

TABLE OF CONTENTS

	PAGE
SUMMARY	i
I. INTRODUCTION	2
II. THE ECONOMIC AND OTHER OWNERSHIP STUDIES RELEASED BY THE COMMISSION VERIFY THAT THERE IS NO VALID DIVERSITY OR COMPETITION-BASED RATIONALE FOR RETAINING THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP BAN.....	5
III. THE STUDIES ALSO CONFIRM NAA’S DETAILED SHOWINGS IN PRIOR PROCEEDINGS THAT REPEAL OF THE BAN WOULD ADVANCE THE FCC’S DIVERSITY OBJECTIVES WITHOUT ANY COUNTERVAILING HARMS	11
A. The Studies Verify That Newspaper/Broadcast Cross-Ownership Strongly Enhances News and Public Affairs Programming.....	13
B. The FCC-Sponsored Studies Further Confirm That Repeal of the Ban Will Pose No Material Threat to Viewpoint Diversity	16
IV. THE RECORD IN THIS PROCEEDING ALSO SUBSTANTIATES NAA’S PRIOR SHOWINGS THAT NEWSPAPER/BROADCAST COMBINATIONS WILL NOT ADVERSELY AFFECT COMPETITION	20
V. RECENT DEVELOPMENTS IN THE LEGAL LANDSCAPE VALIDATE NAA’S PREVIOUS DEMONSTRATION THAT THE BIENNIAL REVIEW STANDARD OF THE 1996 ACT REQUIRES THE FCC TO ENGAGE IN A “ZERO-BASED” REVIEW OF THE BAN AND ELIMINATE IT	24
A. Finding That the FCC’s Previous Approach to the Biennial Review Mandate Was Severely Lacking, the D.C. Circuit Has Clarified That Section 202(h) Establishes a Rigorous Deregulatory Program.....	26
B. An Examination of Section 202(h), as Well as the 1996 Act as a Whole, Makes It Abundantly Clear That the D.C. Circuit’s Interpretation of the Provision in the First Fox Decision Was Correct	30
VI. CONCLUSION.....	35

SUMMARY

The Newspaper Association of America ("NAA") has participated in a lengthy series of proceedings relating to the now 27-year-old newspaper/broadcast cross-ownership ban, providing the Commission with extensive and compelling evidence that repeal of the prohibition is both long overdue and, in fact, statutorily required pursuant to the biennial review mandate of the Telecommunications Act of 1996. Most recently, NAA provided the FCC with detailed evidence in support of immediate elimination of the rule in the Commission's 2001 rulemaking on newspaper/broadcast cross-ownership.

The record that already has been compiled by NAA and numerous other parties is far more than sufficient to compel repeal of the ban. Moreover, that record now has been augmented by the Commission's own data and observations in the September 20, 2002 Notice of Proposed Rulemaking as well as by the economic and other ownership studies released by the agency in conjunction with this proceeding. Specifically, by quantifying the proliferation and extensive consumer usage of a wide range of media outlets, the studies bolster the previous showings by NAA and many other parties that the contemporary information marketplace satisfies the FCC's diversity and competition concerns, which no longer provide a legitimate rationale for retention of the rule. The studies also corroborate the extensive evidence already in the record before the Commission demonstrating that joint ownership of newspapers and broadcast outlets advances the FCC's public interest objectives by substantially enhancing news and public affairs programming, including in particular locally-oriented offerings. The studies further confirm that these important public interest benefits can be achieved without posing any countervailing threats to the agency's viewpoint diversity objectives. Finally, the studies confirm NAA's prior showings that permitting newspaper/broadcast combinations will not have

any adverse impact on competition. Thus, there is no legitimate public interest basis for retention of this archaic restriction.

Recent decisions by the U.S. Court of Appeals for the D.C. Circuit likewise have validated both NAA's prior interpretation of Section 202(h) of the 1996 Act and its position that the agency already is in default of its obligations to review its ownership rules on a biennial basis and to repeal any restrictions that are no longer "necessary in the public interest." In its decisions earlier this year in *Fox Television Stations v. FCC* and *Sinclair Broadcast Group v. FCC*, the Court clarified that the biennial review mandate imposes on the Commission a deliberate and inescapable deregulatory mandate. Consistent with NAA's prior showings, the Court determined that Section 202(h) establishes a strong deregulatory presumption. The D.C. Circuit further made clear that the statutory provision imposes an affirmative duty on the FCC to maintain consistency between its decisions and flatly precludes the agency from delaying fulfillment of its biennial review obligations.

While the Court ultimately left as an open question the precise meaning of the phrase "necessary in the public interest" in Section 202(h), an examination of the statute and legislative history confirms NAA's prior reading of the provision: that it establishes a standard that is far more stringent than the general "public interest" test for initial promulgation of FCC regulations. As the Court found in its original *Fox* opinion, the biennial review standard logically must be read to require the FCC to repeal rules that cannot be shown to be "essential" or "indispensable" to the public interest. Faced with this demanding legal standard, the FCC plainly cannot justify retention of the newspaper/broadcast cross-ownership rule. Even under a more lenient interpretation of Section 202(h), however, NAA submits that the ban no longer can be retained, because it cannot be shown by any objective evidence to advance legitimate Commission objectives and, in fact, frustrates the achievement of significant public interest gains.

In sum, the additional empirical evidence that has been adduced since the comment cycle closed in the 2001 newspaper/broadcast cross-ownership proceeding serves only to confirm the evidence and arguments already presented to the Commission by NAA and numerous other parties in favor of repeal of the ban. The conclusion is inescapable that there is no tenable basis for retention of the newspaper/broadcast cross-ownership prohibition. Accordingly, the Commission must move forward expeditiously to eliminate the ban.

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

In the Matter of)	
2002 Biennial Regulatory Review—Review of)	MB Docket No. 02-277
the Commission’s Broadcast Ownership Rules)	
and Other Rules Adopted Pursuant to Section)	
202 of the Telecommunications Act of 1996)	
)	
Cross-Ownership of Broadcast Stations and)	MM Docket No. 01-235
Newspapers)	
)	
Rules and Policies Concerning Multiple)	MM Docket No. 01-317
Ownership of Radio Broadcast Stations in)	
Local Markets)	
)	
Definition of Radio Markets)	MM Docket No. 00-244
)	

COMMENTS OF THE NEWSPAPER ASSOCIATION OF AMERICA

The Newspaper Association of America (“NAA”) hereby submits its comments in response to the Commission’s September 23, 2002 *Notice of Proposed Rulemaking* (“NPRM”) in the above-captioned proceeding. As detailed below, the record already before the FCC in a series of related proceedings dating back at least to 1996, continuing through the 1998 biennial review, and culminating in the rulemaking proceeding commenced in the fall of 2001 to consider elimination or relaxation of the newspaper/broadcast cross-ownership prohibition,¹ is far more than adequate to support elimination of this antiquated and counterproductive restriction. Indeed, based on that record, the agency already stands in default of its statutorily imposed

¹ *Cross-Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Waiver Policy, Notice of Proposed Rulemaking* in MM Docket Nos. 01-235, 96-197, FCC 01-262, 16 FCC Rcd 17283 (2001) (“2001 NPRM”).

obligation to review all of its broadcast ownership rules every two years, beginning in 1998, and to repeal those regulations that no longer can be found to be “necessary in the public interest.”

Through these comments, NAA supplements the already comprehensive record before the Commission and demonstrates that the FCC’s own findings and the studies it has released for comment in this proceeding serve only to confirm NAA’s longstanding contention that the cross-ownership ban is wholly unnecessary and that its retention disserves the public interest. Accordingly, NAA submits, the Commission should move forward with the utmost dispatch to conclude its consideration of the newspaper/broadcast ban and to eliminate this outdated prohibition.

I. INTRODUCTION

NAA, the leading association representing the newspaper publishing industry,² has played a pivotal role in providing the FCC with extensive and persuasive evidence that repeal of the newspaper/broadcast cross-ownership ban is long overdue and, in fact, is required to advance the Commission’s public interest objectives. Most recently, NAA filed comments and reply comments in response to the FCC’s *2001 NPRM* on newspaper/broadcast cross-ownership. In those comments, NAA provided the agency with detailed evidence supporting the prompt

² NAA is a nonprofit organization that represents the newspaper industry and more than 2,000 newspapers in the United States and Canada. Most NAA members are daily newspapers; those members account for approximately 90 percent of U.S. daily circulation. NAA’s membership also includes many non-daily U.S. newspapers and other newspapers published elsewhere in the western hemisphere as well as in Europe and the Pacific Rim. A number of NAA’s members also hold broadcast station licenses, some in the home markets of their newspapers—the great majority of which were issued prior to the adoption of the newspaper/broadcast cross-ownership prohibition in 1975 and therefore were “grandfathered” when the prospective ban was implemented—and some in other markets across the United States.

NAA serves the newspaper industry and its individual members in strategic efforts to advocate and communicate the views and interests of newspaper publishers to all levels of government and to advance and support newspapers’ interest in First Amendment issues. In this capacity, NAA has participated in numerous Commission and judicial proceedings as well as in a wide variety of federal legislative and regulatory activities affecting the interests of newspaper publishers in general, and the newspaper/broadcast cross-ownership ban in particular.

elimination of the counterproductive and discriminatory restriction.³ NAA also has filed comments in numerous other Commission proceedings since 1996—including the 1998 and 2000 biennial review proceedings—in which it provided extensive documentation showing that perpetuation of the ban not only is unnecessary, but is plainly contrary to the public interest.⁴ In addition, in recent years, NAA has submitted a Petition for Rulemaking as well as a Petition for Emergency Relief to the FCC and has filed a Petition for Review in the United States Court of Appeals for the District of Columbia, all of which urged strongly that immediate steps be taken toward elimination of the prohibition.⁵ Through each of these actions, NAA—joined by numerous other parties submitting detailed empirical evidence—has built a compelling record in support of repeal of the newspaper/broadcast cross-ownership ban.⁶

³ See NAA Comments in MM Docket Nos. 01-235, 96-197 (filed Dec. 3, 2001) (“2001 Comments”); NAA Reply Comments in MM Docket Nos. 01-235, 96-197 (filed Feb. 15, 2002) (“2001 Reply Comments”).

⁴ See 2001 Comments at Section II (citing NAA Comments in MM Docket No. 96-197 (*Newspaper/Radio Cross Ownership Waiver Policy*) (filed Feb. 7, 1997); NAA Reply Comments in MM Docket No. 96-197 (filed Mar. 21, 1997); NAA Comments in MM Docket Nos. 91-221, 87-8 (*Regulations Governing Television Broadcasting*); NAA Comments in MM Docket No. 98-35 (*1998 Biennial Regulatory Review*) (filed July 21, 1998) (“1998 Comments”); NAA Reply Comments in MM Docket No. 98-35 (filed Aug. 21, 1998); NAA Emergency Petition for Relief in MM Docket Nos. 98-35, 96-197 (filed Aug. 23, 1999) (“*NAA Emergency Petition*”); NAA Comments in CC Docket No. 00-175 (*2000 Biennial Regulatory Review*) (filed Oct. 10, 2000)). Pursuant to the *NPRM* in this proceeding, the 2001 Comments and Reply Comments are incorporated by reference into this proceeding. See *2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Proposed Rulemaking* in MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244, at ¶ 7 (rel. Sept. 23, 2002) (“*NPRM*”). NAA hereby incorporates by reference its comments and reply comments in MM Docket Nos. 96-197 and 98-35 and CC Docket No. 00-175 as well as the *NAA Emergency Petition*.

⁵ See 2001 Comments at Section II (citing NAA Petition for Rulemaking, *Amendment of Section 73.3555 of the Commission’s Rules to Eliminate Restrictions on Newspaper/Broadcast Cross-Ownership* (filed Apr. 28, 1997) (“*NAA Petition*”); *NAA Emergency Petition*; *Newspaper Assoc. of America v. FCC*, Case No. 00-1375 (D.C. Cir. Aug. 30, 2000) (order holding case in abeyance)).

⁶ See, e.g., Belo Corp. Comments in MM Docket Nos. 01-235, 96-197 (filed Dec. 3, 2001); Gannett Co., Inc. Comments in MM Docket Nos. 01-235, 96-197 (filed Dec. 3, 2001); Morris Communications Corporation Comments in MM Docket Nos. 01-235, 96-197 (filed Dec. 3, 2001); Tribune Company Comments in MM Docket Nos. 01-235, 96-197 (filed Dec. 3, 2001); Media General, Inc. Comments in MM Docket Nos. 01-235, 96-197 (filed Dec. 3, 2001); The Hearst Corporation Comments in MM Docket Nos. 01-235, 96-197 (filed Dec. 3, 2001); Cox Enterprises, Inc. Comments in MM Docket Nos. 01-235, 96-197 (filed Dec. 3, 2001).

As noted above, NAA believes that the existing record is far more than sufficient to require repeal of the ban without further comment or analysis, and that the Commission has already failed to fulfill its statutorily imposed biennial review obligations. Nevertheless, the agency has determined to continue its examination of the newspaper ban in the context of this “omnibus” rulemaking proceeding. NAA comments here primarily to point out that the Commission’s own findings in the *NPRM* itself and the economic and other ownership studies released by the agency in conjunction with this proceeding provide strong confirmation of NAA’s prior arguments. Thus, the studies bolster NAA’s previous showings that the FCC’s diversity and competition concerns do not provide a legitimate rationale for retention of the rule, corroborate the extensive evidence based on “real world” experience demonstrating that joint ownership of newspapers and broadcast outlets substantially enhances news and public affairs programming, and confirm NAA’s prior showings that permitting newspaper/broadcast combinations will not have any adverse impact on diversity or competition.

Likewise, recent judicial decisions have validated NAA’s prior interpretation of the Commission’s biennial review obligations by confirming that Section 202(h) of the Telecommunications Act of 1996⁷ has imposed on the FCC a demanding and inescapable deregulatory mandate. Specifically, the D.C. Circuit has established that the biennial review provision creates a strong deregulatory presumption, requires the agency to maintain strict consistency among its decisions, and flatly precludes the Commission from delaying its biennial review obligations. Although the Court left as an open question the precise meaning of the phrase “necessary in the public interest” in Section 202(h), an examination of the statute and legislative history confirms NAA’s prior arguments that the phrase establishes a standard far

⁷ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (“1996 Act”).

stricter than the Commission's traditional "public interest" approach. Thus, the Congressional mandate requires the FCC to repeal rules that are not "necessary" in the public interest, *i.e.*, those that cannot be shown to be *required* or *indispensable* to achievement of the Commission's objectives. Considered in that light, the evidence that has been presented to the FCC since the comment cycle closed in its 2001 proceeding on newspaper/broadcast cross-ownership strongly corroborates the showings of NAA and numerous other parties that there simply is no basis for retaining the ban.

II. THE ECONOMIC AND OTHER OWNERSHIP STUDIES RELEASED BY THE COMMISSION VERIFY THAT THERE IS NO VALID DIVERSITY OR COMPETITION-BASED RATIONALE FOR RETAINING THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP BAN

Expressing concern that it has failed to account properly for the numerous competitors in the media environment in prior biennial review proceedings, the FCC observes in the *NPRM* that an accurate assessment of the current marketplace is imperative to this proceeding.⁸

Accordingly, the agency commissioned several economic and other ownership studies aimed at thoroughly evaluating the number of media sources available to today's consumers and tracking relevant changes in the media environment since the broadcast ownership restrictions were first adopted. In addition, the studies undertake a detailed analysis of actual consumer usage of, as well as substitutability among, a wide range of media outlets. The results of the studies amplify the extensive evidence that NAA and others have provided to the FCC in previous proceedings and corroborate what those parties already have overwhelmingly demonstrated—that the

⁸ In the *NPRM*, the Commission recognized that ownership regulation cannot be justified where "the marketplace provides a sufficient level of competition to protect and advance [its] policy goals." *NPRM* at ¶ 31. See also *NPRM* at ¶ 23 (noting, in particular, that "the *Fox Television* court faulted the Commission for failing to provide any analysis of the state of competition in the television industry to justify its retention of the national TV ownership rule"). In this regard, the *NPRM* notes that the public now has access to a "robust" number of media outlets and that today's "broadcasters operate in an increasingly crowded and dynamic media market" in which the "broadcast television industry has faced increasing competition both from additional television stations and from other video delivery systems." *Id.* at ¶ 53. See also 2001 Comments at Section I(C); 1998 Comments at Section VI.

staggering growth in media outlets in recent years has rendered the FCC's traditional but still unproven diversity and competition concerns hopelessly inadequate to justify retention of the newspaper/broadcast cross-ownership ban. Indeed, the Commission's studies confirm that the ban—which was adopted as part of a regulatory regime that no longer exists and in a media environment that has been radically transformed by market forces and technological advances scarcely imaginable at the time—cannot be viewed as necessary to protect diversity or competition in the information marketplace that exists today.⁹

For example, Study #1, which tracked ownership of media outlets over a forty-year period, provides compelling evidence of the growth in media availability that has occurred since the FCC enacted its broadcast ownership restrictions.¹⁰ Study # 1 analyzes the television, radio, cable, DBS, and newspaper outlets in ten representative Arbitron radio Metro markets, calculating both the number of outlets and the number of separate owners in each of these markets in 1960, 1980, and 2000.¹¹

The results of Study # 1 are telling. As the authors conclude, the number of media outlets and owners collectively “increased tremendously” over the period studied.¹² While the number of outlets grew by an average of nearly 200 percent across all ten markets, the owner count

⁹ See 2001 Comments at Sections III(A)-(B).

¹⁰ Scott Roberts, Jane Frenette, and Dione Stearns, *A Comparison of Media Outlets and Owners For Ten Selected Markets*, released in MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244 (September 2002) (“Study #1”). The numbering of the ownership studies in these comments corresponds to the numbering in the attachment to the FCC's October 1, 2002 News Release. See *FCC Releases Twelve Studies on Current Media Marketplace: Research Represents Critical First Step in FCC's Factfinding Mission*, News Release in MB Docket No. 02-277 (October 1, 2002).

¹¹ Specifically, Study #1 accounted for all commercial and non-commercial television stations in the relevant Designated Market Areas (“DMAs”) as well as all commercial and non-commercial radio stations in the radio Metro market. If cable was available within the radio Metro market, it was counted as only one outlet and as a single owner. For the year 2000, DBS was counted as two systems and two separate owners in each of the markets. Daily newspapers published in the radio Metro principal city also were included. Study #1 at Section II.

¹² *Id.* at Section I.

increased by an average of 140 percent.¹³ The markets evaluated experienced outlet growth ranging from a notable 79 percent in Lancaster, Pennsylvania (DMA #113) to a “whopping” 533 percent in the Myrtle Beach, South Carolina market (DMA #169).¹⁴ Although somewhat less dramatic than the upsurge in outlets, the increase in the number of owners ranged from 67 percent in Altoona, Pennsylvania (DMA #253) to a “huge” 283 percent in Myrtle Beach.¹⁵ These statistics are particularly noteworthy in light of the fact that many key sources of news, information, and entertainment—such as the Internet, weekly newspapers, and magazines—were not even taken into account in Study # 1.¹⁶

While finding that this dramatic growth was driven primarily by a significant increase in the number of radio and television outlets, Study # 1 also concludes that cable television exhibited remarkable growth in each of the ten markets studied in terms of communities served, channel capacity, and subscriber count. Present in only two of the markets studied in 1960, cable was available in all ten markets by the year 2000 and was subscribed to by approximately two-thirds of the television households in the markets evaluated at that time. Study # 1 also notes the nationwide availability of DBS service, which of course did not exist in 1960 and 1980.¹⁷

¹³ *Id.* at Section I. See also Joel Waldfogel, *Consumer Substitution Among Media* at 14-15, released in MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244 (September 2002) (“Study #3”) (noting average growth per DMA in the number of television stations from 8.4 in 1995 to 9.7 in 2000 and an increase in the number of radio outlets per Arbitron market from 21.7 in 1993 to 24.8 in 1997).

¹⁴ Study #1 at Section III.

¹⁵ *Id.* at Section III.

¹⁶ See, e.g., Study #3 at 17 (noting rapid growth in the availability of the Internet, with 15.1 percent of households nationwide having access in 1997, 30.3 percent having access in 1998, and 45.9 percent having access in 2000).

¹⁷ In addition, the Study finds that the count of daily newspapers generally remained stable in the ten markets between 1960 and 2000.

In addition to assessing the extraordinary number of media outlets now available to the public, the studies released in conjunction with this proceeding examine consumers' actual use of and substitution among different types of media. For example, Study #8, a comprehensive survey conducted by Nielsen Media Research on consumer usage of various media, shows that the public makes ample use of a broad assortment of outlets.¹⁸ Study # 8 compiles the results of over three thousand interviews consisting of a number of detailed questions about each respondent's use of a range of media—including broadcast television, cable television, daily newspapers, radio, the Internet, weekly newspapers, and magazines—for both local and national news and current affairs.

While the results of the survey show that “traditional” media such as newspapers and broadcast outlets remain important sources of news and information, Study # 8 also demonstrates that the public relies heavily on a range of alternative media as well. Study # 8 thus makes clear that, contrary to traditional FCC assumptions,¹⁹ broadcasters and daily newspapers do not rule the news and information landscape to the exclusion of other significant participants. For example, while roughly 62 percent of the individuals surveyed recently had used broadcast television for local news and approximately 69 percent had used daily newspapers,²⁰ 68 percent reported using radio, 53 percent had relied on cable or satellite channels, 34 percent had used the

¹⁸ Nielsen Media Research, *Consumer Survey on Media Usage*, released in MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244 (September 2002) (“Study #8”).

¹⁹ See e.g., *1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 15 FCC Rcd 11058, 11105 (2000) (“1998 Biennial Review Order”). “[T]he fact remains that broadcast services, in particular broadcast television, and newspapers have been and continue to be the dominant sources of local news and public affairs information in any given market.”

²⁰ These figures take into account initial and follow-up questions regarding usage (e.g., Study # 8, Tables 001, 004, 006) and distinguish between broadcast and cable/satellite television (Table 008) and daily and weekly newspapers (Table 007).

Internet, 29 percent had used weekly newspapers, and 20 percent had made use of magazines for these purposes.²¹

Perhaps even more telling, Study # 8 includes data on the media most often relied on for local and national news and current affairs. While one-third of respondents reported that broadcast television was the source most often relied on and approximately one-quarter indicated that newspapers were the sources used most often, cable and satellite channels also made a very strong showing—one quarter of respondents stated that these were the sources they used most frequently. Ten percent of those surveyed stated that radio was the most commonly used source for news and public affairs, while six percent used the Internet most often.²²

Both Study # 3 and Study # 8 demonstrate, moreover, that today's consumers view a broad range of media as highly substitutable. Study # 3 specifically addresses the issue of media substitutability—or, in other words, the question of whether changes in the availability or use of certain media lead to changes in the availability or use of other media. Study # 3 relies on aggregate data, which measures on a market-wide basis the impact of changes in the use or availability of certain media on other media, as well as data on the usage of various media by individuals.²³

Study # 3 concludes that consumers rely upon and substitute a mixture of media both for news and information and for other uses. Specifically, the author finds “clearest evidence” of

²¹ See Study #8 at Tables 001-008, 097. In addition, 8 percent of the people surveyed had relied on weekly newspapers for local news and public affairs. *Id.* A similar analysis applies for national news and public affairs. While 58 percent of those surveyed had used broadcast television for national news and public affairs and 66 percent used a daily newspaper, approximately 60 percent made use of cable or satellite channels, 56 percent used radio, 32 percent used the Internet, roughly 21 percent made use of weekly newspapers, and nearly 20 percent relied on magazines. *See id.* at Tables 009-016, 098.

²² See Study #8 at Table 020.

²³ See Study #3 at 2-3.

substitution between the Internet and broadcast television both for overall use and for news consumption, between daily and weekly newspapers, and between daily newspapers and broadcast television news.²⁴ In addition, there is evidence of significant substitutability between cable television and daily newspapers both overall and for news purposes, between radio and broadcast television for news consumption, and between the Internet and daily newspapers for news consumption.²⁵

Study # 8 suggests similarly high levels of substitutability between traditional and alternative media. The survey undertaken in Study # 8 included a series of inquiries regarding which media respondents would be most likely to turn to more often if the source they rely on primarily were no longer available. The results of Study # 8 suggest substantial substitutability between daily newspapers and a wide variety of other media. When asked which media they would use more if daily newspapers became unavailable, 66 percent of the respondents who currently rely on daily newspapers as their predominant source of news and information stated that they would be considerably more likely to rely on broadcast television, 54 percent named cable and satellite news channels as falling into that category, 40 percent identified radio sources, 36 percent named local weekly newspapers, and 31 percent included the Internet.²⁶

Likewise, Study # 8 indicates high levels of substitutability between broadcast television and a wide array of other sources of local and national news and information. If broadcast television were no longer available, 56 percent of respondents who now rely primarily on broadcast television for news and informational content would be considerably more likely to

²⁴ *Id.* at 39.

²⁵ *Id.*

²⁶ Study #8 at Tables 045-050 (including the “Top 2 Box”—*i.e.*, scores of 4 and 5 out of a 1-5 scale).

rely on cable or satellite news channels, 50 percent named daily newspapers, 49 percent identified radio, 40 percent listed weekly newspapers, and 28 percent named the Internet.²⁷

In short, Study # 1, Study # 3, and Study # 8 all reinforce the evidence that has been provided by NAA and numerous other parties demonstrating that the Commission's longstanding but still speculative diversity and competition concerns no longer can provide a foundation for the newspaper/broadcast cross-ownership rule. Indeed, the world that formed the backdrop for the Commission's adoption of the ban in 1975 no longer exists. In light of the abundant sources of news, information, and entertainment content available to consumers today and the public's pervasive reliance on a wide range of different outlets, restricting newspaper/broadcast cross-ownership plainly is not necessary to protect the public's interest in having access to a variety of independent and diverse media sources. As NAA previously has established, a thriving, highly competitive, and richly diverse information marketplace already exists—not as a result of government regulation, but because of technological advances and the remarkable expansion in the media environment that has occurred since the FCC first imposed its onerous broadcast ownership regulatory scheme. That marketplace satisfies the Commission's public interest objectives and eliminates the need for the newspaper/broadcast ban.

III. THE STUDIES ALSO CONFIRM NAA'S DETAILED SHOWINGS IN PRIOR PROCEEDINGS THAT REPEAL OF THE BAN WOULD ADVANCE THE FCC'S DIVERSITY OBJECTIVES WITHOUT ANY COUNTERVAILING HARMS

In its 2001 Comments, NAA demonstrated, as it had in prior proceedings, that newspaper/broadcast combinations are uniquely situated to, and do in practice, offer the public superior news and informational content. Specific examples from a broad cross-section of existing newspaper/broadcast combinations proved that jointly owned newspapers and broadcast

²⁷ *Id.* at Tables 021-026.

stations realize significant efficiencies and operational synergies that consistently enable them to provide enhanced local news, information, and other content, as well as a range of innovative new services.²⁸ Further, because of the extensive resources and capacity for in-depth analysis that daily newspapers can provide, co-owned broadcast stations typically air more local news and public affairs programming and offer more thorough coverage than other media outlets in their communities, providing demonstrable benefits not only to the combinations themselves, but also to the public at large.

The record shows, moreover, that these benefits come without any appreciable countervailing threat to viewpoint diversity. Again offering examples from existing combinations, NAA demonstrated that there is no basis for concluding that jointly owned newspapers and broadcast stations inevitably offer monolithic viewpoints.²⁹ Rather, the majority of existing co-owned outlets actually compete with respect to newsgathering and news reporting. In part, this is because the audience demographics differ for each type of outlet in a local market, and owners must take into account the varying interests of their specific audiences. In addition, jointly owned outlets have strong professional and economic incentives to avoid presentation of duplicative reports. As the FCC's own studies and observations confirm, newspapers and broadcast stations serve different needs of consumers, and in order to serve these needs, present news and information in contrasting ways.³⁰ The already strong incentive to provide distinctive news and information products is amplified by the desire to maintain credibility with their readers/audience, to compete effectively with other media, and to avoid exposure to criticism or

²⁸ See 2001 Comments at Sections IV(A)(1)-(2).

²⁹ See *id.* at Section IV(B).

³⁰ See *id.* at Section IV(A).

one-upsmanship by those competing media. In sum, NAA submits, repeal of the outdated newspaper/broadcast cross-ownership ban is likely to increase overall programming diversity in the local marketplace, and its elimination should not be expected to cause any material reduction in viewpoint diversity.

A. The Studies Verify That Newspaper/Broadcast Cross-Ownership Strongly Enhances News and Public Affairs Programming

The prior showings of NAA and numerous newspaper owners and broadcasters find strong confirmation in the Commission's ownership studies. The studies corroborate that newspaper/broadcast cross-ownership promotes the quality and quantity of news and public affairs programming and establish that these important benefits come without posing any appreciable threat to viewpoint diversity.

Specifically, Study # 7 substantiates NAA's comprehensive analysis of the superior news and informational content offered by newspaper/broadcast combinations.³¹ That Study, which assesses the local news and public affairs programming of both network owned-and-operated stations ("O&Os") and other network affiliates ("affiliates") in a wide range of markets, examines four different measures of output: (1) local news ratings for the 5:30 p.m. and 6:00 p.m. newscasts during the November 2000 sweeps period; (2) the total number of hours devoted to news and public affairs programming during the same period; (3) the number of awards earned from the Radio and Television News Directors Association ("RTNDA") in 2000 and

³¹ Thomas C. Spavins, Loretta Denison, Scott Roberts, and Jane Frenette, *The Measurement of Local Television News and Public Affairs Programs*, released in MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244 (September 2002) ("Study #7").

2001; and (4) the number of A.I. Dupont Silver Baton awards earned from the Columbia University School of Journalism between 1991 and 2001.³²

In addition to comparing the performance of network O&Os to contractual affiliates, Study # 7 measures the performances of affiliates that are jointly owned with newspaper publishers against all other affiliates. Notably, Study # 7 concludes that, within the overall category of affiliates, “there is a clear variation in performance between [those] that are owned in common with a newspaper publisher and all other network affiliates.”³³ Specifically, the Study finds that “[a]ffiliates co-owned with newspapers experience noticeably greater success under our measures of quality and quantity of local news programming than other network affiliates.”³⁴

For example, while affiliates jointly owned with newspaper publishers provided an average of 21.9 weekly hours of news and public affairs programming during the period studied, the other affiliates aired an average of only 14.9 hours of such programming—a *32 percent* difference.³⁵ Likewise, the average newscast ratings for newspaper-owned affiliates in the 5:30 and 6:00 time slots were 7.8 and 8.2 respectively, compared to 5.7 and 6.7 for all other affiliates.³⁶ The gap between the awards earned by newspaper-owned affiliates and other affiliates is even more telling. Given a baseline score of 100 as the national average for each type of award, affiliates owned in combination with newspapers earned an impressive score of

³² *Id.* at Section II. The Study evaluates three overlapping sets of stations. For the ratings and hours measures, the Study analyzes all markets in which there is at least one O&O station and one affiliate. With respect to RTNDA awards, awards earned in the top 50 markets (or “large market” category) are considered. The Study accounts for all Dupont awards given to commercial television stations. *Id.*

³³ Study # 7 at Section I.

³⁴ *Id.*

³⁵ *Id.* at Section II(B).

³⁶ Study #7 at Section II(B).

319 with respect to RTNDA awards and 200 with respect to A.I. DuPont awards. By contrast, the other affiliates earned a total of only 22 for RTNDA and 30 for DuPont awards.³⁷

Significantly, Study # 7 confirmed the quantitative and qualitative superiority of television stations owned by parties also engaged in newspaper publishing, even where the newspaper properties are not co-located with the TV station. The results are even more pronounced for newspaper/broadcast combinations in the same local market. For example, the affiliates included in Study # 7 that were part of local newspaper/broadcast combinations aired an average of 26 weekly hours of news and public affairs programming, compared to the average of 21.9 weekly hours aired by the entire group of co-owned affiliates.³⁸ Similarly, the stations that were part of local newspaper/TV combinations had average ratings of 9.8 and 11 for the 5:30 p.m. and 6 p.m. newscasts respectively, substantially higher than the already impressive average ratings for all co-owned affiliates of 7.8 and 8.2 during the same timeslots. Thus, as NAA has contended, the journalistic tradition and news gathering resources of newspaper publishers can be employed by commonly-owned television stations even in geographically distant markets to provide superior news and informational content, and the benefits are even greater when the two facilities serve the same community.

Study # 7 thus verifies the detailed showings that NAA and others have made in prior Commission proceedings regarding the public interest benefits inherent in newspaper/broadcast

³⁷ *Id.* at Section II(D).

³⁸ Six stations that are part of local newspaper/broadcast combinations are included in the Study: (1) WFAA-TV (co-owned with *The Dallas Morning News*); (2) WSB-TV (co-owned with *The Atlanta Journal and Constitution*); (3) WFLA-TV (co-owned with the *Tampa Tribune*); (4) KPNX-TV (co-owned with the *Arizona Republic*); (5) WTMJ-TV (co-owned with the *Milwaukee Journal Sentinel*); and (6) WBNS-TV (co-owned with *The Columbus Ohio Dispatch*). *Id.* at Appendix A.

cross-ownership.³⁹ Moreover, by analyzing newspaper-owned stations separately, Study # 7 highlights the potential of newspaper-owned broadcast stations to establish or maintain news operation that can compete very effectively with those of stations owned and operated by the major television networks. Like network O&Os, newspaper/broadcast combinations benefit from the resources and newsgathering expertise of their owners; newspaper-owned stations also have the advantage of an intimate connection to and knowledge of the events and issues affecting their local audiences.

B. The FCC-Sponsored Studies Further Confirm That Repeal of the Ban Will Pose No Material Threat to Viewpoint Diversity

The studies released by the Commission also make clear that there is no legitimate cause for concern that elimination of the cross-ownership ban would trigger any appreciable reduction in viewpoint diversity. Indeed, as NAA has previously shown, elimination of the anachronistic restriction will enhance the prospect for overall programming diversity, because co-owned media outlets have the incentive to try to appeal not only to the center, but also to less popular consumer tastes and interests, in order to attract the largest combined audiences for their common owner.⁴⁰

³⁹ The importance of this evidence cannot be understated. The FCC has consistently requested comments regarding the benefits of newspaper/broadcast cross-ownership in its prior proceedings regarding the ban, *see 2001 NPRM* at ¶ 25, and explicitly acknowledges the need to weigh evidence of such benefits in this proceeding as it continues to consider whether to repeal or modify the rule. *See NPRM* at ¶¶ 32, 56. *Cf. id.*, *Concurring Statement of Commissioner Michael J. Capps* (acknowledging that the Commission must address whether consolidation “serve[s] the interests of the citizenry”). Now, not only does the record in this proceeding include volumes of detailed evidence submitted by a wide range of parties, but it also contains empirical evidence of the benefits of cross-ownership from a study conducted under the Commission’s own supervision.

⁴⁰ *See 2001 Comments* at Section IV(B).

Study # 2 addresses the viewpoint diversity issue most directly.⁴¹ By analyzing the perceived political “slant” of news items broadcast or published by outlets in existing local newspaper/broadcast combinations, Study # 2 measures the extent to which commonly owned newspapers and television stations within the same community could be said to speak with a unified voice about important political matters. In the same vein, Study # 2 also attempts to determine whether news outlets tend to skew information in the direction favored by their corporate parents. Study # 2 specifically evaluates whether news and commentary regarding the 2000 presidential campaign disseminated by ten newspaper/broadcast combinations during the final fifteen days of the campaign had a consistent slant in favor of one major-party candidate or the other. Each news item analyzed is placed into one of three categories: favorable to George Bush, favorable to Al Gore, or neutral.⁴²

While acknowledging that the limited scope of Study # 2 precludes the drawing of sweeping conclusions from its results, the author finds that the data collected clearly suggests that “common ownership of a newspaper and a television station in a community does not result in a predictable pattern of news coverage and commentary about important events....”⁴³ Observing that “different news organizations owned by the same company tended to do things differently” and that newspaper “editorial pages carried not only management’s opinion but also many other opinions,” Study # 2 also concludes that there is no evidence that combination owners generally control the presentation of news.⁴⁴

⁴¹ David Pritchard, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign*, released in MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244 (September 2002) (“Study #2”).

⁴² *Id.* at 1-2, 5-6.

⁴³ *Id.* at 10-11.

⁴⁴ Study #2 at 11.

Specifically, in five of the ten combinations studied, the overall slant of the coverage provided by the television station was found in the Study to be meaningfully different from that offered by the newspaper. In the remaining five combinations, the overall slant of newspaper and broadcast coverage were not found to be significantly different.⁴⁵ The analysis showed, moreover, that the slant of both the newspaper and station coverage often were inconsistent with the newspaper's official candidate endorsement. Indeed, in only one of the combinations studied was the station's perceived overall slant definitively consistent with the newspaper's endorsement,⁴⁶ and two of the television stations presented news with a slant that clearly contradicted the newspaper's endorsement.⁴⁷ In five additional cases, Study # 2 found that the newspaper specifically endorsed a candidate while the station remained more or less neutral.⁴⁸ In the remaining two combinations, the newspaper did not endorse a candidate. Further, of the eight newspapers that endorsed candidates, only half had slants in their news coverage corresponding to the endorsement,⁴⁹ while two had slants contradicting the endorsements,⁵⁰ and

⁴⁵ *Id.* at 8, Table 2. Moreover, the presence of some similarity in "slant" does not establish coordination of viewpoints—rather, the fact that two outlets express a similar view on an issue might just as likely be attributed to local or regional attitudes or consumer preferences, or to two independent actors arriving at the same conclusion without any coordination whatsoever.

⁴⁶ *Id.* at Table 2 (WPIX, New York). Even in this combination, while the newspaper endorsed Gore, the Study's author concluded that the station's slant was only "mildly pro-Gore."

⁴⁷ Study #2 at Table 2 (KPNX, Phoenix; WTIC, Hartford).

⁴⁸ *Id.* at Table 2 (WNYW, New York; WDAY, Fargo; WFLA, Tampa; WFAA, Dallas; and WGN, Chicago). Each of these stations had "slants" of under +/- 4.0. A slant of - 4.69 is described by the Study's author as "fairly close to neutrality." *Id.* at 9.

⁴⁹ Study #2 at Table 2 (*Post*, New York; *Tribune*, Tampa; *Newsday*, New York; and *The Morning News*, Dallas).

⁵⁰ *Id.* at Table 2 (*Forum*, Fargo; *Courant*, Hartford)

two remained essentially neutral.⁵¹ Thus, Study # 2 concluded that “different news organizations owned by the same company tended to do things differently.”⁵²

This result is not surprising, and, indeed, confirms the abundant evidence already before the Commission that newspapers and broadcast stations, whether co-owned or not, take fundamentally different approaches to the presentation of news, commentary, and editorial opinion.⁵³ Newspapers, by their very nature, are more likely to offer clear positions on issues through editorials and other opinion-oriented features, and routinely endorse political candidates. Television newscasts, on the other hand, tend to present news and information without the addition of editorial and other opinion-based features, and rarely take a public position on a particular candidate. Indeed, in considering the future of the television duopoly rule in this very proceeding, the *NPRM* questions “the extent to which local television stations express viewpoints in local newscasts and, if so, whether, and to what extent, those newscasts provide diverse points of view” and notes that “TV stations have largely abandoned editorials because they fear that viewers who disagree with the viewpoint expressed will temporarily or permanently elect to watch another channel.”⁵⁴

Study # 2, in combination with the FCC’s own observations in this proceeding, provides strong confirmation for NAA’s contention that there is simply no basis for concern that newspaper/broadcast combinations will coordinate their presentation of news or public affairs. In particular, the evidence that neither newspapers nor co-owned broadcasters necessarily present

⁵¹ *Id.* at Table 2 (*Arizona Republic*, Phoenix; *Tribune*, Chicago).

⁵² Study #2 at 11.

⁵³ *See* 2001 Comments at Section IV(B); 1998 Comments at Section VII(B).

⁵⁴ *NPRM* at ¶ 79; *see also* 1998 Biennial Review Order, *Separate Statement of Commissioner Michael K. Powell*, 15 FCC Rcd at 11149 (noting that “[l]ocal news programs rarely editorialize, or pick political candidates, or take stands on major issues such as abortion or gun control”).

news in a way that is consistent with the publication's official candidate endorsements corroborates NAA's views and strongly indicates that corporate owners do not have a tendency to dictate the viewpoints expressed in the media. Study # 2 thus validates what NAA already has established in its previous comments—that repeal of the newspaper/broadcast cross-ownership ban will not have any appreciable effect on the levels of viewpoint diversity available to the public.

IV. THE RECORD IN THIS PROCEEDING ALSO SUBSTANTIATES NAA'S PRIOR SHOWINGS THAT NEWSPAPER/BROADCAST COMBINATIONS WILL NOT ADVERSELY AFFECT COMPETITION

The *NPRM* seeks comment on whether regulation is necessary to achieve the Commission's competition policy goals and, if so, on the appropriate regulatory framework to protect and advance a competitive media market.⁵⁵ With respect to the advertising market, the FCC specifically seeks input on the extent to which non-broadcast media compete with broadcasters for advertising revenue and empirical data on the substitutability for advertisers among media outlets.⁵⁶ Several of the studies released by the Commission directly address these issues. By showing that only a limited degree of advertising substitution exists between daily newspaper and broadcast outlets, these studies confirm NAA's position that the degree to which advertisers may view newspapers and broadcast stations as substitutes is inadequate to justify maintenance of the cross-ownership ban.⁵⁷ If, however, the FCC were to determine that a sufficient degree of substitution exists between daily newspapers and broadcast stations to consider them as part of the same product market, the Commission would be obligated to

⁵⁵ See *NPRM* at ¶ 51.

⁵⁶ *Id.* at ¶ 62.

⁵⁷ See 2001 Comments at Section V.

consider a wide range of other media as competitors as well. In such a broad market, there would be no real prospect of “market dominance” by newspaper/broadcast combinations and, thus, no need for a prohibition on cross-ownership.

In this regard, Study # 10 specifically analyzes whether there is a single local media market or several distinct markets for newspaper, radio, and television advertising.⁵⁸ Using a random sample of 45 DMAs and relying on various sources of local radio, television, and newspaper advertising revenue and price data, Study # 10 constructs a model to evaluate the behavior of local businesses in purchasing advertising from each of these media. For a theoretical local business, Study # 10 specifically derives the elasticity of substitution as well as the cross-price elasticity between these media. As Study # 10 explains, an elasticity of zero would indicate that there is no substitutability between two media, while perfect substitution would be represented by the theoretical limit of infinity.⁵⁹

Based on this model, Study # 10 concludes that there is “weak substitutability” between newspapers and broadcast outlets for purchasers of local advertising.⁶⁰ Compared to the theoretical limit of infinity, Study # 10 finds that the elasticity of substitution between newspaper retail advertisements and local radio ads is merely 1.17 and that the elasticity of substitution between newspapers and television stations is only .91.⁶¹ Study # 10’s measures of cross-price elasticities provide additional evidence of weak advertising substitutability between newspapers

⁵⁸ C. Anthony Bush, *On the Substitutability of Local Newspaper, Radio, and Television Advertising in Local Business Sales*, released in MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244 (September 2002) (“Study #10”).

⁵⁹ *Id.* at 11-12.

⁶⁰ *Id.* at 12.

⁶¹ The Study also notes that while these numbers are “very small,” they are statistically significant. See Study #10 at 12.

and broadcast outlets and further suggest that advertisers consider these media to be complements to one another.⁶² The cross-price elasticity between newspaper retail ads and local radio ads is only .018, while the cross-price elasticity between local radio ads and newspaper retail ads is .098. The elasticities for newspaper retail ads and local television ads are negative.

NAA's 2001 Comments explained that, in light of the limited substitutability between newspapers and broadcast stations in local advertising markets, competition concerns do not provide a legitimate basis for the newspaper/broadcast cross-ownership ban.⁶³ More specifically, NAA pointed out that the vast majority of advertisers use newspapers and broadcast stations for different purposes. Because of the individual characteristics of the different types of media and the divergent audiences that they reach, most local businesses employ a multi-media advertising strategy. NAA observed, for example, that while television offers advertisers a unique ability to present visually oriented and action based campaigns, newspapers allow for the more economical presentation of a greater amount of or more complex information. Radio, on the other hand, is distinguished by its ability to target specific demographic groups based upon station format and allows advertisers to reach specific audiences far more efficiently than other media. Thus, advertisers generally have strong incentives to select one or more of these media based on the specific information to be conveyed and the audience they seek to reach.

NAA's 2001 Comments further explained that if, on the other hand, the Commission were to conclude that advertisers regard radio and television stations as sufficiently close substitutes to place them in the same product market, the agency also would be compelled to take

⁶² *Id.* at 12.

⁶³ *See* 2001 Comments at Section V(A).

into account all other forms of media that advertisers view as equally close substitutes.⁶⁴ Any advertising market that is broad enough to encompass such distinct media as newspapers and broadcast stations also must cover a wide range of alternative media, including at a minimum cable, weekly newspapers, yellow pages, magazines, direct mail, outdoor advertising, and the Internet. The presence of these additional outlets is sufficient to protect against any prospect of “market dominance” by newspaper/broadcast combinations, and therefore eliminates the need for a blanket cross-ownership ban.

As NAA repeatedly has pointed out to the Commission, the newspaper/broadcast cross-ownership rule was adopted without any record evidence that newspaper/broadcast cross-ownership had any adverse impact on advertising rates or raised any other material competition concerns.⁶⁵ The empirical evidence that local businesses treat these two media as substitutes only to a limited degree and, instead, view them as complementary parts of a multi-media mix, strongly suggests that there never was any valid competitive basis for the restriction. In any case, the Commission can no longer maintain that the rule provides substantial protection to competition in light of the evidence now before it. Furthermore, as NAA has noted previously, the antitrust agencies will sufficiently protect advertisers or consumers in the highly unlikely event that a proposed newspaper/broadcast combination threatens to exercise undue market power in a particular local advertising market.⁶⁶

⁶⁴ See *id.* at Section V(B).

⁶⁵ See, e.g., 2001 Comments at Section V; 1998 Comments at Section IV. Specifically, in the 1975 Order adopting the ban, the Commission acknowledged that it had “analyzed the basic media ownership questions in terms of [its] primary concern—diversity in ownership . . . rather than in terms of a strictly anti-trust approach.” *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 50 FCC 2d 1046, 1079 (1975).

⁶⁶ See 2001 Comments at Section V(F).

V. RECENT DEVELOPMENTS IN THE LEGAL LANDSCAPE VALIDATE NAA'S PREVIOUS DEMONSTRATION THAT THE BIENNIAL REVIEW STANDARD OF THE 1996 ACT REQUIRES THE FCC TO ENGAGE IN A "ZERO-BASED" REVIEW OF THE BAN AND ELIMINATE IT

Since the adoption of the Telecommunications Act of 1996 ("1996 Act"), NAA has demonstrated in its filings with the FCC that the statute's biennial review mandate obligates the Commission to engage in a thorough and critical review of the broadcast ownership restrictions.⁶⁷ Specifically, NAA has explained that by requiring the Commission to determine whether its rules "remain necessary in the public interest as the result of competition" and to repeal any rules that do not meet this rigorous test, Congress put in place a deliberate deregulatory program. NAA also has shown that the exacting standard of review embodied in Section 202(h) places the burden of persuasion squarely on advocates of continued regulation. Indeed, the biennial review mandate requires the agency to repeal its ownership rules unless it can demonstrate by clear and convincing evidence that a rule is "indispensable" or "required" to serve a substantial public interest.⁶⁸

⁶⁷ See 2001 Comments at Section VII; 2001 Reply Comments at Section I; 1998 Comments at Section III(A); NAA Emergency Petition at Section I.

⁶⁸ See 2001 Comments at Section VII(A). In addition, NAA has pointed out in prior proceedings that governing principles of administrative law require a rigorous re-examination of any regulation when the factual circumstances or regulatory policy considerations on which it was premised have been altered. That duty is particularly compelling where, as in the case of the newspaper/broadcast cross-ownership ban, the rule in question has never been grounded in concrete record evidence but, instead, represents only a speculative "best guess" by the agency that promulgated the regulation. See *id.*; see also 1998 Comments at Section III(B). Further, NAA has shown that the newspaper ban raises serious First Amendment questions, that the waning force of the scarcity rationale is no longer sufficient to justify such onerous regulation, and that the prohibition cannot survive scrutiny under any appropriate constitutional standard. In that connection, NAA submits that the newspaper/broadcast cross-ownership ban should be subject to strict scrutiny because it discriminates against newspaper publishers. See 2001 Comments at Section VIII(A); see also 1998 Comments at Section III(C). Even if reviewed under the more relaxed standards applicable under intermediate First Amendment scrutiny, however, the ban would have to be struck down. See 2001 Comments at Section VIII(B); see also 1998 Comments at Section III(C). In today's marketplace, there can be no serious contention that the rule is narrowly tailored to further a substantial government interest. See 2001 Comments at Section VIII(B); see also 1998 Comments at Section III(C).

Recent legal developments, including critical judicial decisions released after the close of the comment cycle in the 2001 newspaper/broadcast cross-ownership rulemaking proceeding, substantiate NAA's prior contentions. Most significantly, the D.C. Circuit's decisions in *Fox Television Stations v. FCC*⁶⁹ and *Sinclair Broadcast Group v. FCC*⁷⁰ confirm that the biennial review mandate has a clear and substantial deregulatory purpose. Specifically, those cases establish that Section 202(h) creates a "deregulatory presumption," firmly requires the agency to maintain consistency between its decisions, and strictly prohibits it from delaying its biennial review obligations in order to "wait and see" how the marketplace may be affected by retained regulations. Although the Court ultimately left open the question of the precise meaning of "necessary in the public interest" in Section 202(h), a careful examination of that statutory provision in light of the legislative history and overall purposes of the 1996 Act shows that the Court was correct in its original finding that the phrase obligates the FCC to jettison rules that cannot affirmatively be shown to be "indispensable" to the public interest.

Faced with this demanding legal standard, the FCC cannot justify retention of the newspaper/broadcast cross-ownership rule. Even under a more lenient interpretation of the standard, moreover, NAA submits that the ban can no longer withstand examination; the record before the Commission cannot support a finding that there is any significant market failure or other problem to address, much less show that an outright ban on newspaper/broadcast cross-ownership is a useful or appropriate means to deal with any such problem.

⁶⁹ 280 F.3d 1027 (D.C. Cir. 2002) ("*Fox*").

⁷⁰ 284 F.3d 148 (D.C. Cir. 2002) ("*Sinclair*").

A. Finding That the FCC's Previous Approach to the Biennial Review Mandate Was Severely Lacking, the D.C. Circuit Has Clarified That Section 202(h) Establishes a Rigorous Deregulatory Program

Shortly after NAA filed its Reply Comments in the FCC's 2001 proceeding on newspaper/broadcast cross-ownership, the D.C. Circuit issued two decisions that resoundingly rejected the FCC's prior attempts to implement the biennial review mandate. In *Fox*, the Court both remanded the FCC's national television station ownership rule and vacated its television/cable cross-ownership restriction.⁷¹ Likewise, the Court in *Sinclair* remanded the television duopoly rule to the Commission for further consideration.⁷²

In both *Fox* and *Sinclair*, the D.C. Circuit flatly repudiated the reasoning underlying the Commission's past biennial review orders.⁷³ With respect to the national ownership cap, the Court in *Fox* found that the FCC had "adduced not a single valid reason" to believe that the restriction was "necessary in the public interest" to safeguard either competition or diversity.⁷⁴ The Court concluded that the FCC's efforts to analyze the state of competition in the television industry were "woefully inadequate."⁷⁵ Turning to the diversity based rationales for the rule, the Court described the "Commission's passing reference to national diversity" as doing "nothing" to explain why the ownership cap was necessary to further that end. The Court further stated that

⁷¹ 280 F.3d 1027.

⁷² 284 F.3d 148.

⁷³ In August 2000, NAA filed a Petition for Review with the D.C. Circuit seeking to overturn the FCC's decision in the 1998 biennial review proceeding to retain the newspaper/broadcast cross-ownership rule. That case currently is being held in abeyance pending the outcome of the FCC's 2001 newspaper/broadcast cross-ownership proceeding. However, NAA's Petition is based on allegations similar to those set forth by the appellants in *Fox* and *Sinclair*, and NAA believes it is likely that the Court would find similar shortcomings in the Commission's handling of the newspaper/broadcast rule.

⁷⁴ *Fox*, 280 F.3d at 1043.

⁷⁵ *Id.* at 1044; *see id.* at 1041-42 (stating that the agency's attempts to show that broadcasters have undue market power were "to no avail" and that its argument that the rule was necessary to protect competition in any national advertising or program production market was "wholly unsupported and undeveloped").

the FCC's blatant failure to square its decision to retain the rule with the contrary position it had taken in a prior report was "simply arbitrary."⁷⁶ The Court was even more critical of the FCC's decision to retain the television/cable cross-ownership restriction, concluding that the reasons given by the Commission in support of its retention "were at best flimsy" and that the rule was a "hopeless cause."⁷⁷

The FCC's decision to retain the duopoly rule was similarly repudiated by the D.C. Circuit. In remanding the rule to the Commission, the Court in *Sinclair* strongly admonished the agency for its failure to justify the different voice-count tests applied to the duopoly and one-to-a-market rules. The Court determined that, "notwithstanding the substantial deference to be accorded to the Commission's line-drawing," the FCC could not "escape the requirements that its action not run counter to the evidence before it and that it provide a reasoned explanation for its action."⁷⁸

The *Fox* and *Sinclair* decisions clearly establish that Section 202(h) has a clear and inescapable deregulatory purpose. Indeed, the D.C. Circuit held in both decisions that the provision "carries with it a presumption in favor of repealing or modifying the ownership rules."⁷⁹ In reaching this conclusion, the Court confirmed the statement of then-Commissioner Powell in the 1998 biennial review proceeding that Section 202(h) directs the Commission to

⁷⁶ *Fox*, 280 F.3d at 1044.

⁷⁷ *Id.* at 1053; *see id.* at 1049 (noting that "the Commission is largely unresponsive to the[] arguments" presented by the rule's opponents and "to the extent it is responsive, it is unpersuasive."); *see also id.* at 1051-52 (finding that the FCC had responded "feebly" to arguments that the cross-ownership ban does not further diversity interests and failed to justify the rule as necessary to safeguard competition).

⁷⁸ *Sinclair*, 284 F.3d at 162 (internal quotations omitted).

⁷⁹ *Fox*, 280 F.3d at 1048; *Sinclair*, 284 F.3d at 152.

“start with the proposition that the rules are no longer necessary” and requires the agency to “justify the[] continued validity” of any rules that it chooses to retain.⁸⁰

The D.C. Circuit also made clear that Section 202(h) solidifies the Commission’s obligation to maintain consistency both in the reasoning underlying its decisions and the structure of its various ownership restrictions. While recognizing that “[t]he Commission may, of course, change its mind,” the Court in *Fox* stated that the agency is obligated to “explain why it is reasonable to do so.”⁸¹ The *Fox* decision also disapproved of the FCC’s failure to “harmonize” its absolute ban on television/cable cross-ownership with its “seemingly inconsistent decision[]” to permit television duopolies in certain markets.⁸² In *Sinclair*, the Court similarly rejected the agency’s authority to maintain unexplained inconsistencies between its rules.

Further, *Fox* and *Sinclair* invalidated the FCC’s practice of delaying biennial review determinations in order to monitor the functioning of its rules in the marketplace.⁸³ In response to the agency’s decision to retain the national cap while it “observed” the effects of recent changes to the ownership rules, the Court concluded that such a “wait-and-see approach cannot be squared with the Commission’s statutory mandate [to act] promptly—that is, by revisiting the matter biennially—to repeal or modify any rule that is not necessary in the public interest.”⁸⁴ Indeed, the Court equated the biennial review mandate with “Farragut’s order at the battle of

⁸⁰ 1998 Biennial Review Order, Separate Statement of Commissioner Michael K. Powell, 15 FCC Rcd. at 11151.

⁸¹ *Fox*, 280 F.3d at 1044-45.

⁸² *Id.* at 1052. The existing absolute ban on newspaper/broadcast cross-ownership obviously suffers from the same infirmity.

⁸³ *Id.* at 1044.

⁸⁴ *Fox*, 280 F.3d at 1042 (internal quotations omitted).

Mobile Bay ('Damn the torpedoes! Full speed ahead.')."⁸⁵ Under this strict standard, the FCC does not have the authority to simply keep its ownership restrictions in place while it gathers evidence to determine whether they remain "necessary in the public interest." Rather, if the agency cannot provide a sufficient basis to justify retention of its rules at the time of the biennial review, it must eliminate or appropriately modify its ownership rules.

The unambiguous deregulatory framework established by the D.C. Circuit in recent months has made it absolutely clear that the newspaper/broadcast cross-ownership ban can no longer withstand scrutiny. Certainly, the Commission lacks the affirmative evidence required to rebut the presumption that the cross-ownership ban is no longer "necessary in the public interest." Further, in light of the Court's strong admonition that the agency must maintain consistency between its rules, the Commission can no longer single out newspaper/broadcast combinations as the only form of joint ownership that is absolutely barred by the agency.⁸⁶ Moreover, the delaying tactics that the Commission has employed in reaching a final decision with respect to this rule are flatly prohibited under the standards established in *Fox* and *Sinclair*.⁸⁷

⁸⁵ *Id.* at 1044. The Court reached the same conclusion with respect to the FCC's decision to limit the voice-count for the duopoly rule in light of "unresolved questions" about the levels of substitutability among various media. *See Sinclair*, 248 F.3d at 164.

⁸⁶ NAA further submits that, given the extraordinary levels of usage of and substitution among a wide variety of media, daily newspapers should not be weighted more heavily or otherwise accorded disparate treatment among the many other sources of news and information with respect to any measure of media diversity that may be adopted by the Commission. Moreover, in light of the very distinct characteristics and complex strengths and weaknesses of each type of media, NAA believes that assigning appropriate "weights" to different media outlets would prove to be a hopelessly complicated and unworkable task. In any event, it is the availability of a wide range of sources of information, and not the relative popularity of any particular outlet, that ensures consumer access to diverse sources of news and information.

⁸⁷ In this regard, as noted above, the FCC has failed to conclude several proceedings initiated to reconsider the newspaper/broadcast cross-ownership restriction over the past few years. Most recently, the agency's 2001 proceeding on newspaper/broadcast cross-ownership was pending for over a year before it was rolled into the instant rulemaking. Likewise, the Commission's 1996 *Notice of Inquiry* on the newspaper/radio waiver policy—which was eventually folded into the 2001 proceeding—was never completed. *Newspaper/Radio Cross Ownership Waiver*

B. An Examination of Section 202(h), as Well as the 1996 Act as a Whole, Makes It Abundantly Clear That the D.C. Circuit's Interpretation of the Provision in the First *Fox* Decision Was Correct

In addition to its findings regarding the Commission's biennial review decisions, the D.C. Circuit interpreted the language of Section 202(h). In *Fox*, the Court concluded that the phrase "necessary in the public interest" obligates the Commission to affirmatively show that its ownership rules are required or needed to serve the public interest—and not merely that the restrictions are "consonant with the public interest."⁸⁸ Based on this reading of the statute, the Court determined that the FCC previously had applied "too low a standard" in carrying out its biennial review obligations.⁸⁹

In response to a petition for rehearing filed by the Commission, the Court removed the language construing the phrase from its original order, agreeing with the FCC's argument that its decision "did not turn at all upon interpreting 'necessary in the public interest' to mean more than 'in the public interest'" because "[i]t was clear the Commission failed to justify [the national cap] and the [television/cable cross-ownership rule] under either standard."⁹⁰ In reaching this decision, however, the Court specifically declined to accept the FCC's contention that "necessary" means merely "useful" or "appropriate" in this context. Rather, the Court expressly left this issue open for resolution in a later proceeding.

Policy, 11 FCC Rcd 13003 (1996). In addition, the FCC failed to act on either NAA's April 28, 1997 Petition for Rulemaking or its August 23, 1999 Emergency Petition for Relief. See generally *NAA Petition*, *NAA Emergency Petition*. The FCC's inaction cannot be reconciled with the obligations imposed on the agency pursuant to the 1996 Act. See *NAA Emergency Petition* at Section I.

⁸⁸ 280 F.3d at 1050.

⁸⁹ *Id.*

⁹⁰ *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537, 540 (D.C. Cir. 2002).

NAA submits that the FCC is unequivocally obligated to repeal the long outdated newspaper/broadcast cross-ownership ban—regardless of the precise meaning of the phrase “necessary in the public interest” in Section 202(h). The record before the agency shows overwhelmingly that the ban is not needed to address any identifiable public interest objective and, in fact, disserves the Commission’s interest in furthering the provision of high quality news and informational programming. NAA further contends, however, that the D.C. Circuit’s initial reading of the statute in the first *Fox* decision was correct—the biennial review mandate obligates the agency to eliminate ownership restrictions that it cannot affirmatively demonstrate are “essential” or “indispensable” to the public interest.

As NAA explained in its 2001 Comments, this meaning becomes evident when the word “necessary” is read in accordance with its ordinary meaning.⁹¹ Further, a review of judicial interpretations of the word “necessary” as used in other provisions of the same statute also leads to the conclusion that Congress intended it to mean “required” or “indispensable” in Section 202(h).⁹² In addition, NAA submits, the D.C. Circuit was correct in its initial finding that “necessary in the public interest” logically must mean something more than merely “consonant with” or “convenient to” the public interest.⁹³ Pursuant to the Communications Act of 1934

⁹¹ See 2001 Comments at Section VII(A) (noting that an inquiry into whether something is “necessary,” as the term is commonly understood, asks whether it is “logically unavoidable,” “compulsory,” or “absolutely needed: required” (citing *Merriam-Webster’s Collegiate Dictionary* 774 (10th ed. 2001))).

⁹² See 2001 Comments at Section VII(A) (citing *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999); *GTE v. FCC*, 205 F.3d 416, 422-24 (D.C. Cir. 2000) (interpreting “necessary” in another provision of the 1996 Act and finding that, “[a]s is clear from the Court’s judgment in *Iowa Utilities Board*, a statutory reference to ‘necessary’ must be construed in a fashion that is consistent with the ordinary and fair meaning of the word, *i.e.*, so as to limit ‘necessary’ to that which is *required* to achieve a desired goal’’)).

⁹³ See, *e.g.*, *Mail Order Assoc. of America v. U.S. Postal Service*, 986 F.2d 509, 515 (D.C. Cir. 1993) (noting the courts are to construe statutes, where possible, “so that no provision is rendered inoperative or superfluous, void or insignificant”) (internal quotations omitted); *Reiter v. Sonotone Corp., et al.*, 442 U.S. 330, 339 (1979) (“In construing a statute we are obliged to give effect, if possible, to every word Congress used.”).

("1934 Act"), the FCC has broad authority to adopt rules that generally serve the public interest, but is not permitted to leave them in effect, unexamined, indefinitely.⁹⁴ On the contrary, federal agencies already have an ongoing duty under well-established principles of administrative law to reconsider their rules in light of new marketplace, technological, and regulatory developments.⁹⁵ If Section 202(h) directed the Commission to do nothing more than review its rules under the same standard that applies generally to initial rules promulgated under the 1934 Act, the biennial review obligation would be meaningless.⁹⁶

The deregulatory aim of Section 202(h) is clearly articulated in the preamble to the 1996 Act, which states that the purpose of the statute is "to promote competition and *reduce regulation* in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."⁹⁷ As the Supreme Court has recognized, the 1996 Act was an "unusually important legislative enactment" whose "primary purpose"—as "stated on the first of its 103 pages"—was to "reduce regulation."⁹⁸

The deregulatory purpose of the 1996 Act contrasts sharply with the broad authorization in the preamble of the 1934 Act "to *provide for the regulation* of interstate and foreign

⁹⁴ See, e.g., *TRT Telecommunications Corp. v. FCC*, 876 F.2d 134, 136 (D.C. Cir. 1989) (noting FCC's "broad authority" to adopt rules that serve the "public interest, convenience, and necessity"); *Springfield Television of Utah, Inc. v. FCC*, 710 F.2d 620, 623 (10th Cir. 1983) (noting the "FCC's broad power to regulate in the public interest") (internal citations omitted).

⁹⁵ See 2001 Comments at Section VII(B); see also *supra* note 68.

⁹⁶ Moreover, if the FCC were to read the biennial review provision to impose nothing more than a formalistic requirement to review the ownership restrictions every two years, without any further instruction, Congress need not have included the rest of the rest of the statutory directive.

⁹⁷ 1996 Act, Preamble (emphasis added).

⁹⁸ *Reno v. ACLU*, 521 U.S. 844, 857 (1997).

communication by wire or radio. . . .”⁹⁹ Moreover, Section 202(h) itself specifically directs the FCC to review all of its ownership rules biennially “as part of its *regulatory reform* review.”¹⁰⁰ These plainly stated deregulatory goals support a reading of Section 202(h) that compels the agency to eliminate ownership constraints that are no longer needed, rather than an interpretation that would allow the Commission to retain its rules indefinitely so long as it could assert that the rules might reasonably serve some vaguely defined public interest goal.

As the *Fox* Court observed, the 1996 Act “set in motion a process to deregulate the structure of the broadcast and telecommunications industries.”¹⁰¹ Specifically, the statute directed the FCC to take a series of specific deregulatory actions, relaxing several previous broadcast ownership restrictions.¹⁰² On top of these individual deregulatory mandates, Congress instructed the agency in Section 202(h) to review each of its remaining ownership rules every two years. As the *Fox* Court observed, this instruction was made “*in order continue the process of deregulation*” initiated by the other specific directives in Section 202.¹⁰³

⁹⁹ 1934 Act, Preamble (emphasis added).

¹⁰⁰ 1996 Act, §202(h) (emphasis added). Noting that many of the Commission’s broadcast rules date back to the 1940s and are based on outdated “scarcity” considerations, the House Committee Report on the statute states that substantial deregulation of the industry is a primary aim of the proposed legislation: “To ensure the industry’s ability to compete effectively in a multichannel media market Congress and the Commission must reform Federal policy and the current regulatory framework to reflect the new marketplace realities. To accomplish this goal, the Committee chooses to depart from the traditional notions of broadcast regulation and to rely more on competitive forces.” H.R. Rep. No. 104-204, at 55 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 19. 2001 Comments at Section VII(A); 1998 Comments at Section III(A).

¹⁰¹ *Fox*, 280 F.3d at 1033.

¹⁰² Thus, Section 202(a) requires the Commission to eliminate all national ownership limits for AM or FM radio stations. Section 202(b) in turn requires substantial relaxation of the local radio ownership limits, and Section 202(c) resets the cap on the national audience reach that a single television station owner may have at 35 percent. 1996 Act, §§202(a), (b), (c). Other subsections of the Act require the FCC to modify the waiver standard for the “one-to-a-market” rule, the dual network rule, and the network/cable rule. *See* 1996 Act, §§202(d), (e), (f).

¹⁰³ *Fox*, 280 F.3d at 1033 (emphasis added). Significantly, while Section 202(h) instructs the FCC to “repeal or modify” any rule that is no longer in the public interest, it does not call upon the agency to adopt new regulations.

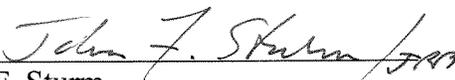
In short, the language of Section 202(h) itself, the interpretation of similar provisions of the 1996 Act, the legislative history, and the unquestionable deregulatory thrust of the 1996 statutory revisions as a whole all point to a reading of Section 202(h) that requires the Commission to either establish that its ownership rules remain “essential” to the public interest or to repeal them. Under this standard, the newspaper/broadcast ban is, like the television/cable cross-ownership restriction vacated in *Fox*, a “hopeless cause.”

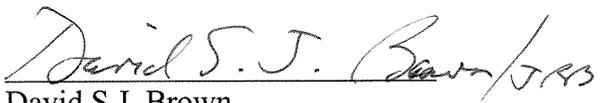
Thus, Section 202(h) can only be read as deregulatory, and as establishing a clear imperative to eliminate outdated ownership regulations.

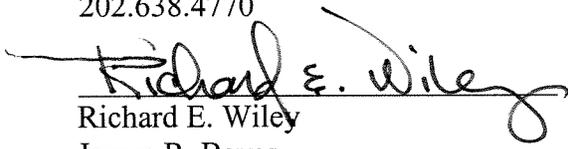
VI. CONCLUSION

As NAA repeatedly has established, the newspaper/broadcast ban is not necessary to further any legitimate Commission objective and, in fact, disserves the public interest; thus, the ban cannot be sustained under any reading of the biennial review mandate. Accordingly, based upon the extensive record previously compiled, which has now been augmented and confirmed by the Commission's own observations in the *NPRM* and the economic and other ownership studies released for review, the agency is compelled to eliminate the newspaper/broadcast cross-ownership prohibition.

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