undergone a veritable revolution. Through the Telecommunications Act of 1996, Congress indicated the new broadcast marketplace mandates a review of the Rule. The Commission relaxed other ownership and structural rules designed to enhance diversity and/or increase competition in the broadcasting industry, finding the broadcast market had developed so fully, and diversification of programming was so extensive, as to require repeal of restrictive ownership or programming limitations. Indeed. such revisions are Constitutionally and statutorily required where, as here, the passage of time has undermined the original justification for a rule.[200]

1. Reconsideration of the Fairness Doctrine.

In the mid 1980s, the Commission reconsidered the Fairness Doctrine, the Commission's ultimate attempt to ensure viewpoint diversity in programming received by viewers. Notwithstanding the Supreme Court's ruling in Red Lion affirming the Constitutionality of the Fairness Doctrine and giving life to the scarcity rationale, the Commission issued an order that expressly found the Fairness Doctrine unconstitutional based on the "explosive growth in the number and types of information sources available in the marketplace" such that 'the public has 'access to a multitude of viewpoints without the need or danger of regulatory intervention'."[201] The Commission concluded, "[t]o the extent that the [Supreme] Court is concerned about numerical scarcity in [broadcast], . . . with the explosive growth in the number of electronic media outlets in the 18 years since Red Lion, there is no longer a basis for this concern."[202]

2. *Other Broadcast Ownership Rules.*

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[200] Syracuse Peace Council v. WTVH, 2 FCC Rcd. 5043 ¶ 8. n.8 (1987) ("Syracuse MO & O") Meredith Corp. v. FCC, 809 F.2d 863. 874 (D.C. Cir. 1987).

[201] Syracuse MO&O, at 5043, 5053-53 (¶¶ 4.64) (quoting Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees. 102 F.C.C.2d 143. 224 (1985).

[202] Syracuse MO&O at 5065 (¶ 37 n.106.)

The Commission has also liberalized almost all of its other broadcast ownership rules and/or their corresponding waiver policies in response to changes in the media marketplace. Most recently, the Commission relaxed the Rule's companion prohibition on combined ownership of television stations and radio stations in the same market (the "One-to-a-Market Rule").'" The One-to-a-Market Rule was adopted in 1970, based on the same diversity and competition rationale underlying the adoption of the newspaper cross-ownership rule in 1975. Citing changes in the local broadcast media marketplace since the adoption of the One-to-a-Market Rule and demonstrated efficiencies that occur in the joint operation of television and radio stations, the Commission now allows combinations of up to two television stations and six radio stations in a single market.'' The Commission was persuaded that public benefits such as improved programming, 'outweighed the cost to diversity."[205] The Commission has foreshadowed even further relaxation of the rule, stating it "will have further opportunity to consider relaxing the radio/TV cross-ownership rule as we evaluate ongoing changes in the television and radio markets in conjunction with future biennial reviews."''

At the same time the Commission relaxed the One-to-a-Market Rule, it substantially revised another long-standing prohibition, the television duopoly rule. The prohibition against ownership of two television stations in the same market was adopted in 1964 on the same diversity and competition basis as the newspaper cross-ownership Rule. In the Television Ownership Order, the Commission determined it was appropriate to permit dual station ownership in markets where at least

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[203] See Review of the Commission's Regulations Governing Television Broadcasting, Report and Order, 14 Fcc Rcd. 12903 at 12947 (1999) ("Television Ownership Order").

[204] Id. at 12948

[205] Id. at 12950. In truth, the Commission's revision of lhe One-to-a-Market Rule has been a continuous effon for more than a decade. In 1989. the Commission began by relaxing the waiver policy associated with the One-to-a-Market Rule, creating a "case-by-case" standard that authorized common ownership of a television station and four radio stations. See, e.g., BREM Broadcasting and WKPG-TV, Inc., 9 FCC Rcd. 1333 (1994).

'' Television Ownershio Order. 14 FCC Rcd. ai 12949 eight independent stations would exist after the combination.[207] The Commission concluded that allowing duopolies would preserve and strengthen weaker stations and create cost savings that could result in improved local programming,[208] and that these public interest benefits outweigh the limited risk to viewpoint diversity that might result from the rule change.[209]

In 1992, the Commission "recognized the need to adapt [its] rules to the changing marketplace" when it increased the number of AM and FM stations a single entity could own in a single market. The Commission concluded, "[t]he explosion of radio and other media since [it first applied local restrictions in 1938] has provided local consumers with a wide range of media choices and presented radio owners with multiple competitive challenges."[210] The 1992 proceeding relaxed that restriction and permitted the common ownership of two AMs and two FMs in a market subject to an audience share limit.[211] The Telecommunications Act of 1996 further relaxed the local radio ownership limit, permitting up to eight stations per market to be commonly owned.[212] The 19% Act also eliminated national limitations on the number of radio or television stations an entity may own and repealed the statutory ban on local TV/cable cross-ownership.

3. <u>1984 Television Deregulation Order</u>.

The Commission has also eliminated several policies and rules regarding programming and license renewal processing, including a policy requiring full Commission review of any television station renewal application that reflected 'less than five percent local programming, five percent informational programming (news and public affairs) or ten percent total non-entertainment

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[207] <u>Id</u> at 12932.

[208] <u>Id</u> at 12933.

[209] <u>Id</u> at 12922.

[210] <u>Revision of Radio Rules & Policies</u>. 7 FCC Rcd. 2755, 2773 (1992).

[211] <u>Id</u>.

[212] <u>Newspaper/ Radio Cross-Ownership Waiver Policy. Notice of Inquiry</u>, 13 FCC Rcd. 13003 (1996)

programming."[213] The Commission found market forces would stimulate the desired mix of informational, local and non-entertainment programming without regulatory intervention, in pan because,

> Many new video technologies such as Subscription Television (STV), Multipoint Distribution Service (MDS), Satellite Master Antenna Television (SMATV). Low Power Television (LPTV), Direct Broadcast Satellite (DBS), Multi-Channel MDS (MMDS) and Instructional Television Fixed Service Stations (ITFS) have begun, or are just beginning, to assert themselves in the marketplace. . . The emergence of these new technologies, coupled with the continued growth in the number of television stations, will create an economic environment that is even more competitive than the existing marketplace. Given the market-based demand for these types of programming . . . this increased level of competition can, in our view, only further ensure the presentation of sufficient amounts of such programming.[214]

4. R e d of the Rules Designed to Curb the Power of Broadcast Networks.

In 1994 and 1995, the Commission repealed its financial interest and syndication ("fin/syn") rules as well as its prime time access rule ("PTAR"). These rules, both contemporaries of the newspaper cross-ownership ban, were similarly designed to protect competition and the marketplace of ideas by placing broad constraints on the financing, ownership, and programming practices of the television networks. The Commission reconsidered these rules and determined that. given competitive conditions in the television marketplace, they should be repealed in their entirety."'

Similarly, in 2000, the Commission determined it was appropriate to relax the dual network rule to allow the top four networks (ABC, CBS, NBC and Fox) to acquire either of the

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[213] Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Lox Requirements for Commercial Television Stations, 98 F.C.C. 2d 1076. 1078 (1984) ('Television Derenulation Order-).

[214] Id at 1086 ¶¶ 20-21

[215] See, Evaluation of the Syndication and Financial Interest Rules, 8 FCC Rcd. 3282. 3284 (1993) ("Fin/Syn Second R&O"); PTAR Report and Order. 11 FCC Rcd. 546. 548 (¶ 4) (1995). See also, Capital Cities/ABC, Inc. v. FCC. 29 F.3d 309 (7th Cir. 1994).

emerging networks (WB or UPN).[216] The Commission concluded the potential programming efficiencies outweighed any potential harm to diversity or competition.

In each instance where the Commission rolled back limitations on the networks, it recognized the dramatic changes in the marketplace since the adoption of the rule in question, including the fact that network audience shares had declined greatly. cable and independent television had grown significantly, competition among the networks had become incense, and first-run distribution had become a fully comparable alternative to network distribution for program producers.[217] The increased competition facing the networks and the new conditions in the television programming market eliminated the danger that repeal of the fin/syn rules and PTAR or relaxation of the dual network rule would impair the competition and diversity goals of these rules.[218]

C. **The Rule** does not withstand even intermediate Constitutional scrutiny.

In the absence of scarcity, any cross-ownership rule would be subject to strict First Amendment scrutiny. Given the Commission's findings in relaxing other regulation, and the realities of the current media marketplace, the Rule would certainly not survive review under the standard of strict scrutiny. As three recent appellate court decisions demonstrate, if reviewed today, a cross-ownership ban would fail even under the standard of intermediate scrutiny.

The Rule *can* be upheld only if it advances important governmental interests unrelated to the suppression of *free* speech and does not burden substantially more speech than necessary to further those interests. In Time Warner Entertainment Co. L.P. v. FCC,[219] the D.C. Circuit concluded the Commission's national cable subscriber cap and limitations on cable carriage of affiliated programming were unconstitutional. Applying intermediate scrutiny. the Court first found Congress

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[216] See, 1998 Biennial Regulatory Review. IS FCC Rcd. at *11094* (2000).

[217] PTAR Report and Order, 11 FCC Rcd. at 556 (¶ 21.)

[218] Id at 542,556: Fin/Syn Second R&O, 8 FCC Rcd. ai 3288.

drew reasonable inferences in the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act") concluding that increases in cable concentration could threaten viewpoint diversity and economic competition. However, in reviewing the rules adopted by the FCC to implement the Cable Act, the Court held, "in 'demonstrat[ing] that the recited harms are real, not merely conjectural,' the FCC must show a record that validates the regulations, **not just** the abstract statutory authority."[220] The court concluded the FCC did not present "substantial evidence" that the perceived harm to diversity and competition exists or is likely to occur. Thus it held the FCC's assumptions were merely conjecture **and** its regulations **unconstitutional**.[221]

Going further, the Coun questioned the premise that even small gains in diversity justify regulatory intervention:

> We have some concern how far such a theory may **be** pressed against First Amendment norms. Everything else being equal, each additional "voice" may **be** said to enhance diversity.... But at some point, surely, the marginal value of such **an** increment in "diversity" would not qualify **as an** "important" governmental interest. Is moving from 100 possible combinations to 101

Just **as** the Court of Appeals found in invalidating the cable regulations in Time Warner, the Supreme Coun determined in **1978** that the newspaper cross-ownership Rule "lacked any hard evidence" that increased competition or broader viewpoint diversity would result.

Moreover, **as** evidenced in these Comments, the Commission's showing in support of the Rule was **minimal**: The Commission's Report and Order adopting the Rule contained no empirical or other evidence that cross-ownership of a newspaper **and** a television station would impede viewpoint

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[219] **240 F.3d 1126 (D.C. Cir 2001).**

[220] **Id at 1130 (citations omitted).**

[221] **Id.**

[222] **Id.**

diversity.” When reviewing the Rule, the D.C. Circuit observed the record contained “little reliable ‘hard‘ information.“” As the Supreme Court commented, “the Commission did not find that existing co-located newspaper-broadcast combinations had not served the public interest, or that such combinations necessarily ‘spea[k] with one voice’ or are harmful to competition.”” The Supreme Court characterized the Rule as merely “reasonable” and the Commission’s predictive judgment “rational.”[226]

Section 47 USSA §533(b) of the Cable Franchise Policy and Communications Act of 1984[227] made it unlawful for a telephone company to provide video programming in its telephone service area. In two subsequent decisions, courts have applied intermediate scrutiny to hold the statutory prohibition on cross-ownership of a telephone and a cable company violated the First Amendment.” The Ninth Circuit concluded the cross-ownership ban was unconstitutional where there is insufficient evidence to demonstrate the ban would foster competition in the cable industry or promote diversity in programming, and where less restrictive means of achieving diversity are available.[229] The Fourth Circuit reached similar conclusions. In <u>Chesapeake and Potomac Telephone Co.</u>, the court observed, afier looking at the history of 533(b), “the FCC's reasoning does not indicate

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[223] <u>Order</u>, 50 F.C.C. 2d 1046, ¶ 111 (1975).

[224] <u>NCCB</u> v. <u>FCC</u>, 555 F.2d 938,956 (D.C. Cir. 1977)

[225] <u>FCC</u> v. <u>NCCB</u>, 436 U.S. at 786.

[226] <u>Id</u> at 776. 790.

[227] 47 USCA § 533(b)

[228] <u>See</u>, <u>Chesapeake & Potomac Tel. Co. v. United States</u>, 42 F.3d 181 (4th Cir. 1994); <u>US West, Inc. v. United States</u>, 48 F.3d 1092 (9th Cir. 1995).

[229] <u>US West, Inc.</u>, 48 F.3d at 1101-1106

that attention was devoted to the possibility of other. less drastic regulatory schemes that might achieve the substantial government interests enunciated above."[230]

As these cases illustrate. once the scarcity rationale is eliminated, the Rule must be based on substantial evidence the particular restriction will promote a substantial government interest without suppressing substantially more speech than necessary. In 1975. the Commission's own record indicates that it was unable to make such a showing and the same would be even more true today.

D. The Rule discriminates against newspapers by singling them out as the sole media outlet subject to blanket and complete restrictions.

In FCC v. NCCB, the Supreme Court countered the concern that the Rule "singled out" newspapers in violation of the First and Fifth Amendments by pointing out "the regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communications were already treated under the Commission's multiple-ownership rules; owners of radio stations, television stations, and newspapers alike are restricted in their ability to acquire licenses for co-located broadcast stations."[231] Since that decision, and as noted above, the most significant of the Commission's other ownership restrictions have been liberalized, putting newspapers at a competitive disadvantage vis-à-vis other media. Among the anomalous results of relaxing all restrictions other than the newspaper ownership ban:

- In South Florida, CBS/Viacom has a virtual triopoly, owning three stations within 80 miles of each other - WFOR in Miami, WBFS in Miami and WTVX in Ft. Pierce (West Palm Beach DMA). It combines their resources to compete with Tribune-owned WBZL. WBZL can share resources with any of these television stations (the largest of which reaches 1,656,200 people), but not with the *Sun-Senfinel.* which reaches only a fraction of that population. WBZL is disadvantaged because it is co-owned by a company that owns a newspaper in the market, while companies that own multiple television stations face no such restrictions.[232]

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[230] 42 F.3d at 201.

[231] FCC v. NCCB, 436 U.S. at 801

[232] Permitted combinations of broadcast stations often result in combined audience shares that far exceed the newspaper's readership. Yet these combinations are permitted and newspaper-broadcast combinations are not.

- AT&T Broadband serves 95% of the cable subscribers in Chicago and **75%** of the cable subscribers in Miami-Ft. Lauderdale. Other cable systems enjoy dominant or substantial market shares in other markets, **and** supply multiple channels of programming in which they have proprietary interests. **As** the Commission has noted, "most programming is either originated or selected by the cable system operator, who thereby ultimately controls the content of such programming'' viewed in the **market.**[233] Yet this market strength by a single entity that selects programming is permitted, while newspapers are denied the ability to own even a single broadcast station.

- One reporter can gather ***and*** interpret news ***for*** *two* TV stations or even, in the case of an informal alliance, for a newspaper and a TV station. **In** other words, the government is willing to allow a single reporter to gather and report news for a newspaper and broadcast station - one reporter's voice over multiple media; but it arbitrarily restricts common ownership of the resources that support the reponer.

The exclusion of newspapers **as** suitable broadcast licensees is even more frustrating when one considers the Commission recently adopted a policy of including newspapers **as** 'voices" for purposes of relaxing the one-to-a-market **Rule.**[234] The Commission **count",** daily newspapers and cable systems, along with radio and television statioos, **as** equal market voices for ***purposes*** of evaluating cross-ownership of television and radio ***stations.***[235] That is, newspapers are counted interchangeably with other media for purposes of loosening restrictions **on** television and radio station owners. but the **same** viewpoint valuation is not applied to evaluate restrictions **on** newspaper publishers.

E. The 1996 Act Creates a Presumption in Favor of Deregulation.

Section 202(h) of the Telecommunications Act of 1996 (the "19% Act") evidences Congress' conclusion that the public interest is best served by competitive market forces. It directs the Commission, every two years. to determine whether its broadcast ownership **rules** are "necessary **in** the public interest **as** a result of competition. The Commission shall repeal or modify ***my*** regulation it

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[233] Television Ownership Rewn and Order. 14 FCC Rcd. at 12953 (¶ 113). See also, NPRM at ¶ 44.

[234] Id at 12951-52 (¶111.)

[235] Id at ¶ 113. The new rules require newspapers. unlike broadcast voices, to have a specified level of market penetrarion to count under the formula. It is equally illogical to count cable. with its multitude of programming choices. as but one voice.

determines to be no longer in the public interest."[236] This is a clear legislative direction to **focus on** competitive market forces.

Both principles of statutory construction and the legislative history of the 19% Act make clear Congress intended the Commission to depart from its traditional regulatory approach. First, the statute emphasizes competition and makes no mention of diversify as an independent goal.[237] This signals a change in direction from the Commission's reliance on the twin goals of competition and diversify that have been used to justify the Rule since 1975.[238]

Second, the legislative history of the Act clearly reveals Congress' intent that the Commission change its regulatory approach in evaluating the continuing need for its broadcast ownership rules. The House Repon noted, "[t]he audio and visual marketplace ... has undergone

[236] Telecommunications Act *of 1966*, *Pub. L.* No. 104-104, §202(h) 110 Stat. 56.111-12 (1996).

[237] The Commission's suggestion that Section 202(h) permits it 10 undertake a far-reaching diversiry analysis is inconsistent with the statutory construction principle *expressio unius est exclusio alterius*, *i.e.*, the "mention of one thing implies exclusion of another thing." Ethyl Corn. v. EPA. 51 F.3d 1053. 1061 (D.C. Cir. 1995) (internal quolation omined). The *expressio unius* maxim has panicular force here because Congress, in enacting other sections of *the 1996* Act with purposes similar IO Section *20201). did* make specific reference to the 'diveniry" aspect of the Commission's public interest standard. See Russello v. United States, 464 U.S. 16.23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")(internal quotation marks omitted); *Halverson v. Slater*, 129 F.3d 180, 186 (D.C. Cir. 1997)(recognizing this principle as a rule of statutory construction). For example. Congress dirsted the Commission to conduct a proceeding to identify and eliminate market entry barriers For *entrepreneurs* and small businesses in the provision and ownership of telecommunications services and information services. See 47 U.S.C. 5 257(a). Congress specifically instructed the Commission that, in executing its statutorily mandated review in that regard. it "shall seek to promote the policies and purposes of this chapter favoring *diversity of* media voices. vigorous economic competition, technological advancement. and promotion of the public interest. convenience. and necessity." Id. § 257(b) (emphasis added). This provision. which is similar in purpose to Section 202(h), makes specific reference to the diversity aspect of the Commission's public interest standard. Section 202(h), in contrast. *maker no reference* whatsoever to diversity and instead. by Omission. specifically limits the Commission's public interest analysis to assessing the level of competition. and nothing more. See National R.R. Passenger Corn. v. National Ass'n of R.R. Passengers, 414 U.S. 453,458 (1974) ("When a statute limits a thing to be done in a panicular mode, it includes the negarive *of any other mode*.'") (quoting Botany Worsted Mills v. United States, 278 U.S. 282.289 (1929)).

[238] NPRM at ¶ 2.

significant changes over the past fifty years and the scarcity rationale for government regulation no longer applies."[239] The Report continued:

> Today, there are in excess of 11,000 radio stations and over 1,100 commercial television stations, a 30 percent increase in the number of stations from just ten years ago. In addition, a fourth network has developed and two new networks are being launched. There is also competition from cable systems as suppliers of video programming. Cable systems pass more than 95 percent of all U.S. television households and 65 percent of U.S. television households subscribe to cable. In addition, other technologies such as wireless cable, low power television, backyard dishes, satellite master antenna television service (SMATV) and video cassette recorders (VCRs) provide consumers with additional program distribution outlets that compete with broadcast stations. To date, twenty four telephone companies have applied to provide "video dial tone service" to customers over phone lines.... This explosion of programming distribution sources calls for a substantial reform of Congressional and Commission oversight of the way the broadcasting industry develops and competes.[240]

Having acknowledged the striking changes in the level of competition in the media marketplace over the past 50 years, the Committee concluded:

> 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 nations of broadcast regulation and to rely more on competitive market forces."'

The Committee Report thus confirms Congress' intent that the Commission 'depart from" its "traditional notion" of the public interest and instead focus on "competitive market forces" in its approach to regulating ownership in the broadcast industry. This change in focus is both sensible as a matter of policy and Constitutionally required as a matter of law

As the Notice itself observes, the local media marketplace has changed dramatically in the past 25 years.* The Commission must give effect to the legislative intent by examining these profound changes and repealing or modifying those rules that are no longer necessary as a result of

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[239] H.R. Rep. No. 104-204, at 54 (1995), *reprinted in* U.S.C.C.A.N. 10, 18 (1996).

[240] Id at 54-55 (1995), *reprinted in* U.S.C.C.A.N. at 18-19 (1996).

[241] Id at 55, reprinted in 1996 U.S. C.C.A.N at 19 (19%) (emphasis supplied)

those changes. In so doing, the Commission may not simply hold to its traditional preference for separately owned outlets simply for the sake of diversity. To the contrary, Congress clearly has concluded that competition ordinarily will protect the public interest. Thus, any decision to depart from reliance on market forces must be supported by a complete explanation of the diversity objective sought to be achieved and a clear demonstration that market forces do not produce the desired objective. The Commission must favor competition over other means of achieving its goals.

VII.

The Commission asks in the Notice whether structural safeguards, a formulaic approach to approving local newspaper-broadcast combinations. a refashioned waiver policy or repeal of the Rule best could serve the Commission's goals and comply with the 1996 Telecommunications Act's deregulatory mandate. Tribune submits the time has come for full repeal of the Rule. None of the alternatives is necessary, desirable or lawful.

A market concentration standard, at the outset, ignores the fact that diversity is only harmed if local news is compromised.[243] Where a broadcast station does not produce news, or produces little original news, there can be little harm in allowing common ownership with the local newspaper, no matter how great the combined share of the post-merger entity. Adopting a market concentration rest does little justice to the goal of protecting diversity. In fact, it completely ignores the quantity or quality of local content being produced in favor of an arbitrary limit similar to the cable cap rules recently invalidated by the Court of Appeals.

In addition, a market concentration standard presents the problem of defining the relevant product market. It would be folly to expect an unassailably objective test to determine the degree to which myriad different competitive voices in a market "compete" with one another. For

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[242] NPRM at ¶8.

[243] See, NPRM. ¶ 40 (diversity of viewpoints in local news presentation is at the heart of the Commission's diversicy goal).

example. in addition to broadcast stations and daily newspapers, the relevant market must include some of the following: news magazines, which typically sell national but not local advertising; local radio; satellite radio; Spanish-language daily newspapers (which do not fall within the scope of the Rule); weekly newspapers. which increasingly take market share from larger newspapers; Internet-based subscription news services. which sell advertising and challenge newspapers and broadcast stations for revenue; leased-access cable programming; and. advertiser-supported basic cable news networks. But which of these to include and to what degree is inherently subjective and. worse, in the absence of a widely-accepted objective criteria, can create the perception of arbitrariness and unfairness.

A "voices" test that equates newspapers with broadcast outlets would also be inherently unworkable and unfair. It, too, ignores the quality and content of the programming. No matter how many voices exist in a market, if one is not producing local news, then its combination with a newspaper that leads to the creation of the local newscast will increase the number of video news voices in the market. More importantly and as evidenced in Tribune's cross-owned markets, even in markets with relatively few stations, allowing combinations with a newspaper will increase the quality of local coverage. Finally, a voices test raises the problem of weighing media outlets of different sizes, types and influence inherent in the Commission's local ownership rules,[244] which use such a test. It presents the inequities of either ignoring or undervaluing the competitive impact of new media such as the Internet and cable program services. Such a test would lack any predictability, as changes in the media landscape would require ever-changing calibration of the "voices" in the market.

A modified waiver policy or standard is equally undesirable. To begin with, the Rule has been waived only four times in 26 years.[245] A liberalized waiver policy would consume more of the

citing, TV Ownership Report and Order, 14 FCC Rcd. at 12933. (¶ 66).

[244] 47 C.F.R.§§ 73.3555(b), (c).

[245] NPRM, ¶ 3 & n.11.

Commission's resources, would be prone to inconsistent results, would make business planning more uncertain, and would increase transaction costs. Just as importantly, since waiver decisions are inherently subjective,[246] allowing decisions about media ownership to be made on such an ad hoc basis would be inconsistent with the Commission's efforts at fairness and predictability and contrary to the Constitutional guarantee of free speech.

Perhaps the most misguided notion raised in the Notice is that of "structural separation" between commonly-owned newspapers and broadcast stations.[247] Tribune is subject to just such an unnatural relationship in South Florida[248] and the results in that market speak for themselves. The attempt to create some form of artificial "diversity" will undermine all of the public interest benefits that occur when newspapers and broadcasters collaborate to serve the community.

Aside from these statutory and constitutional considerations, there is another reason the Commission is well advised to refrain from regulating in this area: the Commission does not regulate newspapers. It has no expertise in understanding their competitive problems and their unique attributes. *And* yet, as described above, each regulatory action the Commission takes in this area will have a profound effect on the future of newspapers in this country. Should a newspaper company that publishes a morning and an evening paper, each with a separate editorial staff. be considered two voices? Is a newspaper that aggressively covers all important population centers in the state to be considered a voice in analyzing local competition? What about powerful national publications like the *New York limes, USA Today* and the Wall *Street Journal* that are read in every local community?

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[246] The current waiver standard, for example, allows the Commission to waive application of the Rule if it determines 'the purposes of the rule would be disserved" by application of *the* newspaper-broadcast common ownership ban. ~~See. Order~~. 50 FCC 2d at 1085: NPRM ¶48. While Tribune believes this discretion is important if a waiver policy is to be in place, it is intended m permit the Commission to have the flexibility to grant waivers it deem appropriate and thus is inherently subjective.

[247] Id.

[248] See supra at Section II.

Should two newspapers operating under a Joint Operating Agreement entered into pursuant to the Newspaper Preservation Act.[249] be considered two newspapers, or one? These are among the many questions that will present a thicket of problems for the Commission should it decide to scrutinize individual newspaper-broadcast transactions for their pro- and anti-competitive effects. In the modem media marketplace, where the newspaper is struggling to keep up with the barrage of competition presented by old and new media competitors alike, it is not in the public interest for the Commission to continue to regulate ownership of the print media.

Finally, the Commission is not charged with enforcing the antitrust laws. and has recognized it has no authority to enforce them.[250] If the Commission undertakes the task of performing exhaustive market analyses for each transaction placed before it, it will duplicate efforts committed by law to other agencies of government far more expert in defining markets, gauging levels of concentration and competition in those markets, and weighing the procompetitive and anticompetitive effects of proposed business combinations. Fortunately, the Commission is entitled to conclude - and, Tribune submits. must conclude - the local and national media markets are sufficiently competitive that a detailed analysis of competition in each market is unnecessary when a radio or television broadcaster seeks to acquire a local daily newspaper, or vice-versa. This will permit the Commission to conserve its resources. while reserving its enforcement mechanisms for cases where competitive harm is demonstrated.

Once the Rule is repealed, antitrust laws will still exist to combat anticompetitive combinations and curb any abuses that otherwise might arise in an economy unburdened of the newspaper cross-ownership Rule. Many acquisitions of broadcast stations are and will continue to be

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[249] Pub. 2. No. 91-353, 84 Stat. 466 (codified at 15 U.S.C.§§ 1801-1804). Before two newspapers can enter into a Joint Operating Agreement. they must obtain the written consent of the U.S.Dept. of Justice. 15 U.S.C. § 1803.

[250] Order. 50 FCC 2d. at 1049; FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775.795 (1978); NBC v. United Stales. 319 U.S. 190.223-24 (1943); Fox Television Stations. Inc., 8 FCC Rcd. 5341, 5352 (1993).

reviewed by the Federal Trade Commission or the Department of Justice under the Hart-Scott-Rodino Antitrust Improvements Act.[251] Public and private actions under the federal and state antitrust laws can be brought to prevent anticompetitive combinations from being formed or to restrain or punish anticompetitive practices.

On numerous occasions, the Commission has chosen to allow the competitive market to function, subject to enforcement of the antitrust laws, rather than continue regulations that stifled competition and innovation.[252] Such actions reduce the Commission's burden and cost of scrutinizing individual transactions. and eliminate attendant uncertainties and delays in business transactions.[253] The

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[251] 15 U.S.C. § 18a.

[252] See, e.g., 1998 Biennial Review—Repeal of Pan 62 of the Commission's Rules, 14 FCC Rcd. 16530.16535 (1999)(repealing rules governing interlocking directorates and relying on other Title II provisions and the antitrust laws to protect the public interest); Program Exclusivity in the Cable & Broadcast Industries, 3 FCC Rcd. 5299.5309–10 (1988)("When there is a diverse set of program sources and outlets, as there increasingly is in the current television marketplace," granting broadcasters locally exclusive rights to programming is procompetitive, and the antitrust laws can be used to police anticompetitive practices.): Elimination of Unnecessary Broadcast Regulation, 57 R.R.2d 913.915 (1985)(repealing policy prohibiting a licensee from using a station in furtherance of the licensee's other business activities: "There is little reason to believe that the prohibited practices in fact suppress competition. To the contrary, we believe that these rules prohibit practices which are either competitively neutral or would foster economic efficiency and are unnecessary to protect listeners or viewers. The Congress has identified those practices which arc genuinely anticompetitive and has outlawed such practices in the antitrust laws, most notably the Sherman and Clayton Acts. We do not believe that this Commission should attempt to outlaw practices not prohibited by the antitrust laws, at least where. as here, the listeners or viewers receive no offsetting benefits."); Representation of Stations by Representatives Owned by Competing Stations in the Same Area, 81 F.C.C.2d 668.681 (1981) (repealing Commission's Golden West policy forbidding a station-owned sales representative organization from representing a competing station in the same market: market forces, subject to enforcement of the antitrust laws, could be relied on to ensure competitive benefits).

[253] Elimination of Unnecessary Broadcast Regulation, 59 R.R.2d 1500, 1514–15 (1986) (Commission repealed policies forbidding joint sales practices and combination advenising rates that prohibited practices not proscribed by the antitrust laws. "We concur . that the policies were premised upon only a 'potential' for abuse. rather than actual antitrust violations. and that this is not an appropriate basis for regulation." Id at 1515. Permitting these sales practices would permit economies of scale and reduce costs of doing business. Id.). See also Reexamination of the Comm'n Cross-Interest Policy, Policy Statement, 4 FCC Rcd. 2208, 2211-13 (1989) (repealing application of the cross-interest policy to consultants, lime brokerage agreements and advertising agency representative relationships. finding that administrative costs could not be justified, the increasing number of media outlets had undercut the notion that any single individual or entity could skew competition through the cross-interests at issue. and alternative remedies, such as the antitrust laws, were available to curb anticompetitive conduct): accord, Review of the Commission's Regulations Governing Attribution of Broadcast & Cable/MDS Interests, 14 FCC Rcd. 12559. 12610 (1999)(deleting application of the cross-interest policy to joint ventures between stations).

Commission can exercise oversight of the competitive dynamics occurring in any market through its licensing process.[254]

CONCLUSION.

The modem media marketplace has rendered the Commission's ban on newspaper cross-ownership and related waiver policy obsolete. The Rule does not, and possibly never has, served its intended purpose of furthering programming diversity, especially local news programming diversity. Indeed, in today's competitive media market — in which ownership restrictions have been lifted for virtually all other combinations — the Rule is actively impeding newsgathering synergies that would improve the scope and quality of local news broadcasts and public affairs programming without sacrificing viewpoint diversity. For these reasons, Tribune respectfully requests the Commission repeal the Rule in its entirety. Doing so will enhance the distribution of news and information that is at the core of the First Amendment's concern for an informed citizenry.

Respectfully submitted:

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December 3, 2001

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[254] <u>Character Qualifications in Broadcast Licensing</u>, 102 F.C.C.2d 1179, 1190-91, <u>on recon.</u>, 1 FCC Rcd. 421 (1986); <u>Fox Television Stations, Inc.</u>, 8 FCC Rcd. 5341, 5352-53 (1993).

Attachment C

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of 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.	MM Docket No. 98-35

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REPLY COMMENTS OF TRIBUNE *COMPANY*

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REPLY COMMENTS OF TRIBUNE COMPANY

Tribune Company, by its undersigned attorneys, hereby submits its Reply to the Comments submitted in response to the Commission's Notice of Inquiry ("NOI"). As demonstrated more fully below, the record in this proceeding fully supports the elimination of the Newspaper-Broadcast Cross-Ownership rule (the "Rule") or, at the very least, a liberalization of its related waiver policy in the largest media markets. In addition. Tribune urges the Commission to retain the so-called UHF discount.

I. Introduction and Summary.

Tribune's initial comments urged the Commission to recognize the dramatic changes in the mass media marketplace since the Rule was originally adopted, and to eliminate the Rule or, at the very minimum, liberalize its waiver policy in the largest media markets.

Tribune demonstrated that marketplace changes, which included a substantial increase in the number of television and radio stations as well as the development of cable, DBS, and the Internet, had mooted the Commission's traditional concern about diversity and competition at least in the larger media markets and undermined the scarcity rationale used to justify the Commission's intrusive regulation of the broadcast industry. Given the elimination of the scarcity rationale, Tribune argued that the Commission's decision to retain the Rule would have to survive at least intermediate scrutiny by a reviewing court -- a standard of review the Rule could not survive in its current form.

Tribune's comments went on to demonstrate that the Rule's exclusive focus on preserving ownership diversity no longer served the Commission's long-stated interest in enhancing local television news diversity. Tribune argued that the FCC needed to liberalize the Rule or its waiver policy to help overcome significant financial and competitive barriers to local news entry faced by television stations – a liberalization that could make available to over-the-air viewers the same kinds of enhanced local news programming Tribune has developed for two different cable channels, serving the Chicago and Orlando markets, using the resources of its nearby daily newspapers.[1]

[1] In fact, as several commenters noted in this proceeding, the Commission itself has consistently recognized "that on average, co-located, newspaper-owned TV stations programmed 6% more local news, 9% more local non-entertainment, and 12% more total local including entertainment than do other TV stations." Second Report and Order, 50 FCC 2d 1046, 1094, Appendix C (1975).

As demonstrated more fully below, none of the comments submitted in response to the NOI seriously dispute or undermine Tribune's arguments. Instead, the best the supporters of the status quo can do is repeat the same generalized, predictive concerns the Commission expressed some 28 years ago about the threat to diversity and competition posed by the common ownership of a newspaper and a television station. Given the marketplace changes noted by the overwhelming majority of commenters in this proceeding. Tribune submits that the Commission cannot continue the Rule in its current form on the basis of these generalized concerns and inaccurate predictions. At least in the largest media markets, the Commission should permit the over-the-air television industry to pursue efficient ownership combinations enjoyed by its competitors -- efficiencies that will help to ensure the continued long-term health of the industry and enhance the amount, quality and diversity of local news available to over-the-air television viewers.

II. The Record Does Not Support the Maintenance of the Newspaper Cross-Ownership Rule and Related Waiver Policy in its Current Form.

Even a cursory review of the initial comments reveals that the Commission must eliminate the Rule or, at the very least, liberalize the Rule's waiver policy. Apart from the erroneous and unfounded incantations about the harms of common media ownership that the Commission accepted without proof 28 years ago, the few commenters who support the Rule have offered virtually no empirical evidence to support its retention. Indeed, these proponents merely express concern about the pace of media consolidation (predominantly in radio) and speculate that co-owned media outlets will censor news or refrain from critical reports about one another. See Center for Media Education Comments at 4-8; United Church of Christ, et al. Comments at 7-8.

These commenters ignore what Tribune's opening comments made clear -- that in the larger media markets, the number of independent. competing voices is so great that no single entity, regardless of how self-serving its editorial decisions, could possibly control public opinion or in any way impede the public's access to a multiplicity of perspectives on issues of public concern. Indeed, as the overwhelming majority of commentem noted, the amount and intensity of media competition in the larger media markets is so great that no one entity can seriously be viewed as a threat to the marketplace of ideas.[2] Moreover, contrary to the implicit suggestions of those opposed to any change in the status quo, elimination of the Rule or liberalization of the waiver policy will not lead to monopolization of media outlets in local markets -- the antitrust laws will remain applicable to any proposed combination.

A brief summary of the intense media competition in the South Florida market, described more extensively in Tribune's opening comments, is illustrative. The South Florida market is comprised in part by the Miami-Ft. Lauderdale DMA, which is served by 11 broadcast television stations (5 VHF and 6 UHF). Most of these stations are owned by well-financed major medii companies that collectively produce over 80 hours of local news programming each week. Basic cable penetration in South Florida ranges from 63 percent in

[2] See, e.g., Newspaper Association of America Comments at 31-55; Gannett Co., Inc. Comments at 23-24; Medii Institute Comments at 8-11.

Dade County to 81 percent in Broward and 84 percent in Palm Beach County. The average cable subscriber receives approximately 62 channels of programming, including several all-news and public affairs channels plus a myriad of specialized programming networks. MediaOne has amassed a cable cluster in the Miami DMA of approximately 642,000 subscribers – nearly 46 percent of the DMA's television households. The South Florida market is also served by six local daily newspapers (five of which are separately owned), over 100 weekly newspapers, which typically provide the most localized coverage, and (as of July 1996) 69 commercial and noncommercial radio stations (operated and controlled by 49 separate entities or individuals) that broadcast a wide variety of formats, including several news and/or news talk stations. &Tribune Opening Comments at 28-38. According to Scarborough estimates, Internet penetration in South Florida is estimated at approximately 28 percent as of the beginning of 1998.[3]

In a market with this level of both competition and diversity of outlets, an occasional incident of self-serving programming is simply background noise. lost in the symphony of competing media voices. To the extent that one player in the market chooses, for its own economic or other reasons, not to air or address a story of public concern. one of

[3] Tribune's initial comments included an economic analysis of the South Florida media market, which documented a competitive unconcentrated media marketplace. See "An Economic Analysis of the Cross-Ownership of WBZL and the Sun-Sentinel," submitted with Tribune Company Comments in response to NOI in MM Docket No. 98-35. A brief supplement to the analysis is attached.