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advance any significant diversity or competition objective, the FCC was fully justified in relaxing its restrictions to permit newspaper/broadcast combinations in a significant number of markets. The Commission's decision was, in fact, a cautious and measured response to the overwhelming evidentiary record before it, and any requests to restore the former absolute ban are wholly without merit.

The handful of opponents of the FCC's relaxation of the newspaper/broadcast cross-ownership rule voice a number of complaints regarding the reasoning and empirical evidence underlying the agency's decision, claiming that the FCC has misrepresented the levels of consolidation that will occur under the revised limitations. These contentions miss the big picture by essentially ignoring the Commission's fundamental finding: allowing greater cross-ownership will provide substantial public interest benefits in the form of enhanced news and public affairs. In addition, these petitioners generally misconstrue the agency's evidentiary findings and conclusions with respect to the Diversity Index. They also recycle the same contentions they have raised in the past regarding the unacceptable threat of "biased" reporting that cross-ownership might pose and assert that the new rules must be reevaluated based on a mistaken reading of Section 202(h) of the 1996 Act and misdirected First Amendment claims. These arguments are unfounded and, in any case, disregard the evidence supporting the Commission's recognition of the wealth of diversity in the current media marketplace. In sum, the opponents of the deregulatory steps taken by the FCC provide no basis to question the agency's measured initiatives, much less any basis for their overblown concerns that the revised rules somehow will imperil today's vastly diverse local media markets.

II. THE FCC'S DECISION TO ELIMINATE ITS ABSOLUTE BAN ON NEWSPAPER/BROADCAST CROSS-OWNERSHIP WAS BASED ON COMPELLING AND EXTENSIVE EMPIRICAL EVIDENCE

NAA, the leading association representing the newspaper publishing industry,² has long been a proponent of repealing the discriminatory and counterproductive ban on newspaper/broadcast cross-ownership and, over the past several years, has participated in building a compelling record demonstrating the clear public interest benefits that would result from removing the restriction.³ NAA believes that the Commission's decision to allow combinations in a substantial number of markets, though falling short of the full repeal supported by the record and the applicable legal standard, unquestionably was justified as a needed deregulatory step. The decision not only will foster the agency's public interest objectives, but also will provide newspaper publishers and broadcasters with a measure of regulatory relief and place them on a more equitable footing vis-à-vis their many and varied competitors in the multi-channel, multi-media 21st century marketplace.

Contrary to petitioners' suggestions, the FCC's decision to replace the newspaper ban with more flexible cross-media limits was based on the most comprehensive record ever amassed

² NAA is a nonprofit organization that represents the newspaper industry and more than 2,000 newspapers in the United States and Canada. Most NAA members are daily newspapers; those members account for approximately 90 percent of U.S. daily circulation. NAA's membership also includes many non-daily U.S. newspapers and other newspapers published elsewhere in the western hemisphere as well as in Europe and the Pacific Rim. NAA serves the newspaper industry and its individual members in strategic efforts to advocate and communicate the views and interests of newspaper publishers to all levels of government and to advance and support newspapers' interest in First Amendment issues. In this capacity, NAA has participated in numerous Commission and judicial proceedings as well as in a wide variety of federal legislative and regulatory activities affecting the interests of newspaper publishers in general, and newspaper/broadcast cross-ownership in particular.

³ See NAA Comments in MM Docket No. 98-35 (*1998 Biennial Regulatory Review*) (filed July 21, 1998) ("NAA 1998 Comments"); NAA Reply Comments in MM Docket No. 98-35 (filed Aug. 21, 1998); NAA Comments in MM Docket Nos. 01-235, 96-197 (filed Dec. 3, 2001) ("NAA 2001 Comments"); NAA Reply Comments in MM Docket Nos. 01-235, 96-197 (filed Feb. 15, 2002) ("NAA 2001 Reply Comments"); NAA Comments in MB Docket No. 02-277 (filed Jan. 2, 2003) ("NAA 2003 Comments"); NAA Reply Comments in MB Docket No. 02-277 (filed Feb. 3, 2003) ("NAA 2003 Reply Comments"). As demonstrated in Section IV, *infra*, however, under Section 202(h), the cross-ownership ban could not be retained absent an affirmative demonstration that it is necessary to advance public interest objectives.

on newspaper/broadcast cross-ownership. The record consisted not only of the extensive comments submitted by a wide range of industry participants and public interest organizations in the FCC’s omnibus media ownership proceeding, but also of those participating in the Commission’s 2001 proceeding on newspaper/broadcast cross-ownership.⁴ Among the twelve economic studies commissioned by the agency in connection with this proceeding were several specifically targeted at assessing the public interest impact of newspaper/broadcast combinations.⁵ Moreover, due to the existence of approximately forty grandfathered combinations, these empirical studies were supplemented by real-world examples in a full range of the nation’s local media markets.

The record unequivocally supported the Commission’s conclusion that a flat ban on cross-ownership no longer can be justified. Both the empirical studies and the experiences of the existing combinations demonstrated that the ban was unnecessarily precluding enhanced news and public affairs programming from reaching local media markets. The conclusion of the FCC-sponsored Spavins Study that stations “co-owned with newspapers experience noticeably greater success under our measures of quality and quantity of local news programming”⁶ was echoed both by an independent five-year study conducted by the Project for Excellence in Journalism at Columbia University—which found that stations jointly owned with newspapers “were more

⁴ *Cross-Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Waiver Policy, Notice of Proposed Rulemaking* in MM Docket Nos. 01-235, 96-197, 16 FCC Rcd 17283 (2001). Indeed, the record in that proceeding alone was more than sufficient to warrant repeal of the antiquated newspaper/broadcast cross-ownership ban.

⁵ Thomas C. Spavins, Loretta Denison, Scott Roberts, and Jane Frenette, *The Measurement of Local Television News and Public Affairs Programs*, released in MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244 (September 2002) (“Study #7”); David Pritchard, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign*, released in MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244 (September 2002) (“Study #2”).

⁶ Study #7 at Section I.

likely to do stories focused on important community issues” and were “more likely to provide a wide mix of opinions”⁷—and by a host of individual experiences reported by owners of existing combinations.⁸

The evidence further showed that the ban no longer can be justified in light of current conditions prevailing in the regulated industry, a consideration that even the lowest standard of administrative law requires the FCC to address. First, the facts in the record show the explosive growth that has occurred in local media markets since the rule was adopted nearly three decades ago. Second, the facts show that there is no legitimate cause for concern that greater cross-ownership would diminish either competition or the diversity of viewpoints available to local communities.⁹ At the same time, the record demonstrates that broadcasters have suffered significant audience declines in recent years in the face of increased competition from a host of new rivals—most prominently cable and DBS operators—as well as significant growth in the number of traditional broadcast stations.¹⁰ The Commission thus correctly recognized that the

⁷ Project for Excellence in Journalism, *Does Ownership Matter in Local Television News*, released February 17, 2003, available at <http://www.journalism.org/resources/research/reports/ownership/default.asp>.

⁸ See, e.g., Belo Corp. Comments in MB Docket No. 02-277 (filed Jan. 2, 2003); Belo Corp. Comments in MM Docket No. 01-235 (filed Dec. 3, 2001); Cox Enterprises, Inc. Comments in MM Docket No. 01-235 (filed Dec. 3, 2001); Dispatch Broadcast Group Comments in MB Docket No. 02-277 (filed Jan. 2, 2003); Dispatch Broadcast Group Comments in MM Docket No. 01-235 (filed Dec. 3, 2001); Gannett Co., Inc. Comments in MB Docket No. 02-277 (filed Jan. 2, 2003); Gannett Comments in MM Docket No. 01-235 (filed Dec. 3, 2001); Media General, Inc. Comments in MB Docket No. 02-277 (filed Jan. 2, 2003); Media General, Inc. Comments in MM Docket No. 01-235 (filed Dec. 3, 2001); Morris Communications Corp. Comments in MB Docket No. 02-277 (filed Jan. 2, 2003); Morris Communications Corp. Comments in MM Docket No. 01-235 (filed Dec. 3, 2001); NAA 2001 Comments; Tribune Company Reply Comments in MB Docket No. 02-277 (filed Jan. 2, 2003); Tribune Company Comments in MM Docket No. 01-235 (filed Dec. 3, 2001).

⁹ See Scott Roberts, Jane Frenette, and Dione Stearns, *A Comparison of Media Outlets and Owners For Ten Selected Markets*, released in MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244 (September 2002); C. Anthony Bush, *On the Substitutability of Local Newspaper, Radio, and Television Advertising in Local Business Sales*, released in MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244 (September 2002); Study #2; *2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 29 CR 564 (2003) (“Order”).

¹⁰ See Order, ¶ 359.

efficiencies inherent in cross-ownership could play an important role in alleviating this trend, particularly by providing broadcasters with newspaper resources and capital to initiate or enhance local news operations.¹¹

In light of the indisputable weight of the evidence before it, the FCC's decision to modify its cross-ownership restriction, rather than eliminating the ban entirely, must be regarded as a cautious one. The decision provides a start, however, toward promoting the FCC's longstanding interest in localism as well as regulatory parity and certainty. In particular, the more flexible three-tiered cross-media limits will provide a measure of relief to the newspaper publishing and broadcasting industries. After 28 years of being flatly prohibited from joining resources with local broadcasters—at the same time that other media were being permitted to enter into any of a wide range of efficient combinations—newspaper publishers in a substantial number of markets finally will be allowed to operate on a more level playing field with their multimedia competitors. An end to the discriminatory and irrational treatment of newspaper owners under the former absolute ban was long overdue, and the small number of petitions asking the Commission to reverse even its limited deregulatory initiatives in this respect are unsupported and patently without merit.

**III. PETITIONERS SEEKING REINSTATEMENT OF THE NEWSPAPER/
BROADCAST CROSS-OWNERSHIP BAN IGNORE CRITICAL RECORD
EVIDENCE, MISINTERPRET THE FCC'S FINDINGS, AND PROVIDE NO
BASIS FOR RECONSIDERATION OF THE COMMISSION'S DECISION TO
RELAX THE RESTRICTION**

The few opponents of the FCC's new, more flexible cross-media limits focus their energy on a list of grievances regarding certain aspects of the reasoning underlying the agency's decision. In doing so, these parties essentially ignore critical aspects of the agency's findings,

¹¹ *Id.* at ¶ 360.

including its overriding conclusion that elimination of the former absolute ban will serve the public interest by allowing broadcasters to draw on the extensive newsgathering resources that newspaper publishers have to offer. Moreover, the arguments that relaxation of the rule inevitably will result in rampant consolidation are unfounded and, in any case, rely on a faulty analysis of the empirical evidence underlying the *Order*. Similarly, in expressing concern that the revised rules will result in an increase in “biased” reporting, these parties fail to address the Commission’s finding that the wealth of diversity in today’s media marketplaces has rendered irrelevant any isolated incidents of overt viewpoint coordination and also fail to show that there is any cause to believe that cross-ownership will lead to an appreciable increase in such incidents. Simply put, these parties offer no persuasive evidence demonstrating that there is any basis for the Commission to reverse its decision to relax the long-outdated newspaper/broadcast cross-ownership ban.

A. Petitioners Do Not Refute the Commission’s Findings on the Public Interest Benefits Inherent in Cross-Ownership

While both the Consumer Federation of America/Consumers Union (“CFA/CU”) and United Church of Christ, *et al.* (“UCC”) claim that the FCC should retain its absolute ban on newspaper/broadcast cross-ownership,¹² these parties devote very little attention to a central factor in the agency’s decision to relax the rule—its finding that broadcast stations owned jointly with newspapers overwhelmingly tend to provide superior public interest benefits in the form of more and higher quality local news and informational services.

CFA/CU asserts that the FCC wrongly ignored its argument that the studies demonstrating the benefits of cross-ownership were based on a “faulty analysis.”¹³ In support,

¹² See UCC Petition at iii, 29-38; CFA/CU Petition at i-ii, 14-24.

¹³ CFA/CU Petition at 30-31.

however, the petitioner simply cites to its own previous speculative and misdirected criticisms of the studies without offering any additional explanation or discussion of the FCC’s findings on this issue. CFA/CU neither addresses any of the other extensive record evidence regarding the benefits of cross-ownership nor offers any significant data of its own to refute the determination that newspaper-owned stations are, in fact, likely to offer improved local news and informational services.

Acknowledging the FCC-sponsored Study finding that combinations offer superior news services, UCC posits the theory that, “[a]s cross-ownership becomes the norm, other television stations may stop producing news altogether.”¹⁴ This speculation defies logic, not to mention the economic dynamics that drive local TV station business plans, and UCC provides no evidence to back up this unlikely scenario. UCC also notes a couple of instances in which combinations apparently did not cover local hearings on media ownership issues, examples which it asserts “belie” the agency’s findings regarding the tendency of newspaper-owned stations to offer superior news and informational coverage.¹⁵ These isolated examples are, of course, not even marginally related to the issue of whether stations jointly owned with daily newspapers tend to offer more or higher-quality local news than other stations.¹⁶

Certainly, the recycled arguments and unsupported assertions made by the parties seeking reinstatement of an absolute ban provide no basis for the FCC to reconsider its in-depth analysis of this issue in the *Order*¹⁷ or its ultimate finding that there is “overwhelming evidence that

¹⁴ UCC Petition at 4.

¹⁵ *Id.* at 33-34.

¹⁶ In fact, given the strong incentives that jointly owned newspapers and broadcasters have to differentiate their offerings, there is no legitimacy to claims that permitting greater cross-ownership will diminish the variety of news and information provided in local markets. *See infra* Section III(C).

¹⁷ *Order*, ¶¶ 342-358.

combinations can promote the public interest by producing more and better overall local news coverage.”¹⁸ Accordingly, these petitioners provide no basis for the agency to reevaluate its amply supported determination that the former newspaper/broadcast cross-ownership ban was “not necessary to promote [its] localism goal” and, in fact, likely “hinder[ed]” localism objectives.¹⁹

B. Concerns that Eliminating the Cross-Ownership Ban Will Result in Undue Concentration Are Without Merit and Are Based on a Fundamental Misinterpretation of the Agency’s Reasoning

CFA/CU and UCC express concern that the new cross-media limits are “extremely lax” and will result in an “incredible increase in concentration” in local media markets.²⁰ In particular, both parties focus their arguments on alleged defects in one of several bases for the FCC’s decision, the Diversity Index, which they claim understates the current levels of concentration in local media markets and the consolidation that will occur under the new rules.²¹ These arguments generally misinterpret the Commission’s reasoning and, in any case, do not show that relaxation of the rule will imperil the abundance of diversity in today’s local media markets.

As a preliminary matter, these petitioners erroneously characterize the Diversity Index as the only empirical basis for the FCC’s decision to modify the newspaper/broadcast cross-ownership ban.²² In actuality, the new rules are justified by a compelling and extensive evidentiary record, of which the Diversity Index is only one part, as well as by the agency’s

¹⁸ *Id.* at ¶ 354.

¹⁹ *Id.*

²⁰ UCC Petition at iii; CFA/CU Petition at 38.

²¹ *See* CFA/CU Petition at 14-19, 20-28, 32-34, 36-38; UCC Petition at 34-38.

²² *See* UCC Petition at 34; CFA/CU Petition at i.

general expertise on media ownership rules. Indeed, the FCC need not have employed the Diversity Index at all to justify elimination of the former rigid restrictions. At most, the Index served as a useful “methodological tool” to help the Commission organize the data in the record.²³ As the Commission explained in its decision, the Diversity Index “informs, but does not replace, [its] judgment in establishing rules of general applicability that determine where [it] should draw lines between diverse and concentrated markets.”²⁴ The new rules “ultimately rest[] on” the Commission’s “independent judgments about the kinds of markets that are most at-risk for viewpoint concentration, and the kinds of transactions that pose the greatest threat to diversity.”²⁵

Moreover, contrary to petitioners’ claims, the Diversity Index significantly *understates* the levels of diversity in today’s local markets by incorporating several “conservative assumptions.”²⁶ For example, the Index excludes both cable television and magazines, despite record evidence that both outlets serve as important sources of local news and information, and incorporates the admittedly implausible assumption that each local market has only one weekly newspaper.²⁷ The Index similarly excludes low power television and radio stations, even though these stations are “often operated with the express purpose of serving niche audiences with ethnic or political content that larger media outlets do not address.”²⁸ In addition, the Index

²³ *Order*, ¶ 433.

²⁴ *Id.* at ¶ 391.

²⁵ *Id.* at ¶ 435. Even if the Diversity Index were found to be a flawed measure of marketplace diversity, the Commission’s decision to eliminate its flat ban on cross-ownership would not be deemed invalid in light of the other legitimate bases for its decision.

²⁶ *Order*, ¶ 399.

²⁷ *Id.* at ¶ 392.

²⁸ *Id.* at ¶ 399.

accounts for only local media, omitting a large number of national news sources, such as all-news cable channels and national Internet sites. Despite the high levels of substitution among a wide range of sources of news and information, the FCC also decided—“out of an abundance of caution”—to weight different types of outlets based on actual usage instead of counting all outlets equally based on general availability.²⁹ Overall, as the Commission itself concedes, the Diversity Index “is a conservative measure, and one [adopted] in the interest of prudence.”³⁰

Petitioners also claim that “absurd results” stem from the application of the Diversity Index to individual media markets and contend that the FCC erred in not determining the market shares or coverage of specific media outlets in constructing the Index.³¹ In making these assertions, UCC and CFA/CU completely ignore the Commission’s explicit and repeated statements that the Diversity Index is not designed as a precise analytical tool that can be used to closely examine individual media markets. Rather, the FCC explained, the Diversity Index “is a blunt tool capable only of capturing and measuring large effects or trends in typical markets.”³²

The FCC further cautioned in its *Order* that the Index is useful “only in the aggregate” and “cannot, and will not, be applied by the Commission to measure diversity in specific markets.”³³ In attempting to apply the Diversity Index to individual markets, CFA/CU is, in effect, reiterating its request for case-by-case review of media transactions as opposed to bright

²⁹ *Order*, ¶ 399. As NAA has explained in its previous filings, it is the availability of a wide range of sources of information, and not the relative popularity of any particular outlet, that ensures consumer access to diverse sources of news and information. *See* NAA 2003 Comments at Section V(A).

³⁰ *Order*, ¶ 396.

³¹ CFA/CU Petition at 14-19; UCC Petition at 36-36.

³² *Order*, ¶ 398.

³³ *Id.* at ¶ 392. *See also id.* at ¶ 391 (“While the Diversity Index is not perfect, nor absolutely precise, it is certainly a useful tool to inform our judgment and decision-making.”).

line rules.³⁴ The Commission correctly rejected case-by-case review, however, as unnecessary and antithetical to its public interest objectives of regulatory certainty and consistency.³⁵

Certainly, the opponents of the revised, more flexible rules offer no evidence indicating that their attack on the Diversity Index provides any basis for reinstating the prior ban on cross-ownership. The new rules are in fact more restrictive than can be shown to be necessary in the contemporary marketplace and, thus, are plainly more than sufficient to ensure that a wide array of news and informational outlets will remain in every local market.³⁶ Indeed, any newspaper/broadcast combination created pursuant to the new rules will be subject to competition from at least three and generally several more independently owned television stations and numerous radio outlets, not to mention the vast array of other print and electronic competitors that make up the contemporary competitive environment.

C. Arguments Pertaining to the Threat of “Biased” Reporting Are Unfounded and Disregard the FCC’s Findings Regarding the Wealth of Options in the Current Media Marketplace

UCC contends that the FCC erroneously “discounts” its prior argument that permitting greater newspaper/broadcast cross-ownership poses an unacceptable threat of viewpoint coordination and “biased reporting.”³⁷ UCC specifically takes issue with the agency’s failure to give credence to its isolated anecdotal examples on this issue, given the Commission’s finding

³⁴ See CFA/CU Petition at iii, 41.

³⁵ See Order, ¶¶ 80-85.

³⁶ CFA/CU further argues that the new cross-media limits directly conflict with the revised TV duopoly and national TV ownership rules because, while the latter rules will curb increases in economic power, the new cross-media limits will fail to do so. See CFA/CU Petition at 28-30. In light of the FCC’s finding that “a newspaper/broadcast combination . . . is not a horizontal merger and cannot adversely affect competition in any market,” this comparison is inapposite. Order, ¶ 332. Because “most advertisers do not view newspapers, television stations, and radio stations as close substitutes,” there is no basis for concern that newspaper/broadcast combinations will wield undue economic power. *Id.*

³⁷ UCC Petition at 29-32.

that ownership may sometimes have an impact on the viewpoints expressed by a particular outlet. UCC's petition overlooks the Commission's overriding conclusion that this issue has little relevance in today's abundant media environment, where participants in the gathering and dissemination of news take many forms, both traditional and new. In any event, UCC fails to make the case that commonly owned newspapers and broadcast outlets generally would have any incentive to speak with a monolithic voice.

To the contrary, the Commission correctly concluded in its *Order* that common ownership of newspapers and broadcast stations “does not result in a predictable pattern of news coverage and commentary about important political events....”³⁸ It further noted that, as local media markets become more fragmented and competitive, “media owners face increasing pressure to differentiate their products, including by means of differing viewpoints.”³⁹ Thus, there is no merit to UCC's assertion that there is a fundamental conflict between the FCC's finding that ownership may influence the viewpoints expressed or issues addressed by a particular outlet and its determination that commonly owned outlets will not necessarily express monolithic viewpoints. Rather, the agency simply determined that while ownership may have some impact on viewpoint dissemination, it is not a predictable one—and therefore cannot justify a flat ban on joint ownership of newspapers and broadcast stations.

Furthermore, that FCC finding does not stand in isolation. Rather, it is one of several related factors justifying relaxation of the rule. The Commission's analysis, in fact, turned on its determination that a multitude of “antagonistic viewpoint[s]” exists in today's local media

³⁸ *Order*, ¶ 361; *see also* NAA 2003 Comments at Section III(B); NAA 2003 Reply Comments at Section IV.

³⁹ *Order*, ¶ 364.

markets.⁴⁰ Based on the extensive evidence showing that “[t]he average American has a far richer and more varied range of media voices from which to choose today than at any time in history,” the Commission correctly concluded that “the influence of any single viewpoint source is sharply attenuated.”⁴¹ Thus, even to the extent that there may be occasions on which specific outlets “betray some bias,” the FCC found that this simply does not “mean that the public will be left uninformed.”⁴² Indeed, as NAA previously has pointed out to the Commission, alternate sources inevitably will stand ready to point out the failings of their competitors.⁴³

Apart from making the unsubstantiated and highly implausible assertion that “no one else may be able or willing to present an antagonistic viewpoint” once cross-ownership is permitted,⁴⁴ UCC fails to address the crux of the Commission’s analysis on this issue. By merely citing anecdotal evidence already brought to the FCC’s attention in previous filings, UCC certainly provides no reason for the agency to reconsider its analysis.

IV. THE FCC CORRECTLY DETERMINED THAT THE FORMER NEWSPAPER/BROADCAST CROSS-OWNERSHIP BAN COULD NOT BE JUSTIFIED UNDER THE EXISTING LEGAL FRAMEWORK

The few petitioners seeking reinstatement of the cross-ownership ban also assert that the FCC’s *Order* must be reconsidered based on their extremely limited reading of the biennial review mandate and their claims that the Commission “fundamentally misapplie[d]” First

⁴⁰ *Id.*

⁴¹ *Id.* at ¶ 366.

⁴² *Order*, ¶ 364.

⁴³ *See, e.g.*, NAA 2001 Comments at Section IV(B).

⁴⁴ UCC Petition at 32.

Amendment law.⁴⁵ These arguments lack merit. The FCC rightly determined that the former ban cannot be justified under Section 202(h), and that the First Amendment in fact compels elimination, not perpetuation, of discriminatory restrictions on cross-ownership.

A. The Outdated Newspaper/Broadcast Cross-Ownership Prohibition Is Not Sustainable Under Section 202(h)

As NAA has demonstrated in its previous filings,⁴⁶ Section 202(h) of the Telecommunications Act of 1996 (“1996 Act”)⁴⁷ imposes specific and substantial legal imperatives on the Commission. The statute reverses traditional administrative law procedures by requiring the FCC to affirmatively justify any decision to retain its broadcast ownership restrictions. As the D.C. Circuit confirmed in its decisions in *Fox Television Stations v. FCC*⁴⁸ and *Sinclair Broadcast Group v. FCC*,⁴⁹ Section 202(h) also “carries with it a presumption in favor of repealing or modifying the ownership rules.”⁵⁰ In addition, the Court has clarified that the FCC may not rely upon “predictive judgments” or inferences in carrying out its biennial review mandate, but instead must show that its rules are fully justified based on present market conditions.⁵¹

⁴⁵ See *id.* at ii; CFA/CU Petition at 32-38; Free Press Petition; Amherst Alliance/Virginia Center for the Public Press Petition at 9-11.

⁴⁶ See, e.g., NAA 2003 Comments at Section V; NAA 2001 Comments at Section VII; NAA 2001 Reply Comments at Section I; NAA 1998 Comments at Section III(A).

⁴⁷ Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁴⁸ 280 F.3d 1027 (D.C. Cir. 2002) (“*Fox*”).

⁴⁹ 284 F.3d 148 (D.C. Cir. 2002) (“*Sinclair*”).

⁵⁰ *Fox*, 280 F.3d at 1048; *Sinclair*, 284 F.3d at 152.

⁵¹ *Fox*, 280 F.3d at 1051. Indeed, the Court confirmed that the Commission’s historical “wait-and-see approach cannot be squared with the Commission’s statutory mandate [to act] promptly—that is, by revisiting the matter biennially—to repeal or modify any rule that is not necessary in the public interest.” *Id.* at 1042 (internal quotations omitted).

In light of the deliberate and rigorous deregulatory program put in place by Congress, it is incontrovertibly clear that the former newspaper/broadcast cross-ownership prohibition cannot be maintained. There has been no showing that the former rule was necessary to achieve the Commission’s public interest goals. Even assuming *arguendo*, however, that a less exacting standard were to apply, the absolute cross-ownership ban still could not be justified.⁵² The record did not demonstrate that a flat ban on cross-ownership serves any useful or appropriate role in today’s abundantly diverse media marketplace; to the contrary, the prohibition has been shown to be counterproductive to the Commission’s public interest goals.

B. Petitioners’ Ill-Conceived First Amendment Arguments Cannot Support Reinstatement of the Cross-Ownership Ban

Petitioners opposing relaxation of the cross-ownership ban also claim—as they have done repeatedly in their prior pleadings—that by permitting any form of newspaper/broadcast cross-ownership, the FCC has failed in its duty under the First Amendment to ensure the “widest possible dissemination of information from diverse and antagonistic sources.”⁵³ This argument

⁵² NAA submits that the FCC’s conclusion in its media ownership decision that Section 202(h) embodies no more than an ordinary rulemaking standard is incorrect. *See Order*, ¶ 11 (*citing 2002 Biennial Regulatory Review*, 18 FCC Rcd 4726 ¶ 13 (2003)). Interpreting the statute to impose no greater burden than that which applies in the ordinary rulemaking context would disregard both the D.C. Circuit’s determination that the statute contains a “presumption in favor of deregulation” and its finding that the FCC may not rely solely upon predictive judgments to support retention of a rule. Construing the “necessary in the public interest” test contained in Section 202(h) to embody nothing more than the “plain public interest” test that applies in the exercise of ordinary rulemaking also violates the established canon of statutory construction that counsels against interpreting statutes to render entire portions superfluous. *See, e.g., C.F. Communications Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997) (noting the “familiar principle of statutory interpretation which requires construction so that no provision is rendered inoperative or superfluous, void or insignificant.”) (internal quotations omitted).

In addition, such an interpretation of the “necessary in the public interest” test would directly contravene the D.C. Circuit’s recent decision in *CTIA v. FCC*, 330 F.3d 502 (D.C. Cir. 2003). There the Court construed the term “necessary” as used in Section 10 of Communications Act of 1934, as amended, 47 U.S.C. §160, to require a “strong connection between what the agency has done by way of regulation” and what it sought to do. *Id.* at 513. The Court further held that a rule is “necessary” only if it is “required to achieve the desired goal.” *Id.* at 510.

⁵³ *See* CFA/CU Petition at 36; UCC Petition at 5. *See also, e.g.,* Office of Communication of the United Church of Christ, *et al.* Comments in MB Docket No. 02-277 at 2-3 (filed Jan. 2, 2003); Consumer Federation of America, *et al.* Comments in MB Docket No. 02-277 at 1, 20, 21, 26, 67, 283 (filed Jan. 2, 2003).

is manifestly flawed—brought to its logical conclusion, the standard advocated by these Petitioners would prohibit *all* joint ownership of media outlets. First Amendment law certainly does not obligate the FCC to maximize the number of licensees in local markets. Claims that the new rules fail to adequately protect the rights of viewers and listeners are similarly flawed.⁵⁴ Nothing in Supreme Court jurisprudence suggests that listener rights are more extensive than speaker rights. Indeed, the rights of viewers and listeners are corollary to the rights of speakers—even regulated ones.⁵⁵ While petitioners point to the scarcity doctrine as support for this argument,⁵⁶ whatever diminished force the scarcity rationale may have in the contemporary media marketplace is certainly insufficient to justify a complete ban on newspaper/broadcast cross-ownership.⁵⁷

Contrary to the assertions of opponents, the FCC’s decision to eliminate the former absolute ban on cross-ownership was compelled by First Amendment imperatives. While NAA disagrees with the FCC’s conclusion that its media ownership rules should be evaluated under a rational basis standard,⁵⁸ it agrees with the agency’s conclusion that the newspaper/broadcast cross-ownership ban could not be maintained even under that minimal standard.

⁵⁴ See UCC Petition at 4-5; CFA/CU Petition at 35. See also Free Press Petition at 11.

⁵⁵ See, e.g., *Virginia St. Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976).

⁵⁶ See CFA/CU Petition at 36.

⁵⁷ See NAA 2001 Comments at Section VIII(A); NAA 1998 Comments at Section IX(B); NAA 2003 Comments at Section V.

⁵⁸ See *Order*, ¶ 13. As NAA has explained to the Commission in several prior pleadings, restrictions on newspaper/broadcast cross-ownership should be subject to strict scrutiny. See NAA 2001 Comments at Section VIII(A); NAA 1998 Comments at Section III(C); NAA 2003 Comments at Section V.

V. CONCLUSION

For the foregoing reasons, NAA respectfully submits that there is no defensible basis for the Commission to retreat from its decision to allow newspaper/broadcast cross-ownership in a substantial number of markets. The decision unquestionably will advance the FCC's public interest objectives and will provide a measure of long overdue regulatory relief to the newspaper publishing and broadcasting industries. Indeed, given the compelling and comprehensive record before the agency, NAA believes that the Commission would have been fully justified in completely eliminating its cross-ownership restrictions.

Respectfully submitted,

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October 6, 2003

CERTIFICATE OF SERVICE

I, Wanda L. Thorpe, hereby certify that on October 6, 2003, I caused a copy of the foregoing Response of the Newspaper Association of America to Petitions for Reconsideration to be mailed via first-class postage prepaid mail to the following:

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