

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

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| 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 COMMENTS OF COX ENTERPRISES, INC.

COX ENTERPRISES, INC.

Kevin F. Reed
Christina H. Burrow

Its Attorneys

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

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SUMMARY

In the Telecommunications Act of 1996 Congress made the policy decision that free markets and competition, rather than government-imposed regulation, best promotes the public interest. Recognizing this Congressional mandate, the D.C. Circuit last Spring confirmed that those who would retain structural media ownership restrictions face a high hurdle: they must show with “substantial evidence” a public harm that the ownership restriction will help cure. Absent a showing of harm, and absent a showing that the ownership restriction in question is needed to address the harm, the ownership restriction should be abolished.

The record in this docket shows that the daily newspaper/broadcast cross-ownership restriction cannot withstand this judicial test. Proponents of the daily newspaper/broadcast cross-ownership rule have been unable to produce concrete facts showing that cross-ownership causes harm. Rather than reliable evidence, they provide unsupported speculation and irrelevant anecdotes. In contrast, grandfathered daily newspaper/broadcast co-owners provide extensive evidence of the public benefits co-ownership can provide. The record shows that viewers, listeners and readers in cross-owned markets receive better local news and public affairs coverage than they otherwise would enjoy, and that advertising rates are no higher, and are sometimes actually lower, when compared to similar non co-owned markets. Based on the record before it, the Commission must respect the legislative judgment of Congress set forth in the Telecommunications Act of 1996 and take swift action to eliminate the daily newspaper/broadcast cross-ownership rule.

TABLE OF CONTENTS

| | Page |
|--|-------------|
| I. A FACTUAL FOUNDATION HAS NOT BEEN ESTABLISHED SUFFICIENT TO RETAIN THE RULE | 2 |
| II. UNSUPPORTED, IRRELEVANT POLICY ARGUMENTS CANNOT SUSTAIN THE RULE'S RETENTION | 7 |

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Cox Enterprises, Inc. (“Cox”), by its attorneys, hereby submits its Reply Comments in the above-captioned rulemaking proceeding.¹ Cox, a grandfathered holder of co-owned broadcast and daily newspaper properties in two markets, has reviewed the comments with interest and was not surprised to find ample evidence supporting Cox’s long-held view that daily newspaper/broadcast cross-ownership actually promotes the Commission’s dual goals of competition and diversity. Co-owned properties demonstrably provide the public with *more* local news and information than do their separately owned counterparts and do so with advertising rates that are no higher, and are sometimes actually lower, than their market competitors.

While the record fully supports the repeal of the daily newspaper/broadcast cross-ownership rule, in contrast, no competent evidence was adduced in support of the rule’s retention. Indeed, no party submitted facts or data showing any actual harm, either to the

¹ Cross-Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Waiver Policy, *Order and Notice of Proposed Rulemaking*, MM Docket Nos. 01-235, 96-197, FCC No. 01-262 (rel. Sep. 20, 2001) (“*Notice*”).

viewing/listening/reading public or to advertisers, in grandfathered markets. Without evidence to support their position, proponents of the rule's retention might have relied on a legal analysis, but that too is missing. As a result, those who would retain the rule blithely urge the Commission to ignore federal law and the clear mandate of Congress.

However, the Telecommunications Act of 1996 is quite clear on the Congressionally required foundation necessary for any continuation of existing broadcast ownership restrictions. Although there may have been a time when the Commission could promulgate or preserve ownership rules based on its informed speculation that a rule is in the public interest, today facts, not social theory, are required. Here, where the record is devoid of facts or evidence showing that co-ownership of daily newspapers and broadcast outlets harms the public interest, the Commission is legally bound to repeal the rule at the earliest opportunity. Thus, based on the record in this proceeding, the daily newspaper-broadcast cross-ownership rule must be eliminated without delay.

I. A FACTUAL FOUNDATION HAS NOT BEEN ESTABLISHED SUFFICIENT TO RETAIN THE RULE.

Numerous commenters point out that both Congress in the Telecommunications Act of 1996 and the courts, most recently the D.C. Circuit in the *Time Warner II* decision,² have established the legal standard that must be met for a structural broadcasting ownership restriction to remain in place. First, the Telecommunications Act of 1996 changed the regulatory paradigm by creating a presumption in favor of deregulation.³ As Media General points out, "Section 202(h) [of the Telecommunications Act of 1996] squarely places on the proponents of continued

² *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) ("*Time Warner II*").

³ See, e.g., Comments of Tribune Company at 66-68.

regulation the burden of persuasion for justifying retention of [a broadcast ownership] rule.”⁴ Congress has mandated that the Commission must reexamine its broadcast ownership rules, including the daily newspaper/broadcast cross-ownership rule, and “repeal or modify any regulation it determines to be no longer in the public interest.”⁵ Second, as the Newspaper Association of America points out, in last year’s *Time Warner II* decision the D.C. Circuit “made clear that the FCC must demonstrate persuasively that its ownership rules are supported by evidence and reasoned analysis.”⁶ Indeed, the Commission “has a duty to ‘draw reasonable inferences based on substantial evidence.’”⁷ Accordingly, the Commission cannot retain a broadcast ownership restriction unless it makes an affirmative finding, based on actual facts, that retention of the rule is in the public interest.

Disputing that the Commission bears the burden of proof if it wants to retain the daily newspaper/broadcast cross-ownership rule, the Consumers Union Group in its voluminous comments argues that the Administrative Procedure Act establishes a presumption against regulatory change.⁸ Cox agrees with the case law cited for the proposition that if the Commission changes a rule, it must do so with reasoned analysis based on a rulemaking record.⁹

⁴ Comments of Media General, Inc. at 59.

⁵ Comments of the National Association of Broadcasters at 15 (quoting Pub. L. No. 104-104 § 202(h), 110 Stat. 56 (1996)).

⁶ Comments of the Newspaper Association of America at 114-115.

⁷ Comments of Gannett Co., Inc. at 22, citing *Time Warner II*, 240 F.3d at 1133 (emphasis added).

⁸ Comments of Consumers Union, Consumer Federation of America, Civil Rights Forum, Center for Digital Democracy, Leadership Conference on Civil Rights and Media Access Project (“Consumers Union Group”) at 22-24.

⁹ See, e.g., Comments of Consumers Union Group at 23-24 citing *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983).

However, a legal presumption against rule changes is not inconsistent with a legal obligation to provide evidentiary support for a rule's retention. Here, it is obvious that the Commission's order repealing the daily newspaper/broadcast cross-ownership rule must be supported by facts and reasoned analysis. Similarly, however, if the Commission attempts to retain the rule, any order doing so must be supported by competent evidence in the record and not the mere whim of the proponents of the rule.

Those who would retain the rule have utterly failed to build such a record. Indeed, while their comments are hundreds of pages long and include three separate attachments by legal and media "experts," the Consumers Union Group fails to provide supported factual examples of harm, either to consumers or advertisers, from co-owned daily newspaper/broadcast entities. Similarly, the Comments of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") lack any examples of harm from co-ownership. Only two proponents of the rule, the United Church of Christ Group¹⁰ and the Mid-West Family Stations even attempt to include applicable facts for the record. However, neither of these commenters provide evidence to show grandfathered co-owned broadcast and newspaper entities are not operating in the public interest. To the contrary, the facts in both sets of comments actually illustrate the benefits co-ownership can provide.¹¹

¹⁰ See Comments of the Office of Communication, Inc. of the United Church of Christ, National Organization for Women and Media Alliance ("United Church of Christ Group").

¹¹ Two additional commenters, The Caribbean International News Corporation and Arso Radio Corporation also support retention of the rule. However, as their comments primarily discuss whether the rule should be expanded to include Spanish language daily newspapers, Cox does not address their arguments. Cox also does not address the scores of nearly identical e-mail "comments" orchestrated by the Consumers Union Group.

For example, in a statement provided by the United Church of Christ Group, the owner of a publication called the *Tri-State Shopper* discusses his experiences trying to bring a new shopping newspaper into Quincy, Illinois.¹² He discusses how his co-owned newspaper competitor lowered advertising rates, increased circulation, began using better printing paper stock, and introduced full color to its publications after the *Tri-State Shopper* entered the market.¹³ While this competitive response has nothing to do with co-ownership, it also in no manner harmed the readers and advertisers in Quincy, Illinois.¹⁴ Indeed, this “complaint” is nothing more than an attempt by some to highjack the Commission’s public interest mandate in an effort to protect competitors, not competition.¹⁵ Similarly, the Mid-West Family Stations discusses how it must compete against co-owned combinations that give “preferential treatment to advertisers using both the newspaper and newspaper-owned radio stations.”¹⁶ One must presume that such preferential treatment results in lower prices for advertisers, which the

¹² The United Church of Christ Group comments include three other statements from independent publishers in co-owned markets. These statements consist of conclusory comments of a general nature and are devoid of specific facts.

¹³ Comments of the United Church of Christ Group, Attachment 6, “Statement of Jim Helenthal, Publisher of the *Tri-State Shopper*” at 1-2.

¹⁴ The Statement also claims that some advertisers of the co-owned entities were told that their advertising rates would increase if they moved some of their business to Mr. Helenthal’s new paper. This is not inconsistent with fair competition, however, because parties that place larger advertising orders commonly command lower rates. It follows, therefore, that if an advertiser were to cut his advertising in half, his remaining ads might be charged a higher rate.

¹⁵ Cox notes that the Commission has consistently recognized its obligation to protect competition, not competitors, consistent with the tenets of antitrust law. *See, e.g.*, Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, *Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 5754, 5759 (1997) (“The public interest in this regard is the provision of services of value to the listening public and includes the protection of competition, not competitors.”); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

¹⁶ Comments of the Mid-West Family Stations at 5.

Commission has seen as a benefit.¹⁷ As these two examples show, the evidence provided by proponents of the rule actually works against them because it illustrates the benefits co-ownership can provide.

In contrast to the paucity of evidence provided to support the rule's retention, commenters who urge repeal of the daily newspaper/broadcast cross-ownership rule provide ample evidence of how grandfathered combinations promote the public good. For example, the Newspaper Association of America provides numerous examples of the superior news coverage and local programming provided in grandfathered markets by all types and sizes of broadcasters.¹⁸ Similarly, The New York Times Company, Tribune Company, Belo Corp., and Gannett Co., Inc., all provide examples from their grandfathered markets of the public benefits of co-ownership.¹⁹ An investment bank, Bear, Stearns & Co., also submitted independent research showing that co-owned properties produce better newscasts and a higher quality news product than do their market competitors.²⁰

Once the record is reviewed, the Commission will find that *all* of the evidence in this proceeding is on one side of the scale. Given that the record is utterly devoid of competent

¹⁷ See, e.g., *Notice* at ¶¶ 25 and 29. To the extent that repeal of the cross-ownership rule would allow a common broadcast/print owner to reduce its costs of sales, streamline its billing, provide better targeting to reach the desired audiences for both media, and otherwise realize efficiencies not possible absent repeal of the rule, common advertisers can expect superior service and lower overall costs of advertising from the repeal.

¹⁸ See Comments of the Newspaper Association of America at 24-30. These comments also provide examples of the efficiencies and operational synergies of co-ownership, as well as examples of advertiser benefits. See Comments of the Newspaper Association of America at 18-21; 38-39.

¹⁹ See Comments of The New York Times Company at 7-13; Comments of Tribune Company at 42-51; Comments of Belo Corp. at 4-7; Comments of Gannett Co., Inc. at 8-10.

²⁰ Comments of Victor B. Miller IV and Kevin R. Gruneich of Bear, Stearns & Co., Inc. at 24-28.

evidence to support the rule's retention, the Commission must follow Congress' mandate in the Telecommunications Act of 1996 and the D.C. Circuit's direction in *Time Warner II* and swiftly repeal the daily newspaper/broadcast cross-ownership rule.

II. UNSUPPORTED, IRRELEVANT POLICY ARGUMENTS CANNOT SUSTAIN THE RULE'S RETENTION.

In a desperate attempt to mask their lack of evidence and supporting law, the rule's proponents have filed extensive comments that have little or nothing to say about the issue in this docket. Once the Commission parses the rhetoric, nothing relevant is left to examine. First, proponents of the rule, most notably the Consumers Union Group, present pages of unsupported statements and theoretical arguments that have no grounding in actual fact. Illustrative of this point are claims made both in the comments and in an attachment by a Consumers Union Group "expert" that co-owned broadcast and newspaper entities do not provide the same critical checks and balances against each other that separately owned properties provide.²¹ They also claim that media owners use their "monopoly rents to pursue their personal agendas."²² For neither of these statements can the Consumers Union Group point to actual facts, although its "expert" Professor Bagdikian claims that "[i]t has been the experience of many observers, including this writer's, that this cross-media mutual criticism and evaluation becomes minimal when both the local newspaper and a local broadcast station come under common ownership."²³ Such a statement is nothing more than unsubstantiated opinion and, therefore, entitled to no weight.

²¹ See, e.g., Comments of the Consumers Union Group at 15-16; Comments of the Consumers Union Group, Appendix A, *Statement of Ben Bagdikian* at 2. Other rule supporters similarly make blanket, unsupported statements with no basis in fact. See, e.g., Comments of AFL-CIO at 4 (listing theoretical harms that would be caused by elimination of the rule).

²² See, e.g., Comments of the Consumers Union Group at 43-45.

²³ Comments of the Consumers Union Group at 15.

As the Consumers Union Group provided no facts or examples to support its statements, except the undocumented personal experience of Professor Bagdikian, Cox, using publicly available Internet search engines, reviewed its own properties to see whether they provide the “checks and balances” sought by the Consumers Union Group. Cox found numerous examples showing that they do.²⁴ These examples range from newspaper articles criticizing programming and discussing a reporter’s error on Cox’s WSB-TV, to Cox Radio’s high-profile syndicated talk show host Neal Boortz disagreeing with the Atlanta Journal-Constitution on various issues ranging from politics to sports.²⁵ Cox’s experience shows that, contrary to the ruminations of academic professors, co-owned newspapers and broadcast holdings do express different viewpoints, even when they have been under common ownership for many years.

Cox also notes that the Consumers Union Group’s theoretical musing that broadcast and newspaper owners use their properties to advance their own personal or political agendas has been rebutted by facts supplied by other commenters.²⁶ Further, after the comments were filed, a new research study was published in the Federal Communications Law Journal that found “substantial diversity” in the news and commentary offered on the 2000 presidential campaign in

²⁴ In its comments Cox already discussed how its co-owned newspapers have taken different sides of issues ranging from politics to the economy to taxes. *See* Comments of Cox Enterprises, Inc. at 14 n.47.

²⁵ *See, e.g.,* Drew Jubera, *Watching TV: King of the daytime ogle: Watch Maury watch the girls*, Atlanta Journal-Constitution, Feb. 11, 2001, at L3; Drew Jubera, *WSB’s Chavis suspended over location incident*, Atlanta Journal-Constitution, Sept. 9, 1999, at D11; Neal Boortz, *You Know, She Really Doesn’t Get It*, program notes from Nov. 21, 2000, THE NEAL BOORTZ SHOW, at <http://www.boortz.com/nov21.htm> (last visited Jan. 22, 2002); Neal Boortz, *Democratic Talking Points*, program notes from Dec. 11, 2000, THE NEAL BOORTZ SHOW, at <http://www.boortz.com/dec11.htm> (last visited Jan. 22, 2002); Neal Boortz, *Measuring by Group Status – Instead of Individual Worth – Again*, program notes from Jan. 24, 2002, THE NEAL BOORTZ SHOW, at <http://www.boortz.com/dec11.htm> (last visited Jan. 24, 2002).

²⁶ *See, e.g.,* Comments of Media General, Inc. at 35.

three different co-owned markets.²⁷ Far from using their broadcast outlets and newspapers to advance a particular political view, the study found “no evidence of ownership influence on, or control of, news coverage of the 2000 presidential campaign in cross-owned media properties in Chicago, Dallas and Milwaukee.”²⁸

In addition to the pages of unsubstantiated claims, the rule’s proponents also filed pages of irrelevant material. For example, the Consumers Union Group comments include extensive discussions of an attached paper that reviews racial preferences in media markets.²⁹ While this discussion may be interesting, it has no relevance to whether the common ownership of daily newspapers and broadcast outlets is harmful. Similarly irrelevant are arguments against the radio and television industry consolidation that has been permitted by recent Congressionally-mandated changes in broadcast ownership rules.³⁰ While the various groups supporting retention of the daily newspaper/broadcast cross-ownership rule may dislike these recent rule changes, the changes are settled law and arguing against them serves no purpose here.³¹ The AFL-CIO’s

²⁷ David Pritchard, *A Tale of Three Cities: Diverse and Antagonistic Information in Situations of Local Newspaper/Broadcast Cross-Ownership*, 54 FEDERAL COMMUNICATIONS L.J. 31, 37-38 (2001). To the extent that this study in its entirety is not formally made a part of the record, Cox urges the Commission to take administrative notice of the study.

²⁸ *Id.* at 49.

²⁹ Comments of the Consumers Union Group, Appendix B, *Who Benefits Whom in Local Television Markets* by Joel Waldfogel. The AFL-CIO also attempts to use the race card in its comments, citing the same “expert” hired by the Consumers Union Group. See Comments of the AFL-CIO at 15.

³⁰ See, e.g., Comments of the United Church of Christ Group at 2-8.

³¹ Cox also cautions the Commission against relying on the statistics provided by the Consumers Union Group. For example, in its initial discussion on the growth and changes in the broadcast industry, the Group compares telephone, radio and television penetration in 1945 and 1970. See Comments of the Consumers Union Group at 9-10. Oddly (and quite obviously erroneously), the Group states that 55 percent of all households had a radio in 1945, whereas only 47 percent of all households had a radio in 1970. *Id.* Unfortunately, as with most of the “facts” included with its comments, the Consumers Union Group provides no citations for its statistics. Cox notes,

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angst about media employee burdens also adds nothing of use to the record,³² as does its complaints that newspapers are being purchased by non-local newspaper chains.³³

While their comments contain little of substance applicable to the questions posed in this docket, the proponents of the daily newspaper/broadcast cross-ownership rule nevertheless urge the Commission to retain the rule. Given, however, that the rule's proponents fail to provide verifiable and relevant evidence to support their position, the Commission cannot legally retain the rule on the record they provide. Although the judiciary is generally deferential to the fact-finding expertise of an administrative agency, an agency's decision nevertheless must be a "reasonable extrapolation from some *reliable* evidence."³⁴ The D.C. Circuit has also looked with disfavor on agency use of data that is inconsistent with "all other important evidence in the record."³⁵

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however, that 2000 Census Bureau figures put radio penetration in 1970 at 98.6, with the average household having 5.1 radios. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, COMMUNICATIONS AND INFORMATION TECHNOLOGY 567 (2000).

³² Comments of the AFL-CIO at 6-8.

³³ Comments of the AFL-CIO at 8-11. One can only speculate as to whether the trend towards non-local ownership of daily newspapers might have been different if local broadcasters had been allowed to purchase local newspapers. Similarly, the demise of newspaper coverage of state and national government cited by the AFL-CIO might have been prevented if daily newspapers and local broadcasters had been permitted to pool their resources. *See* Comments of the AFL-CIO at 13-14.

³⁴ *Natural Resources Defense Council v. Thomas*, 805 F.2d 410, 432 (D.C. Cir. 1986); *see also American Trucking Associations, Inc., v. United States Environmental Protection Agency*, 175 F.3d 1027, 1055 (D.C. Cir. 1999) (emphasis added).

³⁵ *American Iron and Steel Institute and Bethlehem Steel Corp. v. Occupational Safety and Health Administration and United States Department of Labor*, 939 F.2d 975, 1010 (D.C. Cir. 1991).

Accordingly, the Commission is not free here to rely on the “evidence” provided by the rule’s proponents. Should it attempt to do so, it will face rigorous scrutiny in court. As the D.C. Circuit has stated:

A court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to the evidence on technical and specialized matters, for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent.³⁶

If a court is “satisfied that the agency has taken a hard look at the issues with the use of reasons and standards,” it will uphold the agency’s findings if the agency’s path can “reasonably be discerned.”³⁷

Since the *Greater Boston Television Corp.* case, the D.C. Circuit has often applied the “hard look” doctrine. For instance, when United Parcel Service, Inc. challenged a U.S. Postal Service rate increase, the D.C. Circuit said that the U.S. Postal Rate Commission’s decision would be affirmed if the court could discern the path followed by the Commission in reaching the increase.³⁸ However, if the evidence in the record does not allow an agency to reach a certain conclusion, the court will remand the decision. In addition, the D.C. Circuit has held that an agency’s decision must be based on the record *as a whole*.³⁹ An administrative agency decision based on unreliable evidence contradicting other evidence in the record is arbitrary and capricious because it fails to consider the record as a whole. Here, where there is no competent

³⁶ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970).

³⁷ *See id.* at 851.

³⁸ *See United Parcel Serv. Inc. v. U.S. Postal Serv., et al.*, 184 F.3d 827, 838 (D.C. Cir. 1999).

³⁹ *See Marin TV Services Partners, Ltd. v. FCC*, 936 F.2d 1304, 1309 (D.C. Cir. 1991); *see also Int’l Union, United Mine Workers of Am. v. Fed. Mine Safety and Health Admin., et al.*, 924 F.2d 340, 344 (D.C. Cir. 1991).

evidence in the record to support retention of the daily newspaper/broadcast cross-ownership rule, the Commission would be ill advised to undertake the role of social engineer as the proponents of the rule essentially urge it to do. Instead, it must uphold the rule of law as it has been directed to do by Congress.

The Atlanta Journal and WSB-AM have operated under common ownership since 1922. Cox purchased both the Atlanta Journal and WSB-AM in 1939, and Cox launched WSB-FM and WSB-TV in 1948. Speculative fears that cross-owned properties improperly pursue political and personal agendas have found no evidentiary support despite 80 years of common ownership in Atlanta through four wars, the Depression, recessions and boom times, Republican and Democratic federal, state and local administrations, segregation and the Civil Rights Movement. Surely if Cox's co-owned properties wanted to abuse their position, four score years would have been long enough for those abuses to surface. Accordingly, where there is no showing of

harm, the Commission cannot fail to act: at the conclusion of this proceeding the Commission must swiftly eliminate the daily newspaper-broadcast cross-ownership rule.

Respectfully submitted,
COX ENTERPRISES, INC.

By: /s/Kevin F. Reed
Kevin F. Reed
Christina H. Burrow
Its Attorneys

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