picketing was a violation of the equal protection guarantee in the absence of an overriding state interest to support a distinction between labor pickets and picketing by other speakers. The Court expressly held that where statutory classifications affect "expressive conduct within the protection of the First Amendment," it was inappropriate to review them under traditional rational basis standards.[12/] In *Carey*, the Court likewise struck down on equal protection grounds a ban on residential picketing that excepted peaceful picketing outside a home that was also used as a place of employment and was involved in a labor dispute.[13/] The Court held that the ban's distinction between labor picketing and all other peaceful demonstrations was not narrowly tailored to the government's stated purpose of protecting residential privacy. The regulation against non-labor demonstrations was deemed fatally under-inclusive because it permitted forms of picketing that were equally likely to intrude on the tranquility of the home.[14/]

The Court also has invalidated measures that singled out the press for special burdens, or that discriminated among media or among different speakers within a single medium. In *Grosjean v. American Press Co.*, the Court struck down a tax imposed selectively on a small group of newspaper publishers because it "limit[ed] the circulation of information to which the public is entitled in virtue of the constitutional guarantees."[15/] In *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, the Court invalidated a use tax on paper and ink products consumed in the production of periodicals which exempted the first $100,000 worth of ink and

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12/ *Id.* at 98-99.

13/ *Carey,* 447 U.S. at 471.

14/ *Id.* at 462.

15/ 297 U.S. 233, 250 (1936).

paper consumed annually.[16] The tax thus discriminated against larger publishers and favored smaller ones. The Court struck down the tax, holding that the state's interest in revenue "cannot justify the special treatment of the press" because the state could "raise the revenue by taxing businesses generally . . . ."[17] The Court held that the paper and ink tax "violate[d] the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers."[18] Significantly, the Court did not require any evidence of improper motive on the part of the legislature: "Illicit legislative intent is not the sine qua non of a violation of the First Amendment."[19] To the contrary, the Court affirmed that "even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment" and ruled that because the tax in question "singles out the press" and "targets individual publications within the press," the State carries a heavy burden to justify its action.[20]

Here, the record cannot support the continued retention of the daily newspaper/broadcast cross-ownership rule. The only way for the Commission to avoid the rigorous requirements of the Equal Protection Clause is for it to conclude that broadcasters are not similarly-situated to other media because spectrum is scarce. Since "spectrum scarcity" no longer exists, the Commission may only differentiate between broadcasters and all other media if it fashions a narrowly tailored rule which promotes a compelling government interest. The lack of a

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16/ 460 U.S. 575 (1983).

17/ *Id.* at 586.

18/ *Id.* at 591.

19/ *Id.* at 592.

20/ *Id.* at 592-93 (citations omitted).

compelling governmental interest in the daily newspaper/broadcast cross-ownership rule is obvious, however. If "diversity" is so compelling, why are not other media owners similarly restricted? Moreover, just like the picketing ban in *Carey*, the cross-ownership rule in this case is hopelessly under-inclusive because all other video programming distributors besides broadcasters are spared its application. Absent the "special circumstance" of spectrum scarcity, the Commission cannot logically or lawfully prohibit daily newspaper/broadcast cross-ownership and at the same time permit common ownership among newspapers and other electronic media.

Precedent shows that, without the scarcity rationale, the Commission cannot sustain the daily newspaper/broadcast cross-ownership rule: Without spectrum scarcity, there is simply no constitutionally permissible reason to treat broadcasters differently from other video program providers. The comments show that the special circumstance that purportedly makes broadcasting different from other video programming media, namely spectrum scarcity, is no longer valid.[21/] Because "spectrum scarcity" is invalid as a regulatory construct for affording broadcasters lesser constitutional protection than other media owners, the daily newspaper/broadcast cross-ownership rule must fall.

21/ Media Institute Comments at 7-11; Hearst Corporation Comments at 26-29; Affidavit of J. Gregory Sidak Comments at 14-23; NAA Comments at 92-100; Tribune Company Comments at 4-14.

B. The Internet Alone Provides a Sufficient Basis to Find that "Spectrum Scarcity" No Longer Supports Diminished First Amendment Rights for Broadcasters.

The comments detail the explosion in the number and type of media outlets that are now available to speakers, viewers and listeners.[22/] While the Joint Commenters note that all media, including those using broadcast spectrum, are much more widely available today than in 1975, they also note that the Internet alone provides a sufficient basis to find that "spectrum scarcity" no longer supports diminished First Amendment rights for broadcasters.

Virtually unknown even five years ago, Internet growth has been rapid. As Chairman Kennard recently observed, there currently are 75 million e-mail users in the U.S., and that number is expected to grow to 135 million in three years.[23/] Analysts predict that by the year 2005 more than 90 million households will be on-line.[24/] More Americans already use the Internet than subscribe to daily newspapers,[25/] and the Internet is having significant effects on television viewing habits.[26/]

Internet growth will continue at a rapid pace in part because access is becoming ever more affordable. In fact, prices today are well within the reach of most American families.

22/ *See, e.g.*, NAA Comments at 31-55; NAB Comments, Appendix A: Mark R. Fratrik, Ph.D, National Association of Broadcasters, *Media Outlets by Market — Update.*

23/ Chairman William E. Kennard, Remarks Before the National Association of Regulatory Utility Commissioners (July 27, 1998), at 3.

24/ Price Colman, *Revving up high-speed data*, BROADCASTING & CABLE, May 25, 1998, at 44 (statistic attributed to Strategis Group).

25/ NAA Comments at 36; Gannett Co., Inc. Comments at 12.

26/ *See* Mass Media, COMMUNICATIONS DAILY, August 13, 1998, at 6 (discussing new Nielsen survey finding that Internet homes watch 15% less television per week than do non-Internet homes).

Purchasing an inexpensive computer system to gain Internet access costs only between $800 and $1000, and WebTV, an even cheaper alternative, is now widely available. A WebTV unit and keyboard can be purchased for less than $135,[27] a price below the cost of an average color TV. Internet service also is inexpensive, and can be obtained from Internet access providers for only $10 per month.[28]

Americans also need not purchase a computer or a WebTV unit to obtain Internet access. Free access to the Internet often is available at work.[29] and public computers with Internet capability are increasingly available. In Washington, D.C., for example, eight city libraries offer the public free Internet access, and the library system will provide free Internet access at all city libraries within the next few years. All libraries in Arlington, Fairfax, Montgomery and Prince Georges counties already provide public Internet access.[30] Moreover, public Internet access is not restricted to large, urban communities. Chairman Kennard recently observed that in Brownsville, Texas, a city of less than 1 million people where 57% of the population live below

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27/ *See, e.g.,* ProActive Web Marketing's WebTV Systems page (visited Aug. 6, 1998) <http://www.pactive.com/electronics/webtv.htm>. *See also* Hearst-Argyle Television, Inc. Comments at 15 n.44.

28/ In the Washington, D.C. area the following Internet service providers are advertising access at $10 per month: Capital City Cyberlink, Davis Computer Systems, DSI Internet Post Office, PressRoom Online Services and Zzapp!. *See* WashingtonPost.Com, *Local ISP Guide*, (visited Aug. 10, 1998) <http://www.washingtonpost.com/wp-srv/tech/ffwd>.

29/ It is estimated that only one-third of active Internet users in the United States exclusively use the Internet at home. Saul Hansell, *Eye Catching: How New Media Are Racing to Become the Mass Media; In Terms of the Audience, Size Matters. But How Big? And by Whose Measure?*, N.Y. TIMES, May 11, 1998, at D1.

30/ Indeed, the Commission and the Clinton Administration have been at the forefront of efforts to link all schools and libraries nationwide. *See* Seth Schiesel, *Cuts Are Urged In Internet Fund Clinton Praises*, N.Y. TIMES, June 6, 1998, at D1.

the poverty level, almost 16% of the population visit the Brownsville library each month to use the Internet.[31/] These facts and figures show that the Internet is not, as some commenters assert, merely an information source for the wealthy and need not cost "thousands of dollars."[32/] In fact, it need not cost anything at all.

Further, the Internet is an important source of local news and information, contrary to the assertions of some.[33/] The Yahoo! Washington, D.C. News site alone lists over 40 sources of local news and information, some of which are affiliated with local newspapers and broadcast stations and some of which are not.[34/] Indeed, the Internet provides access not only to news and information selected for publication and broadcast by local newspaper publishers and television stations; it also provides access to current and archival news and information from newspaper publishers and television broadcasters otherwise unavailable to audiences. News and information are also available from the many chat rooms and personal web pages on virtually any topic imaginable — local, national and international.[35/]

31/ Chairman William E. Kennard, Remarks Before the National Urban League (August 3, 1998), at 4.

32/ Center for Media Education *et al.* Comments at 9.

33/ *See, e.g., id.* at 8.

34/ Yahoo! Washington D.C.: News (visited August 6, 1998) <http://dc.yahoo.com/Cities.Washington__DC/News>.

35/ Internet service providers have been actively promoting Web page building by their subscribers for the past several years. America Online, for example, is currently promoting its "Personal Publisher II" as an easy way to create a personal or business Web page accessible by anyone with a connection to the Internet. AOL.COM, AOL NetHelp/Web Publishing (visited August 17, 1998) <http://www.aol.com/nethelp/publish/aboutpersonalpublisher.html>.

The Internet is changing dramatically the way Americans obtain news and information. As the NAA Comments point out, approximately 8.5 million voters said that information they obtained on the Internet influenced their vote in the 1996 election.[36/] That number will increase in future election cycles because, as a recently released Pew Research Center study found, the number of Americans obtaining news on the Internet at least once a week more than tripled in the past two years.[37/] Political candidates are, in fact, increasingly using the Internet to reach voters, so much so that some are calling the Internet an "indispensable electoral tool."[38/]

As the comments show, the Internet offers would-be publishers and information providers a low cost method of distributing viewpoints and information.[39/] Once disseminated, Internet viewpoints and information are available to an ever widening cross-section of Americans. The Internet has changed the fabled "marketplace of ideas," and made it possible to achieve the First Amendment goal of "'the widest possible dissemination of information from diverse and antagonistic sources'"[40/] in ways neither anticipated nor understood when the daily newspaper/broadcast cross-ownership rule was adopted. The concept that broadcast spectrum

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36/ NAA Comments at 38.

37/ *See* The Pew Research Center For The People & The Press, *Pew Research Center Biennial News Consumption Survey* (visited July 7, 1998) <http://www.people-press.org/med98rpt.htm>.

38/ *See* John P. Martin, *Nationwide, Candidates Spin the Web* (visited Aug. 18, 1998) <http://washingtonpost.com/wp-srv/local/longterm/library/mdelect/candidatesites.htm>.

39/ *See, e.g.,* Hearst-Argyle Television, Inc. Comments at 16-17 (discussing success of Internet publisher Matt Drudge); NAA Comments at 39-40 (discussing Jonathan Wallace, publisher of Internet newsletter *Ethical Spectacle*).

40/ *National Citizens Comm. for Broad.*, 436 U.S. at 795 (citation omitted).

qualifies for lesser First Amendment protection because of "spectrum scarcity" is plainly anachronistic. The Internet alone is a sufficient reason to declare the end of "spectrum scarcity."

C. Complete Elimination of the Daily Newspaper/Broadcast Cross-Ownership Rule Is Required.

The comments demonstrate that the "spectrum scarcity" foundation for the daily newspaper/broadcast cross-ownership rule so obviously has been eroded that it no longer can sustain the rule. If the rule has no factual foundation upon which it can be based, it cannot be maintained even in some modified form. The Commission, for example, cannot maintain the rule subject to a new waiver policy if the basis for according broadcast stations' lesser constitutional rights no longer can be supported. Without a factual record upon which to support the continued retention of the daily newspaper/broadcast cross-ownership rule, the Commission is obligated to eliminate it.

II. ABSENT "SPECTRUM SCARCITY," DIVERSITY GOALS ARE INSUFFICIENT TO SUPPORT CONTINUED RETENTION OF THE DAILY NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE.

Mere recitations that "diversity" is an important public interest goal are insufficient to support continued lesser constitutional protections for broadcasters and newspaper owners. As many commenters point out, the burden in this proceeding is on those who would retain the rule to demonstrate its continued viability.[41/] That burden has not been met.

41/ *See, e.g.,* NAA Comments at 6-7; Tribune Company Comments at 20-22. *See also* Powell Monterey Remarks at 4.

Only three comments support retention of the daily newspaper/broadcast cross-ownership rule.[42/] Those commenters urge retention based on two propositions: (1) the rule will promote ownership and viewpoint diversity; and (2) the rule will protect against possible diversity-related harms. Neither of these propositions is valid, and neither supplies a foundation for the rule's retention.

An argument that the daily newspaper/broadcast cross-ownership rule should be retained because it promotes "diversity" misses the point. The fundamental question first to be answered is whether the Commission can continue to diminish broadcasters' constitutional rights when the "spectrum scarcity" rationale has been discredited and no longer can be factually supported. Restricting newspaper ownership by other media also can be said to promote diversity of ownership[43/] and diversity of viewpoint,[44/] yet only broadcast licensees are so burdened. Indeed, it has only been the special attribute of broadcast spectrum that has permitted the daily newspaper/broadcast cross-ownership rule to exist. Now that "spectrum scarcity" has been discredited, arguments about diversity are moot. The Commission has no authority to violate the

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42/ *See* United Church of Christ Comments, Center for Media Education *et al.* Comments and Independent Free Papers of America Comments. A fourth commenter, Morality in Media, Inc., urges the Commission not to review the "spectrum scarcity" rationale because such a review may lead to recommendations that the Commission "eliminate or modify the requirement of licensing. . . ." Morality in Media, Inc. Comments at 2. The Joint Commenters disagree with the claim that a review of the "spectrum scarcity" doctrine cannot take place without implicating whether broadcasters are licensed. Contrary to the assertions of Morality in Media, Inc., Commission action to eliminate the daily newspaper/broadcast cross-ownership rule because the scarcity rationale no longer can be sustained does not affect whether broadcasters are licensed.

43/ United Church of Christ Comments at 2.

44/ Center for Media Education *et al.* Comments at 5; Independent Free Papers of America Comments at 1.

Constitution in the name of attempting to promote "diversity" if the "spectrum scarcity" rationale no longer can be sustained.

The second argument in support of the retention of the daily newspaper/broadcast cross-ownership rule is equally infirm. The commenters supporting the rule claim that it may prevent diversity-related harms, but those commenters produce no facts or evidence in support of their claims. The United Church of Christ posits that, if the rule is eliminated, local news stories may not be critiqued and counterbalanced by other media outlets.[45/] Similarly, the Center for Media Education states that the rule's elimination "*may* give an owner the power to control or manipulate local news and viewpoints . . . [and] news or viewpoints . . . *could* go unreported in a community."[46/] These speculative harms are not facts or evidence on which the Commission can retain the rule.[47/] Indeed, the NAA comments provide facts to document just the opposite: commonly-owned media entities can and do present differing viewpoints and critiques of each other's news coverage.[48/]

The Independent Free Papers comments focus on another speculative harm: market dominance. If the daily newspaper/broadcast cross-ownership rule is eliminated, it is asserted,

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45/ United Church of Christ Comments at 7.

46/ Center for Media Education *et al.* Comments at 27 (emphasis added).

47/ Because the examples cited by United Church of Christ and Center for Media Education do not involve situations of common broadcast-newspaper ownership, they say nothing about the consequences of common ownership.

48/ NAA Comments, Appendix A: Statement of E. Molly Leahy, Legislative Council, Newspaper Association of America at 3.

advertising competition would be reduced and advertising prices would increase.[49/] Again, without facts or evidence to support them, these are nothing but speculative harms. And again, the facts support the contrary: a study submitted by NAA shows that cross-owned newspapers do not charge higher advertising prices than other newspapers.[50/]

Diversity-related arguments also are the underpinning of the final refuge of the commenters supporting the continued retention of the daily newspaper/broadcast cross-ownership rule: the Commission's obligation to regulate in the "public interest."[51/] The daily newspaper/broadcast cross-ownership rule cannot, however, be maintained under the Commission's general authority to regulate in the public interest. As Commissioner Furchtgott-Roth has already noted in this proceeding, the First Amendment serves to limit, not enable regulatory action.[52/] The First Amendment and the Equal Protection Clause supersede and trump any generalized Commission authority to regulate in the "public interest" under the Communications Act. These constitutional requirements are not appendages to or an inferior form of some greater public interest as interpreted by an administrative agency. The legal hierarchy is precisely the opposite.

49/ Independent Free Papers of America Comments at 3-4 and 5-6.

50/ NAA Comments, Appendix B: Economists Incorporated, *Structural and Behavioral Analysis of the Newspaper-Broadcast Cross-Ownership Rules*. Other commenters properly question the Commission's authority to impose regulation based on competitive effects in the advertising arena. If anti-competitive conduct occurs, the Justice Department and the Federal Trade Commission are the proper agencies to investigate and take necessary action. *See* ABC Inc. Comments at 27; Media Institute Comments at 3; Gannett Co., Inc. Comments at 16-17; Affidavit of J. Gregory Sidak Comments at 8 and 11; NAA Comments at 69-71.

51/ *See* Center for Media Education *et al.* Comments at 26 and 28; United Church of Christ Comments at 1 and 2 n.2; Independent Free Papers of America Comments at i, 12 and 14.

52/ *Notice*, Separate Statement of Comm'r Furchtgott-Roth at 1.

III. CONCLUSION

The comments show that broadcast spectrum is no longer scarce in a "unique" or unusual way. Indeed, it can be argued that broadcast spectrum is unusually abundant.[53/] Because the comments show that the factual underpinnings of the "spectrum scarcity" rationale are gone, the Commission cannot retain rules based on the concept of "spectrum scarcity." The Joint Commenters therefore urge the Commission to promptly issue a Notice of Proposed Rulemaking proposing to eliminate the daily newspaper/broadcast cross-ownership rule.

Respectfully submitted,

COX BROADCASTING, INC.

By: Christina H. Burrow
Werner K. Hartenberger
Christina H. Burrow

MEDIA GENERAL, INC.

By: John R. Feore, Jr.
Elizabeth A. McGeary

Their Attorneys

DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2000
August 21, 1998

53/ *See, e.g.,* Affidavit of J. Gregory Sidak Comments at 16-17; Commissioner Michael K. Powell, *Willful Denial and First Amendment Jurisprudence,* Remarks Before the Media Institute (April 22, 1998), at 5; *Action for Children's Television v. FCC,* 58 F.3d 654, 675 (D.C. Cir. 1995) (Edwards, J., dissenting), *cert. denied,* 116 S. Ct. 701 (1996).