

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

In the Matter of)	
)	
2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996)	MB Docket No. 06-121
)	
)	MB Docket No. 02-277
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)	
)	MM Docket No. 01-235
)	
Cross-Ownership of Broadcast Stations and Newspapers)	MM Docket No. 01-317
)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets)	MM Docket No. 00-244
)	
Definition of Radio Markets)	

**REPLY COMMENTS OF
OFFICE OF COMMUNICATION OF UNITED CHURCH OF CHRIST, INC.
NATIONAL ORGANIZATION FOR WOMEN FOUNDATION
MEDIA ALLIANCE
COMMON CAUSE
BENTON FOUNDATION**

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SUMMARY

The Office of Communication of the United Church of Christ, Inc., National Organization for Women Foundation, Media Alliance, Common Cause, and the Benton Foundation, along with many other commenters, have shown that the public interest would best be served by maintaining or tightening the existing broadcast ownership limits.

The record does not support relaxing the media ownership limits. The industry commenters supporting deregulation have offered surprisingly little evidence in support of their position. In several instances the industry ignores the precedent of the *Prometheus* case and re-argues issues before the Commission that were already settled by the Third Circuit. While commenters in support of deregulation may wish that the *Prometheus* decision was not binding, the Commission cannot ignore a U.S. Court of Appeals. For this reason, arguments that 202(h) should be reinterpreted as a “deregulatory ratchet” are without foundation. The FCC is bound by the law of the case doctrine to reject these industry arguments.

The industry once again argues that the emergence of the Internet has rendered broadcast media ownership limits unnecessary. Time and again, public interest advocates have demonstrated, both in prior FCC proceedings and before the *Prometheus* court, that the vast majority of local Internet content originates from broadcast sources and major newspapers. This is still true today.

Not only does the Internet offer few new sources of local news, many Americans do not have access to the Internet. Moreover, even if more Americans had access, recent changes in FCC rules may reduce the diversity of content available on the Internet. While FCC rules formerly protected freedom of speech through common carriage obligations that prohibited the owners of Internet infrastructure from interfering with Internet speech, the FCC has removed

these protections. Without meaningful guarantees of net neutrality, the Internet cannot be counted on to provide alternative voices for the American public.

Industry also argues that broadcast stations and newspapers are experiencing financial distress and that additional consolidation will somehow allow them to better compete against the “new media.” The Commission should reject these arguments. Industry claims of financial woe are unsupported and greatly exaggerated. In any event, it is not the Commission’s job to protect broadcasters from competition. Evidence shows that the public benefits from competition rather than increased consolidation.

A few industry commenters repeat the arguments they made in the 2002 Biennial Review. In particular they argue that the FCC should repeal the newspaper-broadcast cross-ownership rule because it is unconstitutional. Because the Third Circuit unanimously rejected these arguments in *Prometheus*, and the Supreme Court declined to review that decision, the Commission must reject these arguments under the law of the case doctrine. In any event, the argument that the rules should be subjected to a higher level of scrutiny because broadcast spectrum scarcity no longer exists both misreads fifty years of Supreme Court precedent and ignores the reality that the spectrum remains unable to accommodate all who wish to use it.

Because industry commenters fail to demonstrate that a repeal of the rules would serve the public interest, and other commenters have shown that retaining or tightening the rules does serve the public interest, the FCC should not relax the rules at this time. Nonetheless, should the FCC decide that modifying the rules would serve the public interest, it should issue a new further notice seeking public comment before modifying the media ownership rules.

The current Further Notice expressly ignores the exhortation of the *Prometheus* court to provide better notice on remand. It neither proposes any specific rules, nor even lays out a range

of options. It fails to address with any specificity the policy options to increase ownership opportunities for women and minorities, despite a specific directive by the Third Circuit to do so. As such, the Further Notice does not constitute adequate public notice under the Administrative Procedure Act. But even if it were adequate, seeking another round of comments on specific proposals would improve the quality of decision-making by the Commission and would increase the likelihood of adopting rules that would serve the public interest and withstand judicial review.

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REPLY COMMENTS

The Office of Communication of the United Church of Christ, Inc. (“UCC”), the National Organization for Women Foundation (“NOW”), Media Alliance, Common Cause, and the Benton Foundation (collectively, UCC, et al.), by their attorneys, the Institute for Public Representation, respectfully submit reply comments in response to the comments filed in the above referenced proceeding.

I. The FCC May Maintain or Tighten the Current Ownership Rules Under 202(h)

Like UCC, et al., a large number of commenters have advocated that the public interest would best be served by maintaining or tightening the existing broadcast ownership limits.¹ Several industry commenters, however, argue that not only should the Commission not tighten the rules, but that under Section 202(h) of the Telecommunications Act of 1996 the FCC must relax them. This position is wrong as a matter of law.

Section 202(h), as amended, requires the FCC to review its ownership rules every four years to determine if they remain “necessary in the public interest as the result of competition.” It instructs the Commission to “repeal or modify any regulation” that is no longer in the public interest.² In reviewing the rules adopted in the 2002 Biennial Review, the Third Circuit held in *Prometheus Radio Project v. FCC*, that this section does not create a deregulatory presumption and that the Commission may maintain or tighten current ownership restrictions as the public interest requires.³

Some industry commenters repeat the Section 202(h) arguments they lost in *Prometheus*. Clear Channel, for example, argues that the word “necessary” means “absolutely required,”

¹ Commenters include Consumers Union; Consumer Federation of America & Free Press; Prometheus Radio Project; Screen Actors Guild; American Women in Radio and Television; Future of Music Coalition, Minority Media and Telecommunications Council, National Association of Black-Owned Broadcasters; Recording Artists Coalition; AFL-CIO; National Association of Hispanic Journalists; Children’s Media Policy Coalition; Independent Film and Television Alliance; as well as thousands of comments submitted by individual citizens.

² Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996), required the Commission to undertake biennial reviews. Congress amended the act in 2004 to provide for quadrennial reviews. Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004).

³ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 394-95 (3rd Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005)

‘indispensable,’ or ‘essential.’”⁴ However, the *Prometheus* court rejected this interpretation and agreed with both the FCC and the D.C. Circuit (in *Cellco P’ship v. FCC*⁵) that the word “necessary” means “‘convenient,’ ‘useful,’ or ‘helpful.’”⁶ Similarly, Clear Channel again contends that that Section 202(h) is a “one-way ratchet in the direction of *less* regulation.”⁷ Yet the *Prometheus* court explicitly held that “we do not accept that the ‘repeal or modify’ in the public interest instruction must therefore operate only as a one-way ratchet,”⁸ and that if the Commission “reasonably determines that the public interest calls for a more stringent regulation,” it may implement that regulation.⁹ Sinclair also argues that Section 202(h) is deregulatory based on language in *Fox Television Stations v. FCC (Fox I)*, which likened the Congress’s mandate to the FCC under 202(h) to Admiral Farragut’s command, “Damn the torpedoes! Full speed ahead!”¹⁰ But as the *Prometheus* court found, “*Fox I*’s suggestion of a heightened standard was expressly retracted by *Fox II*.”¹¹

⁴ Comments of Clear Channel Communications, Inc., at 5. Clear Channel made the same arguments in these Comments as it did to the Third Circuit, which soundly rejected these arguments in *Prometheus*. Compare Section I(B) of Clear Channel’s Comments with *Prometheus*, 373 F.3d 372, *Brief for Petitioner Clear Channel Communications, Inc.* at 20-25. Indeed, Clear Channel primarily cites to its own briefs in *Prometheus* for its arguments, and then buries the court’s decision in a “But see” clause. Comments of Clear Channel Communications, Inc., at 6-7 n. 25.

⁵ 357 F.3d 88 (D.C. Cir. 2004).

⁶ *Prometheus*, 373 F.3d at 394.

⁷ Comments of Clear Channel Communications, Inc., at 6 (emphasis in original).

⁸ *Prometheus*, 373 F.3d at 394.

⁹ *Id.* at 394-95.

¹⁰ Comments of Sinclair, at 2, 9 (quoting *Fox Television Stations v. FCC*, 280 F.3d 1027, 1044 (DC Cir. 2002)).

¹¹ *Prometheus*, 373 F.3d at 393. Similarly, Sinclair’s reliance on the D.C. Circuit’s decision in *Sinclair* is misplaced. As noted by the *Prometheus* Court, a later D.C. Circuit decision in *Cellco* “characterized *Sinclair* as merely ‘piggyback[ing]’ on *Fox I* without ‘adopt[ing] a general presumption in favor of modification or elimination of regulations.’” *Id.* at 393.

Under the law of the case doctrine, the Commission is obliged to follow the Third Circuit's interpretation of Section 202(h). This doctrine posits that when a court decides upon a rule of law, its decision should continue to govern the same issues in later stages of the same case.¹² The doctrine "protect[s] against the agitation of settled issues."¹³ The law of the case "must be followed in all subsequent proceedings . . . unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice."¹⁴ This doctrine applies to judicial review of administrative decisions and requires "the administrative agency, on remand from a court, to conform its further proceedings in the case to the principles set forth in the judicial decision, unless there is a compelling reason to depart."¹⁵ Thus, the FCC is bound to apply the Third Circuit's interpretation of Section 202(h) and to reject industry arguments that Section 202(h) requires deregulation or prohibits tightening ownership limits in the public interest.¹⁶

II. Additional Diversity from New Media Does Not Eliminate the Need for Ownership Limits

In applying the Section 202(h) standard to the record amassed in this proceeding, the Commission should conclude that the broadcast ownership limits remain necessary in the public interest. It should reject the arguments of industry commenters that the rules are no longer necessary because of the diversity of content available via new media, especially the Internet.

¹² *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 815-816 (1988).

¹³ *Id.* at 816.

¹⁴ *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967).

¹⁵ *Grigsby v. Barnhart*, 294 F.3d 1215, 1218 (10th Cir. 2002). *See also Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998); *Brachtel v. Apfel*, 132 F.3d 417, 419-20 (8th Cir.1997).

¹⁶ Although the law of the case would apply in any event, here the Third Circuit expressly retained jurisdiction over these proceedings. *Prometheus*, 373 F.3d at 435.

The NAA, for example, points to the “myriad information sources accessible via the Internet,” and claims the Internet “alone should give the Commission comfort that consumers would continue to have a wealth of local news information options” even without strict local broadcast ownership rules.¹⁷ The NAB similarly refers to the “virtually unlimited voices available via the Internet”¹⁸ and notes that the Internet has been described as “diverse as human thought.”¹⁹ Fox calls the Internet “without doubt the most democratizing technology in the history of human invention.”²⁰ Commenters also point to the availability of urban wi-fi services²¹ and podcasting.²² Several provide examples of how traditional media outlets are using new media.²³

While consumers undoubtedly have more options for obtaining news and entertainment, these developments do not render the ownership limits obsolete. First, most of the new media cited by industry commenters requires broadband access to the Internet, and many Americans still lack even dial-up access to the Internet, much less broadband. Second, the traditional media continue to be the dominant providers of the local news in the new media environment. Finally, recent regulatory developments are likely to reduce the diversity of content on the Internet.

¹⁷ Comments of NAA at 93.

¹⁸ Comments of NAB at 35.

¹⁹ *Id.* at 42, (citing *Reno*, 521 U.S. at 870).

²⁰ *See, e.g.*, Comments of Fox at 14.

²¹ *See* Comments of Sinclair at 14; *see also* Comments of NAA at 51.

²² *See, e.g.*, Comments of NAA, at 29-30; Comments of NAB, at 19-20, 26; Comments of Sinclair at 16-17; Comments of Hearst-Argyle at 9-11; Comments of NBC at 17-18.

²³ *See, e.g.*, Comments of NAA at 30 (noting that “in the past year, all three broadcast network news operations have introduced podcasts”); Comments of Sinclair at 18 (newspaper reporters shoot video for newspaper websites). *See also* Comments of Hearst-Argyle at 9-11; Comments of NBC at 17-18.

A. Many People Are Unable to Access, Use or Afford New Media

Most of the news and entertainment sources cited by industry commenters—websites, blogs, podcasts, social networking sites—require access to the Internet. Many, such as YouTube, require hi-speed or broadband access. Yet, many parts of the U.S. still do not have broadband access, and even where it is available, many people cannot afford it.

Indeed, as UCC, et al. already pointed out in initial comments, more than a quarter of Americans (27 percent) report that they do not use the Internet at all. Less than half (42 percent) of adult Americans currently have broadband at home, and broadband penetration continues to lag in rural areas where the number of other media outlets also tends to be more limited. Moreover, minorities use the Internet less than non-minorities.²⁴

Industry emphasis on the availability of broadband Internet, as well as other new media tools such as ipods and cell phones, ignores the reality that lower-income Americans have inadequate access to these technologies. For example, women, who make-up two-thirds of below-minimum wage earners, may have more limited access to expensive new media tools.²⁵ Additionally, other commenters have presented evidence that African-Americans and Hispanics tend to place greater reliance on free over-the-air broadcasting—and less on broadband—than do Whites.²⁶ They also cite a 2005 Report of the General Accounting Office finding that 41 percent of American households did not have an Internet connection from home, and that of those households without an Internet connection, 75 percent did not have a computer at home.²⁷

²⁴ Comments of UCC, et al. at 43 n. 183 (citing Pew/Internet, *Internet Evolution: Internet Penetration and Impact* at 3 (Apr. 26, 2006)).

²⁵ See U.S. Bureau of Labor Statistics, *Characteristics of Minimum Wage Workers 2005*, at Table 1, available at <http://www.bls.gov/cps/minwage2005tbls.htm#7>.

²⁶ See, e.g. Comments of Catherine J.K. Sandoval, et al, at 3.

²⁷ *Id.* citing GAO, *Broadband Study*, Fig. 1.

Having a computer and an Internet connection is essential to obtaining access to most of the new media, including podcasts, blogs, and video sites like YouTube.

Industry commenters point out that some cities are providing or propose to provide wi-fi to their residents.²⁸ However, urban wi-fi is not available in rural areas or even the vast majority of cities and towns. In fact, many municipalities have been slow to adopt the service, partly because of preemptive litigation initiated by and legislative roadblocks for the benefit of existing providers.²⁹ Additionally, even where free or low-cost wi-fi is available, many cannot afford the computer with a wireless card needed to access it.

B. The Traditional Media Remain Dominant in the New Media Environment

Despite the changes in the media environment, local television, newspapers, and local radio remain the major sources of local news and informational programming for several reasons. First, they continue to be the most widely used media platforms. Second, they provide much of the content for the “new” media, either directly, through their involvement in such media ventures, or indirectly, by providing the news which is then repackaged by news aggregators or commented on by bloggers. Finally, even when news stories are occasionally broken by blogs, the traditional media also continue to serve their gatekeeper function by choosing which of these “stories” to pick up and publicize to a broader audience.

In promoting the public interest goal of diversity, the Commission correctly focuses on diversity of local news. In doing so, as the Third Circuit made clear, the Commission must take

²⁸ Sinclair refers to Annapolis, Philadelphia, Chicago, Manhattan and Mountain View, California (home of Google), while the NAA refers to San Francisco, Philadelphia and New Orleans. *See* Comments of Sinclair at 14 and Comments of NAA at 51.

²⁹ *See, e.g.,* Verne Kopytoff, *Fierce Wi-Fi fight expected in S.F. – Mayor hints lawsuits could hinder plan for affordable, high-speed wireless Internet access*, SAN FRANCISCO CHRONICLE, Oct. 4, 2005. *See* Richard Koman, *Will Congress Ban Municipal WiFi?*, O’Reilly Policy DevCenter (Aug. 3, 2005) (documenting the fight over municipal WiFi).

into account actual market shares in assessing the contribution that various outlets make to diversity.³⁰ A single source heard by millions is far more powerful in the marketplace of ideas than millions of independent voices heard by only a few.

As UCC, et al. and others demonstrated in initial comments, broadcast television, newspapers, and to a lesser extent, local radio, continue to dominate the local news and informational programming landscape.³¹ Local television remains the source the public relies upon most for news and information.³² In fact, a January 2007-released Gallup Poll survey reports that 55 percent of Americans tune into their local television news every day, yet only 22 percent report using the Internet as a daily source of news.³³ Thus, local TV news remains the major daily source of information on most subjects for most people.³⁴

Newspapers are the single most important source for news about the local community and local government.³⁵ Citizens who read newspapers are much more likely to learn about taxes, education, and government than they would in other media.³⁶ Newspapers report on the widest range of topics and include the deepest sourcing and most angles of any medium other

³⁰ *Prometheus*, 373 F.3d at 408-09.

³¹ Comments of UCC, et al. at 40-44. *See also* Consumers Union, *Media Use Survey*, attached to CU comments.

³² Michele Greppi, *Local TV Still the No. 1 News Source*, TVWEEK, Dec. 4, 2006. *See also* Comments of UCC, et al. at 41.

³³ Lydia Saad, *Local TV Is No. 1 Source of News for Americans*, Gallup News Service, Jan. 5, 2007, available at <http://www.galluppoll.com/content/Default.aspx?ci=26053&VERSION=p>.

³⁴ The Pew Research Center, *Online Papers Modestly Boost Newspaper Readership*, 28 (July 30, 2006), available at <http://people-press.org/reports/pdf/282.pdf> (“Pew Media Study”). It is also a major source of entertainment; even though cable systems may have hundreds of channels, in 2005 the few broadcast channels accounted for a 47 share in primetime and a 41 share over the course of the day. *12th Annual Video Competition Report*, 21 FCC Rcd at 2503, 2550-51, ¶ 93.

³⁵ *See* Comments of UCC, et al. at 42.

³⁶ Project for Excellence in Journalism (“PEJ”), *State of the News Media 2006* at Newspapers: Content Analysis.

than the Internet.³⁷ Furthermore, the Gallup Poll survey found that twice as many Americans report reading their local newspapers everyday as those that report using the Internet daily.³⁸ This suggests that newspapers have retained their dominant position in the media landscape despite the emergence of new media technologies.

Not only are the traditional outlets themselves the most influential, but the owners of these outlets are engaged in many “new media” ventures as well. Most broadcast stations and newspapers operate their own websites. Many commenters provide examples of local newspapers offering full-blown newscasts online or otherwise posting video on their websites.³⁹ Moreover, all of the major broadcast networks are involved in a range of cable, Internet and other new media ventures. For example, General Electric owns both the NBC and Telemundo networks, 38 television stations in the United States, and cable networks, including MSNBC, Bravo and the Sci Fi Channel. NBC Universal recently announced plans to redirect \$750 million from broadcast news and entertainment towards digital media.⁴⁰ The Walt Disney Company owns the ABC television network, 72 radio and 10 television networks, and cable networks including ESPN, The Disney Channel, SOAPnet, A&E and Lifetime. CBS, although just recently split from Viacom, still owns the UPN and Showtime networks and has been rapidly expanding its distribution on the Internet and mobile devices.⁴¹ News Corp, in addition to Fox Television, Fox News and other cable networks, owns DirectTV and MySpace.com. It uses the

³⁷ *Id.* The number of major stories with three or more sources was 90 percent for national newspapers, 53 percent for metro newspapers, 93 percent for national websites, and 20 percent for cable television.

³⁸ Saad, *Local TV Is No. 1 Source of News for Americans.*

³⁹ See Comments of NAA at 56-57; Comments of Sinclair at 18; Comments of UCC, et al., at 63.

⁴⁰ See *NBC Universal to Slash Costs In News, Prime-Time Programs*, WALL ST. J., Oct. 19, 2006.

⁴¹ See *Wilks Bcst. Group Will Buy 7 CBS Radio Stations*, COMM. DAILY, Oct. 12, 2006, at 9.

website to cross-promote its video programming.⁴² NBC and Fox are reportedly in talks to create a video website to compete with YouTube.⁴³ Clear Channel is also taking advantage of new media platforms by launching an Internet radio service.⁴⁴ “In an effort to keep up” with competition from new mobile platforms, it also teamed up with Cingular Wireless to stream programming and to provide it on-demand.⁴⁵

Broadcasters are also using their additional digital spectrum to provide programming over new media. For example, broadcasters have partnered with Samsung Electronics Co., which has introduced a technology that permits cell phones to pick up digital signals from local TV broadcasters. In at least three markets, Sinclair Broadcasting Group has already begun trials with Samsung.⁴⁶

The expansion of traditional media to new media does not increase diversity. The Third Circuit found that websites “that merely republish the information already being reported by the newspaper or broadcast station counterpart . . . do not present an ‘independent’ viewpoint and thus should not be considered as contributing diversity to local markets.”⁴⁷ In fact, people who use the Internet for news overwhelmingly go to websites of traditional media outlets.⁴⁸ While

⁴² See, e.g., Paul R. La Monica, *American Idol Worship – The hit talent show returns next week. Will it lead Fox to a ratings win over CBS, ABC and NBC?*, CNNMONEY.COM, available at http://money.cnn.com/2006/01/10/news/companies/idol_fox/index.htm (discussing Fox’s plans to cross-promote the television program “American Idol” on MySpace).

⁴³ Julia Angwin and Matthew Karnitschnig, *Media Titans Again Discuss Site to Rival YouTube*, WALL ST. J., Dec. 9, 2006.

⁴⁴ Arbitron, Inc., *Persons 12+, Average Weekly Audience* (Sept. 2006), available at http://www.arbitron.com/onlineradio/sep_ratings_2006.htm.

⁴⁵ Comments of Clear Channel Communications at 15.

⁴⁶ Li Yuan, *Cellphone Video Gets on the Beam*, WALL ST. J., Jan. 4, 2007.

⁴⁷ *Prometheus*, 373 F.3d at 406.

⁴⁸ Mark Cooper, *Media Usage: Traditional Outlets Still Dominate Local News and Information*, Media and Democracy Coalition, at 12 (2006) (noting that 51 percent of those who use the Internet as one of their top two sources for news visit the websites of local TV and daily newspapers most frequently); see also Pew Media Study at 15-16 (web news is dominated by a

some citizens do use news aggregator sites, such as Google News, those sites engage in no independent newsgathering and merely aggregate news from other sources.⁴⁹

Contrary to the claims of some commenters, blogs are not a significant source of news. Over two-thirds of the public have never read a blog or do not know what one is.⁵⁰ Only 9 percent of all Internet users have even been to a news blog.⁵¹ Most blogs are not about news or politics, but about personal lives or entertainment preferences. Video blogs, such as those on YouTube, are generally not devoted to news but to home-video type creations. Some popular video blogs have even turned out to be hoaxes.⁵² Most Americans do not consider blogs to be a source of news. Americans ranked blogging dead last in response to a Radio Television News

few sites); *Prometheus*, 373 F.3d at 406 (The Commission should not have included the Internet in its Diversity Index calculations because most people who use the Internet for local news use the websites of local broadcast stations and newspapers). Sinclair recognizes that “Internet [news] users favor websites of traditional media sources.” Comments of Sinclair at 17.

⁴⁹ Sinclair recognizes that many users visit portals, such as Yahoo, Google, and AOL for news. Comments of Sinclair at 17 (citing John B. Horrigan, *Online News*, PEW Internet & American Life Project, March 22, 2006). These portals, however, “aggregate and offer in one place, a variety of content . . . from thousands of . . . media sources.” Comments of Tribune at 18. After the websites of the traditional media, portals are by far the most commonly used Internet news source. Only 9 percent of all Internet users have even been to news blogs, the next most common source of Internet news. Horrigan, *Online News*; see also Comments of Sinclair at 17. Such websites do not provide independent news content; they merely collect already existing sources, the most notable of which are websites of the traditional media. See *About Google News*, available at http://news.google.com/intl/en_us/about_google_news.html (“Google News is a computer-generated news site that aggregates headlines from more than 4,500 English-language news sources worldwide, groups similar stories together and displays them according to each reader's personalized interests”); *How Do You Select Local News Sources?* Yahoo! News, available at <http://help.yahoo.com/l/us/yahoo/news/local/beta-63.html> (“Yahoo! News editors carefully select local news sources in each market in order to provide the best possible coverage while ensuring relevance to that particular local area.”).

⁵⁰ Bob Papper, The Radio-Television News Directors Association and Foundation, *The Future of News*, Oct.3. 2006, available at <http://www.rtnda.org/resources/future/index.shtml> at Section 1.

⁵¹ Horrigan, *Online News*. In fact, more than two-thirds of the overall public have never read a blog or do not know what they are. Papper, *The Future of News*, at Section 1.

⁵² For an example of a well-known YouTube hoax, see Virginia Heffernan & Tom Zeller, ‘*Lonely Girl*’ (and Friends) Just Wanted Movie Deal, N.Y. TIMES, Sept. 12, 2006 (discussing the YouTube drama of “Lonely Girl,” whose popular YouTube video blogs were revealed to be hoaxes designed to help the creators secure a movie deal).

Directors Association (RTNDA) poll asking “What is news?”⁵³ Even blogs that are concerned with news generally rely on print journalism for “the heart of [their] content.”⁵⁴ Similarly, much of the content on video sites such as YouTube comes from broadcast television.

Industry commenters cite a few examples of news stories that originated on a website or blog to suggest that these sources compete with traditional news outlets. Sinclair, for example, refers to a video clip of Virginia Senator George Allen calling an opposing candidate’s volunteer “macaca” that was shown publicized on YouTube.⁵⁵ The Newspaper Association of America discusses how bloggers raised questions about CBS News’ use of a memo purporting to document President Bush’s National Guard Service.⁵⁶ But in each of these cases, the incident did not become a prominent news story until traditional news outlets picked it up.⁵⁷ Thus, at best, blogs may supplement traditional news gathering and reporting. Broadcast stations and newspapers retain their important gatekeeping function of determining what “stories” to present to the broader community. In fact, rather than being hurt by competition from user generated content, a recent Deloitte study suggests that traditional media sources are in a prime position to capitalize on user-generated content such as blogs by incorporating it into their own content and, thus, “should see it as an opportunity and not a threat.”⁵⁸

⁵³ Papper, *The Future of News*, at Section 3.

⁵⁴ PEJ, *State of the News Media 2006* at Newspapers: Content Analysis.

⁵⁵ Comments of Sinclair at 18-20.

⁵⁶ Comments of NAA at 50.

⁵⁷ The story was originally posted on YouTube almost immediately after it happened on Aug. 11, 2006 and did not appear in the Washington Post until Aug. 15. Ryan Lizza, *THE NATION: Candidly Speaking; The YouTube Election*, N.Y. TIMES, Aug. 20, 2006 (discussing how the story first appeared on YouTube before hitting the front page of The Washington Post and then appearing on cable and network television news shows); See Tim Craig & Michael D. Shear, *Allen Quip Provokes Outrage, Apology*, WASH. POST, Aug. 15, 2006.

⁵⁸ Kate Holton, *User Generated Content Good for Old Media*, REUTERS, Jan. 3, 2007.

C. The Commission's Own Actions Will Limit the Diversity of Ideas Available on the Internet

For people with Internet access, the Internet has undoubtedly expanded the sources of information available to them. At the same time, the FCC's recent deregulatory activity with respect to Internet access means that there is no protection ensuring that Internet content will not be limited by service providers.

In its 1997 decision in *Reno v. ACLU*, the Supreme Court adopted the district court's characterization of the content available of the Internet "as diverse as human thought."⁵⁹ However, much has changed since 1997, and especially since the 2002 Biennial Review. Most consumers today can only choose between the cable company and the telephone company to provide them with Internet access.⁶⁰ Moreover, the FCC no longer requires that these phone and cable companies afford access to diverse content on a nondiscriminatory and equal basis. These developments can be expected to limit the diversity of content available to Americans on the Internet, and thus the Internet cannot be relied upon as a substitute for traditional media.

At the time of the *Reno* decision, the FCC's common carriage rules ensured that telephone companies could not discriminate against providers of computer and information services.⁶¹ Thus, consumers could use their phone lines to "dial up" any Internet Service

⁵⁹ *Reno v. ACLU*, 521 U.S. 844, 852 (1997) (quoting *ACLU v. Reno*, 929 F. Supp. 824, 842 (1996)).

⁶⁰ Some consumers lack broadband access all together while others may only have one provider available to them. See S. Derek Turner, *Broadband Reality Check*, Free Press, at 12 (2005), available at http://freepress.net/docs/broadband_report.pdf.

⁶¹ In essence, the rules required that phone carriers providing service defined as "basic" or "telecommunications" service could not interfere with the "enhanced" or "information" services, such as data processing and other computer services, running over their lines. See *Reg. and Policy Problems presented by the Interdependence of Computer and Comm. Servs., Final Decision and Order*, 28 F.C.C.2d 267 (1971); *Second Computer Inquiry, Final Decision*, 77 F.C.C.2d 384 (1980); *Amendment of Sections 64.702 of the Comm'n's Rules and Regs., Report and Order*, 104 F.C.C.2d 958 (1986) (Computer Inquiries).

Provider (ISP) without fear phone carriers would block their choice. In short, the common carriage obligations ensured a competitive ISP market that ensured consumers access to all lawful content without discrimination.

Many consumers have since migrated from dial-up Internet access to high-speed, or broadband, Internet access offered by phone and cable companies. For several years, it was unclear whether this high-speed service would be regulated as a cable service subject to local franchising, a telecommunications service subject to common carrier regulation, or an “information” service which would be largely unregulated.⁶²

In 2002 the FCC issued a declaratory ruling, later upheld by the Supreme Court under *Chevron* deference in *NCTA v. Brand X*,⁶³ finding that broadband Internet service provided by cable companies was an “information” service, and hence was not subject to common carrier regulation.⁶⁴ Yet, because the FCC understood that ISP competition was tied to consumers’ wide access to all Internet applications and content, the Commission issued net neutrality “principles” which held that consumers should be entitled to access the lawful Internet content of their choice, to run applications and use services of their choice, to connect their choice of legal devices that do not harm the network, and to have access to competition among network

⁶² See, e.g., *AT&T v. City of Portland*, 43 F.Supp. 2d. 1146 (1999).

⁶³ *National Cable Telecommunications Ass’n v. Brand X Internet Services, et al.*, 545 U.S. 967 (2005).

⁶⁴ *Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002). Soon after, the Commission determined that broadband Internet service offered by telephone companies to consumers, known as DSL, was also an information service and thus no longer subject to common carrier requirements. *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853 (2005).

providers, application and service providers, and content providers.⁶⁵ These principles, however, are not enforceable rules.

Armed with the legal ability and economic incentive to discriminate, phone and cable companies have since announced that they would charge for preferential access and tax their competitors.⁶⁶ While there have been a variety of efforts in Congress and before the FCC and FTC to implement binding “net neutrality” rules, currently there are no industry-wide net neutrality requirements.⁶⁷ Thus, without meaningful guarantees of net neutrality, the Internet cannot be counted on to provide alternative voices for the American public.

⁶⁵ *Policy Statement, Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14986 (2005).

⁶⁶ In December 2005, the chief technology officer for BellSouth Corp. remarked that an Internet service provider such as BellSouth should be able to charge companies like Yahoo Inc. for the opportunity to have its search site load faster than that of Google Inc. Jonathan Krim, *Executive Wants to Charge for Web Speed: Some Say Small Firms Could Be Shut Out of Market Championed by BellSouth Officer*, WASH. POST., Dec. 1, 2005. Similarly, in October 2005, the CEO of SBC Telecommunications (now AT&T) said “there’s going to have to be some mechanism for [Internet upstarts like Google, Yahoo!, and Vonage] who use these [broadband] pipes to pay for the portion they’re using” because “[w]e have” those pipes. *At SBC, It’s All About “Scale and Scope*, BUSINESSWEEK, October 7, 2005. Finally, in January 2006, the *Wall Street Journal* wrote that “[l]arge phone companies, setting the stage for a big battle ahead, hope to start charging Google Inc., Vonage Holdings Corp. and other Internet content providers for high-quality delivery of music, movies and the like over their telecommunications networks.” Dionne Searcy & Amy Schatz, *Phone Companies Set Off a Battle over Internet Fees*, WALL ST. J., Jan. 6, 2006.

⁶⁷ One recent implementation of net neutrality principles involved AT&T’s acquisition of Bell South, where the telecommunications giant agreed to “abide by much the same ‘network neutrality’ rules that it spent 2006 strenuously opposing in Congress.” There the FCC required AT&T to follow non-discrimination rules for the next two years as a condition of the agency’s approval of the merger. Tom Abate, *Net Neutrality Advocates Hail AT&T’s Concessions to get Approval for BellSouth Acquisition*, SAN FRANCISCO CHRONICLE, Jan. 7, 2007.

III. The Claimed Financial Distress of Local Television Stations and Newspapers Does Not Justify Eliminating Ownership Limits

Industry commenters also claim that broadcast stations and newspapers are experiencing financial difficulties and that additional consolidation will somehow allow them to better compete against the “new media.” The Commission should reject these arguments. The industry claims of financial problems are unsupported and greatly exaggerated. Moreover, it is not in the public interest to allow these companies to increase profits by reducing competition.

A. Claims of Financial Woe Are Greatly Exaggerated

Several industry commenters devote much paper to complaining about increased competition from other media outlets and declining profits. For example, the NAB devotes an entire section to arguing that “Television Stations in Medium and Small Markets Are Experiencing Severe Economic Stresses.”⁶⁸ Similarly, the Smaller Market Broadcasters claim: “The financial viability of smaller market stations is at risk.”⁶⁹ The NAA argues that a “corollary of the increasing fragmentation in the news and information marketplace has been a decline in the prominence and economic performance of local daily newspapers and broadcast outlets.”⁷⁰

Although some industry commenters make dire predictions, they present very little current evidence of actual losses that could threaten their ability to serve the public interest. The Smaller Market Broadcasters, for example, rely primarily on the record of the 2002 Biennial Review.⁷¹ The NAB submits a new study by Theresa J. Ottina that purports to show the

⁶⁸ Comments of NAB at 89- 94.

⁶⁹ Comments of Smaller Market Television Stations at 3.

⁷⁰ Comments of NAA at 41; see also *Id.* at 46 (referring to the “competitive challenges facing traditional newspapers and broadcasters”). Even NAA, however, is forced to concede that “local television stations generally have remained profitable,” despite loss of viewership. *Id.* at 43.

⁷¹ Comments of Smaller Market Television Stations, at 6-7.

weakening financial viability of television stations in medium and small markets.⁷² However, the methodology of this study is so deeply flawed that its conclusions must be rejected. Since others will surely provide a detailed critique of this study, we will simply point out one of the most obvious problems.

This study analyzes the profitability of certain stations affiliated with ABC, CBS, FOX, and NBC for the years 1997, 2001, and 2003 and concludes that the low-rated affiliated stations were less profitable in 2003 than they were in 1997.⁷³ In selecting these odd-numbered years, however, it ignores data from election years when profits would be higher due to election-related spending. In 2006, local broadcast television revenues were up largely due to political advertising. Political spending on broadcast television accounted for \$207.3 million out of a total \$442.5 million increase of all local broadcast television revenue.⁷⁴ For example, News Corp.'s total profits soared as “[a]dvertising growth at Fox Broadcasting and the Fox-owned stations group helped boost TV operating income to \$192 million, up 20 percent.”⁷⁵ Thus, by omitting data from national election years, the NAB study grossly under-represented the profitability of broadcast television stations.

More recent and less self-interested evidence suggests that television stations still bask in financial success. According to the Project for Excellence in Journalism (PEJ), local television remains “an enormously profitable industry, with its pre-tax margins of 40 percent and even 50

⁷² Comments of NAB at Attachment J (Theresa Ottina, *The Declining Financial Position of Television Stations in Medium and Small Markets*, August, 2006); see also Comments of NAB at 91-93.

⁷³ *Id.* at 93.

⁷⁴ John Eggerton, Political, *Telco Dollars Drive Local TV Revs*, BROAD. & CABLE, Dec. 14, 2006.

⁷⁵ Michele Greppi, *News Corp. Profit Soars in Latest Quarter*, TV WEEK, Nov. 8, 2006.

percent.”⁷⁶ Moreover, the prospects for continued financial success look good.

PricewaterhouseCoopers recently boosted its forecast for average growth in network television advertising sales by 7.1 percent per year to \$48.8 billion in 2009 and nearly \$52 billion in 2010.⁷⁷

The FCC’s own staff has similarly concluded that broadcasting has remained profitable. A June 2006 study recently posted on the FCC’s website, which uses 2004 data from the National Association of Broadcasters, concluded that in every market size category “both profits and cash flow are positive . . . and are particularly robust in larger markets.”⁷⁸ Indeed, even the NAA and Gannett concede, with considerable understatement, that local broadcast stations “generally have remained profitable.”⁷⁹

Similarly, claims that newspapers are “struggling to keep pace,”⁸⁰ that print advertising has “taken a substantial hit”⁸¹ and that newspaper stock prices are falling,⁸² also paint a misleading picture of the financial health of the newspaper publishing business. In fact, newspapers are enormously profitable. Local daily newspapers generate average operating profits of approximately 20 percent.⁸³ These profit margins are more than double the average

⁷⁶ PEJ, *The State of the News Media 2006*, at Local TV, Economics.

⁷⁷ These estimates are up from last year's forecast of 5.9 percent annual growth to \$43.2 billion in 2009. David Lieberman, *Consultants See TV Ad Dollars Growing 7 percent a Year*, USA TODAY, June 21, 2006.

⁷⁸ Jonathan Levy and Anne Levine, *The Evolving Market Structure and Changing Boundaries of the U.S. Television Market in the Digital Era*, at 20 (June 6, 2006), available at <http://www.fcc.gov/ownership/materials/newly-released/evolving060106.pdf>.

⁷⁹ Comments of Gannett at 23; Comments of NAA at 43.

⁸⁰ Comments of Gannett at 21.

⁸¹ Comments of NAA at 42 (citing 0.3 percent growth in print advertising).

⁸² *Id.*; Comments of Gannett at 21.

⁸³ PEJ, *State of the News Media 2006*, at Newspapers, Economics. These operating profits derive from strong advertising expenditures in print newspapers, which increased by 3.8 percent

profits of Fortune 500 companies and are also higher than “the average pre-tax operating margin for the oil industry.”⁸⁴

Print newspaper advertising remains strong. Newspaper advertising rose by 46.5 percent from 1993 to 2004, even though, unlike emerging media, newspapers were already a mature industry in 1993.⁸⁵ In the first quarter of 2006 spending on newspaper print advertising increased over the corresponding period in 2005.⁸⁶ Newspaper advertising still generates \$48 billion a year, three times the amount spent for all online ads.⁸⁷ Newspapers have also introduced free local dailies,⁸⁸ whose circulation and advertising adds to newspapers’ reach and profits.

Although newspapers complain about the decline of ad revenues due to Internet competition, a 2006 internal Commission review of the newspaper industry recently released on the FCC’s website concludes that newspapers were “slow to realize the potential of the Internet as a new source of readers and advertising revenues.”⁸⁹ Thus, though initially the Internet may have sapped some revenues, newspaper companies are beginning to realize the benefits of online growth and advertising for themselves. Online newspaper readership increased by 15.8 percent

through the first nine months of 2004 to 33 billion dollars, and increased again from 1 percent to 2 percent in 2005. They combined with strong growth in online and niche publications to push total revenues up from 2 percent to 4 percent.

⁸⁴ *Id.*

⁸⁵ Comments of NAA at 42.

⁸⁶ *Id.*

⁸⁷ Jeremy Caplan, *Extra: Newspapers Aren’t Dead*, TIME.COM, Dec. 3, 2006.

⁸⁸ Comments of NAA at 25.

⁸⁹ *Financial Health of the Newspaper Industry*, at 2 (June 2006), available at <http://www.fcc.gov/ownership/materials/newly-released/financialhealth060006.pdf>. The authors note that though the newspaper industry has faced challenges from the emergence of the Internet, the industry as a whole has remained profitable even in the face of a cyclical decline in ad revenues and increases in the cost of newsprint. *Id.* at 1-2. The authors also comment that newspaper ad revenue losses can also be traced to the Internet’s erosion of newspapers’ previously near-monopolistic hold on the local advertising market. *Id.* at 3.

in 2005,⁹⁰ and by a full one-third in the first half of 2006.⁹¹ The CEO of New York Times Co. indicated in late 2005 that analysts should consider online reach in addition to print circulation to fully understand newspapers' value.⁹² Indeed, 85 percent of adults either read a physical paper or visit a newspaper website every week.⁹³

Like online readership, online advertising revenue for newspapers has also skyrocketed. Newspapers netted a full 41 percent of all local online revenue last year.⁹⁴ In 2005, online advertising revenues at public newspapers grew 30 to 60 percent.⁹⁵ NAA chief marketing officer John Kimball has observed that “[n]ewspaper Websites have become a significant addition to the print product, and are driving large audience growth.”⁹⁶ Indeed, articles cited heavily by the NAA conclude that newspapers will see “exceptional long-term growth from online revenue” and that “[n]ewspapers have been *helped* by the general growth in online advertising.”⁹⁷ Moreover, ad-driven Internet companies like Google, Yahoo, and Monster.com are setting up partnerships with print publishers to help them manage their online advertising, which will only

⁹⁰ Newspaper Association of America, *The Source: Newspapers by the Numbers*, available at <http://www.naa.org/thefsource/>.

⁹¹ Robert MacMillan, *Online Newspaper Readership Grows*, REUTERS, October 4, 2006.

⁹² Editorsweblog.org at http://wef.blogs.com/editors/i_future_of_print/index.html (“[T]he wide reach of newspapers is surprising after years of falling circulation. We're not saying people shouldn't look at circulation. But we want to be sure we get the full credit for what newspapers have to offer.”).

⁹³ Caplan, *Extra: Newspapers Aren't Dead*.

⁹⁴ *Local TV's Clear Shot At the Net*, BUSINESSWEEK ONLINE, May 15, 2006.

⁹⁵ Newspaper Association of America, *The Source*. Combined WashingtonPost.com and Newsweek.com revenue rose 24 percent from last year. See *New Technologies*, COMM. DAILY, Nov. 6, 2006.

⁹⁶ *Local TV's Clear Shot At the Net*, BUSINESS WEEK ONLINE, May 15, 2006.

⁹⁷ Julie Bosman, *Online Newspaper Ads Gaining Ground on Print*, N.Y. TIMES, June 6, 2006 (emphasis added), cited in Comments of NAA, at 42, n.168, 172.

strengthen the publishers' online presence.⁹⁸ In late December 2006, for example, 176 newspapers formed a partnership with Yahoo to share "content, advertising, and technology."⁹⁹

Newspapers not only compete with the new media, they also use new media platforms and own new media properties. NAA complains that while "there are no prohibitions ... on print oriented Internet sites from extending into the provision of audio or video services," broadcasters cannot buy newspapers in the same town.¹⁰⁰ But newspaper companies may use their Internet sites to provide print, audio, and video, just as any other company can. Indeed, some analysts naturally believe that the "online environment is [the newspapers'] to lose."¹⁰¹

Claims about falling stock prices and the Tribune Company's economic woes are also misleading. Newspaper stock prices historically would have internalized newspaper companies' enormously high profit margins and so would have reflected those profit margins. When those profit margins decrease slightly, stock prices will fall relative to previous prices, even though the companies retain very high margins. Many investors, in fact, believe newspaper stocks are undervalued, as they remain local monopolies generating considerable cash.¹⁰²

As for Tribune, shareholders are unhappy with Tribune's management in large part because of that company's failed cross-ownership strategy.¹⁰³ Tribune also suffered several problems of its own making: one of its papers was severely inflating its circulation so Tribune has been forced to set aside \$90 million to pay bilked advertisers; also, it gambled on a tax dispute inherited from Times Mirror but has had to appeal a billion-dollar tax bill after losing

⁹⁸ Jeremy Caplan, *Google's Growing Grasp*, TIME.COM, Oct. 1, 2006.

⁹⁹ Miguel Helft & Steve Lohr, *176 Newspapers to Form a Partnership with Yahoo!*, N.Y. TIMES, Nov. 20, 2006.

¹⁰⁰ Comments of NAA at 45.

¹⁰¹ Paul R. La Monica, *Contrarian Bet: Value Investors Nibble on Newspapers*, CNN MONEY.COM, April 6, 2006.

¹⁰² *Id.*

¹⁰³ See Comments of UCC, et al. at 66-67.

that case.¹⁰⁴ Thus, if anything, the Tribune experience suggests that retaining the cross-ownership limit, subject to possible waivers, would be in the public interest, yet would not harm newspaper industry.

B. It Is Not in the Public Interest to Protect Companies from Competition

Even if broadcast stations and newspapers were struggling financially, it does not follow that it would be in the public interest to allow greater consolidation. Industry commenters place the blame for their supposed financial woes on increased competition and “fragmentation” in the media marketplace.¹⁰⁵ For example, according to the Small Market Television Stations, the “most important” reason for their decline in profits is competition from other media.¹⁰⁶ NAA argues that “increasing fragmentation of the media marketplace has continued to chip away at the audience for ... daily newspapers and broadcast outlets.”¹⁰⁷ The NAB argues that the “[l]ocal and national advertisers are being lured by new competitors.”¹⁰⁸

¹⁰⁴ Rachel Smolkin, *Tribune Tribulations*, AM. JOURNALISM REV., Dec. 2006/Jan.2007.

¹⁰⁵ Comments of NAB at 97; NAA at 41; Comments of Gannett at 21.

¹⁰⁶ Comments of Smaller Market Television Stations at 8.

¹⁰⁷ Comments of NAA at 24.

¹⁰⁸ Comments of NAB at 29. These arguments constitute unabashed rent-seeking—that is, incumbents pleading with a government regulator to protect them from new competition from other media. Indeed, the industry commenters’ arguments parallel those made decades ago under the now-discredited Carroll Doctrine. Under that doctrine, incumbent broadcasters could oppose the FCC’s grant of a new license in the area by arguing that “ruinous” competition would harm existing broadcasters. The theory was that the amount of available advertising in an area was fixed and that new competitors would take a piece of that advertising, thereby lowering incumbents’ profits, which would give them less money and cause them to provide worse service to the public. *See, e.g., Policies Regarding Detrimental Effects of Proposed New Broadcasting Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *clarified* 4 FCC Rcd 2276 (1989). In abandoning this doctrine in 1988, the FCC concluded the public interest is not served by protecting existing broadcast stations from competition from new broadcast stations.” 3 FCC Rcd at 640. While here commenters seek protection from new media competition rather than new broadcast stations, the same principle applies.

While broadcast companies and newspapers may well be facing competition, this competition is a positive development. All consumers, viewers, and listeners are helped when companies face competition. The Commission has sought to promote its goal of development of alternative mass media technologies “on the basis that an unrestricted, competitive environment generally leads to better service to the public.”¹⁰⁹ In a competitive environment, advertising rates go down, quality goes up, and audiences are better served.

Broadcast companies are not limited in any way that their competitors are not – they are free to enter the new media space (as many have) and new media companies face the same limits as existing licensees if they should choose to enter the broadcast medium. The only difference is that while large broadcast companies can easily enter and succeed in the new media space through their large financial reserves and cross-promotion of existing outlets, the new media companies have little opportunity to obtain a broadcast license because they are scarce and exceedingly expensive.

A Future of Music Coalition (FMC) report suggests that consolidation of the old media, not the mere existence of new media, is likely to blame for the decreasing audience share of local broadcast stations and newspapers. FMC found that radio listenership experienced a “rapid descent” between 1995 and 1998, the years of most intense consolidation, long before the rise of Internet radio, satellite radio, and iPods.¹¹⁰ Instead of improving radio’s position, consolidation has reduced the diversity listeners seek. The FMC report concludes that increased concentration of local radio ownership has resulted in a relatively small number of programming formats now

¹⁰⁹ 3 FCC Rcd at 640.

¹¹⁰ Peter DiCola, *False Premises, False Promises: A Quantitative History of Ownership Consolidation in the Radio Industry*, Future of Music Coalition, at 45, available at <http://www.futureofmusic.org/research/radiostudy06.cfm>.

dominating commercial AM and FM radio.¹¹¹ For example, owners who exceed or meet the local ownership cap “tend to program heavily in just eight formats.”¹¹² Additionally, the largest station groups do not offer “niche” formats, such as classical music.¹¹³ Playlists can overlap up to 97 percent between commonly owned stations in the same format.¹¹⁴

A FCC draft staff paper on localism just recently posted on the FCC’s website provides further support for FMC’s findings of increased radio content homogenization. This study found that “[c]ommonly-owned stations within the same format play more similar music within the same format than separately-owned stations within the same format because common ownership within formats generates greater playlist similarity.”¹¹⁵ This suggests that playlists of commonly owned stations are more likely to be the products of corporate dictates rather than responsiveness to local music tastes and talent.

Because of homogenized media content on traditional media, citizens find themselves turning increasingly to the more responsive new media alternatives in order to fulfill their diverse media needs. Country music fans in New York City and Los Angeles turn away from broadcast radio to other media because there is *not one* full-power country music station in either

¹¹¹ *Id.* at 7, 113.

¹¹² *Id.* at 7.

¹¹³ *Id.* According to the Washington Post, commercial classical stations are a dying breed, dropping in number from 40 to 27 stations nationwide since 1998. Marc Fisher, *Snyder's Gambit May Silence D.C.'s Last FM Classical Music Station*, WASH. POST, Dec. 12, 2006.

¹¹⁴ DiCola, *False Premises* at 7. See also, Jared Allen, *Country Legends Plead with FCC to Stop Radio Consolidation*, NASHVILLE CITY PAPER, Dec. 12, 2006. According to a prominent country songwriter and publisher, the number of top country singles on country radio stations has gone from 40 to 15 since the passage of the Telecommunications Act. “The three country stations [in Nashville] sound exactly the same.” *Id.*

¹¹⁵ George Williams and Keith Brown, *FCC Radio and Music Diversity Paper* at 19 (2005), available at <http://www.fcc.gov/ownership/materials/newly-released/radiomarketstructure081506.pdf>.

market.¹¹⁶ Classical music fans in Washington, D.C. may soon have to turn to new media as the city's only classical music service was recently moved to a new frequency with a weak signal and may soon change formats.¹¹⁷ Similarly, Houston, the fourth largest city in the country, has no station with an "all news" format.¹¹⁸ Competition, not consolidation, would increase broadcasters' incentives to serve their communities.

For the same reason, the FCC should discount companies' arguments that if they faced less competition and made more money, they would provide better local service.¹¹⁹ NAB, for example, argues that the deteriorating condition of many television stations threatens the economic viability of local news."¹²⁰ The Smaller Market Television Stations similarly argue that the financial challenges of competition will lead to a "reduction or elimination of localized service," citing a 2002 article reporting that eight television stations around the country had dropped locally produced news programs.¹²¹

UCC, et al. note that it is difficult to evaluate claims that local news has decreased because the FCC does not require television stations to report whether and how much local news they actually provide.¹²² There is little indication, however, that many stations have recently stopped airing local news. A recent RTNDA study concludes that, "[d]espite the attention given to stations that have dropped local news, there has actually been a net increase every year we've

¹¹⁶ Allen, *Country Legends Plead with FCC to Stop Radio Consolidation*. (Emphasis added).

¹¹⁷ Fisher, *Snyder's Gambit May Silence D.C.'s Last FM Classical Music Station* (discussing a tentative sale that would result in a format change).

¹¹⁸ PEJ, *State of the News Media 2006*, at Radio: Content Analysis.

¹¹⁹ See e.g., Comments of Nexstar Broadcasting at 10; Comments of Gannett at 22; Comments of NAB at 89; Comments of Smaller Market Television Stations at 6-8.

¹²⁰ Comments of NAB at 94.

¹²¹ Comments of Smaller Market Television Stations at 9 citing Columbia Journalism Review.

¹²² An NPRM asking whether broadcast stations should be required to make such disclosures has been pending since 2000. *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, 15 FCC Rcd 19816 (2000).

tracked the number.”¹²³ It noted that “[t]he total amount of local TV news time per week remains at record levels.”¹²⁴ Moreover, the same study suggests that local news remains profitable. Only 12 percent of news directors surveyed reported that their news operations were showing a loss.¹²⁵ Indeed, the NAB reports that local news still provides local broadcasters with much of their revenue; on average 42.8 percent of television revenues derive from news, with 47.1 percent derived in markets 101-150 and 43.3 derived in markets 151 and down.¹²⁶ Thus, it seems unlikely that many stations will cut back local news as a result of competition.

Similarly, there is little reason to believe that reducing competition in the provision of news by allowing newspaper-broadcast cross ownership would benefit the public. For example, instead of resulting in benefits to the public, Tribune Company’s acquisition of Times Mirror in 2000 resulted in significant cutbacks in the resources devoted to news.¹²⁷ The former editor of the *Los Angeles Times*, who was fired for refusing to carry out job cuts desired by headquarters, characterized the cost-cutting as “ravaging” the paper.¹²⁸ Tribune also phased out the international reporting after it acquired *Newsday* newspaper, even though *Newsday*’s international reporting garnered more Pulitzers than the *Times* or *Chicago Tribune*.¹²⁹

Moreover, to the extent that the FCC concludes that broadcast stations are not providing local news and other programming that local communities desire, it could more directly achieve

¹²³ Bob Papper, *News, Staffing and Profitability*, COMMUNICATOR, Oct. 2005, at 34.

¹²⁴ *Id.*

¹²⁵ *Id.* at 36.

¹²⁶ Comments of NAB 96, n.225. Indeed, the NAB concedes that there have been “increases in the number of local broadcast television news providers in the 1980s and 1990s.” *Id.* at 95.

¹²⁷ Smolkin, *Tribune Tribulations*.

¹²⁸ *Id.*

¹²⁹ *Id.*

this goal by requiring broadcast stations to provide local news, rather than allowing local stations to consolidate and hope that the stations invest additional profits in local news operations.

IV. The Newspaper-Broadcast Cross-Ownership Rule Is Constitutional.

Tribune and Media General repeat the arguments they made in the 2002 Biennial Review that the FCC should repeal the newspaper-broadcast cross-ownership rule (“NBCO”) because it violates the First Amendment and the Equal Protection Clause of the Constitution. The Supreme Court has already reviewed and upheld the NBCO rule.¹³⁰ Similarly, only two years ago the *Prometheus* court unanimously rejected these same constitutional challenges¹³¹ and the Supreme Court declined to review that decision,¹³² thus the Commission should similarly refuse to entertain these meritless arguments.

A. The Newspaper-Broadcast Cross-Ownership Rule Is a Constitutional Means of Promoting the Public’s First Amendment Right to Diverse Sources of News and Information.

Tribune and Media General assert that the NBCO should be subject to heightened scrutiny because its “constitutional underpinning”— namely the scarcity doctrine — is “dubious” and “obsolete.”¹³³ They contend that the advent of the Internet, cable TV, and satellite radio has dramatically changed the way in which consumers receive information, thereby freeing the public from its dependence upon a scarce resource.¹³⁴ They also argue that both the Commission and Congress have provided signals indicating that the courts should re-

¹³⁰ *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 802 (1978) (“*NCCB*”).

¹³¹ *Prometheus*, 373 F.3d 372, *cert. denied*, 545 U.S. 1123 (2005). Chief Judge Scirica, concurring in part with the majority’s decision and dissenting in part, stated that he joined in the majority’s “rejection of the constitutional challenges.” *Id.* at 435 (Scirica, C.J., concurring in part, dissenting in part).

¹³² 545 U.S. 1123 (2005).

¹³³ Comments of Tribune at 83, Comments of Media General at 71, 73.

¹³⁴ Comments of Tribune at 88, Comments of Media General at 70.

examine the scarcity doctrine.¹³⁵ Additionally, Media General claims that the broadcast spectrum is “no more scarce than any other good” and thus “provides no basis for the discriminatory treatment embodied in the rule.”¹³⁶

The Commission should reject each of these arguments. The NBCO rule is consistent with well-established First Amendment doctrine. First, the law of the case doctrine compels the Commission to apply rational basis review and uphold both the constitutionality of the NBCO rule and the validity of the scarcity doctrine. Second, even if the Commission were not bound by the law of the case doctrine, it should nevertheless apply rational basis review because the physical broadcast spectrum continues to be a scarce resource as a matter of fact and law, and therefore provides justification for rational basis review.

1. The Law of the Case Doctrine Compels the Commission to Uphold the Rule as Constitutional.

The law of the case doctrine forecloses Tribune and Media General’s First Amendment claims on remand. That doctrine mandates that “when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.”¹³⁷ In so doing, courts and agencies promote the finality and efficiency of the judicial process by “protecting against the agitation of settled issues.”¹³⁸ Therefore, an agency on remand from a

¹³⁵ Comments of Tribune at 90-92, Comments of Media General at 75-77.

¹³⁶ *Id.* at 73-74.

¹³⁷ *Christianson*, 486 U.S. at 816 (citing *Arizona v. California*, 460 U.S. 605, 618 (1983)). *See also Commercial Union Insurance Co. v. Walbrook Insurance Co.*, 41 F.3d 764, 769 (1st Cir. 1994) (holding that a “decision of an appellate court on an issue of law, unless vacated or set aside, governs the issue during all subsequent stages of litigation in the nisi prius court and thereafter on any further appeal”); Moore’s Federal Practice § 134.20.

¹³⁸ Moore’s Federal Practice § 134.20.

court must “conform its further proceedings in the case to the principles set forth in the judicial decision, unless there is a compelling reason to depart.”¹³⁹

Here, the Third Circuit determined that the Commission’s “continued regulation of the common ownership of newspapers and broadcasters does not violate the First Amendment rights of either.”¹⁴⁰ In addition, the court upheld the validity of the scarcity doctrine, stating that it was “not in a position to reject” it; and even if it were, it refused to “accept the . . . contention that the expansion of media outlets has rendered the broadcast spectrum less scarce.”¹⁴¹ Furthermore, when presented with these same arguments by Tribune, Media General, and other broadcasters two years ago, the Supreme Court denied certiorari.¹⁴² Thus, the Commission is compelled to reject these arguments here again on remand.

2. Broadcast Spectrum Scarcity Remains

Even were the Commission not bound by the law of the case, it should nonetheless subject the NBCO rule to rational basis review because the broadcast spectrum continues to be scarce today as a matter of both law and fact.

(a) The Recent Rise in the Number of Media Outlets Has No Bearing on the Scarcity of the Broadcast Spectrum.

Tribune and Media General persist in claiming that the “explosion of fundamental technological changes” renders the scarcity doctrine “obsolete” because many people now receive news and information via the Internet, cable television, or satellite radio rather than over

¹³⁹ *Wilder*, 153 F.3d at 803.

¹⁴⁰ *Prometheus*, 373 F.3d at 402.

¹⁴¹ *Id.*

¹⁴² 545 U.S. 1123 (2005).

the public airwaves.¹⁴³ However, this argument merely demonstrates the increasing number of *media outlets*, a trend that has no bearing on the *physical scarcity* of the broadcast spectrum. Because broadcast spectrum is a scarce, publicly-owned resource, and more people would like to broadcast than can be accommodated, the Commission issues licenses to broadcast conditioned on serving the public interest.¹⁴⁴ With demand for licenses exceeding supply, no person or entity has a First Amendment right to a license; thus, a denial of one cannot constitute a First Amendment violation. Consequently, licensing regulations are subject only to rational basis review and every court that has considered ownership regulations of the type at issue here has found them to be a constitutional means of promoting the public interest in diversity and competition.

As early as 1943, the Court rejected a constitutional challenge brought by radio broadcast owners against an ownership rule known as the “chain broadcasting rule.” The Court found that “unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation. Because it cannot be used by all, some who wish to use it must be denied.”¹⁴⁵ Denying a would-be broadcaster a license, the Court therefore concluded, “is not a denial of free speech.”¹⁴⁶

Subsequently, the Court unanimously observed in *Red Lion* that “[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of

¹⁴³ Comments of Media General at 77-79, Comments of Tribune at 89-90. Along the same lines, Media General additionally argues that the broadcast spectrum is “no more scarce than any other good.” Comments of Media General at 73.

¹⁴⁴ See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

¹⁴⁵ *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 226 (1943).

¹⁴⁶ *Id.* at 227.

every individual to speak, write, or publish.”¹⁴⁷ Following this logic, the Court in 1978 rejected challenges to the same cross-ownership rule at issue here in *NCCB*, finding the rule to be “a reasonable means of promoting the public interest in diversified mass communications.”¹⁴⁸ Observing that the number of broadcast signals “is far exceeded by the number of persons wishing to broadcast to the public,” the Court held that “Government allocation and regulation of broadcast frequencies are essential, as we have often recognized.”¹⁴⁹ Therefore, the Court concluded, “[e]fforts to enhance the volume and quality of coverage of public issues through regulation of broadcasting may be permissible where similar efforts to regulate the print media would not be.”¹⁵⁰

More recently, the Court affirmed the notion of physical spectrum scarcity in *Turner I*. There, the Court distinguished broadcast regulation from cable regulation, noting that “[t]he justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium.”¹⁵¹ This physical scarcity, the Court continued, “required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters.”¹⁵² The Court similarly differentiated broadcast regulation from that of the Internet in *Reno v. ACLU*, where it used heightened scrutiny to strike down legislation aimed at protecting minors from indecent material on the Internet. The Court recognized that there exist “special justifications for regulation of the

¹⁴⁷ *Red Lion*, 395 U.S. at 388.

¹⁴⁸ *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 802 (1978) (“*NCCB*”).

¹⁴⁹ *Id.* at 799.

¹⁵⁰ *Id.* (internal quotation marks omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 96 (1976)).

¹⁵¹ *Turner Broadcasting System, Inc v. FCC*, 512 U.S. 622, 637 (1994) (“*Turner I*”).

¹⁵² *Id.* at 637-38.

broadcast media that are not applicable to other speakers,” and that unlike the broadcast spectrum, “the Internet can hardly be considered a ‘scarce’ expressive commodity.”¹⁵³

More than a half-century of Supreme Court precedent dictates that the Commission’s efforts to license the spectrum are subject to rational basis review. Because the increasing number of media outlets does not affect the spectrum’s physical limits, the spectrum continues to be scarce. Thus, this precedent still controls today.

**(b) Neither the Commission nor Congress
Have Signaled to the Courts that the
Scarcity Doctrine Should Be Overruled.**

Twenty years ago, the Court in *League of Women Voters* stated in a footnote that upon “some signal from Congress or the FCC . . . some revision of the system of broadcast may be required.”¹⁵⁴ Tribune and Media General point to a 1987 FCC decision, statements of former Commissioners, and the 1996 Telecommunications Act to support their contention that both the Commission and Congress have provided this signal.¹⁵⁵

As the United Church of Christ has previously argued, all of these examples fall well short of constituting the signal required by *League of Women Voters*.¹⁵⁶ Congress has not evidenced a desire to reconsider the scarcity doctrine. Media General mischaracterizes Congress’ decision to award licenses using spectrum auctions rather than comparative hearings as an effort to equate licenses with economic goods “traded on the open market,” thereby

¹⁵³ *Reno*, 521 U.S. at 868-70.

¹⁵⁴ *League of Women Voters*, 468 U.S. 364, 376, n.11 (1984).

¹⁵⁵ Comments of Tribune at 90-92, Comments of Media General at 75-77, 81-83.

¹⁵⁶ See Brief for Office of Communication of the United Church of Christ as Intervenors at 14-17, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (2004) (No. 03-3388).

stripping the Commission of a “basis for continued regulation based on spectrum scarcity.”¹⁵⁷

Yet, that action was intended to address the inefficiencies of the hearing process stemming from the growing number of applications for new broadcast licenses.¹⁵⁸ Indeed, the Balanced Budget Act which legislated the change, relied upon spectrum scarcity in requiring that minimum amounts be raised by each auction.¹⁵⁹ In fact, recent spectrum auctions have produced ample evidence of spectrum scarcity, with more bidders than the spectrum can accommodate offering huge amounts of money to purchase licenses.¹⁶⁰

Accordingly, the Supreme Court in recent years has consistently refused to overturn the scarcity doctrine. In *McConnell v. FEC*, the Supreme Court explicitly relied upon *Red Lion* in upholding an important provision of the Bipartisan Campaign Reform Act of 2002.¹⁶¹ Furthermore, when presented with the same arguments the Commission now faces on remand, the Court declined to review the Third Circuit’s decision in *Prometheus*.¹⁶² Therefore, not only have the Commission and Congress affirmed the scarcity doctrine in recent years, but the Supreme Court has found no reason to question its validity.

Nor has the Commission repudiated the scarcity doctrine. The Commission relied on scarcity in its brief to the Second Circuit in *Fox v. FCC* to support its assertion that broadcast regulations are subjected to a lower level of scrutiny than other speech regulations.¹⁶³

¹⁵⁷ Comments of Media General at 77. This statement apparently ignores the fact that broadcast licenses have been always openly traded in secondary markets, but were and continue to be subject to the Commission’s approval of such transactions.

¹⁵⁸ H.R. REP. NO. 105-149 at 558 (1997).

¹⁵⁹ *Id.* at 569-72 (setting minimum amounts “[i]n recognition of the scarcity (and hence, the value) of spectrum”).

¹⁶⁰ *See infra* at 36.

¹⁶¹ *McConnell v. FEC*, 540 U.S. 93, 237 (2003).

¹⁶² 545 U.S. 1123 (2005).

¹⁶³ Brief of Respondents at 57-58, *Fox Television Stations, et al v. FCC*, 06-1760-ag (2nd Cir. 2006).

Additionally, in their own pronouncements, Chairman Martin and other Commissioners concede the scarcity of the spectrum. For example, in a November 30, 2006 speech, Chairman Martin applauded spectrum auctions and called them an “efficient way to allocate *scarce* resources.”¹⁶⁴ And as Commissioner Deborah Taylor Tate recently wrote, “[o]ne of the bedrock principles of the Communications Act of 1934 . . . is that the airwaves belong to the public. Much like public spaces and national landmarks, these are *scarce and finite* resources that must be preserved for the benefit of all Americans.”¹⁶⁵ Thus, far from having “resoundingly repudiated” the scarcity doctrine, as Media General alleges,¹⁶⁶ the Commission has given every indication that it continues to believe it is a valid basis for broadcast regulation.

(c) As a Practical Matter, the Broadcast Spectrum Cannot Accommodate All Potential Licensees.

Even with developments in technology, as a practical matter, more people want licenses than can be accommodated on the spectrum. The large number of unlicensed broadcast stations shut down by the Commission in recent years demonstrates that there continue to be more would-be broadcasters than frequencies available for licensing.¹⁶⁷ By September 2006, a record 185 “pirate” broadcasters received fines or cease-and-desist letters or had been raided—an increase from 151 enforcement actions in 2005 and 92 in 2004.¹⁶⁸ This increasing amount of

¹⁶⁴ Speech, Kevin J. Martin, Georgetown University McDonough School of Business’s Center for Business and Public Policy, November 30, 2006 (emphasis added).

¹⁶⁵ Statement of Commissioner Deborah Taylor Tate, Notice of Apparent Liability for Forfeiture, available at <http://www.fcc.gov/eb/Orders/2006/FCC-06-18A1.html> (emphasis added).

¹⁶⁶ Comments of Media General at 81.

¹⁶⁷ See, e.g., *Ruggiero v. FCC*, 317 F.3d 239, 242 (D.C. Cir. 2003); *Grid Radio v. FCC*, 278 F.3d 1314, 1316 (D.C. Cir. 2002); *Prayze FM v. FCC*, 214 F.3d 245, 250 (2d Cir. 2000); *United States v. Any and All Radio Station Transmission Equip.*, 218 F.3d 534, 549-50 (6th Cir. 2000).

¹⁶⁸ Robert Feder, *Pirate Radio Station Raises Listeners’ Ire*, *THE CHICAGO SUN-TIMES*, October 31, 2006.

illicit unlicensed spectrum activity is evidence of the spectrum's inability to accommodate all who wish to use it.

Furthermore, Tribune and Media General's arguments that the spectrum is no longer scarce are contradicted by their statements in other contexts. For example, in a letter to Senator Ted Stevens, Maximum Service Television, on whose board of directors the presidents of both Tribune and Media General serve, expressed "major concerns" that the FCC's proposal allowing unlicensed electronic devices to use the spectrum's "white space" would cause interference to television sets.¹⁶⁹ MSTV asserted that sharing such use would "impair the value of the spectrum" and "be devastating to the American public."¹⁷⁰ If spectrum scarcity no longer existed, there would be no reason to exclude new users from the spectrum.

Other licensees express similar concerns about accommodating new spectrum uses. When the Commission in 1998 announced its plan to create new licenses for low-power FM radio stations (LPFMs), many broadcasters feared low-powered stations would interfere with their signals; as a result, they lobbied Congress to pass a bill aimed at protecting a licensee's signal and minimizing the amount of LPFM use.¹⁷¹ Were there no spectrum scarcity, as Tribune and Media General contend, license holders would have no reason to fear interference from any of these sources. Instead, licensees' persistent objections to new uses of the spectrum evidence their belief that it cannot accommodate all users.

Furthermore, the large numbers of bidders willing to spend staggering amounts to obtain licenses demonstrates that not all who wish to do so may use the spectrum. In early 2006, 96

¹⁶⁹ Letter, MSTV to Honorable Ted Stevens, Apr. 8, 2005, on file with the Commission, available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517610710.

¹⁷⁰ *Id.*

¹⁷¹ Reporters Committee for Freedom of the Press, *A Long Road for Low-Powered FM Radio Stations*, NEWS MEDIA AND THE LAW (Winter 2001).

bidders spent more than \$72 billion to obtain the rights to 171 licenses to use the FM broadcast spectrum, with the top bidder in some instances spending more than \$6.5 billion to obtain the right to use a portion of the spectrum.¹⁷² In addition, bidders are turning out in large numbers for the spectrum auctions—as of December 1, 2006, 51 entities had applied to bid on nine FM broadcast construction permits in an upcoming auction.¹⁷³ These figures indicate that contrary to Tribune’s assertion, scarcity is far from becoming a “constraint of the past.”¹⁷⁴ Rather, with so many bidders offering such high figures for a limited number of licenses, it very much remains a limited, yet highly-sought commodity — the veritable “gold of the early 21st Century.”¹⁷⁵

In sum, the fact remains that more people want to use the spectrum than can be accommodated, and thus, it continues to be necessary for the FCC to license users of the spectrum. In determining who is eligible to receive a license, the FCC reasonably adopted rules that award licenses to entities that do not already own a daily newspaper serving the same area. Not only do these rules pass muster under rational basis scrutiny, they also further the “purpose of the First Amendment to preserve an uninhibited marketplace of ideas.”¹⁷⁶

B. The Newspaper-Broadcast Cross-Ownership Rule Does Not Violate the Equal Protection Clause.

As with their First Amendment arguments, Tribune and Media General make the same Equal Protection claims that were put forth in the 2002 Biennial Review and were unanimously

¹⁷² See FCC FM Broadcast Auction No. 62, *Top 20 Construction Permits By Net Winning Bid*, available at http://wireless.fcc.gov/auctions/62/charts/62press_1.pdf and http://wireless.fcc.gov/auctions/default.htm?job=auCTION_summary&id=62.

¹⁷³ See Public Notice, *Auction of FM Construction Permits*, (Dec. 1, 2006), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-06-2383A1.pdf.

¹⁷⁴ Comments of Tribune at 89-90 (citing *Columbia Broad. Sys., Inc. v. Democratic National Comm.*, 412 U.S. 94, 158 n.8 (1973)).

¹⁷⁵ Barnaby J. Feder, *FCC Expected to Extend Satellite Operators’ Reach*, N.Y. TIMES, Jan. 27, 2003.

¹⁷⁶ *Red Lion*, 395 U.S. at 390.

rejected by the Third Circuit in *Prometheus*.¹⁷⁷ They argue that the NBCO violates the Equal Protection Clause, asserting that “[n]ewspapers are the only non-broadcast media today that are subject to any restrictions on the ownership of broadcast stations.”¹⁷⁸ The Supreme Court unanimously upheld the constitutionality of the cross-ownership rule when faced with Equal Protection challenges in *NCCB*, holding that it “treats newspaper owners in essentially the same fashion as other owners of the major media of mass communications.”¹⁷⁹ The Commission similarly must deny this attempt to overturn well-settled law.

Just as the law of the case doctrine compels the Commission to reject First Amendment challenges to the NBCO, so, too, does it bar the Commission from finding an Equal Protection violation on remand. In *Prometheus*, the Third Circuit found Equal Protection challenges to the NBCO to have been “foreclosed” by the Supreme Court’s ruling in *NCCB* that the rule treats “newspaper owners in essentially the same fashion as other owners of the major media of mass communication.”¹⁸⁰ The court stated that while there may be “more media outlets today” than when *NCCB* was decided, “it cannot be assumed that these media outlets contribute significantly to viewpoint diversity as sources of *local* news and information” and thus declined the media industry’s invitation to “disregard Supreme Court precedent.”¹⁸¹ Because it is bound by the law of the case doctrine, the Commission must do likewise.

Even were the Commission not bound by the law of the case doctrine, it should nevertheless reject Tribune and Media General’s Equal Protection challenges. These commentators try to escape *NCCB*’s holding by arguing that while there were only three “major

¹⁷⁷ *Prometheus*, 373 F.3d at 401, 435.

¹⁷⁸ Comments of Tribune at 93, Comments of Media General at 87.

¹⁷⁹ *NCCB*, 436 U.S. at 801.

¹⁸⁰ *Prometheus*, 373 F.3d at 401.

¹⁸¹ *Id.* (emphasis in original).

media of mass communication” when *NCCB* was decided, the “major media outlets of today” include many non-broadcast outlets such as the Internet and satellite and broadband services.¹⁸² They claim that because “it is no longer true that newspapers are the only non-broadcast ‘major medi[um] of mass communications’,” the rule unfairly singles out newspapers.¹⁸³

This argument misreads *NCCB*, however. The cross-ownership rule at issue was not intended to diversify all major media of mass communication; rather, the FCC sought to regulate broadcast cross-ownership to promote diversity of viewpoints within *local* communities.¹⁸⁴ The Commission excluded certain types of mass media, such as magazines and other periodicals that “dealt exclusively with regional or national issues and ignored local issues.”¹⁸⁵ In 1975, therefore, the Commission recognized that other major mass media existed, but chose to restrict common ownership of only those media that covered local issues — specifically, newspapers, broadcast television, and broadcast radio. Further evidence of the Commission’s emphasis on localism is the fact that the rule — both then and now — only prohibits ownership of a newspaper and broadcast station in the same local market; newspapers are free to own broadcast stations in other markets.

Likewise, in the 2002 Biennial Review, the Commission sought to “preserve[e] viewpoint diversity among local, not national, news sources.”¹⁸⁶ Therefore, the Commission excluded “the large number of *national* news sources such as all-news cable channels and the news sources on the Internet.”¹⁸⁷ Finding that “broadcast television, daily newspapers, and

¹⁸² Comments of Media General at 89.

¹⁸³ *Id.* See also Comments of Tribune at 93.

¹⁸⁴ *NCCB*, 436 U.S. at 786 (citing *Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report & Order*, 50 F.C.C.2d 1046, 1075 (1975)).

¹⁸⁵ *NCCB*, 436 U.S. at 787 n.10; 1975 *Order*, 50 F.C.C.2d at 1080 ¶ 112.

¹⁸⁶ 2002 Biennial Review ¶ 399.

¹⁸⁷ *Id.* (emphasis added).

broadcast radio” continue to be “the three media platforms that Americans turn to most often for local news and information,”¹⁸⁸ the Commission appropriately limited the cross-media limits to those media that are the most significant sources of local news. Because newspapers, broadcast radio, and broadcast television are the main sources of the public’s local news and information today, the NBCO no more discriminates among these three media forms today than it did in 1978 when *NCCB* was decided.

Moreover, Tribune’s claim that the NBCO unfairly “singl[es] out newspapers for more restrictive prohibitions”¹⁸⁹ is premised on the faulty assumption that a company owns only newspapers or only broadcast stations and cannot change its ownership mix. In fact, nothing in the rule prevents any company—Tribune included—from owning both a newspaper and broadcast station, provided the two are not located in the same local market. Thus, the same rule applies to companies whether they own newspapers, broadcast stations, or both, and in no way “singles out” newspaper owners.¹⁹⁰ Because the rule provides a reasonable mechanism for assigning broadcast licenses and does not discriminate against any potential licensees, heightened scrutiny is not warranted.

V. Should the Commission Decide to Modify the Rules, It Must First Issue a Further Notice

Because industry commenters have failed to demonstrate that a repeal of the rules would serve the public interest and other commenters have shown that retention or even tightening of

¹⁸⁸ *Id.* at ¶452.

¹⁸⁹ Comments of Tribune at 93.

¹⁹⁰ To the extent Tribune and Media General invoke *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue* to support their Equal Protection claims, their reliance is misplaced. That case involved a state tax that applied in practice only to a few large newspapers. 460 U.S. 575, 578-79, 81 (1983). Furthermore, the case is directly analogous to *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), which the *NCCB* Court held not to be controlling on the question of cross-ownership regulation.

the rules does serve the public interest, the FCC should not relax the rules at this time.

Nonetheless, should the FCC decide that modifying the rules would serve the public interest, the Commission should issue another further notice before modifying the media ownership rules.

Unfortunately, the Commission does not appear to have mended its ways with respect to the adequacy of its notice on its media ownership rules. In *Prometheus*, the Third Circuit emphasized that notice and comment would have improved the Commission's decision-making. The *Prometheus* court devoted an entire section to the proposition summed up in its heading: "The Commission should provide better notice on remand."¹⁹¹ The court concluded that remand would give the Commission "an opportunity to cure its questionable notice."¹⁹² But this FNPRM is, if anything, less detailed and informative than the prior NPRM criticized by the Third Circuit.

A. The FNPRM Failed to Provide Adequate Notice Under the Administrative Procedure Act

The requirement of notice and fair opportunity to comment is a basic tenet of administrative law. It promotes public participation in the administrative process and ensures informed agency decision-making. The Administrative Procedure Act (APA) requires that the Commission's notice include "either the terms or substance of the proposed rule" or "a description of the subjects and issues involved."¹⁹³ The FNPRM includes neither.

The FNPRM fails to include the terms or substance of any proposed rule and suggests no proposals other than the possibility of repealing certain rules or of finding a way to justify the same rules that were already found arbitrary and capricious in *Prometheus*.¹⁹⁴ It reads more like

¹⁹¹ *Prometheus*, 373 F.3d at 411.

¹⁹² *Id.*

¹⁹³ 5 U.S.C. §553(b)(3).

¹⁹⁴ *See, e.g.*, FNPRM at ¶¶ 18, 22, 32, 33, 35.

a Notice of Inquiry than a Further Notice of Proposed Rulemaking. The “essential inquiry” in assessing adequacy of notice is whether “commenters had a fair opportunity to present their views on the contents of the final plan.”¹⁹⁵ As a result of the deficient FNPRM, commenters in this proceeding can have only the vaguest notion of the rules the Commission may ultimately adopt.

In terms of proposing alternative possible rules, the FNPRM’s notice is wholly inadequate. It merely notes that the FCC might adopt new rules, without describing the range of considered alternatives with any specificity. As courts have recognized, if merely noting that it might adopt new rules were sufficient notification of such intention “an agency could simply propose a rule and state that it might change that rule without alerting any of the affected parties to the scope of the contemplated change, or its potential impact and rationale, or any other alternatives under consideration.”¹⁹⁶

Perhaps the most glaring omission of the FNPRM was the Commission’s failure to set out any proposals regarding minority and female ownership. The *Prometheus* Court specifically directed the Commission to address MMTC’s proposals for advancing ownership by minorities and other disadvantaged businesses on remand.¹⁹⁷ The FNPRM does “seek comment on the proposals to foster minority ownership advanced by MMTC in its filings in the 2002 Biennial Review proceeding” and asks “Are any of these proposals effective and practical ways to increase minority ownership?”¹⁹⁸ However, the FNPRM does not even list, much less describe MMTC’s many proposals. It offers no indication of which of MMTC’s proposals the Commission proposes to adopt, nor does it offer any proposals of its own. As a result, although

¹⁹⁵ *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979).

¹⁹⁶ *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1023 (2nd Cir. 1986).

¹⁹⁷ *Prometheus*, 373 F.3d at 421 n. 59.

¹⁹⁸ FNPRM at ¶5.

all of the commenters that addressed the issue of minority and female ownership supported adoption of policies to further opportunities for minority and women,¹⁹⁹ many comments did not address this issue. Specific proposals are particularly important because the constitutionality of a rule turns on how narrowly tailored it is and this may only be assessed in the context of a specific proposal.

The FNPRM is similarly vague in its discussion of specific ownership limits. The Commission makes no proposals for modifying the newspaper-broadcast and radio-television cross-ownership limits. It asks whether the rules remain necessary in the public interest but does not even suggest that it could justify the 2003 limits, especially in light of its conclusion to abandon the Diversity Index.²⁰⁰ Instead, it asks should “limits vary depending on the characteristics of local markets,” without explaining how they may vary and which characteristics the Commission considers relevant.²⁰¹ It asks whether “aspects of television and radio broadcast operations” could affect differences in limits for television and radio, but does not hint at which “aspects” are relevant for comment, how the two radio and television cross-limits would be different, or what those limits may be.²⁰²

For the local television rule, the Commission suggests justifying the 2003 rule, but does not explain how it might be justified, and makes no other proposals.²⁰³ The Commission asks a string of open-ended questions, such as whether the rules adopted in 2003 should be

¹⁹⁹ See Comments of MMTC; Comments of UCC, et al. at 3-40; Comments of AWRT; Comments of NABOB; Comments of Prometheus; Comments of Consumers Union at 21-23; Comments of NAB at 124-26.

²⁰⁰ FNPRM at ¶32.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at ¶18.

“revised.”²⁰⁴ The Commission also asks whether, and without suggesting how, the limits should “vary” by size of market and how changes would “impact” the top four-ranked restriction.²⁰⁵ To our knowledge, only one commenter (other than UCC, et al., which advocated for a return to the pre-1999 no overlapping contour rule) offered a specific proposal for modifying the local television rule.²⁰⁶ Should the Commission wish to adopt this proposal, it would need to propose it for further public comment, “because as a general rule [an agency] must *itself* provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment.”²⁰⁷

Similarly, the section of the FNPRM dealing with the Local Radio rule asks open ended questions such as “whether the local radio ownership rule currently in effect is necessary in the public interest as a result of competition.”²⁰⁸ It does not propose how the current limits might be justified nor proposes how they might be modified. Only two commenters make specific proposals regarding the Local Radio ownership rule. UCC, et al., citing a Future of Music Coalition proposal, recommend that the Commission adopt a mathematical formula using actual market share to set numerical limits for local markets, permitting concentration up to 1800 HHI, a level above which the DOJ and FTC consider to be highly concentrated.²⁰⁹ Clear Channel proposes that the caps be raised to 10 or 12 in larger markets.²¹⁰ Yet for the reasons stated

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Hearst-Arygle Television proposed that the FCC adopt a new rule permitting any common ownership of local TV stations as long as the combined audience share remained below 30 percent. Comments of Hearst-Argyle at 26-32.

²⁰⁷ *AFL-CIO v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985) (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F. 2d 506, 549 (D.C. Cir. 1983) (emphasis in original).

²⁰⁸ FNPRM at ¶22.

²⁰⁹ See Comments of UCC, et al. at 80. For a more detailed description of this proposal see DiCola, *False Premises, False Promises*, at 70-74.

²¹⁰ Comments of Clear Channel at 50.

above, the FCC could not adopt either of these proposals without further opportunity for public comment.

Not only does the FNPRM fail to set out the “terms and substance of the proposed rules,” it also fails to provide an adequate “description of the subjects and issues involved.”²¹¹ While agencies are not limited to adopting final rules identical to proposed rules, the rules must be a “logical outgrowth” of the Commission proposal.²¹² As the D.C. Circuit has noted, while there is no precise definition of what counts as a logical outgrowth, courts consider whether the purposes of notice and comment have been served, including whether the regulations are improved by diverse public comment, fairness has been ensured to affected parties, and whether the quality of judicial review has been enhanced.²¹³

While some modifications of the existing limits may be considered logical outgrowths, the sparse nature of the notice limits what the FCC can do because “something is not a logical outgrowth of nothing.”²¹⁴ For example, in *Shell Oil v. EPA*, the D.C. Circuit found that an agency had not provided adequate notice when it initially proposed to define regulated wastes based on their characteristics but instead ultimately adopted a rule generating lists of specific wastes to be regulated.²¹⁵ The court observed that, even if parties could have anticipated the final rules, the agency could not rely on its “unexpressed intention,” because that would require interested parties to “divine [its] unspoken thoughts.”²¹⁶ With mere “ambiguous comments and

²¹¹ 5 U.S.C. §553(b)(3).

²¹² See, e.g., *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991).

²¹³ See *International Union, United Mine Workers of America v. Mine safety and Health Administration*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

²¹⁴ *Id.* at 1259 (citing *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994)).

²¹⁵ See *Shell Oil Co.*, 950 F.2d at 752.

²¹⁶ *Id.* at 751.

weak signals from the agency,” interested parties could not adequately “anticipate and criticize the rules” that would be ultimately generated.²¹⁷

As precedent makes clear, not only must the FCC discuss with specificity the individual rules under its consideration, it must provide some direction as to how these individual parts will affect the ultimate regulatory scheme as a whole. However, the FNPRM fails to explain how any of the rules, and in particular the local rules and minority proposals, would work together in an ultimate ownership framework. In *Horsehead Resource Development Co., Inc. v. Browner*, the D.C. Circuit emphasized that notice of the “individual parts of a proposed rule is not necessarily notice of the whole.”²¹⁸ The court emphasized that “general notice that a new standard would be adopted affords the parties scant opportunity for comment.”²¹⁹ Instead an agency has a more “demanding” obligation: it must “describe the range of alternatives being considered with reasonable specificity.”²²⁰

Because the Commission’s deficient notice limited commenters’ ability to participate in this proceeding, the Commission has a limited range of rules it may promulgate. Thus, the Commission should issue another Notice that will meaningfully inform the public as to its ownership rule proposals and allow commenters to respond effectively.

²¹⁷ *Id.*

²¹⁸ 16 F.3d 1246, 1267 (D.C. Cir. 1994). In *Horsehead* the EPA called for data involving combustion standards by listing the “individual elements of the standard”; however, it failed to “collect together” the parts “in such a fashion as to enable the parties to anticipate and adequately comment on the ultimate” rules. *Id.* at 1268.

²¹⁹ *Id.*

²²⁰ *Id.*

B. Allowing for Further Public Comment on the FCC’s Specific Proposals Would Increase the Likelihood of Adopting Rules that Would Withstand Judicial Review

Even assuming *arguendo* that the APA does not require additional notice, the Commission should nonetheless issue a further notice prior to modifying the ownership rules. Issuing a more specific and detailed further notice would conform with the strongly expressed preferences of the Third Circuit and the Senate Commerce Committee, improve the FCC decision-making process, and increase the likelihood that the rules will ultimately withstand judicial review.

In reviewing agency conformity with administrative procedures, a court is not constrained by the same deference required for review of agency technical expertise.²²¹ Instead, “the court relies on its own independent judgment” and “must be strict in reviewing an agency’s compliance with procedural rules.”²²² As noted above, the *Prometheus* court specifically criticized the Commission’s notice in the prior NPRM in this docket. Because the court concluded that “as the Diversity Index’s numerous flaws make apparent, the Commission’s decision to withhold it from public scrutiny was not without prejudice,” it found that “it is advisable that any new ‘metric’ for measuring diversity and competition in a market be made subject to public notice and comment before it is incorporated into a final rule.”²²³

Unfortunately, despite this advice, the FNPRM does not provide any better notice than did the NPRM in the 2002 Biennial Review proceeding.

In addition, the Senate Committee on Commerce, Science, and Transportation, has expressed concerns about the adequacy of the current FNPRM. In 2006, the Senate Commerce

²²¹ *Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985).

²²² *Id.* (citing *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 641 (1st Cir. 1979)).

²²³ *Prometheus*, 373 F.3d at 412.

Committee reported out the Advanced Telecommunications and Opportunity Reform bill.²²⁴ Although that bill did not pass and is not binding law, Section 1009 of that bill, which was adopted unanimously at the markup, would have required the Commission to issue a further notice prior to adopting new rules.²²⁵

In sum, even if the APA did not require the FCC to issue a further notice spelling out the proposed rules and seeking public comment, both the Third Circuit and the Senate Commerce Committee expect the FCC to provide better notice, and so doing would increase the likelihood of adopting rules that would serve the public interest and be upheld on appeal.

CONCLUSION

For the foregoing reasons, Commenters respectfully request that the Commission retain the prohibition against newspaper-broadcast cross-ownership and tighten the local TV, radio and TV-radio cross-ownership limits. The Commission should also promptly issue a further notice proposing specific policies for increasing opportunities for minorities and women to own broadcast stations.

²²⁴ S. REP. NO. 109-355 (2006).

²²⁵ The section states: “Before making any changes to ... 47 C.F.R. 73.3555... as those regulations were in effect on June 1, 2003, the Federal Communications Commission shall issue a further Notice of Proposed Rulemaking with respect to any such changes.” *Advanced Telecommunications and Opportunity Reform*, H.R. 5252, 109th Cong. § 1009 (2006). The Congressional Research Report on the FCC Media Ownership Rules explains the Commerce Committee’s expectation: “The FCC adopted on June 21, 2006, and released on July 24, 2006, a Further notice of Proposed Rulemaking ... [the bill], as reported out of the Senate Commerce Committee, would require the FCC to issue another Notice detailing the specific proposed changes to the rules prior to adopting any new rules.” CRS Report for Congress: *FCC Media Ownership Rules: Current Status and Issues for Congress*, at Summary.

