II. Media Diversity Has Materialized Over the Last Quarter Century, and Removing the Ban Will Have No Adverse Effect on Viewpoint Diversity.

A. In 1975, the Commission Based Adoption of the Rule on Sheer Speculation That It Would Foster Diversity Rather Than in Response to Any Demonstrable Showing of Harm to Diversity from Common Ownership.

In 1975, the Commission asserted authority under the Communications Act to adopt a rule flatly prohibiting newspaper publishers, who hold no spectrum-related assets, from acquiring and operating broadcast stations in markets in which their newspapers are published. Pointedly, the Commission adopted this ban, not because it cited any "basis in fact or law for finding newspaper owners unqualified as a group for future broadcast ownership,"[47] but solely because "[w]e think that any new licensing should be expected to add to local diversity."[48]

Although well-intentioned, the Commission issued the 1975 rule conjecturing that it would improve diversity despite making a number of empirical findings on the record to the contrary. For instance, the FCC found that there generally was significant diversity or "separate operation" between commercially owned broadcast stations and newspapers.[49] Moreover, as noted above, a study of broadcast licensee programming conducted by the FCC's staff had found that newspaper-owned broadcast stations rendered more locally oriented service.[50]

On appeal, the United States Court of Appeals for the District of Columbia Circuit found that the FCC had adopted its new flat ban "without compiling a substantial record of tangible harm," and it noted that the rule was based on a record that included "little reliable 'hard'

[47] *Second Report and Order*, 50 FCC 2d at 1075.

[48] *Id.*

[49] *Id.* at 1089.

[50] *Id.* at 1078 n.26.

information."[51] The United States Supreme Court, in affirming the FCC's ban, similarly commented on the "inconclusiveness of the rulemaking record,"[52] noting that the FCC "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."[53]

B. Since 1975, the Media Marketplace Has Experienced an Explosive Growth in Diversity; the Availability of a Wide Variety of Outlets and Owners in Media General's Converged Markets Reflects This Increase.

The *NPRM* is replete with information demonstrating, through national statistics, how the media marketplace has changed dramatically since the ban on newspaper/broadcast cross-ownership was adopted in 1975.[54] The *NPRM* also acknowledges, as the FCC did when it first adopted the ban, that "'[t]he Commission is obliged to give recognition to the changes which have taken place and see to it that its rules adequately reflect the situation as it is, not was.'"[55]

In chronicling the changes that have occurred since 1975, the *NPRM* documents the growth that has occurred in outlets at both the national and local levels. As it notes, the local radio and television stations in the nation have increased by over 60 percent since 1975, with radio stations increasing from 7,785 as of January 1, 1975 to 12,932 as of June 30, 2001, and television stations increasing from 952 to 1,678 stations over the same period.[56] The availability

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[51] *Nat'l Citizens Comm. for Broad. v. FCC*, 555 F.2d 938, 944, 956 (D.C. Cir. 1977), *aff'd in part and rev'd in part on other grounds*, 436 U.S. 775 (1978) ("*NCCB*").

[52] *NCCB*, 436 U.S. at 795.

[53] *Id.* at 786.

[54] *E.g.*, *NPRM* ¶¶ 8, 9, 11.

[55] *Id.* ¶ 1 (citation omitted).

[56] *Id.* ¶ 9. In comments being filed today, Media General understands that the NAA is providing extensive and detailed information about the growth in media, particularly at the national level. Media General hereby incorporates Appendix I of the NAA comments by reference. As a result,

of cable also has increased, growing from 13 percent of television households in 1975 to 67.4 percent last year.[57] The number of channels available on the cable systems has also increased, with 99 percent, or virtually all subscribers, now able to receive 30 channels or more, and the majority, or 68 percent, of cable subscribers now able to receive at least 54 channels.[58]

As the *NPRM* also notes, the programming services available over these outlets also have grown. Rather than just three national television networks, as was the case in 1975, there are now seven, along with two (and soon three) national Spanish-language networks.[59] National cable networks have emerged as powerful players, and regional cable networks have begun to attract viewers around the country.

Not only has there been growth in the electronic services that were available in 1975, but the FCC has authorized a myriad of new services that now compete with the pre-existing players. Full-power television stations have been joined by low-power television stations and Class A television stations as providers of free over-the-air broadcast programming. Other providers of subscription video services now compete with cable -- principally DBS and, to a more limited

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Media General will provide only a brief description of the profusion at the national level, mainly as background for the information Media General has gathered about the growth of media at the local level in its six commonly owned markets, which is presented in Appendices 9 through 14. At the beginning of each of Appendices 9 through 14, Media General has included a summary of the media outlets included in each of its six co-owned markets. The summary presents totals on the availability of outlets of the following types of media: television, radio, LPFM, cable, direct broadcast satellite ("DBS"), print, wireless cable and the Internet.

[57] *Id.* ¶ 11.

[58] *Id.*

[59] *Id.* ¶ 9. *See also* Louis Chunovic, *Advertising Has More of a Spanish Accent*, Electronic Media, Oct. 15, 2001, at 3.

extent, wireless cable systems. Other parties are seeking authority to provide video over portions of the spectrum that have not previously been used to provide video programming.[60]

Unhindered by government regulation, the Internet also has become a significant source of both national and local news and information. Although still in their infancy, local and national Internet sites are beginning to offer audio and video services, and they add a plethora of new choices for advertisers.[61]

At the same time, as the *NPRM* notes, changes in the newspaper industry have been "more mixed." While the number of daily newspapers has declined by 19 percent and experienced a decline in circulation of 8 percent, the number of smaller, more targeted newspapers has more than doubled, while their circulation has almost trebled.[62]

To help address questions raised in the *NPRM*, Media General over the last few months has conducted an extensive survey to catalog the other media outlets available in the six markets described in Section I in which it owns both a newspaper and television station. As noted above, these markets range in size from Tampa, which is the 14th ranked DMA, to Panama City, Florida, which is the 159th DMA; this survey accordingly provides a valuable overview of media conditions across all market sizes. For some of the media, such as radio, television, DBS, and print outlets, information as to the number of outlets and identity of ownership was readily available. Information on their content, such as with low-power and low-power FM ("LPFM") stations, was a little harder to derive, although applicant answers to questions on FCC forms allow a determination of whether the stations rebroadcast another full-service station. Similarly,

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[60] Bruce Branch, *MDS Wants FCC To Auction Spectrum Sought by Northpoint*, Communications Daily, Oct. 16, 2001.

[61] The profusion of Internet information is discussed more fully in Section II.C., below.

[62] *NPRM* ¶ 10.

while it was relatively easy to identify the majority of cable providers in a DMA, obtaining information about their channel offerings was more difficult and was compiled from *TV Guide* and web site listings, as well as by telephone requests of cable operators, as necessary. Wireless cable, clearly an industry with its frequencies in transition to other uses, proved very difficult to survey. Finally, cataloging locally available Internet sites was difficult because of their virtually unlimited and ever-expanding number.

The information Media General has assembled demonstrates that each of its six co-owned markets has experienced the same explosion in media growth that has characterized the United States media market as a whole. As is also true of the national scene, diversity in each of Media General's co-owned markets has been enhanced greatly by the entry of numerous new media services that were not present in 1975. Most importantly, review of the entire panoply of media offerings in each market -- both traditional services and new outlets -- shows clearly that each market benefits from extensive pluralism and diversity both in terms of availability of outlets and ownership of those sources.

Broadcast Television. As shown by the chart attached as Appendix 6 and the market-by-market listings attached as Appendices 9 through 14, the choices of free over-the-air broadcast video services have grown extensively since 1975. The number of broadcast television outlets in all of Media General's co-owned markets has increased since 1975; the number of stations has at least doubled in four of the six markets.[63] The Tampa DMA -- where there are now 12 commercial and two noncommercial television stations -- experienced the greatest growth in the number of television outlets, whereas the Florence, South Carolina, and Panama City, Florida,

[63] In the Tri-Cities DMA, the number of outlets increased from five to seven. In the Columbus, Georgia DMA the number of commercial television outlets increased from three to five, but the number of noncommercial television stations decreased from three to two.

DMAs each experienced the greatest percentage increase, each growing from two to a total of six broadcast television outlets in the last quarter century. As shown by the summary sheets at the front of each market's appendix, each market also has a variety of television owners: Tampa has 14 separate television owners; Roanoke and Columbus each have seven different owners; Columbus and Panama City each have six different owners; and Florence has five different owners.

Radio. As shown by the chart attached at Appendix 7A, the number of radio stations in each of Media General's co-owned markets has increased greatly since 1975. While the redefinitions of radio markets over the last quarter century certainly make direct comparison of the number of stations per market difficult, the data plainly show that these large groups of radio stations are also highly diverse. As shown in the summary sheets at the front of each market's appendix, the overall number of stations in each market ranges from a high of 43 commercial and six noncommercial radio stations in the Tampa radio metro market, to a "low" -- if it can be called that -- of 16 commercial and three noncommercial radio stations in the Columbus, Georgia radio metro market.[64] In terms of ownership and content, the markets are also extremely diverse. The Tampa radio metro market has 27 owners and 23 different radio formats; Roanoke has 22 owners and 19 different radio formats; Tri-Cities has 23 owners and 18 different radio formats; Florence has nine owners and 14 different radio formats; Columbus has eight owners and 15 different radio formats; and Panama City has seven owners and 15 different radio formats.

[64] The radio charts included in each of the market-by-market sections in Appendices 9 through 14 list a slightly larger number of stations than are included in the *2001 Broadcasting & Cable Yearbook* as being in each locale's "radio metro market." This results from the fact that radio charts are based on BIA's *2001 Investing in Radio*. For each market, that publication lists not only the stations deemed to be in the radio metro market, often a somewhat smaller area than a television DMA, but also stations that register an audience share that BIA deems to be

Cable Television. Of the more traditional media that were present in the Media General co-owned markets in 1975, cable has experienced the greatest growth over the last quarter century. All of the Media General markets had cable penetration under 30 percent in 1975, and now all markets have cable penetration rates higher than 65 percent.[65] Specifically, Tampa's cable penetration has skyrocketed from 13 percent in 1975 to 74 percent today; Tri-Cities has gone from 24 to 73 percent; Roanoke from 12 to 65 percent; Florence from 24 to 70 percent; Columbus from 27 to 74 percent; and Panama City from 27 to 65 percent.[66]

This dramatic increase in cable penetration has spurred a corresponding growth in program offerings by all the different cable systems available in each co-owned market. As shown by the market-by-market charts of cable systems included in Appendices 9 through 14, the large majority of these systems now offers more than 54 different channels. Media General was most interested in learning about the availability of local origination and leased access channels. Although it was difficult to obtain the channel listing for such a wide array of systems, the lists Media General was able to compile from *TV Guide* and direct inquiries to the systems confirm that a substantial majority of the systems offer local origination and leased access channels, and that, of those that do, a significant majority offer more than two channels. Notably, in Media General's two smallest markets, Columbus, Georgia, and Panama City, Florida, an even greater proportion of systems offer such channels and frequently with more channels on average than in the larger markets.

"significant" in the market. Depending upon the size of the market, this share will vary, but, according to BIA, no matter what the market size, it will always be at least a share of one.

[65] Appendix 6.

[66] *Id.*

New Services. Like the national experience reviewed in the *NPRM* and in the NAA filing, the inauguration of new media has brought a profusion of new content sources to Media General's six co-owned markets. Each market now receives local over-the-air video programming from Class A and low-power television stations, providers that did not begin to offer service until the 1980s. All the DMAs have at least one Class A television station; Tampa has six, and Florence has three. The number of low-power television stations is much greater, with Tampa and Roanoke each having 12; Tri-Cities, Florence, and Panama City each having eight; and Columbus two. Based on applications filed with the FCC, a majority of these stations report that they do not simply rebroadcast the signals of other full-time stations. Thus, they can be counted as truly new local voices. As shown in the summary sheets at the front of Appendices 12 through 14, there are also numerous applicants who have sought authority to offer low power television service in the three smallest Media General co-owned markets. Each of the nation's two DBS providers, DirecTV and Dish Network, also reach all of Media General's co-owned markets, bringing viewers a choice between two different satellite-delivered slates of one hundred-plus channels and a subscription alternative to cable television.[67]

On the audio side, listeners in Media General's co-owned markets soon can look forward to soon receiving hundreds of channels of audio programming not only from cable and DBS operators but also from the FCC's recently inaugurated low power FM service. Intended as a

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[67] *See* DBS Charts in Appendices 9 through 14. Of the six markets, only Tampa receives delivery of local television broadcast service in the line-up of DBS channels.

As shown in the Wireless Cable Charts included in Appendices 9, 10, and 14, while Tampa, Roanoke, and Panama City have wireless cable providers offering subscription video services over MDS and MMDS channels, most wireless cable frequencies in the markets seem to have been taken out of service or are being sold to providers who hope to convert them to data or Internet-related uses. *E.g.*, Sprint Press Release, Sprint to Terminate ION Efforts; Announces Additional Actions (Oct. 17, 2001), available at http://www3.sprint.com/PR/CDA/PR_CDA_Press_Releases_Detail/1,1579,3921,00.html.

community-based new media, low-power FM stations will bring a wealth of new local programming to Media General's markets. In two of the markets, Roanoke and Tri-Cities, construction permits have already been issued for the new service.[68] A review of the FCC's database of the many small communities in which applicants have sought to establish LPFM stations reveals that 37 applications have been filed in the Tampa market; 10 in Columbus; five each in Roanoke, Tri-Cities, and Panama City; and three in Florence.[69]

Of all the new media entrants that are bringing outlet and content diversity to consumers in Media General's co-owned markets, the Internet offers the largest volume of news and new information. Nonexistent when the newspaper/broadcast cross-ownership ban was adopted in 1975, the Internet has grown rapidly over the last decade, bringing viewers access not only to information services offered on a national basis, but as shown immediately below, a host of local information so diverse and extensive that it approximates, from an information standpoint, the establishment of at least one newspaper, if not more, in each of Media General's markets.

C. Locally Established Internet Sites Create a Substitute for Local Newspapers and Offer a Very Inexpensive and Quick Method for Reaching Consumers in Every Market with General Interest as Well as Specialized Niche Information.

In all of its markets, and particularly in its co-owned markets, Media General has seen a recent and rapid rise in the number of locally created Internet sites. To demonstrate this profusion, Media General collected and categorized scores of sites available, on a local basis, in each of its converged markets. From a content standpoint, these sites can be grouped into many

[68] Two construction permits have been issued in Roanoke and one in Tri-Cities. Summary sheets at the beginning of Appendices 10 and 11.

[69] Television Charts, Appendices 9 through 14.

of the same categories or section headings as appear in a local newspaper.[70] These sites offer a wealth of information about their local communities. As many as one-third of the sites offer continuously updated locally-generated content. Some of the information is of general interest, such as news, weather and traffic information; other sites offer news clearly designed for niche audiences, such as fishermen, bicyclists, wine enthusiasts, antique collectors, and racing car fans. The news on some sites covers recent events, provides information about upcoming occasions, or provides specific and very targeted material intended to appeal to niche groups. One local site in Roanoke even offers a daily crossword puzzle similar to that found in the local newspaper.[71]

In the aftermath of the September 11 terrorist attacks, many of the sites, as annotated in the Internet Charts included in Appendices 9 through 14, have offered information about subsequent events and developments related to the attacks, such as updates concerning anthrax incidents. Other sites, as also annotated in the charts, while not offering daily or weekly news updates on post-September 11 events, provide a sounding board for the expression of local sentiment and opinion concerning recent events.

In each market, many sites allow for the exchange of ideas or discourse on current political issues in general. Sites established by traditional political parties include opinions on candidate elections and other ballot initiatives. More specialized sites address gay rights, racial issues, social apartheid, and specialized tax issues. Numerous sites allow the posting of opinions.

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[70] Internet Charts, Appendices 9 through 14. These categories include local news/weather and media; business; chambers of commerce; classifieds; civics clubs; culture, recreation and sports; education; emergency services; government; home services/food; hospitals and health; libraries; political parties; religion; style and society; tourism; transportation and infrastructure; utilities; and miscellaneous.

[71] *See* www1.roanoke.com/freetime/cross/crossword.

A sizeable number of the local sites, in some markets a majority, also include advertisements for local products and services. In each Media General co-owned market, at least five local sites serve as a medium for individuals and businessmen in the community to post for-sale notices, functioning almost identically to the classified sections of the newspaper. With their general advertisements and classified offerings, these sites further qualify the Internet as a surrogate for the conventional local newspaper.

Moreover, statistics show that a large percentage of households in the states in which Media General's markets are located have computers and access to the Internet. The percentages of households with computers range from 43.3 percent in South Carolina to 53.9 percent in Virginia; the percentage of households with Internet access range from 32.0 percent in South Carolina to 44.3 percent in Virginia.[72] Most importantly, these computer and Internet access percentages show that more people in Media General's DMAs now have access to the Internet than households in these markets had to the then relatively new medium of cable television in 1975, when the archaic newspaper/broadcast cross-ownership ban was adopted.[73] Media markets today clearly offer more alternatives to broadcast and newspapers than consumers had in 1975.

In relying upon the diversity goal as the primary rationale for adoption of the newspaper/broadcast cross-ownership ban, the FCC addressed the importance to American democracy of maintaining a multiplicity of opinions as well as a free flow of information. Diversity, according to the Commission, was "a vitally important matter, for it is essential to a democracy that its electorate be informed and have access to divergent viewpoints on

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[72] Appendix 8.

[73] *Compare* Appendix 8 *with* Appendix 6.

controversial issues."[74] The Commission has sought, as the *NPRM* reminds, "to ensure that the public has access to a diversity of viewpoints to promote First Amendment values."[75]

Combined with the proliferation since 1975 of traditional and other new service entrants, this multiplicity of locally generated and available sites -- both general in nature and of interest to niche audiences -- assures that the Commission's concerns over ownership and viewpoint diversity will be met. Internet sites are very inexpensive and quick to establish,[76] and this ease of entry is important in further ensuring diversity. Once established, Internet sites are also relatively inexpensive to maintain.[77] Given the ease of entry and low barriers to the provision of continued service, economies of scale become unimportant, and profusion is further guaranteed. In short, any speculative and hypothetical concern that the FCC may have had in 1975 about the need to protect diversity through adoption of the newspaper/broadcast cross-ownership ban has been quashed by the advent of the Internet. This new technology, in itself, has ensured that the Commission's concern over the availability of divergent and antagonistic viewpoints will be met. Because of the Internet, the Commission has even less justification for refusing to completely eliminate the newspaper/broadcast cross-ownership ban.

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[74] *Second Report and Order*, 50 FCC Rcd at 1074.

[75] *NPRM* ¶ 14.

[76] For example, Yahoo offers a full-service package that includes domain name registration, web site creation and hosting facilities, and 10 e-mail accounts to match the domain name registration. This service costs $14.95 for set-up and $14.95 a month to maintain. A site can be established within minutes. *See, e.g., Yahoo! Website Services,* at http://website.yahoo.com (last visited Nov. 29, 2001).

[77] *See* note 76, *supra*, and Create-a-Website, at http://www.createawebsite.net/hosting (last visited Nov. 29, 2001) (offering set-up for $25.00 and hosting for $14.95 a month).

D. Media General's Experience in Operating Co-Owned Newspapers and Television Stations as Well as FCC Precedent Addressing Structural Ownership Regulations Show That There Is No Correlation Between Common Ownership and Any Loss in Diversity of Viewpoint.

In the *NPRM*, the FCC notes that, while the number of outlets in a market can be important for analyzing diversity, the Commission traditionally has focused on the number of different owners in a market, as opposed to the number of outlets, because the FCC has assumed that diversity of ownership will lead to diversity of viewpoint.[78] This concern is not new. Prior to adopting the newspaper/broadcast cross-ownership ban, the FCC sought and obtained comments on the extent to which commonly owned media enterprises maintain separate approaches to content development and dissemination.[79] The comments demonstrated that the Commission's assumption that ownership diversity leads to viewpoint diversity was ill-founded. Since then, the FCC, in a number of more recent rulemaking proceedings, has acknowledged that this assumption is not valid and has acted to relax or repeal structural ownership regulations. Media General's "real world" experiences also demonstrate that there is no correlation between common ownership and loss in diversity of viewpoint. In light of this FCC precedent and confirming evidence from the industry, the FCC should have no concerns about eliminating the archaic newspaper/broadcast cross-ownership ban.

1. Second Report and Order.

In 1975, in adopting the newspaper/broadcast cross-ownership ban, the FCC acknowledged that "most" of the commenting parties who had commonly owned newspaper and broadcast facilities reported that their stations and newspapers had separate management,

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[78] *NPRM* ¶ 16.

[79] *Second Report and Order*, 50 FCC Rcd at 1059.

facilities, and staff, including the news staffs.[80] "Some even claim that because they have separate editorial boards they present editorials in one outlet which are opposed in the other."[81] The parties also pointed to "built-in protections" against common ownership resulting in common expressions of viewpoint, among them the professionalism in journalism and existence of industry practices and ethical codes that transcend employer-employee loyalties and result in independence among journalistic staff members and editors.[82] As the FCC noted, these same parties commented that, if commonly owned outlets had prevented or stymied the dissemination of views, the public would have been complaining vociferously about such abuses. A number of parties observed that the silence from the public on this point was the most telling argument against the need for the proposed restrictions.

2. FCC Precedent.

Its own hypotheticals about the effect of common ownership on viewpoint diversity aside, the FCC has never demonstrated a non-conjectural link between its structural ownership limitations and viewpoint diversity. Over the last decade, faced with growing evidence that common ownership produced tangible public interest benefits and that its continued restrictions *suppressed* those benefits, the FCC has repealed and relaxed various ownership regulations and in the process has noted that it does not expect the changes to harm the diversity of viewpoints. In fact, in the course of adopting these modifications, the FCC began to acknowledge that common ownership may lead to *increased* diversity of content and viewpoint.

Most recently, the FCC came to that conclusion in its Dual Network Rule proceeding, when it found that common ownership of broadcast networks creates rather than eliminates

[80] *Id.*

[81] *Id.*

[82] *Id.* at 1059-60.

incentives to diversify programming and serve niche interests and minority audiences. Specifically, the FCC found, much as Media General has observed with radio changes in its markets,[83] that with combined ownership, content options frequently increase:

> We also agree with commenters that a major network and an emerging network under common ownership would have a strong economic incentive to diversify their program offerings, particularly by increasing service to minority or niche tastes and interests. A single broadcast network has the incentive to attract the largest possible audience with mass appeal programming (which is similar to the programming offered by its rivals). However, if two networks are owned by a single entity, the entity has an incentive to attract an array of viewers with differing interests to produce the largest combined audience for the overall enterprise. This allows for the major network to pursue mass tastes, with the smaller network programming to pursue minority and niche tastes.[84]

Over a decade earlier, the FCC relaxed its previous prohibition on joint ownership of same-market television and radio broadcast stations -- the "one-to-a-market rule" -- finding that the relaxation should not have a significant impact on viewpoint diversity.[85] In taking this step, the Commission noted that the comments filed in the proceeding showed that "the joint ownership of two or more media outlets in the same market does not necessarily lead to a commonality of viewpoints by those outlets."[86] Commenters had shown that group owners of broadcast stations, even in the same market, do not necessarily disseminate a "monolithic viewpoint" at all their outlets. A CBS study, in particular, showed that in 45 percent of the instances in which CBS-owned same-market radio and television stations made endorsements in

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[83] *See* Section II.D.3, below.

[84] *Amendment of Section 73.658(g) of the Commission's Rules – The Dual Network Rule, Report and Order*, 16 FCC Rcd 11114, 11131 (2001) ("*Dual Network Rule Order*").

[85] *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules, Second Report and Order*, 4 FCC Rcd 1741, 1744, *recons. denied in part, granted in part*, 4 FCC Rcd 6489 (1989) ("*1989 One-to-a-Market Order*").

[86] *Id.*

electoral races over a three-year period from 1980 to 1983, they endorsed opposing candidates.[87] Some of these differing endorsements came in such major political races as a gubernatorial contest in California, a gubernatorial primary in New York, and a Chicago mayoral primary.[88] CBS also reported that its commonly owned stations took different editorial stances in editorials on important issues such as abortion and school prayer.[89] NBC submitted similar comments noting that its stations made editorial and programming decisions independently of other co-owned outlets, a procedure that produced a difference in operations.[90]

The FCC has acknowledged similar comments and reached similar findings in the context of relaxing the radio local ownership rules. In first proposing that radio owners be allowed to own more than one AM and one FM station per market, the FCC expressed the following opinion:

> On a local level, we 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 need not necessarily decrease diversity of programming and, to the contrary, may encourage it; the Commission has noted that "it is indeed possible to have greater viewpoint diversity than there is ownership diversity."[91]

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[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Revision of Radio Rules and Policies,* 6 FCC Rcd 3275, 3276 (1991) (citation omitted) ("*Revision of Radio Rules NPRM*"). The *Revision of Radio Rules NPRM* also noted that, while the FCC had already had the opportunity to demonstrate the proof of this theory in the cable context, it had not yet had the opportunity to confirm it in the radio marketplace. *Id.* at 3276 n.12.

Shortly thereafter, in relaxing the local radio ownership rules, the FCC noted that the commenters in the proceeding, including the Federal Trade Commission, had agreed with the proposition in the *Revision of Radio Rules NPRM* that increased concentration will not harm diversity because a single owner is likely to try to program different stations to appeal to different audience segments so that total audience size is maximized, unlike competing stations, which are likely to try to reach the same core audience.[92] Again, Media General's observation of radio stations in its co-owned markets has proven this prediction to be true.

3. Real World Experiences.

The experiences of parties that today commonly own and operate newspapers and broadcast facilities echo those of the commenting parties from a quarter century ago and the more recent FCC proceedings and show that any concern the Commission may have had about viewpoint suppression when it adopted the newspaper/broadcast cross-ownership ban, that concern has not materialized. Media General's goal or mission is not to have its commonly owned journalistic properties in each market assume identical personalities and take identical positions and stances on important issues of the day. In convergence, each outlet has chosen to maintain separate news and editorial staffs.

While news managers at each outlet are aware of what the others are doing, they are free not to follow the other's approach in covering the news if they want to do something entirely different. Each is aware of the others' direction, but not controlled by them. Media General's outlets, no matter what their method of disseminating content, operate separately in developing that content.

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[92] *Revision of Radio Rules and Policies, Report and Order*, 7 FCC Rcd 2755, 2771, *recons. granted in part, denied in part*, 7 FCC Rcd 6387 (1992), *further recons. granted in part, denied in part*, 9 FCC Rcd 7183 (1994).

Media General does not have a company-wide editorial policy. As illustration, among the Media General newspapers in Virginia, some endorsed Mark Earley in this year's gubernatorial election, and some endorsed Democrat Mark Warner.[93] At least one made no endorsement at all. Today, few broadcast outlets editorialize about candidates or political positions, so, as a practical matter, the staffs of the commonly owned broadcast and newspaper outlets do not currently discuss editorial decisions or candidate endorsements.

To Media General, convergence does not equal consolidation. The Media General professionals at the commonly owned properties recognize and respect the diversity of opinion within the organization and the choices of the other party's journalistic approach. Instead, from Media General's standpoint, convergence is about sharing ideas and resources to improve the company's core journalistic product and best serve the reader and viewer.

Available information regarding how other companies practicing convergence handle internal communications between news and editorial staffs at their co-owned outlets in the same markets suggests that, given principles common to the journalism profession, the other companies similarly maintain separate staffs. For example, Tribune Vice President/Intergroup Development David Underhill reports that his company "insists that its properties remain editorially separate, even when it means properties owned by Tribune get slammed by its own newspapers. 'There's no question that it poses new sets of challenges, but if you get back to basics, it's pretty clear-cut,' he says."[94]

To examine further the effect of common ownership on content diversity, Media General surveyed the recent history of radio ownership in its six converged markets. As shown in

[93] *Compare, e.g., Earley for Governor*, Richmond Times-Dispatch, Oct. 28, 2001, at F2, with *Mark Warner, for our future*, Danville Register & Bee, Nov. 4, 2001, at 10A.

Appendix 7B, since relaxation of the radio local ownership rules following adoption of the 1996 Telecommunications Act, Media General has witnessed a decline in the number of radio station owners in each of its converged markets. As also shown by Appendix 7B, in none of the six markets did the decline in ownership diversity result in a decline in format diversity. In four out of the six markets, the number of formats actually increased despite increased concentration of ownership. In Roanoke and Tri-Cities, the number of formats remained the same despite the decreased number of owners. In these examples, common ownership increased the variety of content available to radio listeners.

Since the Commission has already acknowledged in other contexts that its conjecture that ownership diversity leads to content diversity is not valid, it is certainly time for the FCC to reexamine this speculation as the foundation for banning co-owned newspaper and broadcast properties. This need is even more compelling since, as the FCC acknowledged in 1975 when it adopted the ban, it had no evidence of any danger to diversity. The comments and evidence that the FCC has amassed in other proceedings, as well as Media General's experience in its co-owned markets, show that the assumption is equally invalid in this context. The ban should be repealed.

E. The FCC's Concern Over the Effect Newspaper/Broadcast Ownership May Have on Diversity Is Misplaced and, in Any Event, Cannot Be Measured.

1. The Ban on Newspaper/Broadcast Cross-Ownership Is Inconsistent with Broadcasters' Acquisitions of Unregulated Assets Related to Broadcasting or Licenses for Other Parts of the Non-Broadcast Spectrum.

When the Commission first proposed the newspaper/broadcast cross-ownership ban, it acted out of a hope that the regulation would foster a diversity of ownership and in reliance on its

[94] Lucia Moses, *TV or Not TV? Few Newspapers Are Camera-Shy*, Editor & Publisher, Aug. 21,

authority to regulate the scarce broadcast spectrum. Other than the newspaper/broadcast cross-ownership rule and the television/cable cross-ownership rule, which is now being challenged in the courts,[95] the FCC's media structural ownership regulations apply only to parties that utilize broadcast spectrum. The rules limit the number of stations that can be held per market, owned in combination with other stations, and, for television, possessed on a national basis.

Manifestly, such rules should not be applied to the ownership of broadcast spectrum and unregulated assets, such as newspapers. Indeed, the FCC does not flatly prohibit investments, in combination, in broadcast licensees and any number of other assets that may relate closely to broadcasting, such as advertising agencies, representation firms, broadcast equipment manufacturers, and broadcast networks and program suppliers.[96] Moreover, the FCC does not prohibit broadcast licensees from holding licenses for other arguably scarce spectrum used to provide different services. The licensees of wireless cable and DBS properties are free to own broadcast outlets and vice versa. Broadcast licensees are also allowed to hold cellular, specialized mobile radio, personal communications service, and other licenses used to provide wireless telephony.

2000, at 23.

[95] *Fox Television Stations, Inc. v. FCC*, No. 00-1222 (D.C. Cir. filed June 19, 2001), consolidating appeals of the Commission's decisions to retain the national television ownership cap and the television/cable cross-ownership rule. The FCC's authority to regulate television/cable cross-ownership is arguably much stronger than its authority to regulate newspaper/broadcast cross-ownership, given cable's use of Cable Antenna Relay Service frequencies for the delivery of programming to systems and the much more direct competition it offers to broadcast television stations through its delivery of video programming.

[96] Although at one time the Commission restricted broadcasters from owning sales representation firms and advertising agencies, it removed those restrictions in the 1980's, concluding that market forces, antitrust agencies, and civil courts are better equipped to prevent the anti-competitive practices that were targeted by these prohibitions. *See Policy Statement in MM Docket No. 87-154*, 4 FCC Rcd 2208 (1989); *Policy Statement and Order in the Matter of Elimination of Unnecessary Broadcast Regulation*, MM Docket 83-842 (FCC 85-25), 50 Fed. Reg. 5583 (1985).

A rule that prohibits co-ownership of broadcast outlets and otherwise unregulated newspaper assets, based on a rationale originally as tenuous and now as discredited as the possible enhancement of diversity of ownership and viewpoints, cannot be allowed to stand. This is particularly true when the FCC allows broadcast licensees to own other unregulated assets that are much more closely related to the provision of broadcast services than are newspapers. Further, if the FCC truly had a concern over possession of scarce spectrum, a rationale now much more discredited than the diversity rationale,[97] it should not allow broadcasters to own other services and occupy other portions of the spectrum where frequencies also are scarce. Not only does discreditation of the diversity and scarcity rationales compel elimination of the newspaper/broadcast cross-ownership ban, sheer logic also dictates its repeal.

2. The FCC Lacks a Valid Method for Measuring Diversity.

As shown above, given the growth in existing and new media services, the FCC's conclusions in other ownership proceedings, and the real world experiences of newspaper/broadcast owners like Media General, any concern the FCC had in 1975 over diversity of ownership and viewpoints is no longer justified. Moreover, the FCC does not have a valid method to measure diversity and gauge whether a particular prohibition on ownership begins to enhance it. Lacking a rational method for establishing a harm or for measuring the results of its proposed remedy, the FCC cannot act to bar otherwise permissible ownership combinations.

To date, the FCC's only means for measuring diversity of viewpoints has been its "voices" test. First announced in 1989 when the FCC relaxed its "one-to-a-market rule," the test seeks to measure not just the number of different outlets in a market, but also the number of

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[97] *See* Section VI.A., below.

different owners or "voices," in an attempt to quantify the number of viewpoints that may be expressed.[98] In the case of the liberalized "one-to-a-market rule," the FCC allowed combined ownership of radio stations and a television station in the same Top 25 market if it could be shown that, following the acquisition, at least 30 other independent "voices" remained in the market. "Voices" were defined as television licensees in the relevant Area of Dominant Influence, a television audience measurement area, and radio licensees in the relevant television metropolitan market, a somewhat smaller geographic area utilized in audience measurement.[99] No other media services were counted as "voices."

In 1999, the FCC announced new rules for local television ownership that also employed a "voices" test. In liberalizing its former ban on television duopoly, the FCC adopted a new rule permitting the common ownership of two television stations within the same DMA, as defined by Nielsen Media Research, and with overlapping Grade B signal contours, if (a) at least eight independently-owned and operating full-power television stations would remain in the DMA following the proposed combination and (b) the two merging stations were not both among the top four-ranked stations in the market, as measured by audience share (the "Eight Voices Test").[100] In contrast, at the same time and in the very same order, the Commission adopted rules for radio/television cross-ownership that counted as voices not only independently owned and operating full-power television stations, but also (1) all independently owned and operating radio stations, as had been the case under the former "one-to-a-market rule"; (2) independently owned English-language daily newspapers published in the DMA having a circulation exceeding

[98] *1989 One-to-a-Market Order*, 4 FCC Rcd at 1742-45.

[99] *Id.* at 1751.

[100] *Review of the Commission's Regulations Governing Television Broadcasting and Television Satellite Stations Review of Policy and Rules, Report and Order*, 14 FCC Rcd 12903, 12932-33 (1999), *recons. granted in part*, 16 FCC Rcd 1067 (2001) ("*TV Ownership Report and Order*").

five percent in the DMA; and (3) wired cable service, provided that cable service is generally available in the DMA.[101] The new "one-to-a-market rule" permitted varying levels of newspaper/radio cross-ownership depending on whether at least 10 or 20 "voices" remained in the market post-combination.

Commissioner Furchtgott-Roth dissented from the new ownership limitations and in particular from the Eight Voices Test. He noted that the goal of "diversity" on which the limits were based was undefined and, if defined to mean content diversity, presented "'enormous tensions with the First Amendment.'"[102] In any case, the claim that ownership limits lead to any sort of "diversity" was based on pure "hunch."[103] Moreover, the Commission provided no basis for asserting "why eight is generally in the ball park and why, say, fifteen is not."[104] The Commissioner questioned whether the limitations could survive review under the First Amendment.[105]

This latest transformation of the "voices" test -- again, the only test the FCC has developed to date for measuring diversity -- is highly arbitrary and demonstrates why attempts at quantifying diversity are doomed to fail. The rules announce no clear, consistent levels of what is enough, or when is diversity achieved: it was a 30 radio and television "voices" test under the old "one-to-a-market rule"; it is an eight television voices test for purposes of television duopoly; and it becomes a 20 or 10 "voices" test under the new "one-to-a-market rule."

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[101] *Id.* at 12950-52.

[102] *Id.* at 12994 (Dissenting Statement of Commissioner Harold Furchtgott-Roth at 12993 (quoting *Lutheran Church v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998)).

[103] *Id.*

[104] *Id.*

[105] *Id.* at 12994-98.

Moreover, there is no consistency as to what counts as a voice. The old "one-to-a-market rule" counted radio and television stations, the new television duopoly rule counts just television stations, and the latest iteration of the "one-to-a-market rule" counts radio stations, television stations, cable operations and certain newspapers. Excluded from the count are many media services that are now becoming pervasive, such as DBS and the Internet. By including cable as just a single voice, the latest "one-to-a-market rule" also radically undercounts voices, failing to recognize that the cable "pipe," particularly in this age of digital cable, can bring literally hundreds of "voices" into the home.

Finally, the FCC's latest decision to exclude newspapers from consideration under television duopoly's "Eight Voices Test" simply cannot be reconciled with retention of the newspaper/broadcast cross-ownership ban. The assumption that daily newspapers competed head-to-head with television broadcast stations as a source of local news and information formed the basis for the original adoption of the newspaper/broadcast cross-ownership ban. If such competition was so serious as to warrant a flat ban on newspaper/broadcast cross-ownership, it must also be considered in judging competition in a market following formation of a television duopoly. Accordingly, the FCC's inconsistency in excluding newspapers from the "Eight Voices Test" offers a further, very strong argument in favor of repeal of the newspaper/broadcast cross-ownership ban.

Application of any "voices" test is thus clearly riddled with infirmities, and it is, at best, only a poor surrogate for a crude competition test, all in an area of content provision in which any regulation inevitably creates First Amendment frictions. Protecting consumers, moreover, is best left to a classic competition analysis to the extent market factors evidence excessive concentration and warrant intervention from federal or state antitrust authorities, as described below in Section III. In short, the FCC has not posited -- nor, Media General submits, can it posit -- a test that either promotes, legitimately, or quantifies diversity in the marketplace of ideas, so that it can demonstrate first that any regulation, much less a flat ban on newspaper/broadcast cross-ownership, is warranted and, then, that conditions justify that it be retained. Lacking any demonstration of a danger to diversity and any method to measure its existence, the current prohibition on the co-ownership of newspapers and broadcast stations must be repealed. And, for all these same reasons, the Commission additionally cannot posit a sustainable substitute.

III. Repealing the Archaic Newspaper/Broadcast Cross-Ownership Ban Would Not Harm Competition in Local Markets.

In the *NPRM*, the Commission notes that the primary economic market in which newspapers and broadcast stations might compete is the advertising market, and it asks commenting parties to address the effect liberalization of the newspaper/broadcast cross-ownership ban would have on that market.[106] The profound growth in the diversity of media outlets that has occurred since 1975, as discussed in Section II above, also has brought an equally significant growth in the competition for advertising dollars at the local level. This vigorous competitive environment, coupled with the fact that neither the FCC nor any party favoring the rule has ever been able to articulate how common ownership harms competition for local advertising, compels repeal of the existing ban.

A. The FCC Has No Evidence of a Competitive Problem.

In adopting the rule in 1975, the FCC significantly acknowledged that no claim had been made that "newspaper-television station owners [had] committed any specific non-competitive

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[106] *NPRM* ¶ 19.