Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
	)	
Newspaper/Radio Cross-Ownership Waiver Policy	)	MM Docket No. 96-197
	)	

COMMENTS OF THE NEWSPAPER ASSOCIATION OF AMERICA

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SUMMARY

More than a quarter of a century ago, the Federal Communications Commission imposed the newspaper-broadcast cross-ownership ban as part of a comprehensive program of media ownership restrictions. The overall scheme was conceived in a time before the full emergence of cable television systems and direct mail advertising; before the explosive growth of suburban, weekly, and alternative newspapers; before the licensing of hundreds of new TV and radio stations; before the establishment of four new national television broadcast networks and scores of cable programming channels; and before the development of the Internet, direct broadcast satellite ("DBS") television, and satellite digital audio radio service ("DARS"). Almost five years ago, when most of these new media outlets were already well established and thriving, the Newspaper Association of America ("NAA") began providing evidence to the Commission that the factual premises for the ban had been swept away by this flood of new media outlets and advertising vehicles. Since then, NAA has updated its factual submissions in a series of related proceedings. That evidence, and the additional information submitted today, overwhelmingly demonstrate that the newspaper/broadcast ban serves no legitimate purpose in the modern media marketplace.

The transformation of the media marketplace since 1975, when the newspaper/broadcast ban was devised, has been accompanied by a series of changes in the Commission's regulations governing broadcast ownership that have left newspaper publishers virtually alone in preclusion from station ownership. Further, the statutory "biennial review" mandate, as well as controlling administrative law and constitutional precedent, now plainly require the Commission to justify any regulation of media ownership with clearcut evidence of a substantial problem in the marketplace and to demonstrate that the regulatory solution chosen is in fact necessary to address

that problem. Under these standards, the ban no longer can be justified by what the FCC acknowledged in 1975 was a "mere hoped for gain in diversity."

The newspaper/broadcast ban and other similar "one outlet per market" restrictions were fashioned in an era when consumers had relatively limited choice among sources of up-to-date news, information, entertainment, and advertising. Marketplace developments during the past two decades, however, have convinced policymakers to jettison or greatly relax the TV duopoly ban, the radio/TV one-to-a-market restriction, and the local radio caps, as well as a plethora of national media ownership restrictions. The same explosive growth in media outlets that influenced those rule changes obviously applies here as well. For example:

- the number of television stations has mushroomed nationwide since 1975, from 952 to 1,678, with the average local market now supporting at least ten full-power facilities (as well as many low-power or Class A stations);
- the number of national TV networks has more than doubled, from three to seven – a figure that does not even include the growing Spanish-language services;
- the number of radio stations nationally has ballooned from fewer than 8,000 to more than 12,000, with the majority of listeners now able to hear more than ten local stations;
- the number of recognized radio formats has expanded from 15 to as many as 91;
- the number of U.S. households subscribing to multichannel video programming distributors ("MVPDs"), including cable and DBS, has grown from less than 20 percent to more than 84 percent – and the vast majority of these subscribers have access to more than 50 different programming channels;
- among the most popular cable programming options are the many national, regional, and local news channels – none of which existed two decades ago;
- readers can now obtain news and information from flourishing national dailies as well as suburban, weekly and alternative newspapers, whose combined circulation has more than doubled during the last quarter-century; and
- a rapidly growing majority of American homes and virtually all schools and offices enjoy access to the Internet, which provides limitless sources of news, information, and entertainment content.

Time plainly has proven the FCC's speculative assumptions about media scarcity to be incorrect. The facts show that eliminating the restriction now will promote the public interest in broader and deeper dissemination of local news and information, without any material reduction in "diversity," however defined.

Repeal of the ban would lead to significant efficiencies and operational synergies that would benefit both consumers and advertisers. Grandfathered newspaper/broadcast combinations provide concrete examples of these benefits. In markets ranging in size from the very largest to the smallest, newspaper/broadcast combinations not only have excelled in providing local news and other informational offerings, but also have been able to better coordinate their newsgathering resources and more widely disseminate important information to their communities. Many combinations have been able to achieve efficiencies in the "back office" aspects of their business, such as sales, accounting, and human resources, that can then flow to advertisers, who can enjoy the benefits of "one-stop shopping" and custom-tailored media mixes, and to consumers, who have access to improved news coverage and informational offerings.

Jettisoning the newspaper/broadcast ban also would advance another – and perhaps less obvious – public interest benefit. By better integrating resources and employee talents, local newspaper/broadcast enterprises would be better able to develop information delivery mechanisms that will collectively appeal to every taste. Professionally developed stories can then be tailored and dispatched to the Internet-savvy teenager, drive-time commuters, and morning newspaper devotees. The result, in the end, will be a better informed populace.

Given the diffuse array of news, entertainment, and information sources now available to consumers, repeal of the newspaper/broadcast ban will not lead to any material reduction in

viewpoint diversity. Moreover, the Commission has no factual basis for assuming that common ownership necessarily reduces the print and broadcast media to a single, monolithic viewpoint; most existing combinations to date tend to compete vigorously and to differentiate themselves by their approaches to reporting and editorializing. In addition, there are substantial differences in the very nature of the print and broadcast media, as well as economic incentives inherent in common ownership for distinguishing multiple outlets by interest and viewpoint – and thereby attracting, in the aggregate, the broadest possible audience for the enterprise's offerings

Furthermore, there is no credible threat of harm to competition in any legitimately conceivable market. Newspapers, TV stations, and radio offer advertisers distinctly different advantages with respect to audience reach, demographics, and ability to convey detail. The Commission has never demonstrated any basis for including the three media in a single uniform product market. Yet if the FCC were to ignore the differences and shoehorn daily newspapers, TV, and radio into one product market, such a broad approach would require the agency to consider many other alternative vehicles for local advertising. (These include – but certainly are not limited to – the local cable system, weekly newspapers, direct mail, and the Internet.) For no particular local newspaper/broadcast combination could ever gain, much less leverage, power in this kind of diffuse product market.

Thus, neither the facts nor any coherent legal theory can support perpetuation of a flat ban on newspaper/broadcast combinations. The agency is under a specific statutory mandate – the biennial review provision of the Telecommunications Act of 1996 – to repeal any broadcast ownership rule rendered superfluous by marketplace competition. Moreover, well-established principles of administrative law buttress this specific Congressional directive: agencies are compelled to reexamine and amend or repeal rules when the factual underpinnings of the

restrictions are no longer valid. The dizzying array of content options and advertising vehicles now available to consumers and advertisers belie any plausible concerns about either diversity or competition in the local market.

Last – but far from least – time has made plain that the ban violates the First Amendment. Technology and marketplace advancements, by fostering many more media outlets than anyone could have envisioned in the 1970s, have dissolved the foundation of the old "scarcity" rationale underlying broadcast ownership regulation. That, in turn, vitiates the argument that the newspaper/broadcast restriction deserves less than the highest degree of constitutional review. As it now operates, the rule flatly bans a form of speech by local newspaper publishers alone, while allowing essentially all other media owners the freedom to operate broadcast stations in the community. Such a discriminatory restriction plainly cannot survive strict scrutiny by the courts.

The newspaper/broadcast restriction is fundamentally flawed regardless of the level of constitutional review applied to it. The reasons are simple ones: the Commission has no facts to show that local newspaper/broadcast combinations create any real harm that requires government intervention, and the agency has no evidence that the 26-year-old restriction has worked to address even the agency's speculative 1975 goals. The FCC therefore should act, at long last, to repeal the ban in its entirety, and free newspaper publishers to utilize their resources, expertise, and knowledge of the local community to enhance broadcast service and develop additional new and innovative information services and outlets.

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COMMENTS OF THE NEWSPAPER ASSOCIATION OF AMERICA

I. INTRODUCTION

After more than a quarter century, the Federal Communications Commission ("FCC" or "Commission") has finally initiated a rulemaking proceeding to reexamine and consider the elimination of its rule prohibiting the common ownership of a daily newspaper and either a radio or a television broadcast station in the same market. The Newspaper Association of America ("NAA"), the leading association representing the newspaper publishing industry, hereby submits its comments in response to the Commission's September 20, 2001 *Order and Notice of Proposed Rulemaking* in the above captioned proceeding.[1] For the reasons set forth below, NAA urges the Commission promptly to repeal its long outdated, discriminatory, and counterproductive cross-ownership ban.

As NAA has shown in prior related proceedings and further demonstrates below, the newspaper/broadcast cross-ownership ban was adopted in 1975 as part of a regulatory regime that no longer exists, in a media environment that has been radically transformed by

[1] *Cross-Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Waiver Policy, Notice of Proposed Rulemaking* in MM Docket Nos. 01-235, 96-197, FCC 01-262 (rel. Sept. 20, 2001) ("*NPRM*").

technological advances and marketplace forces that could scarcely have been imagined at the time. The prohibition on newspaper ownership of broadcast stations was adopted, moreover, without any record evidence that combined operations posed any threat to competition or that the restriction was necessary to, or would in fact, promote diversity in broadcasting. Indeed, the agency itself justified the prohibition on the basis of what it acknowledged was a "mere hoped for gain in diversity."

In the intervening years, the proliferation of new competitors in the print media, the explosive growth in broadcasting itself, the development of a seemingly unending stream of new technologies for the delivery of information and entertainment to the mass audience, and the elimination or relaxation of parallel ownership restrictions on newspaper publishers' competitors have rendered the ban obsolete and unsupportable. The Commission's maintenance of this selective ownership restriction plainly discriminates against publishers and broadcasters and frustrates their ability to compete freely in the environment of convergence that has been opened to their numerous "multi-channel" competitors. The record before the Commission already makes clear that its outmoded ban on newspaper ownership of broadcast stations is not necessary or appropriate to address any identifiable problem or market failure. Instead, the prohibition stymies the efforts of publishers and stations owners to pursue operational efficiencies that can result in improved broadcast programming, increased attention to the concerns of local audiences, and the more rapid development of new and innovative services and additional media outlets that augment the flow of local and national information to the public.

The specific directive of Congress in the Telecommunications Act of 1996 ("1996 Act") to review and eliminate unnecessary broadcast ownership regulations, as well as long-settled principles of administrative and constitutional law, place the burden squarely on the FCC to

demonstrate that any ownership restriction the Commission intends to retain is "necessary" and is reasonably and appropriately crafted to address a clear cut problem in the media marketplace. Here, however, the record before the Commission demonstrates that the competitive information marketplace is functioning extremely well, and that the "hoped for gain in diversity" on which the rule adopted in 1975 was premised has long since been achieved – not through governmental regulation, but through the technological revolution of the last quarter century and the explosive growth in competition among an ever-expanding array of media outlets. In these circumstances, the Commission's duty is clear: the agency must move forward expeditiously to repeal the newspaper/broadcast cross-ownership ban.

II. THE NEWSPAPER ASSOCIATION OF AMERICA

The Newspaper Association of America ("NAA") is a nonprofit organization that represents the newspaper industry and more than 2,000 newspapers in the United States and Canada. Most NAA members are daily newspapers; those members account for approximately 90 percent of U.S. daily circulation. NAA's membership also includes many non-daily U.S. newspapers and other newspapers published elsewhere in the western hemisphere as well as in Europe and the Pacific Rim. A number of NAA's members also hold broadcast station licenses, some in the home markets of their newspapers – the great majority of which were issued prior to the adoption of the newspaper/broadcast cross-ownership prohibition in 1975 and therefore were "grandfathered" when the prospective ban was implemented – and some in other markets across the United States.

NAA serves the newspaper industry and its individual members in strategic efforts to advocate and communicate the views and interests of newspaper publishers to all levels of government and to advance and support newspapers' interest in First Amendment issues. In this

capacity, NAA has participated in numerous Commission and judicial proceedings as well as in a wide variety of federal legislative and regulatory activities affecting the interests of newspaper publishers, in general, and the newspaper/broadcast cross-ownership ban, in particular:[2]

- NAA submitted Comments and Reply Comments in response to the FCC's 1996 Notice of Inquiry exploring possible revisions of the agency's existing policies concerning waiver of the newspaper/radio cross-ownership restriction.[3] In those Comments, NAA requested that the Commission move forward quickly to open rulemaking proceedings to consider complete repeal of the prohibition, and called for interim relief in the form of a broad and flexible waiver policy.[4]

- During the pendency of that proceeding, NAA filed a Petition for Rulemaking seeking elimination of the newspaper/broadcast cross-ownership ban in its entirety.[5] NAA demonstrated in its Petition that the prohibition is an anachronism, given the highly diverse and technologically advanced mass media marketplace that has developed since the FCC adopted the prohibition. Accordingly, NAA again requested that the Commission promptly commence a rulemaking proceeding to repeal the restriction.

- On July 30, 1997, NAA, joined by the Association of Local Television Stations, Inc. ("ALTV") and the National Association of Broadcasters ("NAB"), submitted a Brief Amici Curiae in support of the Petitioner-Appellant in Tribune Co. v. FCC.[6] The case was on appeal from an agency order denying Tribune Company's request for a permanent waiver of the ban to permit the common ownership of a daily

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[2] NAA's predecessor organizations, including the American Newspaper Publishers Association ("ANPA"), were similarly active in numerous FCC proceedings regarding the rule, including the Commission's first inquiry into newspaper/broadcast combinations dating back to 1941, as well as the rulemaking proceeding that resulted in the adoption of the current newspaper/broadcast cross-ownership restriction. *See Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 50 FCC 2d 1046 (1975) ("*1975 Multiple Ownership Order*"), *recon.*, 53 FCC 2d 589 (1975) ("*1975 Multiple Ownership Order (Reconsideration)*"), *rev'd in part sub nom., Nat'l Citizens Comm. for Broad. v. FCC*, 555 F.2d 938 (D.C. Cir. 1977) ("*NCCB v. FCC*"), *reinstated, FCC v. Nat'l Citizens Comm. for Broad.* 436 U.S. 775 (1978) ("*FCC v. NCCB*").

[3] *See Newspaper/Radio Cross Ownership Waiver Policy*, 11 FCC Rcd 13003 (1996) ("*Newspaper/Radio NOI*"); NAA Comments in MM Docket No. 96-197 (filed Feb. 7, 1997); NAA Reply Comments in MM Docket No. 96-197 (filed Mar. 21, 1997).

[4] In addition, on February 7, 1997, NAA filed Comments in the Commission's ongoing proceedings relating to television ownership (MM Docket Nos. 91-221, 87-8). Those comments also urged the FCC to take the steps necessary to repeal the newspaper/broadcast cross-ownership ban.

[5] *See* NAA Petition for Rulemaking, *Amendment of Section 73.3555 of the Commission's Rules to Eliminate Restrictions on Newspaper/Broadcast Cross-Ownership* (filed Apr. 28, 1997) ("*NAA Petition*").

[6] ALTV, NAA, and NAB Brief of Amici Curiae, *Tribune Co. v. FCC*, 133 F.3d 61 (D.C. Cir. 1998) (No. 97-1228).

newspaper and a UHF television station in the Miami-Fort Lauderdale, Florida market.

- NAA submitted Comments and Reply Comments in response to the March 1998 Notice of Inquiry initiating the Commission's first biennial review of its ownership rules pursuant to Section 202(h) of the Telecommunications Act of 1996 ("Telecom Act") and Section 11 of the Communications Act of 1934, as amended.[7] In those submissions NAA, for the third time in just over two years, provided extensive documentation to demonstrate that, in today's extremely diverse and highly competitive information market share, perpetuation of the ban is not only unnecessary but contrary to the public interest. NAA called upon the FCC to move forward quickly to initiate a rulemaking proceeding to eliminate the prohibition.[8]

- On August 23, 1999, NAA filed an Emergency Petition for Relief. That petition, like NAA's prior Petition for Rulemaking, urged the FCC to repeal the ban in order to avoid serious further prejudice to newspaper publishers, whose broadcast competitors had received extensive regulatory relief in the Commission's action in the 1999 Television Ownership Order.[9]

- The Commission failed to take steps to repeal the ban during the 1998 biennial review proceeding, despite the ample evidence in the record that the restriction is not necessary in the current marketplace and in fact disserves the public interest. NAA then filed a Petition for Review in the United States Court of Appeals for the District of Columbia, requesting that the Court set aside the FCC's decision.[10] The parties subsequently submitted a consent motion to hold the case in abeyance pending the outcome of this proceeding, which the Commission had committed itself to initiate.[11]

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[7] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"); 47 U.S.C. § 161; *see 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*, 13 FCC Rcd 11276 (1998) ("*1998 Biennial Review NOI*").

[8] *See* NAA Comments in MM Docket No. 98-35 (filed July 21, 1998) ("*NAA 1998 Biennial Review Comments*"); NAA Reply Comments in MM Docket No. 98-35 (filed Aug. 21, 1998).

[9] *See* NAA Emergency Petition for Relief in MM Docket Nos. 98-35, 96-197 (filed Aug. 23, 1999) ("*NAA Emergency Petition*"); *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903 (1999) ("*1999 Television Ownership Order*").

[10] *Newspaper Assoc. of America v. FCC*, Case No. 00-1375 (D.C. Cir. filed Aug. 16, 2000).

[11] *Newspaper Assoc. of America v. FCC*, Case No. 00-1375 (D.C. Cir. Aug. 30, 2000) (order holding case in abeyance).

- During the FCC's 2000 Biennial Review, NAA again submitted comments requesting repeal of the ban in its entirety.[12]

NAA submits that, in view of the longstanding and consistent efforts of the NAA and other interested parties demonstrating that the ban is outdated, the Telecom Act's explicit directive to eliminate unnecessary broadcast ownership rules, and the Commission's own repeated recognition that the restriction is long overdue for a through reevaluation, the FCC should seize this opportunity and move forward promptly to repeal it. By doing so, the Commission can give newspaper publishers and broadcasters the much-needed freedom to compete effectively with cable and other multi-channel/multi-outlet providers, as well as with new print and computer-based sources of news, information, and entertainment. Relief from the outdated ban not only will help preserve newspapers and broadcast stations as critically important local voices, but also foster their evolution into diversified and innovative competitors in the technologically advanced and highly diverse information marketplace of the 21st century.

III. THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RESTRICTION WAS ADOPTED IN A BYGONE ERA IN WHICH MEDIA CHOICES WERE FAR MORE LIMITED, BASED ONLY UPON SPECULATIVE ASSUMPTIONS ABOUT DIVERSITY THAT HAVE NOT WITHSTOOD THE TEST OF TIME

In the opening paragraph of its *NPRM*, the Commission states that in the current inquiry, as in the 1975 proceeding in which it adopted the newspaper/broadcast cross-ownership ban, the

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[12] *See Biennial Regulatory Review 2000*, Staff Report, CC Docket No. 00-175 (Sept. 19, 2000) ("*2000 Biennial Review Staff Report*"); NAA Comments in CC Docket No. 00-175 (filed Oct. 10, 2000). NAA's Comments and Reply Comments in response to the *1998 Biennial Review NOI*, the *Newspaper/Radio NOI* and the television ownership proceedings, its Petition for Rulemaking and Emergency Petition, along with its Comments in response to the *2000 Biennial Review Staff Report*, are hereby incorporated by reference. *See NPRM* at ¶ 7, nn. 22 and 25; *1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Communications Act*, 15 FCC Rcd 11058, 11103 (2000) ("*1998 Biennial Review Report*") (considering comments submitted in response to NAA's Petition for Rulemaking); *1998 Biennial Review Report*, 15 FCC Rcd at 11103 n.203 (stating that NAA's Emergency Petition would be considered in the 2000 Biennial Review); *1998 Biennial Review NOI*, 13 FCC Rcd at 11289-90 (requesting comments on NAA's Petition for Rulemaking).

agency "is obliged to give recognition to the changes which have taken place [in the multimedia environment] and see to it that its rules adequately reflect the situation as it is, not as it was."[13] NAA submits, that in order to do so, and to undertake the searching zero-based analysis of the cross-ownership ban mandated by Congress,[14] it is necessary first to examine the circumstances surrounding the original adoption of the rule in 1975, to attempt to discern the Commission's purposes in adopting the proscription, and to identify the means by which the agency thought that the ban might further those purposes.[15]

A. The Ban Was Imposed as Part of a Comprehensive Scheme of Cross-Ownership Restrictions That Has Largely Been Abandoned

The newspaper/broadcast ban[16] was adopted as part of a series of cross-ownership restrictions that the FCC enacted in the 1960s and 1970s. These included the one-to-a-market rule (prohibiting common ownership of radio and television stations in the same market) as well as rules prohibiting television stations, television networks, and telephone companies from owning cable systems in their home markets.[17] The general impetus behind these restrictions was to prevent any one party from owning more than a single local media outlet.

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[13] *NPRM* at ¶ 1 (citing *1975 Multiple Ownership Order*, 50 FCC 2d at 1075).

[14] *See infra* Section VII.

[15] *See 1998 Biennial Review Report*, 15 FCC Rcd at 11132 (Separate Statement of Comm'r Harold Furchtgott-Roth); *see also id.* at 11151 (Separate Statement of Comm'r Michael K. Powell) ("I start with the proposition that the rules are no longer necessary and demand that the Commission justify their continued validity.").

[16] The rule prohibits the acquisition of a broadcast station license by the owner of a daily newspaper in the same community. *See* 47 C.F.R. § 73.3555(d) (1996) (formerly 47 C.F.R. § § 73.35(a), 73.240(a)(1), and 73.636(a)(1)). The regulation also serves to prevent broadcasters from acquiring co-located newspapers.

[17] *See generally 1975 Multiple Ownership Order*, 50 FCC 2d at 1047-49.

As the Commission recognizes in its *NPRM*, at the time it adopted these cross-ownership prohibitions, the local marketplace was extremely limited and, apparently, highly saturated.[18] In 1975, the broadcast television industry was dominated by three national television networks, complemented in some of the larger markets by a handful of "independent" stations.[19] The three networks had a viewing share that exceeded 90 percent – and a primetime viewing share of 95 percent – while that of all independent stations combined had yet to reach double figures, and the viewing share of cable operators was insignificant.[20] Further, the Commission clearly envisioned little potential for expansion of this relatively concentrated market, observing that "the broadcast medium has matured" and that "the channel in question may be the last or one of the last available for the community."[21]

The cable industry was not then viewed as having the potential to make a significant contribution to diversity. In 1975, the cable industry served fewer than 10 million homes, and the prospect of widespread availability of cable service including local program origination as well as the retransmission of broadcast programming appeared to be dim.[22] The FCC noted that "[m]any cable systems do not originate nor, of course, do they carry signals of [additional]

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[18] *NPRM* at ¶ 1.

[19] *See Network Financial Interest & Syndication Rules*, 23 FCC 2d 382 (1970), *aff'd sub nom.*, *Mount Mansfield Television, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971).

[20] *See* F. Setzer and J. Levy, *Broadcast Television in a Multichannel Marketplace*, Office of Plans and Policy Working Paper No. 26, 6 FCC Rcd 3996, 4000, 4019 (1991) ("*OPP Report*"); *see also NPRM* at ¶ 1.

[21] *1975 Multiple Ownership Order*, 50 FCC 2d at 1075.

[22] *See HBO, Inc. v. FCC*, 567 F.2d 9, 24 (D.C. Cir. 1997), *cert. denied*, 434 U.S. 829 (1977). Cable television had its origins in "community antenna" services, or CATV, designed merely to provide better reception of over-the-air television signals. The primary function of these early cable systems was simply to ensure that viewers in small, geographically isolated communities received the signals of three network affiliates. *See Amendment of Part 74, Subpart K, of the Commissions Rules and Regulations Relative to Community Antenna Television Systems*, 36 FCC 2d 143, 179 (1972).

stations dealing with local issues. The signals they import are those of outside stations."[23] In this restricted environment, the Commission certainly could not have been expected to foresee the growth of independent stations; the emergence of a fourth, fifth, sixth, and now a seventh national network; or the development of the myriad alternatives to the traditional broadcast and print media that have arisen during the two and one-half decades that followed.

B. The Ban Was Based on Speculative Premises That Have Not Been Borne Out by Experience

To justify the new cross-ownership ban, the FCC relied on what the agency itself acknowledged to be a "mere hoped for gain in diversity."[24] Rather than providing any concrete evidence that the rule would in fact enhance diversity in the media marketplace, the Commission offered only its observation that licensing newspaper owners to operate broadcasting stations "is not going to add to already existing choices, is not going to enhance diversity."[25] This reasoning was labeled by commenting parties as "51 voices are necessarily better than 50,"[26] and plainly reflects the agency's unproven assumption that greater diversity in ownership would translate, automatically and inevitably, into greater diversity in programming content.

In reviewing the FCC's 1975 order, the D.C. Circuit noted that "[t]he Commission enacted these rules without compiling a substantial record of tangible harm."[27] To the contrary,

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[23] *1975 Multiple Ownership Order (Reconsideration)*, 53 FCC 2d at 593. Similarly, the D.C. Circuit observed at the time that in view of the enormous capital outlays necessary, "extension of cable service with cablecasting capability to the country as a whole does not seem possible in the immediate future." *HBO, Inc. v. FCC*, 567 F.2d at 24.

[24] *1975 Multiple Ownership Order*, 50 FCC 2d at 1078.

[25] *Id.* at 1075.

[26] *Id.* at 1059.

[27] *NCCB v. FCC*, 555 F.2d at 944.

according to the court, the record contained "little reliable 'hard' information."[28] The Court further expressly noted the absence of evidence in the record of specific anticompetitive acts by cross-owned stations.[29] In addition, Judge Bazelon observed that technological improvements could eventually eliminate spectrum scarcity, and that "[a]lleviating scarcity would not only eliminate the need for promoting diversity, it would also presumably eliminate the need for all licensing save that necessary to prevent interference."[30] Thus, even in affirming the FCC's adoption of the ban, Judge Bazelon clearly foresaw the time when a diverse and competitive information marketplace would render the newspaper/broadcast cross-ownership restriction obsolete.

Similarly, although it ultimately affirmed the prohibition adopted by the FCC, the United States Supreme Court recognized that "the Commission did not find that existing co-located newspaper-broadcast combinations had not served the public interest, or that such combinations necessarily 'spea[k] with one voice' or are harmful to competition."[31] Thus, "[t]he prospective rules were justified [only] by reference to the Commission's policy of promoting diversification of ownership," which "would *possibly* result in enhanced diversity of viewpoints."[32]

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[28] *Id.* at 956.

[29] *See id.* at 959.

[30] *Id.* at 950 n.31.

[31] *FCC v. NCCB*, 436 U.S. at 786 (citation omitted). Indeed, in its order adopting the cross-ownership ban, the FCC noted that co-owned "print and [broadcast] outlets were [not] mirror images of one another, speaking with one voice." Based in part on that fact, the Commission determined not to require divestiture of most existing combinations. *1975 Multiple Ownership Order*, 50 FCC 2d at 1089.

[32] *See NPRM* at ¶ 2 (quoting *FCC v. NCCB*, 436 U.S. at 786 (emphasis added)).

C. The Proliferation of Media Outlets Since 1975 Renders Any Concern with Diversity or Competition Patently Insufficient to Justify the Newspaper Ban

As the Commission recognizes in its *NPRM*, the mass media marketplace has undergone a dramatic and sweeping transformation in the 26 years since the newspaper/broadcast cross-ownership ban was first implemented.[33] The three once-dominant television networks and their affiliated local stations have lost their pre-eminent positions, and the daily newspaper has faced greatly increased competition from a vast array of content providers. Alternatives to these traditional media have multiplied as new media outlets have entered the marketplace, and consumers now enjoy the widest choice of outlets that has ever been available.

Perhaps most obvious are the dramatic changes in the broadcast television market over the past 26 years, with the dominance of the national networks diminishing amid the explosive growth of alternative media outlets. Over-the-air television content is vastly more diverse than it was in 1975, when three networks were the only outlets for video programming for home viewers. Now, with the addition of new broadcast outlets – Fox, UPN, WB, PaxTV, and others – the variety of programming has greatly increased, both in terms of sources and in terms of content.[34]

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[33] *See NPRM* at ¶¶ 1, 9-13. In its 1997 Petition for Rulemaking and again in its Comments in the 1998 Biennial Review proceeding, NAA supplied extensive information concerning the dramatic growth and diversification that has occurred in the information marketplace over the past quarter century. *See NAA Petition* at Section V, 17-18; *NAA 1998 Biennial Review Comments* at Section VI, 31-54. NAA's prior evidentiary showings in this regard are hereby incorporated by reference, and will not be repeated in detail in these Comments. However, Appendix I (attached hereto) provides updated information on the continuing growth in diversity and competition among the media from which consumers obtain news, information, entertainment, and other content.

[34] PaxTV, for instance, made its debut vowing to bring to American viewers family oriented programming free of excessive violence, explicit sex and foul language. *See* Appendix I, Section II. Similarly, UPN employs a targeting strategy that allows its programs to typically rank highest among minority viewers. *See* Viacom Comments in MM Docket No. 00-108, at 30 n.90 (filed Aug. 31, 2000). Univision, Telemundo, and others have focused their efforts on the rapidly growing Hispanic populations in the United States. *See, e.g.*, Ingela Waugh, *Hispanic TV Outshines Anglophone Nets*, Video Age Int'l, May 1, 2000, at 60; Hoovers Online, *Univision Communications, Inc. Company Capsule* at <www.hooversonline.com> (visited Dec. 2, 2001); Telemundo Communications Group, Inc., *Corporate Information* at <www.telemundo.com> (visited Dec. 2, 2001).

The development of four additional national television networks, as well as the growth in Spanish-language programming in the past two decades, has had a dramatic impact at the local level as well as nationally. The availability of network-quality programming, brand recognition, and promotional support has enabled countless television stations that were struggling financially, or nonexistent, to develop into viable local outlets and, in some cases, to provide additional sources of local news and other informational programming. Indeed, the Commission notes in its *NPRM* that "approximately 77% of commercial TV stations provide local news," including one third of the stations that are not affiliated with the original "Big Three" networks.[35] Furthermore, the introduction of digital television, which can multiply the channels available for programming, presents opportunities for broadcast television that the Commission could not have imagined in 1975.

As the FCC recognizes, while there has been tremendous growth in content diversity on broadcast television, it has been accompanied by audience fragmentation and loss of viewers to cable and other new video providers. Thus, the combined viewership of the largest four networks has steadily decreased over the past several years.[36] More and more viewers are turning to cable, a fledgling industry at the implementation of the newspaper/broadcast cross-ownership ban, and more recently to satellite-delivered video services. In 1975, fewer than 20 percent of all households subscribed to cable.[37] By 2000, subscribership had more than tripled to 67.4 percent of all households.[38] As the Commission notes, more than 200 video

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[35] *NPRM* at ¶ 15.

[36] Since 1975, as the Commission notes, primetime broadcast audience shares have fallen by 34%. *See NPRM* at ¶ 9.

[37] *See* Appendix I, Section IV.

[38] *See id.*

programming sources are available on cable systems, 99 percent of all cable subscribers receive at least 30 channels, 68 percent enjoy 54 or more, and 6 percent subscribe to systems with 91 channels or more.[39] Direct broadcast satellite service, which only came into being within the past decade, also has grown rapidly and now serves nearly 13 million subscribers, or more than 15 percent of the households that are served by multichannel video programming distributors, or MVPDs.[40] Almost 84 percent of all U.S. television households now receive service from cable, DBS, or another multi-channel video provider.[41] Beginning in late 1999, moreover, DBS providers have been able to carry local television signals. A "must carry regime" similar to that governing cable is scheduled to go into effect for DBS providers in January 2002.[42]

Local and regional cable news networks also have become instrumental in broadening the alternatives for local news. While the national services such as CNN and MSNBC are most familiar, other cable news networks cover a limited geographical area, such as a city or metropolitan area, providing citizens with around-the-clock coverage of local news and events. Regional networks, such as Texas Cable News, focus on news that affects their home states or regions of the country.[43]

The number of broadcast radio stations also has skyrocketed since 1975, growing by more than 50 percent from 7,785 stations to 12,932,[44] and the number of recognized radio

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[39] *See NPRM* at ¶ 11.

[40] *See id.*

[41] *Id.*

[42] *See* Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501 (codified in scattered sections of Titles 17 and 47 U.S.C.); *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues,* 16 FCC Rcd 1918 (2000); 47 C.F.R. § 76.66.

[43] *See* Appendix I, Section V.

[44] *See* Appendix I, Section III.A; *see also NPRM* at ¶ 9.

program formats has expanded from 15 to more than 90.[45] Spanish language programming has exploded onto the scene, and is now the fastest growing segment of the broadcast industry.[46] Furthermore, just this year XM Satellite Radio launched the first satellite-delivered digital audio radio service ("DARS"). A second DARS provider, Sirius Satellite Radio, expects to initiate service next year. Both will offer subscribers dozens of channels of CD-quality music and other information/entertainment services.

In the newspaper realm, the developments that have occurred over the past 26 years have caused publishers to search for new ways to remain competitive. By 2000, there were 276 fewer daily newspapers than there were in 1975.[47] However, readers are choosing from a wider variety of newspaper sources, including three dailies – *USA Today*, the *Wall Street Journal*, and the *New York Times* – that are now distributed nationally, as well as an explosion in the circulation of weekly and special interest newspapers. Weekly newspapers have emerged as significant sources of highly localized news and information. In 1975, the total circulation for weekly newspapers was 35.8 million; by 2000, the circulation for weeklies had nearly doubled to 70.9 million.[48]

In an effort to thrive in this new market, daily newspapers have continually updated and improved their product to meet the changing tastes of their readership and preserve their advertising base. Nationally recognized dailies, as well as smaller and less well known

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[45] *See* Appendix I, Section III.A.

[46] *See, e.g.*, Steve McClellan, *Spanish Language TV Weathers Stormy Economic Conditions So Far*, Broadcasting and Cable, Oct. 1, 2001, at 22; Dianne Solis, *Based on Census, Nielsens Will Reflect More Hispanic Viewers*, The Dallas Morning News, June 6, 2001, at 60; Ingela Waugh, *Hispanic TV Outshines Anglophone Nets*, Video Age Int'l, May 1, 2000, at 60.

[47] *See* Appendix I, Section I. The decline in the number of daily newspapers since 1975 reflects, in large part, the disappearance of afternoon dailies in many communities. *See id.*

[48] *See id.*

newspapers, have created online versions of daily content in an effort to capture an audience through a new medium, the Internet.[49] While these newspaper "pioneers" are venturing into and developing the uncharted territory of the Internet, however, they are competing with the millions of electronic publishers that post their content worldwide. As of November 2000, the FCC notes, 56 percent of all Americans had access to the Internet from home.[50] Some users log on primarily to read the day's news, but a variety of alternative uses compete for consumers' time, including online shopping and education-related research sources. In this vastly diverse universe, daily newspapers cannot hope to "corner the market" for local news and information, as the Commission apparently feared they might over two decades ago.

Simply put, the world that formed the backdrop for the Commission's adoption of the newspaper/broadcast cross-ownership ban in 1975 no longer exists. Technological and market forces (not governmental management) have yielded a wealth of information outlets from which Americans can pick and choose their sources of news, opinion, information, and entertainment. Moreover, the speculative "best guesses" by the Commission in 1975 as to how its new regulations might impact diversity in the local information marketplace remain unsupported by any empirical evidence. In fact, as detailed below, they have been proven by the passage of time, the enormous expansion among the competitive media, and the experiences of the several dozen remaining local newspaper/broadcast combinations to be wholly unnecessary and, indeed, inimical to the public interest objectives the Commission seeks to advance.

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[49] *See, e.g.*, Wall Street Journal <www.wsj.com> (visited Dec. 2, 2001); New York Times <www.nyt.com> (visited Dec. 2, 2001); Washington Post <www.washingtonpost.com> (visited Dec. 2, 2001); Canby (OR) Herald <www.canbyherald.com> (visited Dec. 2, 2001); Daily (Keyser, WV) News-Tribune <www.newstribune.townnews.com> (visited Dec. 2, 2001); Ely (NV) Daily Times <www.elynews.com> (visited Dec. 2, 2001).

[50] *NPRM* at ¶ 12.

IV. ELIMINATION OF THE BAN IN ITS ENTIRETY WILL MOST EFFECTIVELY PROMOTE THE SIGNIFICANT PUBLIC INTEREST BENEFITS OF COMMON OWNERSHIP OF MEDIA OUTLETS IN THE LOCAL MARKETPLACE AND ADVANCE THE DELIVERY OF DIVERSE, LOCALLY ORIENTED NEWS AND INFORMATION TO CONSUMERS

Elimination of the newspaper/broadcast cross-ownership ban will advance numerous important public interest goals. As evidenced by the performance of the several dozen newspaper/broadcast combinations in existence today, repeal of the restriction will promote efficiencies and operational synergies that not only benefit the combinations themselves, but also advertisers and, most importantly, the public. Moreover, elimination of the newspaper/broadcast prohibition will achieve these important benefits without causing any material reduction in viewpoint diversity. In fact, jettisoning the ban will likely increase overall programming diversity and responsiveness to the needs of the local marketplace. Thus, if freed from the Commission's stifling cross-ownership restriction, daily newspapers and broadcast stations will be able to better serve the public interest in their local communities.

A. The Experiences of Existing Newspaper/Broadcast Combinations Demonstrate That Elimination of the Ban Will Promote Significant Efficiencies and Operational Synergies That Benefit the Media Combinations Themselves, Advertisers, and Ultimately the Public

There are approximately 38 grandfathered newspaper/broadcast combinations in existence today,[51] as well as four combinations that exist pursuant to permanent or temporary waivers of the newspaper/broadcast cross-ownership prohibition[52] and four combinations created through recent newspaper acquisitions, pending the outcome of the next cycle of broadcast

[51] According to NAA's records, the grandfathered newspaper/broadcast combinations in existence today include 11 TV/newspaper combinations, 18 radio/newspaper combinations, and 9 TV/radio/newspaper combinations. *Cf. NPRM* at ¶¶ 1, 28. Appendix II (attached hereto) provides information regarding the newspapers and broadcast stations that comprise these grandfathered combinations, as well as the combinations that exist pursuant to waivers and those created through recent acquisitions.

[52] *See NPRM* at ¶¶ 1, 28.

license renewal proceedings in 2005 and 2006. The experiences and performance of these newspaper/broadcast combinations – which are located in all corners of the nation and across a broad range of market sizes[53] – illustrate the numerous and considerable public interest benefits that can accrue from efficiencies and operational synergies created by such common ownership.

As the Commission recognized in the *NPRM*:

> [T]he efficiencies of a merger [between a broadcast station and a daily newspaper in the same market] may enable [the] broadcast station and [the] newspaper to combine sales and operations staff, and thereby save expenses or reduce advertising prices. At least some of the savings could be passed on to advertisers…. Some of the additional savings … could also be passed on to listeners, viewers, and subscribers in the form of enhanced content.[54]

Although many of the existing cross-owned combinations have been somewhat hesitant over the years to fully pursue the potential synergies of joint operations, due to concerns that the Commission might question some such efforts, the dynamics of the contemporary marketplace have compelled them more and more in recent years to make efforts to conserve resources and take advantage of available efficiencies. In this regard, the experiences of existing commonly owned newspapers and broadcast stations provide powerful concrete examples of how the local marketplace can benefit from the elimination of the outdated newspaper/broadcast cross-ownership ban. They demonstrate that, by calling upon the extensive resources, newsgathering capabilities, journalistic expertise, and local ties of newspaper publishers, commonly-owned stations can significantly expand and improve broadcast coverage of local events and issues. Further, newspaper/broadcast combinations are uniquely qualified to develop enhanced and

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[53] The newspaper/broadcast combinations currently represent a cross-section of markets ranging in size from the 1st-ranked market through the 181st-ranked market. *See Television & Cable Factbook 2001* at A-1–A-4. While there are various methodologies for defining the relevant local market in the mass media context, for ease of reference and consistency, these Comments use Nielsen Designated Market Areas, or "DMAs" throughout.

[54] *NPRM* at ¶ 25.

innovative new information services as well as additional distribution outlets that meet the varied needs and interests of consumers in the local marketplace.

1. Elimination Of the Prohibition Will Allow the Combinations Themselves to Realize Significant Efficiencies and Operational Synergies

First, as the Commission anticipates in the *NPRM*, common ownership has enabled newspapers and broadcast stations to realize considerable cost savings[55] by (i) sharing staff members in various aspects of their businesses, including newsgathering, news reporting, advertising sales, technical services, administrative/business functions, and human resources; (ii) sharing physical facilities and thus reducing rent and overhead costs; and/or (iii) sharing newsgathering resources such as news bureaus, wire services, cameras, vehicles, and helicopters.[56]

For example, Journal Communications' joint ownership of the *Milwaukee Journal Sentinel*, WTMJ-TV, WTMJ(AM), and WKTI-FM in the 33rd-ranked Milwaukee market provides an excellent example of such efficiencies and operational synergies.[57] While the newspaper and broadcast stations do not share staff members or news bureaus, Journal Communications is able to achieve substantial cost savings through the use of some of the same news sources as well as a number of centralized business and administrative operations. In

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[55] *See id.*

[56] *See* Kent Mikkelsen, Economists Incorporated, *Horizontal and Vertical Structural Issues and the Newspaper – Broadcast Cross-Ownership Ban,* at 1 (Dec. 2001) ("Economists Inc. Study") (attached hereto as Appendix IV) ("Newspaper and broadcast stations may improve their news product and realize cost efficiencies through sharing of news leads, sources, personnel and operations in various forms."); *id.* at 10-11 ("Closer cooperation between jointly-owned newspapers and broadcast stations can bring significant benefits. Among the potential benefits are the following: … Newspapers and broadcasters can more readily share leads, … news, … news personnel, … [and] administration and support services[,]" thus reducing unnecessary duplication and producing cost savings and efficiencies.).

[57] *See* Statement of E. Molly Hemsley, Director, Government Affairs and Legislative Counsel, Newspaper Association of America ("Hemsley Statement") (attached hereto as Appendix III).

particular, the newspaper and broadcast stations all utilize centralized payroll, treasury, tax, audit, and legal services.

Likewise, in Tampa – the 14th-largest market – Media General, Inc. ("Media General"), the owner of the *Tampa Tribune*, WFLA-TV, and Tampa Bay Online (or TBO.com), built a state-of-the-art news complex that houses all three media outlets.[58] The multimedia assignment desk located in the middle of WFLA-TV's newsroom serves as the nerve center of the converged operation. The *Tampa Tribune*, WFLA-TV, and TBO.com share multimedia editors as well as staff members who monitor police scanners, research stories, and share leads. The complex also has a digital editing system that allows editors from each of the outlets to access material simultaneously and cameras to permit newspaper reporters to present on-air versions of their stories during WFLA-TV newscasts. Conversely, WFLA- TV reporters often adapt their stories for presentation in the *Tampa Tribune* and on TBO.com.

Similar operational efficiencies and synergies are exemplified by Gannett Co. Inc.'s ("Gannett") joint ownership of *The Arizona Republic*, KPNX-TV, and the online news provider <AZcentral.com> in the 17th-ranked Phoenix market. The three media outlets share staff and newsgathering sources (such as a helicopter owned by KPNX-TV), while utilizing the unique "expertise" of each outlet. Specifically, "more than 30 print reporters … participat[e] in KPNX newscasts and special programs … [and] KPNX reporters write special reports for print. All [reporters] contribute to AZcentral.com."[59] Reporters for *The Arizona Republic* also appear on KPNX newscasts. In addition, multimedia directors from the newspaper and the television

[58] *See* Media General Comments in MM Docket Nos. 01-235, 96-197 (filed Dec. 3, 2001); Chris Gabettas, *Three's Company*, Communicator, June 2000, at 26.

[59] *See* Gannett Comments in MM Docket Nos. 01-235, 96-197 (filed Dec. 3, 2001); Tom Callinan, Editor, *The Arizona Republic*, *Convergence Gannett Style*, Gannetteer, May-June 2001, at 8.

station attend joint news meetings "to spot opportunities for coverage partnerships and cross-promotion, arrange on-air appearances by *Republic* staffers, and set up writing sessions for KPNX reporters." Moreover, once a month, KPNX producers meet with reporters for *The Arizona Republic* to brainstorm regarding education stories that work well for both print and television; in this manner, they coordinate their segments and stories to avoid duplicating newsgathering efforts.

In the much smaller Cedar Rapids community – the nation's 89th-largest market – the Gazette Company ("Gazette") publishes the *Cedar Rapids Gazette* and is the sole shareholder of the licensee of KCRG-TV and KCRG(AM). Gazette's daily newspaper and broadcast stations in the Cedar Rapids community share staff members and physical facilities and often draw on each others' resources.[60] For example, assignment editors at the *Gazette* and the broadcast stations consult with each other on a daily basis regarding news tips and story ideas, and reporters for the respective outlets frequently collaborate on spot news (*e.g.*, providing local angles on the recent terrorist attacks). In addition, the *Gazette*'s financial editor provides frequent business reports for the stations, and its court reporters provide occasional broadcast coverage of trials and related matters. Conversely, KCRG-TV and KCRG(AM) create the daily weather map for the newspaper, and the *Gazette* sometimes uses the broadcast stations' helicopter pilot/reporter to cover breaking news stories. Further, the archives of each outlet are available to the news staffs of the other two Cedar Rapids outlets.

The co-owned Cedar Rapids newspaper and broadcast stations also combine their expertise and resources to work together on enterprise projects called "Read It/See It." These projects are published and broadcast concurrently, but each set of editors determines how best to

[60] *See* Hemsley Statement.

use the unique capabilities of their respective media to communicate the information to their audiences. As a recent example, on Veteran's Day, the *Gazette* presented a Civil War theme article, and one of its photographers produced a videotaped essay, which was broadcast on KCRG-TV. The *Gazette*, KCRG-TV and KCRG(AM) also have pooled their resources to produce candidate forums during elections and to co-sponsor events to raise awareness of local issues, such as hunger in the community. Thus, the ability of Gazette's daily newspaper and broadcast stations in the Cedar Rapids market to combine their resources has enabled dialogue that might not have been possible in the absence of common ownership of these local outlets.

Newspaper/broadcast combinations in numerous other markets demonstrate similar efficiencies and operational synergies.[61] For example, The Findlay Publishing Co.'s ("Findlay") joint ownership of *The Courier*, WFIN(AM), and WKXA-FM in the 67th-ranked Toledo market allow the Findlay outlets to share staff members in various aspects of their business, including administrative functions, technical services, human resources, and marketing. This integrated staffing structure allows Findlay to realize a savings of approximately $20,000 annually. Likewise, in Fredericksburg, Virginia – a community that has developed into a suburb in the 8th-ranked Washington, DC market – The Free Lance-Star Publishing, owner of *The Fredericksburg Free Lance-Star* and three local radio stations, is able to achieve an estimated $113,500 cost savings per year by using some of the same staff for administrative functions, technical services, and human resources. The company also reports that it saves approximately $40,000 annually because its Fredericksburg outlets are able to share physical facilities, a phone system, and business software.

[61] *See id.*

2. Elimination of the Ban Will Allow the Public to Realize Significant Benefits in the Form of Enhanced Content, Innovative Media Outlets and Services, and Increased Exposure to Important Information

As suggested by the preceding discussion, the significant efficiencies and operational synergies realized by the commonly owned daily newspapers and broadcast stations enable them to provide important benefits to their listeners, viewers, and subscribers. Indeed, the performance of existing newspaper/broadcast combinations across a broad cross-section of market sizes demonstrates that commonly owned newspapers and broadcast stations typically provide consumers with enhanced local news, information, and other content, as well as an array of innovative media outlets and services, including cutting-edge web sites. Such web sites – in association with co-owned newspapers and broadcast outlets – further benefit the local community by presenting information in multiple formats, thereby reaching more people, delivering information in the form in which they want to receive it,[62] and increasing the public's exposure to important news stories and other informational content. Elimination of the newspaper/broadcast cross-ownership restriction will better serve consumers by enabling more newspaper and broadcast outlets to combine their expertise and resources to provide these important public interest benefits.

The journalistic expertise of newspaper publishers, in conjunction with the extensive newsgathering resources of broadcast stations and the deep community ties of the combined local media outlets, render newspaper/broadcast combinations uniquely suited to offer enhanced content to consumers. Indeed, daily newspapers – unlike broadcast stations, which can be

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[62] John Madigan, President, Chairman and CEO, Tribune Company, *The New Mass Media: National Reach with a Local Touch*, Address at Town Hall, Los Angeles, CA (Sept. 20, 2000) (available at <www.tribune.com/about/news/2000.madigantownhall.com>) ("[P]eople ... have a need for community, for information and entertainment – and for sharing all those things with each other. They have a need to use their information in a form that is most useful to them at any given time – print, broadcast, or online.").

programmed from afar via microwave links or satellite feeds – are by their very nature compelled to be deeply involved in and aware of the activities, concerns, and issues affecting their home communities and to assemble and deploy the resources necessary to report local events and inform their readers with respect to local concerns and controversies.[63] Thus, commonly owned daily newspapers and broadcast stations generally offer superior coverage of local as well as national news, public affairs, and informational issues, as compared to their independently owned competitors.[64]

In particular, co-owned broadcast stations tend to provide more in-depth coverage of local news and public affairs than other media outlets in their communities,[65] as well as innovative news features and investigations.[66] In recognition of such achievements, many of these broadcast stations have won local, state, and national awards for outstanding news coverage and public affairs programming. Indeed, numerous commonly owned broadcast stations have received many of the industry's most prestigious honors, including DuPont-

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[63] *See Powell Stresses Need For Facilities-Based Competition*, Comm. Daily, Oct. 24, 2001, at 2 (citing Chairman Michael K. Powell) (stating that "newspaper-broadcast combinations actually could promote [the] FCC's objective of localism because newspaper content [is] so locally oriented").

[64] Numerous members of the mass media industry support the proposition that commonly owned newspaper and broadcast outlets tend to provide more and better local news and public affairs programming. *See, e.g.*, Belo Comments in MM Docket No. 98-35, at 15-21 (filed July 21, 1998); Chronicle Comments in MM Docket No. 98-35, at 16-21, Exhibit B (filed July 21, 1998); Gannett Comments in MM Docket No. 98-35, at 21-22 (filed July 21, 1998); Hearst Comments in MM Docket No. 98-35, at 15, 19-21 (filed July 21, 1998); Tribune Comments in MM Docket No. 98-35, at 60-72 (filed July 21, 1998); NAA Comments in MM Docket No. 98-35, at 62-63 (filed July 21, 1998); Journal Broadcast Group Comments in MM Docket No. 96-197, at 2-3 (filed Feb. 7, 1997); Knight-Ridder Comments in MM Docket No. 96-197, at 7-8 (filed Feb. 7, 1997). Moreover, the Commission itself has recognized that there may be markets in which "cross-ownership … could lead to … increased dissemination of news and information in the relevant market." *Newspaper/Radio NOI*, 11 FCC Rcd at 13009.

[65] *See, e.g.*, John C. Busterna, *Television Station Ownership Effects on Programming and Idea Diversity: Baseline Data*, 1 J. Media & Econ. 63, 67 (1988) (finding that stations owned by larger groups broadcast more minutes of both local news and public affairs programming).

[66] In fact, the Commission, in adopting the newspaper/broadcast cross-ownership restriction, acknowledged a "statistically significant superiority in newspaper owned television stations" in a number of areas, including local news, local non-entertainment programming, and total local programming. *1975 Multiple Ownership Order*, 50 FCC 2d at 1078 n.26, 1094-98, Appendix C.

Columbia Awards, Peabody Awards, and Murrow Awards,[67] and generally are the top stations in their respective markets.

WTMJ-TV and WTMJ(AM), which are co-owned with the *Milwaukee Journal Sentinel* by Journal Communications in the 33rd-largest market, have achieved longstanding success in their community.[68] Indeed, "[e]very one of [WTMJ-TV's] weekday newscasts is the highest-rated newscast in its time period" and "ratings for [WTMJ-TV's] late news regularly exceed those for other NBC affiliates throughout the country." The station is the news leader in southeastern Wisconsin,[69] providing 5.5 hours of local news each weekday, as well as 33 hours of local non-entertainment programming and 27.5 hours of national non-entertainment programming on a weekly basis. WTMJ(AM), which specializes in news, talk, sports, and information, is consistently the top-rated radio station in Milwaukee. The station has a 24-hour news operation, with more than twice the news staff of any other radio station in the market and the largest radio sports department in the state. WTMJ(AM) provides an impressive 96.5 hours of local non-entertainment programming per week, including 27 hours of newscasts, 31.5 hours of public affairs programming, 19 hours of political programming, and 18.5 hours of other news/information programming. Indeed, all of Journal Communications' broadcast stations in

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[67] For example, E. W. Scripps Co.'s WCPO-TV has won various awards, including the Murrow Award, the DuPont Award, the Jack R. Howard Award, and Ohio Associated Press awards. *See* WCPO-TV Scripps Howard Broadcasting Company, *WCPO-TV: More Than Half a Century of Excellence* at <www.cincinow.com/whatson9/aboutwcpo/history/more1.shtml> (visited Nov. 27, 2001). The Post Company's KIFI-TV has won "significant state and regional awards for journalistic excellence." *See* The Post Company, d.b.a. KIFI-TV, *About Us* at <www.localnews8.com/aboutus/index.htm> (visited Nov. 27, 2001).

[68] *See* Hemsley Statement; Journal Communications Inc., *WTMJ-TV* at <www.journalbroadcastgroup.com/stations/wtmjtv.htm> (visited Nov. 27, 2001).

[69] During the October 24, 2001 ratings period, Nielsen Media Research reported that WTMJ-TV was number one among adults ages 25-54. Indeed, the station had come in first place for 35 of 36 prior ratings periods.

the Milwaukee market provide more news, public affairs, and other informational programming than their competitors.[70]

Similarly, KCRG-TV and KCRG(AM) – which are co-owned with the *Cedar Rapids Gazette* in the 89th-largest market – broadcast more non-entertainment programming than competing stations in their market.[71] Specifically, the television station presents 27.5 hours of local newscasts, 23 hours of national newscasts, and 15.5 hours of national news/information programming each week. KCRG-TV also airs a total of 70.5 hours of non-entertainment programming on a weekly basis. Moreover, KCRG(AM) broadcasts 19 hours of local news and information (including four hours of local newscasts), 14 hours of national news and, in total, 42.5 hours of non-entertainment programming each week.

In addition, WFAA-TV – which Belo Corp. owns jointly with *The Dallas Morning News* in the nation's 7th-largest market – consistently provides more news and other non-entertainment programming than any other network-affiliated station in its market.[72] The high quantity of such programming presented by WFAA-TV is matched by the superior quality and audience appeal of the station's news and informational programming. For example, "Good Morning Texas," the

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[70] Likewise, KPNX-TV – which has been owned by Gannett for many years and now is operated in conjunction with *The Arizona Republic* in the 17th-ranked market – is Arizona's leading television station, due in large part to the high quality of the station's newscasts. KPNX-TV's 6 p.m. newscast is ranked first in Phoenix, and the station's 12 p.m. newscast was the only morning newscast in the market to experience growth in the last six months. Although the station only recently has been able to draw directly on the resources of a co-owned local daily, Gannett's journalistic heritage and resources surely have contributed to KPNX-TV's news leadership in the market. *See* Gannett Comments in MM Docket Nos. 01-235, 96-197 (filed Dec. 3, 2001); Tom Callinan, Editor, The Arizona Republic, *Convergence Gannett Style*, Gannetteer, May-June 2001, at 8; KPNX-TV, *12 Stands for Local News in May Sweeps*, (June 11, 2001) at <www.12news.com/search/index.html?id=53054switch=2> (citing May 2001 Nielsen Media Research) (visited Nov. 27, 2001).

[71] *See* Hemsley Statement.

[72] *See* Belo Comments in MM Docket Nos. 01-235, 96-197 (filed Dec. 3, 2001); Belo Comments in MM Docket No. 98-35, at 19 (filed July 21, 1998).

station's live information, talk, and entertainment morning program aimed at a Texas audience, has been a consistent ratings winner since its launch in 1994.[73]

Moreover, WSB-TV and WSB(AM), affiliates of Cox Enterprises, Inc. ("Cox") – which also owns *The Atlanta Journal-Constitution* in the 10th-largest market – provide outstanding news, public affairs, and informational programming.[74] WSB-TV offers an average of 36 hours of local newscasts each week and, in June 2001, the station won Emmy Awards for Outstanding Achievement in News Editing, Photography, Investigative Reporting, Writing, Medical Series Reporting, Consumer Series Reporting, Specialty Reporting, Top News Segment, and Daily Newscast. WSB(AM) provides more news and informational programming than its rivals in the Atlanta market, offering approximately 39 hours of local newscasts and 39 hours of national newscasts on a weekly basis.[75]

As yet another example, WEOL(AM) – which Elyria-Lorain Broadcasting Company co-owns with the *Chronicle Telegram* in a suburb of Cincinnati, the 15th-largest market – also broadcasts more news and community information than its independently owned rivals.[76] In

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[73] WFAA-TV's reputation for outstanding news and informational programming has been recognized through numerous awards. The station has received 5 DuPont-Columbia Awards, 5 Peabody Awards, and a host of additional awards including national and regional Murrow awards and a 2000 National Headliners Award for the best overall newscast. *See* Ken Parish Perkins, *Channel 8 Double Winner of Murrows*, Fort Worth Star Telegram, Sept. 15, 2000; The Hollywood Reporter, Mar. 27, 2000; Belo Comments in MM Docket No. 98-35, at 19 (filed July 21, 1998).

[74] *See* Hemsley Statement; Cox Interactive Media, *Channel 2 Action News Team Showered with Emmys* at <www.accessatlanta.com/ partners/wsbtv/aboutus/emmys.html> (visited Nov. 27, 2001).

[75] Similarly, WHIO-TV – which Cox co-owns with the *Dayton Daily News* in the 55th-largest market – provides more and better news, public affairs, and informational programming than its competitors in the market. Indeed, WHIO-TV offers an average of 37 hours of local newscasts, 15.5 hours of national news and informational programming, and a total of 58 hours of non-entertainment programming on a weekly basis. In recognition of the station's achievements, WHIO-TV won a Murrow Award for Best Spot News Coverage in March 2001. *See* Hemsley Statement; Cox Interactive Media, *WHIO-TV Wins Edwin R. Murrow Award for Best Spot News Coverage* (Mar. 23, 2001) at <www.activedayton.com/partners/whiotv/aboutus/murrow.html> (visited Nov. 27, 2001).

[76] *See* Hemsley Statement.

fact, WEOL(AM)'s award-winning local news is presented every hour on the hour, 24 hours a day, with extra news summaries scheduled every half hour during morning and afternoon prime time. The station also offers local "agri-news" twice daily on weekdays and features countywide coverage of high school athletics, presenting over 70 high school basketball and football games each season. In recognition of the station's achievements, in 2001 alone, WEOL(AM) received first place awards by the Ohio Associated Press Broadcasters Association for Outstanding News Operation and by the Society of Professional Journalists for Best Newscast and Outstanding News Operation.

WBNS-TV and WBNS(AM) – which the Dispatch Broadcast Group jointly owns with *The Columbus Dispatch* in the 34th-largest market – broadcast similarly exceptional non-entertainment programming.[77] WBNS-TV airs an average of 33.5 hours of local newscasts, 18.5 hours of national news and information and, in total, 58 hours of non-entertainment programming per week. The television station is the "most watched news channel in Central Ohio" and has led the Columbus television market in ratings more often than any other station in the past 50 years with its impressive coverage area of nearly 30 Ohio counties. WBNS(AM) broadcasts approximately 25 hours of local newscasts, 32.5 hours of national news and, in total, 63.5 hours of non-entertainment programming each week.

Newspaper-owned WDAY-TV – which Forum Communications Company ("Forum") co-owns with *The Forum* in the 120th-ranked Fargo market – has "continually had the highest ranked newscast in the market" since its sign-on in 1953.[78] WDAY-TV airs an average of 31.5 hours of local and national newscasts and a total of 73.5 hours of non-entertainment

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[77] *See* Hemsley Statement; WBNS-TV, Inc. at <www.10tv.com > (visited June 21, 2001 and Nov. 28, 2001).

[78] *See* Hemsley Statement; Forum Communications Co., *In-forum* at <www.in-forum.com/wday/info.shtml#news> (visited Nov. 28, 2001).

programming each week. WDAY(AM), another local broadcast station owned by Forum, airs an average of 37 hours of local news and information (including 22 hours of local newscasts), 19 hours of national news and information and, in total, 71 hours of non-entertainment programming on a weekly basis.

Similarly, WJAG(AM), located in a small community in the 144th-ranked Sioux City, Iowa market, has built and maintained a solid reputation as a leader in providing local news, weather, sports, and public affairs programming.[79] The same local family has owned the station and *The Norfolk Daily News* since 1922, making WJAG(AM) arguably the oldest continuously owned family radio operation in the country. The station – which prides itself on its localism and high quality news and informational programming – broadcasts 10.5 hours of local news and information, 17 hours of national news and information, and, in total, 59 hours of non-entertainment programming each week. WJAG(AM)'s outstanding programming has not gone unrecognized; in fact, in the past two years alone, the station has been honored with more than 35 awards for broadcast excellence from organizations such as the Associated Press, the Nebraska Broadcasters Association, and the Northwest Broadcasters Association.

WGEM-TV and WGEM(AM) – which Quincy Broadcasting Company owns jointly with the *Quincy (IL) Herald-Whig* in the 163rd-ranked market – provide similarly excellent non-entertainment programming.[80] WGEM-TV airs an average of 20 hours of local news, informational, and public affairs programming, 26.5 hours of national news and information and, in total, 63.5 hours of non-entertainment programming per week. WGEM-TV has been "a consistent audience leader with its news programs" in the tri-states area of Northeast Missouri,

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[79] *See* Hemsley Statement.

[80] *See* Hemsley Statement; Quincy Broadcasting Company, *About WGEM* at <www.wgem.com/about/index.htm> (visited Nov. 28, 2001).

Southeast Iowa, and West Central Illinois.[81] Further, WGEM(AM) broadcasts approximately 30 hours of local news and informational programming (including 20 hours of local newscasts), 19.5 hours of national news, public affairs, and informational programming and, in total, 63 hours of non-entertainment programming each week.

Newspaper-owned broadcast stations in a wide variety of other markets also provide exceptional coverage of local news and public affairs issues. For example, WFIN(AM) – which Findlay co-owns with *The Courier* in a suburb of the 67th-ranked Toledo market – offers more news, public affairs, and other informational programming than its competitors.[82] This year alone, WFIN(AM) received three awards from the Ohio Associated Press Broadcasters Association in the categories of Best Continuing Coverage, Best Regularly Scheduled Sportscast, and Best Overall Sports Operation. Similarly, WSBT-TV – which Schurz Communications Inc. jointly owns with the *South Bend Tribune* and two radio stations in the 87th-ranked market – has been recognized as Indiana's Best Newscast by the Associated Press.[83] Thus, as these combinations demonstrate, newspaper-owned broadcast stations in a broad array of markets of all sizes generally offer superior coverage of news, public affairs, and informational issues.

Like commonly owned broadcast stations, co-owned newspapers also generally provide superior coverage of local news and public affairs topics. Indeed, such newspapers tend to provide more distinctive content, such as a regular column by a member of Congress or other public official, and more extensive and diverse local sections, including expanded "op-eds" for

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[81] In recognition of its achievements, WGEM-TV has won Murrow Awards for Best Sport News Coverage and Best Newscast, as well as the National Headliner Award for Best TV Coverage/Spot News Event.

[82] *See* Hemsley Statement.

[83] *See* News 22, *Recognized as Indiana's Best Newscast by the Associated Press* at <www.wsbt.com> (visited Nov. 28, 2001). WSBT-TV also won the NAB Service to America Award in June 2001 for excellence in community service. *See* News 22, *22WSBT Wins Service to America Award* at <www.wsbt.com> (visited June 21, 2001).

local views. The outstanding journalistic achievements of many of these commonly owned daily newspapers have earned them some of the industry's most prestigious local, state, and national honors for their coverage of news and informational issues.[84]

For example, *The Dallas Morning News* – which Belo Corp. jointly owns with WFAA-TV in the nation's 7th-largest market – has been honored with six Pulitzer prizes.[85] The *Cedar Rapids Gazette* – which Gazette co-owns with KCRG-TV and KCRG(AM) – offers expanded "op-eds" for community viewpoints and extensive sections on local issues and events.[86] Moreover, *The Fredericksburg Free Lance-Star* – which The Free Lance-Star Publishing co-owns with local radio stations – also provides expanded "op-eds" and local sections and published more than 2,200 letters to the editor last year.[87] Similarly, *The Courier* – which Findlay co-owns with two local radio stations in the 67th-ranked Toledo market – offers expanded local sections for its readers and has been honored with numerous awards for its outstanding coverage of state and local issues.[88] The *Milwaukee Journal Sentinel* – which Journal Communications co-owns with local stations WTMJ-TV and WTMJ(AM) – provides weekly pages focusing on issues of interest to local teenagers.

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[84] For example, The Post Company's *The (Idaho Falls) Register* has won a number of "significant state and regional awards for journalistic excellence." *See* The Post Company, d.b.a. KIFI-TV, *About Us* at <www.localnews8.com/aboutus/index.htm> (visited Nov. 27, 2001).

[85] *See* Belo Comments in MM Docket Nos. 01-235, 96-197 (filed Dec. 3, 2001); Belo Comments in MM Docket No. 98-35, at 18 (filed July 21, 1998).

[86] *See* Hemsley Statement.

[87] *See id.*

[88] In 2001, *The Courier* won awards from the Associated Press Association of Ohio for Best Column, Best Sports Column, Brightest Headline, Best Sports Writer, Best Game Story, and Best Business Reporting. *The Courier* also received numerous awards from the Ohio Prep Sportswriters Association and the Ohio Public Images and the Ohio Disabilities Council. *See id.*

The existing newspaper/broadcast combinations also provide a number of excellent case studies demonstrating that commonly owned daily newspapers and broadcast stations are particularly well suited to offer innovative media outlets and services to the public.[89] Indeed, the efficiencies and operational synergies realized by these combinations enable them to more effectively develop new and alternative news and information outlets and services for their consumers.[90] In particular, existing newspaper/broadcast combinations have utilized their aggregate expertise in publishing and audio/video journalism to develop state-of-the-art web sites offering unique locally oriented content.[91] Co-owned newspapers and broadcast stations also have combined their journalistic skills and audio/video expertise to launch successful local cable news channels.

For example, in order to meet consumers' new media demands, Media General, the owner of the *Tampa Tribune* and WFLA-TV, has developed the online news provider Tampa Bay Online (or TBO.com).[92] Media General believes that TBO.com caters to the way that the public will be accessing their news in the future – an environment that will be "driven by the reach and the immediacy of the Internet, where wireless technologies make it possible to deliver

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[89] Numerous members of the mass media industry believe that commonly owned newspaper and broadcast outlets often create "value added" services and new information products that would be too expensive to offer in the absence of joint ownership. *See*, *e.g.*, Belo Comments in MM Docket No. 98-35, at 8, 12-15 (filed July 21, 1998); Chronicle Comments in MM Docket No. 98-35, at 21-25, Exhibit B (filed July 21, 1998); Gannett Comments in MM Docket No. 98-35, at 27-32 (filed July 21, 1998); Hearst Comments in MM Docket No. 98-35, at 21-22 (filed July 21, 1998); Tribune Comments in MM Docket No. 98-35, at 64-72 (filed July 21, 1998); NAA Comments in MM Docket No. 98-35, at 63-65 (filed July 21, 1998).

[90] *See* Economists Inc. Study at 10-11 ("Closer cooperation between jointly-owned newspapers and broadcast stations can bring significant benefits. Among the potential benefits are the following: … Newspapers and broadcast stations can collaborate in operating and providing content to an Internet web site.").

[91] "The ability to provide local multimedia content over the Internet is especially important because high-speed access to video-over-the-Web will become commonplace." Sandra Guy, *Trib Agrees to Buy Times Mirror Co.*, Chicago Sun-Times, Mar. 14, 2000 (citing Jack Fuller, President, Tribune Publishing).

[92] *See* Media General Comments in MM Docket Nos. 01-235, 96-197 (filed Dec. 3, 2001); Chris Gabettas, *Three's Company*, Communicator, June 2000, at 26, 28.

news and information to consumers wherever they are, whenever they want." Moreover, TBO.com provides a "perfect platform" on which to run stories prepared by Media General's traditional outlets that are too lengthy for television or newspaper reports, such as in-depth interviews. Similarly, Gannett's *The Arizona Republic* and KPNX-TV utilized their combined resources to develop <AZcentral.com>, which is now the top web site in the state of Arizona, with 121 million page views per month.[93] Among other valuable services, <AZcentral.com> provides a calendar of local events and links to a vast store of web sites mentioned in *The Arizona Republic*.

Journal Communications' newspaper and broadcast stations in the Milwaukee market also have combined their resources to develop a web site offering consumers a broad range of local and regional information. Among other services, <OnWisconsin.com> provides national and local news coverage, a comprehensive guide to arts and entertainment in Milwaukee and Wisconsin, and a search vehicle that provides access to a wide range of local news and information.[94] The web site also provides links to the sites of the newspaper and each of the local stations, thus allowing consumers quick access to streaming video from WTMJ-TV and the capability to listen live to both of Journal Communications' local radio stations. In addition, <OnWisconsin.com> provides a hosting service for, and links to, web pages and event calendars of community groups, including the "Good Grief Discussion Group" for individuals dealing with the loss of a loved one and the local chapter of the National Stroke Association. The site also

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[93] *See* Gannett Comments in MM Docket Nos. 01-235, 96-197 (filed Dec. 3, 2001); Tom Callinan, Editor, The Arizona Republic, *Convergence Gannett Style*, Gannetteer, May-June 2001, at 8; <www.AZcentral.com> (visited Nov. 28, 2001). The benefit of this alternative new media outlet was evident in February and March 2001, when <AZcentral.com> partnered with *The Arizona Republic* and KPNX-TV on an in-depth series about Arizonans who suffer from asthma. The web site bolstered traditional print and broadcast coverage by featuring recorded interviews and animated graphics. The site received 3,000 page views, including messages and visits to an interactive bulletin board where the community submitted questions about their conditions and had them answered by a doctor.

[94] *See* Hemsley Statement; Milwaukee Journal-Sentinel at <www.OnWisconsin.com> (visited Nov. 28, 2001).

offers numerous message boards where users can post their thoughts (and respond to others' postings) on issues of public importance such as the tragic events of September 11.

Commonly owned newspapers and broadcast stations also have combined their journalistic skills and audio/video expertise to launch successful local cable news channels. For example, Quincy Broadcasting Company – the owner of the *Quincy (IL) Herald-Whig*, WGEM-TV, and WGEM(AM) in the 163rd-ranked market – launched CGEM, a stand alone cable channel in Quincy, Illinois.[95] CGEM debuted in July 1994 and has developed into a highly effective local cable programming source. Indeed, most of the channel's programming is locally originated and includes replays of basketball and football games at Quincy University and local high schools, as well as live extended coverage of a number of civic events. Other programs on CGEM include "City Desk," a weekly discussion of community issues, featuring senior editors from WGEM-TV and the *Quincy (IL) Herald-Whig*; "Down to Business," a weekly show with the *Quincy (IL) Herald-Whig*'s business reporter; "Major Stories," a documentary look at video gathered by WGEM-TV; "GEM archives," a historical program featuring video from the WGEM News Library; and "The Sportswriters Journal," a weekly talk show with area sportswriters.

Similarly, Tribune Broadcasting Company's *Chicago Tribune*, WGN-TV, and WGN(AM) provide newsgathering resources for ChicagoLand Television News ("CLTV"), the newspaper's 24-hour cable news channel focused on delivering up-to-the-minute news and information in a style devoid of hype or sensationalism.[96] The cable channel, which shares a

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[95] *See* Quincy Broadcasting Company, *CGEM Channel 18* at <www.wgem.com/home/wgem_cgem_frontpage.htm> (visited Nov. 29, 2001).

[96] *See* Stanley M. Besen and Daniel P. O'Brien, *An Economic Analysis of the Efficiency Benefits from Newspaper-Broadcast Station Cross-Ownership*, at 8 (July 21, 1998) (prepared for Gannett Company) ("Besen/O'Brien Gannett Study"); Stanley M. Besen and Daniel P. O'Brien, *An Economic Analysis of the Efficiency Benefits from Newspaper-Broadcast Station Cross-Ownership*, at 10-11 (July 21, 1998) (prepared for Chronicle Publishing) ("Besen/O'Brien Chronicle Study"); Tribune Interactive, Inc., *About CLTV* at <www.cltv.com/about/station/> (visited Nov. 29, 2001).

newsroom/studio with the *Chicago Tribune*, was launched on New Year's Day 1993. CLTV now covers 100 percent of the major cable systems in ChicagoLand (*i.e.*, Chicago, its suburbs, and Northwest Indiana) and reaches 1.7 million cable households, making it one of the largest local cable channels in the nation. CLTV values localism in its programming and emphasizes the "people, places, and stories that make ChicagoLand and its surrounding communities so unique." In recognition of its success, in its first six months of operation, CLTV received four Midwest Regional Emmy Awards and has gone on to win a total of 13 Emmys, along with numerous Associated Press, National Press, and other honors for the channel's programming excellence.

As yet another example, Belo Corp. – the owner of the Pulitzer Prize-winning *The Dallas Morning News* and WFAA-TV in the 7th-ranked market – has combined the resources and experience of its Dallas outlets (as well as Belo Corp.'s other Texas outlets) to launch Texas Cable News ("TXCN").[97] TXCN serves approximately one million viewers in Texas and is the state's "first and only 24-hour cable news channel designed for Texans and their special brand of news." The cable channel offers local, regional, and state news and headlines every 15 minutes, constant views of local time and temperature, statewide weather updates every ten minutes, and sports once each half hour – and reporters from *The Dallas Morning News* frequently appear on TXCN providing coverage of a wide range of news and informational topics. The cable channel even has its own web site, which provides around-the-clock local, regional, and national news, weather, and sports, as well as information on community events.

[97] *See* Belo Comments in MM Docket Nos. 01-235, 96-197 (filed Dec. 3, 2001); TXCN – Texas Cable News, A Belo Subsidiary, *About Texas Cable News* at <www.txcn.com/about/> (visited Dec. 1, 2001).

In a separate statement attached to the *NPRM*, Commissioner Copps observes that "the local marketplace of ideas [is] a function critical to a democratic society."[98] NAA submits that, in order to fulfill the objectives inherent within the "marketplace of ideas" metaphor – *i.e.*, informed decision making, cultural pluralism, citizen welfare, and a well-functioning democracy[99] – the Commission must eliminate its outdated ban on the formation of newspaper/ broadcast combinations and, in its place, promote a multi-platform media marketplace in which strong competitors will be free to provide diverse services to consumers.[100]

As discussed above, cross-owners are uniquely qualified to present high quality news, public affairs, and informational content over a variety of outlets, including newspapers, broadcast stations, and cutting-edge web sites.[101] Such convergence activities by owners of newspaper/broadcast combinations are critical to facilitating a robust competitive environment in the marketplace of ideas. A one-size-fits-all approach to the delivery of news and information is no longer adequate to meet the varied needs of American consumers. With the explosion of media outlets in recent years, consumers are getting their news, public affairs, and informational content in a variety of ways, which differ considerably across demographic groups (*i.e.*, age,

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[98] *NPRM* (Separate Statement of Comm'r Michael J. Copps). *See also* Philip M. Napoli, *Foundations of Communications Policy: Principles and Process in the Regulation of Electronic Media* 127 (Ron Rice ed., Hampton Press 2001) ("Napoli, *Foundations of Communications Policy*") (stating that "[t]he [Commission's] emphasis on diversity as a policy objective grows directly out of the marketplace of ideas metaphor").

[99] *See* Napoli, *Foundations of Communications Policy*, at 127.

[100] *See id.* at 148 ("[P]olicymakers concerned with fulfilling the objectives inherent within the marketplace of ideas metaphor need to concern themselves with the degree to which audiences are exposing themselves to a diversity of information products and sources. Consequently, audience exposure must be an integral part of the conventional diversity framework and must receive greater attention in diversity assessment research.").

[101] Also, as discussed previously, the commonly owned newspaper, broadcast station(s), and web site can each be a better product for the distribution of information to the consumer. Indeed, the daily newspaper benefits from the other outlets' extensive resources, immediacy, and – in the case of television stations – video capabilities. The station in turn benefits from the depth provided by the print reporters, and the web site benefits from the combined strengths of the two traditional outlets – thus creating a unique product. Ultimately, of course, the public derives the benefits of these joint efforts.

socio-economic status, community of residence). Indeed, many consumers prefer to get their content via the immediacy of the Internet, while others are partial to the unique video capabilities and emotional impact of television coverage, and still others prefer the depth of coverage possible only in the print medium. Thus, convergence allows media owners to satisfy the public's diverse preferences by utilizing the strengths of various media for the dissemination of news and information.

Moreover, convergence of media outlets further increases the public's exposure to important content – and thus serves the local marketplace of ideas to an even greater degree – when one media platform draws its audience's attention to an alternative co-owned outlet or service.[102] For example, the newspaper-owned broadcast stations in Cedar Rapids often refer their listeners and viewers to the *Cedar Rapids Gazette* for details that are beyond the scope of broadcast news; conversely, the newspaper refers its readers to the broadcast stations for audio and video elaboration of the stories that appear in its pages, and the *Gazette* and the broadcast stations direct their audiences to their website for immediate and unique coverage of local content.[103] By drawing consumers' attention to alternative and additional media outlets and thus expanding the amount of information that is communicated to the public, the multi-outlet owner clearly serves the public interest and advances the goal of a well-informed electorate that is critical to a democratic society.

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[102] *See* Economists Inc. Study at 10-11 ("Closer cooperation between jointly-owned newspapers and broadcast stations can bring significant benefits. Among the potential benefits are the following: Newspapers can direct their readers to information available on the broadcast news, and broadcast stations can direct their audience to information available in the newspaper.").

[103] *See* Hemsley Statement. Similarly, a reporter for Media General's *Tampa Tribune* says that "crossing outlets has allowed her to reach a larger audience and draw viewers to more in-depth print reports." *See* Chris Gabettas, *Three's Company*, Communicator, June 2000, at 26, 27.

As shown above, the owners of existing newspaper/broadcast combinations have compiled admirable and consistent records of local service, journalistic excellence, and commitment to the development of new and innovative information services and outlets. By contrast, the post-divestiture histories of the handful of "egregious" combinations subjected to forced divestiture as a result of the FCC's 1975 decision generally serve to demonstrate that the newspaper/broadcast cross-ownership ban was misguided and counterproductive.

For example, the *Anniston Star* as well as WHMA(AM), WHMA-FM, and WHMA-TV once were under common ownership by long-time residents of Anniston, Alabama. When the owners were forced by the FCC to divest their broadcast properties, the television and radio stations were sold to separate purchasers. Commission records indicate that each of the stations has had several owners in the past two decades. The AM/FM combination is now licensed to a subsidiary of Pennsylvania-based Susquehanna Radio Corp., and the FM station, today identified as WWWQ, has successfully petitioned the Commission to reallot the channel on which it operates from Anniston to College Park, Georgia, a suburb of Atlanta.[104] The Anniston television station, now known as WJSU-TV, was licensed to Flagship Broadcasting Corp. and programmed pursuant to a local marketing agreement with WCFT-TV, Allbritton Communications Company's station in Tuscaloosa, Alabama, from late 1995 until the Commission relaxed its television ownership rules in 1999. At that time, Allbritton purchased WJSU-TV, creating a television duopoly in the Birmingham DMA.

Similarly, the Owosso, Michigan AM/FM combination once owned by the Argus Press Company (publisher of the daily *Argus Press*) was sold in 1987 and subsequently passed through several owners. The FM station, WRSR(FM) (formerly WOAP-FM), is now licensed to

[104] *Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville and Social Circle, Georgia*, 16 FCC Rcd 3411 (2001), *recon. denied*, FCC 01-324 (rel. Nov. 8, 2001).

Cumulus Licensing Corp., the nation's second largest radio station group owner with a current total of 243 stations.[105] Commission records indicate that the AM station, WOAP, is today owned by 1090 Investments, L.L.C., which also owns radio stations in Livonia, Ypsilanti, and Flint, Michigan as well as Los Angeles, California. And the Hope, Arkansas AM/FM combination once owned and operated by the publishers of the daily *Hope Star* is now licensed to a subsidiary of Sudbury Services Inc., a 10-station regional group owner headquartered in Blytheville, Arkansas, at the opposite corner of the state.[106] Thus, the forced sale of these broadcast stations can hardly be said to have furthered either any significant ownership diversity objective *or* the interests of the local community.[107]

3. Elimination of the Ban Will Benefit Advertisers

The considerable efficiencies and operational synergies realized by commonly owned daily newspapers and broadcast stations also enable these media outlets to provide a substantial benefit to advertisers in the form of "one-stop shopping."[108] In this regard, advertisers buying

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[105] *Who Owns What*, Nov. 26, 2001, at 2.

[106] The current owners of the broadcast stations divested by the local newspaper owners as a result of the adoption of the cross-ownership ban in 1975 include many qualified and well-respected licensees. None of the new licensees noted above, however, is locally based, and none is under the business imperative uniquely applicable to a local newspaper publisher to be involved in and aware of the activities, concerns, and controversies affecting their home communities.

[107] In a similar vein, in connection with the Commission's grant of a permanent waiver of the rule to allow Rupert Murdoch to control both a daily newspaper and a television station in New York City, then-Commissioners Quello and Duggan both observed that the cross-ownership rule, by excluding local broadcast station owners as prospective buyers, had contributed to the demise of the *Washington Star*. As then-Commissioner Duggan aptly noted, that result certainly was "[n]o victory for media diversity." *Fox Television Stations, Inc.*, 8 FCC Rcd 5341, 5369 (1993) (Separate Statement of Comm'r Ervin S. Duggan). Unfortunately, the *Washington Star* was not an isolated example. Between 1988 and 1993, at least 115 daily newspapers failed throughout the United States. *See Fox Television Stations, Inc.*, 9 FCC Rcd 5246, 5249 n.10 (1994) (Separate Statement of Chairman James H. Quello) (Erratum). At least some of those papers might well have survived had local broadcasters been eligible to acquire struggling dailies in their home communities.

[108] *See infra* Section V.B. (discussing advertisers' use of a "mix" of media to reach intended target audiences). Similarly, applicants seeking FCC merger approval often point to consumers' demand for "one-stop shopping." *See, e.g., Applications of Ameritech Corp. and SBC Communications, Inc. for Consent to Transfer of Control,* 14 FCC

space in newspapers and time on broadcast stations can benefit from the transactional efficiencies that newspaper/broadcast combinations are able to offer.[109]

Specifically, by dealing with the advertising sales representative of a daily newspaper and one or more local broadcast stations simultaneously, advertisers can take advantage of cross-media packages and craft consistent multimedia advertising strategies that allow them to reach their target audiences in the most flexible and cost effective manner possible.[110] For example, Tribune Broadcasting Company's *Chicago Tribune* has created and cross-promoted multimedia joint advertising packages for the *Tribune*, WGN-TV, WGN(AM), and CLTV.[111] Similarly, *The Gazette*, KCRG-TV, and KCRG(AM) present marketing solutions for their customers utilizing the advertising options of all three of Gazette's Cedar Rapids outlets in order to help promote customers' products and services in a systematic, integrated manner.

Rcd 14712, 14748 n.156 (1999) (citing *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*,13 FCC Rcd 18025, 18134-36 (1998); *Applications for Consent to Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications Inc. to AT&T Corp.*, 14 FCC Rcd 3160, 3228-29 (1999) ("*AT&T/TCI Order*")). For example, in *AT&T/TCI*, applicants indicated that a merger would increase the availability to consumers of a wide array of packaged telecommunications services. *See AT&T/TCI Order*, 14 FCC Rcd at 3229; *see also Application of Pacific Telesis Group and SBC Communications, Inc. for Consent to Transfer of Control*, 12 FCC Rcd 2624, 2646 (1997) (stating that "the bundling of local access and long distance services – a form of one-stop shopping – may be a desirable feature for some customers").

[109] "An immediate benefit of [a cross-media] merger is the [joint] companies' ability to offer … advertisers a one-stop shop for TV, newspaper, radio and online exposure." Sandra Guy, *Trib Agrees to Buy Times Mirror Co.*, Chicago Sun-Times, Mar. 14, 2000. *See also* CBS Comments in MM Docket No. 98-35, at 43 (filed July 21, 1998) (citing transactional efficiencies that occur when a group owner can offer "one-stop shopping" for advertisers); NCTA Comments in MM Docket No. 98-35, at 8 (filed July 21, 1998) (stating that "commonly-owned [outlets] … will enjoy scale economies that enable advertisers to purchase more efficiently … in a single transaction with fewer transaction costs").

[110] *See* Lisa Rabasca, *Benefits, Costs & Convergence*, Presstime Magazine, at 44 (June 2001) ("Newspaper and television ad directors [for commonly owned local outlets] are putting together packages of television, newspaper and online ads…."); Media Institute Comments in MM Docket No. 98-35, at 3 (filed July 21, 1998) (stating that "[t]he owner of both a newspaper and broadcast outlet [in the same local market] might be inclined to offer a discounted 'package deal' for advertising in both media").

[111] *See* Besen/O'Brien Chronicle Study at 11; Besen/O'Brien Gannett Study at 8.

Unfortunately, the newspaper/broadcast cross-ownership restriction prevents most daily newspapers and local broadcasters from being able to offer these benefits of "one-stop shopping" to advertisers. Accordingly, elimination of the counterproductive rule will remove an unnecessary obstacle to efficient multimedia advertising transactions, thereby enhancing the ability of daily newspapers and broadcast stations to provide these important benefits to their customers.[112]

B. Elimination of the Newspaper/Broadcast Ban Should Not Be Expected to Cause Any Material Reduction in Viewpoint Diversity – and, in Fact, Is Likely to Increase Overall Programming Diversity in the Local Marketplace

In the *NPRM*, the Commission questions whether elimination of the newspaper/broadcast cross-ownership restriction might affect viewpoint and/or programming diversity in the local marketplace.[113] As shown below, the Commission need not be concerned in this regard. Repeal of the prohibition will in fact promote the significant efficiencies and operational synergies discussed above without causing any appreciable reduction in the extremely high level of viewpoint diversity already present in the local marketplace. Indeed, repeal of the newspaper/broadcast cross-ownership restriction will likely increase overall programming, or content, quality and diversity in the local marketplace.

First, the Commission correctly concluded over a decade ago 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."[114] This growth in outlets has been

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[112] Moreover, as discussed in more detail in Section V below, there is no reason to believe that permitting newspaper/broadcast cross-ownership will result in any adverse effect on advertising rates.

[113] *See NPRM* at ¶ 17.

[114] The Commission added that "[i]n large markets, the degree of diversity is tremendous." *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*").

even more dramatic over the last decade, and local markets of all sizes with newspaper/ broadcast combinations presently offer very high levels of diversity.[115] For example, the 7th-ranked Dallas market – the locale of Belo Corp.'s newspaper and television station combination – has 19 daily newspapers, 18 television stations, and 102 radio stations (with 75 different owners). Milwaukee, the 33rd-largest market and home to Journal Communications' daily *Sentinel* and broadcast stations, provides 9 daily newspapers, 12 television stations, and 66 radio stations (with 46 different owners). The 89th-ranked Cedar Rapids market – the locale of Gazette's newspaper/broadcast combination – offers 7 daily newspapers, 8 television stations, and 66 radio stations (with 41 different owners). The 120th-largest Fargo market, home to Forum's newspaper and broadcast stations, has 5 daily newspapers, 7 television stations, and 83 radio stations (with 39 different owners). Even Quincy, Illinois – the 163rd-ranked market and the location of Quincy Broadcasting Company's newspaper/broadcast combination – provides 4 daily newspapers, 5 television stations, and 39 radio stations (with 25 different owners). Thus, the common ownership of newspapers and broadcast stations would not result in any appreciable level of media ownership concentration – regardless of the market size.

Second, it should not be assumed that a jointly owned newspaper/broadcast station combination will somehow be reduced to a single, monolithic viewpoint. Despite their common ownership and cooperative activities, most commonly owned daily newspapers and broadcast stations tend to utilize a competitive approach in various aspects of their businesses. Existing newspaper/broadcast combinations operating in a broad range of market sizes generally engage in intra-company competition with respect to newsgathering, news reporting, and/or editorializing and commentary, even when management of the newspaper and broadcast stations

[115] *See* BIA Financial Network Report (Nov. 28, 2001); *Editor and Publisher Yearbook 2001*, at Part I (daily newspapers) and B171, B184, B207, B220 (DMA counties).

is integrated. Moreover, audience demographics will inevitably vary for each outlet under common ownership – and it would be a foolish owner who did not seek to take into account (and cater to) the differing tastes and interests that are representative of these distinct audience groupings.

Daily newspapers and broadcast stations compete vigorously, taking each other to task for perceived errors, omissions, or misguided points of view. Further, each must maintain credibility with its readers/audience, under the watchful eyes of competing media that provide an inherent check on their print and broadcast rivals. In short, diversity of programming or viewpoint among the mass media in local markets is a matter of market economics, business realities, professional standards, and competition for the attention of the local audience, and that dynamic is not likely to be altered in a market in which a newspaper and broadcast station are under common control.

For example, notwithstanding their sharing of resources, each of Gazette's Cedar Rapids newspaper and broadcast stations reserves the ultimate decision on which stories to cover and how to cover them; judgments are made independently by each outlet and are based on journalistic principles, technical capabilities, and relevance to their respective audiences.[116] The *Gazette*'s executive editor determines the newspaper's content, while the news director at KCRG-TV and KCRG(AM) oversees the daily news and editorial content aired by the broadcast stations. Similarly, while the editors of The Free Lance-Star Publishing's daily newspaper and local radio station meet on a daily basis to discuss local news and events, *The Fredericksburg Free Lance-Star*'s Editor is responsible for the editorial position/news judgment of the newspaper and WFLS-FM's News Editor (a different individual) determines the station's

[116] *See* Hemsley Statement.

editorial and news stance.[117] In fact, numerous common owners that currently have separate individuals overseeing the daily news and editorial content of their jointly owned newspapers and broadcast stations believe that, while elimination of the newspaper/broadcast cross-ownership rule would make owners more comfortable in merging some of their newsgathering and administrative functions, it would have little or no practical effect on the independence of their broadcast or newspaper content.[118]

In short, the fundamental differences in the nature of newspaper journalism and broadcasting, as well as the need to reach different types of audiences, provide strong incentives to maintain a competitive approach.[119] These differences and incentives have ensured that viewpoint diversity in the local information marketplace is not – and will not be – adversely affected by the common ownership of daily newspapers and broadcast stations.[120]

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[117] Similar arrangements are in place at other newspaper/broadcast combinations in a wide variety of markets, including *The Norfolk Daily News* and a commonly owned radio station in a suburb of the 144th-ranked market, and *The Bowling Green (KY) Daily News* and co-owned radio stations in the 181st-ranked market. *See id*.

[118] *See id*. In this connection, then-Commissioner Powell observed in his Separate Statement accompanying the Commission's *1998 Biennial Review Report* that "I fail to see how ownership restrictions in themselves do much to promote the goal of antagonism…. I would suggest that some amount of 'antagonism' sells. Controversy and conflict are the stuff of good story. If different viewpoints are to be found, I think they will be the products of the commercial market much more than … our rules and our adherence to the high-brow ideal we used to defend them." *1998 Biennial Review Report, Separate Statement of Commissioner Michael K. Powell*, 15 FCC Rcd at 11149.

[119] Numerous members of the mass media industry support the proposition that commonly owned newspapers and broadcast stations typically compete with each other in many key aspects of their businesses, as well as with the extensive array of independently owned media outlets in the local marketplace. *See, e.g.*, Belo Comments in MM Docket No. 98-35, at 20-21, Appendix A at 22 (filed July 21, 1998); Chronicle Comments in MM Docket No. 98-35, at 19 (filed July 21, 1998); Gannett Comments in MM Docket No. 98-35, at Appendix A (filed July 21, 1998); Hearst Comments in MM Docket No. 98-35, at 16 (filed July 21, 1998); Lee Enterprises Comments in MM Docket No. 98-35, at 4-5 (filed July 21, 1998); NAB Comments in MM Docket No. 98-35, at Appendix B (filed July 21, 1998); Tribune Comments in MM Docket No. 98-35, at 38 (filed July 21, 1998); NAA Comments in MM Docket No. 98-35, at 61 (filed July 21, 1998); ALTV Reply Comments in MM Docket No. 98-35, at 27-29 (filed Aug. 21, 1998); Chronicle Reply Comments in MM Docket No. 98-35, at 7-8 (filed Aug. 21, 1998).

[120] In addition, the Commission has recognized in other contexts that common ownership of media outlets does not damage the editorial independence of those outlets. For example, the FCC concluded that "relaxing the [one-to-a-market] rule should not significantly affect diversity of viewpoints." In so doing, the Commission noted "that group owners of broadcast stations, even in the same market, do not necessarily have a 'monolithic viewpoint' at all of their stations." This evidence revealed, among other things, that in 45% of the instances in which CBS owned a

It also has been widely recognized that co-located media outlets[121] under common ownership have a strong *commercial incentive* to diversify their program or content offerings in order to reach the largest possible aggregate audience, whereas an independently operating media outlet has an incentive to engage in "mainstream" content or "greatest common denominator" programming in order to attract the largest possible audience for that one outlet.[122] Support for this proposition is found in a wealth of economic studies, as well as in determinations by the Commission in previous proceedings regarding its mass media ownership rules.[123] For example, in 1991 in the radio ownership proceeding, the agency stated:

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radio and television station in the same market, the stations endorsed opposing candidates in political races. Similarly, NBC submitted comments indicating that, "even among its stations located in the same market, editorial and programming decisions are made independently from other NBC-owned stations, resulting in its commonly owned stations making different editorial or programming decisions." *Broadcast Multiple Ownership Rules*, 4 FCC Rcd at 1744.

[121] "[T]he Commission traditionally has focused on the number of different [media] owners' as opposed to the number of media outlets [based on the theory] that diversity in ownership promotes diversity in viewpoint." *See NPRM* at ¶16. This theory has been widely criticized, however, by scholars and economists. *See, e.g.*, Benjamin M. Compaine, *The Impact of Ownership on Content: Does It Matter?*, 13 Cardozo Arts and Ent. L.J., 755, 755-80 (1995); John C. Busterna, *Television Station Ownership Effects on Programming and Idea Diversity: Baseline Data*, 1 Journal of Media and Economics 63 (1988); Stanley M. Besen and Leland Johnson, *Regulation of Media Ownership by the Federal Communications Commission: An Assessment*, at 7, 28-32 (1984).

[122] As the *NPRM* explains, under this theory, competing parties in a local market have a commercial incentive to provide "greatest common denominator" programming, while a single party that owns multiple outlets has a commercial incentive to provide more diverse programming to appeal to all substantial interests. *See NPRM* at ¶17; *see also Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking* in MM Docket Nos. 01-137, 00-244, FCC 01-329, at ¶ 37 (rel. Nov. 9, 2001).

[123] Economic studies are virtually unanimous in recognizing these incentives, and economics literature supporting this model has been frequently cited and relied upon by the Commission. *See, e.g.*, Bruce M. Owen and Steven S. Wildman, *Video Economics* (Cambridge, Mass.: Harvard Univ. Press 1992), Chapters 3 and 4 (cited in *Amendment of Section 73.658(g) of the Commission's Rules – The Dual Network Rule*, 15 FCC Rcd11253, 11263 n.30 (2000)); Steiner, P.O., *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, Q. J. Econ. 66 (1952) (cited in *Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules*, 10 FCC Rcd 3524, 3551 n.81 (1995) ("*TV Ownership FNPRM*")). Specifically, the studies demonstrate that, given the widespread consumer preference for "mainstream" content or "greatest common denominator" programming, the owner of a single outlet generally is induced to offer programming similar to that offered by its rivals – thus ignoring less popular consumer tastes and interests. In contrast, the owner of multiple outlets in a local market has the incentive to diversify the outlets' content offerings in order to attract consumers with differing tastes, and thereby garner the largest combined audience for the overall media enterprise.

> [W]e believe that stations separately owned will each tend to strive for the same core audience with roughly the same type of programming, while the same stations managed in common may have greater incentives to appeal separately to distinct segments of the audience with distinct programming. In other words, stations managed in common can effectively counterprogram each other. Therefore, we believe that increased group ownership . . . may encourage [diversity of programming]. . . .'[124]

Again in 1995, in the television ownership proceeding, the Commission aptly explained the counterprogramming model:

> [W]here there are competing parties, each of their strategies would be to go after the median viewer with 'greatest common denominator' programming, leaving minority interests unmet. But where one party owned all the stations in a market, its strategy would likely be to put on a sufficiently varied programming menu in each time slot to appeal to all substantial interests. . . . [T]his model may, indeed, promote diversity of entertainment formats and programs. . . .[125]

The Commission noted that, under this model, the opportunity for diversity of programming content in fact increases as the concentration of ownership of media outlets increases.[126]

The newspaper/broadcast cross-ownership restriction, of course, directly hinders increased consolidation of media outlets. Accordingly, elimination of this anachronistic restriction will enhance the prospect for overall programming diversity, because co-owned media

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[124] *Revision of Radio Rules and Policies*, 6 FCC Rcd 3275, 3276 (1991).

[125] *TV Ownership FNPRM*, 10 FCC Rcd at 3551 (internal citation omitted). *See also Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2771-72 (1992) ("*Radio Rules and Policies Order*") ("[C]ommenters tend to agree . . . 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").

[126] *Radio Rules and Policies Order*, 7 FCC Rcd at 2771-72.

outlets will have the incentive to cater not only to the center, but also to less popular consumer tastes and interests, in order to attract the largest combined audience for their common owner.[127]

C. The Commission Has Eliminated or Relaxed Other Outdated Mass Media Ownership Restrictions Based on Benefits of Common Ownership Similar to Those That Have Been Achieved by Newspaper/Broadcast Combinations

In previous proceedings, the Commission has determined that the benefits of joint ownership – such as those generated by newspaper/broadcast combinations – were significant enough to justify elimination or relaxation of other outdated mass media ownership restrictions. These same considerations fully support repeal of the newspaper/ broadcast cross-ownership ban.

In 1999, for example, the Commission substantially relaxed two of its long-standing restrictions governing local television ownership: the duopoly rule and the one-to-a-market rule.[128] In announcing its decision to greatly relax the television duopoly rule and the one-to-a-market rule, the Commission observed, "[t]he record reflects that there has been an increase in the number and types of media outlets available to local communities…. In markets with many separate licensees and a variety of other media outlets, we believe the benefits of joint ownership in certain instances outweigh the cost to diversity from permitting such combinations."[129] Further, the agency expressly recognized that "[t]here is evidence concerning the efficiencies inherent in joint ownership and operation of television stations in the same market, and of radio-

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[127] Numerous members of the mass media industry believe that common ownership of daily newspaper and broadcast outlets fosters diversity in content and enhances programming in the public interest in the local marketplace. *See, e.g.*, Chronicle Comments in MM Docket No. 98-35, at 13-25 (filed July 21, 1998); Gannett Comments in MM Docket No. 98-35, at 27-28, Appendix B (filed July 21, 1998); NAB Comments in MM Docket No. 98-35, at 8-11, Appendix B (filed July 21, 1998). Other commenters have addressed this issue more broadly. *See, e.g.*, Tribune Comments in MM Docket No. 98-35, at 9-13 (filed July 21, 1998); NAA Comments in MM Docket No. 98-35, at 59-60 (filed July 21, 1998).

[128] *See 1999 Television Ownership Order*, 14 FCC Rcd at 12903.

[129] *Id.* at 12922.

television combinations. These efficiencies can lead to cost savings, which in turn can lead to programming and other service benefits that serve the public interest."[130]

Based on these findings, the Commission decided to jettison its decades-old "one outlet per customer per market" television ownership regime and allow common ownership of two television stations and up to six radio stations (at least in large and competitive markets). These same considerations fully support elimination of the outdated newspaper/broadcast ban.

In fact, the Commission has indicated that newspaper/broadcast cross-ownership implicates the agency's oft-cited diversity concerns *to a lesser degree* than common ownership of two television stations in the same market. Specifically, the Commission has stated that "broadcast television, more so than any other media, continues to have a special, pervasive impact in our society given its role as the preeminent source of news and entertainment for most Americans."[131] Under the new local television ownership rules, however, two local television stations – which the FCC itself has identified as the most directly significant media voices in the local marketplace – are permitted to combine and, in many cases, to be owned in common with multiple radio outlets.[132] The Commission also pointed to changed marketplace realities in determining "that the public interest would be best served … by relaxing the radio-television cross-ownership rule to permit same-market joint ownership of radio and television facilities up

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[130] *Id.*

[131] *Id.* at 12934.

[132] For purposes of the revised duopoly rule, moreover, the agency established an "eight remaining voices" test that takes into account *only* television stations but, surprisingly – and in direct contradiction to its stated concerns in this proceeding – gives no weight to daily newspapers. *See id.* at 12935.

to a level that permits broadcasters and the public to realize the benefits of common ownership while not undermining our competition and diversity concerns."[133]

Thus, the Commission recognized that daily newspapers and broadcast stations are participants in the same broad media marketplace, but has viewed television stations – and not daily newspapers – as the dominant voices insofar as the agency's public interest objectives are concerned. Yet, perversely, the FCC continued to exclude *only* daily newspaper publishers from the recognized benefits of expanded joint ownership. In this new regulatory environment, where common ownership of two television stations and as many as six radio stations is permissible, it is patently arbitrary and discriminatory to continue to prohibit newspaper publishers from acquiring interests in even a single television or radio station in the same local marketplace. Moreover, as discussed in Section VIII, *infra*, maintenance of the newspaper cross-ownership ban in the current media and regulatory environmental cannot withstand examination under the First Amendment.

D. The Efficiencies and Operational Synergies Produced by Newspaper/Broadcast Combinations Cannot Be Fully Achieved Through Joint Ventures

In the *NPRM*, the Commission notes that a previous commenter in this proceeding has suggested "that businesses do not need to combine to realize these efficiencies because they could simply form a joint venture."[134] Numerous economic studies have shown that, while joint

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[133] *Id.* at 12947. For purposes of the new radio/television rule, the Commission announced that it would take into account commercial and noncommercial television stations and radio stations, daily newspapers published in the DMA that have a circulation exceeding 5% of DMA households, and cable systems providing service generally available in the DMA. *Id.* at 12951-52. The FCC stated that it had decided to include daily newspapers and cable systems in its voice count "because we believe that such media are an important source of news and information on issues of local concern and compete with radio and television, at least to some extent, as advertising outlets." *Id.* at 12953.

[134] *NPRM* at ¶ 25 n.76 (citing Independent Free Papers Comments in MM Docket No. 98-35, at 2-4 (filed July 21, 1998)). *But see* Chronicle Comments in MM Docket No. 98-35, at 26 (filed July 21, 1998) (stating that the different

venture operation or other contractual relationships may allow businesses to achieve *some* of the benefits produced by common ownership, the inherent limitations of such joint undertakings clearly render them inefficient substitutes for common ownership.[135] For this reason, the best way for daily newspapers and broadcast stations to fully realize the significant benefits discussed above is to permit the common ownership of these outlets.

These economic studies agree that joint venture operation of media outlets is not capable of producing the significant efficiencies and operational synergies that are achieved by common ownership. Specifically, joint venture participants confront three types of issues (not confronted by a common owner) that hinder their ability to achieve efficient joint production: (i) the costs and uncertainties of entering into a contractual relationship; (ii) the difficulty in monitoring effort and performance; and (iii) incentives to engage in opportunistic behavior that is not in the best interest of the joint venture.[136]

First, participants in a joint venture face numerous costs and uncertainties as they attempt to enter into an effective contractual relationship. To begin, participants must agree on a common course of action – which tends to be a difficult and slow process. The joint venture participants generally encounter delays, or even stalemates, as each attempts to influence the

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interests of the joint venture partners may prevent the most efficient operation); ALTV Reply Comments in MM Docket No. 98-35, at 26 (filed Aug. 21, 1998) (stating that "[t]he efficiencies associated with … outright ownership combinations far exceed those which are possible through joint ventures"); Hearst Reply Comments in MM Docket No. 98-35, at 5-6 (filed Aug. 21, 1998) (stating that common ownership creates competitive efficiencies not possible with joint ventures).

[135] *See, e.g.*, Economists Inc. Study at 1-2 ("Economic theory finds that the types of cooperation [between newspapers and broadcast stations] that appear most likely may not be undertaken, or undertaken only at greater cost, if a cross-ownership ban prevents newspapers and broadcast stations from being brought under common ownership."); *see also* Besen/O'Brien Gannett Study at 14; Besen/O'Brien Chronicle Study at 15.

[136] *See* Economists Inc. Study at 13-16; *see also* Besen/O'Brien Gannett Study at 15-23; Besen/O'Brien Chronicle Study at 16-24.

venture in a way it finds more favorable.[137] Moreover, once a course of action is finally agreed upon, the contracts among joint venture participants are costly to negotiate and draft, as it may be impossible to adequately "specify in advance just what each party should do" and to "identify the contingencies and agree in advance what actions should be taken."[138] Further, after a business plan is agreed upon, it is difficult to change – and would require frequent contractual modifications.

Second, participants in a joint venture tend to encounter difficulties in monitoring each party's effort and performance – especially when cooperation involves the exchange of private information. Indeed, "when it is information, rather than some physical good, that one firm supplies to anther, the firms generally will experience difficulties in setting up an appropriate contract [as discussed above] and policing the terms of the contract."[139] Each joint venture participant has the incentive to withhold private information in order to increase its chances of capturing a larger share of the profits and benefits of joint operation or to protect its activities outside the joint venture.[140] Such behavior leads to inefficient outcomes.[141] In the worst case, it

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[137] *See* Besen/O'Brien Gannett Study at 15; Besen/O'Brien Chronicle Study at 16.

[138] Economists Inc. Study at 13. Indeed, joint venture participants typically find it necessary to erect a complex array of safeguards to ensure against opportunistic behavior. *See* Besen/O'Brien Gannett Study at 15-16; Besen/O'Brien Chronicle Study at 17.

[139] Economists Inc. Study at 14.

[140] *See* Besen/O'Brien Gannett Study at 16; Besen/O'Brien Chronicle Study at 17.

[141] The incentive for joint venture participants to misrepresent private information is well known in economics literature on agency relationships and bargaining under incomplete information, which explains why exchange under incomplete information leaves potential gains unexploited. *See, e.g.*, P. Milgrom and J. Roberts, *Economic, Organization, and Management*, Chapter 5 (Prentice Hall 1992).

can result in the failure to reach any agreement at all; in less extreme cases, withholding private information results in an alliance with a more limited scope than efficiency would dictate.[142]

Third, the incentives of each participant typically do not align with the best interests of the joint venture, often leading participants to engage in "opportunistic" behavior.[143] In particular, participants have an incentive to under-provide quality or other productive inputs (including equipment and workers) to the joint venture in order to maximize their own profits.[144] In a newspaper/broadcast joint venture, for example, "[i]f the newspaper were to behave 'opportunistically,' the television station could get a much smaller return on its investment than intended. Out of fear of such opportunistic behavior, [the] television station may be unwilling to make the needed investments."[145] Thus, opportunistic behavior by participants (as well as the fear of such behavior) prevents the joint venture from achieving maximum efficiency and profitability.

Clearly, joint ventures face an array of complicated incentive issues that frustrate efficient production. Common ownership, in contrast, resolves these issues. A firm under common ownership already has in place the governance structures necessary to deal with many of the issues that joint venture participants must specify in a complex contract.[146] For this

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[142] *See* Economists Inc. Study at 16 ("[W]ithout common ownership, such cooperation may be at greater cost and be more limited. It is also possible that, in some instances, newspaper-broadcast cooperation will not be undertaken at all without common ownership.").

[143] *See id.* at 15-16; *see also* Besen/O'Brien Gannett Study at 17-18; Besen/O'Brien Chronicle Study at 18-19.

[144] *See* Besen/O'Brien Gannett Study at 18; Besen/O'Brien Chronicle Study at 19.

[145] Economists Inc. Study at 16.

[146] *See id.* at 13 ("It is quite possible that internal decision-making within a jointly-owned newspaper-broadcaster firm would have the flexibility to deal with developing situations, whereas firms involved in a contractual relationship would be unable to react appropriately or do so at a much higher transaction cost.").

reason, common owners of daily newspapers and broadcast stations are able to engage in much more efficient operations and pass through cost saving benefits to advertisers and consumers.

Common ownership also reduces the problem of monitoring each party's effort and performance – especially with respect to the exchange of private information. Because withholding the sharing of sensitive business information is no longer a concern within a single firm,[147] "a jointly-owned firm may be better suited to assure that both the newspaper and the broadcast station are forthcoming and cooperative in providing the information that is to be exchanged."[148] Thus, it is easier for senior management and key decisionmakers to obtain the information they need to effectuate an efficient outcome.

Moreover, aligning the incentives of the participants with those of the overall joint venture is facilitated when the participants are part of a common firm with a common objective. In fact, "[i]t may be that the only effective assurance against opportunistic behavior is for the newspaper and the television station to be jointly owned."[149] For these reasons, common ownership is the best mechanism for achieving all of the significant efficiencies and operational synergies that are possible from the operation of daily newspapers and broadcast stations.

E. The Record Supports Complete Elimination of the Ban, Without the Imposition of Separation Requirements or Other Operational "Safeguards"

Finally, in the *NPRM*, the Commission asks whether "structural separation requirements [would] both allow broadcast stations and newspapers to realize the economic benefits of combined operations."[150] As demonstrated above, however, the elimination of the newspaper/

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[147] *See* Besen/O'Brien Gannett Study at 20-21; Besen/O'Brien Chronicle Study at 22.

[148] Economists Inc. Study at 14.

[149] *Id.* at 16.

[150] *NPRM* at ¶ 51.

broadcast cross-ownership ban will in fact serve to increase content diversity, as well as the availability of news, public affairs, and informational programming in the local marketplace – with no appreciable adverse impact on viewpoint diversity or economic/advertising competition. Thus, no additional "conditions" or "safeguards" are necessary to further the Commission's goals in this regard. Moreover, any agency-imposed separation requirements or other operating restrictions are likely to undermine the efficiencies and stifle the flexibility and creativity that are necessary to ensure the long-term success of the nation's daily newspaper and broadcast industries.[151] Perhaps more importantly, the imposition of structural separation requirements also will embroil the Commission in the details of the editorial decisionmaking process, which lies at the center of the First Amendment, and therefore would raise substantial constitutional concerns.

Accordingly, NAA respectfully submits that the record before the Commission in the 1998 Biennial Review proceeding and in this new rulemaking proceeding supports elimination of the newspaper/broadcast cross-ownership ban in its entirety. As demonstrated above, the contemporary video marketplace is extremely diverse and highly competitive. Moreover, that market is expanding at an astounding rate as alternative newspapers, cable networks, DBS, and now the Internet have emerged to challenge daily newspapers and over-the-air broadcast program services.[152] Thus, a merger of a co-located daily newspaper and a broadcast station will not unduly affect the level of diversity and competition at the local level. Further, the economic incentives that will be created by newspaper/broadcast combinations will strongly encourage

[151] Indeed, "[i]f jointly owned firms were compelled to keep their management functions separate, there would be no one in a position to resolve unanticipated coordination problems as they arise, nor anyone to observe the degree of effort of both cooperating parties form the inside. For this reason, imposing structural separation may eliminate some of the key advantages of joint ownership of a newspaper and a broadcast station." Economists Inc. Study at 14-15.

[152] *See supra* Section III (discussing the explosion of media outlets in recent years); Appendix I (same).

differentiation of programming offerings that benefit the local audience. The efficiencies that flow from common operation also will strengthen print and over-the-air services and allow greater investment in new and innovative program offerings that benefit the local audience. In sum, elimination of the decades-old, anachronistic newspaper/broadcast cross-ownership restriction will effectively promote the Commission's important public interest objectives, while helping to ensure the long-term survival of daily newspapers and broadcast stations in the local marketplace.

V. NEWSPAPER/BROADCAST COMBINATIONS WOULD NOT ADVERSELY IMPACT COMPETITION IN THE ADVERTISING MARKET, NOR IN ANY OTHER RELEVANT PRODUCT LINE

In addition to raising questions regarding diversity, the Commission in its *NPRM* seeks information about the economic impact of maintaining, modifying, or repealing the newspaper/broadcast cross-ownership restriction. In particular, the agency observes that the advertising market appears to be the "primary economic market in which broadcast stations and newspapers may compete"[153] and asks commenters to address the potential competitive impact that newspaper/broadcast combinations might have on the advertising market. The Commission also inquires whether broadcast stations and newspapers compete in other economic markets, and, if so, how competition in these other economic markets should affect its assessment of the prohibition.[154]

Initially, NAA notes that, when the FCC adopted the ban, the record was devoid of any evidence that owners of newspaper/broadcast combinations had engaged in anticompetitive

[153] *NPRM* at ¶ 19.

[154] *Id*.

conduct. [155] The Commission's own analysis in the 1975 proceeding failed to show any effect on advertising rates attributable to newspaper ownership, and the agency explicitly stated that it had "analyzed the basic media ownership questions in terms of [its] primary concern – diversity in ownership . . . rather than in terms of a strictly anti-trust approach."[156] Accordingly, although the *1975 Multiple Ownership Order* recited that economic competition was one of the "foundations" of the multiple ownership rules in general, the FCC failed to reach any conclusion on the impact of newspaper/broadcast cross-ownership on advertising rates. The Commission therefore cannot reasonably be found to have relied on a desire to protect economic competition in the advertising market as a basis for adopting the newspaper/broadcast ban.[157]

Even if the Commission could have found some competitive justification for its proscription on cross-ownership in the advertising marketplace of 1975 , there certainly is no persuasive evidence in the record in this or other recent proceedings that newspaper/broadcast combinations have engaged in anticompetitive practices with regard to advertising rates. Nor is there reason to believe that permitting cross-ownership in the future poses any appreciable danger that they will do so. As demonstrated below, the degree, if any, to which advertisers may view newspapers and broadcast stations as substitutes is inadequate to justify a Commission conclusion that they participate in an assumed single advertising market and, hence, inadequate to support maintenance of the rule. The available evidence also shows that allowing newspaper/broadcast combinations would not harm competition in other economic markets – to the contrary, substantial economic and efficiency benefits would result from repeal of the

[155] *See 1975 Multiple Ownership Order*, 50 FCC 2d at 1072.

[156] *Id.* at 1079.

[157] No claims were made that newspaper-television combinations had committed any specific anticompetitive acts. Indeed, even the Supreme Court recognized that the Commission never found that "existing co-located newspaper-broadcast combinations … are harmful to competition." *FCC v. NCCB*, 436 U.S. at 786.

outdated prohibition. Accordingly, any concern the Commission may have with regard to economic competition is plainly insufficient to justify retention of the newspaper/broadcast cross-ownership restriction.[158]

A. In View of the Limited Degree of Substitutability Between Newspapers and Broadcast Stations in the Advertising Market, the Ban Cannot Be Justified on Competition Grounds

As the FCC acknowledges in the *NPRM*, the first step in any competitive economic analysis involves the delineation of the relevant product market.[159] To determine whether newspapers and broadcast stations compete in a single market for advertising, the Commission has stated that it will consider whether newspapers and broadcast stations are interchangeable substitutes for advertisers.[160] NAA submits that, although some advertisers use both newspapers and broadcast stations for advertising, these media cannot be regarded as fully interchangeable. Rather, the degree of substitutability between them, and thus the degree to which they can be said to compete in a single product market, varies widely depending on the identity and intended target of the advertiser involved and is not of a character to warrant maintenance of the FCC's absolute bar on newspaper/broadcast cross-ownership.

In previous proceedings, the Commission has considered the extent to which newspapers, radio stations and television stations are substitutes for each other in the advertising market, but

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[158] To the extent that a particular newspaper/broadcast combination might ever pose a quantifiable harm to economic competition, the antitrust laws are entirely sufficient to ensure that any such harm is addressed. The Commission should defer enforcement of those laws to the agencies best suited to engage in the complex market analysis necessary to assess the existence of competitive harms – the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"). *See* Economists Inc. Study at 12.

[159] *NPRM* at ¶ 21.

[160] *See id.*; *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956) (stating that products constitute a single competitive market when they are "reasonably interchangeable by consumers for the same purposes.").

the agency has never found a solid basis to treat them all as part of a separate and self-contained market. For example, the Commission justified the retention of its local radio ownership rules during the 1998 Biennial Review by reference to the lack of substitutes for radio advertising, stating that:

> We recognize that many advertisers consider alternative media to be good substitutes for radio advertising. However, the Department of Justice (DOJ) has concluded that there are a significant number of advertisers that do not. In distinguishing radio advertising as a distinct market from that of television and newspaper advertising, the DOJ explains that 1) radio advertising is unique in reaching a mobile broadcast audience; 2) radio has a greater ability to target particular audience segments; and 3) radio can be more cost effective and more flexible in responding to changes in local advertising conditions. Additionally, as we noted in our recent TV Ownership Order, "[a] recent econometric study finds that other advertising media are not good substitutes for radio advertising and that radio advertising probably constitutes a separate antitrust market." Thus, for certain advertisers, newspapers, cable, and broadcast television stations do not constitute an effective substitute for radio stations.[161]

Similarly, in the *1999 Television Ownership Order*, the Commission acknowledged that there had been no "definitive empirical studies that quantify the extent to which the various media are substitutable in local markets."[162] Although the FCC found that "there may be some intermedia substitutability in the markets served by broadcasters," it was "unable to reach a definitive conclusion at th[e] time as to the extent to which other media serve as readily available substitutes for broadcast television."[163] NAA submits that, absent such a "definitive conclusion"

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[161] *1998 Biennial Review Report*, 15 FCC Rcd at 11088-89 (footnotes omitted). *See also id.* at 11292 ("We have previously noted that it is not clear how substitutable radio and newspaper local advertising is for broadcast television local advertising.").

[162] *1999 Television Ownership Order*, 14 FCC Rcd at 12918.

[163] *Id.* at 12919, 12935.

with respect to newspapers and broadcast stations, the Commission cannot reasonably rely on competition in the advertising market as a basis for prohibiting cross-ownership of those media.

A number of recent economic studies support the view that radio, television and newspapers are not sufficiently direct substitutes to form a separate and undifferentiated product market for all advertisers. At least one such study demonstrates that newspaper advertising is not a substitute for radio advertising, and concludes that radio advertising must be considered a separate antitrust market.[164] Another recent study asserts that newspaper and television advertising, on the one hand, and radio and television advertising, on the other, enjoy some degree of substitutability.[165] That study, however, concludes that radio and television advertising are closer substitutes for each other than are television and newspaper advertising.[166] Thus, these media cannot be viewed simplistically as perfectly interchangeable alternatives for advertisers.

Moreover, as discussed above, the FCC has recently eliminated or substantially relaxed other cross-ownership rules, notwithstanding the possibility that relevant media might compete for advertising revenue. For example, in modifying the one-to-a-market-rule in 1999, the Commission determined that cross-ownership of radio and television stations would not pose an undue threat to competition in the advertising market, but failed to conclude that radio and television stations are direct and complete substitutes for advertisers.[167] If radio and television advertising are, as the economic evidence suggests, *closer* substitutes than either newspaper and

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[164] *See* Robert B. Ekelund, Jr., George S. Ford, John D. Jackson, *Is Radio Advertising a Distinct Local Market? An Empirical Analysis*, 14 Rev. Indus. Org. 239 (1999).

[165] *See* Robert B. Ekelund, Jr., George S. Ford, John D. Jackson, *Are Local TV Markets Separate Markets?*, 7 Int'l J. Econ. Bus. 79 (2000).

[166] *See id.* at 91. Specifically, the study concludes that a 10% increase in radio advertising prices will lead to a 10% increase in the demand for television advertising. A 10% increase in the price of newspaper advertising, in contrast, causes only a 2% increase in the demand for television advertising. *See id.*

[167] *See 1999 Television Ownership Order*, 14 FCC Rcd at 12948-49.

radio or newspaper and television, the Commission certainly cannot justify permitting radio/television combinations in markets of virtually every size while retaining an absolute ban on newspaper/broadcast cross-ownership.

As the Commission notes, at the time the FCC adopted the newspaper/broadcast ownership rule, the DOJ held the view that although they were not perfect substitutes, newspapers and broadcast stations were competitors for advertising revenue.[168] Today, in contrast, the agencies with primary responsibility for enforcing the antitrust laws do not view newspapers, radio stations, and television stations as part of a single, unified advertising market.[169] Part of the shift in the DOJ's ideology inevitably results from the virtual revolution that has occurred in antitrust law and analysis since the 1970s, when the newspaper/broadcast cross-ownership rule was adopted. When the DOJ urged the FCC to include newspapers and broadcast stations in the same advertising market in 1975, neither the modern Hart-Scott-Rodino transaction review process nor the *Horizontal Merger Guidelines* had yet been put in place.[170] At that time, the courts and the DOJ simply had not developed a uniform framework for defining product markets. The significance of these developments, and the degree to which they have affected the DOJ's analysis of antitrust markets cannot be underestimated. Congress' enactment of the Hart-Scott-Rodino Act in 1976,[171] combined with the subsequent refinement of

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[168] *See NPRM* at ¶ 21; *1975 Multiple Ownership Order*, 50 FCC 2d at 1056.

[169] *See NPRM* at ¶ 21.

[170] *See generally* William L. Reynolds and Spencer Weber Waller, *Legal Process and the Past of Antitrust*, 48 S.M.U. L. Rev. 1811, 1830-33 (1995) (discussing the shift from "doctrinal incoherence" under relevant court decisions to "administrative coherence" under the Hart-Scott-Rodino Act and the Merger Guidelines).

[171] Pub. L. No. 94-435, 90 Stat. 1390 (codified at 15 U.S.C. § 18a).

competitive antitrust analysis in the Merger Guidelines first developed in the mid-1980s,[172] make the FCC's consideration of the effects that newspaper/broadcast combinations might have on competition in the advertising market even less appropriate than it was at the time the rule was enacted.

In recent years, the DOJ has consistently viewed radio as a separate product market and has analyzed the competitive effects of radio mergers without considering additional advertising outlets, such as television stations or newspapers.[173] Indeed, in a 1998 merger proceeding, the Department identified at least six specific characteristics of radio that distinguish it from other forms of media.[174] As a DOJ economist has put it, the mere "fact that radio stations provide this whole set of features while other media, such as television, cable and newspapers do not provide the same entire set of features, suggests that the best substitutes for a radio station will be other radio stations rather than other media such as TV, cable and newspapers."[175]

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[172] The Merger Guidelines were first promulgated in 1984, re-issued in 1992, and amended in 1997. *See* U.S. Dep't of Justice, Merger Guidelines (1984), *reprinted in* Antitrust Laws and Trade Regulation: Primary Source Pamphlet (Matthew Bender) ("Antitrust Primary Source Pamphlet"); U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines (1992), *reprinted in* Antitrust Primary Source Pamphlet. Section 4, on efficiencies, was amended April 8, 1997.

[173] *See, e.g., United States v. Jacor Communications, Inc.*, Civil No. C1-96-757, 1996 WL 784589, at *10 (S.D. Ohio Dec. 31, 1996) (stating that "radio is a qualitatively different medium than television or newspapers.") (competitive impact statement); *see DOJ Analysis of Radio Mergers*, Address by Joel I. Klein, Acting Assistant Attorney General, Antitrust Division, U.S. Dept. of Justice at <www.usdoj.gov/atr/public/speeches/jik97219.htm> (Feb. 19, 1997) ("*DOJ Analysis of Radio Mergers*") (emphasis added).

[174] According to the DOJ, radio is unique in that it: is exclusively sound-based; allows advertisers to focus more on particular groups than most media; is priced low enough to allow for many repetitions of ads; is less expensive to produce compared to some other media, such as television; allows for very quick turnaround time from the decision to run an ad to actually hearing a professionally produced ad; and can reach people while they are driving. Comments and Petition for Hearing of the Department of Justice, *Triathlon Broad. Co. and Capstar Radio Broadcast. Partners, Inc.* at 8, FCC File Nos. BTC-980821EE, BTC-980821EF, BTC-980821EG, BTCH-980821EH, BTCH-980821EI, BTCH-980821EJ (filed Oct. 19, 1998) ("*DOJ Triathlon/Capstar Comments*"); *Affidavit of Dr. Sean F. Ennis* at ¶ 14 (Attachment C to *DOJ Triathlon/Capstar Comments*) ("*Ennis Aff.*). Although the DOJ initially filed comments in opposition to the license transfer involved in that case, it subsequently withdrew its comments as a result of a settlement.

[175] *Ennis Aff.* at ¶ 15.

Similarly, courts have repeatedly determined that newspaper advertising constitutes a distinct antitrust market from radio and other broadcast advertising.[176] As one district court explained concisely in a 1995 decision:

> The local daily newspaper offers advertisers a unique set of opportunities. They are able to reach a broad cross-section of consumers in a specific geographic circulation. They also allow a detailed message to be delivered in a timely manner. The peculiar characteristics and uses of other advertising media are very different . . . . [T]he main problem with [radio and television] is that the advertising message conveyed is transitory. It is nearly impossible to provide price detail, and so newspapers are especially critical for grocery stores, furniture outlets, hardware stores, car dealers, etc. Television and radio do not provide a guaranteed audience and the expense of producing radio and television spots can be prohibitive. Many advertisers use radio and television to complement, but not replace, their use of print advertising, often for the purpose of "image advertising."[177]

Although the relevant product market for television advertising has been considered somewhat less frequently, the Supreme Court has gone so far as to approve a market as narrow as televised college football, notwithstanding the fact that other programs on television were available as advertising vehicles.[178] The Court reasoned that college football attracted "an audience uniquely attractive to advertisers" who where willing to "pay a premium price per

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[176] *See, e.g.*, *Cmty. Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1155-1157 (W.D. Ark. 1995), *aff'd sub nom., Cmty. Publishers, Inc. v. DR Partners*, 139 F.3d 1180 (8th Cir. 1998) (noting significant differences between newspapers and broadcast stations and refusing to group the various media outlets together with newspapers in a single product market); *see also Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 441 F. Supp. 628, 635-36 (W.D.N.Y. 1977) (rejecting argument that the relevant product market in a newspaper antitrust case should be broadened to include television and radio), *rev'd on other grounds*, 601 F.2d 48 (2d Cir. 1979); *United States v. Citizen Publ'g Co.*, 280 F. Supp. 978, 986-87 (D. Ariz. 1968) (refusing to find that radio and television stations were part of the same advertising product market); *United States v. Times Mirror Co.*, 274 F. Supp. 606, 617 (C.D. Cal. 1967), *aff'd. mem., Times Mirror Co. v. United States*, 390 U.S. 712 (1968) (defining newspaper advertising as a distinct antitrust market).

[177] *Cmty. Publishers, Inc.*, 892 F. Supp. at 1156.

[178] *See Bd. of Regents of the Univ. of Okla. v. NCAA*, 468 U.S. 85, 112 n.49 (1984) (stating that "college football constitutes a separate market . . .whether the market is defined from the standpoint of broadcasters, advertisers, or viewers.").

viewer" to reach individuals within a specific target demographic.[179] Although the Supreme Court's decision in the college football case focused primarily on the national advertising market, the Court's analysis is equally instructive with respect to the local marketplace. As the Court plainly recognized, advertisers use different media – and different programs or comparable segments within the same medium – to reach specific targets. The advertising marketplace, then, is exceedingly complex, and not susceptible to the sort of "one size fits all" analysis the Commission would have to adopt in order to support a newspaper/broadcast cross-ownership ban premised upon a concern for competition in a separate, homogeneous, and self-contained market for local advertising.

Any attempt to group newspaper and broadcast advertising together in a single undifferentiated market ignores the realities of the marketplace, which under clear precedent must "serve as the lodestar" of market definition.[180] For example, the Commission's analysis of newspapers' share of local advertising revenue in the *NPRM* apparently lumps all local newspaper advertising revenues into a single category, equating newspaper classified advertising with broadcast television and radio advertising. Thus, the FCC estimates that on a national basis, advertisers spend about 45 percent of all local advertising dollars on newspapers. [181] According to NAA's estimates, however, approximately 48 percent of the total amount that advertisers spend on local advertising in newspapers is allocated to classified advertising.[182] In the

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[179] *Id.* at 111.

[180] *United States v. Empire Gas*, 537 F.2d 296, 303 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).

[181] *See NPRM* at ¶ 21. Although the FCC does not explicitly state that it has included classified advertising in its market share calculations, the 45% figure approximates NAA's estimates of newspapers' market share when classified advertising revenue is included. *See* Newspaper Association of America, *Facts About Newspapers; A Statistical Summary of the Newspaper Industry Published in the Year 2001,* at 13 ("*NAA Facts About Newspapers*").

[182] *See NAA Facts About Newspapers* at 13.

Commission's view, as stated in the *NPRM*, however, broadcast stations do not compete with newspapers for classified advertising, rendering it inappropriate to include classified advertising revenues in a market share analysis.[183]

Likewise, any suggestion that permitting newspaper/broadcast combinations would necessarily reduce the availability of substitutes in the local advertising market overlooks the reality that advertisers use newspapers and broadcast stations for different purposes and that the vast majority of advertisers use a multi-media advertising strategy due to the individual characteristics of the different types of media and the audiences that they reach.[184] Television offers advertisers a unique ability to present action-based campaigns, while newspapers permit presentation of a greater amount of information (or information that is more complex) for less money in a static format.[185] Additionally, advertisers who choose to use coupons as a promotional technique choose newspapers due to the permanent nature of the print medium. Radio, on the other hand, has its own set of unique characteristics and is distinguished by its ability to target specific demographic groups based upon station format and allows advertisers to reach target audiences far more efficiently than other media.[186]

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[183] *See NPRM* at ¶ 21. If classified advertising – and particularly personal classifieds, which should not be viewed as part of any commercial advertising market – are excluded, the share of local ad dollars credited to newspapers would of course be substantially reduced. Moreover, it appears that the Advertising Age study cited by the Commission in the *NPRM* did not take into account direct mail advertising, which also accounts for a significant share of local revenues.

[184] *See* Richard T. Kaplar, The Media Institute, *Cross Ownership at the Crossroads*, at 46 (1997). Kaplar notes that, "[w]hen it comes to advertising, newspapers offer mainly local advertising while television advertising is primarily national; local television ads lean heavily toward car dealers, while local newspaper advertising relies on department stores, supermarkets, car dealers and real estate interests; there is no broadcast equivalent to newspapers' classified advertising; and there is no equivalent among newspapers to radio's highly segmented demographics according to station format." *Id.*

[185] *See Cmty. Publishers, Inc.*, 892 F. Supp. at 1156.

[186] *See Jacor Communications*, 1996 WL 784589, at *10 (competitive impact statement). Advertising firms have even defined special demographics based upon radio listening habits – the "road warrior," for example, is defined by McCann-Erickson as a male between the age of 35 and 54 who drives over 15,000 miles a year. *See* McCann-

The particular product advertised also may dictate choice of medium, even by a single advertiser. Indeed, the DOJ has explained succinctly that:

> [F]or some types of advertising campaigns, radio is more desirable and for other types of campaigns, radio may be less desirable. For instance, if a department store is advertising a general storewide July 4th sale, it may be happy to advertise on radio. In contrast, if a department store is advertising a sale on Scandinavian furniture, the department store might prefer to advertise the sale on television to better show the style of furniture available.[187]

The Commission acknowledges in the *NPRM* that its "historic rationale" for attempting to protect competition may not make sense in the current media marketplace, due in part to the multiplicity of advertising outlets available and the increase the number of Americans that subscribe to MVPDs.[188] NAA submits that, in fact, the Commission's recognition that there is "considerable debate" over whether advertising on broadcast stations is a substitute for advertising in a newspaper, combined with its continued inability to reach a definitive conclusion on this issue, is sufficient in and of itself to warrant repeal of the newspaper/broadcast cross-ownership restriction. As the courts have made clear, an agency may not offer conclusory and unsupported speculation in defense of its decisions, nor may it ignore contradictory evidence in the record and fail to justify seeming inconsistencies in its approach.[189] Instead, the Commission

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Erickson WorldGroup, *Insight: Media In Mind, Road Warriors and Driving Habits* at <www.mccann.com/insight/mediainmind.html> (May 2001).

[187] *Ennis Aff.* at ¶ 17; *see Cmty. Publishers, Inc.*, 892 F. Supp. at 1156.

[188] *NPRM* at ¶ 17.

[189] *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41, 43 (1983) (requiring a "rational connection between the facts found and the choice made"); *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1269 (D.C. Cir. 1994) (striking down as arbitrary and capricious the EPA's adoption of an emissions standard where the comments filed in support of the standard referred merely to a "possibility" that the standard would be accurate and finding that the agency had relied on "pure speculation.").

must justify its rules based upon reliable factual support and sound legal analysis.[190] Here, the agency has *never* marshaled evidence that newspaper/broadcast combinations pose a genuine threat to competition in any product market for advertising, no matter how defined.[191] Absent such evidence, the FCC cannot justify maintenance of the cross-ownership ban based on an elusive desire to protect competition.

B. If the Commission Were to Determine That Newspapers and Broadcast Stations Compete in the Same Advertising Market, the Agency Would Also Be Required to Consider Other Sources of Competition and Conclude That There Is No Possibility That a Newspaper/Broadcast Combination Could Exercise Market Power to Increase Advertising Rates

In general, a product market includes the following: (i) identical products, (ii) products with such negligible differences that buyers regard them as substitutes, and (iii) other products that buyers regard as "such close substitutes" that a slight price increase in one will induce "intolerable shifts" of demand away from the other.[192] As indicated in the preceding section, the Commission has not identified an adequate basis for finding that newspapers and broadcast stations are "identical," that they have only "negligible . . . differences," nor that they are close enough substitutes that slight price increases in one would cause advertisers to shift to others at anything approaching an "intolerable" level.

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[190] *See Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1142-43 (D.C. Cir. 2001) ("*Time Warner II*") (striking down the Commission's elimination of the single majority shareholder exemption for cable companies because the FCC failed to support its "concern" regarding a potential problem by "some finding grounded in experience or reason."); *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 887 (D.C. Cir. 1999) ("*RTNDA v. FCC*") (remanding Joint Statement regarding the personal attack and political editorial rules to the Commission due to the FCC's failure to explain why, after the Commission itself had "highlighted the apparently excessive breadth" of the rules, the rules remained desirable without modification).

[191] *See 1975 Multiple Ownership Order*, 50 FCC 2d at 1072-73.

[192] *See generally* IIA Phillip E. Areeda, *et. al*., Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶¶ 562, 562a (Little, Brown and Company 1995) (explaining market definition principles applicable to user substitutes).

If, however, the Commission were to conclude that advertisers regard radio and television stations as sufficiently "close substitutes" to place them in the same product market, NAA submits that the agency also would be constrained to take into account all other forms of media that advertisers view as equally "close substitutes," rather than arbitrarily including some media and excluding others. Any advertising market that is broad enough to encompass such distinct media as newspapers and broadcast stations also must cover alternative media, including at a minimum cable, weekly newspapers, yellow pages, magazines, direct mail, outdoor advertising, and the Internet – as well as any other outlet that an advertiser could reasonably be expected to utilize to reach its audience.[193] As demonstrated below, there is ample evidence to suggest that many alternative outlets compete vigorously with newspapers for advertising revenue.[194] Further, the presence of these additional outlets is sufficient to protect against any prospect of "market dominance" by newspapers or broadcast stations (or even newspaper/broadcast

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[193] In *Midwest Radio Co. v. Forum Publ'g Co.*, 1989 WL 108352, *4 (D.N.D. June 29, 1989), *aff'd*, 942 F.2d 1294 (8th Cir. 1991), the district court granted summary judgment in favor of the owner of a newspaper/television combination in Fargo, North Dakota on a claim that it had exercised monopoly power in an advertising market including only newspapers and broadcast stations. The court held that additional media that compete with those outlets had to be included in the relevant market. Although it found that television, daily newspapers, and radio were "preferred methods of advertising," the court concluded that other media had "the potential to take away significant amounts of business from television, radio, and newspapers." *Id. See also Belfiore v. New York Times Co.*, 826 F.2d 177, 180 (2d Cir. 1987) (criticizing plaintiffs' attempt to define market narrowly as an "awkward attempt" to conform their theory to the facts they allege) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 591-592(1966) (Fortas, J., with Stewart, J., dissenting) (criticizing narrow market definitions tailored only to those activities in which defendants engage; relevant market includes all alternative sources of and substitutes for defendants' products reflecting "commercial realities")).

[194] Several economic studies supporting this view have previously been submitted to the Commission in other proceedings. *See, e.g.*, National Economic Research Associates ("NERA"), *Regulating Television Station Acquisitions: An Economic Assessment of the Duopoly Rule*, at 2 (May 17, 1995) (attached to Local Station Ownership Coalition Comments in MM Docket No. 91-221 (filed May 17, 1995)) (concluding that a market for local advertising that includes radio, broadcast and newspaper advertising also includes direct mail, magazines, yellow pages, and outdoor billboards); Economists Incorporated, *An Economic Analysis of the Broadcast Television National Ownership, Local Ownership, and Radio Cross-Ownership Rules*, at 23-24 (May 17, 1995) (attached to CBS, NBC, ABC and Westinghouse Joint Comments in MM Docket No. 91-221 (filed May 17, 1995)) (citing empirical evidence demonstrating "that other forms of advertising, such as yellow pages, outdoor and direct mail, are substitutes for video, radio and newspaper advertising," and concluding that "there is no evidence to support a conclusion that [these] other forms of advertising . . . do not constrain the prices of video, radio and newspaper advertising.").

combinations), and therefore eliminates the need for a blanket ban on newspaper/broadcast cross-ownership.

At an absolute minimum, Commission precedent mandates consideration of cable advertising, which the FCC has previously stated is part of a "video advertising" market.[195] Indeed, the agency has acknowledged that cable's share of the local advertising market has quadrupled in the last decade.[196] Local advertising on cable rose by 16.5 percent between 1999 and 2000 to $3.1 billion, and advertising on regional sports networks, which also are local in nature, increased 11.1 percent to $379 million.[197] The increased availability of digital cable, and the concomitant rise in extended channel capacity, is expected to help drive local cable advertising over the next five years.[198] In fact, one industry observer has stated:

> Local [television] advertising is under siege from cable interconnects and even the Internet. Cable has the ability to deliver a DMA that is just as good as television stations, except they have 22 channels on which to deliver advertising. There has been a narrowing to the ratings spread: The lowest ratings on over-the-air network prime time are now equivalent to higher ratings on cable prime, which threatens local stations' ability to charge higher CPMs (costs-per-thousand).[199]

An examination of historical and projected advertising expenditures on local and regional cable versus newspapers, radio and television between 1995 and 2005 reveals that cable competes vigorously with newspapers and broadcast stations for local advertising revenue and

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[195] *See 1998 Biennial Review NOI*, 13 FCC Rcd at 11288; *TV Ownership FNPRM*, 10 FCC Rcd at 3541.

[196] *See NPRM* at ¶ 22.

[197] *See* Veronis Suhler, *Communications Industry Forecast* 158-59 (5th ed. July 2001) ("*Communications Industry Forecast*"). In cable, the "ad business grew more than 20% annually in the last 7-8 years and … [v]iewership is continuing to move from broadcast to cable channels." *Cable Says Slump in Ad Sales is Short-Term Phenomenon*, Comm. Daily, June 12, 2001.

[198] *See Communications Industry Forecast* at 165.

[199] Diane Mermigas, *Profile: Barry Baker*, Electronic Media, Nov. 27, 2000, at 28.

protects against any possible exercise of market power. Between 1995 and 2000, retail newspaper advertising grew at a compound annual rate of 3.4 percent, television advertising at a rate of 6.4 percent, and radio advertising at a rate of 10.5 percent.[200] Local cable advertising, in comparison, increased at an annual compound rate of 16.9 percent, substantially exceeding newspapers, television stations, or radio stations.[201] Similarly, regional sports advertising rose at an annual compound rate of 13.5 percent.[202] Projections over the next five years call for retail newspaper advertising to grow at a 4.5 percent annual compound rate, with local television advertising rising by 3.1 percent annually and local radio advertising by 6.7 percent.[203] Local cable advertising is expected to outperform all of these media, rising by 9.8 percent.[204] Projections call for regional sports advertising to increase by 11.5 percent.[205]

Weekly newspapers also attract local advertisers and deliver editorial content to defined demographic segments – specific audiences (*e.g.*, youth-oriented or religious) and ethnic groups – or to particular suburban or rural geographic regions that intersect or are adjacent to the primary circulation area of a major daily newspaper.[206] Weekly newspapers have succeeded, at

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[200] *See Communications Industry Forecast* at 254 (retail newspaper), 140-41 (local television), 178 (local radio). As discussed above, classified advertising is irrelevant to an analysis of competition among newspapers, television stations and radio stations. In any event, classified advertising increased at only 7.4% annually from 1995-2000, and is expected to grow at an even slower rate of 1.3% between 2000 and 2005. Even under the most expansive analysis of the newspaper advertising market (including retail, national and classified advertising), newspaper advertising grew at only 6.2% between 1995 and 2000, and is expected to slow to 3.6% compound annual growth from 2000 to 2005.

[201] *See id.* at 160.

[202] *See id.*

[203] *See id.* at 254 (retail newspaper), 140-41 (local television), 178 (local radio).

[204] *See id.* at 160.

[205] *See id.*

[206] *See id.* at 257.

least in part, "due to their ability to provide quality and credible content to niche markets" that daily newspapers may not fully serve.[207] A further subset of weekly newspapers, the "alternative newspaper," aims to satisfy the needs of even more targeted groups. The demographic characteristics of alternative newspaper readers make these publications particularly attractive to advertisers. Readers of alternative newspapers tend to be active consumers, particularly likely to purchase automobiles, computers, electronic equipment, concert tickets, CDs or sporting goods.[208] Moreover, every major market in the United States is served by at least one alternative newspaper.[209]

Weeklies compete directly with daily newspapers for stories, readership, circulation, and advertising revenues. During 1999, advertising expenditures on weekly newspapers increased by 6.8 percent to reach $6.3 billion.[210] Advertising expenditures on weekly newspapers have grown at a compound annual rate of 8.2 percent over the last five years.[211] Industry analysts predict that weekly newspaper advertising expenditures will increase at an annual compound rate of 6.4 percent over the next five years, reaching $8.6 billion by 2005.[212]

Yellow pages and outdoor advertising, the bulk of which are local in nature, also account for increasingly large amounts of advertising dollars. In 2000, yellow pages advertising

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[207] *Id.*

[208] *See id.* at 258.

[209] *See* Association of Alternative Newsweeklies, *About the Association of Alternative Newsweeklies* at <www.aan.org/gbase/Aan/viewPage?oid=oidpercent3A2086> (visited Dec. 2, 2001).

[210] *See Communications Industry Forecast* at 258.

[211] *See id.* at 254 (retail newspaper), 260 (weekly newspaper). Even taking into account classified advertising in daily newspapers (7.4%), weekly newspapers are still competitive. Moreover, as noted above, classified advertising growth is expected to occur at a mere 1.3% annual compound rate over the next five years.

[212] *See id.* at 260.

expenditures topped $13 billion ($11.2 billion of that amount was allocated to local advertising), and outdoor advertising garnered over $5 billion ($2.4 billion of which was locally-oriented).[213] Local yellow pages advertising has increased at a compound annual rate of 5 percent over the last five years, and is expected to continue at approximately this rate, while local outdoor advertising grew 9.4 percent between 1995 and 2000 and is expected to slow only slightly, to 8 percent, between 2000 and 2005.[214] At the same time, magazine advertising revenue continues to rise, and although some magazines carry mainly national ads, many make advertising available on a local or regional basis or are purely local publications.[215] Advertising expenditures on consumer magazines rose 10.5 percent in 2000, reaching $12.6 billion, and are expected to increase to $15.8 billion by 2005.[216]

Even more remarkable is the proliferation of direct mail, which is used to some extent on a national basis but also serves as a locally targeted advertising medium that competes directly and vigorously with daily newspapers for advertising revenues generated by the "inserts" in newspapers, particularly Sunday newspapers. Direct mail generated over $44.5 billion in advertising revenues in 2000 – more than double newspapers' retail advertising revenues of $21.4 billion.[217] Direct mail accounts for 23.3 percent of total direct response marketing expenditures of $191.6 billion.[218] In contrast, newspapers were expected to generate 11.4

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[213] *See NAA Facts About Newspapers* at 13; *Communications Industry Forecast* at 82 (local yellow pages), 84 (local outdoor).

[214] *Communications Industry Forecast* at 82 (local yellow pages), 84 (local outdoor).

[215] Examples of purely local magazines include the *Washingtonian*, *L.A. Magazine*, and *Baltimore Magazine*.

[216] *Communications Industry Forecast* at 287.

[217] *See id.*

[218] *See* Direct Marketing Association, *2000 Economic Impact: U.S Direct Marketing Today* at <www.the-dma.org/library/research.shtml> (2000).

percent of direct response marketing expenditures, with predictions for television and radio even lower at 9.6 percent and 4 percent, respectively.[219]

Other miscellaneous advertising vehicles, such as shoppers, pennysavers, and bus and cinema advertising also would have to be included in a reasoned economic analysis. Together with weekly newspapers, these alternatives garnered almost $31.5 billion in revenues in 2000.[220] In addition, and of great significance to any consideration of the continuing need for a ban on newspaper/broadcast combinations, Internet marketing has emerged as a serious competitive threat to newspapers and broadcast stations, generating $4.3 billion in advertising revenues 2000 according to NAA's preliminary data. Other industry analysts place expenditures on Internet advertising much higher, at $8.2 billion, representing an increase of 78.1 percent over 1999 revenue of $4.6 billion.[221] Projections call for Internet advertising expenditures to reach $9.9 billion by 2005.[222] As one observer notes, "[t]he advertising and audience pie was never more fragmented among targeted options – such as local cable and satellite, newspapers and the Internet – that in some ways have become nearly as efficient and cost effective as local broadcast television."[223]

The attached economic study compared the relative level of competition for advertising revenue in 21 representative sample markets in 1975, when the cross-ownership ban was adopted, and in 2000.[224] Considering the artificial advertising product market used by the

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[219] *See id.*

[220] *See NAA Facts About Newspapers* at 13.

[221] *See Communications Industry Forecast* at 228-29.

[222] *Id.* at 230.

[223] Diane Mermigas, *Halcyon Days Over for Broadcasters,* Electronic Media, Apr. 2, 2001, at 14.

[224] *See* Economists Inc. Study at 2-10, Table 4.

Commission, which includes *only* newspapers and broadcast stations, the study shows that concentration levels have decreased significantly since the adoption of the rule.[225] Utilizing a model that assumed that each radio and station in each DMA had the same share of revenue, the study concluded that concentration has decreased "about 40 percent" since 1975.[226] When available estimates of radio and television stations' actual advertising revenues were used, concentration levels were even lower.[227] Moreover, as discussed above, any advertising product market that is broad enough to include newspapers and broadcast stations would reasonably have to encompass other advertising outlets, such as cable, non-daily newspapers, direct mail, yellow pages, outdoor, the Internet, and other forms of advertising. Thus, the results of the study significantly overstate the actual levels of concentration, which would be greatly reduced when other competing media are included.[228]

Due to the abundance of cable, weekly newspapers, and other advertising outlets in today's advertising marketplace and the degree to which they compete with daily newspapers and broadcast stations, protecting competition in any advertising market in which newspaper and broadcast stations may be found to be competitors is a far less critical concern today than it was in 1975. Moreover, this rise in the number and power of advertising alternatives is augmented by the increased competition due to the entry of additional radio and television stations and other media outlets into local markets, as discussed above.[229] Plainly, newspapers and broadcast stations are subject to vigorous competition which is more than adequate to eliminate the remote

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[225] *See id.*

[226] *Id.* at 8, Table 4 (showing decrease in HHI from 2,761 to 1,614, or of 1,148, between 1975 and 2000).

[227] *See id.* at 9-10, Table 5 (showing average HHI levels of between 1,360 and 1,667 in 2000).

[228] *See id.* at 3, 9-10.

[229] *See supra* Section III; *see generally* Appendix I.

possibility that a newspaper/broadcast combination could exercise market power to increase advertising rates in the local market. Simply put, regardless of the manner in which FCC defines the product market, it cannot justify regulation on this basis.

C. The Impossibility of Defining a Relevant Geographic Market with Precision Renders FCC Regulation Based on Competition for Advertisers Wholly Inappropriate

NAA submits that as a result of the difficulties in defining the advertising product markets served by newspapers and broadcast stations that are discussed in detail above, the question of geographic market definition in this context need not be reached. Moreover, as the FCC acknowledges in the *NPRM*, the traditional antitrust approach to geographic market definition bears little or no relation to the definition the Commission has utilized in the past,[230] making a comparison between the FCC and the DOJ approaches an exercise in futility. The DOJ defines the relevant geographic area for antitrust analysis as the region in which a hypothetical monopolist that is the only producer of the relevant product in the region could profitably raise the price of the relevant product.[231] The FCC, on the other hand, has utilized the area of overlap between a broadcast station's service contour and the newspaper's area of significant circulation.[232]

Furthermore, information relevant to any competitive analysis is reported based upon entirely different geographic areas. Newspapers report their circulation to the Audit Bureau of Circulations in various areas, while radio station audience share is calculated within Arbitron-defined markets and television audience ratings are measured within local markets designated by

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[230] *See NPRM* at ¶¶ 21-23.

[231] *See id.* (citing *Horizontal Merger Guidelines* § 1.21, *reprinted in* Antitrust Primary Source Pamphlet).

[232] *See NPRM* at ¶ 23.

Nielsen. The very fact that these industry-defined sources use separate and distinct geographic market definitions strongly suggests that an attempt to accurately define a geographic area that would allow an accurate analysis of competition between newspapers, radio stations and television stations is destined to be unsuccessful.[233]

D. Newspaper/Broadcast Combinations Will Result in Synergies and Efficiencies That Enable Them to Provide More Cost Effective Service to Advertisers

As discussed in more detail in Section IV.A., *supra*, there is ample evidence that newspaper/broadcast combinations create economic efficiencies that can increase program quality and result in more cost effective service to advertising customers. Significantly, one economic study of 815 daily newspapers demonstrated that newspaper/broadcast cross-ownership actually is associated with *lower* advertising rates.[234] According to the study, newspaper-television combinations achieved cost efficiencies that resulted in newspaper advertising rates that were, on a statistically significant level, lower than independently owned newspapers.[235] Newspaper-radio combinations similarly enjoyed economies of scope and scale that lowered newspaper advertising rates, although the difference between the rates charged by such combinations and independently owned newspapers was not found to be statistically significant.[236]

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[233] If the geographic market is defined too narrowly, it will inevitably overlook many alternative advertising outlets that reach consumers from neighboring areas. On the other hand, a geographic market defined broadly enough to include all relevant competing advertising outlets – *e.g.*, a television DMA – will certainly confirm that the likelihood of any exercise of "market power" by a newspaper/broadcast combination is too remote to warrant FCC concern.

[234] *See* James M. Ferguson, *Daily Newspaper Advertising Rates, Local Media Cross-Ownership, Newspaper Chains, and Media Competition*, 3 J.L. & Econ. 635, 651 (1983).

[235] *See id.*

[236] *See id.*

A more recent study of more than 1,400 daily newspapers in markets of various sizes provides no indication that cross-owned newspapers charge higher advertising prices than other newspapers.[237] Utilizing current 1998 data, the study demonstrated that "there was no statistically significant difference between advertising prices of cross-owned newspapers and those of other papers."[238] Based upon these studies, NAA submits, there is no reason to believe that cross-ownership is likely to lead to higher advertising prices, and no basis in competition concerns for perpetuation of the archaic newspaper/broadcast cross-ownership ban.

E. Newspapers and Broadcast Stations Do Not Compete in Any Other Relevant Product Market

Any fear that newspaper/broadcast combinations might harm an "economic market" for news is misplaced.[239] Indeed, the Commission has not made clear in its *NPRM* how the provision of news to the public by newspapers or broadcasters can properly be analyzed as any sort of "economic" market. News in print and broadcast news – like any other broadcast programming on commercial stations – is funded by advertising revenues. While newspapers, and some non-broadcast audio and video providers, also benefit from subscription fees, over-the-air broadcasters do not.

In any event, newspapers, radio and television stations provide news in entirely different formats. Indisputably, newspapers offer far greater in-depth coverage and background

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[237] *See* Economists Incorporated, *Structural and Behavioral Analysis of the Newspaper-Broadcast Cross-Ownership Rules* (July 1998) (attached as Appendix B to *NAA 1998 Biennial Review Comments*).

[238] *Id.* at 15. This finding is consistent with earlier studies that found no effect from cross-ownership. *See id.* at 13 (citing John Peterman, *Concentration of Control and the Price of Television Time*, 61 Am. Econ. Rev. (1971); RMC Incorporated, *A Quantitative Analysis of the Price Effects of Joint Mass Communication Ownership*, Report #UR-150 (attached to NAB Comments in FCC Docket No. 18110); A.M. Lago, *The Price Effects of Joint Mass Media Ownership*, 16 Antitrust Bull. (1971).

[239] *See NPRM* at ¶ 27.

information on a wide variety of issues than do broadcast outlets. Additionally, inherent differences between newspapers, radio stations, and television stations dictate differences in the type of news coverage offered. Newspapers, as a text-based medium, have far greater flexibility in terms of providing more detailed material that readers may need time to absorb and consider. Television and radio broadcasts, in contrast, are fleeting, and therefore must present information to viewers in an easily understandable fashion to convey a message quickly and effectively. Television, as opposed to both radio and newspapers, is uniquely able to provide visual images of news events occurring in "real time."

The Commission has "distinguished the influence of television from that of newspapers as being more immediate, and from that of both newspapers and radio as having more visual impact and serving more people as a primary source of news."[240] Likewise, the FCC has found it significant in other proceedings that "broadcast television and cable television are the only participants in the market for delivered news and public affairs *video* programming at the local level."[241] Because newspapers and broadcast stations provide news in different formats for different purposes, they cannot be said to compete in an economic market for news.[242]

Nor, as the FCC has previously found, do newspapers and broadcast stations compete in the markets for delivered video programming or delivered audio programming.[243] During both

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[240] *1998 Biennial Review Report*, 15 FCC Rcd at 11117; *see 1999 Television Ownership Order*, 14 FCC Rcd at 12917-18.

[241] *1998 Biennial Review Report*, 15 FCC Rcd at 11117 (emphasis added).

[242] In addition, even if a separate news market including newspapers and broadcast stations could theoretically be defined, it would have to be broad enough to encompass a plethora of other sources from which news is available, including cable, weekly newspapers, the Internet, and local magazines, to mention but a few. Any such market would be diverse and competitive. Accordingly, any concern the Commission might have regarding concentration in an "economic market" for news would be insufficient to justify maintenance of the newspaper/broadcast cross-ownership ban.

[243] *1998 Biennial Review NOI*, 13 FCC Rcd at 11288.

the 1998 Biennial Review and the TV Ownership proceedings, the Commission adhered to the view that "delivered video programming [is] a sufficiently distinct product so as to represent a different product market relative to radio stations and newspapers for competitive analysis purposes."[244] The same holds true with respect to radio, as newspapers "do not operate in the market for delivered audio programming."[245] Likewise, competition in the program production marketplace would be unaffected by allowing newspaper/broadcast combinations. Because newspapers are a print medium, they simply do not compete in the program production markets for audio or video programming.[246] Consequently, allowing cross-ownership between broadcast stations and newspapers could not harm competition in the program supply or program production markets.

F. In the Unlikely Event That a Proposed Newspaper/Broadcast Combination Might Significantly Increase Market Power, Other FCC Multiple-Ownership Limits and the Antitrust Laws Would Adequately Protect Against Any Harm to Advertisers or Consumers

As demonstrated above, normal market conditions are sufficient to protect against any possible exercise of market power by a newspaper/broadcast combination. The FCC itself has other multiple ownership rules in place that prevent the aggregation of an undue amount of market power in the hands of one owner.[247] Moreover, and contrary to the Commission's apparent fear, repeal of the newspaper/broadcast cross-ownership ban would not leave any

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[244] *Id.*

[245] *Id.*

[246] *See id.*; *TV Ownership FNPRM*, 10 FCC Rcd at 3544.

[247] *See, e.g.*, 47 C.F.R. § 73.3555(a) (local radio ownership rules); *id.* § 73.3555(b) (local television multiple ownership rule); *id.* § 73.3555 (c) (one-to-a-market rule).

significant competitive concerns that might occur as a result of newspaper/broadcast combinations free from government scrutiny.

Rather, proposals for mergers between newspaper owners and broadcast licensees would trigger the DOJ and FTC merger review procedure.[248] That process, whether under the Hart-Scott-Rodino Act or pursuant to the agencies' general Clayton Act authority to prevent mergers or acquisitions that may substantially lessen competition or create a monopoly, sufficiently protects against any isolated danger to competition for advertising revenue in specific local markets.[249] The FTC/DOJ merger review process is rigorous and ensures that mergers that require consideration receive a complete economic analysis.[250] The agencies have a panoply of powers to obtain additional information from merging companies, and indeed exercise those powers frequently and with rigor, to ensure that they have before them a complete set of facts upon which to base their competitive analysis.

In addition, the antitrust laws provide the DOJ and FTC with a full range of enforcement authority that can be invoked at any time to protect against the exercise of market power.[251] The FCC should leave enforcement of the antitrust laws to DOJ and FTC, which are better equipped

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[248] The DOJ and FTC share responsibility for merger review, and coordinate with each other to ensure that the agency with the most expertise in an area handles the matter. *See* 5 Julian O. von Kalinowski, *et. al*., Antitrust and Trade Regulation § 90.02 (2d ed. 2001).

[249] *See* 15 U.S.C. §§ 18, 18a.

[250] Indeed, Joel I. Klein, then-chief of the Department of Justice's antitrust unit, stated that it "takes very careful study and analysis to find out if a given merger is likely to have anticompetitive effects. And *our job* is to make sure that the analysis is done properly and, when necessary, thoroughly." *DOJ Analysis of Radio Mergers* (emphasis added).

[251] *See* Economists Inc. Study at 12.

to undertake the complex market analysis necessary to determine whether competition is adversely affected by a newspaper/broadcast combination.[252]

VI. THE NEED FOR RELIEF FROM THE OUTDATED NEWSPAPER/ BROADCAST CROSS-OWNERSHIP BAN IS EXACERBATED BY CURRENT ECONOMIC CONDITIONS

As detailed in Section III. above and in Appendix I attached hereto, the dominant position that the traditional media enjoyed in 1975 has been substantially eroded in the intervening years. Similarly, daily newspapers, once virtually alone among the print media in reaching a mass audience, today face unrelenting competition from a wide array of print challenges as well as their ever-expanding electronic counterparts. Newspaper publishers and broadcasters have been particularly hard hit, moreover, by recent downward trends in the U.S. economy. In the past year, industry analysts have issued increasingly bleak reports about the current state of these highly advertising-dependent businesses, and earnings projections have taken a nose dive. In this challenging environment, relief from the outdated newspaper/broadcast cross-ownership restriction would provide a much-needed boost to both the newspaper business and the broadcasting sector.

A. Newspaper Publishers and Broadcast Companies Are Struggling to Remain Competitive in Today's Marketplace

As one industry observer noted early this year, "[f]ears of a recession are mounting – and when advertisers cut back spending in anticipation of slowing consumer spending, the newspaper

[252] As the Commission acknowledged when it adopted the rule, its role in preserving competition in advertising is extremely limited, because concerns about advertising rates bear little or no relation to the FCC's primary goal of ensuring that the public interest is served. *See 1975 Multiple Ownership Order*, 50 FCC 2d at 1079-80.

industry is one of the first to feel it."[253] Broadcasters have had an even tougher time. A dramatic drop in all-important "upfront" advertising sales for this year's fall television season led analysts to scale-down already weak revenue projections last summer.[254] Another industry watcher noted in July 2001, "the just-concluded advertising market for next fall's TV season is sure to set the tone for other media sales throughout the year: slower, longer, and more stressful."[255]

The difficulties facing the major networks in the upfront ad market also confront their local affiliates and, indeed, all of the independent local television outlets as well. In early September, continued "anemic ad spending" led JP Morgan to forecast that U.S. television advertising would decline by 10 percent in 2001.[256] Similarly, in downgrading its television ad forecast for the rest of the year, investment banking firm ABN AMRO predicted in early September that "[t]he duration and magnitude of the advertising weakness will be worse than consensus expectations" and that, in defiance of historical trends, ad spending would continue to decrease as a percentage of gross domestic product in 2002.[257] Merrill Lynch economists went even further in a report issued at the beginning of September in which it lowered advertising

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[253] Lucia Moses, *Relaxing Of Cross-Ownership Rules Under Bush Administration Likely, Opening Up Potential For New Era For Growth-Minded Newspaper Groups*, Editor and Publisher Magazine, Jan. 22, 2001.

[254] Seth Sutel, *Network TV Advertising Slumps; Outlook Poor*, The Associated Press, July 8, 2001 (noting 14% drop in upfront advertising commitments from year 2000). *See also id.* (quoting Prudential Securities media analyst Katherine Styponias) ("Things may not be getting any worse, but it looks like we're scraping along the bottom.").

[255] *Id. See also* Beth Piskora, *Mastering The Media Market: Though Ad Sales Are Weak, Top Analyst Jessica Reif Cohen Expects A Turnaround*, July 15, 2001 (quoting Cohen) ("Whether we're in an official recession or not, we're certainly in an advertising recession. Advertising has been weak for the last four quarters. Actually, "weak" is a bit too kind; advertising is down in the last four quarters in virtually every sector.").

[256] Diane Mermigas, *Bigger Is Better In A Soft Market*, Electronic Media, Sept. 10, 2001.

[257] *Id.*

spending estimates for 2001 and 2002 and anticipated that "heightened lay-offs and weakened consumer confidence will put more pressure on ad spending" and overall reinvestment.[258]

The newspaper and broadcasting industries have been subjected to heightened strains in light of the tragic events of September 11 and the ensuing international campaign against terrorism. In the days following the terrorist attacks in New York City and at the Pentagon, newspapers across the country provided the public with outstanding service by printing extra editions in order to focus on news developments.[259] Likewise, broadcasters more than willingly provided the public with around-the-clock, commercial-free news coverage for days following the attacks on the World Trade Center and the Pentagon. Indeed, the media industry collectively has incurred hundreds of millions of dollars in increased costs and lost advertising revenues.[260]

According to estimates gathered from media analysts and companies, for example, U.S. news organizations likely spent as much as $100 million beyond their initial budgets as of mid-October to report the crises.[261] About a month after the attacks, a Merrill Lynch Media analyst estimated that some of the larger newspaper publishers already had incurred an additional $3 to $4 million in added expenses.[262] Likewise, media experts have determined that providing around-the-clock news coverage in the days after September 11 cost each broadcast network an

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[258] *Id.*

[259] *See, e.g.*, Sallie Hofmeister, Greg Johnson, *Crisis Coverage Costly For Networks, Newspapers, Regular Programming Is Canceled And Extra Pages Are Added As News Reports Crowd Out Advertising*, L.A. Times, Sept. 13, 2001.

[260] *Id. See also* Seth Sutel, *U.S. Attacks Compound Media Woes*, Associated Press Online, Sept. 18, 2001 (noting that "newspaper publishers, already struggling with a severe advertising downturn, are warning that the horrific events of last week are likely to further impact their profits").

[261] Seth Schiesel and Felicity Berringer, *News Media Risk Big Losses To Cover War*, N.Y. Times, Oct. 22, 2001.

[262] *Id. See also* Richard Burnett, *Newspaper Companies Struggle As Revenue Slips*, The Orlando Sentinel, Oct. 19, 2001 (quoting John Sturm, President, NAA) ("Papers are going through probably the worst period in decades.").

additional $500,000 to $1 million per day.[263] On top of these expenses, some media companies have faced substantial disaster-related expenses.[264] On the revenue side of the ledger, newspaper organizations have lost millions of dollars in advertising revenues, while the provision of commercial-free coverage in the days following the crises resulted in an estimated average daily loss of $10 million in advertising earnings for each broadcast network.[265] Of course, local network affiliates, as well as all of the other local television and radio stations that have provided stepped-up news coverage while foregoing advertising opportunities, have absorbed corresponding "hits" to their bottom lines.[266]

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[263] Diane Mermigas, *Media Strains In Disaster's Wake*, Electronic Media, Sept. 17, 2001. *See also* Geraldine Fabrikant, *Suddenly, The Magic Is In Short Supply*, N.Y. Times, Sept. 23, 2001.

[264] Diane Mermigas, *Media Strains In Disaster's Wake*, Electronic Media, Sept. 17, 2001. For New York broadcast stations, these costs have included the replacement of transmitters and other destroyed property, employee overtime, hiring back formerly laid-off news personnel, and support provisions such as food, changes of clothes, and shelter for staffers. More than a half-dozen media companies, including NBC and ABC and their owned and operated stations, must rebuild and relocate transmitters, antennas, and transmission facilities in New York City. "In the New York market, transmitters can cost between $5 million and $10 million, and antennas between $2 million and $4 million." *Id.* Tom Wolzien, an analyst at Sanford Bernstein, has stated that "[t]here are dire implications to the loss of transmitters, antennas and communications facilities. You are talking about tens of millions of dollars of capital expenditures to replace those things." *Id. See also* Steve McClellan, *Down But Not Out, New York TV Stations Cope With Attack Aftermath In An Already Bad Year*, Broadcasting & Cable, Oct. 15, 2001. New York–based newspapers have been similarly affected. The *Wall Street Journal*, for example, lost its main offices near the World Trade Center as a result of the terrorist attacks. To get a paper out on September 11, Dow Jones had to set up alternate offices, install 100 workstations and order additional network capacity. It will take months of rebuilding, as well as significant expenditures, before the *Wall Street Journal* can return to its original offices. *See* Eric Chabrow and Martin J. Garvey, *Regeneration Business Continuity*, Information Week, Nov. 26, 2001, at 38.

[265] Seth Schiesel and Felicity Berringer, *News Media Risk Big Losses To Cover War*, N.Y. Times, Oct. 22, 2001; Diane Mermigas, *Media Strains In Disaster's Wake*, Electronic Media, Sept. 17, 2001.

[266] In addition to coping with the challenges posed by the current U.S. economy, television broadcasters have been subject for years to ever-increasing competition from cable and DBS providers and rapidly rising programming costs. Now they also face the need to finance the transition to digital services. Indeed, Chairman Powell has recognized the need to review the DTV transition obligations in light of "new realities that have arisen out of the tragic events of September 11," including the "financial impact of the attacks on our media companies" and the "impact on consumer spending." *See* Heather Forsgren Weaver, *Hollings Scorns DTV Relocation Plan*, RCR Wireless News, Oct. 22, 2001. While the agency recently has taken action to ease the obstacles that the transition has put in front of broadcasters by permitting stations to elect more graduated conversion schedules and to initially build lower-powered digital facilities, DTV requirements will continue to pose a substantial financial challenge to the nation's television broadcasters. *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, Memorandum Opinion and Order on Reconsideration* in MM Docket No. 00-39 (rel. Nov. 15, 2001).

B. Repeal of the Ban Would Provide a Critical Boost to the Newspaper and Broadcast Industries

In this daunting environment, elimination of the outdated newspaper/broadcast cross-ownership restriction – long overdue in any event – would be particularly timely and would provide essential relief to both industries. As shown above, repeal of the rule would allow newspapers and broadcasters to realize significant efficiencies and operational synergies.[267] For example, newspaper/broadcast combinations would be able to join sales forces and operating staff, news resources, and physical facilities and thereby achieve considerable cost savings.[268]

Relaxation of the Commission's ownership regulations thus could provide an important boost for the currently struggling media industry. A number of industry experts have concluded that repeal of restrictions on cross-ownership such as the newspaper/broadcast ban would stimulate transactions that have been artificially suppressed by the agency's regulations.[269] These deals would in turn enable companies to become better equipped to withstand economic downturns. For example, media analyst Paul Kagan and Associates Inc. has noted that newspaper publishers are "very vulnerable to recessionary periods . . . and when you have more media to sell across . . . you can weather the storm better."[270]

Another media observer similarly has noted that deregulation would be highly beneficial to broadcasters in today's weak economy: "With many TV stocks trading at a 50 percent to 75 percent of discount of their private market values . . . the impetus for some transactions has to

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[267] *See supra* Section IV.A.

[268] *Id. See also NPRM* at ¶ 25.

[269] *See* Dan Trigoboff, *Sellers Face Big Obstacles*, Broadcasting & Cable, Oct. 15, 2001; Jaret Seiberg, *FCC May Loosen Media Merger Rules*, The Daily Deal, Sept. 13, 2001.

[270] Lucia Moses, *Relaxing Of Cross-Ownership Rules Under Bush Administration Likely, Opening Up Potential For New Era For Growth-Minded Newspaper Groups*, Editor and Publisher Magazine, Jan. 22, 2001.

come from the undeniable recognition that stations would be better off with someone else's assets."[271] Veteran media fund analyst Mario Gabelli has stated that if the FCC relaxes its cross-ownership rules in this environment, the agency will provide "a springboard for a lot of terrific dynamics" for broadcasters.[272] Thus, in an environment in which newspaper publishers and broadcasters are being sorely tested, relief from the FCC's outdated newspaper/broadcast cross-ownership prohibition would provide a much-needed stimulus and would offer both sectors the chance to realize essential synergies and efficiencies that can contribute to the foundation for their long-term health.

VII. THE TELECOMMUNICATIONS ACT OF 1996, AS WELL AS GOVERNING PRINCIPLES OF ADMINISTRATIVE LAW, REQUIRE THE COMMISSION TO ENGAGE IN A "ZERO-BASED" REVIEW OF THE BAN AND ELIMINATE IT

As the preceding sections of these Comments demonstrate, the newspaper/broadcast cross-ownership prohibition cannot be found to be necessary to further any demonstrable public interest objective. Rather, the ban serves only to foreclose publishers and station owners from taking advantage of efficiencies offered by joint operation that can increase the quantity and improve the quality of news, public affairs, and other informational programming to which the audience in a local market is exposed. In these circumstances, the Commission should be mindful of its responsibility, in this rulemaking proceeding that is an outgrowth of the statutorily-mandated biennial review process, to examine the rule critically and to eliminate it upon a determination that it is no longer "necessary" in the public interest as a result of competition. Similarly, governing principles of administrative law require a rigorous re-examination of any regulation when the factual circumstances or regulatory policy

[271] Diane Mermigas, *Many See A TV Station Sales Frenzy*, Electronic Media, Jan. 22, 2001.

[272] *Id.*

considerations on which it was premised have been altered. That duty is particularly compelling where, as here, the rule in question has never been grounded in concrete record evidence but, instead, represents only a speculative "best guess" by the agency that promulgated the regulation.

A. The Deregulatory Biennial Review Mandate of the 1996 Act Obligates the FCC to Repeal Any Broadcast Ownership Rule That – Like the Newspaper/Broadcast Restriction – Is No Longer Necessary in Light of Competition

As part of the deregulatory framework of the 1996 Act, Congress charged the FCC with a duty of conducting a thorough review of its broadcast ownership regulations every two years and eliminating or relaxing any regulation that, based on competitive considerations, does not serve the public interest. Specifically, Section 202(h) requires the Commission to " review . . . all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934" and to "determine whether any of such rules are necessary in the public interest as the result of competition."[273] The provision further obligates the agency to "repeal or modify any regulation it determines to be no longer in the public interest."[274] The instant proceeding, although not initiated until the fall of 2001, is an outgrowth of the initial Biennial Review proceeding, commenced in 1998 pursuant to the statutory directive.

The central motive behind the establishment of this statutory mandate clearly was the elimination of outmoded ownership rules that unnecessarily burden the workings of the competitive marketplace. As Commissioners charged with this biennial review obligation

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[273] 1996 Act § 202(h).

[274] *Id.* Similarly, Section 11 of the Communications Act of 1934, as amended, obligates the Commission to review on a biennial basis any of its regulations that apply to the operations or activities of any provider of telecommunications service and to "determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition." Communications Act of 1934, as amended, § 11, codified at 47 U.S.C. § 161(a)(2). This provision further requires the agency to "repeal or modify any regulation it determines to be no longer necessary in the public interest." 47 U.S.C. § 161(b).

repeatedly have recognized, Congress intended the FCC to conduct a comprehensive review of its ownership regulations with the fundamental goal of repealing those regulations that no longer serve the public interest.[275] Thus, "the clear bent of the biennial review process . . . is deregulatory" and was established by Congress "in recognition of the pace of dramatic change in the marketplace and the understanding that healthy markets can adequately advance the government's interest in competition and diversity."[276] Pursuant to the "concept of regulatory reform embodied in Section 202(h)," the Commission's primary task in the biennial review process is to determine whether the forces of competition have "obviate[d] the need for the rules" rather than simply to "ask[] how the rules promote diversity and competition."[277]

This central motive of deregulation is embodied in the biennial review provision's exacting standard of review. In order to justify keeping existing regulations in place, the Commission must conclude that the regulations are "necessary in the public interest."[278] This showing has three significant components. First, it requires the Commission to conclude not

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[275] *See, e.g.*, *2000 Biennial Regulatory Review*, 16 FCC Rcd 1207, 1213 (2001) *("2000 Biennial Review Order")* (The "key purpose of section[] . . . 202(h) is to repeal or modify certain regulations that are no longer necessary as a result of competition."); *1998 Biennial Review NOI*, 13 FCC Rcd at 11304 (Separate Statement of Comm'r Michael K. Powell) ("In mandating that we review these ownership rules, Congress [was] primarily concerned that we adjust or eliminate these rules if, as is anticipated by the Telecommunications Act, sufficient robust competition develops."); *id.* at 11298 (Separate Statement of Chairman William E. Kennard) (referring to the need to "take a critical look at [the Commission's] ownership rules"); *id.* at 11299 (Separate Statement of Comm'r Susan Ness) ("[T]he Commission should and will take a hard look at its [ownership] regulations and follow the statutory directive to "repeal or modify any regulation it determines to be no longer in the public interest."); *Amendment of Section 73.658(g) of the Commission's Rules – The Dual Network Rule*, 16 FCC Rcd 11114 (2001) (The FCC's "focus, pursuant to section 202(h), is whether this aspect of the rule remains 'necessary in the public interest as the result of competition.'"); *1998 Biennial Regulatory Review – Testing New Technology*, 14 FCC Rcd 6065, 6068 (1999) (describing biennial review "deregulatory and streamlining mandate"); *Truth-In-Billing and Billing Format*, 14 FCC Rcd 7492, 7571 (1999) (Dissenting Statement of Comm'r Harold Furchtgott-Roth) (noting that the "biennial review provisions are founded on the assumption that as competition increases, the need for regulation decreases" and that "[t]hrough these and other provisions of the 1996 Act, Congress made clear its intention that the Commission remove regulations as competition develops").

[276] *1998 Biennial Review Report*, 15 FCC Rcd at 11151 (Separate Statement of Comm'r Michael K. Powell).

[277] *Id.* at 11139 (Dissenting Statement of Comm'r Harold Furchtgott-Roth).

[278] 1996 Act § 202(h).

merely that the existing regulations are acceptable or reasonable, but that they are not more broad than *required* to further the public interest reflected in the Act. Second, it directs that the Commission determine that the public interest served is significant and substantiated. Finally, it places the burden of persuasion on advocates of continued regulation.

Specifically, the 1996 Act requires the agency to decide whether the regulations are "necessary" in the public interest. An inquiry into whether something is "necessary," as the term is commonly understood, asks whether it is "logically unavoidable," "compulsory," or "absolutely needed: required."[279] In other words, "[s]omething is *necessary* if it is *required* or *indispensable* to achieve a certain result."[280] Courts, which "construe a statutory term in accordance with its ordinary or natural meaning,"[281] have held that the interpretation of the word "necessary" in the 1996 Act must accord with this common understanding.

In *AT&T v. Iowa Utilities Board*,[282] the Court interpreted the provision of the 1996 Act that requires "the Commission [to] consider … whether access to . . . network elements as are proprietary in nature is *necessary*."[283] The Court rejected the Commission's broad reading of "necessary" and stated that "the Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act."[284] The Court further reasoned:

> [T]he Commission's assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element

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[279] *Merriam-Webster's Collegiate Dictionary* 774 (10th ed. 2001).

[280] *GTE v. FCC*, 205 F.3d 416, 422 (D.C. Cir. 2000).

[281] *FDIC v. Meyer*, 410 U.S. 471, 476 (1994) (explaining that courts construe a statutory term to accord with its ordinary meaning "[i]n the absence of [a statutory] definition").

[282] *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999).

[283] 1996 Act § 251(d)(2) (emphasis added).

[284] *AT&T v. Iowa Utilities Board*, 525 U.S. at 388.

> renders access to that element "necessary[]" … is simply not in accord with the ordinary and fair meaning of th[at] term[].[285]

The D.C. Circuit, when it interpreted the word "necessary" as it appears in yet another provision of the 1996 Act,[286] similarly held that Congress used the term in accordance with its commonly understood meaning.[287] The Court rejected the Commission's reading of "necessary" to mean "useful" and explained:

> As is clear from the Court's judgment in *Iowa Utilities Board*, a statutory reference to 'necessary' must be construed in a fashion that is consistent with the ordinary and fair meaning of the word, *i.e.*, so as to limit "necessary" to that which is *required* to achieve a desired goal.[288]

Thus, it has been judicially recognized the word "necessary," as it appears in the 1996 Act, means *required* or *indispensable*.

Nothing in Congress's deliberate use of the term "necessary" in the biennial review provision indicates that it should mean anything different in that provision than in these other provisions already interpreted by the courts. On the contrary, Congress is presumed to have intended that a word repeated in a statute carry the same meaning in each usage.[289] And, had Congress intended that the review inquiry examine only whether existing regulations are "reasonable in light of," "consistent with," or "useful to" the public interest, it certainly had more clear and direct ways to say as much. Accordingly, in the context of the biennial review

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[285] *Id.* at 389-90.

[286] The Court interpreted the provision of the 1996 Act that requires LECs "to provide … physical collocation of equipment *necessary* for interconnection or access to unbundled network elements at the premises of the local exchange carrier." 1996 Act § 251(c)(6) (emphasis added)

[287] *GTE v. FCC*, 205 F.3d 416, 422-24 (D.C. Cir. 2000).

[288] *Id.* at 423 (emphasis added).

[289] *See, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) ("Only last Term we adhered to the 'normal rule of statutory construction' that 'identical words used in different parts of the same act are intended to have the same meaning.'") (quoting *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)).

provision, the question is whether the existing regulations are required in, or indispensable to, the public interest.

This exacting inquiry demands a concrete showing that the regulations are a more than merely useful means to achieve the end of serving the public interest. The Commission could and has speculated that regulations might be helpful or useful in the past, but it cannot show that regulations are *required* without providing a specific demonstration that the regulations are, in fact, indispensable to the public interest as reflected in the statutory scheme. To the extent the regulations are not, in fact, indispensable to achieve the end, they are more broad than "necessary," and must be repealed.

Second, and as important, Congress's use of the term "necessary" does not merely describe the nature of the means that a regulation must employ to withstand biennial review. The requirement that the existing regulations be "necessary in the public interest" also impacts the nature of the *end* the regulation must serve. The Commission must, in conducting the biennial review, determine whether the existing regulations are required to serve a significant and substantiated interest.

The word "necessary" inescapably demands that there be a congruence between the means and ends of the existing regulations. If the Commission had broad discretion to define the public interest that must be served by the regulations, and could do so without substantial factual basis, then it could always define the interest in such a way that the existing regulations are *required* to remedy the problem. A regulation perfectly calibrated to serve a trivial and unsubstantiated interest can hardly be deemed "necessary in the public interest" under any common sense reading of the biennial review provision, particularly in light of Congress's central objective of promoting deregulation. Thus, the Commission is not permitted to find that

"*any*" increase in diversity or competition promoted by existing regulations (no matter how minor), which might provide "*any*" benefit to the public interest, renders the regulations "necessary."[290]

Third, NAA submits that the burden of persuasion in the biennial review process is squarely and properly placed on advocates of continued regulation. In other words, the Commission must "start with the proposition that the rules are no longer necessary" and is responsible for "justify[ing the] continued validity" of those restrictions it opts not to repeal or relax.[291] Thus, absent a convincing demonstration on the record that an ownership restriction is necessary to protect competition and is appropriately crafted to achieve this objective, the Commission cannot maintain it.

Here, the FCC simply cannot meet its substantial burden of providing affirmative justification that its newspaper/broadcast cross-ownership ban is required to serve a significant and substantiated public interest. As shown above, the number of media outlets has exploded since the newspaper/broadcast rule was enacted. Newspapers and broadcast stations face vigorous competition from an array of alternative advertising sources. Therefore, there is no significant interest in guarding against threats to "competition."[292]

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[290] *See AT&T v. Iowa Utilities Bd.*, 525 U.S. at 389-90.

[291] *1998 Biennial Review Report*, 15 FCC Rcd at 11151 (Separate Statement of Comm'r Michael K. Powell). *See also 1998 Biennial Review NOI*, 13 FCC Rcd at 11305 (Separate Statement of Comm'r Michael K. Powell) ("We have a duty to answer … whether in light of significant changes in competitive conditions [our ownership] rules continue to have vitality…. [W]e must [articulate clearly the government's interest in 'diversity'] if we are to affirm any of our ownership rules based on such an interest…. We must be capable of explaining the link between ownership restrictions and our asserted diversity objectives"); *1998 Biennial Review Report*, 15 FCC Rcd at 11131 (Dissenting Statement of Comm'r Harold Furchtgott-Roth) ("Under Section 202(h), the Commission's job is to explain why changes in competition have not rendered broadcast ownership rules superfluous in promoting the public interest.").

[292] Indeed, as discussed above, concerns regarding competition were not even a key impetus behind the adoption of the newspaper/broadcast cross-ownership prohibition. The FCC's primary objective in implementing the restriction was to enhance media diversity, and not to safeguard competition. When it adopted the newspaper/broadcast cross-ownership restriction in 1975, the Commission explicitly said that it had "analyzed the basic media ownership

If the FCC broadens it inquiry beyond an analysis of the competitive environment to incorporate diversity considerations, the record again demonstrates that such concerns do not provide any legitimate justification for retaining the rule. As NAA and other interested parties have shown, and the Commission itself repeatedly has acknowledged, there is now an abundance of information sources and a phenomenal range of viewpoints available to consumers on virtually every subject.[293] In light of today's incredibly diverse media environment, any argument that newspaper/broadcast combinations could have an appreciable adverse effect on the wealth of information resources available to the public is simply implausible. In any event, NAA also has demonstrated that operators of newspaper/broadcast combinations have strong incentives to provide varied content and to develop innovative services and new distribution vehicles to bring more and better information to the public. In these circumstances, because the Commission cannot meet its burden of demonstrating that the newspaper/broadcast ban remains necessary in the public interest, the biennial review obligations imposed by Congress require that the restriction be repealed.[294]

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questions in terms of this agency's primary concern – diversity in ownership . . . rather than in terms of a strictly anti-trust approach." *1975 Multiple Ownership Order*, 50 FCC Rcd at 1079.

[293] *See NPRM* at ¶ 15; *see generally* Appendix I.

[294] Finally, even if the Commission were able to prove that there is a significant and substantiated public interest in ensuring that a broadcast-newspaper combination does not stifle diversity of viewpoint in a given geographic region and does not threaten "competition," the newspaper/broadcast ban is far more broad than necessary to further that public interest. It may very well be *useful*, and certainly easy, to prohibit *all* combinations in the attempt to stop those few that may have harmful effects on the public interest, but prohibiting all broadcast-newspaper combinations in the same market is not *required* to reach the few that may arguably be harmful. For example, as discussed in greater detail in Section V, *supra*, the antitrust laws are fully adequate to provide protection against potential harm to both advertisers and consumers. *See NAA 1998 Biennial Review Comments* at Section III.A.

B. Well-Established Principles of Administrative Law Similarly Obligate the Commission to Repeal the Restriction

The obligations imposed by Congress through the biennial review provisions of the 1996 Act strengthen, and make more concrete, the standards that define the Commission's statutory duties. But even under pre-existing principles of administrative law, an agency has a continuing duty to support its regulations and must reexamine a rule if there is a significant change in the circumstances that led to its adoption. If either the factual or the legal underpinnings of a rule have changed in such a way that the rule no longer serves its intended purpose, the agency must alter the rule accordingly. These requirements are based on a sound logical foundation. As the D.C. Circuit noted in *Home Box Office v. FCC*, even "a regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist."[295] Moreover, the duty to respond to new developments is heightened where – as is the case with the newspaper/broadcast ban – the restriction in question initially was adopted based on speculative assumptions rather than empirical evidence.

NAA demonstrated in its prior submissions that the federal appellate courts repeatedly have held that agencies have an ongoing obligation to reconsider their rules in light of new developments and a correlative obligation to adjust or repeal those regulations that no longer serve their intended purposes.[296] As the Supreme Court has recognized, "[r]egulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in

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[295] *HBO, Inc. v. FCC*, 567 F.2d at 9 (quoting *City of Chicago v. FPC*, 458 F.2d 731, 742 (D.C. Cir. 1971)). *See also Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) ("[A] statute depending for its validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears. It can hardly be supposed that the vitality of conditions forging the link between Commission regulations and the public interest is any less essential to their continuing operation."); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985); *ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988).

[296] *See NAA 1998 Biennial Review Comments* at Section III.B.

a volatile, changing economy."[297] Thus, an agency is "neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday."[298]

The D.C. Circuit similarly has emphasized an agency's responsibility to reevaluate and modify its rules in response to changed circumstances, again with respect to the FCC specifically.[299] In *ACLU v. FCC*, for example, the Court largely upheld the Commission's cable rate regulations against a broad challenge to both the rules and the agency's rationales for adopting them.[300] In doing so, however, the Court observed that the FCC had a duty to "carefully monitor the effects of its regulations and make adjustments where circumstances so require."[301] The Court further admonished that it "would not expect the Commission to adhere blindly to regulations that are cast in doubt by new developments or better understanding of relevant facts."[302] Similarly, in an opinion upholding the FCC's decision to relax its regulation of radio broadcast licensees, the Court expressly noted the agency's "responsibility" to

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[297] *Am. Trucking Assocs., Inc. v. Atchison*, 387 U.S. 397, 416 (1967). The Supreme Court likewise has stated with respect to the FCC specifically that "[i]f time and changing circumstances reveal that the 'public interest' is not served by application of . . . regulations, it must be assumed that the Commission will act in accordance with its statutory obligations." *NBC*, 319 U.S. 190, 225 (1943). *See also AFL-CIO v. Donovan*, 757 F.2d 330, 343 (D.C. Cir. 1985); *Central & Southern Motor Freight Tariff Assoc., Inc. v. United States*, 757 F.2d 301, 320 (D.C. Cir. 1985).

[298] *Am. Trucking Assocs.*, 387 U.S. at 416. *See also id.* (The "flexibility and adaptability to changing needs and patterns . . . is an essential part of the office of a regulatory agency.").

[299] *See, e.g., Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992) *cert. denied sub nom., Galaxy Comm. Inc. v. FCC*, 506 U.S. 816 (1992); *WWHT, Inc. v. FCC*, 656 F.2d 807 (D.C. Cir. 1981); *Geller v. FCC*, 610 F.2d at 980; *see also Syncor Int'L Corp. v. Shalala*, 127 F.3d 90 (D.C. Cir. 1997); *RSR Corp. v. EPA*, 102 F.3d 1266 (D.C. Cir 1997); *Hadson Gas Sys. v. FERC*, 75 F.3d 680 (D.C. Cir. 1996); *Am. Horse Protection Agency v. Lyng*, 812 F.2d 1 (D.C. Cir. 1987).

[300] *ACLU v. FCC*, 823 F.2d 1554, 1563-65 (D.C. Cir. 1987).

[301] *Id.* at 1565.

[302] *Id.*

"reevaluate its regulatory standards over time."[303] Referring to the FCC's mandate to regulate broadcasters in the "public interest, convenience, and necessity," the Court also pointed out that "Congress in fact vested this Commission with broad discretion precisely to facilitate . . . modifications of administrative policies in light of developments in the evolving broadcast industry."[304]

In *Bechtel v. FCC*, the Court concluded that the Commission had an obligation to consider and explain whether its longstanding policy favoring "integration" of ownership and management in comparative licensing hearings was still in the public interest in light of other regulatory changes.[305] To this end, the Court stated that "it is settled law that an agency may be forced to reexamine its approach if a significant factual predicate of a prior decision has been removed" and "[it] . . . should stand ready to alter its rule if necessary to serve the public interest more fully."[306] Likewise, in response to a challenge to the agency's copyright rules pertaining to cable carriage of broadcast signals in *Geller v. FCC*, the Court instructed the FCC that it was

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[303] *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983).

[304] *Id.* at 1423, 1425. Similarly, in *New Jersey Coalition for Fair Broad. v. FCC*, the Court noted that the Commission's licensee forfeiture provisions "must serve the public interest and must be reconsidered and changed by the Commission when they fail to do so." 580 F.2d 617 (D.C. Cir. 1978). *See also Fibermaster, Ltd. v. INS*, No. 88-2001, 1990 U.S. Dist. LEXIS 8331, at 12 (D.D.C. 1990) (Noting responsibility of INS to "modify . . . regulations in light of . . . changed circumstances"); *RSR Corp. v. EPA*, 102 F.3d at 1270 ("[I]f new studies in fact remove the factual premise on which the [rule] is based, we do not see how the EPA could ignore this information.").

[305] *Bechtel v. FCC*, 957 F.2d at 881.

[306] *Id.* (quoting *WWHT, Inc. v. FCC*, 656 F.2d at 819). In *WSB, Inc. v. FCC*, 85 F.3d 695 (D.C. Cir. 1996), the D.C. Circuit again expressed skepticism regarding the continued utility of Commission rules, this time with respect to the cross-ownership restrictions in particular. The case involved the efforts of Cox Enterprises ("Cox") to acquire an FM radio station in the Atlanta market, in which it already owned two daily newspapers (*The Atlanta Constitution* and *The Atlanta Journal*), a VHF television station, and two radio stations. The Court did not reach the newspaper/broadcast cross-ownership issue directly, but its comments on Cox's one-to-a-market waiver request are telling. Thus, although the Court ultimately determined that the Commission's refusal to grant Cox a waiver based on the top 25 markets/30 voices standard was consistent with FCC precedent, the Court expressly questioned the Commission's rigid waiver policy in light of the competitive media marketplace: "It escapes us why Cox's ownership of WJZF radio is more threatening to the public interest because of its ownership of other radio stations or, more generally, why the proposed assignment is inimical to the public interest notwithstanding Cox's other media holdings." *Id.* at 701.

"statutorily bound" to determine via a rulemaking proceeding whether the "vital link" between its regulations and the "public interest" continued to exist in light of new copyright legislation.[307]

With respect to the newspaper/broadcast cross-ownership restriction, it can no longer be seriously questioned that the sweeping changes in both the marketplace and the regulatory landscape detailed above have eroded whatever legitimate foundation the ban initially may have had. As these Comments demonstrate and the Commission well knows, the media marketplace has undergone a massive transformation since the newspaper/broadcast rule was adopted more than a quarter-century ago.[308] The environment has evolved from one in which consumers had a mere handful of media outlets to choose from to one in which they enjoy an abundance of information outlets and an extraordinary range of viewpoints. These marketplace developments render Commission intervention to achieve a "hoped for" gain in diversity entirely superfluous.

Moreover, in response to these dramatic marketplace changes, both the Commission and Congress have adjusted the regulatory approach to ownership of broadcast outlets. As noted above, the newspaper/broadcast ban was adopted as part of a series of cross-ownership restrictions enacted in the 1960s and 1970s that were generally aimed at preventing a single owner from controlling more than one media outlet in a given local market. With the glaring exception of the newspaper/broadcast restriction, nearly every other major limitation on broadcast ownership has since been either eliminated or greatly relaxed.

Most recently, in its *1999 Television Ownership Order*, the FCC significantly relaxed two of its longstanding rules governing local television ownership: the duopoly rule and the one-to-

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[307] *Geller v. FCC*, 610 F.2d at 980.

[308] *See NPRM* at ¶¶ 8-13 ("Since the Commission adopted the newspaper/broadcast cross-ownership rule over twenty-five years ago, the local media marketplace has changed dramatically."); *see generally* Appendix I.

a-market rule.[309] The remnants of these rules now allow broadcasters to own two television stations in the same markets in which they own as many as six radio stations, or a single television station and up to seven radio outlets.[310] Similarly, local radio ownership limitations have been relaxed both by the Commission and pursuant to the 1996 Act from a regime in which common ownership of only a single AM and single FM radio station was permissible to the current system, in which as many as eight radio stations in a local market may be commonly owned.[311]

In addition, most other competitors in today's information marketplace – online service providers, cable system operators and programmers, DBS providers, local and long-distance telcos, software providers, and magazine publishers – are generally free to enter into combinations with both broadcasters and newspapers. In light of these far-reaching changes to both the market-based and regulatory underpinnings of the newspaper/broadcast prohibition, controlling administrative law precedent dictates that the Commission must thoroughly reconsider and ultimately eliminate this last vestige of an otherwise abandoned regulatory regime.[312]

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[309] *See 1999 Television Ownership Order*, 14 FCC Rcd at 12903.

[310] *See id.* at 12908, 12947.

[311] 1996 Act § 202(b).

[312] As discussed in NAA's 1998 Biennial Review Comments, the Commission itself has recognized the need for a thorough reevaluation of the newspaper/broadcast cross-ownership ban and has repeatedly stated its intention to do so in a series of decisions dating back, at least, to the 1996 approval of the Disney/ABC merger under then-Chairman Reed Hundt. *See NAA 1998 Biennial Review Comments* at 24-29.

C. The Commission's Duty to Reevaluate the Newspaper/Broadcast Restriction Is Heightened Because the Rule Was Adopted Based on Pure Speculation Rather Than Empirical Evidence

Finally, because the FCC's reasons for adopting the newspaper/broadcast cross-ownership ban were purely conjectural, the agency has a particularly strong duty to study the rule's impact and to eliminate it, given that it has never been shown to be either helpful or necessary in serving the Commission's speculative diversity goals. Indeed, courts repeatedly have found that agencies relying on unsubstantiated assumptions as the foundation of their regulations have such a heightened responsibility.

In *Bechtel v. FCC*, for example, the D.C. Circuit strongly criticized the agency for its continued dependence on "unverified predictions" in defense of its decades-old "integration" policy.[313] Noting that the Commission had not accumulated any evidence indicating that the policy had achieved even one of its claimed benefits, the court derided the agency's continued reliance on unsubstantiated predictions as "begin[ning] to look a bit threadbare."[314] The court further advised that:

> The Commission's necessarily wide latitude to make policy judgments based upon predictive judgments deriving from its general expertise implies a correlative duty to evaluate its policies over time to ascertain whether they work – that is, whether they actually produce the benefits the Commission originally predicted they would.[315]

Likewise, in *ACLU v. FCC*, the D.C. Circuit found that the Commission had an especially strong duty to closely monitor the effect of its cable rate regulation rules and to adjust

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[313] *Bechtel v.* FCC, 10 F.3d 875, 880 (D.C. Cir. 1993).

[314] *Id.*

[315] *Id.* (quoting *Bechtel v. FCC*, 957 F.2d at 881). *See also NAB v. FCC*, 740 F.2d 1190, 1213 (D.C. Cir. 1984) ("[T]he authority of an agency to defer issues to the future implies a correlative responsibility that the agency reexamine its initial decision when the verdict which the future returns on the agency's predictions substantially undermines the basis of the initial decision.").

them when necessary in light of the agency's own admission that certain aspects of the rules were not based on "an exercise in scientific precision."[316] Specifically, the Court stated that "where the Commission itself has recognized the tentative nature of its predictive judgments . . . , we find it particularly appropriate to emphasize the need . . . to vigilantly monitor the consequences of its rate regulation rules."[317]

In its recent decision in *Time Warner II*, the D.C. Circuit placed great emphasis on the FCC's responsibility to base its regulations on empirical evidence rather than mere speculation.[318] In remanding the agency's horizontal cable ownership limits and "channel caps," the Court acknowledged its obligation to "give appropriate deference to predictive judgments that necessarily involve the expertise and experience of [an] agency."[319] Based on its finding that the Commission had "put forth no evidence at all" to justify the adoption of its horizontal ownership limit, however, the Court concluded that the agency had failed in its duty to "draw reasonable inferences based on substantial evidence" before adopting regulations. In addition, the Court rejected the FCC's decision to eliminate its so-called "single majority shareholder exception" to its cable attribution rules. Noting the agency's affirmative duty to provide justification for its decision, the Court stated that "the Commission effectively offers none."[320]

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[316] 823 F.2d at 1565.

[317] *Id.*

[318] *See generally Time Warner II*, 240 F.3d at 1130-33. Although the Court rests almost exclusively on First Amendment grounds in this portion of the decision, the Court makes clear that the same basic principles apply in an administrative law context. *See id.* at 1139-1144.

[319] *Id*. at 1133.

[320] *Id.* at 1143. The Court flatly rejects the agency's unsubstantiated "concern" that a minority shareholder might be able to exercise influence over a cable entity notwithstanding the existence of a majority shareholder as simply not "grounded in experience or reason." *Id.*

The newspaper/broadcast cross-ownership restriction similarly was based on unverified predictions.[321] The conjectural foundation of the cross-ownership ban thus imposes upon the Commission a heightened duty to closely monitor the rule, to revaluate it carefully in light of the changes in factual circumstances and related regulatory policies and provisions since 1975, and to eliminate it because it is neither necessary nor appropriate to serve its predicted purpose.

VIII. THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP BAN VIOLATES THE FIRST AMENDMENT

In its *NPRM*, the Commission notes – quite correctly – the recent decision of the D.C. Circuit striking down the horizontal ownerships limitation and the so-called "channel cap" the FCC had adopted to implement the Cable Act of 1992.[322] The agency goes on to solicit comment on the relevance of the *Time Warner II* decision to the "competition goals that inform our newspaper/broadcast cross-ownership policies" and, more generally, to the First Amendment interests at stake in this proceeding.[323] Further, the Commission asks for comment on "the impact of [*Time Warner II*] on [its] diversity analysis, and how the marketplace changes that have occurred since the Supreme Court upheld the newspaper/broadcast cross-ownership rule may affect the First Amendment analysis."[324]

NAA has addressed the serious First Amendment implications of the Commission's retention of the outdated newspaper/broadcast rule in its Comments in the 1998 Biennial Review proceeding and in its filings in other related proceedings over the past five years, and hereby

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[321] *See supra* Section III.B.

[322] *NPRM* at ¶ 31 (citing *Time Warner II*).

[323] *Id.* at ¶ 32.

[324] *Id.* at ¶ 33. As the Commission notes, the Supreme Court upheld the ban as originally promulgated in 1978, in *FCC v. NCCB*, 436 U.S. at 796.

incorporates these materials by reference. In view of the Commission's specific request for comment, however, and in view of the critical significance of the issue, NAA believes it is necessary to reiterate its views here: that the enormous changes that have occurred in the media marketplace and in the regulatory environment since the ban's inception have eviscerated the rationale on which the rule was initially based. These changes, together with the recent *Time Warner II* decision and other developments in First Amendment law over the past quarter century, plainly render the Supreme Court's 1978 decision insufficient to support maintenance of the newspaper/broadcast cross-ownership prohibition in the 21st century.

Quite apart from *Time Warner II*, courts have consistently held that the burden is on the government, or on any proponent of the regulation in question, to produce evidence to support an infringement on First Amendment rights. As the Supreme Court made clear in *Turner I*:

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.[325]

In fact, the newspaper/broadcast cross-ownerships ban should today be reviewed under the strict scrutiny standard, because it impermissibly singles out newspaper publishers for disparate treatment under a regulatory restriction that unquestionably limits their right to address the audience in the manner and thorough the vehicles they choose. Even if evaluated under intermediate scrutiny, as were the cable ownership regulations at issue in *Time Warner II*, however, the prohibition could not survive. The Commission has not shown that the rule is necessary in today's media environment to address any market failure or other substantial public

[325] *Turner I*, 512 U.S. at 664 (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d at 1455).

interest concern, and certainly cannot demonstrate that an outright prohibition of joint ownership of daily newspapers and local broadcast stations is narrowly tailored to address such interest.

A. The Ban Is Subject to Strict Scrutiny Because It Is a Pure Speech Restriction That Impermissibly Singles Out and Discriminates Against Newspapers

Two years before the Supreme Court first reviewed the newspaper/broadcast cross-ownership prohibition, the Court recognized the dynamic nature of the broadcasting industry in finding that

> [b]alancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty … The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence.[326]

When it was first confronted with the newspaper/broadcast cross-ownership ban in 1975, the Supreme Court concluded, under then existing jurisprudence, that the ban was a content-neutral regulation and thus subject to intermediate scrutiny.[327] The Court reached this decision based largely upon the scarcity rationale articulated in the Supreme Court's decision in *Red Lion*.[328] The scarcity rationale, however, no longer provides a sufficient basis for the reduction of the constitutional protections otherwise afforded to newspapers and broadcast stations.

Perhaps even more significant than the demise of the scarcity doctrine is the manner in which the current application of the rule disproportionately burdens a single category of speakers – newspapers. As discussed above, the FCC has eliminated or reduced restrictions on virtually

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[326] *Columbia Broad. System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973).

[327] *See NCCB v. FCC*, 436 U.S. at 801 (holding that regulations prohibiting the common ownership of co-located newspapers and broadcast stations "are not content-related.").

[328] *Red Lion Broad. Co. v FCC*, 395 U.S. 367, 388-89 (1969).

all other categories of media owners who were prohibited from owning broadcast stations in 1975, allowing them to purchase broadcast stations in the same location as their other media investments. The Commission now permits radio/television combinations[329] as well as television duopolies[330] and more recently, cable operators have petitioned the courts to permit them to own television stations in areas in which they program cable systems.[331] In an era in which virtually all of the Commission's other ownership restriction have been eliminated or relaxed, an absolute ban on the newspaper/broadcast cross-ownership arbitrarily singles out newspapers. Regulations such as the newspaper/broadcast cross-ownership ban which disparately impact different categories of speakers, are subject to strict scrutiny review under the First Amendment.[332]

1. The Scarcity Rationale Was Properly Abandoned a Decade Ago by the Commission Itself and Cannot Be Used to Justify a More Relaxed Standard of Constitutional Review of the Newspaper/Broadcast Cross-Ownership Ban

NAA notes that, in the past, broadcast regulations have been subject to a lesser degree of constitutional scrutiny based on the notion that the scarcity of frequencies allowed a larger role for government regulation.[333] However, this "scheme for broadcast regulation developed and

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

[330] *See 1999 TV Ownership Order*, 14 FCC Rcd at 12903.

[331] *See Fox Television Stations Inc. v. FCC*, Docket Nos. 00-1222, 00-1263, 00-1326, 00-1359, 00-1381, 00-1136 (D.C. Cir. 2001).

[332] *Action for Children's Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) ("[W]e apply strict scrutiny to regulations of this kind regardless of the medium affected by them ….").

[333] *See, e.g.*, *Red Lion Broad.*, 395 U.S. 367, 388-89 (1969). Of course, the prohibition at issue here affects newspaper publishers, who generally enjoy the highest level of First Amendment protection, as well as broadcasters.

was ensconced in an era when broadcasting . . . was the only form of electronic mass media."[334] As then Commissioner Powell noted three years ago, however:

> The growing convergence of technology will not allow us to continue to maintain two First Amendment standards, one for broadcasting and one for every other communications medium. . . . [C]onvergence and the exponential increase in capacity . . . is making it impossible to maintain that broadcasting is uniquely undeserving of full First Amendment protection.[335]

Indeed, the mass media marketplace has changed so drastically in the past 50 years that the old spectrum scarcity rationale underlying the *Red Lion* doctrine and the subsequent *NCCB* decision can no longer be invoked to justify a lower level of judicial scrutiny for broadcast ownership regulations than for regulations affecting other forms of media. Consequently, scarcity cannot be used as an affirmative justification for governmental action to foster diversity.

As noted above, even at the time of the D.C. Circuit's review of the newly adopted newspaper/broadcast ban, Judge Bazelon foresaw the time when technological improvements would eliminate the notion of spectrum scarcity, which in turn would eliminate the justification for most FCC licensing regulation.[336] Similarly, more than a decade ago, the Supreme Court itself noted that the scarcity rationale "has come under increasing criticism in recent years" and suggested that the advent of new technologies such as "cable and satellite television" – and the resulting access of communities to diverse programming – may soon render "the scarcity

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[334] Laurence H. Winer, *Deficiencies of the "Aspen Matrix"* at 5 (1998) (Paper No. 3 in The Media Institute's series *Issues in Broadcasting and the Public Interest*). At the time the Commission's ownership regulations were adopted, "the economic and physical distinctions between print and the broadcast media that underlie the Commission's diversification policies . . . were numerous and self evident. The number of broadcast outlets nationwide was far fewer than the number of print media outlets." Jonathan W. Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 Cath. U. L. Rev. 401, 438 (1989). As NAA has demonstrated, this is no longer the case.

[335] Comm'r Michael K. Powell, Remarks before the 42nd Annual MSTV Membership Meeting, New Regulatory Thinking (Apr. 6, 1998).

[336] *NCCB v. FCC*, 555 F.2d at 950 n. 31.

doctrine" obsolete."[337] The Court declined to reconsider the *Red Lion* doctrine at the time, "without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."[338] It cannot be seriously disputed, however, that the FCC, Congress, and the courts have now given repeated signals to that effect, acknowledging that technological advances have led to the inevitable demise of the scarcity doctrine.

In its 1985 reexamination of the fairness doctrine, "the Commission sought to respond to the Supreme Court's invitation," and found "explosive growth of information sources – in both traditional broadcasting sources (radio and television) and new substitutes for broadcasting such as cable TV, SMATV, VCRs, and LPTV."[339] The Commission concluded that, "[the scarcity] rationale that supported the [fairness] doctrine in years past is no longer sustainable in the vastly transformed, diverse [communications] market that exists today."[340] Reviewing the Commission's action, the Court concluded that, "[i]n essence, the [Commission's] Report found

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[337] *FCC v. League of Women Voters*, 468 U.S. 364, 376-77, n.11, *appeal dismissed*, 468 U.S. 1205 (1984). *See also News America Publ'g., Inc. v. FCC*, 844 F.2d 800, 811 (D.C. Cir. 1988) ("The Supreme Court . . . has recognized that new technology may render the [broadcast scarcity rationale] obsolete – indeed, may have already done so"); *NAA 1998 Biennial Review Comments* at 92 n.312.

[338] *FCC v. League of Women Voters*, 468 U.S. at 376-77 n.11. The D.C. Circuit recently asserted that the Court's "suggestion" in *League of Women Voters* "may impose an implicit obligation on the Commission" to review the spectrum scarcity rationale. *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998).

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

[340] *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 FCC 2d 145 (1985). *See also 1998 Biennial Review NOI*, 13 FCC Rcd at 11303 (Separate Statement of Comm'r Harold W. Furchtgott-Roth) (citing *1985 Fairness Report*, 102 FCC 2d 145 (1985); *Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York*, 2 FCC Rcd 5043 (1987), *aff'd*, 867 F.2d 654 (1989)) ("One of the most fundamental ways in which the broadcast landscape may have changed is that … there are significantly more outlets for communications than there once were"); *Repeal or Modification of the Personal Attack and Political Editorial Rules*, 15 FCC Rcd 19973, 19996 (2000) (Dissenting Statement of Comm'r Michael K. Powell) ("accepting *Red Lion's* legal framework and its interpretation of the Constitution, we must acknowledge that it rests on economic, technical, and other factual predicates, as well as predictive judgments about the effects of governmental intervention that can and have changed over time.").

that the 'scarcity rationale,' which has historically justified content regulation of broadcasting, is no longer valid."[341]

The media marketplace has continued to expand rapidly in the years since this decision, and the development of new technology ensures that this trend will continue in the decades to come. Moreover, since the FCC articulated its abandonment of the spectrum scarcity doctrine in the late 1980s, its changed regulatory policies clearly have reflected the new standard. Thus, the Commission has significantly altered its approach in the ownership arena, eliminating or substantially relaxing virtually all other ownership limitations on media and routinely permitting common ownership of several outlets in a local market.

Congress, too, has expressed strong doubts as to the viability of the scarcity rationale.[342] In enacting the 1996 Act, for example, the House Commerce Committee observed that, in light of vast changes in the mass media marketplace, "the scarcity rationale for government regulation no longer applies."[343] In further recognition of those changes, Congress expressly directed the Commission to eliminate or relax many of its outmoded ownership restrictions and to reexamine

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[341] *Meredith Corp. v. FCC*, 809 F.2d at 867 (internal citations omitted). *See also id.* at 873 ("The FCC has issued a formal report that eviscerates the rationale for its existing regulations."). The FCC was even more explicit later that year, stating in a related decision:

> [T]he scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press. Therefore, in response to the question raised by the Supreme Court in *League of Women Voters*, we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press. *Syracuse Peace Council against Television Station WTVH Syracuse, New York*, 2 FCC Rcd 5043, 5053 (1987), *aff'd*, 867 F.2d 654 (1989).

[342] As NAA has demonstrated previously, many distinguished scholars have also challenged the viability of the scarcity rationale. *See NAA 1998 Biennial Review Comments* at 95 n.20; *see also* Napoli, *Foundations of Communications Policy*, at 54 n.11 ("[T]he notion that the broadcast spectrum is uniquely scarce, and therefore deserving of different regulatory treatment, buckles under the fact that (a) all resources are essentially scarce; and (b) advances in media technology, such as signal compression and wireline delivery of television signals, have undermined whatever scarcity initially existed.").

[343] Communications Act of 1995, H.R. Rep. No. 104-204, 104th Cong., 1st Sess., at 54 (July 24, 1995).

the remaining rules "in light of competition" on a biennial basis.[344] While the Supreme Court has not expressly reevaluated the endurance of the scarcity rationale, numerous jurists have openly challenged the validity of the doctrine. For example, Judge Bork observed more than a decade ago in *Telecommunications Research and Action Center v. FCC*,[345] that there is "nothing uniquely scarce about the broadcast spectrum" and that the "scarcity concept . . . inevitably leads to strained reasoning and artificial results."[346]

Similarly, then-Chief Judge Edwards recognized that "it is no longer responsible for courts to apply a reduced level of First Amendment protection for regulations imposed on broadcast based on an indefensible notion of spectrum scarcity."[347] Significantly, although the Chief Judge's dissent presented a detailed analysis of the obsolescence of the *Red Lion* standard, the majority opinion upholding the FCC's time-of-day restrictions on the broadcast of indecent material did not even invoke the scarcity rationale. Instead, the majority focused on television's "uniquely pervasive presence" and the fact that "broadcasting is uniquely accessible to children."[348] Equally important, the majority based its decision on what it deemed convincing

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[344] *Id.*

[345] 801 F.2d 501 (D.C. Cir. 1986), *cert. denied*, 428 U.S. 919 (1987).

[346] *Id.* at 508. *See also Time Warner Entm't Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing *en banc*) ("[T]he criticism [of *Red Lion]* rests on the growing number of . . . broadcast channels."); *Action for Children's Television v. FCC*, 58 F.3d 654, 684 (D.C. Cir. 1995), *cert. denied sub nom.*, *Pacifica Found. v.* FCC, 516 U.S. 1043 (1996) (Wald, J., dissenting) ("[T]echn[ical] assumptions about the uniqueness of broadcast . . . have changed significantly in recent years.").

[347] *Action for Children's Television*, 58 F.3d at 675. The Chief Judge also wrote, "[N]either technological nor economic scarcity distinguish broadcast from other media." *Id.* at 676. *See also HBO, Inc. v. FCC*, 567 F.2d at 104 (quoting *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 247-56 (1974)) ("scarcity which is the result … of economic conditions is … insufficient to justify even limited government intrusion into the First Amendment rights of the conventional press").

[348] *Action for Children's Television*, 58 F.3d at 676 (citation omitted). *See also* (then-)Comm'r Michael K. Powell, Remarks before The Media Institute (Apr. 22, 1998) ("[T]he pervasiveness of broadcasting certainly has rivals in cable, satellite services and . . . Internet services…. The TV set … is no more an unwilling intruder into the home than cable [or] DBS…."). The "uniquely accessible to children" rationale, however, has only been used to uphold

evidence of a compelling government interest in protecting children from exposure to indecent programming, and found the "channeling" mechanism adopted by the FCC to be no more restrictive than necessary.

In short, the Courts, Congress, scholars, and the Commission itself all have recognized the rapidly waning significance of the concept of spectrum scarcity. Thus, the scarcity rationale should not be seen as an obstacle to eliminating the newspaper/broadcast cross-ownership ban, nor a basis for applying a lower level of First Amendment scrutiny than is otherwise applicable to speakers in a free society.

2. The Ban Should Be Subject to Strict Scrutiny Because Broadcasters Engage in "Pure Speech" When Selecting Programming to Deliver to Audiences

In the years since *NCCB*, it has become more and more firmly entrenched that broadcasters, like other more traditional speakers, engage in protected speech under the First Amendment.[349] Courts have increasingly recognized that broadcasters and other programmers "exercise[] editorial discretion in selecting the programming [they] will make available" to their subscribers or audience members.[350] Each programmer may bring a unique programming viewpoint to a broadcast station. The claim that precluding local newspapers from the broadcast market is "content neutral" is belied by the unique experiences and viewpoints that local newspapers bring to the community. If the rule prohibited local religious organizations or local

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regulations where the government's stated interest included protecting children; by contrast, the government's stated interest in the newspaper/broadcast cross-ownership rule does not include a desire to protect children. Thus, this alternative rationale is inapplicable here.

[349] *See, e.g.*, *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494-95 (1986); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

[350] *Time Warner II*, 240 F.3d at 1129 (citing *Time Warner Entm't Co., L.P. v. United States*, 211 F.3d 1313, 1316 (D.C. Cir. 2000)).

unions from owning broadcast facilities, there would likely be little argument that the ban directly limits "pure speech." Likewise, by prohibiting newspapers as a class from owning broadcast facilities in their markets, the cross-ownership restriction bans "pure speech" by excluding the owners with unique local expertise from exercising their free speech rights to choose programs and commercials to air to viewers in their home communities.

Additionally, the rule bars newspapers from providing broadcast programming of their choice to their core audience – the local newspaper subscriber.[351] The argument that newspapers can express themselves to their audience through the print media, and may own broadcasting licenses outside of their print markets, does not resolve the fact that the prohibition prevents newspapers from reaching their target audience through broadcasting. Fundamentally, the ban interferes with a newspaper/broadcaster's speech rights "by restricting the number of viewers to whom they can speak"[352] as well as the ability of the viewers to receive the message. As discussed above, however, the fragmentation of today's media audience requires that effective speech must come from a multiplicity of sources to reach the desired audience.[353] Accordingly, any prohibition on newspaper ownership of local broadcast facilities implicates core First Amendment values and should be considered under the highest level of scrutiny.

3. The Ban Disproportionately Burdens Newspapers and Should Therefore Be Subject to Strict Scrutiny

In addition to directly impairing the ability of newspaper publishers to reach their desired audiences in the manner they choose, the newspaper/broadcast cross-ownership ban has a disparate impact on newspaper publishers in the current regulatory environment. This

[351] *See Schnieder v. N. J.*, 308 U.S. 147, 163 (1939).

[352] *Time Warner II*, 240 F.3d at 1129.

[353] *See supra* Section IV.A.

discriminatory effect also justifies strict scrutiny under the First Amendment.[354] The Supreme Court in *Arkansas Writer's Project* described the burden that the government faces in such cases as "heavy," and stated that the government "must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."[355]

The Court considered the subject of disparate treatment of certain sectors of the media more than sixty years ago, in *Grosjean v. American Press Co.* In that case, the Court struck down a tax which was imposed selectively on a small group of newspaper publishers, stating: "[T]he suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern."[356] Further, the Court has made clear that the government motivation behind such discriminatory regulation is irrelevant; no intent to suppress speech on the part of the government need be shown. On the contrary, the very existence of "differential treatment," the Court said in *Minneapolis Star*, "suggests that the goal of the regulation is not unrelated to the suppression of expression, and such a goal is presumptively unconstitutional."[357]

When it considered the constitutionality of the newspaper cross-ownership regulation in the NCCB case 23 years ago, the Supreme Court concluded that "the regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communications were already treated under the Commission's multiple ownership rules."[358] The Court relied on the fact that the newspaper rule was one in a series of cross-ownership

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[354] *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983); *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936).

[355] *Ark. Writers' Project*, 481 U.S. at 221.

[356] *Grosjean v. Am. Press Co.*, 297 U.S. at 250.

[357] *Minneapolis Star v. Minn. Comm'r of Revenue*, 460 U.S. at 585.

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

regulations affecting all sections of the then-existing mass media to distinguish the newspaper cross-ownership ban from the tax struck down in *Grosjean*. Thus, the Court observed that "owners of radio stations, television stations, and newspapers alike are now restricted in their ability to acquire licenses for co-located broadcast stations . . . [*Grosjean*] is thus distinguishable in the degree to which newspapers were singled out for special treatment."[359]

As detailed above, however, the FCC's application of ownership restrictions has changed dramatically in the intervening years. Deregulation initiated by both the FCC and Congress has eliminated or dramatically eased the broadcast ownership restrictions referred to by the Supreme Court in *FCC v. NCCB*.[360] The newspaper cross-ownership ban is thus a last vestige of a local ownership regulatory scheme that has otherwise been almost entirely dismantled. As such, it should be evaluated under strict scrutiny and repealed, because the FCC cannot show that it is necessary to address any compelling government interest, nor that it is the least restrictive means of serving any legitimate regulatory end.

Indeed, it is implausible to argue that the government's interest in maintaining diversity in the newspaper/broadcast arena is "compelling," but that this interest does not reach other, similar activities by competing television and radio station licensees and other competing media owners.[361] Furthermore, even if it has a compelling interest in maintaining diversity, the government cannot show that the cross-ownership ban is "necessary" to achieve that goal. Finally, like the tax on newspapers struck down in *Arkansas Writers' Project*, it is "both

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[359] *Id*.

[360] *Id.*

[361] *See supra* Section VII.

overinclusive and underinclusive."[362] It prohibits all newspaper/broadcast combinations, without regard to whether or not they can be shown to decrease diversity, and it fails to reach other combinations which may, under the FCC's outdated rationale are likely to have an equal or greater effect on diversity. Maintenance of the newspaper/broadcast rule effectively limits publishers' ability to express their views and places newspapers at a distinct disadvantage in the information marketplace. Accordingly, applicable First Amendment principles dictate that the rule be repealed.

B. The Ban Could Not Be Sustained Because It Is Not Narrowly Tailored to Address a Substantial Government Interest

Even if newspaper owners were denied the protection of "strict" First Amendment scrutiny,[363] the existing cross-ownership rule would still be found to violate the First Amendment, given today's media marketplace. In *FCC v. League of Women Voters*, 468 U.S. 364 (1983), the Supreme Court expressly stated that, even under the level of scrutiny established by *Red Lion* and its progeny, restrictions on broadcast speech "have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest . . . ." While the Court in *NCCB* presumably found that the Commission satisfied this standard when it first adopted the newspaper/broadcast rule in the mid-1970s, it should now be clear, beyond any reasonable dispute, that the rule could not withstand a "narrowly tailored"/"substantial governmental interest" review in the context of today's radically transformed, highly diverse, and intensely competitive electronic media marketplace.

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[362] *Ark. Writers' Project*, 481 U.S. at 231.

[363] *See United States v. O'Brien*, 391 U.S. 367, 377 (1968).

1. The FCC Has Failed to Identify A Substantial Government Interest Supporting the Newspaper/Broadcast Cross-Ownership Ban

The limited and admittedly inconclusive "record" developed in 1975 falls far short of demonstrating the existence of any substantial governmental interest requiring perpetuation of the cross-ownership prohibition today.[364] The concept that this rule was needed to promote viewpoint diversity was never more than speculative at best. There was no real evidence that newspapers and broadcast stations under joint ownership did a poor job of providing access to diverse and antagonistic viewpoints. But in the mid-1970's, when individual markets were typically served by only two or three television channels, it was at least understandable that decision-makers would view the maintenance of these stations under "independent" ownership as a significant public interest goal – that might, in some circumstances, be needed to prevent monopolization of the mass media in a given locality. Today, however, with the typical home receiving nearly 100 TV channels (and having access to an endless array of other media sources), the public interest significance of maintaining independent ownership of any individual outlet has markedly diminished – and, indeed, has now reached a "vanishing point" in which it lacks any reasonable claim of legitimacy as a basis for retaining these regulations.

2. The Newspaper/Broadcast Cross-Ownership Ban Is Not Narrowly Tailored

Even if a reviewing court were to determine that the newspaper/broadcast cross-ownership restriction is intended to further some substantial governmental interest of relevance today, the outright ban the FCC adopted in 1975 could not be found to be sufficiently narrowly tailored to withstand judicial review.

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[364] *See 44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 500 (1996).

As discussed in NAA's previous Comments in the 1998 Biennial Review proceeding, two circuits struck down the similar cable/telco cross-ownership ban on the ground that it was not "narrowly tailored" to further a substantial government interest. In *Chesapeake & Potomac Tel. Co. v. United States*, the Fourth Circuit agreed that the government had a substantial interest in preventing discrimination and preserving diversity in the market of electronic access, but concluded, nonetheless, that there were simpler and more efficient means of guaranteeing cable companies' access to telephone poles and wires.[365] Similarly, in *U.S. West, Inc. v. United States*, the Ninth Circuit held the cable/telco prohibition unconstitutional, concluding that the evidence was insufficient to demonstrate that the ban would foster competition or promote diversity in programming and that other less restrictive means of achieving diversity were available.[366] The FCC subsequently recommended repeal of the similar cable/telco cross-ownership ban, citing the changed communications environment,[367] and Congress responded by eliminating the restriction in Section 302 of the Telecommunications Act of 1996.[368]

The asserted government interest supporting the newspaper/broadcast cross-ownership ban, like the cable/telco prohibition, putatively involves promoting competition and diversity.[369]

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[365] *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 199-202 (4th Cir. 1994), *cert. granted*, 515 U.S. 1157 (1996), *remanded*, Nos. 93-2340, 93-2341 (4th Cir. Apr. 17, 1996) (order granting motion to remand and to vacate order on the grounds of mootness).

[366] *U.S. West, Inc. v. United States*, 48 F.3d 1092, 1100-06 (9th Cir. 1994), *cert. granted, judgment vacated*, 516 U.S. 1155 (1996), *dismissed as moot*, 84 F.3d 1153 (9th Cir. 1996).

[367] *See Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, 7 FCC Rcd 5781, 5823 (1995); H. R. Rep. No. 104-204, at 52.

[368] *See* H. R. Rep. No. 104-204 at 52-53 ("The original rationale for adopting the prohibition of telephone entry into video services has been satisfied, and given the changes in technology and the evolution of the cable industry, the prohibition is no longer valid.").

[369] *See 1975 Multiple Ownership Order*, 50 FCC 2d at 1048-50 (goals of newspaper/broadcast cross-ownership ban); *Chesapeake & Potomac Telephone Co.*, 42 F.3d at 190 (goals of cable/telco cross-ownership ban); *U.S. West*, 48 F.3d at 1102 (same).

As was found to be the case with respect to the cable/telco cross-ownership ban, however, a host of less restrictive means exist to ensure that newspaper owners do not monopolize the broadcast market. Additionally, as discussed above, the Commission may appropriately rely on the antitrust laws and defer to the DOJ and/or the FTC to the extent the FCC seeks to preserve economic competition. The antitrust laws, to the extent they preserve competition, inevitably have the added effect of maintaining diversity of media ownership. Given the existence of these safeguards, there is no reasonable basis for believing that additional, redundant ("belt and suspenders") regulations are needed. Moreover, the overbreadth of the rule is further illustrated by the fact that the newspaper rule is far more restrictive than the TV duopoly rule – notwithstanding the fact that the Commission itself has recognized the primacy of television over other competing media outlets.

Thus, the rule fails the first part of this First Amendment analysis, because preventing newspaper acquisition of a broadcast station can no longer reasonably be defined as a substantial or "important" governmental interest. But even assuming the existence of a substantial governmental interest, the rule fails the second prong of First Amendment review, because it sweeps far more broadly than necessary, especially given the technological advances and growth in the media marketplace since the rule's adoption in 1975.

C. The *Time Warner II* Decision Places the Burden Squarely on the Commission to Provide a Factual Record to Justify the Newspaper/Broadcast Cross-Ownership Ban's Impact on Free Speech Rights

Regardless of the level of scrutiny under which any newspaper/broadcast cross-ownership ban will be reviewed, the responsibility of ensuring that any remaining restriction will withstand First Amendment review rests squarely on the Commission. In *Time Warner II*, the D.C. Circuit made clear that the FCC must demonstrate persuasively that its ownership rules are

supported by evidence and reasoned analysis.[370] Although the Commission asserted that the potential for cable collusion justified setting the horizontal cable cap at thirty percent and that the potential for favoring affiliated programming mandated a vertical limit of forty percent, the Court found that the FCC failed to adequately substantiate its supposition that there was a risk of collusion and failed to explain the mechanism under which collusion would occur.[371] Furthermore, the Court found that the Commission failed to "justify its chosen [vertical] limit as not burdening substantially more speech than necessary" even going as far as accusing the FCC of "pluck[ing] the 40 percent limit out of thin air."[372]

As the Commission recognizes in its NPRM, the *Time Warner II* Court went on to question whether the diversity rational could ever justify an infringement on First Amendment rights.[373] Although the Court found that precluding a specific group of owners from a media market "may be said to enhance diversity," it also observed that is almost impossible to create a record to support drawing a line at any particular level of diversity.[374] The Court found that the marginal value of such an increment in "diversity" would not qualify as an "important" government interest for First Amendment purposes.[375]

Other courts have made clear that when as here, a regulation is subject to a colorable First Amendment challenge, the "rule of rationality which will sustain legislation against other

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[370] *Time Warner II*, 240 F.3d at 1128 (concluding that "the FCC has not met its burden under the First Amendment").

[371] *Id*. at 1131.

[372] *Id*. at 1137.

[373] *NPRM* at ¶ 33; *Time Warner II*, 240 F.3d at 1135.

[374] *Time Warner II*, 240 F.3d at 1135.

[375] *Id.*

constitutional challenges typically does not have the same controlling force."[376] The D.C. Circuit recently remanded the FCC's personal attack and political editorial rules because the Commission failed to provide an adequate justification for retention of the rules.[377] The court found that

> [Where] the challenged rules by their nature interfere with at least some journalistic judgment, chill at least some speech, and impose at least some burdens on activities at the heart of the First Amendment … [w]ooden application of principles underlying rhetoric about the FCC's vast power, its broad discretion, and the importance of vibrant debate in democracy to a specific set of rules would force the court to adopt an impressionistic approach that would disserve the parties and muddle the First Amendment analysis. The FCC must therefore explain its rationale for these rules in more detail, thereby permitting the court to test that rationale against petitioner's factual assertions and, if necessary, the demands of the First Amendment.[378]

In short, even if the Commission may have been justified in establishing the newspaper/broadcast ban more than 25 years ago, the regulation does not serve the public interest in today's media marketplace. The abundant diversity and competition that exists among newspapers, radio and television broadcast stations, cable operators and MVPDs, alternative publications, the ever-expanding array of content providers on the Internet, and the myriad other new entrants in the contemporary information marketplace vitiate the concerns that underlay the adoption of the rule in 1975 and eliminate any justification for perpetuating its discriminatory effects. To the contrary, the available evidence overwhelmingly demonstrates that elimination of the restriction will foster diversity, competition, and innovation by newspapers and broadcasters that will serve the interests of the public.

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[376] *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986)

[377] *RTNDA v. FCC*, 184 F.3d at 875.

[378] *Id.* at 877.

IX. CONCLUSION

For the foregoing reasons, the Commission should promptly repeal the newspaper/ broadcast cross-ownership prohibition in its entirety. The ban cannot be shown to be necessary in the public interest and impermissibly burdens vital First Amendment interests. Its elimination will free newspaper publishers to utilize their extensive newsgathering resources, journalistic expertise, and local community ties to expand and improve broadcast coverage of local news and public affairs and to develop innovative information services and outlets that better enable consumers to access the information they desire at the time and in the manner they choose.

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APPENDIX I

Overview Of Diversity And Competition In The Marketplace

This appendix provides an overview of the continuing growth in diversity and competition among the media from which American consumers obtain news, information, entertainment and other "content." The information contained herein is based in part on the Comments submitted by the Newspaper Association of American in the Commission's 1998 Biennial Review Proceeding and includes additional material derived from the *Order and Notice of Proposed Rulemaking* ("*NPRM*") in MM Docket Nos. 01-235 and 96-197, FCC 01-262 (rel. Sept. 20, 2001), from records, reports and decisions issued by the Commission, and from other published sources of information concerning the contemporary media marketplace.

I. Newspapers

The number and variety of newspapers available to consumers has greatly increased since the newspaper/broadcast cross-ownership ban was adopted in 1975. The number of daily newspapers published in the United States has declined in the past twenty years. By contrast, however, circulation of weeklies and "alternative newsweekly" newspapers has exploded, vastly increasing the number of local news and information outlets available to readers. Weekly and specialized newspapers made an insignificant contribution to the marketplace in 1975 when the Commission examined outlet diversity in the newspaper industry.[1] However, readership of weekly newspapers has doubled since 1975.[2]

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[1] *See Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard FM and Television Broadcast Stations*, 50 FCC 2d 1046, 1075 (1975) (Second Report and Order) ("*1975 Multiple Ownership Report*"), *recon.*, 53 FCC 2d 1046 (1975), *rev'd in part sub nom., National Citizens Comm. For Broadcasting v. FCC*, 555 F.2d 938 (D.C. Cir. 1977), *reinstated FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978).

[2] *See* Newspaper Association of America, *Facts About Newspapers; A Statistical Summary of the Newspaper Industry Published in the Year 2001*, at 15-16 ("*NAA Facts About Newspapers*").

Weekly newspapers are valuable sources of localized news and information. A focus on local issues has contributed to their remarkable success in recent years. Add to that the fact that nearly 80 percent of weeklies are distributed at no charge to readers, and the impact that weeklies have had on the industry becomes clearer.[3] In 1975, the 7,612 weeklies then in existence had a combined circulation of 35.8 million.[4] In 2000, the circulation of weeklies had virtually doubled, reaching 70.9 million.[5]

In 1975, the 1,756 dailies then in operation had a daily circulation of 62.1 million.[6] In 1996, the number of dailies had decreased to 1,520, with a circulation of 56.9 million.[7] In 2000, another decrease in the number of dailies left 1,480, with a circulation of 55.7 million.[8] Sunday circulation figures, while slightly higher than daily circulation figures, also have fallen somewhat in recent years. While circulation rose significantly from 1975 to 1996, increasing from 51 million to 60.7 million, that figure decreased slightly in 2000 to 59.4 million.[9]

In today's communications landscape, the impact that "alternative newsweekly" newspapers have on diversity must not be overlooked. Alternative newsweeklies were the

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[3] Veronis Suhler, *Communications Industry Forecast* 256, 259 (5th ed. July 2001).

[4] *See NAA Facts About Newspapers* at 15.

[5] *See id*.

[6] *See id*. at 14, 16.

[7] *See id*.

[8] *See id*. In large part, the decrease in the number of daily newspapers reflects the demise of afternoon newspapers in many markets. *See* Susan Byrnes, *Afternoon Papers Have Fallen Victim to Modern Times*, The Seattle Times, Feb. 3, 1999, at A6.

[9] *See id*.; *see also Cross-Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Waiver Policy*, MM Docket Nos. 01-235, 96-197, FCC 01-262, at ¶ 9 (rel. Sept. 20, 2001) ("*NPRM*").

inevitable outgrowth of the end of competing daily newspapers in many cities.[10] These publications have created distinct local identities that set them apart from the mainstream press. They provide coverage of news and events that may not carry a mass-market appeal, leaving readers with targeted editorial coverage that has a direct impact on their lives.[11] Publishers typically belong to associations that assist them in attracting advertisers interested in their targeted publications. The Association of Alternative Newsweeklies, comprised of 125 alternative newsweeklies that distribute their papers free of charge in major metropolitan areas, requires that its members not be owned by a daily newspaper publisher or an affiliate.[12] An association called the Ruxton Group has over 27 member papers which achieve a circulation of more than 2.6 million.[13] That group, of which Washington, DC's *City Paper* is a member, boasts an active audience of over 6.7 million weekly readers who seek the investigative journalism, entertainment updates, and commentary that alternative newsweeklies provide.[14]

Beyond the growth in local newspapers, newspapers such as *USA Today*, the *Wall Street Journal*, and *The New York Times* have been successful in achieving national readership.[15] With a focus on presenting information relevant to the nation at large, *USA Today* has become the largest selling daily newspaper in the United States, with a circulation of approximately 2.3

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[10] *See* CASS Communications, Inc., *The Cass Alternative Newsweekly Network* at <www.casscom.com> (visited Nov. 21, 2001).

[11] *See id.*

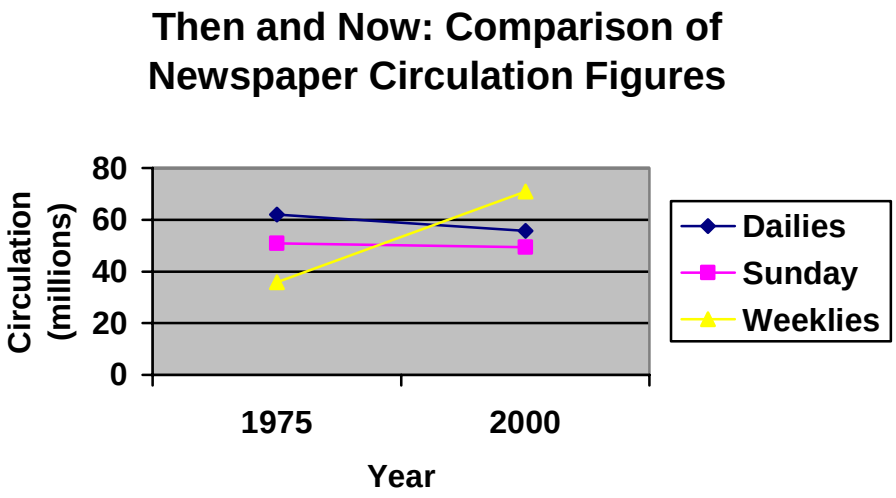
[12] *See* Association of Alternative Newsweeklies, *Membership* at <aan.org/gbase/Aan/viewPage?oid=oid%3A2091> and *Introduction* at <aan.org/gbase/Aan/viewPage?oid=oid%3A2086> (visited Nov. 21, 2001).

[13] *See* The Ruxton Group at <www.ruxton.com/index.html> (visited Nov. 21, 2001).

[14] *See id.*

[15] National newspapers are not subject to the newspaper/broadcast cross-ownership restrictions. *See Stockholders of CBS, Inc. and Westinghouse Electric Corporation for Transfer of Control of CBS, Inc.*, 11 FCC Rcd 3733, 3799 (1995); *Applications to Transfer Control of the Evening News Association to Gannett Co., Inc.*, 102 FCC 2d 1263, 1266 (1986).

million.[16] The *Wall Street Journal* became the world's leading business newspaper by providing readers with vital business and financial news and information.[17] A national edition of *The New York Times* has been available in major cities nationwide since 1980.[18] The *Times* has achieved an average weekday circulation of more than 1.1 million and a Sunday circulation of more than 1.6 million.[19] These publications greatly enhance the diversity of daily news and information available to consumers nationwide.



II. Television

The market for delivered video programming has changed drastically since 1975. First, the number of licensed television stations has increased from 952 on January 1, 1975 to 1,678 as of June 2001 – an increase of more than 76 percent since the newspaper/broadcast cross-

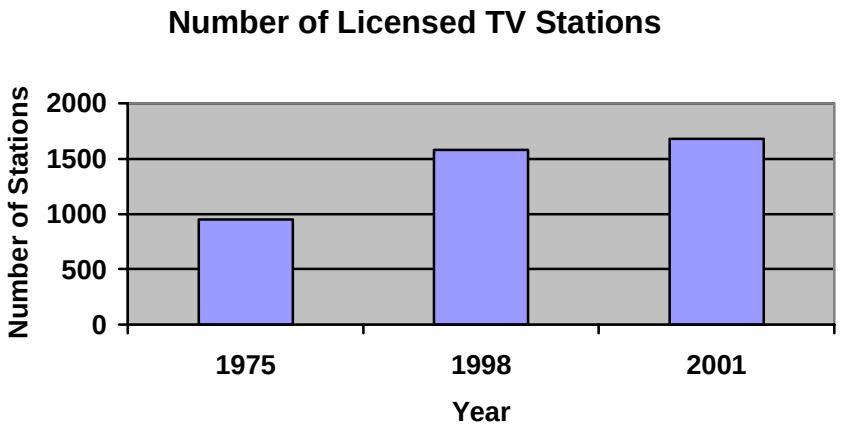
[16] *See* Gannett Co., Inc., *Company Profile* at <www.gannett.com/map/gan007.htm> (visited Nov. 30, 2001).

[17] *See* Dow Jones & Company, Inc., *Our Businesses* at <www.dowjones.com/corp/corprofile.htm> (visited Nov. 30, 2001).

[18] *See* The New York Times Company, *New York Times Newspaper Fact Book: Editions and Circulation* at < www. nytco.com/pressroom > (visited Nov. 30, 2001).

[19] *See* The New York Times Company, *The New York Times* at <www.nytco.com/company/busi.nyt.html> (visited Nov. 30, 2001).

ownership prohibition was adopted.[20] Even nine 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 were in markets with ten television stations or more.[21] In addition, the FCC has licensed 2,396 low power television stations and 232 Class A TV stations, which by definition must provide local programming.[22] Neither LPTVs nor Class A stations existed in 1975.[23]



More importantly, over-the-air television content is vastly more diverse than ever before, due in substantial part to the growth of new networks made possible by the establishment of additional stations to serve as local outlets. The once dominant Big Three networks (ABC, CBS and NBC) have lost their pre-eminence amid the growth of alternative media outlets. The introduction of the Fox Television network in the 1980s so impacted the broadcast market that

[20] *See NPRM* at ¶ 9.

[21] *See* Comments of the Newspaper Association of America, *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, at 45 (filed July 21, 1998) ("*NAA 1998 Biennial Review Comments*").

[22] *See NPRM* at ¶ 9.

[23] *See id.; see also* FCC, *Broadcast Station Totals as of June 30, 2001* at <www.fcc.gov> (visited Sept. 5, 2001).

the Big Three were aptly renamed the "Big Four." In addition, UPN and WB subsequently have emerged as significant alternative over-the-air voices. In the 1999-2000 season, the two achieved a combined 8 percent share of prime time viewing.[24] A seventh network, PaxTV, made its debut in August of 1998, carrying family oriented programming embodying positive values, free of excessive violence, explicit sex and foul language.[25] The PaxTV network currently reaches 81 percent of U.S. television households via nationwide broadcast television, cable, and satellite distribution systems.[26]

Despite the growth in content diversity, the combined viewership of the Big Four networks has continued to decline over the past several years, as evidenced by the audience shares for 24-hour viewing. In the 1993-94 television season, the "Big Four" networks maintained a combined 72 percent share of prime-time viewers.[27] That figure fell to 58 percent in the 1996-97 season, and dropped again to 50 percent in the 1998-99 season.[28] Currently, the combined prime time audience share of all seven national networks totals only 61 percent.[29]

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[24] *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 16 FCC Rcd 6005, at ¶ 99 (2000) (Seventh Annual Report) ("*2000 Competition Report*").

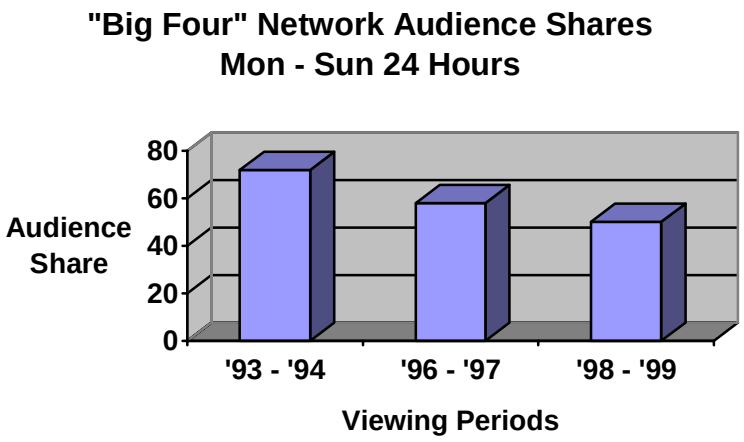
[25] *See* Paxson Communications Corporation, *About Pax: Corporate History*, at < www.paxtv.com/about/ overview.cfm > (visited Oct. 30, 2001).

[26] *See* Paxson Communications Corporation, *Paxson Communications to Present at Merrill Lynch Global Leveraged Finance Conference* at <www.paxson.com/about/pressreleases.cfm> (visited Oct. 30, 2001).

[27] *See Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for Delivery of Programming*, 9 FCC Rcd 7442, 7492 (1994) (First Report) ("*1994 Competition Report*").

[28] *See Broadcasting Network Prime Time Ratings According to Nielsen*, Broadcasting & Cable, Sept. 27, 1999, at 74.

[29] *See NPRM* at ¶ 9.



Digital television ("DTV") creates a host of new outlets for broadcast programming and a variety of other digital data services. The DTV service rules adopted by the Commission allow broadcasters to transmit high definition television, multiple streams of standard definition television, or any of a variety of ancillary services in addition to broadcast signals.[30] Currently, the networks use DTV spectrum for simultaneous broadcast of the programming carried on their NTSC channels. As of December 5, 2000, all of the top ten markets had at least two affiliates of the top four networks broadcasting DTV.[31] As of August 2001, digitally transmitted programming included CBS's scripted series, some movies, and some sports, including all college football for the Fall of 2001; ABC's scripted series, most movies and some sports; and NBC's "Wonderful World of Disney," "The Tonight Show" and some movies. In addition, two broadcast consortia have been formed to combine DTV spectrum allowing third parties to deliver Internet and television content directly to consumers.[32]

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[30] *See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 14588 (1997) (Sixth Report & Order), 12 FCC Rcd 12809 (1997) (Fifth Report & Order).

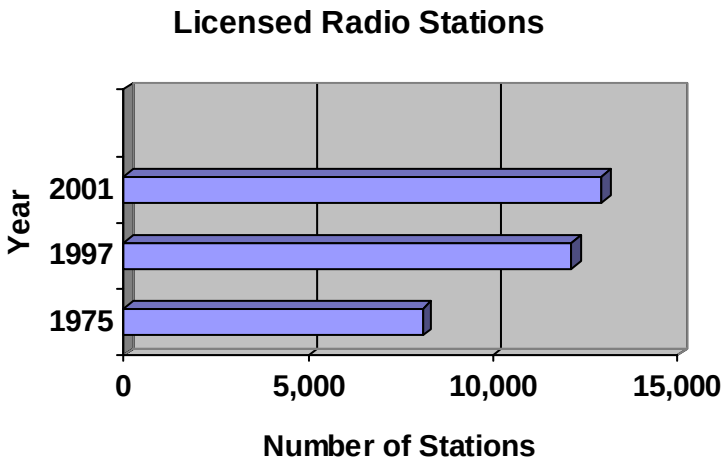
[31] *See 2000 Competition Report* at ¶ 98.

[32] *See id*. at ¶ 46.

III. Audio Programming

A. Broadcast Radio

The number of broadcast radio stations has skyrocketed since 1975, growing from 7,785 on January 1, 1975 to 12,932 stations in mid-2001.[33] In even the smallest radio markets, listeners can choose from several radio stations. Of the 278 Arbitron metro markets, 138 have more than twenty radio stations, and 93 percent of radio markets are served by more than ten radio stations.[34]



Accompanying the increase in radio stations has been a remarkable evolution in programming diversity. In 2000, *Broadcasting & Cable Yearbook* recognized 91 distinct radio formats, in contrast to the fifteen formats it tracked in 1982.[35] BIA now lists 95 formats, including 7 separate varieties of "news/talk," the most diverse of the 20 major format categories

[33] *See NPRM* at ¶ 9; *see also* FCC, *Broadcast Station Totals as of June 30, 2001* at <*www.fcc.gov*> (visited Sept. 5, 2001).

[34] *See* BIA Research, Inc., *Radio Market Report 2000* Table 2 (3d ed. 2000) ("*Radio Market Report 2000*").

[35] *See Broadcasting & Cable Yearbook 2000* at D-630; *NAA 1998 Biennial Review Comments* at 40.

listed.[36] Given this range of available formats, it is no surprise that the market has developed to include over 300 syndicated radio programmers, as well as dozens of regional radio networks and national radio programming options.[37] Further diversifying the format landscape is Spanish language programming, the fastest growing segment of the radio industry.[38] Often, Spanish radio is the only link non-English speaking Hispanics have to news and information.[39] While some stations meet the news demand essentially by translating English broadcasts, many others provide news and information from the Latino point of view.[40]

B. Digital Radio

The radio world has undergone revolutionary change since 1975, when broadcast radio was the only alternative by which listeners could receive audio programming. Today's radio listeners can now receive custom ordered digital audio programming at home via cable and satellite and can "stream" radio station signals via the Internet. Music services such as DMX and Music Choice provide a wide variety of music genres via cable, satellite and the Internet.[41] These services deliver 30 or more channels of commercial free, CD quality music to millions of subscribers. Other programming services target consumers of information radio. For example,

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[36] *See Radio Market Report 2000* 14.

[37] *See NAA 1998 Biennial Review Comments* at 40.

[38] *See* Radio-Television News Directors Association and Foundation, *Espanol – The Growing Voice in Radio News* at <www.rtnda.org/resources/radioupdate/spring2000/main-article-text.html> (visited Oct. 30, 2001).

[39] *Id.*

[40] *Id.*

[41] *See* DMX/AEI MUSIC, Inc., *DMX Music Rings in the Holiday Season with an Assortment of Festive Music* at <www.dmxmusic.com/coinfo/press/11_01_01.html>; Music Choice, *About Us, Music Channels* at <mc1.musicchoice.com/what_we_are.html#music_channels> (visited Oct. 31, 2001).

WTOP's FederalNewsradio.com, a radio station designed solely for the Internet, targets federal workers around the globe.[42]

New technologies have been developed to bring these innovations to the American motorist, as well. Digital audio radio service ("DARS") provides cross-country travelers with hours of uninterrupted music, sports and entertainment news. Satellites and terrestrial repeaters keep the entire contiguous United States within broadcast range, ensuring continuous, crystal clear sound quality. XM Satellite Radio and Sirius Satellite Radio are the two major competitors for subscribers. XM Satellite Radio's offerings provide unprecedented choice that consumers can experience from their own automobiles and homes. The more than 100 channels of continuous programming features content producers such as the Discovery Channel and CNN/Sports Illustrated.[43] Listeners are also entertained from an extraordinarily broad music library.[44] Sirius' offerings, scheduled to launch next year, will have the added benefit of being commercial-free.[45]

IV. Cable Television

Cable has played a significant role in creating an abundantly diverse market for delivered video programming. The number of households served, the large channel capacities of the majority of systems, and the steady increase in viewership all contribute to the audience fragmentation experienced by broadcast television. The number of households subscribing to cable has grown phenomenally in the last twenty-six years. In 1975, only 17 percent of U.S.

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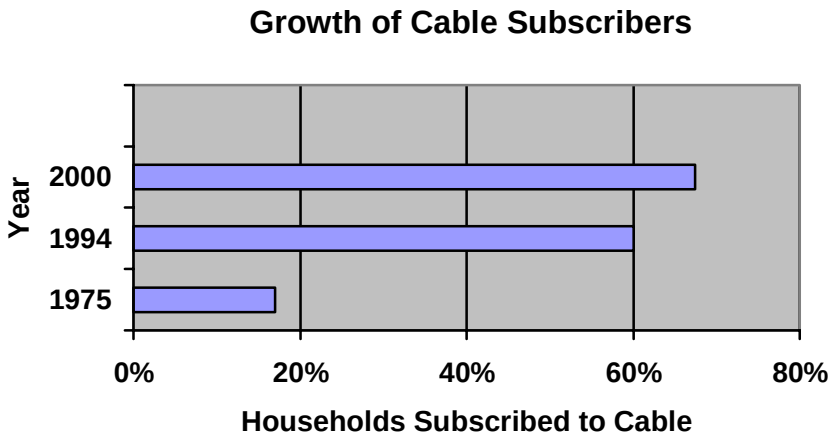
[42] *See* Dennis Kelly, *A Digital Radio Success Story*, Broadcasting and Cable, April 16, 2001.

[43] *See* XM Satellite Radio, *Fast Facts* at <www.xmradio.com > (visited Nov. 24, 2001).

[44] *See id.*

[45] Rob Pegoraro, *XM Rocks Into Void Left by Uninspired FM Radio Offerings*, Washington Post, Nov. 23, 2001, at E1.

households subscribed to cable.[46] Today cable television service is universally available and provides viewers with the option of accessing a multitude of alternative programming sources. In 1990, 55.8 percent of television households subscribed to cable.[47] By 1994, nearly 60 percent of households subscribed, and in 1998, subscribership rose to 66.32 percent.[48] Some 67.4 percent of all households subscribed to cable services by the end of June 2000, and that number continues to grow.[49]



Nearly all cable subscribers are served by systems with large channel capacities – 99 percent of subscribers are served by systems with 30 channels or more.[50] As of October 2000, more than two-thirds of the nation's cable subscribers, or 68.5 percent, were served by systems with 54 or more channels.[51] In addition, more than 6.5 percent of subscribers are served by

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[46] *See* F. Setzer and J. Levy, *Broadcast Television in a Multichannel Marketplace*, Office of Plans and Policy Working Paper No. 26, 6 FCC Rcd 3996, 4008-09 (1991) ("*OPP Report*").

[47] *See 1994 Competition Report* at 7481.

[48] *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 13 FCC Rcd 1034, 1049 (1997) (Fourth Annual Report) ("*1997 Competition Report*").

[49] *See 2000 Competition Report* at ¶ 19.

[50] *See id*. at ¶ 21; *see also NPRM* at ¶ 9.

[51] *See id*. at ¶ 21; *see also NPRM* at ¶ 9.

systems with capacities of 91 or more channels.[52] The number of programming options available to consumers has grown in tandem. In 1994, the majority of the existing 106 cable programming services were owned in whole or part by cable MSOs.[53] In recent years, however, the number of independent cable programming services has more than doubled, increasing from 50 in 1994 to 104 in 1997.[54] At the end of 1999, there were 147 basic cable networks, 43 premium networks, and nine pay-per-view networks providing consumers with an extensive assortment of programs from which to choose.[55]

Furthermore, viewership shares for cable have continuously grown over the past decade, while viewership of broadcast television has steadily declined. In 1988, the 24-hour a day, 7-day a week audience of all non-premium cable programming was a mere 11.5 percent share of viewers.[56] In 1997, this share increased to 36.25.[57] From June 1999 to June 2000, cable's share rose by 7.8 percent from 42.2 to a 45.5 share.[58] In July 1998, for the first time, cable networks topped the four major broadcast networks for a week by every available Nielsen Media Research measurement – total viewers, ratings, and audience share.[59] During the same periods, broadcast

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[52] *See id*. at ¶ 21; *see also NPRM* at ¶ 9.

[53] *See 1994 Competition Report* at 7589-92, App. G, Tables 3-4.

[54] *See 1997 Competition Report* at 1213-25.

[55] *See 2000 Competition Report* at ¶ 23.

[56] *See 1997 Competition Report* at 1051.

[57] *See id.*

[58] *See 2000 Competition Report* at ¶ 22.

[59] David Bauder, *Cable Ratings Top Networks*, Wash. Post, July 8, 1998, at D7.

television's share for July 1998 to June 1999 was 60.9. That figure decreased by 2.1 percent to 59.6 for July 1999 to June 2000.[60]

Larger channel capacities have led to an increase in local programming on cable systems. The public, educational, and governmental ("PEG") access channels have greatly enhanced program diversity. Carried by approximately 15 percent of all cable systems, PEG channels serve as an outlet for citizens to air their own programs or to view local news, educational and public affairs programming.[61] In addition to PEG channels, regional news networks have become instrumental in broadening the local news scene. Of the 75 regional programming networks counted in 2000, 30 are regional news networks.[62] Regional and local news networks tend to have more diverse ownership than other programming concerns.[63] While some networks are vertically integrated with cable MSOs, many are not. Most regional news networks cover a limited geographic market, such as a single city, although a handful of these networks, such as Texas Cable News, have elected to provide statewide coverage.[64]

V. Other MVPDs

"MVPD" refers to the distribution of multichannel video programming to households via wireline and wireless technologies. The wireless technologies include direct broadcast satellite ("DBS") and multichannel multipoint distribution service ("MMDS"). Recently, several electric and gas utilities have announced ventures involving MVPD. While they are not yet major

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[60] *See 2000 Competition Report* at ¶ 22.

[61] *See id*. at ¶ 192.

[62] *See id*. at ¶ 191.

[63] *See id*.

[64] *See* Lee Nichols, *Only in Texas: Cable Companies Plug Into Regional, Local News*, The Austin Chronicle, Feb. 20, 1999.

competitors in the cable market, their involvement marks a significant deviation from their limited role in the mid 1970's.[65] The same can be said of telephone companies, which compete in the video market through MMDS, DBS and a variety of other technologies. These various sources of video programming greatly increase outlet diversity in the multichannel video programming market.

A. DBS

DBS, which was non-existent in the 1970s, offers subscribers hundreds of high-quality digital channels delivered via satellite to a small dish antenna located at the viewer's home. DBS is the principal competitor to cable television service, now serving nearly 13 million subscribers, or over 15 percent of MVPD households.[66] At the end of 2000, four companies were licensed by the Commission to provide DBS service: DirecTV, EchoStar, Dominion Video Satellite, Inc. and R/L DBS Company.[67] As of October 2001, EchoStar was poised to acquire DirecTV, which would make it the nation's largest satellite-to-home broadcaster, expected to reach nearly 22 million subscribers by the time the deal is closed.[68]

Initially, DBS providers were restricted from retransmitting local broadcast signals into the local television markets they served. This changed with the enactment of the Satellite Home Improvement Viewer's Act of 1999 ("SHVIA"), which authorized satellite providers to retransmit local network affiliate signals into their local markets.[69] Additionally, in

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[65] *See 2000 Competition Repor*t at ¶ 132.

[66] See *NPRM* at ¶11.

[67] *See 2000 Competition Report* at ¶ 60.

[68] *See* Andy Pasztor, *EchoStar CEO Ergen's Management Style Faces the New Test of Hughes Acquisition*, Wash. Post, Oct 30, 2001, at A3.

[69] *See 2000 Competition Report* at ¶ 13.

accordance with SHVIA, the Commission established rules requiring mandatory carriage of broadcast signals starting in 2002.[70] Following the Act's passage, DBS experienced a significant increase in subscribers.[71]

B. MMDS

MMDS, or wireless cable, offers up to 33 analog channels of microwave transmitted programming; over 35 million homes were capable of receiving MMDS in 1999.[72] There are currently between 700,000 and one million MMDS subscribers.[73] Digital MMDS will allow MMDS operators to provide six or more digital channels of programming for each analog channel on which they were previously providing service.[74] As of March 1999, Sprint, WorldCom, BellSouth and Nucentrix collectively held approximately 90 percent of the MMDS licenses in the U.S.[75] As the technology continues to improve, the ultimate competitive success of MMDS will be determined.

VI. Internet

Over the past several years, the Internet has transformed the information marketplace in ways unimaginable when the newspaper/broadcast cross ownership rule was adopted. Since the Internet came into existence in the late 1970's as an outgrowth of a military project, its tremendous growth has greatly impacted the media industry. The number of Americans online

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[70] *See id*. at ¶ 71.

[71] *See id*. at ¶ 13.

[72] *See 2000 Competition Report* at 86, 88.

[73] *See id*. at ¶ 88.

[74] *See, e.g., Report to Congressional Committees Pursuant to the Rural Local Broadcast Signal Act*, 16 FCC Rcd. 578, 588 (2001): *1997 Competition Report* at 1079-80.

[75] *See* California Amplifier, Inc., *The History of MMDS*, at <www.calamp.com> (visited Nov. 14, 2001).

as of August 2001 has been estimated to be 166.14 million, a whopping 59.75 percent of the population.[76] Compare that to an approximate 18 million online in 1995 (a mere 6.7 percent of the population), and the pace of the Internet's speedy progression becomes apparent.[77] The number of websites, another indicator of Internet growth, has multiplied in recent years, from 1,570,000 in 1997 to more than 8,745,000 in 2001.[78] That represents an increase of 457 percent.

There appears to be no uniform pattern among Americans in the amount of time spent online or sites visited, suggesting that the content viewed varies as widely as the members of the public who are logging on.[79] However, it seems that Internet users may find the time to go online by reducing the amount of time spent viewing television.[80] According to a study by the UCLA Center for Communication Policy, Internet users and non-users have access to television in almost equal numbers, but the number of hours spent watching each week varies considerably between the two groups.[81] That is, Internet users watch significantly less television than non-

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[76] *See* NUA, *How Many Online?* at <www.nua.ie/surveys/how_many_online/n_america.html > (visited Nov. 21, 2001). Studies by Nielsen/NetRatings put the number of Americans online closer to 115 million and state that 58 percent of all Americans had Internet access in their homes. *See* Nielsen//NetRatings, *Internet Captures 63 Percent Growth In the Past Two Years; Internet Usage Climbs To Record Highs in October* at <www.nielsen-netratings.com> (visited Nov. 24, 2001).

[77] *See* NUA, *How Many Online?* at <www.nua.ie/surveys/how_many_online/n_america.html > (visited Nov. 21, 2001).

[78] *See* Online Computer Library Center, Inc., *Size and Growth* at <wcp.oclc.org/stats.size.html> (visited Nov. 24, 2001).

[79] *See* Susannah Fox, *Why Some People Use the Internet More than Before* at <www.pewtrusts.com> (visited Sep. 25, 2001).

[80] *See* UCLA Center for Communication Policy, *The UCLA Internet Report 2001– Surveying the Digital Future* 32 at <www.ccp.ucla.edu> (visited Nov. 29, 2001).

[81] *See id.*

users.[82] Perhaps more importantly, the study also shows that television viewing decreases as Internet experience increases.[83]

Despite concerns that the Internet would benefit only the richest members in society, recent studies show that the digital divide is narrowing. According to the US Department of Commerce, at the end of August 2000, half of all U.S. households had a computer, while 41.5 percent had Internet access.[84] Previously underrepresented demographics are being drawn to the medium, as the number of women, minorities, and families with modest incomes continues to surge online.[85] Over the past year, African-American web usage outpaced the average national usage, as African-American Internet use grew by 19 percent, from 6.9 million to 8.2 million.[86] Currently, fifty percent of Hispanics adults are online, representing an Internet population growth of 25 percent over the last year.[87] In addition, the most visited websites differ according to ethnic groups, suggesting a diversity of content able to satisfy widely varying tastes. For example, studies show that Hispanics tend to look to national and international streaming media

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[82] The study shows that users watch 4.5 hours per week less television than non-users. *See id.*

[83] *See id*. The study compared the amount of time spent watching television by new users (those with less than one year experience) and very experienced users (those with five or more years Internet experience). Among child viewers, 23 percent watch less television now than before they started using the Internet. *Id*. at 78.

[84] *See* U.S. Department of Commerce, *Falling Through the Net: Toward Digital Inclusion* at <osecnt13.osec.doc.gov/public.nsf/docs/fttn-tdi-executive-summary> (visited Nov. 24, 2001).

[85] *See* Lee Rainie, *More Online, Doing More*, February 18, 2001 at <www.pewtrusts.com > (visited Sep. 25, 2001). The study shows that the number of American adults with Internet access grew from 88 million to more than 104 million in the second half of 2000. In the process, the Internet population is looking more like the overall population of the United States. In 2000, more Americans went online on a typical day than in previous years. The number of women with Internet access who visited daily increased from 49 to 55 percent from mid-year to year-end 2000. During the same period, African-American daily presence increased from 37 to 44 percent.

[86] *See* Nielsen//NetRatings, *African American Web Surfers Grow Faster Than Average Online Population with 8.2 Million Users*, Sept. 2001 at <www.nielsen-netratings.com> (visited Nov. 24, 2001).

[87] *See* Pew Internet and American Life, *50% of Hispanic Adults Are Now Online*, July 2001 at <www.pewinternet.org/releases/release.asp?id=27> (visited Nov. 24, 2001).

to find news, entertainment and other content not available in traditional outlets.[88] On the other hand, African-Americans are more likely to visit entertainment websites than the general Internet population.[89]

The appetite for online news continues to expand as readers in increasing numbers turn to the Internet for news and information. A survey commissioned by RTNDA Foundation shows that reading online news is Internet users' second favorite online activity after email.[90] One in three respondents said they read online news and information daily.[91] News seekers enjoy the freedom provided by the Internet to control the news they see instead of watching or reading news items selected by others.[92] The audience for news and information sites grew 14.7 percent from July 2000 to July 2001, slightly outpacing overall web traffic growth of 12.3 percent.[93]

The Internet has developed into a rich source of local news and information. Websites offering local news reportedly have significantly higher levels of customer satisfaction than sites offering national news.[94] While the web still is an ancillary news source for many people, a recent study commissioned by the Pew Charitable Trusts suggests that viewers are abandoning

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[88] *See* Nielsen//NetRatings, *Local Markets Miami, Cincinnati and Houston Lead Streaming Media Consumption*, March 2001 at <www.nielsen-netratings.com> (visited Nov. 24, 2001).

[89] *See* Nielsen//NetRatings, *African American Web Surfers Grow Faster than Average Online Population with 8.2 Million Users* at <www.nielsen-netratings.com> (visited Nov. 24, 2001).

[90] *See* NUA, *RTNDA Foundation: Internet Users Like Choosing News*, May 2000 at <www.nua.com> (summarizing survey commissioned by RTNDF and Zatso, Inc., titled "A View of the 21st Century News Consumer") (visited Nov. 24, 2001).

[91] *See id.*

[92] *See id.*

[93] *See* Felicity Barringer, *Growing Audience Is Turning To Established News Media Online*, Aug. 27, 2001 at <www.nytimes.com/2001/08/27/business/media> (visited Aug. 27, 2001).

[94] *See* NUA, *Local News Focus Pays Off*, Feb. 2001 at <www.nua.com/surveys> (summarizing study done by research firm cPulse) (visited Nov. 24, 2001).

local television news in favor of the Internet.[95] The study likens the trend to the networks' audience loss more than a decade ago with the advent of cable.[96] The ways in which Americans used the Internet immediately following the terrorist attacks of September 11th are quite telling.[97] The Internet was an important supplement to local television news, and many found it useful for self-expression after the assault.[98] While many viewers turn to established news media online, the number of local news and information websites not sponsored by established media continues to grow.[99]

A key strength of the Internet is the vast array of available content, from news to education-related sites to email. The Internet has become an increasingly important feature of the learning environment for teenagers, who use the Internet as an essential study aid both inside and outside the classroom.[100] In modern computer culture, moreover, an anonymous email author can instantly become a recognizable figure as the message zips around the continent in a matter of minutes. The Internet offers something to consumers that no medium before it has been able to offer – a platform for widespread self-expression and emotional exchange. The phenomenon has been compared to talk radio, where the driving force is people's desire to speak

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[95] *See* Tom Rosenstiel, *et al*, *Time of Peril for TV News: Quality Sells, But Commitment and Viewership Continue to Erode*, Columbia Journalism Reporter, November/December 2000.

[96] *Id.*

[97] *See* Lee Rainie, *How Americans Used the Internet After the Terror Attack*, September 15, 2001 at <www.pewtrusts.com> (visited Nov. 21, 2001).

[98] *See id.*

[99] *See* NUA, *Local TV Sites Winning Audiences*, Feb. 2001 at <*www.nua.com/surveys*> (summarizing study performed by Media Audit) (visited Nov. 24, 2001).

[100] *See* Amanda Lenhart, *The Internet and Education*, September 2001 at <www.pewtrusts.com> (visited Nov. 21, 2001).

out, share feelings and listen to others. The Internet surpasses talk radio's draw, however, because it offers a limitless degree of interaction.[101]

The Internet also is increasingly being recognized as a more efficient way to spread political messages than television advertising.[102] In a recent study by e-advocates and Juno Online Services, Inc., of eight toss-up U.S. House and Senate races in which challengers won, six (*i.e.*, 75 percent) were found to have employed a "superior Web strategy."[103] In seven of those eight races, challengers spent less money than incumbents.[104] According to data from Nielsen/NetRatings, online newspapers were among the news channels that prospered during the last presidential election period.[105] The data shows such an increase in web traffic for the week ending November 12, 2000 that it has been termed the most famous week in web news history.[106] The Internet also affords citizens access to government on a national, state, and local level with unparalleled ease and convenience. For instance, citizens can now watch the daily happenings of the Illinois House of Representatives online.[107] As evidenced by these developments, the Internet has become a powerful force in shaping political debate and citizen response.

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[101] *See* Paul Fahvi, *Gathering for Laughs at the Online Water Cooler*, Wash. Post, Nov. 25, 2000.

[102] *See* Politics Online Newsletter, Volume 4, number 23 at <*www.politicsonline.com*> (visited Nov. 15, 2001).

[103] *See id*.

[104] *See id*.

[105] *See* Allen Weiner, *Online Newspapers Bask In Overtime Election* at <www.forbes.com/2000/11/29/1129 netratings.html> (visited Nov. 15, 2001).

[106] *Id*.

[107] *See* Illinois General Assembly at <www.legis.state.il.us> (visited Nov. 15, 2001). The Illinois legislature spent $750,000 to install robotic cameras so it can provide gavel-to-gavel coverage of members in action.

APPENDIX II

Newspaper/Broadcast Combinations

Newspaper/Television Combinations

1. The Dallas Morning News & WFAA-TV
2. The (Cedar Rapids, IA) Gazette & KCRG-TV
3. Temple (TX) Daily Telegram, Killeen Herald & KCEN-TV
4. The Spokesman Review & KHQ-TV
5. The Atlanta Journal & Constitution & WSB-TV
6. Dayton Daily News & WHIO-TV
7. The Columbus (OH) Dispatch & WBNS-TV
8. The (Fargo, ND) Forum & WDAY-TV
9. Milwaukee Journal Sentinel & WTMJ-TV
10. Baton Rouge Morning Advocate & WBRZ (TV)
11. The Tampa Tribune & WFLA-TV
12. The Paducah (KY) Sun & WPSD-TV
13. The (Idaho Falls) Post Register & KIFI-TV
14. Quincy (IL) Herald-Whig & WGEM-TV
15. The Cincinnati Post & WCPO-TV
16. South Bend Tribune & WSBT-TV
17. Chicago Tribune & WGN-TV
18. (Columbus, MS) Commercial Dispatch & WCBI
19. Bristol (VA) Herald Courier & WJHL
20. The Vindicator (OH) & WFMJ-TV

*21. Fort Lauderdale Sun-Sentinel & WDZL (TV)
*22. New York Post & WNYW & WWOR (for 2 yrs)
**23. Hartford Courant & WTIC
**24. Los Angeles Times & KTLA (TV)
**25. The Arizona Republic & KPNX-TV
**26. Newsday & WPIX

Newspaper/Radio Combinations

1. The (Cedar Rapids, IA) Gazette & KCRG-AM
2. The Atlanta Journal-Constitution & WSB-AM-FM
3. Dayton Daily News & WHIO-AM, WHKO (FM)
4. The Champaign News-Gazette & WDWS (AM), WHMS-FM
5. The (Bowling Green, KY) Daily News & WKCT (AM), WDNS (FM)
6. The Columbus (OH) Dispatch & WQKT (FM)
7. The Elkart (IN) Truth & WTRC(AM), WBYT(FM)
8. Findlay (OH) Courier & WFIN (AM), WKXA-FM
9. The (Fargo, ND) Forum & WDAY-AM
10. Fredericksburg Free Lance-Star & WFLS-FM
11. Milwaukee Journal Sentinel & WTMJ-AM, WKTI (FM)
12. Scranton (PA) Times/Tribune & WEJL (AM), WEZX (FM)
13. Wooster (OH) Daily Record & WQKT (FM)
14. The New York Times & WQEW (AM), WQXR-FM
15. Ponca City (OK) News & WBBZ (AM)
16. Clearfield (PA) Progress & WCPA (AM), WQYX (FM)
17. Quincy (IL) Herald-Whig & WGEM-AM-FM
18. South Bend Tribune & WSBT-AM, WNSN (FM)
19. Miles City (MT) Star & KATL (AM)
20. Gettysburg (PA) Times & WGET (AM), WGTY (FM)
21. Chicago Tribune & WGN-AM
22. Reading Times/Eagle & WEEU (AM)
23. Norfolk (NE) Daily News & WJAG (AM), KEXL (FM)
24. Morgantown (WV) Dominion-Post & WAJR (AM), WVAQ (FM)
25. The Janesville Gazette & WJVL (FM)
26. (La Salle, IL) News-Tribune & WLPO (AM), WAJK-FM
27. (Elyria, IL) Chronicle Telegram & Medina (IL) Gazette & WEOL-AM, WNWV (FM)

* 28. Amarillo (TX) Daily & NewsGlobe Times & KGNC-AM-FM
* 29. Topeka (KS) Capital -Journal & WIBW-AM-FM

* Not grandfathered properties. Granted either permanent or temporary waivers.
** Co-owned properties until broadcast license is up for renewal.

APPENDIX III

Statement of E. Molly Hemsley,

Director, Government Affairs and Legislative Counsel,

Newspaper Association of America

STATEMENT OF E. MOLLY HEMSLEY

1. I am Director of Government Affairs and Legislative Counsel for the Newspaper Association of America ("NAA"). The NAA is a non-profit organization that represents the newspaper industry and over 2,000 newspapers in the United States and Canada.

2. NAA members account for approximately 90 percent of the daily circulation of newspapers in the United State. A number of NAA's members also hold broadcast station licenses, some in the home markets of their newspapers. The great majority of these were issued prior to the adoption of the newspaper/broadcast cross-ownership prohibition in 1975 and therefore "grandfathered" when the prospective ban was implemented. A few additional combinations are operated pursuant to waivers of the newspaper/broadcast cross-ownership prohibition or pending the station's next renewal proceedings. (Appendix II submitted with NAA's Comments in this proceeding provides a list of co-located newspaper/broadcast station combinations.)

3. In October-December 2001, the NAA conducted an informal and confidential survey of the newspaper/broadcast cross-owners among its members. These newspaper/station owners were asked to comment on four general areas: (i) the amount of local news and public affairs programming and publishing that the respondents' outlets provide in relation to their competition; (ii) the degree to which resources and facilities are shared among the respondents' newspaper and broadcast outlets, if at all; (iii) whether there is a difference in editorial posture/news judgment between the respondents' broadcast and newspaper properties; and (iv) any additional programs, services, or products that the newspaper/broadcast combination(s) have enabled the respondents to develop/provide to their communities.

4. The responses to our inquiries were generally consistent and, moreover, consistent with my understanding and expectations based on my own involvement with the newspaper industry. Most of the cross-owned properties that replied provide at least as much, and in many cases, much more, local and national news, public affairs, and other informational programming than their competitors. Many of the cross-owned outlets also indicated that they have received some of the industry's most prestigious honors and are generally the top stations in their respective markets.

5. A substantial number of the cross-owners who replied to our inquiry indicated that they realize considerable efficiencies and cost savings by (i) sharing staff members in various aspects of their businesses, including newsgathering, news reporting, advertising sales, technical services, administrative/business functions, and/or human resources; (ii) sharing physical facilities and thus reducing rent and overhead costs; and/or (iii) sharing newsgathering resources such as news bureaus, wire services, cameras, vehicles, and helicopters.

6. The responses also confirmed that the efficiencies and operational synergies realized by many co-owned newspapers and broadcast stations have enabled them to effectively develop innovative media outlets and services for the distribution of information to their consumers. Many of the respondents stated that they have utilized their aggregate expertise in publishing and audio/video journalism to develop state-of-the-art web sites offering unique locally oriented content. Some co-owned newspaper and broadcast stations have combined their journalistic skills and audio/video expertise to launch successful local cable news channels.

7. The responses indicated that newspaper-owned broadcast stations can refer their listeners and viewers to their co-owned daily newspaper for details that are beyond the scope of

broadcast news. Conversely, newspapers can refer their readers to their co-owned broadcast stations for audio and video elaboration of the stories that appear in its pages. The responses further indicated that newspapers and broadcast stations can and do direct their respective audiences to a co-owned website for immediate and unique coverage of local content.

8. The respondents generally indicated that, notwithstanding their sharing of resources, the editorial posture/news judgment of their cross-owned newspaper and broadcast properties is made independently by each outlet, based on journalistic principles, technical capabilities, and relevance to their respective audiences. The responses also confirmed that co-owned daily newspapers and broadcast stations tend to compete vigorously with each other, taking each other to task for perceived errors, omissions, and/or misguided points of view – whether operation or management of the print and broadcast outlets is integrated. In fact, newspapers generally compete as aggressively with each other as with any other competitor in the marketplace and elimination of the newspaper/broadcast cross-ownership ban would have little, if any, impact on the independence of their outlets' content.

9. I participated directly in the preparation of, and have reviewed, the accompanying Comments of the NAA. These Comments include numerous examples of the experiences of existing newspaper/broadcast station combinations which, except where otherwise noted, are derived from the results of our informal survey and follow-up discussions with the respondents. To the best of my knowledge, information, and belief, the information contained therein

regarding the newspaper and broadcast operations of these existing combinations are true and accurate.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 3, 2001.

E. Molly Hemsley
Director, Government Affairs and
Legislative Counsel
Newspaper Association of America

December 3, 2001

APPENDIX IV

Horizontal and Vertical Structural Issues

and the

Newspaper-Broadcast Cross-Ownership Ban

Kent Mikkelsen

Economists Incorporated

December 2001

HORIZONTAL AND VERTICAL STRUCTURAL ISSUES AND THE NEWSPAPER-BROADCAST CROSS-OWNERSHIP BAN

Economists Incorporated

December 2001

Introduction and Summary

This paper explores structural indicators of competition in a sample of locales. There has been a considerable increase in the amount of competition since the newspaper-broadcast cross-ownership prohibition was adopted in 1975. Even if a national policy prohibiting cross-ownership were justified based on competition concerns in 1975, that justification would not hold today, especially because individual transactions are already subject to case-by-case review under the Clayton Act.

The Federal Communications Commission focuses on competition among newspapers, television and radio to sell advertising. This focus is overly narrow because it excludes other relevant competing media, but it is adopted here to investigate changes in the ownership concentration of advertising in these three media in a sample of 21 Designated Market Areas (DMAs) between 1975 and 2000. Ownership concentration has decreased or remained unchanged in 20 of the 21 DMAs examined, despite acquisitions of radio stations permitted following the passage of the Telecommunications Act of 1996.

Newspapers and broadcast stations may improve their news product and realize cost efficiencies through sharing of news leads, sources, personnel and operations in various forms. Economic theory finds that the types of cooperation that appear most likely may not be undertaken, or undertaken only at greater

cost, if a cross-ownership ban prevents newspapers and broadcast stations from being brought under common ownership.

Competition in Advertising[1]

An important step in assessing the potential competitive effect of joint ownership is to define a relevant market. For a merger or acquisition to affect market concentration, it is necessary that both firms involved in the acquisition participate in the same market. Thus, for example, common ownership of a newspaper, television station or radio station with a dry cleaning firm would have no effect on either concentration or single firm market share because dry cleaning does not participate in any market in which any of the three media outlets competes.

The Commission has identified advertising as the primary economic market in which newspapers and broadcast stations may compete.[2] There can be no competitive rationale for the cross-ownership rule unless the relevant product market is at least this broad. The Commission acknowledges that cable television also competes in this advertising market.[3] Newspapers other than daily newspapers, direct mail, yellow pages, and outdoor advertising are other media that compete with newspaper, radio and television advertising. This paper,

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[1] This section provides an update of findings previously reported in " Structural and Behavioral Analysis of the Newspaper-Broadcast Cross-Ownership Rules," Economists Incorporated, July 1998, attached as Appendix B to the Newspaper Association of America' s (NAA) comments in 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, (released March 13, 1998) (" 1998 Biennial Review"). Previously reported numbers for 1975 and 1997 are not directly comparable to the numbers in this paper, due to changes in the geographic coverage of some DMAs, increased availability of revenue estimates for broadcast stations, and the correction of some minor data errors.

[2] In the Matter of Cross-Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Waiver Policy, MM Docket Nos. 01-235, 96-197, FCC 01-262 (released September 20, 2001 (" NPRM"), ¶19.

[3] 1998 Biennial Review, ¶5.

however, will focus only on those media that are the subject of the cross-ownership ban. Excluding other relevant media from the study makes it possible to examine structural changes in concentration among the three media that are the subject of the cross-ownership rule. Note that this narrow focus has the effect of significantly overstating the level of concentration measured in local markets.

Competition takes place within a certain geographic context. Precisely defining the relevant geographic market in which these media compete is a task beyond the scope of this paper. For purposes of year-to-year comparisons, the relevant geographic markets are proxied by Designated Market Areas (DMAs). DMAs are defined by Nielsen Media Research for purposes of measuring television audience information, and thus are a likely candidate for the appropriate market for television advertising. Newspapers and radio stations located within the same DMA can be viewed as among the alternative means of reaching an advertising audience within the DMA. Since an important objective of this study was to compare concentration levels across time, a precisely correct definition of the geographic market is less important than maintaining consistent geographic market definitions across time. Accordingly, the geographic area defined to be within each DMA in 2001 was applied to 1975, even though that area differed in some instances from the area included in those DMAs as they were defined in 1975.

Due to the high cost of manually extracting and assembling 1975 data from printed sources, the analysis of structural change between 1975 and 2000 was limited to a sample of 21 DMAs. In a previous paper,[4] 21 DMAs were chosen at random from among each ten consecutively ranked DMAs. Thus, for instance, Chicago (rank 3) was chosen from the DMAs ranked 1-10, Phoenix (rank 17) was

[4] See footnote 1.

chosen from the DMAs ranked 11-20, etc.[5] This study utilizes the same DMAs studied in the previous paper. Table 1 shows the DMAs included in the sample as well as their 1997 and 2001 market ranks. The sample DMAs appear to match the entire population of DMAs quite well.[6]

Procedures for estimating the advertising revenues of individual newspapers, radio station and television stations were constrained by the information available both for 2000 and for 1975. For 2000, estimates are available for the advertising revenues of many individual commercial radio and television stations as well as many newspapers. The information available in 1975 was limited to the number of commercial radio stations and television stations and the number and circulation of daily newspapers.

Lacking revenue information for individual radio and television stations in 1975, it was not possible to determine how concentration of advertising revenue among these stations changed between 1975 and 2000. For these media, the main structural change that could be observed was the growth in the number of stations. The number of commercial radio stations increased in all of the sample

[5] The lowest ranked 11 DMAs were treated like a group of ten.

[6] The table below compares the average (mean) and median for variables related to DMA size and number of media. Data were derived from BIA, Inc.; *Federal Communications Commission News*, " Broadcast Station Totals as of September 30, 2001," October 30, 2001; Newspaper Association of America, *2001 Newspaper Facts*; and the number of DMAs in 2001 (210).

	Average		*Median*	
	Sample	All DMAs	Sample	All DMAs
Population (2000, thous.)	1,343	1,282	661	658
Effective Buying Income (1999, $ mil.)	23,487	22,681	10,476	10,082
Number of Commercial Radio Stations	51.1	51.3	40	n.a.
Number of Commercial TV Stations	6.1	6.2	5	n.a.
Number of Daily Newspapers	6.1	7.0	5	n.a.

DMAs. The median number of radio stations in the sample DMAs increased by 17, from 23 stations in 1975 to 40 stations in 2000. See Table 2. The number of commercial television stations also increased in all of the sample DMAs except two DMAs in which the number was unchanged. The median number of commercial television stations increased from three in 1975 to five in 2000, an increase of two stations. An increase in the number of separately owned radio and television stations, holding other factors constant, decreases the overall concentration in the advertising market.

The increase in stations within the sample DMAs is consistent with national trends. In 1975, there were 7,230 commercial radio stations; by 2001, this has increased almost 50 percent to 10,778 stations.[7] The number of commercial television stations on air increased from 706 in 1975 to 1,309 in 2001, an increase of over 80 percent.[8]

Separate estimates were available from BIA for total radio and television advertising in each DMA in 2000.[9] From these totals, the average advertising revenue for each radio and television station in each sample DMA was calculated. To express the relative importance of radio stations and television stations as sellers of advertising in 1975 and 2000, the average advertising revenue for each radio station and each television station in each DMA in 2000 was applied to stations in 1975.[10] This assumption made it possible to include radio and television stations in the calculation of an HHI for each DMA in 1975 and 2000.[11]

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[7] *Statistical Abstract of the United States: 1990,* Table 914; and *Federal Communications Commission News,* " Broadcast Station Totals as of September 30, 2001," October 30, 2001.

[8] *Television & Cable Factbook: Services 2001*, Table I-45.

[9] Data on radio and television stations in the 21 DMAs were supplied by BIA, Inc. from existing databases as a special report to Economists Incorporated.

[10] The underlying assumption is that the ratio of average radio station revenue to average television station revenue in each DMA was approximately the same in 1975 and in 2000. No

As with radio and television stations, no estimate of newspaper advertising revenues was available for 1975. However, circulation information was available for both 1975 and 2000. Changes in relative circulation size among newspapers in a DMA can give some indication of the changes in their relative shares of advertising revenues. An HHI based on total weekly circulation was used to summarize newspapers' relative circulation size. The median circulation HHI in the sample DMAs decreased by about 573 points from approximately 7,113 to approximately 6,540.[12] See Table 3. Over the 21 sample DMAs, weekly circulation became less concentrated in 14 DMAs, became more concentrated in five DMAs, and was unchanged in two DMAs.

Table 3 also shows how the number of daily newspapers changed between 1975 and 2000. The number of daily newspapers increased in six DMAs, was unchanged in ten DMAs, and fell in five DMAs. The net effect across all the sample DMAs was to decrease the number of daily newspapers by four newspapers, or about 3 percent. This contrasts somewhat with the national trend over the same period, in which the number of daily newspapers fell by about 16 percent.[13]

Calculation of the overall concentration of advertising revenues among the three media in each DMA requires that each newspaper be assigned some revenue value, as was required for radio and television stations. The following procedure

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information was available on average station revenues in each DMA in 1975, but national station averages support this assumption.

[11] The HHI, or Herfindahl-Hirshman Index, is calculated as the sum of the squared shares of all participants.

[12] The decrease in concentration may be overstated slightly; there were a number of newspapers in 1975 for which circulation was not available and which were treated as zeros. A similar pattern emerges looking only at the eight DMAs for which there was no missing circulation data. Among these DMAs, median circulation HHI fell by 1,184 from 8,487 to 7,303.

[13] *2001 Facts About Newspapers,* Newspaper Association of America, Table 14.

was used for 2000. Duncan' s Radio Market Guide (2001 Edition) provided an estimate of newspaper advertising revenue for selected newspapers. Estimated revenue includes retail advertising, inserts, and real estate and automotive classified advertising.[14] Advertising revenue was then summed across all newspapers for which Duncan provided an estimate. This sum was divided by the total weekly circulation of the same newspapers to form an average revenue/circulation ratio. For each newspaper not among those estimated by Duncan, this ratio was multiplied by the newspaper' s average weekly circulation to get an estimate of advertising revenues.

The structural changes observable among newspapers are changes in the number of newspapers and their relative circulation size. To capture the effects of the changes, the ratio of revenue to weekly circulation calculated for each newspaper in 2000 was applied in 1975.[15]

Having estimated the advertising revenues of each commercial radio and television station and each daily newspaper in each DMA, the last step before calculating HHIs was to group together stations and newspapers under common ownership. Sources used to determine ownership were BIA, Editor & Publisher International Yearbook (1976, 2001), Broadcasting & Cable Yearbook (1976, 2001), and information on newspaper-broadcast cross-ownership supplied by NAA.

Using the procedures described above, HHIs were calculated for each sample DMA for 1975 and 2000. The results are shown in Table 4. Across the 21 DMAs in

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[14] Classified advertising that would be placed by an individual rather than a business is not included.

[15] The underlying assumption is that average advertising revenue per radio station and average advertising revenue per television station in each DMA changed in approximately the same manner as average newspaper advertising revenue per circulation between 1975 and 2000. No information was available on average station revenues or newspaper circulation per circulation in each DMA in 1975, but national averages support this assumption.

the sample, the median HHI decreased from 2,761 in 1975 to 1,614 in 2000, a change of 1,148. This change is very significant, as it represents a decrease in concentration of about 40 percent from the 1975 HHI levels. The change was mirrored by decreases in all but one of the individual DMAs. All but one the decreases were 500 or greater, and all but two of the decreases reduced 1975 HHI levels in the DMAs by at least 20 percent. The only increase was in Little Rock. Due to the closing of the Little Rock Arkansas Gazette, Little Rock went from two newspapers of roughly equal size in 1975 to a single newspaper with roughly the combined circulation, causing concentration to increase slightly.

Projecting the sample results to the nation as a whole, it appears that with possible rare exceptions, the level of concentration of newspaper and broadcast advertising revenues has decreased markedly from the levels that prevailed in 1975.

The cross-ownership rule itself is not responsible for the dramatic decreases in concentration shown in Table 4. In seven of the 21 sample DMAs, the sale of a newspaper or broadcast station caused a pre-existing cross-ownership to be broken up. The cross-ownership rule could have had some deconcentrating effect if it is assumed that the newspaper and broadcast stations would not have been sold separately in the absence of the cross-ownership rule. In practical terms, however, the effect was mostly negligible. In these seven DMAs, a hypothetical HHI was calculated as if the previously cross-owned newspapers and broadcast stations were still cross-owned in 2000. This assumption raised HHI levels in six of the DMAs by an average of just over 40 points. In only one DMA, Omaha, would the 2000 HHI have been significantly higher had the cross-ownership not been broken apart. The Omaha HHI would have been 2,340 instead of 1,804, a change of 536 points. The total drop in HHI in Omaha between 1975 and 2000 was 644 points, implying that factors other than the cross-ownership rule were

also responsible for considerable deconcentration. In all other sample DMAs, the cross-ownership rule had little or no effect on concentration.

Table 4 is useful in assessing the decrease in concentration levels since 1975, but it must be emphasized strongly that it should not be used to indicate actual concentration levels typical in the United States. First, as was pointed out previously, the HHIs presented here do not take account of competition from other newspapers, cable television, direct mail, yellow pages, outdoor and other forms of advertising. For this reason, these HHIs significantly overstate the level of concentration. Previous work on a sample of DMAs showed that concentration in a newspaper-radio-television-only market is decreased by an average of over 1,100 points when the other competing media are added.[16] Second, the sample of DMAs chosen was intended to represent the broad range of DMAs in the country by giving equal weight to all DMAs, regardless of size. In fact, most of the United States population lives in DMAs where concentration levels are relatively low.

Table 5 presents information that may be more useful as an overall picture of concentration levels among newspapers, television and radio. The first column presents HHIs from Table 4. As noted earlier, these HHIs were calculated assuming that each radio station and each television station in each DMA had the same share of advertising revenue. This assumption was necessary to make comparisons with 1975.[17] The second column presents HHIs calculated using available estimates of radio and television stations' actual advertising revenues.

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[16] See Economists Incorporated, *An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-Ownership Rules,* May 17, 1995, submitted in MM Docket No. 91-221, at Table 5, p. 32.

[17] For broadcast stations, an equal shares assumption resembles a capacity-based HHI, which is often used to measure concentration when firms can rapidly increase their share of sales and sales shares are volatile.

This may present a better picture of present concentration.[18] The next two columns show the 2000 population in each DMA and what share of population in the sample DMAs is found in each individual DMA. These shares can be used to calculate weighted average HHIs, as shown in the last two columns. By this measure, the average HHI is about 1,360 to 1,667. HHIs would be significantly lower if other competing media were included in the calculation.

Joint Ownership and Cooperation

Newspaper owners anticipate that closer cooperation between jointly-owned newspapers and broadcast stations can bring significant benefits.[19] Among the potential benefits are the following:

- Newspapers and broadcasters can more readily share leads. For instance, a newspaper may alert an affiliated broadcast station about a story that would not otherwise be covered by the station (or covered only at a later time).
- Newspapers and broadcasters can more readily share news. Information gathered by a newspaper reporter, for instance, could be used in a story reported on a broadcast news show.
- Newspapers and broadcasters can more readily share news personnel. For instance, a television meteorologist can prepare forecasts for the newspaper, a broadcast reporter can write an article for the newspaper, or a newspaper reporter can appear in a broadcast news show.

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[18] These levels are somewhat overstated because stations for which BIA provides no revenue estimate were assumed to have zero revenues; assigning some positive revenues to these stations would reduce HHIs.

[19] More detail is provided in Comments of the Newspaper Association of America to the NPRM.

- Newspapers can direct their readers to information available on the broadcast news, and broadcast stations can direct their audience to information available in the newspaper.
- Newspapers and broadcast stations can collaborate in operating and providing content to an Internet website.
- Newspapers and broadcasters can reduce duplication, resulting in lower costs and expanded services. For instance, some news events that would otherwise be covered by different reporters from the newspaper and the broadcaster might be covered by a single reporter. This could free up another reporter to cover an event that would otherwise not be covered.
- Newspapers and broadcast stations may also realize cost savings in such areas as administration and support services.

In any deliberation about whether to impose or retain a regulation, the basic test is whether the net benefits of the regulation outweigh the net benefits of not having the regulation. Examples of cooperation that can be achieved by jointly-owned newspapers and broadcast stations were provided above. Such cooperation is relevant to the benefits of removing the regulation if a) the likelihood of such cooperation is increased by cross-ownership or b) such cooperation can be achieved at lower cost through cross-ownership.

Firms can choose from among a number of forms of coordination available to them. Arms-length market transactions between two firms are very common. This can be as simple as a one-time purchase-sale exchange without any contractual relationship. For other types of coordination, firms may use contracts to lay out the responsibilities of each firm in the cooperative relationship. One form of contractual relationship is a joint venture—following contractual rules, firms cooperate to achieve a common objective. Internal non-market coordination is also very common. In this case, the cooperating parties are under

common ownership, and coordination tasks such as the assignment of responsibilities and monitoring are made within the firm.

Economists routinely assume that firms attempt to maximize profits. When two independent firms propose a merger or acquisition to achieve common ownership, it is possible that they are attempting to increase profits through the acquisition of market power. Antitrust analysis has been developed by the Department of Justice (DOJ) and the Federal Trade Commission (FTC) with the purpose of detecting and preventing acquisitions that would tend to reduce competition. It is crude and simplistic for the FCC to bar all newspaper-broadcaster joint ownership on the grounds that some combinations could reduce competition.

If firms choose joint ownership rather than some other form of coordination for reasons other than acquiring or exercising market power, it is presumed that the joint ownership is the most efficient way to organize and cooperate. Joint ownership can benefit society in at least two ways. First, the jointly-owned firm can conserve on the resources used to achieve coordination between what had been independent firms. The resources that are freed up are available for other productive uses in the economy. Second, there may be some cooperative projects which have an uncertain payoff. If the coordination costs are too high, the firms will simply not undertake the project. Thus, permitting coordination at lower cost can induce firms to undertake cooperative projects they would otherwise not undertake.

Joint ownership is not necessarily more efficient than other alternative forms of cooperation in every situation. For example, a recent trend in management has been outsourcing—replacing activities previously performed within the firm with goods and services purchased from independent suppliers. However, economists have identified a number of conditions which tend to induce firms to choose joint

ownership rather than other means of coordination such as arms-length market transactions.[20] Several of these conditions appear likely to be present for the type of cooperative projects that newspapers may undertake with a television station or radio station.

a) *Complete contracts are costly or impossible.* Firms use contracts to specify the actions that each agrees to take. In some cases, which actions would be most desirable will depend on future conditions that are unknown when the contract is written. To some extent, this can be addressed by including " contingencies" in the contract. This is difficult when the parties anticipate many different future states of the world that call for different actions. If there is a great deal of uncertainty about the future, it may be impossible to adequately identify the contingencies and agree in advance what actions should be taken. When the two firms are under common ownership, a single decision-maker can assess conditions as they arise and direct the firms to take the most desirable actions.

There is considerable uncertainty about the nature and extent of cooperation it will be desirable for a newspaper and a broadcaster to undertake. For this reason, it is difficult to write a contract that will specify in advance just what each party should do. It is quite possible that internal decision-making within a jointly-owned newspaper-broadcaster firm would have the flexibility to deal with developing situations, whereas firms involved in a contractual relationship would be unable to react appropriately or do so at a much higher transaction cost.

b) *Monitoring effort and performance is difficult.* In addition to uncertainty about the state of the world, firms seeking to cooperate may have difficulty determining

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[20] These conditions are discussed in Oliver Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (New York: The Free Press, 1975); Oliver Williamson, *The Economic Institutions of Capitalism* (New York: The Free Press, 1985); and Benjamin Klein, Robert G. Crawford and Armen A. Alchian, " Vertical Integration, Appropriable Rents, and the Competitive Contracting Process," *The Journal of Law and Economics*, October 1978, pp. 297-326.

whether each has actually performed as agreed. For example, suppose two firms agree that one will provide carbon steel plates to the other. Their agreement will probably include the quantity to be supplied, the dimensions of the plates, the quality or chemistry of the steel, the time and place at which delivery will occur, and the price to be paid. In such a transaction, as in numerous similar transactions throughout the economy, it is relatively easy for both the seller and the buyer to determine whether each has upheld its part of the bargain, because each part of the agreement is measurable and verifiable.

In contrast, when it is information, rather than some physical good, that one firm supplies to another, the firms will generally experience difficulties in setting up an appropriate contract and policing the terms of the contract.[21] If a broadcast station and a newspaper agree to supply news leads and information to one another, for instance, it is difficult for either party to measure the quality or quantity of the information provided. In such situations, a jointly-owned firm may be better suited to assure that both the newspaper and the broadcast station are forthcoming and cooperative in providing the information that is to be exchanged.

Note that the advantages that joint ownership offers in dealing with incomplete contracts and monitoring effort and performance would be reduced significantly if joint ownership were not coupled with some degree of joint management. If jointly owned firms were compelled to keep their management functions separate, there would be no one in a position to resolve unanticipated coordination problems as they arise, nor anyone able to observe the degree of effort of both cooperating parties from the inside. For this reason, imposing

[21] See Williamson, *Markets and Hierarchies*, pp. 86-7.

structural separation may eliminate some of the key advantages of joint ownership of a newspaper and a broadcast station.[22]

c) *Asset value depends heavily on a specific use.*[23] Firms sometimes make investments in assets whose value depends critically on the behavior of a key supplier or customer. When this occurs, one of the parties may be vulnerable to "opportunistic behavior" by the other. For instance, suppose that a supplier locates its plant close to its principal customer in order to reduce the supplier's transportation cost. Once the supplier's plant is built, the customer can threaten to stop purchases unless it receives a significant price reduction; if the supplier's only option is to sell to more distant customers at much greater cost, it may be forced to accept the low price, even if it cannot recover the cost of its investment at the low price. Unless the supplier can get protection against such opportunistic behavior, it may be unwilling to build a plant near the customer and so will lose the cost savings that proximity would have achieved. If contracts cannot provide adequate protection, the only firm willing to invest in the supplying plant may be the customer itself. In other words, a particular type of investment may only be undertaken if there is joint ownership.

Several forms of newspaper-broadcast cooperation discussed above require investments by one or both of the parties. A television news department, for instance, may devote resources to training newspaper staff in how to prepare and present a news story on air, since this requires skills that newspaper reporters may not otherwise have. The television news department may also devote resources in obtaining training in how to write or contribute to newspaper articles. All of these investments have little use to the television station outside of the cooperation with the newspaper. Most communities have

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[22] The Commission raises the possibility of structural separation in NPRM, ¶51.

[23] See Williamson, *The Economic Institutions of Capitalism*, pp. 95-6.

only one metropolitan daily newspaper, so there may be limited opportunities to use these skills in collaborating with another local newspaper. If the newspaper were to behave " opportunistically," the television station could get a much smaller return on its investment than it intended. Out of fear of such opportunistic behavior, a television station may be unwilling to make the needed investments. It may be that the only effective assurance against opportunistic behavior is for the newspaper and the television station to be jointly owned.

The cooperation that is anticipated between newspapers and broadcast stations is similar in some important ways to situations in which common ownership has been found to be desirable. One cannot say that cooperation will not happen without common ownership. However, one can say that, without common ownership, such cooperation may be at greater cost and be more limited. It is also possible that, in some instances, newspaper-broadcast cooperation will not be undertaken at all without common ownership.

These are the potential benefits from cross-ownership. Where markets are unconcentrated, there is no economic benefit from prohibiting cross-ownership. No general prohibition is warranted, and any competitive concerns that emerge can be handled by the appropriate antitrust agencies.

Conclusion

A structural analysis of 21 DMAs was undertaken to determine how competitive conditions among newspaper, radio and television have changed since the enactment of the cross-ownership ban in 1975. Within these consistently defined geographic areas, estimated ownership concentration of advertising revenues fell or was unchanged in 20 of the 21 areas studied, and changes were very substantial. These findings indicate that the structural conditions for advertising competition have improved, such that a broad prohibition is no longer needed to maintain competitive conditions at their 1975 level.

A proper analysis of how competitive structure would be changed by increased cross-ownership should be conducted by the antitrust agencies on a case-by-case basis. Such an analysis would take account of such factors as the relative sizes of the two entities that would be cross-owned, the concentration of advertising revenues among newspaper, television and radio as well as other competing media, and the proper definition of the relevant geographic market in that area. The competitive concerns are indistinguishable from the concerns raised in anti-trust analysis. No across-the-board prohibition on cross-ownership is warranted.

Newspapers and broadcast stations may improve their news product and realize cost efficiencies through sharing of news leads, sources, personnel and operations in various forms. Economic theory finds that the types of cooperation that appear most likely may not be undertaken, or undertaken only at greater cost, if a cross-ownership ban prevents newspapers and broadcast stations from being brought under common ownership.

Table 1. Sample DMAs and Rank

DMA	1997 Rank	2001 Rank
Chicago	3	3
Phoenix	17	16
Raleigh-Durham	29	29
Nashville	33	30
New Orleans	41	43
Little Rock-Pine Bluff	57	56
Flint-Saginaw-Bay City	62	64
Omaha	75	75
South Bend-Elkhart	85	87
El Paso	99	101
Lansing	106	111
Reno	119	110
Corpus Christi	128	129
Bakersfield	132	130
Lubbock	147	148
Panama City	159	159
Utica	166	168
Lake Charles	179	174
Great Falls	184	187
Charlottesville	199	192
Victoria	206	204

Table 2. Number of Commercial Radio and Television Stations in Sample DMAs

DMA	Commercial Radio Stations			Commercial Television Stations		
	1975	2000	Change	1975	2000	Change
Bakersfield	17	35	18	3	4	1
Charlottesville	6	12	6	1	1	0
Chicago	96	111	15	7	13	6
Corpus Christi	20	40	20	3	4	1
El Paso	23	26	3	3	7	4
Flint-Saginaw-Bay City	36	54	18	3	5	2
Great Falls	13	21	8	2	6	4
Lake Charles	7	13	6	1	2	1
Lansing	20	24	4	2	5	3
Little Rock	64	111	47	3	9	6
Lubbock	27	43	16	3	6	3
Nashville	100	137	37	4	10	6
New Orleans	44	56	12	4	8	4
Omaha	30	45	15	3	5	2
Panama City	17	32	15	2	5	3
Phoenix	60	117	57	6	15	9
Raleigh-Durham	74	87	13	3	9	6
Reno	22	38	16	3	6	3
South Bend-Elkhart	27	40	13	4	4	0
Utica	15	24	9	2	3	1
Victoria	3	7	4	1	2	1
Total	721	1,073	352	63	129	66
Median	23	40	17	3	5	2

Table 3. Number and Circulation Concentration of Newspapers in Sample DMAs

DMA	Number of Daily Newspapers			HHI of Weekly Circulation		
	1975	2001	Change	1975	2001	Change
Bakersfield*	2	2	0	10,000	9,284	-716
Charlottesville	1	1	0	10,000	10,000	0
Chicago*	32	23	-9	3,155	3,085	-70
Corpus Christi*	2	2	0	10,000	9,047	-953
El Paso*	4	2	-2	7,113	6,497	-616
Flint-Saginaw-Bay City	8	7	-1	6,974	6,589	-386
Great Falls*	2	2	0	10,000	8,592	-1,408
Lake Charles	1	3	2	10,000	6,540	-3,460
Lansing	3	3	0	4,901	5,000	99
Little Rock-Pine Bluff*	16	14	-2	3,175	5,778	2,603
Lubbock*	3	2	-1	8,291	8,470	180
Nashville	9	9	0	5,577	6,132	555
New Orleans*	7	7	0	9,249	7,085	-2,164
Omaha	7	7	0	6,306	8,234	1,928
Panama City	1	2	1	10,000	8,017	-1,983
Phoenix*	8	9	1	7,313	5,868	-1,445
Raleigh-Durham*	8	12	4	3,072	2,569	-503
Reno*	4	6	2	6,701	5,223	-1,479
South Bend-Elkhart*	9	9	0	3,739	2,627	-1,111
Utica*	4	5	1	6,952	3,816	-3,136
Victoria	1	1	0	10,000	10,000	0
Sample DMAs:						
Total	132	128	-4	-	-	-
Median	4	5	1	7,113	6,540	-573
DMAs without missing circulation information:						
Total	31	33	2	-	-	-
Median	2	3	1	8,487	7,303	-1,184

*1975 circulation was not available for one or more newspapers; missing circulation treated as zero for HHI calculation.

Table 4. Estimated Advertising HHIs in Sample DMAs

DMA	1975 HHI	2000 HHI	Change
Bakersfield	3,233	2,657	-575
Charlottesville	4,037	3,498	-539
Chicago	1,793	984	-809
Corpus Christi	4,070	2,379	-1,691
El Paso	2,761	1,723	-1,038
Flint-Saginaw-Bay City	2,531	1,559	-973
Great Falls	6,164	3,649	-2,515
Lake Charles	4,758	2,603	-2,155
Lansing	2,168	1,408	-760
Little Rock-Pine Bluff	1,355	1,399	44
Lubbock	2,972	1,635	-1,337
Nashville	1,874	1,133	-740
New Orleans	3,047	1,595	-1,452
Omaha	2,448	1,804	-644
Panama City	3,055	1,977	-1,079
Phoenix	2,172	1,521	-650
Raleigh-Durham	990	781	-209
Reno	2,017	1,454	-563
South Bend-Elkhart	1,843	1,250	-593
Utica	3,063	1,614	-1,450
Victoria	8,611	6,533	-2,078
Median	2,761	1,614	-1,148

Table 5. Weighted Average 2000 Estimated HHIs

	Estimated HHI				HHI x Population Weight	
DMA	Equal Shares	Estimated Shares	Population	Population Weight	Equal Shares	Estimated Shares
Bakersfield	2,657	2,756	571,000	2.0%	54	56
Charlottesville	3,498	3,555	148,000	0.5%	18	19
Chicago	984	1,326	9,018,000	32.0%	315	424
Corpus Christi	2,379	2,523	552,000	2.0%	47	49
El Paso	1,723	1,801	882,000	3.1%	54	56
Flint-Saginaw-Bay City	1,559	1,696	1,195,000	4.2%	66	72
Great Falls	3,649	3,768	167,000	0.6%	22	22
Lake Charles	2,603	2,928	247,000	0.9%	23	26
Lansing	1,408	1,664	661,000	2.3%	33	39
Little Rock-Pine Bluff	1,399	1,584	1,292,000	4.6%	64	73
Lubbock	1,635	1,909	403,000	1.4%	23	27
Nashville	1,133	1,371	2,156,000	7.6%	87	105
New Orleans	1,595	1,799	1,736,000	6.2%	98	111
Omaha	1,804	1,965	985,000	3.5%	63	69
Panama City	1,977	2,335	332,000	1.2%	23	27
Phoenix	1,521	2,172	3,779,000	13.4%	204	291
Raleigh-Durham	781	1,012	2,268,000	8.0%	63	81
Reno	1,454	1,549	610,000	2.2%	31	33
South Bend-Elkhart	1,250	1,672	855,000	3.0%	38	51
Utica	1,614	1,729	269,000	1.0%	15	16
Victoria	6,533	6,589	82,000	0.3%	19	19
Median	1,614	1,801				
Total	43,157	47,704	28,208,000	100.0%	1,360	1,667
Weighted Average	1,360	1,667				