

EXHIBIT B

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of)
)
1998 Biennial Regulatory Review --)
Review of the Commission's Broadcast)
Ownership Rules and Other Rules)
Adopted Pursuant to Section 202)
of the Telecommunications Act of 1996)

MM Docket No. 98-35

**JOINT REPLY COMMENTS OF
COX BROADCASTING, INC. AND MEDIA GENERAL, INC.**

COX BROADCASTING, INC.

Werner K. Hartenberger
Christina H. Burrow

MEDIA GENERAL, INC.

John R. Feore, Jr.
Elizabeth A. McGearry

Their Attorneys

DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2000

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SUMMARY

Prompt Federal Communications Commission action to eliminate the daily newspaper/broadcast cross-ownership rule is mandated by the record in this proceeding. As the comments show, the doctrine of "spectrum scarcity" is no longer valid as a rationale for affording lesser constitutional rights to broadcasters and newspaper owners. Because the concept of "spectrum scarcity" is demonstrably obsolete, the Commission promptly must issue a Notice of Proposed Rulemaking to eliminate the daily newspaper/broadcast cross-ownership rule. Such action is, in fact, precisely what is intended by the 1996 Act's statutory mandate which requires the Commission to expeditiously proceed to eliminate cross-ownership rules which no longer can be justified. The comments amply demonstrate how, absent "spectrum scarcity," the daily newspaper/broadcast cross-ownership rule cannot pass muster under the First Amendment.

A second constitutional principle presents an equally serious obstacle to the rule's retention: the principle of equal protection embodied in the Due Process Clause of the Fifth Amendment. The daily newspaper/broadcast cross-ownership rule burdens broadcasters differently from other owners of video programming media such as cable operators, telephone companies and DBS providers. Again, without demonstrable "spectrum scarcity" there is no rationale under which this difference can be supported. The Commission rule fails under not one but two constitutional infirmities. Both First and Fifth Amendment protections demand the rule's elimination.

A single element of today's media environment, in and of itself, is sufficient to demonstrate that the concept "spectrum scarcity" has become outmoded: the Internet. The Internet is changing the way Americans obtain news and information, and provides would-be

publishers and information providers a low cost way to distribute print and multimedia. The emergence of the Internet alone, therefore, is a sufficient development to destroy the doctrine of “spectrum scarcity.”

The paucity of comments favoring retention of the rule provides further support for the rule’s elimination. Instead of submitting facts the Commission might use to justify retaining the daily newspaper/broadcast cross-ownership rule, the comments in support of the rule’s retention consist of nothing more than hypothetical harms that must fly in the face of an exploding marketplace of diversity. Such discussion fails utterly to provide the factual record necessary for the Commission to retain the rule. The 1996 Act places the burden squarely on those parties supporting the rule’s retention to prove its continued viability. The conspicuous lack of facts in the record thus far leaves the Commission no choice but to propose, as Congress has intended, the end of the daily newspaper/broadcast cross-ownership rule.

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Cox Broadcasting, Inc. and Media General, Inc. (the "Joint Commenters"), by their attorneys, file these reply comments in the Commission's proceeding undertaking its review of broadcast ownership rules.^{1/} As the comments overwhelmingly show, the doctrine of "spectrum scarcity," the underlying foundation for the daily newspaper/broadcast cross-ownership rule, is no longer valid as a rationale for justifying lesser First Amendment protection for broadcasters. The Commission accordingly must promptly issue a Notice of Proposed Rulemaking to eliminate the daily newspaper/broadcast cross-ownership rule.

^{1/} See *In the Matter of 1998 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Inquiry, MM Docket No. 98-35, FCC 98-37 (released March 13, 1998) (the "Notice"). All comments referenced in this reply were filed in response to the *Notice*.

I. ELIMINATION OF THE DAILY NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE IS REQUIRED.

As the comments in this proceeding demonstrate, scarcity is an inherent attribute of all economic goods.^{2/} Spectrum, just like any other economic good, is scarce in that people would like to use more than exists.^{3/} Broadcast spectrum, however, has been considered “uniquely” scarce for years not because of general economic scarcity but because of the “physical limitations of the broadcast spectrum,” known as the concept of “spectrum scarcity.”^{4/} The concept of “spectrum scarcity” has been seriously challenged in the past and, in this proceeding, has been proven obsolete.

Because the concept of “spectrum scarcity” is demonstrably invalid, the Joint Commenters support those parties who call for the elimination of the daily newspaper/broadcast cross-ownership rule.^{5/} The Commission is obligated to eliminate the rule because to do

^{2/} See, e.g., Hearst-Argyle Television, Inc. Comments at 13; Affidavit of J. Gregory Sidak Comments at 17.

^{3/} See, e.g., Commissioner Michael K. Powell, Remarks Before the California Broadcasters Association (July 27, 1998) (“Powell Monterey Remarks”), at 6-7; Media Institute Comments at 10.

^{4/} *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 799 (1978). See also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (“Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.”); but see, *Telecommunications Research and Action Ctr. v. FCC*, 801 F.2d 501, 508 n.4 (D.C. Cir. 1986) (“There is nothing uniquely scarce about the broadcast spectrum.”), *cert. denied*, 482 U.S. 919 (1987).

^{5/} See Hearst-Argyle Television, Inc. Comments; Affidavit of J. Gregory Sidak Comments; Newspaper Association of America (“NAA”) Comments; Gannett Co., Inc. Comments; Hearst Corporation Comments; Chronicle Publishing Company Comments; Tribune Company Comments; Media Institute Comments; A.H. Belo Corporation Comments; National Association of Broadcasters (“NAB”) Comments; ABC, Inc. Comments; Elyria-Lorain Broadcasting Company Comments; Freedom of Expression Foundation, Inc. Comments; West

otherwise would violate both the Equal Protection Clause and the First Amendment of the Constitution.

A. Equal Protection Considerations Demand Repeal of the Daily Newspaper/Broadcast Cross-Ownership Rule.

In the name of “increasing diversity” the Commission has long prohibited common ownership of daily newspapers and broadcast licenses in the same market. The Commission’s interest in “diversity,” however, has never been compelling enough for it to prohibit a cable operator (or other video programming provider) from owning a daily newspaper in the same market. Unlike broadcasters, all other media owners may own in-market daily newspapers, including multi-channel video program providers with the capacity to control many more “voices” than broadcasters. Indeed, the comments demonstrate that the daily newspaper/broadcast cross-ownership rule burdens broadcast licensees differently from other owners of video programming media such as cable operators and DBS providers.^{6/} Because the Commission has specifically singled out only broadcasters for different treatment, no one can dispute that the daily newspaper/broadcast cross-ownership rule is intended to discriminate against a certain class. To retain the daily newspaper/broadcast cross-ownership rule, therefore, the Commission must show how it meets the requirements of equal protection analysis.

Equal protection requires the government to deal with similar persons in a similar manner, and mandates that regulatory classifications not be based upon impermissible criteria or

^{5/} (...continued)

Virginia Radio Corporation Comments; Association of Local Television Stations Comments; Lee Enterprises, Inc. Comments.

^{6/} A.H. Belo Corporation Comments at 25; Gannett Co., Inc. Comments at 24-25; NAA Comments at 65-67; Tribune Company Comments at 13.

used arbitrarily to burden groups of individuals. While all regulatory classifications that differentiate between similarly-situated persons or firms must be at least “rationally related to a legitimate state interest,”^{7/} distinctions with respect to the exercise of fundamental rights are judged under a much more exacting standard of scrutiny.^{8/} In particular, “[t]he Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives.”^{9/} As the NAA Comments demonstrate, the daily newspaper/ broadcast cross-ownership rule cannot withstand the strict scrutiny analysis mandated by the affirmative guarantees of the First Amendment.^{10/} Likewise, the rule fails to withstand the exacting scrutiny mandated by the equal protection principles embodied in the Due Process Clause of the Fifth Amendment.

The guarantees of equal protection and the First Amendment are closely intertwined. Invoking either or both of these constitutional protections, the Supreme Court has not hesitated to strike down laws and ordinances that discriminated between similarly-situated speakers. For example, in *Mosley*, the Court invalidated a statute which prohibited pickets and demonstrations within 150 feet of local schools, but which exempted “peaceful picketing” caused by a labor dispute within the school.^{11/} The Court found that the classification regarding permissible

^{7/} *Pennel v. City of San Jose*, 485 U.S. 1, 14 (1988) (citation omitted).

^{8/} See e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

^{9/} *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 101 (1972) (“*Mosley*”); *Carey v. Brown*, 447 U.S. 455, 461-462 (1980) (“*Carey*”).

^{10/} NAA Comments at 101-107.

^{11/} *Mosley*, 408 U.S. at 93-95.