Before the
Federal Communications Commission
Washington, D.C. 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**

REPLY OF THE HEARST CORPORATION

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SUMMARY

The wealth of empirical evidence included in this record convincingly supports the outright repeal of the newspaper-broadcast cross-ownership rule. The few opponents of repeal suggest a potential harm to viewpoint diversity if the rule is repealed or relaxed. The evidence in the record does not support such allegations. Indeed, evidence provided by grandfathered companies confirms that cross-ownership actually enhances investigative reporting and programming variety. Editorial diversity and independence are fostered by the natural desire to compete for audience and advertiser attention.

Some opponents of repeal raise additional concerns over the market power that might reside in a merged company if the Commission repealed the rule. There is much debate in the record regarding the substitutability of newspapers and broadcast stations in the advertising market. But Hearst submits that it is unnecessary for the Commission to determine the proper antitrust product market. Regardless of whether newspaper and broadcast advertising are substitutable or separate or a combination thereof, the competition analysis currently employed in federal antitrust law would adequately protect against anti-competitive behavior in any particular situation, and should not be duplicated in a Commission rule of general applicability.

The concerns raised by the opponents to repeal of the rule are unsubstantiated by the record. Far from causing harm, the great weight of evidence produced in this record indicates that newspaper-broadcast combinations may enhance diversity and allow both media to reduce costs and create efficiencies that redound to the benefit of both advertisers and the consumer. The Commission should, therefore, repeal the rule.

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To: The Commission

REPLY COMMENTS OF THE HEARST CORPORATION

The Hearst Corporation ("Hearst"), by its attorneys, hereby submits the following Reply in response to certain comments filed in the Commission's proceeding on the *Notice of Proposed Rulemaking on the Cross-Ownership of Broadcast Stations and Newspapers*, released September 20, 2001 ("NPRM"). Hearst also reiterates its support for repeal of the cross-ownership rule.

INTRODUCTION

Approximately 34 parties, including Hearst and Hearst-Argyle Television, formally commented on the newspaper-broadcast cross-ownership rule.[1] Only four comments urged the Commission to retain the current rule.[2] The great majority of the formal comments contain

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[1] In addition to the formal comments, more than 1300 individuals filed informal, single page, comments. Most of these filings were submitted at the request of one party, the Center for Digital Democracy, which supports the current rule.

[2] *Comments of the Consumers Union, et al.*; *Comments of AFL-CIO* ("*AFL-CIO*"); *Comments of the United Church of Christ* ("*UCC*"); *Comments of Arso Radio Corporation* ("*Arso*").

detailed legal analysis and a wealth of empirical evidence to support repeal of the rule.[3] Because the strength of the record is overwhelming and needs little repetition, Hearst files this Reply only to dispel a few concerns raised by supporters of the rule. These concerns relate to both diversity and competition in the marketplace.

I. Novel Concepts Such As "Institutional Diversity" Add Nothing New and Do Not Undermine the Rationale for Repeal of the Rule

The cross-ownership restriction was designed with the promotion of diversity as an important goal.[4] With respect to diversity analysis generally, the Commission historically has assessed the efficacy of its ownership rules by considering the following three categories: (1) viewpoint diversity, (2) outlet diversity, and (3) source diversity.[5] At the Commission's request, the majority of parties filing comments addressed the likely effects of repeal or relaxation of the cross-ownership restriction on these categories.[6] Notably, however, comments filed by one group comprised of the Consumers Union, the Consumers Federation of America, the Center for Digital Democracy and the Civil Rights Forum, among others ("Consumers Union"), postulated

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[3] Only five media companies offer support for relaxation instead of complete repeal. *See Comments of Caribbean International News Corp ("Caribbean")*; *Comments of Pathfinder Communications Corp; Comments of Reading Eagle Co.; Comments of Mid-West Family Stations*.

[4] The Commission, of course, sought to protect competition as well. NPRM at ¶¶1-2 (citing *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*, *Second Report and Order*, 50 FCC 2d 1046, 1074 (¶ 99) (1975) (*Second Report and Order*), *recon.* 53 FCC 2d 589 (1975), *aff'd sub nom. FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978)).

[5] *Review of the Commission's Regulations Governing Television Broadcasting, Notice of Proposed Rulemaking,* 10 FCC Rcd 3524, 3547-3550 (¶¶ 57-61) (1995).

[6] NPRM at ¶¶ 14-18.

a fourth category entitled "institutional diversity." But, when distilled to its essence, this concept of institutional diversity merely amounts to a variation on the concept of viewpoint diversity. The record already provides ample evidence to allay any concern that cross-ownership will jeopardize institutional diversity.

Consumers Union defines institutional diversity as the "special expertise and culture of certain media, such as the newspaper tradition of in-depth investigative journalism."[7] Consumers Union asserts that "the most important effect that institutional diversity plays may be its deterrent effect on negative behavior."[8] Conceptually, Consumers Union argues that institutional diversity will be harmed by cross-ownership because jointly owned companies will strip media outlets of their unique perspectives and expertise, "homogenize" local viewpoints out of existence, and diminish the motivation to report on controversial subjects.[9]

Numerous media companies have provided the Commission with hard evidence that journalistic independence between newspapers and broadcast stations will continue to thrive if the cross-ownership restriction is lifted. The record indicates that commonly owned newspapers and broadcast stations "often follow policies of editorial independence,"[10] and that common

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[7] *Consumers Union* at 49.

[8] *Id.* at 16.

[9] *Id.* at 5, 15.

[10] *Comments of Hearst-Argyle Television, Inc.* at 16 ("*Hearst-Argyle*"); *see also Comments of Media General Inc.* at 7 ("*Media General*").

ownership "has not diluted independent, diverse journalism."[11] Moreover, commonly owned newspapers and broadcast stations regularly criticize one another over errors, omissions, and editorial decisions.[12] Despite Consumers Union's concerns that cross-ownership will lead to the demise of "the newspaper tradition of in-depth investigative journalism,"[13] there is strong evidence that the efficiencies and operational synergies of cross-ownership actually will enhance newsgathering and investigative reporting.[14] These synergies also will enhance overall programming diversity.[15] Finally, there also is evidence that cross-ownership leads to enhanced local news coverage and the development of delivery systems that focus specifically on local issues and content.[16]

Given this evidence, there is little reason to believe that commonly owned newspaper and broadcast outlets will be stripped of their "special expertise" or that they will tend to forgo their journalistic or programming independence. Oftentimes, such independence is borne of the

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[11] *Comments of Gannett Co. Inc.* at 12 ("*Gannett*"); *see Comments of Tribune Company* at 41 ("*Tribune*"). Consumer's Union itself recognizes that newspapers provide "a role that is distinct from television." *Consumers Union* at 62-63. "Newspapers provide a different type of information service with a different impact." *Id.*

[12] *See Comments of the Newspaper Association of America* at 42 ("*NAA*"); *see also Tribune* at 41 n.73. Furthermore, as noted in NAA's comments, numerous members of the mass media industry have filed comments with the Commission in other dockets in support of 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 market place." *NAA* at 43 n. 119.

[13] *Consumers Union* at 49.

[14] *See Comments of Cox Enterprises, Inc.* at 13 ("*Cox*"); *see also Media General* at 7.

[15] *See NAA* at 44-45.

[16] *See Gannett* at 3; *see also Hearst-Argyle* at 16-17; *Tribune* at 42.

simple business reality that cross-owned media outlets still must compete for audience and advertiser attention.[17] As then-Commissioner Powell observed in his Separate Statement accompanying the Commission's *1998 Biennial Review Report*, "[c]ontroversy 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 by our rules and our adherence to the high-brow ideal we used to defend them."[18] Beyond commercial factors, journalistic ethics drive commonly owned media outlets to assert their editorial independence.[19] As stated by the Gannett Company, "news trades on its credibility."[20]

Finally, the Commission should note that Consumers Union's suggestion of harm to institutional diversity is unsupported by the empirical evidence in the record. As the Court of Appeals recently reiterated in its *Time Warner* decision, the Commission must justify its ownership restrictions with substantial evidence of harm.[21] In its initial comments, Hearst noted that the Commission originally decided to restrict newspaper-broadcast ownership based on the

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[17] *NAA* at 42-44; *see Tribune* at 42.

[18] *1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Communications Act, Separate Statement of Commissioner Michael K. Powell*, 15 FCC Rcd 11058, 11149 (1998).

[19] *See NAA* at 42; *see also Gannett* at 12.

[20] *Gannett* at 12.

[21] In justifying its horizontal ownership limits on cable companies, the courts have held that the Commission must do more than "simply 'posit the existence of the disease sought to be cured.'" *Time Warner II*, 240 F. 3d 1126, 1133 (D.C. Cir. 2002)(citing *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 666 (*Turner I*)(quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)). Time Warner II also requires that the Commission draw on "reasonable inferences based on substantial evidence." *Id.*(quoting *Turner I* at 666).

thought that, prospectively, diversity and competition might be best fostered by restricting a local newspaper's access to broadcast licenses in the same locality. But to this day, as shown by numerous grandfathered cross-ownership examples, there remains no solid evidence that restricting cross-ownership promotes competition or the diversity of viewpoints.

II. Opponents of Repeal of the Rule Raise Competition Concerns that are Not Supported by the Record and In Any Event are Covered by Existing Antitrust Law

Several parties, including Consumers Union, raise concerns about the market power that might reside in a merged company if the rule were repealed.[22] Accepting, for the purposes of this Reply, Consumers Union's basic contention that the newspaper and broadcast markets are separate and do not compete with one another, Hearst disagrees with Consumers Union's conclusion that common ownership of a newspaper and broadcast station presents problems associated with vertical integration.[23]

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[22] *Consumers Union* at 98-115; *see also Caribbean* at 27-38; *UCC* at 11-13, 15-16.

[23] *Consumers Union* at 99-100 and 110-113. Consumers Union states that "[c]ontrary to the claims of major players in each communications sector, Internet service providers, national broadcast networks, newspaper and radio chains, and cable companies do not compete in a meaningful way against each other for consumers' news, information, entertainment and other communications needs." *Consumers Union* at 99. In the context of competition in the advertising market, the market on which the majority of comments relied, several parties indicate that the distinct features of broadcasting and newspaper advertising make them non-substitutable in some regards, even though the two media compete for the same advertising dollars to a large extent. *See, e.g., Gannett* at 15-16 (stating that although advertisers "use both newspapers and broadcast stations for their campaigns, the media are not interchangeable"); *Media General* at 50 ("Wholesale grouping of newspaper and broadcast properties together may ignore important marketplace realities"); *Hearst* at 5-12 and *Cox* at 17. However, to the extent that the Commission concludes a single product market exists, most parties agree that it should also be broadly defined to include additional media, such as cable, the Internet, weekly newspapers, billboard, etc. *See, e.g., Hearst* at 14-16; *NAA* at 65-73; *Cox* at 9-10; *Media General* at 51.

As Consumers Union acknowledges, a vertical merger "involv[es] companies in a supplier-customer relationship."[24] Aside from relatively modest amounts of advertising in each other's medium, no supplier-customer relationship exists between a newspaper and a broadcast station. But even if applying vertical integration analysis to newspaper-broadcast station combinations were appropriate, Consumers Union still fails to delineate any antitrust concerns arising from such a vertical combination. Under antitrust analysis, the principal vertical merger concern is foreclosure. Foreclosure is explained as blocking a competitor from access to one of a few customers or suppliers, or as raising the costs for a rival to obtain access to customers or suppliers, effectively creating barriers to new entry and requiring two-level entry.[25] A newspaper-broadcast merger presents no foreclosure issue. In combining newsgathering resources, the combined company is not foreclosing its competitors from access to news and information. If a newspaper or broadcast company attempted to acquire the Associated Press (which would be a vertical merger), competitors in the news and information business might

[24] *Id.* at 110 (citing Asch, Peter, *Industrial Organization and Antitrust Policy* (John Wiley and Sons, New York: 1983), 262-264).

[25] H. Hovenkamp, Federal Antitrust Policy: The Law of Competition and its Practice 377-381 (2d ed. 1999); M. Howard Morse, "Vertical Mergers: Recent Learning," 53 Bus. Lawyer 1217, 1225 (1998). Concerns arising from a vertical merger relate to its anti-competitive effects at the horizontal level. In the context of the two-level entry/foreclosure issue, the Merger Guidelines require three conditions for a vertical merger to be determined anti-competitive: 1) there must be vertical integration so extensive that entrants must enter both markets simultaneously; 2) the need for two-level entry must be a significant deterrent to new entrants; and 3) the market must be highly concentrated. DOJ Merger Guidelines, 49 Fed. Reg. 26,823, at 4.2 (1984) (Later DOJ/FTC Guidelines address horizontal mergers, but the 1984 Guidelines remain in effect for non-horizontal mergers). In addition to two-level entry/foreclosure concerns, the DOJ Merger Guidelines identify two other potential concerns from vertical mergers that do not arise from a newspaper-broadcast combination: the facilitation of collusion and the avoidance of rate regulation. *Id.*

legitimately argue that their access to a significant source of news could be restricted by such purchase. But such an argument does not exist with a newspaper-broadcast merger. Thus, Consumers Union's vertical integration analysis fails not only because it assumes a customer-supplier relationship that does not exist, but also because it fails to articulate any anti-competitive result from such a vertical merger.

To the extent that parties assert that the Commission should consider the product markets of a newspaper and a broadcast station (whether newsgathering or advertising) as separate, such a merger would be considered a conglomerate merger under antitrust analysis.[26] As even Caribbean International News Corporation recognizes, a conglomerate merger between a newspaper and a broadcast station would be unlikely to raise enforcement concerns under antitrust law.[27]

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[26] *See, e.g., Consumers Union* at 99 (arguing that the newsgathering activities of the newspaper and broadcast industries are separate markets); *UCC* at 12-13 (stating that broadcast advertising is not a substitute for print advertising in the classified advertising context and that in local markets, competition in advertising between the two media is limited); *Caribbean* at 27-28 (relying on DOJ and federal court precedent that the two advertising markets are separate). *See also, Gannett* at *15*, *Media General* at 46-49, *Cox* at 18, *Comments of The New York Times* (declarations of advertising industry officials, James Beloyianis and Kenneth Sossaman) ("*New York Times*"*)*; and *NAA* at 56-60, which demonstrate that defining the product market is a complex and controversial process, but that significant precedent exists for the conclusion that the broadcast and newspaper advertising markets are separate, or at least not completely substitutable.

[27] *Caribbean* at 28. "[A conglomerate] merger . . . would be difficult to challenge under current antitrust enforcement theories." *Id.* This is an appropriate conclusion since no competitive concerns exist unless the merger would eliminate one of the very few potential entrants into a concentrated market. Thirty-five years ago, antitrust laws were used to attack conglomerate mergers' increased efficiency, but today such an attack would only occur if the merger resulted in the elimination of competition.

Nevertheless, Caribbean states that the Commission's analysis of certain local markets "demands a different result."[28] Caribbean argues that the Commission should not repeal the cross-ownership rule in its entirety, but should instead adopt a "distinct competitive analysis" because "viewpoint *diversity* may be objectively preserved only through avoiding further concentration."[29] Specifically, Caribbean proposes retention of the rule where the combined entity would hold 70% or more of advertising revenues in a media market sector.[30] However, the retention of such a restriction is unnecessary and unwarranted since such levels of concentration would likely raise antitrust concerns in any case. As Caribbean admits, "Antitrust law supports the theory that a firm that controls at least 70% of a market sector approaches monopoly power."[31]

Hearst submits that the record clearly demonstrates, particularly through the comments made by grandfathered companies, that the consolidation of a newspaper and a broadcast station would not threaten viewpoint diversity. Hearst also submits that 1) competition analysis is not the method by which to review viewpoint diversity,[32] and 2) traditional antitrust rules of analysis

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[28] *Caribbean* at 28.

[29] *Id.*

[30] *Id.* at 35.

[31] *Id.* at 37.

[32] *See Cox* at 12-14; *Gannett* at 7-13, exhibit A (Joint Declaration of Susan Clark-Johnson and Roger Ogden); *Media General* at 13, 35, app. 5; *Tribune* at 39-42.

should not be duplicated in a Commission rule. As shown above and in the following footnote, Caribbean's analysis suggests nothing more than such duplication.[33]

In summary, it is unnecessary for the Commission to determine whether a definable product market exists. Regardless of whether the Commission considers the newspaper and broadcast advertising markets to be substitutable or separate or partly both, the competition analysis currently employed in federal antitrust law would protect against anti-competitive behavior threatening the marketplace or the consumer.[34] Moreover, any competition concerns

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[33] See *Caribbean* at 37-38. Both Caribbean and the Consumers Union raise the concern that a merged newspaper-broadcast company may engage in predatory below cost pricing. *Caribbean* at 31-35; *Consumers Union* at 111-113; *see also UCC* at 113. Caribbean suggests illogically that a merged firm can lower advertising rates and recoup losses through "volume sales." However, selling large volumes at a loss only results in large losses. UCC additionally provides anecdotal evidence by a few owners of weekly newspapers and shoppers alleging anti-competitive pricing behavior by commonly owned newspaper-broadcast operations. *UCC* at 15-16. While such claims (usually spurious) are often alleged by weeklies and shoppers, there is no evidence in the record indicating that they amount to anything more than smaller outlets complaining of the pricing efficiencies created by larger companies. The theory that conglomerate mergers will allow a firm to "finance" predatory pricing in one market by raising prices in another, or that a giant firm with deep pockets can afford extended periods of loss selling, have been thoroughly discredited. Price reductions from efficiency, so long as they are above cost, are to be praised, not condemned. *See, e.g, William J. Kolasky, Deputy Assistant Attorney General, U.S. Department of Justice, Conglomerate Mergers and Range Effects: It's a Long War from Chicago to Brussels,* Address before the George Mason University Symposium, November 9, 2001. Evidence provided from cross-owned markets suggests no indication of predatory pricing in any case. *See, e.g., Cox* at 19-20; *Gannett* at 15. With regard to concerns over leveraging through advertising packaging, evidence provided by grandfathered companies confirms that, so long as the provider is not so dominant as to foreclose alternatives (again, an antitrust question), advertising packaging in the form of "one-stop shopping" is good for the consumer. *See, e.g., Comments of Belo Corp.* at 5 ("*Belo Corp.*"). One of Consumers Union's own appendices indicates that cross-ownership will not likely affect market power over advertising rates. *See Consumers Union, app. C*, *C. Edwin Baker, Giving Up Democracy: The Legal Regulation of Media Ownership,* Nov. 2001, at 61.

[34] If the Commission were to find one market, a broadcast-newspaper merger would be considered a horizontal merger, subject to review using the DOJ Merger Guidelines. As at least

(continued…)

raised ought to be weighed heavily against the rest of the record, which is replete with concrete examples from grandfathered companies and recipients of waivers of the thriving competition and efficiencies created by cross-ownership.[35] Far from causing harm, newspaper-broadcast combinations are likely to allow both media to reduce costs, to the benefit of advertisers and consumers.

CONCLUSION

The concerns raised by the opponents to repeal of the rule are unsubstantiated and contrary to the overwhelming evidence submitted in this proceeding. For the reasons stated above and in Hearst's Comments, Hearst respectfully submits that the Commission should repeal the newspaper-broadcast cross-ownership rule.

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(..continued)
one party also indicated, the merger may also be subject to review under states' consumer protection laws as well. *Media General* at 52.

[35] For examples of the efficiencies created by cross-ownership s*ee Gannett* at 13; *Tribune* at 55; *Media General* at 7-10, 57; *New York Times* at 9-10; *Belo Corp.* at 4-7; *Comments of the News Corporation* at 34-42. There is also significant discussion in the record regarding the advantages of cross-ownership over joint ventures. *Hearst* at 17-18; *see Gannett* at 13; *Tribune* at 53-55.