

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

In the Matter of)	
)	
2002 Biennial Regulatory Review – Review)	MB Docket No. 02-277
of 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)	MM Docket No. 01-235
and 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

REPLY COMMENTS OF MEDIA GENERAL, INC.

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SUMMARY

The record in the rulemaking proceeding on the newspaper/broadcast cross-ownership rule that the Commission conducted in 2001-2002 demonstrated that the rule fails to meet the goals that the FCC speculated it would achieve at the time it was adopted and that it now stymies newspapers' and broadcasters' efforts to provide new and innovative information services that meet the demands of their ever-changing communities. The record in this docket shows equally clearly that there is no substantiated public interest justification for retaining the rule.

The commenting parties opposing repeal of the rule offer several myths to support their position, all of which, in Media General's experience, have no basis in fact. First, they argue that, if the FCC allows ownership of newspapers and broadcast properties, the owners will take advantage of the "synergies" of joint operations to reduce news and cut staff. The experience of Media General and other parties operating commonly-owned newspapers and television stations has shown that the successes they have experienced in jointly operating such properties have added to their bottom lines and made it possible, in fact, to expand the newscasts they offer their communities. As a result, some commonly-owned television stations actually have been able to increase their staffs and news personnel, in particular, despite the overall economic downturn.

Second, the opponents of repeal argue that the rule's elimination would be premature because newspapers and television stations are still the dominant sources of local news, and the local news offerings of other new media are non-existent or insufficient to offer any competition. Again, Media General's experience proves the opposite. For instance, cable television systems in Media General's converged markets are offering increasing amounts of local and regional news, sports, weather, and traffic information. The Internet itself offers a multiplicity of locally-

based content, which is available directly to consumers, without the need for any type of media “editor.”

Third, opponents of repeal contend that the corporate management and ownership of commonly-owned outlets directs and determines their content, resulting in a trend toward “homogenization” of the news. To the contrary, Media General and other media owners have actually found that good business principles dictate that they not involve themselves in the content of their local outlets. Media properties garner higher ratings and achieve higher circulations, and therefore are more profitable, if they are responsive to the needs and interests of their local communities. Media General believes that the employees at each of its local outlets, and not distant corporate owners or management, are in a better position to know what the readers and viewers in their communities demand. Thus, Media General requires its local employees to make their own journalistic decisions based on their on-the-spot perceptions of community needs. Avoiding “top down” newsgathering and editorial practices and allowing local outlets’ content to be consumer-driven has contributed to Media General’s successes. These experiences of Media General and other owners of newspaper/broadcast combinations make clear that the fourth myth of the opponents of repeal -- that “diversity of viewpoint” requires “diversity of ownership” -- has no basis in the real world of today’s media marketplace.

Even if the FCC had record evidence of a causal link between “diversity of ownership” and “diversity of viewpoint,” any attempt to justify retention of the newspaper/broadcast cross-ownership rule based on an evaluation of common “slant” in co-owned properties would violate the First Amendment. Such a content-based approach to ownership regulation would require that the resulting regulation meet a strict scrutiny standard of review, which it could not. Even

assuming *arguendo* that “diversity of viewpoint” is in fact a compelling government interest, the purported measurement of “slant” is not a narrowly-tailored way to effectuate that interest.

Finally, Media General addresses calls by some opponents of repeal for a single media ownership rule that would establish a uniform metric for ownership of all broadcast media and newspapers. Any attempt to design such a rule and then apply it effectively will fail. It is clear from the FCC’s, the Department of Justice’s, and many courts’ difficulties over the last decade in crafting product market and geographic market definitions, that the FCC lacks the definitive empirical data necessary to design one single consistent and workable rule. Even if the Commission were able to conceptualize such a standard, applying it to newspapers would be unsustainable on appeal.

Accordingly, just as the record required fully a year ago, the Commission’s anachronistic newspaper/broadcast cross-ownership rule must be repealed in its entirety.

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REPLY COMMENTS OF MEDIA GENERAL, INC.

Media General, Inc. (“Media General”), by its attorneys and in response to the *Notice of Proposed Rulemaking* released in the above-captioned proceeding,¹ hereby submits its Reply Comments and urges the Commission to act expeditiously to repeal the newspaper/broadcast cross-ownership rule.²

I. Introduction

As demonstrated by the initial comments that Media General filed, and as corroborated by the overwhelming weight of the evidence provided in the comments of other parties in this

¹ *Notice of Proposed Rulemaking*, FCC 02-249 (rel. Sept. 23, 2002) (“2002 NPRM”) (“2002 Proceeding”).

² 47 C.F.R. § 73.3555(d)(2000).

proceeding and the extensive record developed in the Commission's recent rulemaking focused solely on the newspaper/broadcast cross-ownership rule,³ repeal of the rule in all markets is long overdue. When combined, these voluminous records show that the rule fails miserably to meet the goals the FCC speculated it would advance over a quarter century ago when it was adopted and instead now hampers newspaper publishers and broadcasters alike in their efforts to provide news and innovative information services that address the demands of their ever-changing communities.

Those few parties that oppose repeal of the rule, a small minority of the total submitting substantive comments, continue to depend on a number of myths -- the myth that common ownership lessens news quantity and quality and results in staff layoffs; the myth that "new" media, such as cable and the Internet, do not yet offer local programming and information; the myth that corporate owners of combined facilities "homogenize" and control their outlets' content from "on high"; and the ultimate myth that the Commission has been unable to support for a quarter century -- that "diversity of viewpoint" requires "diversity of ownership."

Based on Media General's experience in the six markets where it operates commonly-owned newspapers and television stations, none of these myths bears any relationship to actual conditions and operations in the media industry. Even if the FCC had any evidence that ownership influences the "slant" of media content, it would be constitutionally impermissible for the agency to take such content-based analysis into account in justifying restrictions on media ownership.

³ *Cross-Ownership of Broadcast Stations and Newspapers, Newspaper/Radio Cross-Ownership Waiver Policy, Order and Notice of Proposed Rulemaking*, MM Docket Nos. 01-235 and 96-197, FCC 01-262 (rel. Sept. 20, 2001) ("*2001 NPRM*") ("*2001 Proceeding*").

Finally, in these reply comments, Media General addresses the call by some commenting parties for a unitary, “overarching” media ownership rule that would govern all media, including newspapers. Even if such a rule could be conceptualized -- an unlikely possibility given the differences in the product and geographic markets of the various media, its application would be fraught with numerous contradictions and unintended consequences. Most importantly, were it to embrace newspaper owners, the *only* industry *not* regulated by the FCC that is restricted from buying radio and television stations, the rule would be unsustainable on appeal.

Lacking any proof that the newspaper/broadcast cross-ownership rule is necessary in the public interest as a result of competition or any evidence that it affirmatively serves the public interest, the Commission must move promptly to eliminate its prohibitions in all markets, large and small.

II. Media General’s Experience Has Shown That Convergence Results in More Local News and No Diminution in Staff and That Emerging “New” Media Are Providing Local Information and a Platform for Civic Discourse.

Opponents of repeal of the newspaper/broadcast cross-ownership rule contend that repeal is unwarranted for various reasons. Included among their concerns are contentions that the owners of combined newspaper and broadcast operations will take advantage of the “synergies” of joint operation, make cutbacks in staff, and reduce the quantity of news that would otherwise be delivered separately by the outlets.⁴ The opponents of repeal also contend that newer media entrants, such as cable television and the Internet, are not yet providing a sufficient amount of

⁴ *E.g.*, Comments of American Federation of Labor and Congress of Industrial Organizations, *et. al.* in *2002 Proceeding*, filed Jan. 2, 2003 (“AFL-CIO 2003 Comments”) at 40-43; Comments of American Federation of Television and Radio Artists and Writers Guild of America, East in *2002 Proceeding*, filed Jan. 2, 2003 (“AFTRA 2003 Comments”) at para. 32-40; Comments of Communications Workers of America *et. al.* in *2002 Proceeding*, filed Jan. 2, 2003 (“CWA 2003 Comments”) at 2-3, 32-39.

local content or opportunity for discourse at the local level to be included in any evaluation of the diversity of media outlets available in local markets.

Media General's experience shows these concerns to be baseless. In none of its six convergence markets have news and staff levels declined. Media General's local newscasts have actually grown in five out of its six convergence markets, remaining constant in the sixth. Similarly, its staffing has increased in five out of six markets and remained constant in the sixth.

Also contrary to the claims of opponents of repeal, Media General has found that, in the delivery of local news and programming, it is facing increasing competition from emerging local cable program offerings. In addition, the Internet has rapidly grown as a source of local news and information for consumers, who in many instances use the medium to obtain direct access to sources, obviating their need even to consult or rely upon Internet news sites or more traditional news sources. Both the speculative concerns voiced by the opponents of repeal regarding the alleged harms of joint ownership and their attempts to denigrate the diversity of sources actually available at the local level do not ring true.

A. Media General's Television Properties Deliver More News, Post-Convergence, with Larger Staffs.

As noted in its initial comments filed on January 2, 2003, Media General operates commonly-owned newspapers and television stations in six Designated Market Areas (DMAs): Tampa, Florida, where its combination is grandfathered; Roanoke, Virginia; Tri-Cities, Tennessee/Virginia; Florence-Myrtle Beach, South Carolina; Columbus, Georgia; and Panama City, Florida. Media General's initial comments provided extensive details about the public interest benefits these properties have been able to deliver to their markets as the result of

convergence.⁵ In all of these DMAs, the trend among Media General’s television stations has been to offer a growing quantity of news and locally produced shows and to operate with increased staffs, disproving with actual facts the myth that joint ownership results in less news and smaller staffs.

Media General has owned its newspaper-television combination in Tampa since 1966. For the last twelve years, WFLA-TV has been expanding its news line-up. The following chronology shows the increases in news and local programming it has made over the last decade:

August 1992:	Debut of “NewsWatch 8 Weekend Morning Edition” (Sat. & Sun., 9 am – 9:30 am)
	Debut of “NewsWatch 8 Weekend Edition @ Noon” (Sat. & Sun., one-half hour)
September 1994:	Debut of “NewsWatch 8 Sunrise” (M-F, 5:30 am – 6 am)
October 1997:	Expansion of Saturday’s “NewsWatch 8 Weekend Edition @ Noon” (Sat., noon – 1 pm)
May 1998:	Expansion of Sunday’s “NewsWatch 8 Weekend Edition” (at various times on Sundays over the next four months: Sun. 9 am – 10 am, then noon – 1 pm, then 9 am – 10 am)
June 1998:	Debut of “NewsWatch 8 MIDDAY” (M-F, 11 am – 11:30 am)
September 1999:	Debut of “NewsChannel 8 Today” (M-F, 5 am – 5:30 am)
January 2001:	Expansion of “NewsWatch 8 MIDDAY” to two half-hours (M-F, 11 am – noon)
August 2001:	Debut of locally-produced “Daytime” in lieu of “NewsWatch 8 MIDDAY” (M-F, 11 am – noon) (“Daytime” is local variant of “Today” with some paid programming inserts)

⁵ Comments of Media General in 2002 *Proceeding*, filed Jan. 2, 2003 (“Media General 2003 Initial Comments”) at 15-21 and Appendix 3. *See also* Comments of Media General in 2001 *Proceeding*, filed Dec. 3, 2001 (“Media General 2001 Comments”) at 6-10 and Appendix 4.

June 2002: Relaunch of “NewsWatch 8 Midday” (M-F, 11 am – noon) and move of “Daytime” to M-F, 10 am – 11 am

Media General has found that the competitive benefits and success that flow from convergence have allowed WFLA-TV to continually expand its news operations and increase the number of full-time professionals, even over the last year despite the very serious advertising recession and general economic downturn.

Media General’s other five convergence markets present similar experiences. Since Media General acquired WSLs(TV) in Roanoke in January 1997, the station has increased its newscasts by 30 minutes a day, expanding its 6 am-7 am weekday early morning newscast to 5:30 am-7 am. Since convergence, WSLs-TV has also added local programming, such as a new local hunting and fishing show; specials that have included coverage of the opening ceremonies of the National D-Day Memorial in Bedford, Virginia and the NASCAR races in Martinsville, Virginia; live Town Hall meetings following the “9/11” disaster; and local and statewide political debates. Since Media General acquired WSLs(TV), the station’s overall staff has grown by two individuals, and the news department staff has increased by nine.

Similarly, since Media General acquired WJHL(TV) in Tri-Cities, Tennessee/Virginia in 1997, the station has added a new 30-minute weekday newscast at 5 pm. The station also has added a number of local programming specials each year, such as the hour-long “Media Watch” and “Education Watch” shows, as well as locally-produced sports specials. The number of employees has also increased substantially, up from 74 full-time staff members to 88 full-time employees.

At WBTW(TV), Florence, South Carolina, which Media General acquired in March 2000, the complement of newscasts has remained unchanged; however, as noted in Media

General's initial comments, the station has actively engaged in airing political debates and "Town Hall" series.⁶ The station has also increased its overall employee count by two since being purchased by Media General.

In Media General's two smallest converged markets -- Columbus, Georgia, and Panama City, Florida, its television stations also have increased news programming and avoided staff cutbacks. WRBL-TV in Columbus has added a new 30-minute weekday newscast at 5 pm and is scheduled to add another half hour of news at 5:30 pm later this fall. It also is developing a local public affairs show, which will debut in the fall. Since Media General purchased the station, WRBL(TV) has added one additional staff person in the newsroom and will add another two in September when the new 5:30 pm newscast commences. At WMBB(TV) in Panama City, which Media General acquired in March 2000, the station has added an early evening (5:00 pm – 5:30 pm) newscast on Sundays. The number of WMBB(TV)'s news employees has increased by three. Overall, however, WMBB(TV) has experienced a decline of three employees, so staffing levels have remained constant.⁷

Media General's real-world experience should put to rest the concerns of opponents of repeal of the newspaper/broadcast cross-ownership rule. Media General's common ownership of newspaper and television stations in the same markets has resulted in a growth of news programming and more opportunity for staff, in particular news personnel.⁸

⁶ Media General 2003 Initial Comments at 18-19.

⁷ The local news specials and other public interest benefits that WRBL(TV) and WMBB(TV) have been able to deliver post-convergence are set forth in detail in Media General 2003 Initial Comments at 19-22 and Appendix 3.

⁸ Opponents of repeal of the newspaper/broadcast cross-ownership rule also contend that liberalizing the media ownership rules will make it more difficult for non-profit community groups to reach the public. Comments of the Office of Communication, Inc. of the United Church of Christ, *et. al.* in *2002 Proceeding*, filed Jan. 2, 2003 ("UCC 2003 Comments") at 15-

continued...

B. Regionally- and Locally-Originated Cable Programming Is Growing in Media General's Convergence Markets and Elsewhere.

To address additional concerns put forth by the opponents of repeal of the newspaper/broadcast cross-ownership rule that local cable programming is still too sparse to allow cable to be counted as a true locally competitive medium,⁹ Media General probed behind the program grids for the tens of cable systems in its six convergence DMAs. Contrary to opponents' claims, Media General found a growing wealth of cable programming, with the greatest quantity not surprisingly on systems in the Tampa DMA. But even in two of Media General's smaller convergence markets, it found significant local cable offerings. These increases are representative of the information Media General has been able to gather about locally-produced programming available on cable systems throughout the nation. Taken together, this information demonstrates that cable television is providing diverse news, information, and public affairs programming not only at the national level but also at the local level.

...continued

16. Media General's convergence properties work with numerous community and non-profit organizations. As letters from these groups attached as Appendix A attest, they have found their ability to reach the public has improved by being able to rely on Media General's various media platforms in conveying their messages and concerns.

To further ensure community input and access, Media General's three convergence properties in Tampa also operate "Citizen's Voice," a program seeking comments directly from the public on the journalism at all three outlets. All three properties offer an ongoing series of reports on such feedback. See Tampa Bay Online website, at <http://newscenter.tbo.com/> (last visited Feb. 3, 2003) and, e.g., "Readers Take Final Shots at Bucs Coverage," available at <http://newscenter.tbo.com/newscenter/MGAW2W1OQBD.html> (last visited Feb. 3, 2003). As is evident from this last citation, viewers and readers are not always pleased with Media General's coverage, and the company does not shy away from addressing and learning from such reactions.

⁹ E.g., AFL-CIO 2003 Comments at 12-13; UCC 2003 Comments at 29-32.

Tampa. Several of the cable operators in the Tampa DMA themselves offer locally-produced programming. Time Warner subscribers receive “Bay News 9,” a 24-hour local news network, delivering local news, weather, and traffic reports.¹⁰ Time Warner subscribers also have access to “Bay News en Espanol,” an Hispanic version of “Bay News 9,” and “Bay News 9 Weather Now,” a 24-hour local weather channel.¹¹ Comcast subscribers receive “SNN Local News,” a 24-hour local news channel operated by the cable operator and the Sarasota *Herald-Tribune*. The channel offers various features including “SNN sports,” “What’s Cookin’,” “This Week Online,” “State of the Arts,” “Play,” “Gulf Coast Living,” “Open House,” and “Fishing Paradise.”¹² Various Comcast systems also air half-hour weekly or bimonthly locally-produced shows that focus on their particular communities, such as “Venice Views” or “Sarasota Today.”¹³

In addition, at least four local governments in the Tampa DMA operate cable channels of their own on which they offer not just gavel-to-gavel coverage of municipal meetings but also a varied schedule of public affairs and informational programming that they produce and air regularly. City of Tampa TV or “CCTV,” for instance, offers the “Community Affairs Report.”¹⁴ Hillsborough County TV offers “Hillsborough County News” weekdays at noon as well as several other times a day. It also features “Weekly Review,” a show featuring local

¹⁰ See Bay News 9 Sales Brochure, at <http://www.baynews9.com/advertise.cfm> (last visited Feb. 2, 2003).

¹¹ *Id.*

¹² See SNN website, at <http://www.newscoast.com/apps/pbcs.dll/section?CATEGORY=SNN> (last visited Feb. 2, 2003).

¹³ Telephone interview with Daniel Knispel, system representative, Jan. 24, 2003.

¹⁴ City of Tampa Television website, at http://www.tampagov.net/dept_Cable_communications/cttv/about.asp (last visited Feb. 2, 2003).

pundits and “Inside Hillsborough County,” a weekly show on which local officials “explain the meaning behind the news.”¹⁵ Pinellas County Government offers “Inside Pinellas,” a weekly half-hour program “devoted to Pinellas County happenings.”¹⁶ In addition, Pinellas County offers “CityScapes,” a “celebrat[ion of] the great places we call home,” and “Progressive Pinellas,” “your ticket behind the scenes to find out more about how government is working for you.”¹⁷ Finally, Hernando County TV’s schedule lists a number of local interest programs on its website.¹⁸

Panama City. The Cox system in the Panama City DMA offers a variety of programming covering local news, events, and sports. The cable system’s local origination channel offers ten to fifteen hours of new programming per week.¹⁹ The channel features not only coverage of government meetings but shows with public officials such as representatives of the economic development council and sheriff’s office.²⁰ There are also four high schools in the community, and this cable channel presents four or five football games for each high school every fall as well as covering the local high school football playoffs.²¹ In addition, the channel cablecasts two academic tournaments (like the Washington, D.C. area’s “It’s Academic”) that air

¹⁵ Hillsborough County TV website, at <http://www.hillsboroughcounty.org/htv/> (last visited Feb. 2, 2003).

¹⁶ Pinellas 18 website, at http://www.pinellascounty.org/tv_18.htm (last visited Feb. 2, 2003).

¹⁷ *Id.*

¹⁸ Hernando County Government Broadcasting website, at <http://www.co.hernando.fl.us/cr/HCGB.htm> (last visited Feb. 2, 2003).

¹⁹ Telephone interviews with Joseph Brewster, system representative, Jan. 23 and 16, 2003.

²⁰ *Id.*

²¹ *Id.*

weekly for approximately two months every year.²² The cable channel also carries “OWCC Outlook,” a monthly 30-minute program produced by Okaloosa-Walton Community college and has begun to carry “Raiders Sports,” a new show about the college’s sports program.²³ The system also carries a 30-minute monthly program produced by the University of West Florida, which features university guests and campus footage.²⁴ When the channel is not offering local programming, it carries “Gulf Coast TV,” which presents local classified advertising.²⁵

The Cox system also carries the Sunshine Network, which is principally a Florida sports channel airing professional, collegiate, and other sports games and covering special sporting events.²⁶ In 2000, the Sunshine Network launched “NEXTEL Florida Sports News,” a comprehensive one-hour show that airs each weeknight at 10 pm and reports on scores and highlights from around the state and offers commentary and analysis.²⁷ In conjunction with the Florida Cable Telecommunications Association (“FCTA”), the Sunshine Network also offers public affairs programming for two hours each weekday and one hour each weekend day.²⁸ Included in this programming is “Capital Dateline,” which airs 20 to 25 new shows a year. The “Capital Dateline” series includes “Capital Dateline Washington,” a quarterly show with Floridians serving in Congress; “Capital Dateline -- Inside Florida Politics,” a roundtable discussion on Florida politics among the Tallahassee bureau chiefs of large state newspapers;

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Sunshine Network website, at http://www.sunshinenetwork.com/about_sn/about_overview.jsp (last visited Feb. 2, 2003).

²⁷ *Id.*

²⁸ *Id.*

and the issue-focused “Capital Dateline,” which features topics such as the state budget and education.²⁹ In fall 2000, the FCTA and the Sunshine Network teamed up to offer special coverage of state election campaigns.³⁰ The Sunshine Network also recently rebroadcast the inauguration of Florida Governor Jeb Bush.³¹ Finally, the cable system has made itself available for 24-hour fundraisers or “cablethons” benefiting local hospice efforts.³²

The Comcast systems in the Panama City DMA also carry a variety of sources providing regional, state, and local information. First, they carry Comcast Sports Southeast, which provides regional sports coverage.³³ Second, Comcast’s own local origination channel airs programs covering local events; some of the programs are produced weekly, some monthly, and some on a special-event basis.³⁴ Third, the systems offer the same Sunshine Network as carried on the Cox system.³⁵ Fourth, the Comcast systems carry “Weatherscan Local,” an affiliate of The Weather Channel that updates local weather.³⁶ Fifth, the systems carry a 24-hour channel

²⁹ Telephone interview with Janice Caluda, Florida Cable Telecommunications Association, Jan. 21, 2003; “FCTA and Sunshine for Best and Most In-Depth Statewide Election Coverage,” *available at* Florida Cable Telecommunications Association website at <http://www.fcta.com/news1.html> (last visited Feb. 2, 2003); Sunshine Network website, at http://www.sunshinenetwork.com/about_sn/about_overview.jsp (last visited Feb. 2, 2003).

³⁰ “FCTA and Sunshine for Best and Most In-Depth Statewide Election Coverage,” *available at* Florida Cable Telecommunications Association website at <http://www.fcta.com/news1.html> (last visited Feb. 2, 2003).

³¹ Sunshine Network Program Schedule, *available at* http://www.sunshinenetwork.com/program_schedule.jsp?m=1&d=17 (last visited Jan. 17, 2003).

³² Telephone interviews with Joseph Brewster, system representative, Jan. 23 and 16, 2003.

³³ Telephone interview with Shane Abney, system representative, Jan. 15, 2003.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

produced by Gulf Coast Community College.³⁷ In addition to offering telecasts of classroom instruction, this channel carries home conference basketball games and offers “First Air Force News,” a weekend show produced every two weeks by nearby Tyndall Air Force Base to cover activities and issues important to the base.³⁸

Florence. The Time Warner systems in the Florence-Myrtle Beach DMA also offer a variety of programming tailored to regional and local needs. Several of the systems carry “News 14 Carolina,” Time Warner’s 24-hour channel offering local news and “Weather on the Ones,” updated weather forecasts every 10 minutes.³⁹ The Time Warner systems also offer government access channels.⁴⁰ In addition, the Time Warner systems serving Lumberton, North Carolina and Myrtle Beach, South Carolina offer community programming channels, which in the evening carry material supplied by community churches, local community colleges, or nearby university branch campuses.⁴¹ On its Myrtle Beach system, Time Warner also offers a daily 30-minute local show entitled “Southern Style,” which is produced daily and aired twice every weekday throughout the year except on Christmas and New Year’s Day.⁴² The show focuses on local

³⁷ *Id.*

³⁸ Telephone interview with James Baxley, Media Dept., Gulf Coast Community College, Jan. 17, 2003.

³⁹ News 14 Carolina website, at http://www.twcnc.com/about_us/news14.htm (last visited Feb. 2, 2003).

⁴⁰ Telephone interview with Customer Service representative, Lumberton system, Jan. 24, 2003; telephone interview with Lisa Robinson, Florence and Myrtle Beach systems, Jan. 22, 2003.

⁴¹ *Id.*

⁴² Telephone interview with Lisa Robinson, Florence and Myrtle Beach systems, Jan. 22, 2003.

people, organizations, and officials as well as issues related to daily living.⁴³ The show and its host have been carried on the cable system on a daily basis for over 18 years.⁴⁴

Nationwide Information. Comprehensive information regarding locally produced and originated programming that is being aired on cable systems throughout the nation is difficult to obtain short of contacting individual cable operators as Media General did in several of its local convergence markets. Nonetheless, nationally available sources do show growing local cable outlets. For example, *Broadcasting & Cable Yearbook* lists 22 regional cable television news services that are carried on systems throughout the country.⁴⁵ The *Television & Cable Factbook* provides a somewhat similar list of 22 local cable news services and an additional list of 90 regional programming services.⁴⁶ The website for the Alliance for Community Media, the non-profit organization representing public, educational, and government (“PEG”) access centers, reports that their members provide a staggering amount of locally-produced programming. According to the website, “thousands of community groups and over one million volunteer producers, directors, researchers, and technical staff participate in PEG access productions annually. These volunteers produce more than 20,000 hours of new local programming each week! That’s more than all the programming produced by NBC, CBS, ABC, Fox, and PBS combined!”⁴⁷ A study available through the same website that was prepared by the cablecast manager for Boston Neighborhood Network documents the annual budgets and weekly

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Broadcasting & Cable Yearbook 2002* at F-28.

⁴⁶ *Television & Cable Factbook 2002* at F-1 and F-2.

⁴⁷ “Quick Facts on Media Access,” *available at* <http://www.alliancecm.org/awareness/comm-media.htm> (last visited Jan. 24, 2003) (emphasis in original).

programming hours of PEG access centers around the country.⁴⁸ The study, which is attached as Appendix B, shows that at least 353 of the centers surveyed reported at least one hour of original local programming per week. Of these, 21 offered more than 100 hours a week, while another 61 offered at least 40 hours a week, and another 164 offered at least 10 hours a week.

As this wealth of material shows, locally originated cable programming is growing on systems in Media General's markets and elsewhere throughout the country, representing a newly-established, alternative outlet for additional local information.

C. The Internet Offers Consumers Immediate and Direct Access to Information, Frequently Without Any Media "Editor," and Is Also Fast Becoming an Agora of Ideas for Our Democracy.

Opponents of repeal of the newspaper/broadcast cross-ownership rule also claim that the Internet is still insufficiently developed to be considered as an additional alternative media outlet and that the majority of news and information sites available today merely mirror material that is already available through the traditional media.⁴⁹ These contentions, however, fail to recognize that the Internet, unlike any other medium, not only provides access to news sites but also facilitates consumers' direct access to primary sources of information, removing any need for them to depend on the media to act as an intermediate vehicle or "editor" for information.

Examples of the Internet's ability to connect citizens directly to news and information sources are infinite. With or without search engines such as "Google" or "Ask Jeeves," consumers today can quickly reach a multiplicity of government, educational, and cultural sites

⁴⁸ "US PEG Access Centers Reporting Annual Budgets – Descending by Average Weekly Hours of Original Local Programming," *available at* <http://www.alliancecm.org>, which links to study at <http://world.std.com/~rghm/> (last visited Feb. 3, 2003). As the explanatory notes to the study indicate, it is based on data from only those centers that have websites. *Id.* Thus, it probably undercounts access centers and their available programming.

that provide information directly affecting their everyday lives. Much as “fcc.gov” makes available to the communications industry all of the speeches, statements, decisions, and actions of the FCC Chairman, Commissioners, and Bureaus, state and local government websites inform citizens about standards and regulations affecting them.⁵⁰ Education sites not only provide information about course offerings and school policies but keep families informed on a day-to-day basis about school closings and/or bus route changes.⁵¹ Finally, with the multiplicity of cultural sites available, readers have no need to consult the “Style” sections of their newspapers for reviews and cultural listings or to watch television reviewers’ assessments of local offerings.⁵² As a direct conduit for news and information, the Internet must be considered in any analysis of competing information outlets and sources.

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⁴⁹ *E.g.*, AFL-CIO 2003 Comments at 12-13; AFTRA 2003 Comments at para. 23-27; CWA 2003 Comments at 7.

⁵⁰ *See, e.g.*, Montgomery County Government, Maryland website, at <http://www.montgomerycountymd.gov/index.asp> (last visited Feb. 2, 2003); Fairfax County Government, Virginia website, at <http://www.co.fairfax.va.us/> (last visited Feb. 2, 2003); Commonwealth of Virginia website, available at <http://www.vipnet.org/cmsportal/index.html> (last visited Feb. 2, 2003).

⁵¹ *See, e.g.*, Alexandria City, Virginia, Public Schools website, at <http://www.acps.k12.va.us/> (last visited Feb. 2, 2003); Prince George’s County, Maryland, Public Schools website, at <http://www.pgcps.pg.k12.md.us/> (last visited Feb. 2, 2003).

⁵² For instance, a resident of the Washington, D.C. area need only turn to any one of the following easily-located sites to find a blues, jazz, or other musical alternative for a weekend evening’s entertainment:

<http://www.wpas.org/>
<http://www.bluesalley.com/>
http://www.washingtonian.com/inwashington/the_beat.html
<http://www.dcjazz.com/>
<http://www.dcmusicnews.com/links.php3>
<http://dcregistry.com/music.html>
<http://www.karenakers.com/>

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The Internet also clearly deserves to be considered in any assessment of the media marketplace because of the key role it has begun to play not only in providing news and information but also because of the significant impact it is beginning to have on how candidates and voters interact. Former Minnesota Governor Jesse Ventura's 1998 election victory was widely credited to his campaign's skillful use of the Internet. The Ventura campaign used e-mail lists and daily website updates to coordinate volunteers and grassroots organizers. Ventura supporters exchanged e-mail messages and visited his website to target areas for pamphleteering and to provide crowds for whistle stops.⁵³ The Internet also served as a major fundraising platform for Ventura's campaign, collecting \$80,000 in online contributions. Indeed, until the final two weeks before the election, the Ventura campaign had no physical headquarters, merely the "virtual" headquarters run with two computers at the home of the campaign's webmaster.⁵⁴

In 2000, each of the presidential candidates maintained a sophisticated website making the candidate's messages available directly to the voters. Several candidates used their websites to keep volunteers informed of campaign schedules and provide information on how to get involved.⁵⁵ Similarly, in the 1998 election, labor groups used the Internet to increase Democratic turnout in key districts.⁵⁶ The Internet also continues to develop as a source of

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All of these sites operate independently of existing daily newspapers and television stations.

⁵³ Stephen Koff, "Internet May Expand the Scope of Campaigning in the Next Election," *The Seattle Times*, Mar. 7, 1999 at A13.

⁵⁴ Michael Kranish, "Presidential Hopefuls May Soon Get a New Line On Cash," *The Boston Globe*, May 29, 1999 at A1.

⁵⁵ Ben White, "The Cyber Stump; The Web Provides a Closer Link Between Candidates and Voters, But There Are Potential Dangers, Too," *The Washington Post*, May 17, 2000 at G18.

⁵⁶ Alexandra Marks, "Like TV, The Web Is Altering Politics," *The Christian Science Monitor*, May 8, 2000 at 2.

fundraising. Within weeks of Senator John McCain's upset victory in the 2000 New Hampshire primary, McCain's campaign raised more than \$2 million through the McCain.com website -- a total that eventually rose to more than \$7 million.⁵⁷ The lists of Internet sites for each of Media General's convergence markets that were included in its initial comments also included numerous local candidate sites.⁵⁸

Indeed, given the Internet's wide acceptance not only as a source of information but also as a platform for civic discourse, it must no longer be excluded from any analysis of the media marketplace.⁵⁹ Today, the Internet has emerged as a true media voice and competitor.⁶⁰

⁵⁷ Rinker Buck, "Turning Away From TV Debates; Candidates Embracing Internet As Alternative," *The Hartford Courant*, October 17, 2000 at A1; Alexandra Marks, "Like TV, The Web Is Altering Politics," *The Christian Science Monitor*, May 8, 2000 at 2.

⁵⁸ Media General 2003 Initial Comments at Appendices 9-14.

⁵⁹ The United States Court of Appeals for the District of Columbia Circuit made clear in *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, rehearing granted, 293 F.3d 537 (D.C. Cir., 2002) ("*Fox Television*"), that it is inappropriate for the FCC to fail to take new technologies into consideration in competitive evaluations of its broadcast ownership rules. In *Fox Television*, the court reversed the FCC's decision to retain the cable/television cross-ownership rule for failing, among other things, to consider cable's competition from direct broadcast satellite providers. *Id.* at 1050.

⁶⁰ A very recently released study reports that the Internet is viewed as an important source of information by the vast majority of people who go online. In 2002, 60.5 percent of all Internet users considered the Internet to be a very important or extremely important source of information. Indeed, among the most experienced users (online at least six years), the Internet (73 percent) ranks higher than books (67 percent), newspapers (57 percent), television (42 percent), and radio (19 percent) as an important source of information. "Surveying the Digital Future, Year Three," The UCLA Internet Report, UCLA Center for Communications Policy at 9, 35 (Feb. 2003), available at <http://www.ccp.ucla.edu/pages/internet-report.asp> (last visited Feb. 3, 2003).

III. Opponents' Concerns Over Ownership Influence on Content Are Ill-Founded and, Even If Valid, Cannot Be Addressed Through Regulation.

A. Like Other Media Owners, Media General Has Found That Outlets, Even If Commonly Owned, Direct and Determine Their Own Individual Content and That There Is No "Real World" Link Between "Diversity of Ownership" and "Diversity of Viewpoint".

Opponents of repeal of the newspaper/broadcast cross-ownership rule make much of their supposed concern that common ownership will yield not only a melding of operations, but a loss of locally-determined content and what they call a "homogenization" of news and information.⁶¹ As comments that were already filed show, and as Media General's own experience demonstrates, these claims could not be further from the truth.

The comments of both Belo Corp. and Gannett Co., Inc. document that jointly owned and operated outlets do not sacrifice their journalistic and editorial autonomy.⁶² Attached to the comments of Belo, in particular, is a statement from its chairman and chief executive officer, which discusses the company's overall news and editorial philosophies and emphasizes, through discussion of his company's experience in owning *The Morning News* and WFAA-TV in Dallas-Fort Worth, that "Belo's approach to editorial independence among its news organizations has not been altered by shared newsgathering activities."⁶³ Belo's television stations each make their own decisions on story selection, placement, coverage, and presentation.⁶⁴ The only connection

⁶¹ *E.g.*, AFL-CIO 2003 Comments at 20, 44-46; AFTRA 2003 Comments at para. 80.

⁶² Comments of A.H. Belo Corp. in *2002 Proceeding* filed Jan. 2, 2003 ("Belo 2003 Comments") at 14-19; Comments of Gannett, Co., Inc. in *2002 Proceeding* filed Jan. 2, 2003, at 7-8.

⁶³ Statement of Robert W. Decherd, Chairman of the Board, President and Chief Executive Officer, Belo Corp., *attached to* Belo 2003 Comments, at 4.

⁶⁴ *Id.* at 1.

that comes from common ownership, he explains, is a shared commitment to the company's values of "Integrity, Excellence, Fairness, Sense of Purpose, and Inclusiveness."⁶⁵

In fact, Belo's chairman states that, in his experience, there is no link between "diversity of ownership" and "diversity of viewpoint":

The Commission should not assume that diverse television ownership in a given market guarantees newscasts that are "diverse and antagonistic" to each other, as the Commission has often described as its ownership policy goal. Regardless of whether the ownership in a market is diverse, there will be newscasts delivered which, at least for the ratings leader, will provide balanced coverage of the issues. This kind of reporting is driven by the economics of the marketplace, not diversity of ownership.⁶⁶

The intense competition to be news leader in a market arises because the associated advertising stakes are high, he explains, since a significant portion of a Top 50 market television station's annual cash flow derives from advertising on its evening newscasts.⁶⁷ These "market incentives, not regulatory mandates, dictate that stations will produce the kind of newscasts that attract large, high quality audiences," he concludes.⁶⁸

As the attached statement of Media General's chairman and chief executive officer also demonstrates, Media General has found that it can compete effectively even against giant, global players in the media industry by focusing on the delivery of a balanced and objective local news product in each of its markets; such coverage, in Media General's experience, attracts readers, viewers, and subscribers.⁶⁹ To ensure the highest quality local news product, Media General

⁶⁵ *Id.* at 2.

⁶⁶ *Id.* at 3.

⁶⁷ *Id.*

⁶⁸ *Id.* at 4.

⁶⁹ Statement of J. Stewart Bryan III, Chairman of the Board and Chief Executive Officer, Media General Inc., attached as Appendix C, at 2.

continued...

requires the employees at each of its local outlets to make their own journalistic decisions based on their on-the-spot perceptions of the needs and interests of the communities they serve.⁷⁰

Because of this same, market-driven commitment to localism, Media General's outlets also practice editorial independence.⁷¹ Simply, Media General has found avoiding "top down" news gathering and editorial practices to be good business because only that operating principle allows its local platforms to reflect local concerns. Media General knows that there is no "real world" connection between "diversity of ownership" and "diversity of viewpoint."

B. Any FCC Attempt To Justify Retention of the Newspaper/Broadcast Cross-Ownership Rule Based on an Evaluation of Common "Slant" in Co-Owned Properties Would Violate the First Amendment.

Even if the FCC had record evidence, which it does not, of a connection between "diversity of ownership" and "diversity of viewpoint," any attempt to justify retention of the newspaper/broadcast cross-ownership rule based on an evaluation of common bias (denominated "slant" in some of the comments in these proceedings) in co-owned properties would violate the First Amendment. When it originally adopted the newspaper/broadcast cross-ownership rule, the Commission justified the regulation on the hope that "diversification of ownership would possibly result in enhanced diversity of viewpoints, and, given the absence of persuasive

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As Media General has noted, worsening financial conditions and increasing competition local outlets in medium and small markets face from larger national and international players that typically present the same undifferentiated non-local news and information product in all markets has caused television stations in both large and small markets to terminate numerous newscasts. The number of cancellations and curtailments has now grown to over 40, as shown by the chart attached as Appendix D.

⁷⁰ *Id.*

⁷¹ *Id.* at 2-3.

countervailing considerations, even a small gain in diversity was worth pursuing.”⁷² Although the Supreme Court in *FCC v. Nat’l Citizens Comm. for Broadcasting* deferred to the Commission’s rationale, it made clear that any attempts to justify the rule based on “measurements” of content and viewpoint of media programming would necessarily involve “qualitative judgments objectionable on both policy and First Amendment grounds.”⁷³

Nonetheless, those who oppose repealing the rule ask the Commission to engage in precisely these types of prohibited “qualitative judgments.” Although they flatly concede that “the extent of biased reporting cannot be accurately measured,”⁷⁴ these opponents of repeal cite a series of surveys and anecdotes that examine the viewpoints expressed by various newspapers and broadcasters, and they summarily conclude that the content of stories that are disseminated is influenced by the “slant” of the ownership of media outlets.⁷⁵ They argue that these informal “findings” justify the retention of the cross-ownership rule because “slant” within a market purportedly is inconsistent with the Commission’s stated goal of ensuring “diversity of viewpoints.” But, this argument is both illogical and constitutionally flawed.

Were the Commission to justify the retention of the cross-ownership rule based on an examination of the views expressed by media entities, the rule then necessarily must be deemed content-based.⁷⁶ The Supreme Court has made clear that the “essence of content-based

⁷² *FCC v. Nat’l Citizens Comm. for Broadcasting*, 436 U.S. 775, 786 (1978) (internal quotations omitted).

⁷³ *Id.* at 796.

⁷⁴ *See, e.g.*, UCC 2003 Comments at 9.

⁷⁵ *E.g.*, AFTRA 2003 Comments at para. 46-52; CWA 2003 Comments at 28-32.

⁷⁶ The Supreme Court has noted that “government’s purpose” or “justification” in enacting a restriction is the “controlling consideration” in determining if a restriction is content-based. *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). *See also Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976),

regulation” is that it “focuses only on the content of the speech and the direct impact that speech has on its listeners [or readers]” -- exactly the type of last-ditch examination sought today by the rule’s proponents.⁷⁷ But, unless it is shown to satisfy the strict scrutiny standard required for content-based regulations (*i.e.*, the agency action must be “narrowly tailored” to effectuate a compelling government interest), the rule cannot be retained on the basis that it addresses “slant.”⁷⁸

Assuming *arguendo* that “diversity of viewpoints” is in fact a compelling government interest, the purported measurement of “slant” could never be considered a narrowly tailored means to effect that interest. In analyzing whether the “narrowly tailored” prong of the test has been met, courts “insist[] on a *close causal nexus* between the harm that the government seeks to prevent and the speech that will allegedly generate the harm.”⁷⁹ In this case, the opponents of repeal have utterly failed to establish any nexus, let alone a “close” one, between any alleged “slant” and an alleged lack of “diversity of viewpoint.”

Accordingly, crying “slant” is not enough: “slant” then also would have to be quantified or measured so that all involved also could know when an articulated goal of ensuring “diversity of viewpoint” had been achieved. That obviously is not possible, nor is it a stated or permissible goal of the Commission, to ensure that there is an equilibrium of viewpoints in any particular marketplace.

⁷⁷ *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 811-12 (2000).

⁷⁸ *Id.* at 813. Justification of the cross-ownership rule based on slant or bias also would not pass muster under intermediate First Amendment scrutiny (*i.e.*, requiring demonstration that regulation is “narrowly tailored to further a substantial government interest”). *FCC v. League of Women Voters*, 468 U.S. 364, 376 n. 11 (1984).

⁷⁹ Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* § 4:21 at 4-17 (2002) (emphasis added).

In essence, the opponents of repeal argue further that it must remain in effect to avert a scenario in which a liberal- or conservative-leaning media entity owns both a television station and a newspaper within a market -- and so goes the argument -- and dictates exclusively liberal or conservative leaning coverage in that market.⁸⁰ Even assuming the validity of this premise (which certainly can never be established by the opponents of repeal and, as shown above, is in fact contradicted by Media General's and Belo's experience), the existence of such a scenario still does not demonstrate that there would be a lack of diverse viewpoints within the market. The Commission, for example, could not know or predict whether the commonly owned properties would foreclose presentation in their own pages or programs of a variety of viewpoints (*e.g.*, a liberal-leaning newspaper may still run columns by conservative columnists or a liberal-leaning television owner may include conservative pundits in talk shows); it does not tell the Commission whether other stations (or other newspapers in the DMA) are providing a diversity of viewpoints; and it does not tell the Commission if there is access to a wide variety of viewpoints through other media in or outside of the community (*e.g.*, the Internet, weekly newspapers, etc.).

The Commission simply cannot be in the business of picking and choosing among applicants "on the basis of their political, economic or social views."⁸¹ It, then, also may not examine and rely upon alleged "slant" to justify the newspaper/broadcast cross-ownership rule.⁸²

⁸⁰ *E.g.*, Comments of Consumer Federation of America, *et. al.* in *2002 Proceeding*, filed Jan. 2, 2003 ("CFA 2003 Comments") at 45-47; UCC 2003 Comments at 7-9.

⁸¹ *Nat'l Citizens Comm. for Broadcasting*, 436 U.S. at 801.

⁸² *Republican Party v. White*, 536 U.S. 765, 122 S.Ct. 2528, 2535 (2002).

IV. The FCC Has No Basis in the Record for Retaining the Newspaper/Broadcast Cross-Ownership Rule Nor for Designing Any Type of “Media Metric” That Would Prohibit Such Cross-Ownership in Any Market.

The numerous studies previously cited in or submitted to the FCC in the *2001 Proceeding* demonstrated both that the newspaper/broadcast cross-ownership rule is not necessary in the public interest as the result of competition, as Section 202(b) of the Communications Act requires; rather, retention of the rule clearly has been shown on this record to advance the public interest.⁸³ Now, in this phase of these proceedings, the FCC’s own ownership studies further compel repeal of the rule.⁸⁴ And, manifestly, no empirical studies or concrete evidence has been offered in the latest round of comments that meets the presumption set forth in Section 202(h), and acknowledged by *Fox Television* and *Sinclair*, that could possibly allow retention of the rule.⁸⁵

Undaunted, several commenting parties have urged the Commission to adopt various forms of a single unitary, re-regulatory rule to govern the ownership of all types of media --

⁸³ See, e.g., Economists Incorporated, “Behavioral Analysis of Newspaper-Broadcast Cross-Ownership Rules in Medium and Small Markets,” Reply Comments of Media General in *2001 Proceeding*, filed Feb. 15, 2002, at Appendix A; Samuel Robert Lichter, Ph.D., “Review of the Increases in Non-Entertainment Programming Provided in Markets with Newspaper-Owned Non-Entertainment Programming Provided in Markets with Newspaper-Owned Television Stations,” Media General 2001 Comments at Appendix 5; Economists Incorporated, “Horizontal and Vertical Structural Issues and the Newspaper-Broadcast Cross-Ownership Ban,” Comments of Newspaper Ass’n of America in *2001 Proceeding*, filed Dec. 3, 2001, at Appendix IV; Economists Incorporated, “Structural and Behavioral Analysis of the Newspaper-Broadcast Cross-Ownership Rules, July 1998,” Comments of Newspaper Ass’n of America in MM Docket No. 98-35, filed July 21, 1998, at Appendix B; “Non-Entertainment Programming Study,” Comments of A. H. Belo Corp. filed in MM Docket No. 98-35, filed July 21, 1998, at Appendix A; *Second Report and Order*, 50 FCC 2d at 1078 n.26 (“FCC Staff 1973 Programming Study”).

⁸⁴ Media General 2003 Initial Comments at 38-56.

⁸⁵ *Fox Television*, 280 F.3d at 1048; *Sinclair Broadcasting Group, Inc. v. FCC*, 284 F.3d 148, 164 (D.C. Cir. 2000), *rehearing denied*, 2002 U.S. App. Lexis 16618, 16619 (*en banc*) (D.C. Cir. Aug. 12, 2002).

including newspapers.⁸⁶ It is clear, however, from the FCC's, Department of Justice's, and courts' difficulties over the last decade in crafting product market and geographic market definitions, that the FCC lacks the definitive empirical data necessary to develop an overarching rule that can be consistently and practically applied. But, even if the Commission were able to conceptualize such a standard, applying it to newspapers would make it totally unsustainable.

As the first step in deciding what media to include within the reach of a single local cross-ownership rule, the FCC presumably would need to conclude that there is a relatively high degree of substitutability among the media the rule would govern. For instance, to include newspapers, the FCC would need to find that there is such a high degree of substitutability between newspapers and broadcast stations and that newspapers and broadcasters therefore compete in the same product market for advertising.⁸⁷ In 1975, when the newspaper/broadcast cross-ownership ban was adopted, the Department of Justice ("DOJ") had argued that newspapers and broadcast stations were interchangeable substitutes for each other.⁸⁸ Today, however, as the FCC acknowledged in launching its rulemaking on the newspaper/broadcast cross-ownership rule in 2001, there is "considerable debate . . . on the extent to which advertising in one of these media is a substitute for advertising on another, and thus the extent to which they are in fact in the same product market."⁸⁹

⁸⁶ E.g., CFA 2003 Comments at 285-89; CWA 2003 Comments at 3-5 and 46-48.

⁸⁷ 2001 NPRM ¶ 21; *Amendment of Sections 73.34 [sic], 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order*, 50 FCC 2d 1046, 1056, *recons.*, 53 FCC 2d 589 (1975), *aff'd sub nom.*, *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) ("*Second Report and Order*").

⁸⁸ *Second Report and Order*, 50 FCC Rcd at 1056.

⁸⁹ 2001 NPRM ¶ 21.

In fact, since the passage of the 1996 Telecommunications Act, DOJ has investigated dozens of media mergers, reviewed tens of thousands of pages of internal corporate documents, deposed and/or interviewed countless broadcast executives and media buyers, subjected the merging parties' contentions to rigorous economic analysis, and it consistently has concluded that the various forms of media compete in *distinct* product markets.

DOJ's experience with radio mergers illustrates the point. Beginning in 1996, the owners of merging radio properties argued to DOJ that radio was a reasonably interchangeable substitute for, and competed with, both newspapers and television for local advertising dollars; that advertising sales to radio stations accounted for only a small portion of this "market"; and that, accordingly, the combination of radio properties posed no antitrust concerns. DOJ subjected these claims to extensive scrutiny, using the "Second Request" procedure under the Hart-Scott-Rodino Act to obtain thousands of internal documents and obtain discovery from radio executives and media buyers.

But, in 1996, DOJ made its initial challenge to a radio merger, stating in its complaint only that the relevant product market was the "provision of advertising time on radio stations in the Cincinnati metropolitan area"⁹⁰ In the accompanying Competitive Impact Statement, DOJ stated that the "merger as proposed would substantially lessen competition in the sale of *radio* advertising time in the Cincinnati area, eliminate actual competition between Jacor and Citicasters and result in increased rates for radio advertising time . . . , all in violation of Section 7 of the Clayton Act."⁹¹

⁹⁰ Complaint for Injunctive Relief ¶ 19, *United States v. Jacor Communications*, 1997-1 Trade Cas. (CCH) ¶ 71,671 (D.D.C. 1996) (No. C-1-96-757).

⁹¹ Competitive Impact Statement at 7, *Jacor Communications* (No. C-1-96-757) (emphasis added).

In subsequent radio investigations, DOJ reiterated its position that advertising on radio constituted a separate and distinct product market.⁹² In public statements, the Chief of the Antitrust Division emphatically *rejected* the assertion that radio and other media competed in the same product market.⁹³

Moreover, almost contemporaneously with its radio investigations, DOJ contended that daily newspaper advertising was *not* reasonably interchangeable with broadcast advertising.⁹⁴

Reviewing the evidence, the federal court concluded:

⁹² See, e.g., Complaint for Injunctive Relief ¶ 1, *United States v. Clear Channel Communications*, No. 00CV02063 (D.D.C. filed Aug. 29, 2000) (seeking to “enjoin transaction because its effect would be to lessen competition substantially in the provision of radio advertising time”); Competitive Impact Statement at 1, *United States v. Capstar Broad. Corp.*, 1999-2 Trade Cas. (CCH) ¶ 72,717 (D.D.C. 1999) (No. 99-CV-00993) (alleging that the proposed acquisition would “substantially lessen competition in the sale of radio advertising time”); Complaint for Injunctive Relief ¶¶ 20-24, *United States v. Hicks, Muse, Tate & Furst Inc.*, No. CV 98-2422 (E.D.N.Y. filed Mar. 31, 1998) (claiming that the “provision of advertising time on radio stations . . . is a relevant market . . . within the meaning of Section 7 of the Clayton Act”); Complaint for Injunctive Relief at 5, *United States v. American Radio Sys. Corp.*, 1997-2 Trade Cas. (CCH) ¶ 71,898 (D.D.C. 1997) (No. 97 CV00405) (same).

⁹³ Joel Klein, *DOJ Analysis of Radio Mergers*, Address at ANA Hotel, Feb. 19, 1997, 1997 WL 70922, at * 4-5; NAB Interview with Acting Assistant Attorney General Joel Klein Concerning Radio Mergers by Valerie Schulte, NAB Senior Associate General Counsel and Edward P. Henneberry of Howrey & Simon, January 1997, at 5-7.

Likewise, DOJ has investigated transactions involving television properties and similarly concluded that there is a distinct product market for television advertising. For example, DOJ, in a recent complaint opposing the acquisition of a television station by The News Corporation, stated that broadcast television spot advertising is a relevant product market within the meaning of Section 7 of the Clayton Act. In support of its position, DOJ alleged that “[b]roadcast television spot advertising possesses unique attributes that set it apart from advertising using other types of media.” Complaint for Injunctive Relief ¶ 11, *United States v. News Corp.*, No. 01CV00771 (D.D.C. filed Apr. 11, 2001). See also Department of Justice Press Release, *Abry Broadcast Partners Abandons Deal with Bastet Broadcasting* (July 16, 1999), at http://www.usdoj.gov/atr/public/press_releases/1999/2565.htm (abandoning efforts to enter into an agreement to sell advertising on competing television stations after the Justice Department expressed concern over the competitive effects of the proposed deal).

⁹⁴ *Cnty. Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146 (W.D. Ark. 1995), *aff’d*, 139 F.3d 1180 (8th Cir. 1998).

As for radio and television, the main problem with such media is that the advertising message conveyed is transitory. It is nearly impossible to provide price detail, and so newspapers are especially critical for grocery stores, department stores, furniture outlets, hardware stores, car dealers, etc. Television and radio do not provide a guaranteed audience and the expense of producing radio and television spots can be prohibitive. Many advertisers use radio and television to complement, but not replace, their use of print advertising. . . . As for circulars and direct mail, these are often considered nuisances and junk mail and are often thrown away.⁹⁵

The FCC similarly has never defined advertising across broadcast and newspaper outlets as a single market; indeed, FCC precedent recognizes and has been grounded upon differences in the competitive attributes inherent in different media services. For instance, in deciding in the *1998 Biennial Regulatory Review* not to make any changes in the local radio ownership rules, the Commission examined competition in the broadcast industry, reviewed DOJ's current approach to defining the radio industry as a single market, and itself concluded that "for certain advertisers, newspapers, cable, and broadcast television stations do not constitute an effective substitute for radio stations."⁹⁶ Shortly thereafter, in relaxing the local television ownership rules, the Commission was unable to reach any firm conclusion regarding the appropriate product market definition for television given the lack of "definitive empirical studies that

⁹⁵ *Id.* at 1156.

⁹⁶ *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, Biennial Review Report*, 15 FCC Rcd 11058, 11088-89 (2000) ("*1998 Biennial Review Report*"). The Newspaper Association of America challenged the FCC's decision not to repeal the rule. *Newspaper Ass'n of America v. FCC*, Case No. 00-1375 (D.C. Cir. filed Aug. 16, 2000). By order dated Aug. 30, 2000, the court held the case in abeyance and ordered the filing of periodic status reports.

quantify the extent to which various media are substitutable in local markets.⁹⁷ Nonetheless, the FCC decided to relax the local TV rules, noting instead the wide array of alternatives to broadcasting available in today's market.⁹⁸

The Commission also has relaxed other cross-ownership rules, even in the case of media much more similar than newspapers and broadcast stations. Specifically, the FCC began as early as 1989 to allow television station owners to buy radio outlets, and vice-versa, when it relaxed the "one-to-a-market rule."⁹⁹ Three and a half years ago, the Commission relaxed the rule again, permitting single television owners to own up to seven radio stations in a market and duopoly television owners to own up to six.¹⁰⁰ No one seriously can maintain that newspapers and television properties are so "reasonably interchangeable" as to justify a prohibition on cross-ownership but find no similar interchangeability between television and radio properties.

Moreover, even if newspapers and broadcast stations were grouped in the same product market, that market and the ownership rule that sought to regulate it now would have to include, as the FCC intimated in the *TV Ownership Proceeding*, numerous other players -- cable systems, wireless cable providers, other newspapers and magazines, Yellow Pages, billboards, and, most

⁹⁷ *Review of the Commission's Regulations Governing Television Broadcasting and Television Satellite Stations Review of Policy and Rules, Report and Order*, 14 FCC Rcd 12903, 12918 (1999), *recons.*, 16 FCC Rcd 1067 (2001) ("*TV Ownership Report and Order*").

⁹⁸ *Id.* at 12919. This decision not to reach a dispositive conclusion due to a lack of empirical data reversed the FCC's earlier tentative recommendation in the *TV Ownership Further Notice* that local advertising markets should be considered to include broadcast and cable television advertising, radio advertising, and newspaper advertising. *Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, Further Notice of Proposed Rulemaking*, 10 FCC Rcd 3524, 3543 (1995).

⁹⁹ *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules, Second Report and Order*, 4 FCC Rcd 1741, 1741, *recons.*, 4 FCC Rcd 6489 (1989).

¹⁰⁰ *TV Ownership Report and Order*, 14 FCC Rcd at 12908.

recently, Internet websites.¹⁰¹ Accordingly, given the dynamic and varying characteristics of today's media market, accurate and uniform product market definitions are all but impossible.

But even if a product market definition could be crafted in support of a unitary rule, defining a valid geographic market, to be applied consistently in all communities nationwide would be utterly impossible.¹⁰² Different media services typically reach widely differing geographic areas. Television stations, in particular, reach not only the areas covered by their licensed contours but frequently find their reach extended through retransmission by terrestrial satellite television systems, Class A and low power television stations, television translators, cable television systems, and DBS services. A radio station's licensed service area can also be expanded by FM translators and retransmission by cable systems. While newspapers may have more readily measured areas of circulation, these data are reported to the Audit Bureau of Circulation in various geographic components, whereas television share data are determined by Nielsen Media Research based on certain geographic principles, and radio station ratings are calculated by Arbitron based on an entirely different geographic metric.¹⁰³

But suppose the FCC nonetheless invented a unitary rule that somehow "counted" and then accurately "weighed" various media outlets in some conceptually designated "market." There is no way that such a rule could regulate effectively across all size markets. If a "voices" test allowed new combinations provided a certain number of owners remained in a market post-

¹⁰¹ *TV Ownership Report and Order*, 14 FCC Rcd at 12918.

¹⁰² The problems involved in defining product and geographic markets simply argue for leaving any regulation of antitrust abuses, if they arise, to the federal antitrust agencies to handle on a case-by-case basis.

¹⁰³ Indeed, the Commission uses an entirely different contour-based approach to define radio "markets" under its current local radio ownership rule, 47 C.F.R. § 73.3555(a)(3)(iii), a difference noted in the *2002 NPRM* and upon which numerous radio parties have commented. *See, e.g.,* Comments of Inner City Broadcasting Corp. in *2002 Proceeding* filed Jan. 2, 2003.

merger, any finally selected number that did not restrict all business combinations in medium and small markets would be much too small to forestall one owner from acquiring virtually all of the media properties in the largest markets.

Finally, even were the Commission able to justify extending its jurisdiction over newspapers -- a clearly unsustainable result -- the ludicrousness of that position then additionally would require the FCC to regulate other media outlets, such as the Internet and outdoor billboards, that just as plausibly compete with currently regulated media in the sale of advertising and/or the delivery of information and content. That is not a path the Commission should choose for itself.

V. Conclusion.

As was true in the *2001 Proceeding*, commenting parties have not raised any legal or factual justification for retaining the newspaper/broadcast cross-ownership rule. The time for its complete repeal is long, long overdue.

Respectfully submitted,

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