Before the
Federal Communications Commission
Washington, DC 20054

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

REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, DC 20036
(202) 429-5430

Henry L. Baumann
Jack N. Goodman
Jerianne Timmerman

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Executive Summary

The National Association of Broadcasters ("NAB") submits these reply comments in the FCC's proceeding considering whether, and to what extent, the Commission should revise its rule prohibiting common ownership of a broadcast station and a daily newspaper in the same market. NAB again urges the Commission to eliminate the cross-ownership ban.

As an initial matter, NAB stresses that the Commission must affirmatively justify any decision to retain the cross-ownership ban. Especially in light of the unusually weak record upon which the Commission adopted the newspaper/broadcast cross-ownership rule in 1975, and the FCC's statutory duty to reexamine all of its broadcast multiple ownership rules every two years, many commenters agreed with NAB that the Commission must now bear the burden of producing empirical evidence demonstrating that the rule has actually enhanced diversity and that any such diversity benefits outweigh the costs of the rule. Aside from questions as to whether the Supreme Court would, or would not, find the cross-ownership restriction constitutional today, the fact that the Court found the ban constitutionally permissible in 1978 clearly says little about the desirability of the rule, as a matter of policy, in the greatly more competitive mass media marketplace of 2002.

Certainly the record established in this proceeding does not warrant retention of the newspaper/broadcast cross-ownership rule. Numerous commenters described the extraordinary number and variety of competitive media voices available in dozens of markets, thereby confirming the Commission's own sense that the mass media marketplace has changed dramatically since the rule's adoption in 1975. Commenters also provided a wealth of evidence demonstrating the benefits to be gained from allowing newspaper/broadcast combinations. For example, studies submitted showed that common ownership of local newspapers and television

stations improves the quality of broadcast news and increases the amount of non-entertainment programming provided by broadcasters to the public. A number of broadcasters and newspaper publishers also provided many examples of how local cross-ownership has encouraged the provision of new and innovative media services (including Internet and cable), and has enhanced the quantity and quality of traditional broadcast and print news coverage provided to the public. Additional commenters persuasively argued that eliminating the cross-ownership ban should help struggling newspapers and broadcast stations (especially those in smaller markets) maintain their financial viability and continue their local news operations in an increasingly challenging competitive environment.

In contrast, commenters calling for retention of the cross-ownership rule provided a great deal of rhetoric – but little substantive evidence – to support their position. Besides revealing a fundamental mistrust of unregulated markets generally and a visceral dislike of all consolidation in media markets, these commenters have failed to connect their generalized criticisms of "profit-maximizing" media "conglomerates" to grounds justifying retention of the cross-ownership rule at issue. More specifically, these commenters supporting the cross-ownership ban have virtually ignored the impact of changes in the media environment (including the emergence of the Internet), have exaggerated the ability of traditional broadcasters to dominate the modern media marketplace, and have failed to establish how alleged "market failures" in media markets produce actual harms ameliorated by retention of the ban. In sum, the record in this proceeding cannot provide the clear empirical evidence that the Commission must have to meet its burden of justifying retention of the newspaper/broadcast cross-ownership rule, which must accordingly be eliminated.

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Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
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Newspaper/Radio Cross-Ownership Waiver Policy	)	MM Docket No. 96-197
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TO: The Commission

REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] submits this reply to certain comments on the Commission's *Notice of Proposed Rulemaking* in this proceeding.[2] In the *Notice*, the Commission sought comment on whether, and to what extent, the Commission should revise the newspaper/broadcast cross-ownership rule, which bars common ownership of a broadcast station and a daily newspaper in the same market. 47 C.F.R. § 73.3555(d). Comments were submitted in response to this *Notice* by numerous broadcasters, newspaper publishers, trade associations, and media, consumer and other advocacy groups, and they express a wide range of opinions on the Commission's proposals.

In this reply, NAB agrees with the many commenters who concluded that the record in this proceeding does not warrant retention of the newspaper/broadcast cross-ownership rule.

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[1] NAB is a nonprofit incorporated association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry.

Numerous commenters described the extraordinary number and variety of media voices available in dozens of markets, and provided a wealth of evidence showing the benefits to be gained from allowing newspaper/broadcast combinations. Indeed, several commenters argued persuasively that the strict ban on cross-ownership has produced harmful results, particularly in smaller markets.

In contrast, commenters calling for retention of the cross-ownership rule provided a great deal of rhetoric – but little substantive evidence – to support their position. Besides revealing a fundamental mistrust of unregulated markets generally and a visceral dislike of all consolidation in media markets, these commenters have failed to connect their generalized criticisms of "profit-maximizing" media "conglomerates" to grounds justifying retention of the cross-ownership rule at issue. More specifically, these commenters supporting the cross-ownership ban have exaggerated the ability of traditional broadcasters and newspapers to dominate the modern media marketplace, and have failed to establish how alleged "market failures" in media markets produce actual harms warranting retention of the cross-ownership rule. In sum, the record in this proceeding cannot provide the clear empirical evidence that the Commission must have to meet its burden of justifying retention of the newspaper/broadcast cross-ownership rule, which must accordingly be eliminated.

I. The Commission Bears The Burden Of Affirmatively Justifying Retention Of The Cross-Ownership Ban.

Like NAB, a number of commenters noted the unusually weak record upon which the Commission adopted the newspaper/broadcast cross-ownership rule in 1975. Specifically, these commenters recognized that the Commission had no evidence of any competitive or other harms

[2] *Order and Notice of Proposed Rule Making* in MM Docket Nos. 01-235 and 96-197, FCC 01-262 (rel. Sept. 20, 2001) ("*Notice*").

resulting from newspaper/broadcast cross-ownership, but merely relied on speculation about possible small diversity gains that might result from a cross-ownership restriction.[3] Especially because the FCC's bases for adopting the cross-ownership rule were so weak, most commenters agreed that the Commission must now bear the burden of producing empirical evidence that the rule has actually enhanced diversity and that any diversity gains are significant enough to outweigh the costs and burdens of the rule.[4] And even beyond the Commission's general "duty to evaluate its policies over time," especially if "changes in factual and legal circumstances" occur, *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992), Section 202(h) of the 1996 Telecommunications Act directs the Commission to review all of its ownership rules biennially to determine if they remain "necessary in the public interest as the result of competition." Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (1996). Thus, the Commission has an explicit statutory duty to reexamine the newspaper cross-ownership rule, in light of competitive changes in the marketplace, to determine whether its retention serves the public interest.

Supporters of the cross-ownership rule have contended, however, that the presumption must be *against* any change to the long-standing newspaper/broadcast cross-ownership rule and that the Commission must affirmatively justify any alteration to the existing rule. To support their position, they rely in large part on the Supreme Court's affirmance of the rule in 1978 and

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[3] *See, e.g.*, Comments of Hearst Corporation at 4; Hearst-Argyle Television, Inc. at 2-3; Newspaper Association of America ("NAA") at 9-10; Morris Communications Corporation at 2.

[4] *See, e.g.*, NAA at 84-85 (particularly because the rule was never supported by concrete evidence, the FCC has a legal duty to engage in a "zero-based" review of the ban); Comments of Morris Communications Corp. at 2-4 (arguing that the biennial review provisions of the 1996 Telecommunications Act, principles of administrative law, and First Amendment concerns all place the burden on the FCC to demonstrate that the ban is appropriate and necessary); Cox Enterprises, Inc. at 2 (legislative and judicial directives place burden of proof on FCC to develop a record that can support retaining rule); Media General, Inc. at 58-62 (fundamental principles of

on Congress' previous "explicit endorsement" of the rule.[5] *See* Comments of Consumers Union, *et al*. at 22; AFL-CIO at 4. But just because the Supreme Court found the cross-ownership ban constitutionally permissible in 1978 does not imply that the rule is in any way mandated, or that the FCC must overcome a higher presumption against change when considering any reform to the rule. After all, the constitutionality of a regulation or statute "does not tell us whether that regulation or statute is desirable" as a matter of policy, especially in light of changed circumstances since the regulation was promulgated.[6]

Moreover, relying on Congress' previous "endorsement" of the cross-ownership ban as a basis for constraining the FCC's ability to reform the cross-ownership rule today must be regarded as dubious at best. While Congress did for a time prevent the Commission from reexamining the rule, Congress has long since dropped this prohibition and, indeed, now affirmatively requires the Commission to reexamine the newspaper cross-ownership ban (along with its other ownership rules) every two years.[7] Especially in light of the biennial review

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administrative law and the requirements of the biennial review provisions of the 1996 Telecommunications Act place the burden for retaining the ban "squarely" on the Commission).

[5] For several years in the 1980's and 1990's, Congress prohibited the FCC from reexamining the cross-ownership rule. *See Notice* at ¶ 4.

[6] Timothy J. Brennan, *Vertical Integration, Monopoly, and the First Amendment*, J. Media Econ. 57, 74 (Spring 1990). Indeed, the Supreme Court might not even find the cross-ownership restriction constitutional today. *See, e.g.*, Comments of NAB at 30; Media General at 77-80; Cox Enterprises at 10 (noting that the Supreme Court upheld the rule in large part because it treated newspaper owners the same as radio and television station owners in restricting their ability to acquire licenses for co-located broadcast stations, which is, of course, no longer true). The Commission's burden to justify retention of the cross-ownership rule by clear empirical evidence is only increased by the First Amendment implications of the ban, which now clearly operates to disadvantage a single class of speakers. *See, e.g*., Comments of NAA at 101-102; NAB at 27-31.

[7] NAB also notes that Congress' entanglement in the cross-ownership rule during the 1980's and 1990's was inglorious to say the least. A congressional effort to prohibit the FCC from extending existing temporary waivers of the newspaper cross-ownership rule was ultimately

requirements of Section 202(h), and the lack of an evidentiary record for adopting the cross-ownership rule in 1975, it cannot be disputed that the Commission in 2002 bears the burden of justifying retention of the ban by affirmatively demonstrating the diversity benefits derived from it. *See, e.g., Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993) (court invalidated a FCC criterion for licensing broadcast applicants because, after 28 "years of experience with the policy," the Commission could not produce "evidence" indicating that the policy "achieves even one of the benefits that the Commission attributes to it").[8]

II. The Record In This Proceeding Does Not Warrant Retention Of The Cross-Ownership Rule.

A. The Record Demonstrates an Astounding Variety of Competitive Media Outlets and Voices in Market After Market.

The record in this proceeding confirms that the local mass "media marketplace has changed dramatically" since adoption of the newspaper/broadcast cross-ownership rule. *Notice* at ¶ 8. Submissions from numerous commenters detailed the number and variety of media outlets in markets of all sizes. Indeed, Hearst-Argyle Television conducted a comprehensive examination of traditional media "voices" in each of the nation's 210 Designated Market Areas ("DMAs"), finding that, on average, each DMA is home to 81 traditional media voices for which there are 39 separate owners. *See* Comments of Hearst-Argyle Television at 7.[9] The NAA also submitted a detailed national overview of the continuing growth in diversity and competition

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found to be unconstitutional, as it was targeted at a single publisher. *See News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988).

[8] *Accord* Comments of Media General at 61-62; NAA at 97-98.

[9] This survey, moreover, is conservative in its estimates of available media voices because it did not consider the Internet, weekly newspapers, low power or satellite radio, local and regional cable news channels, and other media. *See* Comments of Hearst-Argyle Television at 8-9.

among the media from which American consumers obtain news, information and entertainment,[10] and a number of other commenters submitted detailed analyses of the diversity of voices in dozens of specific markets.[11] Interestingly, a number of submissions identified the locally-oriented Internet sites available in various markets, which cover a range of issues from government and politics to local news and weather. *See* Comments of Media General at 26-28 and Appendices 9-14; *see also* Comments of Hearst Corporation at Appendices A, B & C; Tribune Co. at 12-31.

Commenters supporting retention of the newspaper cross-ownership ban virtually ignored the impact of the Internet, contending that the Internet has no relevance when considering reforms to the cross-ownership rule. These commenters dismissed the Internet as a "shopping mall," rather than as a source of local news and information, and also decried it as a technology oriented to "early adopters" who enjoy high income and education levels. *See* Comments of Consumers Union, *et al*. at 59-60, 92-96; *see also* Comments of Office of Communication, Inc. of the United Church of Christ, *et al*. ("UCC") at 18-19. NAB believes these commenters have fundamentally mischaracterized the value and impact of the Internet.

No one can seriously dispute that the Internet enables consumers to access easily a wide variety of national and even global sources of news and information. And as NAA pointed out, the Internet is also developing into "a rich source of local news and information." Websites "offering local news" are reported to have "significantly higher levels of customer satisfaction

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[10] *See* Comments of NAA, Appendix I.

[11] *See, e.g*., Comments of Hearst Corporation at Appendices A, B & C; Gannett Co., Inc. at Exhibit B; Morris Communications Corp. at Appendices A & B; New York Times Co. at Attachment 1; News Corporation Limited and Fox Television Holdings, Inc. ("Fox") at Tables B-1—B-10; Media General at Appendices 9-14; and Tribune Company at 12-33.

than sites offering national news." Comments of NAA at Appendix I, 18. According to the International City/Council Management Association, almost 95 percent of local governments in the United States either have a website or plan to have one in place within a year. *See* NUA, *Majority of US Local Governments Now Online*, March 1, 2001 at www.nua.com/surveys. A recent special report in the National Journal focusing on the best public-policy related websites identified many accessible, informative sites relating directly to, *inter alia*, political, economic and social issues, public affairs, and state issues. *See Guide to the Web*, National Journal at 3738 (Dec. 8, 2001).[12] Commenters discounting the role of the Internet in providing news and information, particularly political and state or local news, also ignore the fact that many websites, including those maintained by states and localities, allow citizens to access political and other information directly, without the intermediation of the media at all.[13] The Web furthermore allows citizens something that no other existing medium offers – a platform from which to speak to the entire world, cheaply and easily.[14]

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[12] For example, the recommended sites include one that reports on the status of congressional and state legislative redistricting, one that follows all legislation offered in all state legislatures and Congress, and another focusing on state courts and the administration of justice at the state level. Yet another website allows access to 500,000 state documents that include legislative policy reports, current and past legislation, statutes, and 50-state surveys. Still other state-specific sites are recommended, one of the best being for the state of New Jersey. Moreover, none of the above-described websites are controlled by a major media entity, and therefore represent "independent" voices. *See Guide to the Web* at 3773, 3776, 3783.

[13] *See, e.g.*, Deb Price, *Candidates Hit E-Campaign Trail*, Detroit News at A1 (Nov. 26, 1999) (from candidates' point of view, one of "main advantages" of campaigning on the Web is the ability to "get out their political message 24 hours a day without having it filtered by the news media"); Rinker Buck, *Turning Away from TV Debates, Candidates Embracing Internet as Alternative*, Hartford Courant at A1 (Oct. 17, 2000) (Internet allows voters to bypass "traditional" media filters, and to "go online and talk to real people and other voters").

[14] *See, e.g.*, Comments of Media General at 27-29 (noting that local markets have Internet sites that "allow for the exchange of ideas or discourse on current political issues in general" and that simple websites are "inexpensive and quick to establish" and "relatively inexpensive to maintain"). *See also Reno v. ACLU*, 521 U.S. 844, 870 (1997) (Internet "provides relatively

In addition, no one can seriously contend today that the Internet is merely an "early adopter" technology utilized only by an educated, wealthy elite presumed to be overwhelmingly non-minority. According to Forrester Research, almost half of Hispanics in the United States are now active online,[15] and the number of African American Internet users is rapidly growing.[16] Rather interestingly, a higher proportion of African Americans than whites report using the Web as an important source of election information.[17] In addition, women are now more likely than men to be frequent Internet users.[18]

For all these reasons, the Internet cannot simply be dismissed from the FCC's consideration as it addresses the newspaper/broadcast cross-ownership rule. Although the ultimate impact of the Internet on traditional media, on the conduct of public affairs and political life, and on the economy and society as whole cannot yet accurately be judged, a casual

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unlimited, low-cost capacity for communication of all kinds," and through it "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox" or a "pamphleteer").

[15] *See* NUA, *US Hispanics Active Online*, Sept. 25, 2001 at www.nua.com/surveys.

[16] The number of African American Internet users grew by 19 percent between August 2000 and August 2001, according to Nielsen NetRatings, and, in fact, African Americans are leading online growth in the United States. *See* NUA, *More African Americans Now Online*, Sept. 19, 2001 at www.nua.com/surveys; NUA, *African Americans Lead in US Internet Growth*, Feb. 27, 2001 at www.nua.com/surveys.

[17] James Thurber, Erin O'Brien and David Dulio, *Internet Campaigning*, Roll Call (Feb. 26, 2001) (recommending that campaigns interested in targeting African-American voters would do well to consider the web because 71 percent of African-Americans in survey reported that "the Internet was an important source of election information while only 54 percent of whites offered the same assessment").

[18] *See* NUA, *Women More Likely to be Frequent Net Users*, Sept. 27, 2001 at www.nua.com/surveys (although female Internet users are less likely to have years of online experience, Content Intelligence reports that women are three to six times more likely than men to become frequent Internet users within two years.)

dismissal of the Internet as a failed "dot.bomb" phenomenon is clearly inappropriate. Comments of Consumers Union, *et al*. at 95.

Given the tremendous growth in the number and variety of media outlets since 1975, as documented in this proceeding, the record furthermore unsurprisingly demonstrates that permitting newspaper/broadcast cross-ownership should raise no serious competitive concerns. For example, an updated study by Economists Incorporated showed that the level of concentration of newspaper and broadcast advertising revenues has *decreased* markedly from 1975 levels.[19] The record also specifically demonstrates that cross-owned newspapers and broadcast stations do not charge higher advertising prices than non-cross-owned media entities.[20] Thus, as NAB pointed out in its initial comments (at 9-16), competitive concerns – which could not justify adoption of the newspaper cross-ownership rule 27 years ago – clearly cannot warrant its retention today, given the dramatic increase in competition in the mass media marketplace since 1975. *See Second Report and Order* in Docket No. 18110, 50 FCC 2d 1046, 1072-73 (1975) (*"Second R&O"*) (in order adopting cross-ownership rule, FCC found no evidence of

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[19] Kent Mikkelsen, Economists Incorporated, *Horizontal and Vertical Structural Issues and the Newspaper-Broadcast Cross-Ownership Ban* (Dec. 2001), attached as Appendix IV to Comments of NAA. This study showed a decrease in concentration of about 40 percent from 1975 levels, despite the consolidation that has recently occurred in the radio industry.

[20] *See* Economists Incorporated, *Structural and Behavioral Analysis of the Newspaper-Broadcast Cross-Ownership Rules*, attached as Appendix B to Comments of NAA in MM Docket No. 98-35 (filed July 21, 1998) (study of over 1400 daily newspapers provided no indication that cross-owned newspapers charged higher advertising prices than other newspapers); Comments of Cox Enterprises at 18-20 (citing separate reports showing that television advertising and newspaper advertising prices in markets with grandfathered newspaper/broadcast combinations are no higher than in markets without such combinations and are consistent with market size); Comments of Schurz Communications, Inc. at 9-10 (existence of two grandfathered newspaper/broadcast combinations in the relatively small DMA of South Bend, Indiana has not adversely affected the advertising market).

"specific non-competitive acts" by newspaper-owned stations, and no evidence of an effect on advertising rates charged by television stations as a result of newspaper ownership).[21]

B. The Record Shows that the Cross-Ownership Rule Is, at Best, Unnecessary and, at Worst, Actually Operates to Harm Diversity in a Variety of Ways.

The Commission and supporters of the newspaper/broadcast cross-ownership rule have traditionally assumed that newspapers and broadcast stations under common ownership would not provide a meaningful diversity of viewpoints. *See, e.g.*, *Second R&O* at 1079-80; Comments of Consumers Union, *et al*. at 14. However, the Commission and other advocates of the cross-ownership ban have failed to offer empirical evidence supporting their assumption, and a very recent study demonstrates otherwise.[22] The Pritchard Study examined the diversity of information and viewpoints regarding the 2000 Presidential campaign offered by cross-owned newspaper/broadcast combinations in Chicago, Dallas and Milwaukee. "In sharp contradiction to the historical assumptions of the FCC, this study found substantial diversity in the news and

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[21] Indeed, several commenters specifically asserted that advertisers would benefit from the existence of newspaper/broadcast combinations. *See, e.g*., Comments of NAA at 39 (removal of cross-ownership ban would enable advertisers to "take advantage of cross-media packages and craft consistent multimedia advertising strategies that allow them to reach their target audiences in the most flexible and cost effective manner"); Media General at Appendix 4, 7 (multimedia advertising provides "local businesses with more platforms to reach potential customers"); Morris Communications Corp. at 15 (lifting of cross-ownership ban would allow Morris to provide its advertising customers with enhanced service, including "package rates, custom tailored mixed-media campaigns, and one-stop shopping"); Fox at 39 (newspaper/broadcast combinations "may be conducive to cross-media advertising packages with reduced rates due to volume"). Despite claims that the ability to offer "package deals" and "special combination rate[s]" to advertisers gives media combinations an allegedly unfair advantage over other media outlets (comments of UCC at 16-17), it cannot be regarded as improper for cross-owned media to benefit advertisers (and, indirectly, consumers) by increasing the cost-effectiveness of advertising. Indeed, these are the very types of efficiency benefits frequently cited to justify mergers generally.

[22] *See* David Pritchard, *A Tale of Three Cities: "Diverse and Antagonistic" Information in Situations of Local Newspaper/Broadcast Cross-Ownership*, 54 Fed. Comm. L. J. 31 (2001) ("Pritchard Study").

commentary offered by each of the three newspaper/broadcast combinations." Pritchard Study at 33. Specifically, the study "found no evidence of ownership influence on, or control of, news coverage" of the Presidential campaign in the cross-owned media properties in the three markets. *Id*. at 49.[23] The "slant" of the campaign coverage aired by each company's radio and television stations "tended to differ from the slant of news published by the company's newspaper." *Id*. This "difference was especially pronounced in Milwaukee," which was the *most* concentrated media market of the three. *Id*. Overall, the study "found a wealth of 'diverse and antagonistic' information" offered by the newspaper/broadcast combinations examined. *Id*.[24] Because commonly-owned newspapers and broadcast properties appear both willing and able to provide "diverse and antagonistic" viewpoints about political and other issues of public concern, the cross-ownership prohibition would appear, at best, unnecessary.[25]

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[23] Rather interestingly, the author of this study noted that the three media corporations being examined all favored repeal of the newspaper/broadcast cross-ownership rule, "an outcome that was much more likely" if Bush defeated Gore. Pritchard Study at 38. This position did not, however, produce a coordinated or consistent "slant" toward Bush in the coverage of the campaign by the corporations' various cross-owned media properties. *Id*. at 49.

[24] This study therefore confirms the virtually uniform comments of media entities that co-owned newspaper and broadcast properties maintain their autonomy and editorial independence and do not speak with one monolithic voice. *See, e.g*., Comments of Hearst-Argyle Television at 16; Cox Enterprises at 11-16; Gannett Co. at 11-13; Morris Communications Corp. at 15-16; Tribune Co. at 40-42; Journal Broadcast Corp. at 2-3; Media General at 34-35; NAA at 41-43. Commenters also refuted the specific assertion made by supporters of the ban that commonly owned newspapers and broadcast stations would fail to engage in "mutual criticism." Statement of Ben Bagdikian at 2, attached as Appendix A to Comments of Consumers Union, *et al*. *See, e.g*., Comments of Fox at 22-23 (citing specific examples of writers at the commonly-owned New York Post harshly criticizing the television programming, movies and sports programming of Fox Television and 20th Century Fox); Gannett Co. at Exhibit A, 11 (noting that the media writer on a commonly-owned newspaper praised a rival television newscast as probably the "best" in that market).

[25] Moreover, as Chairman Powell has expressly noted, much of the content on radio and television is entertainment-oriented and not the type of programming where the concept of viewpoint antagonism has substantial "relevance." Separate Statement of Commissioner

Additional studies and evidence show, however, that the ban on local newspaper/broadcast cross-ownership actually operates to harm diversity in today's competitive mass media marketplace. For example, a study by Bear, Stearns & Co., Inc. examined the ratings of early and late local newscasts of television stations cross-owned by a local newspaper. Assuming that higher quality news programming should capture higher viewing shares, this study clearly demonstrates that common ownership of local newspapers and television stations increases the quality of local television newscasts. Specifically, the Bear Stearns study found that cross-owned television stations had, on average, a 43% larger audience than the second-ranked station in the market during the early news daypart and a whopping 193% larger audience than the third-rated station. In the late news daypart (where ratings can be significantly impacted by the performance of the affiliated network's entertainment programming), cross-owned television stations still had, on average, a 17% greater audience than the second-ranked station and a 134% larger audience than the third-ranked station. Comments of Bear, Stearns at 24-26.

Michael K. Powell in MM Docket No. 98-35, *1998 Biennial Review Report*, FCC 00-191 (rel. June 20, 2000). *See also* Comments of Tribune Co. at 41 (noting that entertainment programming decisions are "cost-based and market-driven" and that "choosing programming reflects economic considerations" rather than "any viewpoint bias"). And as has been well established, ownership consolidation can increase diversity in programming and formats, including programming appealing to minority audiences. *See, e.g., Further Notice of Proposed Rulemaking* in MM Docket Nos. 91-221 and 87-8, 10 FCC Rcd 3524, 3551 (1995) (recognizing that consolidation in broadcast industry may well lead to greater "diversity of entertainment formats and programs"); Comments of NAB in MM Docket No. 99-25, Attachment B, *Format Availability After Consolidation* (filed Aug. 2, 1999) (showing that consolidation in radio industry increased the number of formats available to public); Comments of Media General at Appendix 7B (showing that the diversity of radio formats in markets surveyed generally increased, or at least remained constant, during a period of ownership consolidation from 1994 to 2000); West Virginia Radio Corp. at 16-18 (common ownership of several radio stations in Charleston, WV allowed the owner to change the format of one station to serve the modestly-sized African-American community); Journal Broadcast Corp. at 3-4 (common ownership of multiple radio stations in Omaha market allowed commenter to program one of its stations in Spanish to appeal to the area's small percentage of Hispanic residents).

Another study conducted for Media General showed that cross-ownership has a positive effect on the overall amount of non-entertainment programming broadcast across a market.[26] The Lichter Study compared the amount of non-entertainment programming offered by the network-affiliated television stations in markets with a newspaper/television station combination to the amount of non-entertainment programming offered by network affiliates in similarly-sized DMAs without any newspaper/television combination. In the markets with a cross-owned television station, this study found that, on average, the network-affiliated television stations aired six percent more non-entertainment programming per week than did television stations located in markets with no newspaper/television combination. Thus, the Lichter Study demonstrates that the presence of a newspaper-owned television station in a market tends to raise the competitive bar for the other television stations in the same market, thereby benefiting the public.

These studies, moreover, confirm the FCC's own 1975 study concluding that newspaper-owned television stations were superior to other television stations "in a number of program particulars." *Second R&O* at 1078 n. 26.[27] Taken together, these three studies effectively refute the contentions of supporters of the ban that cross-ownership turns newspapers into "marketing devices for broadcasters." Comments of Consumers Union, *et al*. at 66. To the contrary, common ownership of local newspapers and television stations evidently improves the quality of broadcast news and increases the amount of non-entertainment programming provided by

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[26] Samuel Robert Lichter, Ph.D., *Review of the Increases in Non-Entertainment Programming Provided in Markets with Newspaper-Owned Television Stations*, attached as Appendix 5 to Comments of Media General ("Lichter Study").

[27] The FCC previously found that cross-owned television stations programmed more local news and more local programming generally than other television stations. *Second R&O* at 1094, Appendix C.

broadcasters to the public. The cross-ownership prohibition therefore harms the public interest by preventing the common ownership of local newspapers and television stations.

Beyond the studies discussed above, the record in this proceeding also contains a wealth of more anecdotal evidence describing the benefits produced by common ownership of newspapers and broadcast outlets. Commenters have provided evidence that newspaper/broadcast cross-ownership should, *inter alia*, enhance localism, encourage the development of new media services, and, above all, improve (or at least maintain) existing broadcast and print news coverage.

For instance, several commenters asserted that elimination of the newspaper cross-ownership ban "can help *local* broadcasters compete with larger *national* multi-media, multi-platform players." Comments of Bear, Stearns at 5 (emphasis in original). As Tribune explained in more detail, cross-ownership would enable unaffiliated stations (or stations affiliated with emerging networks) that often do not offer news to start a local news operation in competition with the well-financed newscasts aired by television stations affiliated with (or even owned by) the major networks. *See* Comments of Tribune Co. at 26, 50-51 (Tribune's station in Miami was unable to start a local newscast to compete with the newscasts of network-affiliated stations because the terms of a temporary waiver of the cross-ownership rule prevented that station from utilizing the resources of Tribune's newspaper in Fort Lauderdale).

A number of commenters also provided many examples of how newspaper/broadcast cross-ownership has encouraged the provision of new and innovative media services, and has enhanced the quantity and quality of local news coverage. Commenters discussed in detail how existing newspaper/broadcast combinations have utilized their combined resources and expertise

to develop "state-of-the-art web sites offering unique locally oriented content" and to "launch successful local cable news channels" in several markets. Comments of NAA at 31-34.[28] According to many commenters, local cross-ownership of a newspaper and a broadcast outlet has additionally improved the traditional broadcast and print news coverage provided to the public in a number of markets.[29] Along with the studies described above, all of these examples serve to

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[28] *See also* Comments of Hearst-Argyle Television at 16-17 (common owner of a newspaper and television station can develop synergies, such as a web site that includes in-depth reporting on local news and accompanying video clips); Belo Corp. at 6 (describing how Belo combined resources of its four Texas television stations and its Dallas newspaper to create 24-hour cable news network currently serving one million viewers in Texas); Tribune Co. at 48 (Tribune utilized its Chicago newspaper and television station to create a 24-hour all news local cable channel that lost money for seven straight years before becoming a success); Bonneville International Corp. at 5-6 (describing improved content and service resulting from joint operation of a grandfathered radio/television/newspaper combination in Salt Lake City, including joint funding and operation of a web site devoted to the Winter Olympics); Stanley Besen and Daniel O'Brien, Charles Rivers Associates, Inc., *An Economic Analysis of the Efficiency Benefits from Newspaper-Broadcast Station Cross-Ownership*, attached as Appendix B to Comments of Gannett Co. in MM Docket No. 98-35 (filed July 21, 1998) (development of new media, such as the Internet, found to increase "the benefits of cooperation between traditional newspaper and broadcast operations" and therefore also the costs imposed by the cross-ownership ban).

[29] *See, e.g.*, Comments of Belo Corp. at 4-6 (sharing of resources of cross-owned television station and newspaper in Dallas has allowed coverage of a wider range of news stories, including international events, national political issues, and local issues, such as the development of a new mass transit service); Cox Enterprises at 12-13 (grandfathered newspaper/broadcast combinations in Atlanta and Dayton have provided consumers with more local news (including political) coverage and significant investigative reporting); Morris Communications Corp. at 6-12 (cross-owned newspaper/radio outlets in Topeka and Amarillo have long provided superior service to their communities, including very substantial local news coverage, particularly on agricultural issues); Gannett Co. at 7-11 (common ownership of television station and newspaper in Phoenix has allowed the delivery of more news with greater depth and increased community service, particularly with special projects (such as ones involving public schools and health care) utilizing combined resources); New York Times Co. at 7-10 (describing how the programming of a commonly-owned FM station in New York City has been enhanced by access to the New York Times' "extraordinary staff of reporters and commentators"); Tribune Co. at 44-47 (because providing consumers with local news is the "primary mission of the daily newspaper," Tribune's newspapers have contributed unique resources to local newscasts of sister stations in Chicago, Hartford, New York and Los Angeles, on such topics as the death penalty, the California energy crisis, and mayoral elections); James K. Gentry, Ph.D., *The Public Interest Benefits Achievable From Eliminating the FCC's Newspaper-Broadcast Cross-Ownership Rule*,

refute contentions that allowing newspaper/broadcast cross-ownership would erode the quantity and quality of local news coverage and programming. *See, e.g.*, Comments of AFL-CIO at 4; UCC at 14.

But perhaps even more importantly, eliminating the cross-ownership ban should help struggling newspapers and television stations (especially those in smaller markets) maintain their financial viability and continue their local news operations. *See* Bond & Pecaro, *A Study to Determine Certain Economic Implications of Broadcasting/Newspaper Cross-Ownership*, attached as Appendix B to NAB Comments in MM Docket No. 98-35 (filed July 21, 1998) (allowing newspapers and broadcast stations to combine "would have a positive economic impact upon these businesses" by increasing "operating cash flow," and "could have a significant impact on the efficiency of operations in smaller markets, especially for marginally performing newspapers and television stations").

As the Commission has recognized, the maintenance of a broadcast news operation entails considerable costs, and some television stations (especially lower-rated and/or non-network-affiliated stations) are simply unable to offer significant local news programming for financial reasons. *See Report and Order* in MM Docket Nos. 91-221 and 87-8, 14 FCC Rcd 12903, 12933 (1999). Indeed, financial difficulties have even recently forced some network-affiliated stations to cut back or entirely eliminate their news operations.[30] Elimination of the

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Appendix 4, Comments of Media General (benefits of convergence of newspaper and television station in Tampa Bay include, *inter alia*, increasing the depth of content on television news through access to the newspaper's archives and research desk, better access to political candidates and government officials, and faster access to breaking news for the newspaper).

[30] *See, e.g.*, *Bye Bye, News*, Broadcasting & Cable at 40 (Jan. 7, 2002) and Electronic Media at 1 (Jan. 2, 2002) (reporting that ABC affiliates in several markets, including St. Louis, have eliminated local news due to weak economy, decline in advertising revenues and competition); Dan Trigoboff, *Live at 11? Maybe Not for Long*, Broadcasting & Cable at 29 (Feb. 11, 2002) (questioning whether local markets can sustain as many television news departments and

newspaper cross-ownership ban would be one way to forestall further cut backs in local broadcast news operations and even encourage the development of new broadcast news operations. *See M Street Daily* at 1 (Dec. 7, 2001) (reporting that newspaper publisher Knight-Ridder is "poised to buy" radio stations "it could flip to all-news" if FCC relaxes newspaper/broadcast cross-ownership rule, and also speculating that other newspaper owners, particularly Gannett, would "return to radio" if the rule were relaxed). Those who bemoan the decline in the number of local broadcast news operations (*see* Comments of Consumers Union, *et al*. at 80) should therefore rethink their opposition to reform of the newspaper/broadcast cross-ownership rule. Especially if local broadcast news operations are to remain viable in small markets, reform of the newspaper/broadcast cross-ownership prohibition is urgently needed.[31]

III. Supporters Of The Cross-Ownership Ban Do Not Present A Sufficient Case For Its Retention.

Those commenters supporting the newspaper/broadcast cross-ownership rule have not provided the clear empirical evidence that the Commission must have to meet its burden of

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newscasts as currently exist); Attachment A to Appendix 4 of Comments of Media General (identifying many press accounts of cutbacks in local television newscasts in numerous markets from November 1998 through November 2001).

[31] *See, e.g.*, Comments of Star Printing Co. at 2-3 (asserting that small markets need relief from cross-ownership rule, which has prevented an existing newspaper/AM combination in Miles City, Montana from acquiring an FM station to "broaden local coverage of public issues and events, local sports and commentary"); West Virginia Media Holdings, LLC at 2-3, 8-14 (with emphasis on Clarksburg, WV market, commenter detailed how small market newspapers and television stations cannot afford to cover issues of local importance or purchase state-of-the-art equipment, and how ownership restrictions "atomize" media ownership in smaller markets so as to impair the ability of media entities to cover local news and public affairs in any significant depth); Steve McClellan, *Small Towns, Big Problems*, Broadcasting & Cable at 20-21 (Aug. 6, 2001) (network compensation, which is decreasing and may be ended altogether, "is the sole source of funding for key services like local news operations" in small markets, and the owner of stations in Glendive and Billings, Montana and Alpena, Michigan stated that the loss of compensation "would force him to reconsider the viability of continuing his local news operations").

justifying retention of the rule. Instead of providing such evidence, these commenters engaged in a lengthy rhetorical discussion attacking media consolidation and the supposed evils of profit-maximizing media conglomerates. These commenters conspicuously failed, however, to connect their generalized criticisms of the mass media marketplace with actual harms that will be directly ameliorated by retention of the cross-ownership ban. And certainly these commenters have failed to establish that any alleged harms prevented by the cross-ownership rule outweigh the significant costs imposed by the rule, especially in smaller markets. *See* Section II.B. above.

A. Comments Supporting the Newspaper Cross-Ownership Ban Consist of General Criticisms of Media Consolidation, Profit-Driven Conglomerates and Unregulated Markets, Which Bear Little Direct Relevance to the Ownership Rule at Issue.

As an initial matter, NAB notes that comments advocating retention of the newspaper/broadcast cross-ownership rule generally reveal a longing for a media marketplace consisting of small, independently-owned media outlets reflecting "the Thomas Paine pamphleteer tradition" of journalism. Comments of Consumers Union, *et al*. at 65. But a variety of forces, including advances in technology, demographic shifts, greater competition and globalization, have already irrevocably altered the media.[32] The Commission's task in this and other ownership proceedings must therefore be to adapt its rules to this radically changed media environment.

More specifically, commenters supporting the newspaper cross-ownership ban complain about consolidation and commercialization in the media and the ill effects of profit-seeking media conglomerates. *See, e.g.,* Comments of AFL-CIO at 5, 11; Consumers Union, *et al*. at 12-14, 54-58, 71-72. They have conspicuously failed, however, to establish the essential connection

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[32] Amy Korzick Garmer, *American Journalism in Transition: A View at the Top*, A Report of the Fifth Annual Aspen Institute Conference on Journalism and Society at 1-2 (2001).

between ownership consolidation (or newspaper/broadcast cross-ownership specifically) and the alleged problems of commercialized, profit-maximizing media.[33] NAB certainly sees no logical or necessary connection between the common ownership of media outlets and the degree to which media owners are driven by profit motives. After all, why should the owner of a single media outlet automatically be assumed to be more public spirited and less driven by profit motives than the joint owner of a newspaper and a broadcast outlet? Indeed, in today's competitive media environment, the owner of a stand-alone outlet may be even more concerned about profits and losses than the owner of a joint media operation because of the struggles of many stand-alone media outlets to even survive in the marketplace, especially during economic downturns.

Moreover, the Commission should not accept the simplistic implication of these comments that small, independently-owned media are by nature "better" than commonly-owned or consolidated media. The "size and diversification" of a media conglomerate may in fact be "one of the best assets for news organizations trying to cope with market pressures," because a company that "gains significant profits in one area" may "reinvest that money in its news properties." Garmer, *American Journalism in Transition* at 18.[34] As other commenters in this

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[33] *See, e.g.,* Comments of AFL-CIO at 5 (stating that consolidation puts "increasing pressure on local newspapers and broadcast stations to reduce costs and increase profits"). Commenters failed to explain, however, why they believe it is consolidation, rather than other factors such as an increasingly competitive media marketplace, the development of new technologies, changing consumer tastes, a decline in the advertising market or economic hard times, that produces this "pressure" on media outlets to "reduce costs and increase profits." The actual link between consolidation and a claimed deleterious obsession with profits is never established.

[34] *See also* Daniel Brenner, *Ownership and Content Regulation in Merging and Emerging Media*, 45 DePaul L. Rev. 1009, 1027 (1996) (larger companies "can produce greater diversity for society" by financing start-up content activity that smaller entities cannot afford, by combating government censorship and supporting First Amendment freedoms, and by expanding speech diversity as a means to grow their operations).

proceeding pointed out, ownership restrictions can "so atomize media ownership," particularly in small markets, that they "actually reduce the media's ability to create local news and public affairs information of any significant depth or breadth." West Virginia Media Holdings at 13.[35]

In generally opposing all media consolidation, comments advocating retention of the cross-ownership ban reflect the outmoded regulatory philosophy that 51 different broadcast licensees must be "more desirable than 50" because "there is no optimum degree of diversification."[36] *See, e.g.*, Comments of UCC at 8-9; Consumers Union, *et al*. at 7-11, 17-18. As discussed in detail in NAB's initial comments (at 18-20), this regulatory approach of maximizing diversity of ownership at all costs that reached its peak in the 1970's was eventually rejected by the Commission and by Congress. Indeed, the Commission has long since expressly recognized the public interest benefits flowing from joint ownership of media entities.[37] The record in this proceeding, moreover, shows that newspaper/broadcast cross-ownership can help keep local media competitive with the outlets owned by national media entities (*see supra* 14), preserve the financial viability of struggling outlets, especially in small markets (*see supra* 16-

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[35] *See supra* 12-17 for a discussion of the harms to diversity caused by the newspaper cross-ownership ban, especially in smaller markets.

[36] *First Report and Order* in Docket No. 18110, 22 FCC 2d 306, 311-12 (1970) (adopting the one-to-a-market rule preventing any single entity from owning more than one broadcast facility in the same market).

[37] *See, e.g., Report and Order* in MM Docket Nos. 91-221 and 87-8, 14 FCC Rcd 12903, 12930 (1999) (allowing local television duopolies "can contribute to programming and other benefits such as increased news and public affairs programming and improved entertainment programming, and, in some cases, can ensure the continued survival of a struggling station"); *Second Report and Order* in MM Docket No 87-7, 4 FCC Rcd 1741, 1748 (1989) (radio/television cross-ownership rule relaxed, as evidence showed that "group-owned stations spend a larger percentage of their budgets on news and overall programming than independent stations" and that group-owned stations may "air more informational programming than non-group-owned stations").

17), and improve, or at least maintain, the news coverage and services provided by local media, particularly television broadcasters. *See supra* 12-16.

The refusal by supporters of the newspaper cross-ownership rule to admit that consolidation has a number of public interest benefits not only flies in the face of reality, but also prevents any discussion by the rule's advocates of its costs and whether those costs are outweighed by the alleged benefits of the cross-ownership ban. The bald assumption that the newspaper cross-ownership rule has been "successful in achieving its intended purpose of promoting diversity and competition" merely because it has reduced the number of newspaper/broadcast combinations and prevented new media combinations is accordingly both unsupported and unwarranted. Comments of UCC at 8-9.

Beyond generally criticizing consolidation in media markets, comments supporting the newspaper cross-ownership ban reflect a fundamental dislike and distrust of unregulated markets. According to commenters, market forces do not provide "adequate incentives" to produce a "high quality media product" or to distribute a "sufficient amount of diverse content necessary to meet consumer and citizen needs." Consumers Union, *et al*. at 49. "[E]conomic competition in commercial mass media markets" also allegedly fails to "assure [viewpoint] diversity and antagonism," but only produces "standardized, lowest common denominator products." *Id*. at 12-13. NAB initially observes that the Commission rejected this anti-market position nearly two decades ago when it determined that broadcast stations would in fact provide an "appropriate mix" of programming (including nonentertainment) in response to market forces.[38]

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[38] *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076, 1087 (1984) (eliminating programming guidelines and

But even assuming for the sake of argument that market forces do at times fail, for example, to produce "high quality media products" or "sufficient amounts" of certain types of content, these commenters do not establish that retention of the Commission's ownership rules generally, or the newspaper/broadcast cross-ownership rule specifically, will ameliorate these problems by causing the production of "better" media products. And, in any event, NAB wonders how the "high" or "low" quality of media products is to be measured, and who is to be entrusted with judging the quality of such products, if ownership rules were to be justified on the basis that a structurally unregulated media market produces substandard products.[39] Indeed, even asking such questions points to the futility of attempting to justify broadcast regulation on the basis of perceived failings in the quality or content of programming.[40]

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ascertainment requirements for television stations). In eliminating the broadcast programming guidelines for radio in the early 1980's, the Commission even suggested that "it may be *offensive* to the public interest to require any type of programming be offered in amounts that please the Commission rather than the public whose interest, after all, is intended to be the interest served under the public interest standard." *Deregulation of Radio, Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968, 1064 (1981) (emphasis added).

[39] "It is difficult and perhaps constitutionally impermissible for *government* to impose its conception of worthiness or beauty on [television] viewers." Separate Statement of Commissioner Michael K. Powell in MM Docket No. 98-35, *1998 Biennial Review Report*, FCC 00-191 (rel. June 20, 2000) (emphasis added).

[40] *See generally* T. Krattenmaker and L. Powe, *Regulating Broadcast Programming* at 311, 315 (1994) (in discussing critics' contentions that broadcasters should produce more and better news and public affairs programming, authors note that "[n]o regulation can make local news harder and better," and observe that these demands stem from the "belief that it is the right of elites to dictate tastes to viewers and listeners"). This "belief" in the "right" to "dictate tastes to viewers and listeners" is certainly reflected in commenters' laments about the "couch potatoism" that broadcasters respond to, how "[c]ouch potatoes staring at the TV set are not enough for democracy to work," and how the media produces "standardized, lowest common denominator products," avoids "culturally uplifting but less commercially attractive content" and "favors entertainment at the expense of information." Comments of Consumers Union, *et al*. at 6, 12. NAB remains unconvinced that concerns over broadcasters "possibly foster[ing]" "couch potatoism" constitute a valid basis for structural ownership regulation. *Id*. at 6.

B. More Specific Claims of Failures in the Mass Media Marketplace and of the Continued Dominance of Broadcasters Made by Supporters of the Cross-Ownership Ban Are Either Unrelated to the Ownership Rule at Issue or Mischaracterize Broadcasters' Position in the Media Marketplace.

Beyond superficially criticizing consolidated media and unregulated markets as described above, commenters advocating retention of the cross-ownership ban do make more specific claims concerning market failures and continued broadcaster dominance in concentrated mass media markets. But again, even these apparently more specific assertions lack any direct connection to the newspaper/broadcast cross-ownership rule at issue, or are inaccurate representations of the position of broadcasters in today's highly competitive media marketplace.

For example, commenters assert that certain unique characteristics of media markets give rise to several "distortions" or "failures" in these markets, including the underserving of minorities and other small or niche groups and the exercise of ownership influence over the organization and content of the media. Comments of Consumers Union, *et al*. at 37-38. Even assuming, for the sake of argument, that media markets may not perfectly reflect consumer preferences or may reflect other "distortions," NAB asks what this means in the context of this proceeding. Are commenters asserting that, because there are certain alleged market failures, then the adoption or retention of any sort of structural regulation should automatically be considered appropriate policy? Again, commenters' criticisms of the media marketplace are not specific enough to inform the question of how to address the specific ownership rule at issue in this proceeding.

Even the studies submitted by commenters fail to establish how retention of the newspaper/broadcast cross-ownership rule would ameliorate the alleged market failures. For instance, one study presents a case for the seemingly obvious point that markets with more diverse populations tend to have more diverse television programming that is then watched by

these more diverse populations.[41] While this may be true, NAB wonders what, if any, implication this has for the newspaper/broadcast cross-ownership rule. There should be no reason to assume that, if a local newspaper owned a local radio or television station, that station would be less inclined to provide the minority viewers in that market with minority-oriented programming than would a stand-alone broadcast outlet in that same market. After all, whether separately owned or commonly owned with a local newspaper, any broadcast station in a particular market with a certain minority population will be responding to those same minority viewers or listeners.[42] In sum, this study appears to have little relevance to the question of whether the newspaper/broadcast cross-ownership rule should be retained or eliminated.

Another study contends that the "weak competition" allegedly resulting from certain characteristics of media markets[43] "allows owners to earn monopoly profits and to use monopoly rents to pursue their personal agendas," including "political" agendas. Comments of Consumers Union, *et al*. at 44, discussing C. Edwin Baker, *Giving Up On Democracy: The Legal Regulation of Media Ownership*, attached as Appendix C ("Baker Study"). NAB questions both the basic premises and the conclusions of this study. As an initial matter, competition in today's

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[41] *See* Joel Waldfogel, *Who Benefits Whom in Local Television Markets*? at 2-3 (Nov. 15, 2001), attached as Appendix B to Comments of Consumers Union, *et al*. (study will "show that the targeting of local programming to minority viewers is much greater in markets with larger minority populations" and the quantity of "minority-targeted television draws minority viewers to viewing").

[42] One could also question whether this study even supports the contention that a significant failure of media markets is to systematically underserve minority populations. A showing that television broadcasters actually do provide more minority-targeted programming in markets with larger minority populations would seem to show that media markets are in fact responsive to the preferences of local viewers and listeners, including minorities.

[43] These characteristics are high first copy (or fixed) costs and the inability to substitute between, or strong preferences for, products. Comments of Consumers Union, *et al*. at 37.

mass media marketplace is more accurately characterized as "relentless" (Garmer, *American Journalism in Transition* at 2), rather than "weak," as the record in this proceeding clearly demonstrates.[44] NAB also disputes the claim that this supposedly weak competition allows broadcast owners in the mass media marketplace to earn "monopoly profits." As NAB has previously documented, increased competition, the costs of the transition to digital television, and the weakened economy and advertising market have all combined to squeeze profits for television broadcasters like never before, especially in small but also in larger markets.[45] Indeed, in such a highly competitive, financially challenging marketplace, many broadcasters are

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[44] *See, e.g.*, *Notice* at ¶¶ 9, 11 (noting significant decline in viewership of commercial television stations, especially due to competition from cable); Comments of Bear, Stearns at 3-4 (summarizing the declining circulation/ratings and advertising revenues of newspapers and television stations); Tribune Co. at 31-37 (describing fragmentation of media markets due to competition, and the decline in ratings and circulation of television and radio stations and newspapers).

[45] *See, e.g.*, John Smyntek, *Local TV Landscape Could Change, Conditions Ripe for Station Consolidation*, Detroit Free Press at 6E (Oct. 31, 2001) (anticipating consolidation in ownership of Detroit's television stations due in part to poor revenue performance "that will force some small owners with heavy debts to sell"); Jube Shiver, Jr., *Broadcasters Face Prospect of Takeovers*, Los Angeles Times, Part 3/Page 1 (Oct. 22, 2001) (describing how costly transition to digital television has "left many of the nation's" station owners "in debt" and made them likely targets for takeovers by larger media companies); Steve McClellan, *Small Towns, Big Problems*, Broadcasting & Cable at 20 (Aug. 6, 2001) (describing the difficult economic circumstances faced by television stations in markets ranked 75th and below); Steve McClellan, *Bleak News Gets Even Bleaker*, Broadcasting & Cable at 12 (Nov. 12, 2001) (describing steep decline in revenue and earnings for "networks and stations alike"). Newspapers are also suffering financially due to the decline in the advertising market and competition from new technologies, including the Internet. *See, e.g.*, Alwyn Scott, *Lean Times for Advertising Budgets, Media Firms are Squeezed in Downturn*, Seattle Times at D1 (Nov. 25, 2001) (noting that some newspapers have been pushed "into the red," and residents fear that Seattle "could lose one of its daily newspapers"); Margarey Beck, *Buffett: Hard Times Ahead for Papers*, AP Online (April 29, 2001) (investor Warren Buffett predicted "hard times for the newspaper industry" because the Internet "is scooping newspapers not only on news, but in cheap accessibility" and is "siphoning" off "advertising dollars").

struggling to make any sort of profit, let alone "potentially significant monopoly profits." Baker Study at 43.[46]

NAB furthermore disputes that these alleged "monopoly profits" are used routinely by media owners to "indulg[e]" or "subsidiz[e]" their "personal ideology." Baker Study at 43-44. The recent Pritchard Study discussed above (at 10-11) certainly "found *no* evidence of ownership influence on, or control of, news coverage" of the 2000 Presidential campaign by the commonly-owned media properties examined in Chicago, Milwaukee and Dallas. Pritchard Study at 49 (emphasis added). Other scholars have specifically concluded that media owners are constrained by marketplace pressures and economic incentives from "control[ling] content in ways they prefer and in ways" divergent from the preferences of "readers, listeners, or viewers."[47] Especially in today's extraordinarily competitive media environment, the "incidence" of problems with media firms "control[ling] content in ways they," rather than consumers, "prefer," should be extremely limited. Brennan, *Vertical Integration, Monopoly, and the First Amendment* at 68. Certainly the Baker Study contained little empirical support for its contention that media owners utilize their "monopoly profits" to control content in ways that

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[46] *See, e.g.*, McClellan, *Small Towns, Big Problems* at 20 (profit margins, which have never been substantial for television stations in small markets, may disappear altogether if network compensation is further reduced or eliminated).

[47] Brennan, *Vertical Integration, Monopoly, and the First Amendment* at 67-68 (explaining that "profit maximization, *even under monopoly*, limits the divergence between the content a monopolist provides and the content most desired by readers, listeners, or viewers," and that "*competition*" also "limits the incidence" of media firms restricting communication by "not transmitting the content" that "consumers want") (emphasis added). *Accord* David Haddock and Daniel Polsby, *Bright Lines, the Federal Communications Commission's Duopoly Rule, and the Diversity of Voices*, 42 Fed. Comm. L. J. 331, 348-49 (1990) (concluding that the "great majority of those who operate broadcast stations" do not appear driven "by the desire to mold public opinion and attitudes").

further their own personal or political agendas, at the expense of the preferences of consumers.[48] Accordingly, this study provides scant support for claims that structural regulations generally -- or the newspaper cross-ownership rule in particular -- are warranted because media markets are seriously distorted by the exercise of ownership influence over the organization and content of the media.

Beyond failing to establish that certain alleged market failures in any way warrant retention of a complete prohibition on local newspaper/broadcast cross-ownership, supporters also attempt to justify retention of the ban by greatly exaggerating the extent to which broadcast television stations and the networks continue to dominate the mass media marketplace. Claims that retention of the cross-ownership rule is justified because the "commercial media marketplace" has not "changed to any significant degree" since 1975 are simply inaccurate, (comments of Consumers Union, *et al*. at 19), as are claims about the extent to which television broadcasters (especially the networks) "still dominate" the viewing audience and the advertising market. *Id.* at 76.

A number of commenters – and even the *Notice* itself – provide ample evidence refuting claims that the mass media marketplace has not experienced any "fundamental change" since 1975. Comments of Consumers Union, *et al*. at 19. As set forth in the *Notice*, the audience share of network-affiliated stations has dropped significantly since 1975, as the number of subscribers to cable television and Direct Broadcast Satellite has grown rapidly.[49] Bear, Stearns

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[48] This portion of the Baker Study (at 44-45) cited a single source describing the book publishing industry to "illustrate" such claims.

[49] *See Notice* at ¶¶ 9, 11 (prime time audience share of affiliates of ABC, CBS and NBC was 95% in 1975 but the prime time audience share of *all* commercial television stations today (affiliates of the seven networks and independent stations) is only 61%; meanwhile, the combined audience share of basic and premium cable networks has grown to 48%).

submitted comments detailing (1) the decline in the circulation, household penetration and total advertising revenue share of newspapers since 1975, and (2) the increase in competition in the video marketplace for television broadcasters and the consequent loss of audience share and advertising revenue share since 1975. *See* Comments of Bear, Stearns at 7-11, 13-22. Tribune similarly documented the fragmentation in the media marketplace, with ratings declines for the television networks and local stations, dramatic plunges in listener shares for radio stations, and circulation declines for daily newspapers. *See* Comments of Tribune Co. at 31-34 (noting a 50 percent or greater decline in the shares of the top-rated television stations from 1975 to today in markets such as New York City, Miami and Hartford).

Even in areas such as news where television broadcasters have traditionally dominated, fewer viewers are watching local and national news, and this drop in viewership seems due at least in part to competition from other news sources, including the Internet and cable. According to recent research, regular viewership of local news has fallen from 72% in 1995 to only 56% in 2000.[50] Thus, the claim by supporters of the cross-ownership ban that "viewership of local broadcast news has not dropped off" also appear inaccurate. Comments of Consumers Union, *et al*. at 92. In sum, assertions that the newspaper/broadcast cross-ownership rule should be retained because the media environment generally has not substantially changed since 1975, and

[50] *See Internet Sapping Broadcast News Audience*, Pew Research Center for the People & the Press (2001) (available at www.people-press.org/media00rpt.htm) (noting the "rapid emergence of the Internet as a news source," a decline in regular viewership of local television news from 64% to 56% between 1998 and 2000, and a decline in regular viewership of network television news from 38% to 30% in that period); *The Shrinking Audience for Local TV News*, Newslab Report (1999) (available at www.newslab.org/nonview-1.htm) (in 1995, 72% of those surveyed said they watched local news regularly, but in 1998 only 64% fell into the category of regular viewers); Angela Powers, *Toward Monopolistic Competition in U.S. Local Television News*, 14 J. Media Econ. 77 (2001) (reporting that "nationwide viewers of local television news declined from 71% in 1995 to 59% in 1999").

because television broadcasters and networks in particular still dominate the marketplace, do not reflect the reality of today's highly competitive mass media market and should be rejected by the Commission.

Advocates of the cross-ownership ban have similarly overstated the degree of concentration that exists in media markets. *See* Comments of Consumers' Union at 70, 72, 75, 81 (contending that media markets are "highly" or even "dangerously" concentrated in both advertising revenue and local viewing shares); UCC at 2-8 (alleging that consolidation has greatly concentrated broadcast audience share in hands of fewer owners). But again, the evidence provided does not support the claims asserted – and certainly does not justify retention of the specific cross-ownership rule at issue in this proceeding.

For example, UCC submitted a study purporting to show that viewership in local television markets is highly concentrated among a small number of owners. *See* Comments of UCC at Attachment 3, *Local Television Ownership and Market Concentration Study* ("UCC Study"). In determining the television viewership shares in ten selected markets, UCC only examined local market commercial broadcast television stations, and excluded viewing of out-of-market television stations, all non-commercial stations, and, most significantly, all cable channels/networks. Thus, the UCC Study seriously undercounted the number of television "voices" available in local markets, and overestimated the level of viewership concentration in these markets.[51] Such a study cannot be seen as accurately reflecting the degree of viewership

[51] It should be obvious that, if cable and noncommercial broadcast station viewing is completely ignored, then the top commercial broadcast television stations will receive a significantly higher share of the remaining television viewing that is counted. *See* Comments of Tribune Co. at 36-37 (pointing out that, in New York and Los Angeles – two markets where UCC decried the high level of concentration in television viewership – cable channels often enjoy higher local audience shares than broadcast stations).

concentration in any local video market. Like UCC, other commenters reached the conclusion that television broadcasters still dominate the mass media marketplace only by ignoring the competition provided by multichannel video services.[52]

Rather interestingly, UCC expressly applauded the operation of ownership restrictions in smaller markets such as Billings, Montana where the number of independent owners of broadcast television stations has increased and where the "share of local commercial viewers held by the top two television station groups" has "dropped" since 1993. Comments of UCC at 8. But UCC should not be so quick to approve of market fragmentation in Billings and other small media markets. In fact, one owner of a Billings television station has stated that, due to small profit margins, he may be forced "to reconsider the viability of continuing his local news operation" if network compensation is cut.[53] As described in greater detail above, it is in small markets like Billings that reform of the newspaper/broadcast cross-ownership and other local ownership rules are most needed if local broadcasters – and their local news operations – are to remain financially viable. *See supra* 16-17.

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[52] *See* Comments of Consumers Union, *et al*. at 67-70 (contending that "*broadcast TV*, newspapers, radio, *multichannel video* and the Internet" do "*not* compete with each other") (emphasis added). Any claim that television broadcasters do not compete with multichannel video programming distributors ("MVPDs") is flatly absurd. *See, e.g.*, *Eighth Annual Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, FCC 01-389 at ¶¶ 78, 80 (rel. Jan. 14, 2002) (stating that "[b]roadcast networks and stations are competitors to MVPDs," discussing the increased advertising revenues and viewing shares earned by cable networks, and describing the decline in prime time viewing share received by broadcast network affiliates). Given this completely erroneous discounting of the competition provided by MVPDs, the Commission must discount claims by supporters of the newspaper/broadcast cross-ownership rule that the ban should be retained due to the still dominant marketplace position of broadcasters.

[53] McClellan, *Small Towns, Big Problems* at 20 (quoting Stephen Marks, owner of stations in Billings and two other small markets). *See also WKPT News Is Kaput*, Broadcasting & Cable at 36 (Jan. 21, 2002) (ABC affiliate in Kingsport, TN "is shutting down its news department," due to loss of network compensation, costs of digital transition and poor economic climate).

Finally, NAB observes that, if the Commission is most concerned about "the impact of concentration on diversity in the marketplace of ideas" – as supporters of the newspaper cross-ownership rule most fervently contend – then it must be careful in defining the market so as not to "overestimate the degree of concentration," as advocates of the ban have done.[54] In an "era of rapidly converging media technologies, and the equally rapid development and diffusion of alternatives to mainstream media," it is "increasingly important to consider the presence and impact of substitutes" to traditional media such as broadcast outlets. Bates, *Concentration in Local Television Markets* at 17. Indeed, nearly two decades ago, the Commission concluded that "the information market relevant to diversity concerns includes not only TV and radio outlets, but cable, other video media, and numerous print media" (such as newspapers, magazines and periodicals) "as well." *Report and Order* in Gen. Docket No. 83-1009, 100 FCC 2d 17, 25 (1984). Today, with the recent emergence of, *inter alia*, the Internet and video and radio satellite services, the "information market relevant to diversity concerns" is broader and more varied than ever before. *Id*. Although supporters of the newspaper cross-ownership rule have tried valiantly to convince the Commission that little has changed in the mass media marketplace since 1975, any objective review of the record in this proceeding demonstrates otherwise. In light of the expansion in the number of traditional broadcast outlets and the "rapid development and diffusion of alternatives" to these "mainstream media" since 1975, the Commission has no defensible empirical basis for retaining the strict prohibition on local cross-ownership of daily newspapers and broadcast stations. Bates, *Concentration in Local Television Markets* at 17.

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[54] Benjamin J. Bates, *Concentration in Local Television Markets*, J. Media Econ. 3, 17 (Fall 1993) (arguing that using the "same market definition to consider the impact" of "concentration on the price of advertising" to also consider "the impact of concentration on diversity in the

IV. Conclusion.

The record in this proceeding does not provide the clear empirical evidence that the Commission must have to meet its burden of justifying retention of the newspaper/broadcast cross-ownership rule. Instead of providing such evidence, commenters supporting retention of the rule supplied a lengthy jeremiad against all consolidation in media markets and the alleged evils of profit-maximizing media conglomerates. These commenters completely failed, moreover, to link their anti-market rhetoric and generalized criticisms of the mass media to actual harms that will be directly ameliorated by retention of the cross-ownership ban. Certainly advocates of retaining the newspaper cross-ownership rule have failed to demonstrate that any benefits to be derived from the ban outweigh the significant costs imposed by the rule, especially in smaller markets.

In contrast, commenters calling for elimination of the newspaper cross-ownership rule have shown that the rule is, at best, unnecessary because local media markets are highly competitive and characterized by an astounding variety of media outlets and voices. Evidence in the record also demonstrates that the ban on local newspaper/broadcast cross-ownership actually operates to harm diversity in a variety of ways in today's fragmented, competitive mass

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marketplace of ideas" would "be to seriously overestimate the degree of concentration" in the marketplace of ideas).

media marketplace. In light of the record in this proceeding, the Commission simply has no defensible basis for retaining its absolute prohibition on common ownership of newspapers and local broadcast outlets.

Respectively submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429-5430

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Henry L. Baumann
Jack N. Goodman
Jerianne Timmerman

February 15, 2002

CERTIFICATE OF SERVICE

I, Patricia Jones, Legal Secretary for the National Association of Broadcasters, hereby certifies that a true and correct copy of the foregoing Reply Comments of the National Association of Broadcasters was sent this 15th day of February, 2002, by first class mail, postage prepaid to the following:

Christopher R. Day
Angela J. Campbell
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, NW
Suite 312
Washington, DC 20001

Mark Cooper
Consumer Federation of America
1424 16th Street, NW
Suite 604
Washington, DC 20036

Joel S. Yudken, Ph.D
Christine Owens
Public Policy Department
American Federation of Labor and
Congress of Industrial Organizations
815 16th Street, NW
Washington, DC 20006

Gene Kimmelman
Christopher Murray
Consumers Union
1666 Connecticut Avenue, NW
Suite 310
Washington, DC 20009

Cheryl Leanza
Andrew Jay Schwartzman
Media Access Project
950 18th Street, NW
Suite 220
Washington, DC 20006

s/Patricia Jones_____
Patricia Jones