("1994 Competition Report").

[154] See Broadcasting Network Prime Time Ratings According to Nielsen, Broadcasting & Cable, June 29, 1998, at 70.

[155] See id.

[156] See Paxson Communication Corp. Signs Agreement With Nielsen Media Ratings Service, Business Wire, May 7, 1998; see also <http://www.businesswire.com/webbox/bw.050798/687248.htm> (visited July 10, 1998); see also John M. Higgins, Paxson Renders Unto TCI, Broadcasting & Cable, May 4, 1998 at 6.

variety of other digital data services. The DTV service rules adopted by the Commission allow broadcasters to transmit one or two high definition television pictures, multiple streams of standard definition television, or a combination of the two.[157] Indeed, the Commission has recognized that "[o]nce broadcast television stations convert from analog to digital television, . . . they will have an option to offer multiple channels of video service during all or part of the broadcast day."[158] In the very near future, the number of available broadcast programming outlets therefore is likely to increase dramatically.

2. Cable Television Has Evolved Into a Rich Source of National, Regional, and Locally Oriented Video Program Content.

When the Commission first adopted the newspaper/broadcast cross-ownership rule in 1975, it certainly did not foresee the role cable television would play in creating an abundantly diverse market for delivered video programming. In 1975, cable was largely insignificant -- only 17 percent of U.S. television households even subscribed to cable.[159] As NAA demonstrated in its Petition for Rulemaking, however, today cable television service is universally available and provides viewers with the option of accessing a multitude of

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[157] See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, 12 FCC Rcd 14588 (1997) (Sixth Report & Order) and 12 FCC Rcd 12810 (1997) (Fifth Report & Order). Under the DTV construction schedule established by the Commission, affiliates of the top four networks in the top ten markets are required to begin digital transmissions by May 1, 1999. By November 1, 1999, digital television signals should be available to more than half of all television households, and all commercial stations are obligated to finish DTV roll-out by May 1, 2002. See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, 13 FCC Rcd 1034, 1092 (1998) (Fourth Annual Report)("1997 Competition Report").

[158] 1997 Competition Report, 13 FCC Rcd at 1092.

[159] OPP Report, 6 FCC Rcd at 4008-09.

alternative programming sources.[160] Indeed, cable subscribership, already remarkably high, continues to rise. In 1990, 55.8 percent of television households subscribed to cable.[161] By 1994, that number had increased to nearly 60 percent,[162] and it now has risen to 66.2 percent of all households.[163]

More importantly, nearly all cable subscribers are served by systems with large channel capacities -- 96.2 percent of subscribers are served by systems with 30 channels or more.[164] More than half of the nation's cable subscribers, 57.2 percent, are served by systems with 54 channels or more.[165] Complementing the growth in available channel capacity has been an increase in the number of programming options available to consumers. Just four years ago there were 106 cable programming services, the majority of which were owned, in whole or in part, by cable MSOs.[166] In recent years, the number of cable-owned programming services has remained relatively steady, increasing from 56 in 1994[167] to 68 in 1997,[168] while the number of

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[160] See NAA Petition for Rulemaking at 21-23.

[161] 1994 Competition Report, 9 FCC Rcd at 7481.

[162] Id.

[163] 1997 Competition Report, 13 FCC Rcd at 1049.

[164] Warren Publishing, 1998 Cable & TV Factbook at I-97.

[165] Id.

[166] See 1994 Competition Report, 9 FCC Rcd at 7589-92, app. G, tables 3-4.

[167] See id. at 7589-90, app. G, table 3.

[168] See 1997 Competition Report, 13 FCC Rcd at 1213-16, app. F, table F-1.

independent cable programming services has more than doubled, increasing from 50 in 1994,[169] to 104 in 1997.[170] Today, there are 170 national and regional cable programming networks -- the majority of which are not affiliated with a cable operator.[171] And independent programming options will continue to grow at an extraordinary rate. While only five new programming services affiliated with cable operators are expected to be launched in the near future, 72 new independent programming services are now in the works.[172]

Further, as the Commission has recognized, cable viewership in the past decade "has grown significantly, while viewership of broadcast television stations has steadily declined."[173] Just ten years ago, the 24-hour a day, 7-day a week audience of all non-premium cable programming was a dismal 11.5 percent of television viewers.[174] Last season, over one-third, 36.25 percent, of televisions were tuned to cable programming,[175] and in July, 1998, "[f]or the first time, the cable networks topped the top four broadcasters for a week by every available Nielsen Media Research measurement -- total viewers, ratings, and audience share."[176]

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[169] See 1994 Competition Report, 9 FCC Rcd at 7591-92, app. G, table 4.

[170] See 1997 Competition Report, 13 FCC Rcd at 1217-21, app. F, table F-2.

[171] See id. at 1213-25, app. F, tables F1-F2. The Commission's Report lists 68 national programming services owned, in part, by cable operators, and another 104 independently owned national programming services. See id.

[172] See id. at 1222-25, app. F, tables 3-4.

[173] Id. at 1051.

[174] See id.

[175] See id.

[176] David Bauder, Cable Ratings Top Networks, Wash. Post, July 8, 1998, at D7; cf. Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, § 2(a)(13)-
(Continued...)

Complementing the growth in cable programming options and the increase in viewership of cable originated programming are the public, educational, and governmental ("PEG") access channels offered by many systems. PEG access provides "a variety and diversity of communication that is often unavailable on commercial local stations,"[177] and offers a rich outlet for citizens to air their views or to transmit local news, educational, or public affairs programming. Indeed, an estimated one million people participate in producing and airing the 20,000 plus hours of new local programming that is aired each week via PEG access.[178] The amount of locally-oriented PEG programming this generates is considerable. For example, the state of Indiana boasts 43 PEG access facilities that produce 1,358 new programs each month, generating 1,255 weekly programming hours and involving over 600 volunteers.[179] Moreover, with the advent of digital compression technology and other technological advances that promise to increase cable's channel capacity in the near future, the number of PEG access programming options available to consumers will undoubtedly continue to expand.

(...Continued)
(14), 106 Stat. 1460-61 codified at 47 U.S.C. §§ 521 & 609 (statutory findings in 1992 by Congress observing that there "has been a marked shift in market share from broadcast television to cable television services" and that "proportionally more advertising revenues will be reallocated from broadcast to cable television services").

[177] 1997 Competition Report, 13 FCC Rcd at 1127.

[178] See Clarke Morrison, Public Access Seen As First Amendment Television, Asheville Citizen-Times (Asheville, NC), Feb. 9, 1998 at A6.

[179] See Erik S. Mollberg, Starting the March for Community Television, The Indianapolis Star, Nov. 14, 1997 at A19.

3. DBS, SMATV, Wireless Cable, and a Host of New Information Technologies Provide Consumers With More Information Choices.

As noted in NAA's Petition for Rulemaking, another alternative technology for delivery of video programming to viewers is direct broadcast satellite ("DBS"). DBS systems, which did not exist in any form in the 1970s, offer subscribers hundreds of high-quality digital channels for a monthly fee that is competitive with cable television rates. Since its introduction, DBS has emerged as a significant alternative to cable television. Subscribership is booming -- up nearly 1.2 million in the past ten months -- with the major DBS program suppliers providing service to 6.6 million households.[180] Moreover, DBS gives viewers even more programming options than cable. For example, the USSB/DirecTV DBS services (which can be purchased together) deliver viewers over 200 channels of programming.[181] In addition, at least one DBS provider, EchoStar, is preparing to expand its programming to include local broadcast television channels from the top twenty markets.[182]

In addition to DBS, other multichannel video programming providers give consumers still more video programming delivery options. Satellite master antenna television ("SMATV") service, which primarily serves multiple dwelling units such as apartments, has "considerable growth potential," according to the Commission, and serves an expanding base

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[180] See DBS Scorecard, Satellite Business News at 1 (Mar. 11, 1998); DBS Scorecard, Satellite Business News at 1 (July 2, 1997).

[181] See <http://www.directv.com/misc/new2dtv.html> (visited July 10, 1998).

[182] See Kazakhstan Launch Completes EchoStar System, Fuels Competition, Satellite News, vol. 21, no. 19, May 11, 1998.

of 1.2 million subscribers.[183] Other choices for consumers include home satellite dishes ("HSD"), which are larger than DBS dishes, but allow viewers to receive signals from multiple satellites and up to 500 channels of video programming.[184] There are now approximately 3.8 to 4.0 million HSD users in the Untied States.[185]

A fifth option for viewers is wireless cable (also called multichannel multipoint distribution service or "MMDS"), which offers up to 33 analog channels of microwave-transmitted video programming and is presently available to 60 million homes. To date, over 1.4 million households have subscribed.[186] Digital MMDS service, which the FCC authorized in July, 1996,[187] will allow MMDS operators to provide six or more digital channels of programming for each analog channel on which they were previously providing service.[188]

4. The Advent of Inexpensive Video Equipment and the Evolution of Internet-Based Video Distribution Technology Greatly Expand the Means for Delivery of Video Programming to a Mass Audience.

Another source of video programming that did not exist when the Commission adopted the cross-ownership rule is the VCR. Nearly 90 percent of U.S. television households have at

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183 1997 Competition Report, 13 FCC Rcd at 1086.

184 See id. at 1077.

185 See id. at 1078.

186 See id. at 1081.

187 See Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Fixed Service Stations, 11 FCC Rcd 18839 (1996) (petitions for clarification and partial recon. pending).

188 See 1997 Competition Report, 13 FCC Rcd at 1079-80, 1083.

least one VCR and, as a result, the videocassette rental and sales industry has exploded.[189] Videocassette rental revenue in 1997 was $7.5 billion, and videocassette sales revenue exceeded $8.3 billion.[190] By contrast, the 1997 total domestic theatrical film box office receipts were only $6.2 billion.[191] More importantly, with the advent of inexpensive video cameras and editing equipment, nearly anyone can create video programming and make it widely available for a minimal cost.[192]

In addition, the Internet is rapidly evolving as a viable alternative mechanism for delivery of video programming. As with audio programming, the Internet allows any citizen with access to a video camera and a PC to deliver video programming to a mass audience. There are already thousands of hours of video available on the Internet,[193] and Internet-only video programming is rapidly emerging. For example, InterneTV has already produced 15 episodes of an Internet-only soap opera titled "Austin" and a documentary series about the rave

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[189] See 1997 Competition Report, 13 FCC Rcd at 1096.

[190] Paul Kagan Assoc., Inc., The Kagan Media Index, No. 134, Apr. 17, 1998, at 14-15.

[191] Id. Videocassette rental revenue has exceeded domestic theatrical film box office revenue every year since 1986. See Paul Kagan Assoc., Inc., The Kagan Media Index, No. 95, Jan. 11, 1995, at 14; Paul Kagan Assoc., Inc., The Kagan Media Index, No. 134, April 17, 1998, at 14-15.

[192] In fact, "South Park," the most popular series ever aired on the Comedy Central cable television network, was originally a five minute short film distributed by videocassette through the mail as a video Christmas card. See Lauri Githens, With 'South Park,' A Cult Following Is Born, The Buffalo News, Dec. 28, 1997 at 1F.

[193] See 1997 Competition Report, 13 FCC Rcd at 1095.

culture called "Plur."[194] Similarly, a group of engineers has produced its own situation comedy using off-the-shelf video equipment and has made it available, free, on the Internet.[195] Another Internet video program supplier, OnlineTV, broadcasts music programming on two channels 24 hours a day and plans to broadcast 10 to 12 new channels of video programming in the coming year.[196] Other businesses are turning to the Internet as a way of delivering video programming to consumers as well. One example is Internet Boeing Television ("iBTV"), which allows Internet viewers to view videos detailing Boeing products.[197]

The continuing evolution of online video, along with the other alternative outlets for mass communication discussed above, have resulted in a dramatic reduction in the cost of creating and distributing information content. As a result, through the Internet, any citizen can now publish, broadcast, or speak to millions. This is true not only in the commercial context, where businesses are scrambling to offer entertainment and other money-making content, but also in the arena for civic discourse, where citizens everywhere are offering their viewpoints to anyone who cares to listen.

In sum, notwithstanding the FCC's fear in 1975 that a single, monolithic media owner could dominate all of the outlets for expression in a given market, technological and market forces (not government intervention) have yielded a wealth of information outlets from which

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[194] See <http://www.internetv.com/html/original.htm> (visited July 10, 1998).

[195] See <http://www.bytemedia.com/> (visited July 10, 1998).

[196] See <http://www.OnlineTV.com/info.html> (visited July 10, 1998). OnlineTV notes that "many of our broadcasts have never before been presented in any medium." Id.

[197] See <http://www.boeing.com/companyoffices/gallery/streamingmedia/> (visited July 10, 1998).

consumers can pick and choose. These developments ensure that sufficient media diversity and competition exist in the marketplace today, and will exist in even greater abundance in the future, to justify elimination of the newspaper/broadcast cross-ownership rule.

VII. THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP BAN FAILS TO ADVANCE LEGITIMATE DIVERSITY CONCERNS AND UNFAIRLY DISCRIMINATES AGAINST PUBLISHERS AND STATION OWNERS.

As NAA urged in it Petition for Rulemaking, maintenance of the rigid and anachronistic newspaper/television cross-ownership restriction in the mass media marketplace of the late 1990s is not necessary or justified and is, moreover, discriminatory.[198] The ban in fact has served only to thwart benefits the public might otherwise have received from the combined ownership of a newspaper and a television station in a local market. In light of the monumental changes in the mass media marketplace over the past two decades, the Commission should repeal the newspaper/broadcast cross-ownership restriction because it cannot be shown to be either necessary or useful to serve the public interest.[199]

A. Given the Explosion in the Number of Media Outlets Over the Past Two Decades, the Diversity Rationale Used To Justify the Rule in 1975 Is Not Valid Today.

As discussed previously, the primary justification offered by the Commission in adopting the newspaper/television cross-ownership ban in 1975 was accurately characterized by the agency itself as a "mere hoped for gain in diversity."[200] Despite the absence of any hard

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[198] NAA Petition at 16. See also HBO, 567 F.2d at 36.

[199] See 1996 Telecom Act § 202(h) ("The Commission shall repeal or modify any [of its ownership rules] it determines to be no longer in the public interest.").

[200] 1975 Multiple Ownership Report, 50 FCC 2d at 1078.

evidence to support its conjectures, the FCC determined that "requiring competition in the market place of ideas is, in theory, the best way to assure a multiplicity of voices."[201]

Although acknowledging "the inconclusiveness of the rulemaking record" as well as the speculative nature of the agency's judgment, the Supreme Court upheld the 1975 cross-ownership restrictions.[202] Applying reduced First Amendment scrutiny in light of the spectrum scarcity doctrine, the Court 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.'"[203] Thus, the Court upheld the restrictions as a "rational" means of promoting "diversification of the mass communications media."[204]

NAA submits that, whatever merit the cross-ownership ban may have had twenty-three years ago, the exponential increase in the level of diversity and competition in the information marketplace has eviscerated the original justification for the policy.[205] In numerous other

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[201] Id. at 1049.

[202] See FCC v. NCCB, 436 U.S. at 796 (1978).

[203] Id. at 797.

[204] Id. at 799, 786 ("The prospective rules were justified . . . by reference to the Commission's policy of promoting diversification of ownership" which "would possibly result in enhanced diversity of viewpoints.").

[205] Indeed, as discussed in greater detail below, the courts, commentators, and even the Commission itself, have clearly signaled that the "spectrum scarcity" doctrine providing the basis for reduced First Amendment scrutiny of broadcast television regulations is no longer viable. See, e.g., Syracuse Peace Council, 2 FCC Rcd at 5052-53 ("the [scarcity] rationale that supported the [fairness] doctrine in years past is no longer sustainable in the vastly transformed, diverse market that exists today"). Absent such scarcity, of course, the Commission's need to regulate ownership for diversity purposes is substantially diminished, if not entirely eliminated.

proceedings since the implementation of the newspaper ban, the Commission has repeatedly acknowledged the vast expansion in media marketplace, as well as the positive impact of that expansion on diversity. For example, as early as 1984, the Commission recognized that for purposes of mass media diversity the market includes not simply "television and radio, but also cable, video cassette recorders, newspapers, magazines, books, and when they are in operation, MDS, STV, LPTV, and DBS."[206] Just a few years later, the Commission concluded that the fairness doctrine, which it had previously found to be constitutional, infringed on the First Amendment right of television broadcasters in light of the "explosive growth in the number and types of information sources available in the marketplace."[207] That growth has continued apace. Today, in addition to expanded services provided by the longer-established media, the market includes the Internet, wireless cable, direct broadcast satellite, and telephone company video programming as well as numerous other new competitors.[208]

In relaxing its waiver policy associated with the one-to-a-market rule, which generally prohibited common ownership of television and radio stations in the same market, the FCC found in 1989 that "circumstances have changed substantially in the eighteen years since [the rule was adopted]" and that its "diversity concerns have become somewhat attenuated since

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[206] Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 FCC 2d at 30.

[207] Syracuse Peace Council, 2 FCC Rcd at 5043.

[208] See, e.g., supra sec. VI. In its ongoing television ownership proceeding the Commission acknowledged that in the current market, "it makes less and less sense to regulate a [broadcast] market on the grounds of ensuring diversity, without taking into account whether there is an available diverse array of non-broadcast media." Review of the Commission's Regulations Governing Television Broadcasting, 10 FCC Rcd 3524, 3546 (1995) (Further Notice of Proposed Rulemaking)("TV Ownership Further Notice").

[that time]."[209] The Commission correctly found that "there has been a dramatic increase in the number of media outlets in markets of all sizes, which has enhanced both viewpoint and programming diversity on a local level. In large markets, the degree of diversity is tremendous."[210]

In sum, assuming arguendo that the Commission's unproven assumptions about the need for greater diversity may have had some validity in 1975, those assumptions certainly can no longer stand in light of the enormous and wholly unanticipated changes and growth in the mass communications market that have taken place over the past two decades. Further, with the emergence of the Internet, satellite delivery, and other alternative information providers, the appropriate governmental response is not to impose restrictions on new media or new entrants. Rather, as the Commission has done with nearly all its other ownership restrictions, the agency should act to remove or relax existing limitations on established players.[211]

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[209] Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules, 4 FCC Rcd 1741, 1744 (1989) ("Broadcast Multiple Ownership Rules") recon. granted in part and denied in part, 4 FCC Rcd 6489 (1989).

[210] Id.

[211] Cf. Kevin Werbach, Digital Tornado: The Internet and Telecommunications Policy, Office of Plans and Policy Working Paper No. 29 at 82 (1997) <http://www.fcc.gov/bureaus/opp/working_papers/oppwp29pdf.html> (visited July 17, 1998) ("The movement toward deregulation and local competition in telecommunications in the United States may be the single most significant development for the future of the Internet.").

B. All of the Available Evidence Demonstrates That Multiple Outlet Ownership, Including Newspaper/Broadcast Cross-Ownership, Promotes Diversity and Enhances Programming in the Public Interest.

In sharp contrast to its unproven negative assumptions about common ownership in the 1975 Multiple Ownership Report, the Commission recognized in a number of more recent proceedings that common ownership of mass media outlets enhances the availability and diversity of informational programming. In its Order relaxing the one-to-a-market rule, for example, the FCC concluded that common ownership of broadcast stations increases the availability of informational programming,[212] providing communities with a more diverse range of programs, stories, and viewpoints than would separately owned stations.[213] Likewise, in granting a waiver of that rule, the Commission observed:

> [I]n both the one-to-a-market rulemaking proceeding and the radio ownership rulemaking proceeding, the Commission expressly determined that combinational efficiencies derived from common ownership of radio and television stations in local markets were presumptively beneficial and would strengthen the competitive standing of the combined stations, a circumstance that would enhance the quality of viewpoint diversity by enabling such stations to invest additional resources in programming and other service benefits provided to the public."[214]

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[212] Broadcast Multiple Ownership Rules, 4 FCC Rcd at 1744 ("[A] broadcaster who seeks to operate a second station in the market may, because of economies of scale and cost savings inherent in radio-television combinations in the same market, produce or purchase more informational programming than would two separate stations.").

[213] 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.").

[214] Golden West Broadcasters, 10 FCC Rcd 2081, 2084 (1995) (emphasis added).

Further, the FCC has observed that even "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."[215] In other words, a common owner of multiple media sources in a particular market will often have a greater incentive to diversify its offerings, in order to attract the greatest possible market share, than would individual owners who have incentives to compete for the same, most lucrative segment of the market.

Moreover, in the course of repealing or relaxing most of its other ownership restrictions over the past decade,[216] the Commission repeatedly has found that cross-ownership of media outlets in the same market does not lead to commonality of viewpoints or programming. For example, the Commission concluded in 1989 that "relaxing the [one-to-a-market] rule should not significantly affect diversity of viewpoints and should further programming and other public interest goals."[217] The evidence the Commission relied upon revealed, among other things, that in 45% of instances in which CBS owned a radio and television station in the same market, the stations endorsed opposing candidates in electoral races.[218]

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[215] TV Ownership Further Notice, 10 FCC Rcd at 3550-51. See also 1992 Revision of Radio Rules and Policies, 7 FCC Rcd at 2771-72 ("In addition, commentators 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.").

[216] See infra sec. VII. C.

[217] Broadcast Multiple Ownership Rules, 4 FCC Rcd at 1744.

[218] Id.

Contemporary evidence regarding cross-ownership of newspapers and broadcast stations similarly reveals tremendous independence in editorial comment and in choosing and presenting news stories. Based upon the responses to inquiries made by NAA to its members, it is clear that today, as in 1975, commonly-owned newspapers and broadcast stations typically maintain separate news and editorial staffs, enjoy operational independence, and compete vigorously with each other and their many rivals in the local marketplace.[219] For example, Paxton Media Group, which owns the grandfathered combination of WPSD-TV, Paducah, Kentucky, and the Paducah Sun, reports that although the station and the newspaper share a common website (to save costs), its two properties are "competitive to the hilt."[220] Paxton explains that WPSD-TV has, on several occasions, done stories questioning the accuracy of the newspaper. In one instance, the Paducah Sun criticized WSPD-TV for its involvement in televising the execution of a search warrant against a local business which resulted in no criminal charges being filed. And, although WSPD-TV, like most broadcast stations these days, rarely editorializes, it took a contrary position from that of the newspaper regarding the creation of a Kentucky State Lottery.[221]

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[219] The NAA conducted an informal poll of the grandfathered cross-owners among its membership to determine the effects that common ownership of a broadcast station and a newspaper in the same market has on program diversity, publishing and editorial decisions, and economic efficiencies. See Statement of E. Molly Leahy, Legislative Counsel, Newspaper Association of America, attached hereto as Appendix A. Virtually all of the parties responding to the inquiry indicated that the jointly owned newspaper and broadcast facilities maintain separate and independent editorial control over their content and described the relationship between the co-owned properties a "competitive" or "very competitive." See id.

[220] Id.

[221] See id.

Moreover, the information provided by NAA's members confirms that cross-ownership fosters more and better local news and public affairs programming. For example, Schurz Communications, which owns a grandfathered AM/FM/TV/newspaper combination in South Bend, Indiana, states that its AM station provides "much more news than competing stations," and its television property is the only TV station in South Bend to offer a local public affairs program.[222] Likewise, according to Quincy Newspapers Group, both of its AM and FM stations, operating as part of a grandfathered newspaper/broadcast combination in Quincy, Illinois, offer "more [news] than most area radio stations."[223] The same holds true for the combination of The Gazette and KCRG-TV in Cedar Rapids, Iowa, owned by The Gazette Co., where the jointly owned television station offers 27 hours per week of local news -- compared with 21.5 and 14.5 hours from other television stations in the market. In Bowling Green, Kentucky, only one radio station employs a full time news director: WKCT-AM, a station that is jointly owned with the Daily News. Another cross-owned station, Findlay Publishing's WFIN-AM, is the only radio station in Findlay, Ohio that offers a full-time news/talk radio format.[224]

These results are hardly surprising; as noted above, the evidence compiled by the FCC in the very proceeding in which it adopted the newspaper/broadcast restriction in 1975 demonstrated a "statistically significant superiority in newspaper owned television stations in a number of programs," including local news, local non-entertainment programming, and more

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[222] Id.

[223] Id.

[224] Id.

newspaper partner. (Once commissioned, the polls were interpreted separately by the individual news staffs of the paper and TV station.)[229]

Operational synergies may make even more sense as publishers and broadcasters seek to develop new media outlets and services through alternative media such as the Internet, where expertise in both publishing and video is ideal to developing a premier locally-oriented website. In Paducah, Kentucky, the Paxton Media Group (owner of the Paducah Sun and WPSD-TV), has developed a web site that includes searchable archives of both newspaper stories and television transcripts for over a month's worth of local news and affairs stories.[230] The combination of TV and newspaper resources makes for "a content rich site in a relatively small market."[231] The same is true in Fargo, North Dakota, where Forum Communications has established a site that contains visual material from the newspaper, as well as RealAudio clips from its radio and television stations.[232] And the Post Company, which owns the Idaho Falls Post-Register and KIFI-TV, has also developed a web site, which not only supplies stories from the co-owned newspaper and television station, but also provides a hosting service for the web pages of small community groups, such as the Idaho Falls Arts Council.[233]

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[229] Id.

[230] See <http://www.sunsix.com/> (visited July 15, 1998).

[231] See Leahy Declaration, attached hereto as Appendix A.

[232] See id.; <http://www.in-forum.com/> (visited July 15, 1998).

[233] See <http://www.idahonews.com/ (general site)>; (visited July 15, 1998) <http://www.idahonews.com/idaho/> (visited July 15, 1998) (links to the Idaho Falls Arts Council and other community web sites).

Similarly, newspaper publishers and broadcast station licensees are ideal candidates to provide cable news channels and similar services that call for journalistic expertise and the resources of a large news organization. Plainly, then, in today's media marketplace, joint ownership can be expected to increase the quantity of new and informational programming as well as diversity of viewpoints, and, in many cases, may provide the only alternative to the demise or marginalization of a newspaper or a struggling broadcast station. Moreover, permitting common ownership can assist broadcasters and newspapers in competing more effectively in the new multi-faceted information marketplace and, therefore, will further the Commission's goal of increasing and improving the quality of news, public affairs, and local programming available to the public.

C. The Newspaper/Broadcast Cross-Ownership Restriction Unfairly Singles Out Newspaper Publishers and Broadcast Station Licensees, Who Are Denied the Opportunity To Take Advantage of Operational Synergies and Economies While Their Competitors Are Free To Pursue Advantageous Cross-Media Relationships.

As demonstrated above, when the newspaper/broadcast cross-ownership rule was adopted, the FCC was maintaining a "one outlet per party per market" regulatory approach, and the newspaper/broadcast ownership restriction was merely one of a number of similar cross-ownership restrictions. In recognition of the enormous increase in the number and diversity of competing media and the public interest benefits that can flow from combined ownership, however, both Congress and the FCC have significantly altered their regulatory approaches in the intervening decades. Today, newspapers and broadcast station owners are virtually alone among major information providers in facing an absolute barrier to common ownership. Indeed, in the past ten years, the Commission has eliminated or substantially