7 owners in 2001.[63] The increase in independent owners in small DMAs like the Des Moines-Ames market illustrates the positive effect that prophylactic media ownership rules can have on diversity in local media markets. In addition, the increase in diversity in many smaller markets debunks the theory, advanced by a number of industry commenters, that small markets cannot support further independent television stations.

UCC, *et al.*'s study of the current state of 31 U.S. media markets presents prima facie evidence that diversity in many local media markets has decreased substantially in recent years. The addition of a daily newspaper to any of the ownership combinations delineated in UCC, et al.'s study would only further serve to decrease local media diversity, and would substantially harm the public interest.

II. The Effects Of the Duopoly Rule Demonstrate That Consolidation Reduces Independently-Produced Local News and Public Affairs Programing

In their initial comments, certain parties also espoused the purported benefits of newspaper/broadcast combinations by focusing on the cost savings that may inure as a result of further combinations and mergers. For example, Hearst-Argyle notes that repeal of the cross-ownership restriction could result in cost benefits for owners, such as "cross marketing" and "cross-branding."[64] Similarly, News Corporation states that "as evidenced by recent transactions, cross-owners have taken advantage of a variety of synergies available to newspaper-broadcast combinations – synergies that lead to cost-savings that, in turn, would permit increased or more

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[63]*See id.*

[64]Hearst-Argyle Comments at 17.

in-depth coverage of local news."[65]

NAA also cites examples from markets with newspaper/broadcast combinations that exist as a result of grandfathering or waivers.[66] Although these examples are intended to show the benefits of common ownership, in fact, they illustrate how permitting cross-ownership reduces of the variety of viewpoints available to the listening and viewing public. For example, according to NAA, Media General, Inc. owns the *Tampa Tribune*, WFLA-TV, and Tampa Bay Online.[67] All three are located in the same building, use the same assignment desk, and share editors and staff members who research stories and share leads. The TV reporters "often adopt their stories for presentation in the *Tampa Tribune* and on TBO.com."[68]

Similarly, Gannett Co, which jointly owns *The Arizona Republic*, KPNX-TV and an online news provider in Phoenix, Arizona, has its "multimedia directors from the newspaper and television station attend joint news meetings 'to spot opportunities for coverage partnership and cross-promotion, arrange for on-air appearances by *Republic* staffers, and set up writing sessions for KPNX reporters.'"[69] While these types of joint arrangements and cross-promotional activities undoubtedly translate into more money for the companies, the public is not benefitted. Since the same editors choose what stories to cover, the variety and type of issues covered is reduced. Members of the public merely get the same stories in different formats.

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[65]See News Corporation Comments at 34.

[66]See NAA Comments at 16.

[67]*See id.* at 19.

[68]*Id.*

[69]*Id.* at 20.

Experience since the Duopoly Rule was modified in August 1999 also shows that while the "synergies" associated with media consolidation often lead to increased cost-savings for companies, they decrease opportunities for viewers. For example, in the Greensboro-High Point-Winston Salem, North Carolina media market, Sinclair Broadcasting recently terminated its news operations at WXLV-TV after creating a duopoly in the market in 1999.[70] In addition, Sinclair has recently stated that it plans to "centralize" weather forecasting for all of its stations, including its 19 duopolies, from one location.[71]

The experience at News Corporation's Fox Television ("Fox") subsidiary has been strikingly similar. Soon after the Commission allowed Fox to create duopolies in New York and Los Angeles, Fox began the process of consolidating operations at the duopoly stations, resulting in numerous layoffs, including both of the general managers at the former Chris-Craft Industries stations in New York and Los Angeles.[72] Such shared management of duopolies inevitably leads

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[70]*See* Dan Trigoboff, *Sinclair Centralizing*, BROADCASTING & CABLE, Jan. 14, 2002, at 38 (noting that Sinclair has already conducted "preliminary research and planning toward central production of national news and possibly sports" and that the company has also terminated local news operations at its St. Louis and Tallahassee, Florida stations resulting in the loss of over 100 jobs).

[71]*See* Dan Trigoboff, *Whether Central*, BROADCASTING & CABLE, Jan. 7, 2002, at 38 ("'It's a terrible idea," says Dan Salamone, news director at Emmis-owned KRQE(TV) Albuquerque, N.M., who has worked in large and small markets where local weather is an important story. 'This is a decision that could only be made by accountants.'").

[72]*See* Dan Trigoboff, *Chris-Craft, Fox Move In*, BROADCASTING & CABLE, Aug. 6, 2001, at 14 (notong that Fox "moved quickly to consolidate management in its three automatic duopolies in New York, Los Angeles and Phoenix, promoting its existing station bosses in those markets to larger management roles"); *see also* Jeremy Murphy, *Fox's Station Combinations*, MEDIAWEEK, May 14, 2001, at 7 ("Fox is likely to get rid of several weaker 10 p.m. newscasts, specifically on Chris-Craft's New York UPN affiliate WWOR (which competes with a higher-rated newscast on Fox owned-and-operated WNYW) and on Chris-Craft's Los Angeles UPN

to the loss of one of the two voices because the ultimate decisions concerning news and public affairs programming are decided by one person with a single viewpoint.

While the consolidation occurring as a result of duopolies raise serious concerns about diversity in a number of local markets, the situation will likely be far worse if newspaper/broadcast combinations are allowed to occur en masse. The conclusion of News Corporation's comments states that "WNYW, WWOR-TV, and the [New York] Post have not yet capitalized on the synergies available under common ownership, [and] they are anxious to move forward with plans to increase their cooperation. . . ."[73] If the experience with the combination of WNYW and WWOR-TV and the Sinclair combinations are any example, the "synergies" resulting from repeal or modification of the Newspaper/Broadcast Cross-Ownership Rule will likely be the loss of thousands of jobs involving news-gathering and "back office" operations. Such efficiencies may benefit the bottom line of certain media conglomerates, but they certainly will not benefit the viewing public.

III. Repeal or Substantial Modification of the Newspaper/Broadcast Cross-Ownership Rule Will Have Substantial Anti-Competitive Effects

Certain parties advocating substantial modification or repeal of the Newspaper/Broadcast Cross-Ownership Rule also claimed in initial comments that abrogation of the Rule will not have any negative impact on competition. The NAA, for example, states that "substantial economic and efficiency benefits would result from repeal of the outdated prohibition."[74]

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affiliate KCOP (which trails Fox O&O KTTV in ratings.");

[73]News Corporation Comments at 42.

[74]NAA Comments at 55-56.

UCC, et al.'s examination of a number of local radio and television media markets reveals exorbitant levels of concentration in the local media market.[75] To the extent that newspapers and broadcast media provide at least some level of local advertising substitutability, any further combination of a daily newspapers and a broadcast entities in local media markets can only serve to increase concentration levels and decrease competition in the advertising market.

A. Stratospheric Levels of Concentration Already Exist in Most Local Media Markets

As detailed in UCC, et al.'s initial comments, the Department of Justice ("Justice Department") uses the Herfindahl-Hirschman Index ("HHI") when determining levels of concentration in a specific product market. Under the Justice Department's Merger guidelines, markets with an HHI below 1000 are unconcentrated; those with an HHI between 1000 and 1800 are moderately concentrated; and those with an HHI above 1800 are generally deemed highly concentrated.[76] In initial comments, UCC, *et al.* took the average commercial market share provided by BIA for 1993 and 2000, and calculated the HHI for both the radio and television market in each of the 10 original markets studied.[77] In an expanded study, UCC, *et al.* determined the concentration of 21 additional markets, for a total of 31 studied markets.[78]

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[75] *See, e.g.*, Attachment 4 (noting the increased levels of concentration among the top four commercial share owners in 31 U.S. Arbitron Radio Metro Markets); Attachment 5 (noting the increased levels of concentration among the top four commercial share owners in most of the 31 U.S. television markets subject to the Duopoly Rule).

[76] *See* United States Department of Justice/Federal Trade Commission Horizontal Merger Guidelines, at § 1.5.

[77] *See* UCC, *et al.* Comments at Attachment 5, HHI Chart.

[78] *See* Attachment 4 (Expanded "Local Television Ownership and Market Concentration Study"); Attachment 5 (Expanded "Local Radio Ownership and Market Concentration Study").

Consistent with UCC, *et al.*'s original calculations, none of the radio or television markets studied in the thirty-one cities had an HHI below 1000.[79] Twenty-six of the television markets studied and twenty-four of the radio markets studied had an HHI over 1800, indicating they are highly concentrated areas.[80] In fact, almost one-third of the television markets and one-half of the radio markets had an HHI over 3000 -- a level far beyond that of a highly concentrated market.[81] These HHIs demonstrate that in most, if not all, local broadcast media markets, lack effective competition.

Furthermore, even the industry submitted studies admit that HHI levels in most media markets have reached the highly concentrated level. The Economists Incorporated study, submitted in conjunction with the NAA comments, states that "[o]wnership concentration has decreased or remained unchanged in 20 of the 21 DMAs examined. . . ."[82] UCC, et al. strongly object to the methodology used in the study because it counts all radio stations in DMAs, rather than just those in Arbitron Radio Metro Markets, and also includes certain small daily newspapers that have little to no circulation. As such, the study presents HHI numbers that are

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[79] *See id.*

[80] *See id.*

[81] *See Federal Trade Comm'n v. Cardinal Health Care, Inc.*, 12 F. Supp.2d 34, 53 (D.D.C. 1998) (noting an increase in HHI to 2277 from one proposed merger and an increase to 3079 from another proposed merger would raise the concentration level so far beyond that of a highly concentrated market the Court enjoined the mergers).

[82]NAA Comments at Appendix 4 (Kent Mikkelsen, *Horizontal and Vertical Structural Issues and the Newspaper Broadcast Cross Ownership Ban* (December 2001)) (hereinafter "*Mikkelsen Study*").

inflated.[83] However, even assuming *arguendo*, that the study is correct, it still lists HHIs over 1000 for 19 out of the 21 "DMAs" studied.[84] Furthermore, the NAA study indicates that 8 of the 21 DMAs have HHIs in the "highly concentrated" range.[85] To the extent that an industry study, using methodology most favorable to opponents of the Newspaper/Broadcast Cross-Ownership Rule, concludes that most studied markets are moderately or highly concentrated, just further demonstrates the serious anti-competitive harms posed by newspaper/broadcast cross-ownerships.

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[83]In addition to flawed overall methodology, the data used to produce the study is also highly suspect. For example, Mikkelsen lacked revenue information for individual radio and television stations in 1975 and was thus unable to determine how concentration of revenue changed between 1975 and 2000. *See Mikkelsen Study* at 4. Instead, Mikkelsen estimates average advertising revenue for each radio and television station in each sample DMA and applies the average advertising revenue in 2000 to the stations for the year 1975 to create an HHI for 1975. Accordingly, his radio and television advertising revenues for 1975 are essentially without any basis in fact. Furthermore, the newspaper data is even more removed from fact. To "estimate" this data, Mikkelsen uses an aggregate estimate of newspaper advertising revenue to average the per-circulation advertising rate. *See id.* at 7. He then applies this advertising rate to all newspapers based on their circulation. *See id.* In the absence of any evidence that per-circulation advertising revenue is the same across newspapers, this assumption is also wholly without basis.

[84]*See* NAA Comments at Appendix 4, Table 4 (listing "Estimated Advertising HHIs in Sample DMAs").

[85]*See id.*

B. Past Efforts By the Commission and the Department of Justice to Examine Large Media Mergers on a "Case-by-Case" Basis Have Failed

Media General[86] and News Corporation[87] advocate complete abolition of the Newspaper/Broadcast Cross-Ownership Rule on the grounds that the Commission, Justice Department, and Federal Trade Commission can adequately regulate combinations resulting in dangerous levels of market power on a case-by-case basis. However, as demonstrated by recent mergers in the radio industry, and astounding levels of concentration in many local radio markets that have occurred as a result, anti-trust review by the Commission, the Department of Justice and the Federal Trade Commission has been a failure. The result of this failure to adequately police the anti-competitive effects of media mega-mergers is clearly illustrated by the current situation in the Billing, Montana Arbitron Metro Market.

In January 1999, Marathon Media L.P. ("Marathon"), owner of three radio stations in the Billings Arbitron Metro Market, filed an application to acquire five radio stations in the same market from Citadel Communications Corporation.[88] In response to the applications, the Department of Justice ("DOJ") filed comments expressing concern over the level of concentration that would exist if the merger was approved.[89] In the comments, DOJ noted that

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[86] *See* Media General Comments at 52 (stating the enforcement powers of the Justice Department and Federal Trade Commission "[are] more than adequate" to guard against isolated dangers to competition).

[87] *See* News Corporation Comments at 23 (stating the Justice Department and Federal Trade Commission "can adequately address and preclude combinations" resulting in anti-competitive behavior).

[88] Broadcast Applications, FCC Report No. 24455, at 3, 6-7 (1999).

[89] *See* United States Department of Justice Comment in Response to Public Notice No. 92809 (rel. April 26, 1999) (hereinafter "DOJ Billings Comments").

the pre-merger HHI in the Billings radio market was 3350 and that the proposed transfer would raise the HHI to 4070, an increase of 720 points.[90] Accordingly, DOJ found that the transaction presented "substantial and material reason to believe that the merger may significantly reduce competition among radio stations that serve Billings" and requested that the Commission "fully investigate by whatever means are appropriate, including having a hearing, whether the acquisition serves the public interest.".[91] In order to address the concerns raised by DOJ's comments, Marathon subsequently agreed to divest three of the stations it would own subsequent to the Citadel transaction, which lowered the HHI in the Billings market slightly to 3291.

After the Marathon transaction was completed, the stations owned by Sunbrook Communications were also transferred to Fisher Broadcasting, and Fisher, along with Marathon, increased their share of the Billings audience, apparently due to the size and power of the station groups. In 2001, Marathon filed applications to transfer its stations to Clear Channel Communications ("Clear Channel").[92] In the Public Notice accepting the Clear Channel applications for assignment of the licenses, the Commission "flagged" the applications and specifically noted that comment was invited on "the issue of concentration and its effect on competition and diversity in the broadcast markets at issue."[93] However, even though the HHI in the Billings market had subsequently risen to 3425– an increase of approximately 135 points–

[90]*See id.* at 11.

[91]*See id.* at 12.

[92]*See* Broadcast Applications, Report No. 24901 (2001).

[93]*See id.*

and the fact that Fisher filed a Petition to Deny,[94] the DOJ did not file comments or otherwise intervene. Furthermore, the Commission did not review any of the competitive aspects of the market, and approved the transaction at the Bureau level.[95]

Furthermore, the Billings area is not the only local media market that has been injured by the Commission's lack of media merger oversight. The Wichita Falls, Texas and Fargo, North Dakota Radio Metro Markets provide two other compelling examples of recent radio mergers that have essentially established radio oligopolies in a number of local markets. In 1993, the top two owners in the Wichita Falls, Texas Arbitron market controlled 26.4% and 21.7% of the local commercial share.[96] In November 1997, Cumulus Broadcasting acquired three stations in the Wichita Falls market, and subsequently purchased a fourth station in June 1998.[97] In December 2000, Clear Channel purchased the remaining three radio stations in the market, creating a duopoly where Cumulus controls 54% of the local commercial share and Clear Channel controls

[94]The Fisher Petition to Deny specifically stated that it believed the application "raises serious concerns with respect to the vertical integration of programming ownership and Clear Channel's market power to control advertising revenue and rating via programming control." *Application of Marathon Media Group, LLC for Assignment of Licenses KBUL(AM), KKBR(FM), KCTR-FM, and KBBB(FM), Billings, MT and KMKH(FM), Harding, MT to Clear Channel Broadcasting Licenses, Inc.*, File Nos. BAL-20001227AAJ, *et seq.*, Fisher Radio Regional Group, Inc. Petition to Deny (filed Feb. 15, 2001).

[95]*See* Letter to Dawn M. Sciarrino, *et al.* from Linda Blair, Chief, Audio Services Division (rel. April 13, 2001) (stating that the "transfer of an existing station combination to an entity that owns no stations in the market does not increase ownership concentration").

[96]*See* Attachment 4 at 61 (*citing Investing in Radio* 1994, BIA Publications, Inc. (1st Edition, 1994).

[97] *See Investing in Radio 2001*, BIA Publications, Inc. (3rd Edition, 2001).

46% of the local commercial share.[98] Even though these mergers increased the Wichita Falls Radio Market HHI from an already highly concentrated 1942 to a stratospheric 5032, neither the Commission nor the Department of Justice did anything to stop the transactions.[99]

The Fargo, North Dakota Metro Market reflects a similar level of concentration. In 1993, the top two radio station owners controlled 31.7% and 19.8% of the market respectively.[100] In September 1999, Triad Broadcasting Company ("Triad") purchased five radio stations in the market.[101] In July 2000, Clear Channel purchased six of the eight remaining stations that were not owned by Triad.[102] Upon the completion of these transactions, Clear Channel and Triad controlled 50.0% and 40.2%, respectively, of the Fargo market.[103] Again, any action to ensure competition in these markets was woefully absent on the part of the Commission and DOJ. is similarly situated with Clear Channel and Triad Broadcasting Inc. ("Triad") in control of 91 percent of the market.[104]

The same trends hold true for the television market. The top two television station owners in seventeen of the twenty middle and smaller level markets studied controlled 60 percent

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[98]*See id.*

[99]*See* Attachment 6 ("Herfindahl-Hirshman Index (HHI) Chart for Radio and TV").

[100]See Attachment 4 at 60 (*citing Investing in Radio* 1994, BIA Publications, Inc. (1st Edition, 1994).

[101]*See Investing in Radio 2001*, BIA Publications, Inc. (3rd Edition, 2001).

[102]*See id.*

[103]*See* Attachment 4 at 60.

[104]*See id.* at 60.

of the market while the top two television station owners in over half of the large DMAs controlled 50 percent of the local market share.[105] The top two television station owners have also increased their control of the Boston market through recent acquisition of television stations. Hearst and CBS, together, control 55 percent of the Boston DMA since their acquisition of television stations in July 1997 and May 2000, respectively.[106] Consistent with the radio industry, the Commission and Justice Department have done nothing to address the skyrocketing market shares of the top television stations.

Based on UCC, *et al.'s* calculations, anti-competitive levels of concentration continue to increase in both local radio and television markets. Furthermore, the Commission, DOJ and the FTC have done little to stop anti-competitive practices in affected radio markets where numerous radio station transactions have taken place in the last few years, except in the most egregious cases. To the extent that the Commission, DOJ and the FTC have been unable to adequately police radio markets where there are only two or three players, it is hard to see how the Commission have any success conducting "case-by-case" reviews of newspaper/broadcast mergers, where the complexity of the issues, and the stakes involved, are much higher. Even if the antitrust agencies are inclined to conduct these reviews, it is a very resource-intensive and expensive process. Thus, without a rule in place, mergers will undoubtedly be allowed to take place even though they result in substantially reduced competition.

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[105] *See* Attachment 5.

[106] *See id.* at 13 (*citing Investing in Television 2001*, BIA Publications, Inc. (4th Edition, 2001).

IV. Existing Newspaper/Broadcast Cross-Ownerships Demonstrate the Anti-Competitive Effect of Newspaper/Broadcast Combinations

In initial comments, certain commenters stated that there have never been any specific instances of anti-competitive behavior in local media markets resulting from existing newspaper/broadcast combinations. The Hearst Corporation, for instance, states that there is "no empirical evidence that cross-ownership harms either the promotion of diversity of local viewpoints or the preservation of local competition."[107] Similarly, Media General opines that "neither the FCC nor any party favoring the rule has ever been able to articulate how common ownership harms competition for local advertising. . . ."[108] The NAA is even so bold is to state that "the certainly is no persuasive evidence in the record in this or other recent proceedings that newspaper/broadcast combinations have engaged in anti-competitive practices with regard to advertising rates."[109] UCC, et al. strongly disagree with these statements.

In its initial comments, UCC, et al. attached statements from four independent publishers alleging specific anti-competitive harms resulting from newspaper/broadcast cross-ownerships.[110] Many of the harms alleged dealt with potentially unlawful "tying" practices, where customers are charged cheaper rates for utilizing both broadcast and print advertising, and are "penalized" for splitting their advertising business with the entity controlling the cross-owned combination and another vendor. In addition, some of the harms also dealt with selling "packaged" advertising at

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[107]Comments of The Hearst Corporation at 5 (hereinafter "Hearst Comments").

[108]Media General Comments at 42.

[109]NAA Comments at 55.

[110]*See* UCC, *et al.* Comments at Attachments 6-9.

below-cost prices in order to "squeeze out" other competitors.

In order to further illustrate the potential harms that could occur throughout the country if the Newspaper/Broadcast Cross-Ownership Rule is repealed, UCC, *et al.* has attached a copy of a complaint recently filed in the United States District Court for the Central District of Illinois by the *Tri-State Shopper* ("TSS"), a weekly newspaper in Quincy, Illinois, against Quincy Newspapers, Inc. ("QNI"), which owns a newspaper/broadcast combination that was "grandfathered" by the Commission's 1975 proceeding.[111]

In the Quincy media market, QNI controls the major daily newspaper, the *Quincy Herald-Whig*, as well as the one commercial televison station and two radio stations licensed to Quincy.[112] In addition, QNI owns and operates a weekly newspaper, the Merchant, that competes directly with TSS in both the local Print Advertising Market, as well as in the High Density Distribution Print Advertising Submarket, which consists of the "high density distribution of printed local advertising materials."[113] In its complaint, TSS alleges that QNI has engaged in "anticomptitive conduct consisting of predatory pricing, monopolistic leveraging, refusals to

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[111]*See* Attachment 7; Plaintiff's Complaint and Demand for Jury Trial, Tri-State Shopper, Inc. v. Quincy Newspapers, Inc. (Case No. 02-3034) (C.D. Ill.) (hereinafter "*TSS Complaint*").

[112]According to BIA, there are three television stations licensed to Quincy, Illinois. WGEM-TV, licensed to QNI, is an NBC affiliate. The other two stations licensed to the market, WTJR and WQEC, provide religious programming and PBS programming. *See Investing in Television 2001*, BIA Publications, Inc. (4th Edition, 2001). The one other commercial station located in the Quincy-Hannibal-Keokuk DMA, KHQA-TV is located in and licensed to Hannibal, Missouri. *See id.* QNI also owns WGEM-AM, WGEM-FM and the dominant local newspaper, the Hearld-Whig. *See* 2001 EDITOR & PUBLISHER INTERNATIONAL YEARBOOK (81st ed.) at I-127.

[113]*TSS Complaint* at 7.

deal, illegal tying arrangements, copyright violations, and/or tortious conduct" since TSS began operation in November 2000.[114] In light of the instant proceeding to review the Newspaper/Broadcast Cross-Ownership Rule, at least two of the allegations delineated in the complaint deserve special review in the context of this rulemaking.

First, TSS alleges that QNI has engaged in "illegal tying arrangments involving two separate products" by agreeing "to sell advertising to customers in the Herald-Whig. . .only on the condition that customers also purchase advertising in the Merchant . . ., or at least agree that they would not purchase advertising *from any other supplier*, specifically including TSS."[115] Furthermore, the complaint alleges that QNI used its broadcast entities in an anti-competitive manner by "offering package deals whereby, at below market prices, customers obtained advertising on QNI's local radio and television stations, and in the *Herald-Whig* and the *Merchant*."[116] While this allegation is extremely troubling even in one local market, its implications could be enormous if the Newspaper/Broadcast Cross-Ownership Rule is repealed or substantially modified. If one entity is able to control the lone local daily newspaper in a market, and also gain control of a highly-rated broadcast station, as is the case in Quincy, the potential is enormous for anti-competitive tying practices. To the extent that the owner of the daily newspaper requires or offers below-cost advertising on broadcast entities, other "sellers of the secondary "tied" product," in this case broadcast advertising, "are foreclosed from sales to

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[114] *Id.* at 10.

[115] *Id.* at 12.

[116] *Id.* at 13.

those customers to whom the primary or 'tying' product or service is essential."[117]

Second, the TSS complaint alleges that QNI has engaged in predatory pricing in the Quincy media market by charging "prices for advertisements in the *Herald-Whig* and the *Merchant*, together and separately, in the Print Advertising Market that were below costs."[118] This allegation has significant relevance in the context of this proceeding because newspaper/broadcast combinations generally entail the combination of a daily newspaper, which is often a monopoly in the area, with either a single broadcast stations or a group of broadcast stations that generally have one or more competitors. In these types of combinations, the prospect of "forced" or "voluntary" combination rates, where an entity offers below-cost advertising on its non-monopoly subsidiary (e.g., a broadcast station), which are offset by profits gained by a monopoly enterprise (e.g., a local daily newspaper), make the threat of both tying and predatory pricing very real.

Such predatory pricing and tying arrangements injure not only commercial advertisers, but also public interest and advocacy groups, such as the National Organization for Women, that may seek to buy advertising space or time in local markets. UCC, *et al.* are very concerned about their continued ability to place such advertising in an anti-competitive local advertising environment that would be created if the Newspaper/Broadcast Cross-Ownership Rule is repealed. In light of the allegations raised in the TSS complaint, UCC, *et al.* urge the Commission to investigate the competitive situation in the Quincy media market and other

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[117]Conrad M. Shumadine et al, *Antitrust and the Media*, P.L.I. COMMUNICATIONS LAW 2000 158 (2000).

[118]*TSS Complaint* at 18.

markets where cross-ownerships exist prior to taking any action to modify or repeal the Newspaper/Broadcast Cross-Ownership Rule. Repeal could result in substantial economic injury not only to commercial advertisers, but also to political parties and advocacy groups that purchase print or broadcast advertising to communicate their message to the public.

V. Opponents of the Newspaper/Broadcast Cross-Ownership Rule Bear the Burden of Justifying Any Change to the Rule

In initial comments, the NAA argues that Section 202(h) of the Telecommunications Act of 1996[119] ("1996 Act") requires an exceptionally high public interest finding and shifts the burden of justifying the Newspaper/Broadcast Cross-Ownership to proponents of the Rule.[120] UCC, et al. reject these contentions as contrary to the plain language and legislative history of Section 202(h), and as antithetical to Commission practice and administrative law.

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[119] Telecommunications Act of 1996, Pub. L. No. 104-104, §202(h), 110 Stat. 56, 111-112 (1996).

[120] NAA Comments at 87. The NAA also contends that the Newspaper/Broadcast Cross-Ownership Rule must be eliminated in light of *Bechtel v. F.C.C.*, 10 F.3d 875 (D.C. Cir. 1993); *see also* NAA Comments, at 97. In *Bechtel*, the D.C. Circuit noted that the Commission's "integration" preference given to applicants for broadcast licenses was arbitrary and capricious given that, first, the Commission's original basis for establishing that preference were "predictions" about its effects on localism, and second, the lack of empirical evidence over three decades to verify those predictions. The NAA asserts that similar circumstances apply here. But as the D.C. Circuit noted, *Bechtel* engaged in a review of agency policy statements, which are exempt from the Administrative Procedure Act's notice-and-comment requirements under §553(b). 10 F.3d at 878. The present review is not of a policy statement but of a rule promulgated under the notice-and-comment requirements of the APA and approved by the Supreme Court as a "reasonable means" to further the important goal of the Commission – diversification of control of the media of mass communications. *F.C.C. v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 802 (1978) (hereinafter "*NCCB*").

A. Section 202(h) Merely Requires The Commission Make Certain Factual Findings and Does Not Shift The Burden Of Persuasion To Those Who Support The Rule

The NAA's first contention is that section 202(h) of the 1996 Act obligates the Commission to show that the regulations are "not more broad than *required* to further the public interest" and that the "public interest served is significant and substantiated" (emphasis in original).[121] The NAA supports its claim with a definition of "necessary" in the Merriam-Webster Collegiate Dictionary.

However, the word "necessary" as used in the Communications Act has long been understood as setting forth a less stringent standard. The use of word "necessary" as used in §202(h) is no different than that in sections 4(i) and 303(r) of the Communications Act of 1934, under which the broadcast ownership rules were originally promulgated.[122] Section 303(r) commands that the Commission "[m]ake such rules . . . as may be *necessary* to carry out the provisions" of the Act; section 4(i) says essentially the same thing. The NAA provides no basis for attributing a different meaning to "necessary" as used in section 202(h). The "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning."[123] Thus, the use of the word "necessary" in section 202(h) does not

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[121] NAA Comments at 87.

[122] *See* 47 U.S.C. §§ 154(i), 303(r); *see also NCCB*, 436 U.S. 775.

[123] *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (quoting *Department of Revenue of Ore. v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)).

place an added burden on the FCC.[124]

The NAA's second argument is that section 202(h) "places the burden of persuasion on the advocates of continued regulation."[125] But the language of section 202(h) does not place a burden on one party or another. Instead, it directs the Commission to "determine whether any such rules are necessary in the public interest as a result of competition."[126] The Commission is thus asked to review broadcast ownership regulations under the traditional standard of "public interest, convenience, and necessity." The additional phrase – "as a result of competition" – merely directs the Commission to make a *finding* as to the effects of market competition and to take that into account in determining whether the rules continue to serve the public interest.[127]

The Commission itself has interpreted section 202(h) to require it to first review its

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[124] In any case, the Supreme Court has already found that the rule fits the end for which it was prescribed: "It was not inconsistent with the statutory scheme, therefore, for the Commission to conclude that the maximum benefit to the 'public interest' would follow from allocation of broadcast licenses so as to promote diversification of the mass media as a whole." *NCCB*, 436 U.S. at 795.

[125]NAA Comments at 90.

[126]1996 Act, 110 Stat. at 112.

[127]The Commission's recent observations in its Section 257 Report to Congress reflect this interpretation: "There was little legislative history associated with these provisions, but it is clear that Congress intended that the Commission regularly evaluate its rules to determine whether they *could be* modified or eliminated in light of the rapidly changing, and increasingly competitive, market conditions that the 1996 Act sought to produce." *Section 257 Report to Congress Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses*, 15 FCC Rcd. 15,376, 15,439 (2000) (emphasis added). The Conference Report for 1996 Act states that "the Commission is directed to repeal or modify any regulation it determines is no longer in the public interest"; the wording there suggests that affirmative findings must justify repeal or modification, not preservation. *S. Conf. Rep. No. 104-230*, at 161 (Feb. 1, 1996).

original findings and reasoning, and next consider and either reject or accept, in part or in whole, contentions by commenters that competition has obviated the rule. For example, in its review of the dual network rule under section 202(h), the Commission mapped out its approach:

> [W]e first identify several competitive changes and trends in the video services market that we consider relevant to the continued necessity for the rule. We then apply the framework, developed in the Notice, for analyzing both the vertical and horizontal competitive impacts of the potential combinations that are currently prohibited by the rule. [Next,] we turn to the impacts of maintaining or changing the rule on diversity, the other primary public interest concern. Weighing these factors, we decide, as proposed in the Notice, to eliminate that portion of the rule that effectively prohibits mergers between UPN or WB and one of the four major networks. We conclude that this change will not harm, and indeed is likely to promote, both competitive efficiency and diversity. Although some commenters also urged us to go beyond the tentative conclusions of the Biennial Review Report and the Notice and to eliminate the dual network rule in its entirety, [we decline to do so,] finding that more information and analysis would be necessary to address the more complex issues that action would involve.[128]

The Commission has either explicitly or implicitly followed this approach in other proceeings involving section 202(h) , whether modifying, repealing, or retaining the rule under review.[129]

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[128] *See Amendment of Section 73.658(g) of the Commission's Rules - The Dual Network Rule*, 16 FCC Rcd. 11,114, 11,117 (2001) (¶ 8).

[129] For example, when the Commission eliminated the experimental broadcast ownership restrictions as a result of its 1998 Biennial Review, the Commission made an extensive review of other existing safeguards in its rules to protect diversity. *See Elimination of Experimental Broadcast Ownership Restrictions*, 16 FCC Rcd. 7457, 7459 (2000) (¶ 7). In retaining the National TV Ownership Rule, the Commission summarized the arguments of the rule's opponents – arguments that economic and technological developments had obviated the need for the rule in light of the Commission's aims (diversity and competition) – and stated: "We believe . . . that the competitive concerns of opponents of relaxation or elimination of the cap are more convincing . . . ." *In re 1998 Biennial Regulatory Review-Review of Commission's Broadcast Ownership Rules*, 15 FCC Rcd. 11,058, 11,073 (2000) (¶ 26). And in the Commission's review of its 1984 attribution rules in calculating corporate ownership resulted in preservation of the 5% stock ownership rule after the Commission noted that opponents of the existing rules had failed to present the Commission "with empirical evidence to rebut our conclusion in the [original] Attribution Order that 'a 5% benchmark is likely to identify nearly all shareholders possessed of

In none of these instances has the Commission indicated any obligation to meet a heavier burden to justify the preservation of its standing rule.

Furthermore, it is helpful to examine the Commission's consideration of section 402 of the Telecommunications Act, which contains virtually identical language as that in section 202(h). Section 402 states that the Commission, in conducting a biennial review of regulations that apply to "the operations or activities of any provider of telecommunications service," must "determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service."[130] In a recent rulemaking, the Commission had an opportunity to consider the same burden-shifting contention now offered by the NAA.[131] In that decision, the Commission noted that some commenters argued that section 402 placed "the burden on proponents of the [existing] spectrum cap [rule] to show why retention of the cap is in the public interest, and on the Commission to show why the spectrum cap and cellular cross-interest rules are necessary."[132] But the Commission concluded that "[t]he statutory language does not impose any particular burdens on the opponents or proponents of a particular rule, but rather places the burden on the Commission to make the

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a realistic potential for influencing or controlling the licensee, with a minimum of surplus attribution.'" *See Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 14 FCC Rcd. 12,559, 12,566 (1999) (¶ 10) (quoting *Attribution of Ownership Interests*, 97 FCC 2d 997, 1006 (1984)).

[130] 1996 Act, §402, amending §11of the Communications Act of 1934, codified at 47 U.S.C. §161.

[131] *See 2000 Biennial Regulatory Review of Spectrum Aggregation Limits for Commercial Mobile Radio Services*, 2001 WL 1605822, WT Docket 01-14 (November 18, 2001) (FCC 01-238).

[132] *Id.* at *10 (¶ 24).

requisite determinations."[133] Given that the language of sections 402 and 202(h) are functionally identical, the Commission should reach the same conclusion about section 202(h).

B. Fundamental Principles of Administrative Law Require That Proponents Justify Repeal of Promulgated Rules

It is a fundamental principle of administrative law "that 'an agency changing its course by rescinding a rule' or departing from precedent 'is obligated to supply a reasoned analysis for the change.'"[134] In fact, ordinarily the Commission's *reversal* or *modification* of a standing rule deserves "heightened" review.[135] Thus, consistent with the Commission's analysis of section 402 above, an agency may consider whether a rule has been obviated by current factors (such as competition), but instructing an agency to do so does not reverse the ordinary expectations in a rulemaking that an agency must provide reasons for changing course. The Commission should adopt the same approach to review of regulations under section 202(h).

Under *State Farm,* there is "at least a presumption that [agency] policies [committed to it by Congress] will be carried out best if the settled rule is adhered to."[136] That presumption arises from the Supreme Court's desire to limit agency discretion by imposing the rule of *stare decisis* on agency action and to facilitate judicial review.[137] Given that the Commission's

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[133] *Id.*

[134] *E.g. Global Crossing Telecommunications, Inc. v. F.C.C.*, 259 F.3d 740, 746 (D.C. Cir. 2001) (quoting *State Farm*, 463 U.S. at 42).

[135] *See, e.g., N.A.A.C.P. v. F.C.C.*, 682 F.2d 983, 998 (D.C. Cir. 1982).

[136] 463 U.S. at 41-42 (quoting *Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973)).

[137] *Atchison*, 412 U.S. at 806-807.

Newspaper/Broadcast Cross-Ownership Rule enjoys this presumption, the burden, therefore, is on the *opponents* of the existing regulation to show the Commission why it should repeal or modify the rule.[138] This is true even if an agency may need to revise or repeal a rule in light of recent developments: "[T]here is no more reason to presume that changing circumstances require the rescission of prior action, instead of a revision in or even the extension of current regulation."[139] As section 202(h) does not itself impose any burden on either opponents or advocates of a broadcast ownership rule, the *State Farm* principle placing the burden on those who would repeal or modify it still stands.

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[138] *See State Farm*, 463 U.S. at 42 (quoting *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808(1973)).

[139] *See State Farm*, 463 U.S. at 42.

CONCLUSION

The opponents of the Newspaper/Broadcast Cross-Ownership Rule have failed to show that its repeal or substantial modification would enhance diversity, promote competition, or otherwise serve the public interest. In light of the substantial declines in both media diversity and competition that have occurred during the last decade, UCC, et al. strongly urge the Commission to retain the Newspaper/Broadcast Cross-Ownership Rule.

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