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
	)	
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	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

COMMENTS OF MEDIA GENERAL, INC.

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SUMMARY

Any action that the FCC takes at this juncture regarding the newspaper/broadcast cross-ownership rule (the "1975 Rule") must comply with the mandate of Section 202(h) of the Communications Act, applicable administrative law principles, and constitutional concerns. In 2003, the FCC determined that the record before it required repeal of the 1975 Rule. The reviewing court affirmed the repeal, agreeing it was mandated by Section 202(h) but remanded for further justification of the media limits adopted by the FCC. The record developed after remand shows, even more so than in 2003, that the 1975 Rule harms localism and is unnecessary to protect diversity.

The Chairman's proposal to retain the 1975 Rule and graft onto it a waiver standard that he acknowledges will provide relief in markedly fewer instances than would have been the case in 2003 is wholly inadequate and contrary to law. While he is to be commended for finally acting on this issue, his proposal is legally unsustainable for, at least, four reasons.

First, he has provided no explanation based in the record to vary from the FCC's decision to repeal the 1975 Rule in 2003, nor can he find such support in the record. Second, by making presumptive waivers available in only the Top 20 markets, his proposal relies on arbitrary DMA line-drawing of the type the FCC has eschewed in the past as "unnecessary" and not reflective of market characteristics. This line-drawing is itself not supported by the record. The Chairman's public statements indicate that reform is needed to help the struggling newspaper industry. Available data show, however, that newspapers in communities outside the Top 20 DMAs have ceased publication in numbers greater than those in the Top 20 markets.

Third, the Chairman's proposal includes a "voice count" of the type struck down in 2002 by the D.C. Circuit as too narrow, a problem his plan compounds by excluding even more TV voices than was the case in the rule the court rejected.

Fourth, his proposal suffers from serious definitional and other omissions. Specific factors require clarification, and grandfathering -- even of cross-owned properties the FCC found consistent with its diversity and competition goals in 1975 -- is never addressed. In its overall scope and in its particulars, the proposal is arbitrary, capricious, and otherwise contrary to law.

The record, particularly with the addition of the latest FCC peer reviewed studies, demonstrates that cross-ownerships provide more local news and information without jeopardizing the FCC's speculative interest in advancing diversity. More to the point, the record that has been developed in these final stages -- as mirrored in "real world" developments -- underscores that diversity of ownership never did and now clearly does not bear an empirically established, and therefore credible, link to diversity of viewpoint.

If the FCC continues to analyze a cross-ownership restriction in terms of diversity, it will find that such a restriction harms not only newspapers, which are outside the FCC's jurisdiction and which the Chairman acknowledges are facing financial difficulties, but prevents newspapers from helping local television news operations, which are within the FCC's jurisdiction. Over the last several years, too many of those television news operations have had to cut back or go dark due to the escalating expense of local news production, the high cost of the DTV transition, and the evaporation of network compensation -- all in the face of fragmenting audiences.

Cross-ownership has been found to reduce these trends by ensuring the delivery of increased amounts of high quality local news. For an FCC concerned about the decline in local television news, a better regulatory approach would be the Media General proposal discussed in the final section of these comments. Under this plan, parties that want to operate cross-ownerships could "opt-in" to a set of public interest requirements. These obligations include provision of a minimum percentage of "locally relevant and responsive programming," which is defined to include not just local news and public affairs but other non-entertainment categories like educational and instructional programming. Such programming is to be developed based on community leader and viewer ascertainment. In addition, participating entities would be required in the month prior to a general election to increase their political programming by an additional two hours a week. These and other programming-related requirements would apply to the stations' analog channels and, post-DTV transition, to their most watched digital channels.

The Media General proposal also includes a serious enforcement mechanism -- the submission of annual sworn declarations attesting to compliance. To further address compliance, the plan includes procedural safeguards intended to guarantee both prompt and high-level review of any failure to meet the obligations. Setting a high bar, and requiring that participating cross-owners meet it, ensures that regulators' concerns will be met.

Even this proposal would not be necessary, however, if the FCC were to accurately assess the record before it and repeal the 1975 Rule as that record compels, even more so than in 2003.

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COMMENTS OF MEDIA GENERAL, INC.

Media General, Inc. ("Media General"), by its attorneys and in response to the FCC News Release, dated November 13, 2007,[1] hereby submits its Comments on Chairman Kevin J. Martin's proposed revision to the FCC's newspaper/broadcast cross-ownership rule, 47 C.F.R. § 73.3555(d) (2002), which was adopted in 1975 (the "1975 Rule"). While the Chairman is to be commended for finally urging reform, his narrow proposal, which would retain the 1975 Rule

[1] FCC News Release, "Chairman Kevin J. Martin Proposes Revision to the Newspaper/Broadcast Cross-Ownership Rule," DOC-278113A1, released Nov. 13, 2007 ("News Release").

and supply waiver standards offering extremely limited relief, falls woefully short of the total repeal mandated by case law and the record.

In 2003, the FCC voted to repeal the 1975 Rule.[2] The United States Court of Appeals for the Third Circuit affirmed that decision.[3] Acknowledging that he is proposing a more conservative approach than in 2003, the FCC Chairman never explains how he could possibly justify keeping a rule the repeal of which has been judicially affirmed. Such a significant change in course requires compelling evidentiary support, which is totally absent from the record that has been amassed.

As also discussed below, the new waiver standards that the Chairman proposes to graft onto the 1975 Rule rely on DMA line-drawing that is similarly unsupported in the record as well as on a model for local TV ownership that has been roundly discredited by the United States Court of Appeals for the District of Columbia and never corrected on remand. The specifics of the waiver proposal are equally inconsistent with established FCC precedent as well as the record.

This proposal has been put forward against a record that shows even more clearly than in 2003 that the 1975 Rule has failed miserably to meet the goals the FCC speculated it might advance over 30 years ago. Instead, it has deleteriously hampered publishers and broadcasters alike in their efforts to provide news and innovative information services that address the demands of their ever-changing communities.

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[2] 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620, 13748 (2003) ("*2003 Report and Order*").

[3] *Prometheus Radio Project v.* FCC, 373 F.3d 372, 398-400 (3d Cir. 2004) ("*Prometheus*"), *cert. denied, Media General, Inc. v. FCC,* 525 U.S. 1123 (2005).

The parties that oppose repeal of the 1975 Rule overlook that residents in markets of all sizes today have access to an incredible abundance of diverse sources of news and information, particularly increasing new sources of hyper-local content. This content is generated and provided not just by "traditional" media using both their "traditional" modes of delivery and a whole host of new technologies but by untold numbers of new alternative, "independent" content purveyors who rely exclusively on new unregulated technologies to distribute news and information.

The rapidity with which American consumers have embraced and popularized these new technologies and the obvious and dramatic impact they have had on political discourse should remove any lingering Commission concern about repeal of the 1975 Rule. The American public has become truly "platform agnostic." Today, as one study has succinctly described, "'[t]he world of centralized, one-way and scheduled media is fading fast. Consumers want media on their own terms and technology has empowered them to do that.'"[4]

The post-2003 record also shows -- just as Media General's experience in the six markets where it operates commonly-owned newspapers and television stations has demonstrated -- that such properties serve the public interest day in and day out, and the opponents of repeal offer no credible case or empirical evidence of documented harms from cross-ownership. These cross-owned properties deliver more and higher quality news to their communities and offer "fresh," new content over their various platforms.

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[4] Comments of Newspaper Association of America in MB Docket No. 06-121 (Oct. 23, 2006) ("NAA Comments") at 37, *quoting* American Society of Newspaper Editors and Newspaper Association of America, *Growing Audience: Understanding the Media Landscape: Executive Summary* at 6 (2006), at http://www.growingaudience.com/downloads/GALandscapeExecSummary.pdf (last visited Jan. 5, 2007).

Opponents of repeal offer "studies," which they claim show that cross-owned properties do not deliver more local news and information. As expert review has detailed, their econometric materials and "results" are unreliable and actually demonstrate that cross-owned properties are indeed more likely to provide increased news and information.[5] Their "studies" are no match for the FCC's solid, peer-reviewed studies, which demonstrate conclusively that cross-ownerships provide more local content and do so in a way that does not imperil diversity. The attempt by opponents of repeal to show that the FCC studies actually reveal a market-wide decline in local content is based on faulty econometric techniques.[6]

Even more importantly, since 2003, audience fragmentation among video suppliers and circulation declines faced by daily newspapers, which are acknowledged by the FCC Chairman, make repeal of the 1975 Rule essential. Local television stations and daily newspapers today face hard economic realities. As Media General has found, however, the downward trends in audience and financial performance are reversible through cross-ownership. Given the state of competition -- most of it unregulated -- confronting television broadcasters and daily newspapers, anything short of complete repeal of the 1975 Rule, such as the proposal put forward by the FCC Chairman, would help presage "failure by regulation."

In light of the massive record favoring repeal that has been amassed, statutory principles of administrative law and constitutional concerns leave the FCC no choice but to repeal the 1975

[5] *See* "Statement of Professor Jerry Hausman, Massachusetts Institute of Technology, Concerning Studies Submitted in FCC MB Docket 06-121," attached to Reply Comments of the Newspaper Association of America in MB Docket No. 06-121 (Jan. 16, 2007) at 2-4.

[6] *See* Statement of Dr. Harold W. Furchtgott-Roth, submitted as Appendix A to Reply Comments on FCC Research Studies on Media Ownership of Media General, Inc. in MB Docket No. 06-121 (Nov. 1, 2007) ("Furchtgott-Roth Statement"); Kent W. Mikkelsen, "Effects of Newspaper-Television Cross-Ownership on Total Market News Minutes: Response to 'Further Comments of Consumers Union, Consumer Federation of America and Free Press,'" submitted as Attachment 1 to Reply Comments of the Newspaper Association of America on Media Ownership Research Studies in MB Docket No. 06-121 (Nov. 1, 2007) ("Mikkelsen Statement").

Rule. With invalidation of the underlying public interest rationales that the FCC once speculated had supported the 1975 Rule, its retention cannot withstand further judicial scrutiny. The FCC found repeal warranted in 2003, and changing course at this point, as the FCC Chairman now suggests, would require clear and compelling evidentiary support, which is miserably lacking on this record. The FCC should once and for all acknowledge that fact by repealing the 1975 Rule.

I. THE FCC CHAIRMAN'S PROPOSAL FAILS TO RECOGNIZE THAT STATUTORY STANDARDS AND THE FCC'S VOLUMINOUS RECORD MANDATE LONG OVERDUE AND COMPLETE REPEAL OF THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE IN ALL MARKETS

A. Under the 1996 Act and General Administrative Law Principles, the FCC Has No Choice But To Repeal the 1975 Rule

As discussed in Media General's previous comments[7] and echoed in comments filed by other parties,[8] the FCC already has found, and the United States Court of Appeals for the Third Circuit has agreed, that the 1975 Rule is not necessary to fulfill the FCC's interest in promoting competition, localism, or viewpoint diversity, and that the 1975 Rule counterproductively harms localism. The FCC found repeal mandated by Section 202(h) of the 1996 Telecommunications Act, and the court agreed.[9]

The *Prometheus* court "sum[med] up" the standard of review that it would apply in any future evaluation of the FCC's actions: "In a periodic review under § 202(h), the Commission is required to determine whether its then-extant rules remain useful in the public interest; if no

[7] Reply Comments of Media General, Inc. in MB Docket No. 06-121 (Jan. 16, 2007) ("Media General Reply Comments") at 49-51; Comments of Media General, Inc. in MB Docket No. 06-121 (Oct. 23, 2006) ("Media General Comments") at 5-7.

[8] *E.g.*, NAA Comments at 18; Comments of Bonneville International Corporation in MB Docket No. 06-121 (Oct. 23, 2006) at 4-5; Comments of Morris Communications Company, LLC in MB Docket No. 06-121 (Oct. 23, 2006) at 6-9.

[9] *Prometheus*, 373 F.3d at 398-400, *citing 2003 Report and Order*, 18 FCC Rcd at 13749, 13754, 13764-66.

longer useful, they must be repealed or modified."[10] Nothing in the voluminous record that has been amassed on remand shows that the 1975 Rule remains "useful" or that any need remains under Section 202(h) to substitute lessened regulation, such as the Chairman now proposes, for the 1975 Rule. The FCC and the court already found the 1975 Rule was unnecessary to advance competition or localism, and the abundance of sources of news and information, particularly local, has mooted any further FCC concern over "diversity." And, now that review is quadrennial, the FCC's statutory burden to ensure that its rules keep pace with marketplace realities is that much stronger. No one has dared contend, nor could they, that trends suggest a future decrease in abundance somehow warranting four more years of regulation.

Long-established administrative law precedents equally compel total repeal. The FCC itself acknowledged in 1975 that there was no evidence of a competitive harm mandating regulation of newspaper/broadcast cross-ownership, and the speculative "hoped-for" gain in diversity upon which it premised adoption of the 1975 Rule has never materialized. The FCC thus has no legal choice but to repeal the 1975 Rule. A regulation reasonable in the face of a problem becomes highly capricious when the problem is shown not to exist.[11] Even a statute, the validity of which depends on a premise supported at the time of enactment, becomes invalid subsequently if the predicate disappears.[12]

In fact, changing course at this point and doing anything short of repealing the 1975 Rule would similarly violate administrative law precedent. Any change would require clear and compelling evidentiary support and a detailed and persuasive explanation for reversing the

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[10] *Id.* at 395.

[11] *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977). *See Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 816 (1992). *See also Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993).

[12] *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979).

direction laid out in 2003.[13] As already shown on the record and reiterated below, nothing in the record warrants a change in the 2003 decision to repeal, and nothing warrants action beyond that point given, as Media General has noted multiple times, the constitutional infirmities plaguing the 1975 Rule.[14]

B. The Chairman's Proposal Ignores That Relief from the 1975 Rule Is Needed in All Markets, Particularly Small and Medium-Sized Markets, and Is Impermissibly Narrow in Scope and Specifics

Against this legal back-drop and a mammoth record showing more availability than ever before of local content, news, and information, the FCC Chairman has put forth a proposed rule that represents a significant retrenchment from the 2003 decision, even including the portion of that decision that was judicially affirmed by the Third Circuit. The Chairman's proposal actually retains the 1975 Rule and adds specified, but difficult to attain, waiver standards.[15] Under his new formulation, the 1975 Rule would not apply if the FCC can make a finding that the public interest, convenience, and necessity permit a cross-ownership when measured by four specific factors.[16] This finding, however, is to be presumed "not inconsistent" with the public interest, convenience, and necessity only in the Top 20 Nielsen DMAs -- again, provided certain additional high standards are met.

The FCC Chairman acknowledges that this new proposal "is notably more conservative in approach than the remanded newspaper/broadcast cross-ownership rule that the Commission adopted in 2003."[17] Whereas the 2003 reform, as the News Release notes, would have permitted

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[13] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

[14] Media General Comments at 69-93; Comments of Media General, Inc. in MM Docket No. 01-235 (Dec. 3, 2001) at 66-80.

[15] § 73.3555(d) (as proposed).

[16] § 73.3555(d)(2) and (3) (as proposed).

[17] News Release at 2.

transactions in the "top 170 markets," the latest proposal will permit "only a subset of transactions in only the top 20 markets which would still be subject to an individualized determination that the transaction is in the public interest."[18] Not only is this overall retraction of 2003 reform contrary to law and not supported by the record, but many of the specifics of the proposal are also arbitrary and contrary to legal precedent.

In 2004, in reviewing the FCC's decision to repeal the 1975 Rule and replace it with a three-tiered approach to cross-ownership regulation, the United States Court of Appeals for the Third Circuit made unmistakably clear that it had great concern over the FCC's arbitrary and capricious approach to constructing the metric upon which it had based the proposed regulations.[19] Yet, after affirming repeal of the 1975 Rule, the court, throughout its review, refrained from overturning the new cross-ownership regulation on the ground that it was too deregulatory. Instead, the court commented only that the Commission is entitled to deference in deciding where to draw its lines.[20] The court never stated that it would be dissatisfied with the result the FCC reached if the agency could justify it.[21]

As noted above, any change in agency direction or result requires clear and compelling evidentiary support and a detailed and persuasive explanation for altering the previous approach.[22] While the Chairman acknowledges the "explosion of new sources of news and

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[18] *Id.*

[19] *Prometheus*, 373 F.3d at 411.

[20] *Id.*

[21] *Id.* at 403. ("[W]e remand for the Commission to justify or modify further its Cross-Media Limits.")

[22] *See supra* page 6, *citing Greater Boston Television Corp. v. FCC*, 444 F.2d at 852. This requirement for support and explanation of any increasingly regulatory change cannot help but be even more stringent when read in conjunction with the text of § 202(h) and its limitation on the FCC's authority to retain only rules "necessary in the public interest." *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002) ("*Sinclair*").

information," including cable, satellite television, and the Internet, and the need to "preserve the viability of newspapers,"[23] he gives no reason for reversing the 2003 decision to repeal the 1975 Rule. He also gives no explanation, as shown below, for basing the articulated standards for waiving the 1975 Rule on an already-discredited regulatory model and grafting onto that model DMA line-drawing and other specific features that are also contrary to precedent and highly unlikely to survive judicial review.

1. *Arbitrary DMA Line-Drawing*. Given the record in this proceeding, retention of the 1975 Rule combined with a limitation on presumptive relief in all but the Top 20 markets is clearly arbitrary and capricious. It also ignores fairly recent FCC precedent decrying such line-drawing. Missing from all of the studies in this record -- the FCC's latest peer reviewed studies, the 2002 studies, and the empirical reviews filed by parties -- is any indication that the results were dependent on market size. In fact, as Media General has already noted, as early as the FCC's 1973 staff study, there was no indication that results would be different in smaller markets.[24] The anecdotal and experiential evidence in the record further underscores that the 1975 Rule is unnecessary even in smaller markets.[25]

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[23] News Release at 1.

[24] *See* Media General Comments at 94-95. The FCC's 1973 study included television stations from variously sized markets. As the study noted, stations in the seven largest markets were specifically excluded from the study which found even back then that, on average, television stations owned by newspapers offered more news, non-entertainment, and overall local programming than other television stations. *Id. citing* Amendment of Section 73.34 [sic], 73.240, and 73.636 of the Commission's Rules Relating to the Multiple Ownership of Standard, FM, and Television Broadcast Stations, *Second Report and Order*, 50 FCC 2d 1046, at Appendix C 1095 n.4, *recon.* 53 FCC 2d 589 (1975) ("*1975 Second Report and Order*"), *modified by Nat'l Citizens Committee for Broad. v. FCC*, 555 F.2d 938 (D.C. Cir. 1977), *aff'd in part and rev'd in part*, 436 U.S. 775 (1978).

[25] *See, e.g.,* Comments of National Association of Broadcasters in MD Docket No. 06-121 (Oct. 23, 2006) at 83 n.197, 115; Comments of West Virginia Media Holdings, LLC in MB Docket No. 02-277 (Jan. 2, 2003); Comments of West Virginia Radio Corp. In MM Docket No. 01-235 (Dec. 3, 2001). *See also* Media General Comments at Appendices 9-14.

In modifying the radio/television cross-ownership rule in 1999, the FCC itself acknowledged that line-drawing based on DMAs is "unnecessary" to advance competition or diversity when a particular rule otherwise calls for an examination of "voices."[26] The FCC's initial liberalization of that rule ten years earlier had permitted, on a presumptive waiver basis, mergers involving one TV, one AM, and one FM station in the Top 25 television markets, if post-merger at least 30 independently owned broadcast "voices" remained.[27] Ten years later, in 1999, the FCC revised the rule to remove the reference to market size. In doing so, the FCC explained its decision as follows:

> [A] rule based on the number of independent voices more accurately reflects the actual level of diversity and competition in the market. As a number of commenters in this proceeding noted, a market-size restriction is unnecessary for purposes of competition and diversity as long as there are a minimum number of independent sources of news and information available to listeners, and a minimum number of alternative outlets available to advertisers . . . . In addition, unlike a rule based on market rank, our revised rule will account for changes in the number of voices in a market resulting from consolidation, the addition of new voices, or the loss of any outlets.[28]

Thus, even when local ownership regulation is warranted, line-drawing based on DMA rank is not.[29]

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[26] Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, *Report and Order*, 14 FCC Rcd 12903, 12949 (1999) ("*1999 Local Television Order*"), *recon.* 16 FCC Rcd 1067 (2000), *aff'd in part and remanded in part sub. nom., Sinclair*, 284 F.3d 148.

[27] Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules, *Second Report and Order*, 4 FCC Rcd 1741 (1989). In 1996, Congress extended the presumption to the Top 50 markets. Pub. L. No. 104-104, § 202(d), 110 Stat. 56, 112 (1996), as amended by Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004).

[28] *1999 Local Television Order*, 14 FCC Rcd at 12949 (footnotes omitted).

[29] For different reasons, the FCC in 1982 repealed its "Top 50" policy, which had required an evidentiary hearing for those seeking to acquire additional VHF stations in the largest markets unless the applicant made a compelling public interest showing. The decision was affirmed by

In the latest newspaper/broadcast cross-ownership proposal, the FCC has given no *official* justification for reinstating a DMA market-size restriction, this time drawing the line at the Top 20 DMAs. Nonetheless, the FCC Chairman has explained in Hill testimony how he arrived at the Top 20 line that he proposes to draw:

> [T]he main reason that I drew it, it was a natural breaking point if you looked at the number of commercial owners for television stations in the top DMAs. And the Top 20 DMAs, 18 of those had at least -- had double-digit owners of television stations.
>
> But starting with the number 21, that went down to seven, five, seven, six, six, six, seven, so it started going down to single digits and actually below the eight independent-owners threshold that we were trying to establish and that we had mirrored off of the television duopoly rule.[30]

Even if these results could be replicated, and Media General has had difficulty verifying them, this rationale, which the FCC Chairman says focuses only on TV station owners, represents an extremely narrow method for evaluating available content in a market. This justification excludes numerous other "voices" that FCC precedent has deemed relevant, contrary to the FCC's approach of defining diversity based on availability. His rationale even fails to take

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the United States Court of Appeals for the District of Columbia Circuit. *NAACP v. FCC*, 682 F.2d 993 (D.C. Cir. 1982). With repeal of the Top 50 policy and removal of DMA rank from the radio/television cross-ownership rule, the FCC's ownership rules no longer are based on arbitrary references to DMA rank.

[30] *Oversight of the Federal Communications Commission: Hearing of the Telecommunications and the Internet Subcommittee of the House Committee on Energy and Commerce* (Dec. 5, 2007) (LEXIS, Federal News Service) ("*Dec. 5 Hearing Transcript*"), at 21.

The fact that parties need to turn to unofficial sources for explanation of agency proposals underscores the administrative law deficiencies associated with releasing a "bare bones" proposal as an interim predicate to a final decision. Administrative law appellate decisions do not require release of such specific proposals, only that adopted standards be a "logical outgrowth" of a rulemaking record. *Shell Oil Co. v. EPA*, 950 F.2d 741, 750-751 (D.C. Cir. 1991). *See also Covad Communications Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006); *NVE Inc. v. HHS*, 436 F.3d 182, 191 (3rd Cir. 2006). The procedural peculiarities arising from the process recently followed in this docket offer good reason why this approach has not been followed in recent decades, if ever, at the FCC.

account of one voice -- “major newspapers” -- that the Chairman’s own proposal, as discussed below, would include in the actual waiver analysis. Although much simpler in application, his metric for line-drawing is no more sustainable than the much discredited Diversity Index.

Further, if as the Chairman has indicated, the FCC intends to liberalize the 1975 Rule to permit cross-ownership in order to preserve the viability of newspapers, data on newspaper failures equally compel relief outside the Top 20 markets. The Chairman notes that at least 300 daily newspapers have ceased publication in the last 30 years.[31] More detailed data, however, show that the majority of recent newspaper failures have occurred outside the Top 20 markets. Data for the period 1988 to 2006 show that of the 88 newspapers that completely ceased publication, 52 or roughly 60 percent were outside the Top 20 markets.[32] Additional data similarly show that, from 1976 to 2006, the overwhelming number of newspaper failures have occurred in very small population centers. In small towns of less than 25,000 residents, 179 papers went out of existence during those three decades, whereas population centers with over one million residents actually gained four papers. As shown by the chart attached as

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[31] News Release at 1.

[32] Data derived from the following: *Editor & Publisher International Yearbook 1989* at I-367; *Editor & Publisher International Yearbook 1990* at I-370; *Editor & Publisher International Yearbook 1991* at I-380; *Editor & Publisher International Yearbook 1992* at I-382; *Editor & Publisher International Yearbook 1993* at I-423; *Editor & Publisher International Yearbook 1994* at I-449; *Editor & Publisher International Yearbook 1995* at I-451; *Editor & Publisher International Yearbook 1996* at xxiv; *Editor & Publisher International Yearbook 1997* at xxiv; *Editor & Publisher International Yearbook 1998* at xxiv; *Editor & Publisher International Yearbook 1999* at xxiv; *Editor & Publisher International Yearbook 2000* at xxiv; *Editor & Publisher International Yearbook 2001* at xx; *Editor & Publisher International Yearbook 2002* at xx; *Editor & Publisher International Yearbook 2003* at xx; *Editor & Publisher International Yearbook 2004* at I-493; *Editor & Publisher International Yearbook 2005* at 490-I; *Editor & Publisher International Yearbook 2006* at I-455; *Editor & Publisher International Yearbook 2007* at I-445; *Broadcasting & Cable Yearbook 2007* at B-132 to B-215. This figure on newspaper failures does not include newspapers that cut back by converting from daily to weekly publication, merged with another newspaper, or became a “zoned edition” of another nearby newspaper; there is no reason to think that those curtailments will be any less prevalent in smaller markets.

Appendix 1, all population tiers with less than one million residents lost newspapers during the period.[33]

2. *Discredited Duopoly Model*. In addition to arbitrarily limiting presumptive waivers to the Top 20 markets, the Chairman's proposed presumptive waiver test will require satisfaction of criteria that are reminiscent of a formulation of the FCC's duopoly rule that has been discredited by a panel of the United States Court of Appeals for the District of Columbia in 2002 as arbitrary and capricious and remanded for corrections that the FCC has never made effective.[34] One judge on the panel, who concurred in part and dissented in part, found that the FCC's formulation of the duopoly rule was so arbitrary and capricious that he would have vacated, rather than remanded, it.[35] The Chairman's proposed presumptive waivers of the 1975 Rule do not correct these problems; they, in fact, compound them.

With the duopoly rule, relief is allowed if the station to be acquired is not ranked among the Top 4 stations in its own market and eight independently owned and operating full power commercial and noncommercial TV stations would remain in the DMA post-merger.[36] The Chairman's proposal first borrows the Top 4 criterion, requiring that the television station that is to be cross-owned with a newspaper not be among the Top 4 ranked stations in its market.[37] In

[33] If the FCC is insistent on adopting newspaper/broadcast cross-ownership restrictions, the plan recently proposed by Rep. Rick Boucher (D-Va.) is not arbitrarily limited to any particular DMAs and is administratively simpler than the Chairman's proposal. *See* Appendix 2.

[34] *Sinclair*, 284 F.3d at 152, 169. As noted above, the Chairman in a recent Hill colloquy acknowledged the fact that his proposal mirrors the duopoly rule. *Dec. 5 Hearing Transcript* at 21.

[35] *Sinclair*, 284 F.3d at 170-72 (Sentelle, J. *dissenting*).

[36] 47 C.F.R. § 73.3555(b)(2) (2002). These criteria are components of the rule and not waiver standards.

[37] *Compare* § 73.3555(d)(4)(i) (proposed) and 47 C.F.R. § 73.3555(b)(2)(i) (2002). In establishing the Top 4 test for the duopoly rule, the FCC specifically noted that it did not need a further limitation based on DMA line-drawing: "We will not include a market rank component in

the duopoly context, adoption of this Top 4 prong was based in part on an interest in promoting competition; the FCC reasoned that allowing merger of two of the Top 4 stations with their larger advertising bases might be anti-competitive.[38] As the FCC found in evaluating the 1975 Rule in 2003, however, and as no party challenged on appeal in the Third Circuit, newspapers and broadcast stations operate in separate product markets for antitrust analysis and competitive concerns are no longer at issue in this review of the 1975 Rule.[39]

In his proposal, the Chairman also borrows the duopoly rule's second requirement that eight independently owned and operating "major media voices" remain post-merger. Under his formulation, "major media voices" are deemed to include "full power commercial TV broadcast stations and major newspapers."[40] As the D.C. Circuit found in 2002, however, a problem arises in the duopoly rule and, therefore, in the Chairman's proposal as well, because of what "voices" are arbitrarily and capriciously excluded from this formulation. In *Sinclair*, the court ruled that the duopoly rule was fatally flawed because of the FCC's unjustified failure to include the types of "voices" that it had found appropriate for inclusion in its simultaneous revision of the radio/television cross-ownership rule.

For the radio/television cross-ownership rule, the FCC in 1999 adopted a "voices" test that counted, by market, four types of voices: independently owned and operating full power commercial and noncommercial broadcast television stations; independently owned and operating commercial and noncommercial radio stations; independently owned daily newspapers

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our new rule because *we believe such a test is unnecessary* given the station rank and minimum number of stations criterion we are adopting." *1999 Local Television Order*, 14 FCC Rcd at 12933 (emphasis supplied).

[38] *Id.* at 12933-34.

[39] *2003 Report and Order*, 18 FCC Rcd at 13749; *Prometheus*, 373 F.3d at 398.

[40] § 73.3555(d)(4)(ii) (proposed).

published in the market that attain five percent or greater circulation; and cable systems, although the number was frozen at one no matter the actual tally.[41] This 1999 revision liberalized the FCC's earlier 1989 radio/television cross-ownership rule by adding newspapers and cable "because we believe that such media are an important source of news and information on issues of local concern."[42]

The court found the difference in approach between the duopoly rule and the radio/television cross-ownership rule unacceptable: "Having found for purposes of cross-ownership that counting other media voices 'more accurately reflects the actual level of diversity and competition in the market' . . . the Commission never explains why such diversity and competition should not also be reflected in its definition of 'voices' for the local [television] ownership rule."[43] The court held that the FCC had "failed to demonstrate that its exclusion of non-broadcast media from the eight voices exception is 'necessary in the public interest' under § 202(h) of the 1996 Act."[44]

In the Chairman's latest proposal, the FCC has taken the discredited duopoly rule's narrow utilization of TV voices and simply added "major newspapers," which it never defines, to the voices that are to be considered. At the same time, its consideration of TV voices is even more limited than the duopoly rule's already narrow approach. The Chairman's proposal omits any consideration of *noncommercial* television stations, which had been included in the duopoly model. The change is surprising since noncommercial television stations' contribution to

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[41] *1999 Local Television Order*, 14 FCC Rcd at 12950-52.

[42] *Id.* at 12953. The FCC noted cable's inclusion was appropriate "because there are PEG and other channels on cable systems that present local informational and public affairs programming to the public." *Id.*

[43] *Sinclair*, 284 F.3d at 164.

[44] *Id.* at 165.

diversity was specifically acknowledged when the FCC modified the 1975 Rule in its 2003 decision. In that ruling, the FCC stated that it was making sure to include noncommercial stations in its analysis because "[p]ublic stations provide viewpoint diversity; indeed that is a special part of their mandate."[45]

If the court in *Sinclair* found it puzzling that the FCC, in crafting the duopoly rule, did not rely on the same construct developed for the radio/television cross-ownership rule, imagine a reviewing panel's reaction when concerns regarding newspaper/broadcast *cross-ownership* are at issue. It would seem that the analysis of "voices" from a radio/television *cross-ownership* model would be even more appropriate to reform of the 1975 Rule than the court thought was the case in reviewing the less analogous local TV ownership standards. Even if a court were to somehow find the discredited duopoly model appropriate as a waiver standard for the 1975 Rule, it is highly unlikely that the FCC could explain the omission of noncommercial television stations from the analysis given the agency's 2003 recognition of their provision of viewpoint diversity.

3. *Definitional and Other Omissions*. Throughout much of the Chairman's proposal, concepts are either imprecisely defined or lacking in any explanation. The concept of "major newspapers," as noted above, is never defined. Among the four enumerated factors to be evaluated in a determination of the public interest, no matter what the market size, "level of concentration" is most glaringly never explained.[46]

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[45] *2003 Report and Order*, 18 FCC Rcd at 13620.

[46] § 73.3555(d)(3)(iii) (proposed). The other three factors include the following, which equally lack precision: "(i) whether the cross-ownership will increase the amount of local news disseminated through the affected media outlets in the combination; (ii) whether each affected media outlet in the combination will exercise its own independent news judgment;" and " (iv) the financial condition of the newspaper, and if the newspaper is in financial distress, the owner's commitment to invest significantly in newsroom operations." § 73.3555(d) (proposed). Among other problems, interpretation of the second factor regarding exercise of "independent news judgment" may mire the FCC in inquiries impermissible under the First Amendment.

The proposed rule never addresses the issue of grandfathering. Thirty-two years ago, the FCC deemed prospective application of the 1975 Rule *inappropriate* to the then existing newspaper/broadcast cross-ownership combinations except in 16 "egregious" cases.[47] These "egregious" situations included a very small number of locations in the nation with a "true monopoly," where the only daily newspaper in a community was cross-owned with the only local radio or television station.[48]

Without knowing the Chairman's plans for grandfathering, it is impossible for parties in this case to comment with specificity on prospective application of the proposed rule. Nonetheless, were the Chairman's proposed rule to bar renewal of licenses for combinations grandfathered in 1975, that for one reason or another do not comply with the Chairman's latest proposal (and there may be many), the Commission could not sustain the result. Determining that the cross-ownerships that existed in 1975 were acceptable from a diversity and competition perspective 32 years ago but finding those same cross-ownerships are no longer acceptable in the intensely more diverse and competitive world of today would be arbitrary and capricious and otherwise contrary to law.[49] Moreover, as Media General has previously argued, anything short of total repeal violates its First and Fifth Amendment rights and unconstitutionally limits its ability to operate cross-owned properties in all markets. If any failure to continue to grandfather

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[47] *1975 Second Report and Order*, 50 FCC 2d at 1078, 1080.

[48] *Id.* at 1081.

[49] The silence on grandfathering makes comment difficult with respect to other existing cross-ownerships. Given the small number of combinations operating today under temporary or provisional waivers (those formed pursuant to footnote 25 of the *1975 Second Report and Order*), the FCC in adopting any new restriction, should grandfather those combinations along with the pre-1975 grandfathered combinations to ensure that divestiture is not required. The record includes no evidence of any harm to the FCC's public interest goals caused by those combinations. Rather, the record is replete with the benefits to localism and diversity that they have contributed.

cross-owned properties protected in 1975, such as in Media General's operation of cross-owned properties in Tampa, results in divestiture, such constitutional violations would be severely exacerbated and would clearly represent an unconstitutional government "taking."

II. THE POST-COMMENT AND POST-REPLY RECORD IN THIS PROCEEDING, INCLUDING THE FCC'S PEER REVIEWED STUDIES, SHOWS CONCLUSIVELY THAT RELIEF IS WARRANTED IN ALL MARKETS

In the nearly 12 months since initial and reply comments were submitted in this proceeding, the record in favor of total repeal of the 1975 Rule has grown further.[50] "Real world" developments similarly show that not only is total repeal warranted but that it will raise no regulatory concerns. The recent proof in two areas -- the FCC's peer-reviewed studies, which opponents have attempted but failed to rebut, and growth and utilization of "non-traditional" media outlets by purveyors of local news and content -- is particularly telling.

FCC Studies. Some six months after the January 16, 2007 reply deadline in this long and tortured proceeding, the FCC released 10 empirical studies (actually 13 since one study included four separate studies) addressing various multiple ownership rules. Those studies have been subject to searching peer reviews and two rounds of comments, both initial and reply comments.

A number of conclusions favorable to cross-ownership emerged from the studies, principles that survived rigorous peer review. Among the most notable conclusions showing that cross-owned stations provide greater public service were the following:

-- newspaper cross-ownership increases the amount of overall news programming television stations provide by up to 11 percent;[51]

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[50] Out of an abundance of caution, Media General hereby incorporates by reference its filings in the proceedings that led up to the *2003 Report and Order*.

[51] Daniel Shiman, "FCC Media Study 4: "News Operations" – Section I: 'The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming,'" DA 07-3470A5, July 2007, at I-1, I-27.

-- television stations owned by a parent that also owns a newspaper in the area offer more local news programming than other stations;[52] and

-- local television newscasts for newspaper cross-owned stations include substantially more state and local election coverage.[53]

One peer reviewed FCC study, in particular -- *Study No. 6* -- found that not only does the 1975 Rule harm localism, but it provides no corresponding benefits in terms of viewpoint diversity.[54]

Deregulatory challengers' most public attack on the studies has been their argument that, while the studies may show increases in news and information at the station level, the studies' own data actually reveal decreases at the market-level when a cross-ownership is present.[55] As Media General has explained, their attempt to focus on market-level data leads, as is often the case with aggregation in applied econometrics, to bias and the masking of specific characteristics of heterogeneous firms, characteristics that may have a substantial effect on the provision of news product by a firm.[56] The challengers' own regressions yielded a decrease in news quantity when cross-ownerships were present simply because of an incorrect specification of variables.[57]

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[52] Gregory Crawford, "Television Station Ownership Structure and the Quantity and Quality of TV Programming: FCC Media Ownership Study #3," DA 07-3470A4, July 2007, at 26.

[53] Jeffrey Milyo, "The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News," DA 07-3470A7, as revised September 2007 ("*Study No. 6*"), at 29.

[54] *Id.* at 16, 20, 28-30. While Consumers Union *et al.* attempt to discredit Professor Milyo's study, their criticisms misunderstand the methodology, are incorrect, and suffer from other fundamental flaws. Further Reply Comments of Tribune Company on Research Studies on Media Ownership in MB Docket No. 06-121 (Nov. 1, 2007) at 3-7.

[55] *See, e.g.*, John Eggerton, "Cross-Owned Stations Do Less News, Activists Claim," *Broadcasting & Cable*, Nov. 2, 2007, available at http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA6496993 (last visited Dec. 10, 2007).

[56] Furchtgott-Roth Statement at 11.

[57] *Id.* at 11-13. (The result was "an artifact of not directly including [a variable for] the number of stations rather than a reflection on the competition for news in the local market.") *See also* Mikkelsen Statement at 4.

In contrast to the flawed objections of deregulatory parties, the FCC's peer-reviewed economic studies have demonstrated the substantial benefits (and lack of countervailing harms) associated with newspaper/broadcast cross-ownership. More importantly, when the studies are viewed in conjunction with the overwhelming evidence already in the record, as supplemented in the next section, which absolutely proves the same points, no question can remain that the FCC has a complete and compelling basis for justifying full repeal of the 1975 Rule.

Media Developments. The FCC has from the beginning defined viewpoint diversity as "availability" of sources, a position it affirmed in the 2003 decision.[58] Based on this precept and given the abundance that has come to characterize today's media landscape, it is most unusual that the Chairman's proposal would take such a narrow approach, one focused on allowing relief in a limited number of markets and based on measurement of so few outlets.

The record in this proceeding provides a very different picture than the one informing the Chairman's proposal. Consumers today find themselves distracted by too many outlets. Studies have shown that, in a typical day, more than a dozen different forms of media vie for consumers' attention.[59] The options only increase with time-shifting and place-shifting technologies. As a result, one-third of the time that consumers spend using media, they are actually using two outlets at once.[60] These statistics, which are now almost two years old, have doubtlessly increased in the interim.

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[58] *2003 Report and Order*, 18 FCC Rcd at 13627 ("Viewpoint diversity refers to the availability of media content reflecting a variety of perspectives.").

[59] NAA Comments at 38, n. 154, *citing* Center for Media Design, Ball State University, *Middletown Media Studies: The Media Day* at 12, 14 (Fall 2005).

[60] NAA Comments at 38-39, *citing generally* Center for Media Design, Ball State University, *Middletown Media Studies: Concurrent Media Exposure* (Fall 2005).

As FCC consideration of this issue has continued over the last decade, the "traditional" media, despite finding their audiences threatened, have continued to deliver an abundance of local content both in their customary manner and in new more technologically advanced ways.[61] At the same time, during the pendency of this proceeding, the participants have seen entirely new outlets come into existence and make increasing inroads into the audiences of "traditional" media.[62]

Even in the previous 12 months since the last round of initial and reply comments were submitted, new developments and uses have been launched by both "traditional" and "non-traditional" media players. The more notable developments include the following:

-- The emergence of "YouTube" as a method for delivering local broadcast content and providing civic discourse. Within the last year, LIN and Hearst-Argyle have begun to utilize "YouTube" to deliver online "channels" of news, weather, and entertainment video, as well as popular local programs. The content is not always a duplicate of their "over-the-air" fare.[63]

-- In the second half of this year, CNN has twice paired with "YouTube" to transmit and popularize for a younger demographic two Presidential candidate debates. The reviews of the Democratic debate in Charleston, South Carolina in July and the Republican debate in St. Petersburg, Florida last month show that the plan was successful, as both events captured high levels of audience, both online and over cable.[64]

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[61] Media General Reply Comments at 6-14.

[62] *Id.* at 15-21.

[63] "LIN Launches New Local Channels on YouTube," *TVNewsday*, Nov. 13, 2007, available at http://www.tvnewsday.com/articles/2007/11/13/daily.3/ (last visited Dec. 10, 2007); Michael Malone, "Hearst-Argyle's YouTube Channels," *Broadcasting & Cable*, June 4, 2007, available at http://www.broadcastingandcable.com/article/CA6448808.html (last visited Dec. 7, 2007).

[64] "Tune-in Climbs for CNN Repub. Debate," *Television Week*, Dec. 3, 2007 at 3; Dan Balz and Anne Kornblut, "Public Voice Adds Edge to Debate; Democrats Face Questions from Internet Users in Unorthodox Format," *The Washington Post*, July 24, 2007 at A1.

-- Candidates themselves have continued to make the Internet a powerful political force. The Presidential campaign of Ron Paul stands as testament to the medium's effectiveness as a messenger and a fundraising tool.[65]

-- In 2004, the Third Circuit indicated it was reluctant to consider the Internet a "voice" unless it could be shown that Internet sites both aggregated local information and distilled it.[66] With recent growth, the Independent Media Center websites, which the court cited as an example of a source that served both functions, have now increased to reach 62 markets.[67] Topix.net, a similar outlet, has made recent changes to its operation that ensure not just aggregation, but distillation.[68] Even Wikipedia has made a point of emphasizing its breaking news coverage and its editors' efforts to ensure accuracy, as was the case in its coverage of the Virginia Tech massacre.[69]

-- The coverage of local sports has benefited immensely from Internet developments. The last year has seen the launch of numerous Internet-based sports "channels," some hosted by local start-ups, others by more traditional media. Independently owned examples include DigitalSports and Loudoun Prep Sports. Two early entrants -- HighSchoolSports.net and MaxPreps -- were recently bought by Gannett and CBS, respectively, acknowledgement of their success in attracting audiences. The new technology lends itself particularly well to hyper-local coverage of community sports, with content frequently contributed by citizen journalists and edited by professional staff.[70]

-- Local content delivered directly to cellphones has also gained a greater foothold within the last year. The content is sometimes provided by traditional and new media sources, such as broadcast outlets, but, more recently by entities such as county governments. The latter have set up

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[65] Katharine Q. Seelye and Leslie Wayne, "The Web Finds Its Man, And Takes Him for a Ride," *The New York Times*, Nov. 11, 2007 at Sec. 1, pg. 30.

[66] *Prometheus,* 373 F.3d at 407.

[67] *See* http://www.indymedia.org/en/index.shtml (last visited Dec. 9, 2007).

[68] *See* David Lieberman, "Topix.com homes in on citizen journalists," *USAToday.com*, April 11, 2007, available at http://www.usatoday.com/tech/webguide/2007-04-01-topix-site_N_htm (last visited Dec. 9, 2007). The topix.net and topix.com addresses now both provide access to the same Topix site.

[69] Noam Cohen, "The Latest on Virginia Tech, From Wikipedia," *The New York Times*, April 23, 2007, available at http://www.nytimes.com/2007/04/23/technology/23link.html (last visited Dec. 10, 2007).

[70] Zachary A. Goldfarb, "Can Youth Sports Coverage Pay Off Online: Local Start-ups, Traditional Media Vie for Ad Dollars," *The Washington Post*, Dec. 3, 2007 at D1.

text message services for residents; the government receives information and alerts from numerous federal and non-federal sources and then distills and decides what to pass on to residents.[71] Not only television networks and telephone companies are providing video content straight to mobile phones, but local broadcasters are launching similar initiatives.[72]

-- Social networking sites have provided the impetus for the emergence of "social media," which provides even more competition for audiences. These outlets provide extensive news and entertainment content. Examples include Mixx, Digg, and Buzzflash. Among these, Mixx has recently begun to provide local information.[73]

-- Technological developments are also allowing broadcasters to provide "channels within channels," expanding the streams of local information that can be delivered in pre-existing, finite segments of spectrum. Originally called "In-Band, On-Channel," or "IBOC," HD radio now allows each FM station to, in essence, multi-plex its channel offerings. As of this month, 1,537 HD stations are operating around the country, more than the 1379 commercial TV stations nationwide.[74] DTV technology is also advancing with the U.S. Patent and Trademark Office recently giving the U.S. go-ahead for new "CodecSys" technology, which will enable 12 HDTV channels to be broadcast over the same spectrum currently supporting only two channels.[75] Whether measured in terms of more

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[71] *See, e.g.,* Arlington Alert, at http://www.arlingtonalert.com/faq.php (last visited Dec. 6, 2007).

[72] *See* Todd Spangler, "AT&T to Flip on Qualcomm's Live Mobile-Video Platform," *Multichannel News*, Feb. 19, 2007, available at http://www.multichannel.com/article/CA6417216.html (last visited Dec. 10, 2007) (reporting on AT&T's plans to offer network programming from CBS, Fox, NBC, MTV, Comedy Central, Nickelodeon, and ESPN). Verizon Wireless offers a similar service called V-Cast Mobile TV in 49 cities. *See* http://products.vzw.com//index.aspx?id=mobileTV (last visited Dec. 10, 2007). *See also* Glen Dickson, "Mobile TV Takes Flight; New Broadcast Digital TV Standard Could Open Up Markets," *Broadcasting & Cable*, Nov. 12, 2007 at 12 (describing a coalition of almost 800 local stations working to bring live over-the-air television to mobile devices).

[73] Http://www.digg.com (general news and entertainment, last visited Dec. 10, 2007); http://www.buzzflash.net (news, last visited Dec. 10, 2007); http://www.mixx.com/local/20036 (local news and postings for Washington, D.C., last visited Dec. 10, 2007).

[74] *See* http://www.ibiquity.com (last visited Dec. 9, 2007); FCC News Release, "Broadcast Station Totals as of September 30, 2007," DOC-277449A1, released Oct. 18, 2007 (reporting 1379 commercial television stations).

[75] *See* "U.S. Patent Body Green-lights CodecSys Video Compression Technology," *Broadcast Engineering*, Sept. 4, 2007, available at http://broadcastengineering.com/RF/patent-codecsys-compression-tech20070904/index.html (last visited Dec. 6, 2007). *See also* "U.S. Patent Allowed for CodecSys Video Compression Technology from Broadcast International," *M2 Wireless News*, Sept. 1, 2007, available at http://www.lexis.com.

> "traditional" outlets or these newer "non-traditional" offerings, spectrum scarcity has vanished.

While by no means exhaustive, this list of media developments underscores the accelerating increase in the availability of local news content and information, frequently over local outlets and often from new media "players." This continued growth makes most illogical the FCC Chairman's limited approach to reform of the 1975 Rule.

III. PERMITTING ALTERNATIVE CROSS-OWNERSHIP RELIEF FOR TELEVISION LICENSEES THAT MEET INCREASED PUBLIC INTEREST OBLIGATIONS, SUBJECT TO LOSING THEIR LICENSES, WILL MEET ANY UNSUPPORTED, BUT LINGERING, CONCERN OVER LOCALISM AND DIVERSITY

If the FCC, in the final analysis, decides that retention of restrictions on newspaper/broadcast cross-ownership is warranted, Media General submits that an approach that places public interest obligations on those broadcasters that want to operate newspaper/broadcast cross-ownerships is the more prudent way to proceed. This concept, which would not be forced on any broadcaster but would be available to those broadcasters that "opt-in," provides assurance that any television station involved in a cross-ownership would provide the increased local news and information that challenging parties claim is either not produced in such situations or, provided, they contend, only long enough to obtain regulatory relief.

The approach is set forth in Appendix 3 and is styled as a "Note" to Section 73.3555, the existing FCC media ownership rule. This new "Note" simply states that the restrictions of the cross-ownership rule, whether those currently in existence or adapted to whatever formulation the FCC posits in the future, will not apply to stations meeting the Note's heightened public interest requirements.

The Note embodies its own enforcement mechanism. As required by its seventh enumerated point, any licensee taking advantage of its provisions "shall file annually a declaration by an officer, partner, or member attesting that the station has substantially complied with the terms of the Note in all material respects." The provision of a declaration, sworn under penalty of perjury as required by the FCC's rules, will allow any party concerned about compliance to readily make a complaint to the FCC that will carry the threat of alleged "misrepresentation," the most potent of FCC allegations within the agency's enforcement purview.[76]

The Note also includes other procedural mechanisms intended to ensure FCC review and disposition of complaints. Complaints not acted upon by the FCC staff, on delegated authority, will be deemed denied, entitling the filer to seek full Commission review. If any challenge to a renewal application raises a substantial and material question of fact regarding compliance with the Note's terms, that challenge may be reviewed and disposed of by the FCC staff, again acting on delegated authority. The filer does not need to await full Commission review, unless staff delays occasion it.

The substantive obligations of the Note, which return the broadcaster to many of the requirements in existence prior to Reagan-era broadcast deregulation, include the following:

-- Provision between 5 a.m. and midnight of an average of five percent "locally relevant and responsive" programming, of which half must be produced by the licensee or its affiliate.

"Locally relevant and responsive" is defined to include an extensive list of local news and public affairs programming that addresses issues of local cultural interest, controversial issues of public importance, and issues of interest to minorities in the community. Also included are local sports,

[76] *See, e.g., Contemporary Media v. FCC*, 214 F.3d 187, 196 (D.C. Cir. 2000) (recognizing that intentional misrepresentation alone provides sufficient grounds for revocation of licenses); *Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980) ("it has been clear that the Commission may refuse to renew a license where there has been willful and knowing misrepresentation or lack of candor in dealing with the Commission"). *See also* 47 C.F.R. § 1.80(b)(4)(Note) (2006) (making misrepresentation/lack of candor the only violation for which the base forfeiture amount is the maximum allowed by statute).

local weather information, educational or instructional programming, local children's educational programming, local and non-paid religious programming, and local or regional agricultural programming.

-- Determination of local relevance and responsiveness of the programming through quarterly community leader interviews and quarterly viewer meetings, which shall include minority representatives.

-- In the four weeks prior to each general election, an increase between 5 a.m. and midnight, exclusive of paid political or free time for candidates, of an additional two hours per week of locally produced news, interviews, and other public affairs formats providing for debates or discussion of ballot measures, referenda, or candidate or party positions.

-- Provision by the station of an average per week of 100 non-paid PSAs of 30-seconds duration directed to local issues, of which half must be locally produced and not promote station-sponsored events.

-- Annual website posting and public file placement of an itemized report on the gender and minority composition of the licensee's workforce.

-- Prohibition of a blanket prohibition on the sale of advertising time to non-federal candidates.

At every step in these requirements, the Note provides for transparency in the form of public file and website reports. Moreover, the locally responsive and relevant programming, election related content, and PSA requirements all apply to the station's analog channel prior to the DTV cut-over, and thereafter to its most watched digital channel.

In making his proposal, the FCC Chairman has spotted a legitimate issue: decline in local news. The FCC, however, does not regulate newspapers, but television, and it should be addressing its proposals to the specific issue of trying to reverse declines in local news among non-cross-owned stations. That remedy is needed in all markets. The Note that Media General proposes is well tailored to the FCC's legitimate public interest goal of preserving and increasing high quality local *television* news.

For years, Media General has operated all of its television stations, both in cross-owned and non-convergence markets, in a manner intended to bring increased news and high quality news to its local communities. It has continually been told by regulators that, if the FCC could be assured that parties benefiting from cross-ownership operated their stations the same way, the regulators would not be reluctant to grant relief from the 1975 Rule. The Note raises the bar, even for Media General, and through its "annual declaration" requirement ensures that any party operating cross-owned facilities will meet regulators' concerns. Any "bad apples" will become "good apples."

IV. CONCLUSION

For the reasons noted above, Media General respectfully submits that the FCC not adopt the very narrow reformulation of the 1975 Rule proposed by the FCC Chairman. Instead, it should move promptly to repeal the 1975 Rule in all markets or adopt the solution, proposed by Media General, that would allow cross-ownerships and ensure that they address any lingering public interest concerns the FCC still believes they present.

Respectfully submitted,

MEDIA GENERAL, INC.

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December 11, 2007

Appendix 1

Changes in Number of Daily Newspapers by Population Tiers (1976-2006)

Population within Corporate City Limits	***1976***	***2006***	***Numerical change 1976-2006***	***Percent change 1976-2006***
> 1,000,000	27	31	+ 4	+ 14.8%
500,001 – 1,000,000	49	31	- 18	- 36.7%
100,001 – 500,000	211	171	- 40	- 19.0%
50,001 – 100,000	237	192	- 45	- 19.0%
25,000 – 50,000	310	263	- 47	- 15.2%
< 25,000	928	749	-179	- 19.3%
Total	1762	1437	- 325	- 18.4%

Sources: *Editor & Publisher International Yearbook 1977* at 23; *Editor & Publisher International Yearbook 2007* at viii.

RICK BOUCHER
9TH DISTRICT, VIRGINIA

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December 6, 2007

The Honorable Kevin J. Martin, Chairman
The Honorable Michael J. Copps, Commissioner
The Honorable Jonathan S. Adelstein, Commissioner
The Honorable Deborah Taylor Tate, Commissioner
The Honorable Robert M. McDowell, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: 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

Dear Mr. Chairman and Commissioners:

I am writing to follow up on the statement I made at the December 5th House Subcommittee on Telecommunications and the Internet hearing on media ownership. I share Chairman Martin's view that under certain circumstances, newspaper-television cross-ownership in some markets should be permitted. I differ with him on what those circumstances should be. I offer for the Commission's consideration an alternative proposal which would repeal the total ban on cross-ownership of a newspaper and television station in a single market and replace it with a standard based on the number of independent voices that would remain in a given market following a joint ownership combination.

Specifically, under my proposal, a newspaper-television combination in a market would be permitted where, following the combination, and apart from the combined entity, at least one independently owned television station and one independently owned newspaper of regular, general circulation remain. A market would have to have at least two major newspapers and two television stations for a combination to be permitted. At most, the number of independent voices would decline from four to three. Diversity would be assured and helpful newspaper-television station combinations, such as the commonly owned WJHL-TV and *Bristol Herald Courier* in my Congressional District, would be permitted.

Since the original cross-ownership ban was enacted in 1975, the sources of news and entertainment content available to the typical consumer have expanded dramatically. Unlike in 1975 when the local newspapers and local television stations were for practical purposes the sole information sources available to most, today's consumer has satellite services, independent cable programming, and most importantly Internet-delivered fare at the consumer's disposal. The consumer is no longer dependent solely on local print and broadcast media for news and information.

The financial effect of this explosion of news and entertainment alternatives on the newspaper industry has been profound. Advertising revenue declined by 9% in the 3rd quarter of this year alone. For a decade, circulation numbers have been declining. The industry has responded in a creative way that in my view well serves the information consumer.

The currently legal cross-ownership of WJHL-TV and the *Bristol Herald Courier* has resulted in a better news product, both in the newspaper and television station that are commonly owned. The collaborative pooling of the news gathering and reporting talent of the print and broadcast operations enables more in-depth reporting on major events and an increase in the number of local events that can be covered when television contributes on the print side and print contributes to television reporting. I have seen this collaboration in operation, and the improvement in the news product is real.

Under Chairman Martin's proposal to permit cross-ownership essentially in the 20 largest markets, the beneficial combination I have described in my District would have to be disbanded. Either the newspaper or the television station would have to be sold, and news consumers would suffer.

I agree with parties who say maintaining a diversity of voices in a community is important. Diversity in voices should be the basic test for determining whether to allow cross-ownership. Under the standard I am proposing, diversity of voices would be assured and newspaper-television common ownership that benefits both the companies concerned and the consumers of their news product could continue.

Thanking you for consideration of these comments, I remain with kind personal regards

Sincerely,

Rick Boucher

Rick Boucher
Member of Congress

RB/jas

NOTE X to § 73.3555. Paragraph (d) of this section will not be applied so as to prohibit cross-ownership of a TV broadcast station and a daily newspaper, provided that the licensee of such TV broadcast station complies with the following requirements in the market in which it owns such daily newspaper:

1. (a) Station shall provide, during the hours of 5 a.m. to midnight on its analog channel, and after February 17, 2009, on its most watched digital channel, an average of five percent locally relevant and responsive programming, of which half must be locally produced by licensee or its affiliate, as documented in the station's public inspection file and on its website.

   (b) "Locally relevant and responsive programming" means local news and public affairs programming, and such programming also may include programming addressing issues and topics of local cultural interest, controversial issues of public importance, and issues of interest to minorities in the community; local sports; local weather information; educational or instructional programming; local children's educational programming; local and non-paid religious programming; and local or regional agricultural programming.

   (c) Licensee shall determine the local relevance and responsiveness of the station's programming through quarterly interviews of community leaders and quarterly meetings with viewers, which shall include representatives from local minority organizations or institutions, as documented in the station's public inspection file and on its website.

2. In the four weeks preceding a general election, station shall provide, during the hours of 5 a.m. to midnight on its analog channel, and after February 17, 2009, on its most watched digital channel, an additional two hours per week of locally produced news programming, interviews, and other public affairs formats that provide for debates or a discussion of ballot measures, ballot referenda, or positions of candidates or political parties in the forthcoming election. Such time shall not include paid political advertisements or free time for political candidates.

3. Station shall provide on its analog channel or, after February 17, 2009, on its most watched digital channel, an average per week of 100 non-paid public service announcements ("PSAs") of 30-seconds duration (or an equivalent amount of total PSA time) directed to matters of interest and concern to the local community, at least half of which are locally produced by licensee or its affiliate and do not promote station-sponsored events, as documented in the station's public inspection file and on its website.

4. All averages are to be computed on a calendar quarter basis.

5. Licensee on an annual basis, on the anniversary of its renewal application filing date or other consistent reporting deadline, shall complete and place in the

station's public inspection file and on its website FCC Form 395-B ("Broadcast Station Annual Employment Report") or such successor form for the workforce of the station.

6. Station shall not have a blanket prohibition on the sale of advertising time to non-federal candidates.

7. Licensee shall file annually a declaration by an officer, partner, or member attesting that the station has substantially complied with the terms of this Note in all material respects.

8. In the event that a complaint relating to non-compliance with the terms of this Note is filed with the Federal Communications Commission and not acted upon by the FCC staff within 180 days, such complaint shall be deemed denied, and its filer eligible to submit an application for review by the full Commission.

9. For the avoidance of doubt, all obligations set forth in this Note shall continue throughout the licensee's ownership of the TV broadcast station and a daily newspaper in the same market.

10. Any licensee that demonstrates compliance with the terms of this Note in its application for renewal of the station's license may have that application reviewed and disposed of by the FCC staff, acting on delegated authority. If any challenge to the renewal application raises a substantial and material question of fact regarding compliance with the terms of this Note that challenge may similarly be reviewed and disposed of by the FCC staff, acting on delegated authority.