DowLohnes

August 31, 2010

VIA ECFS FILING

Marlene H. Dortch, Esquire
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Notification of *Ex Parte* Communication
MB Docket No. 09-182

Dear Ms. Dortch:

This is to advise you, in accordance with Section 1.1206 of the FCC's rules, that yesterday, George L. Mahoney, Vice President, Secretary, and General Counsel of Media General, Inc. ("Media General"), and I met with Professor Jonathan Baker, the FCC's Chief Economist, and Tracy Waldon, Chief Economist in the Office of the Media Bureau Chief. In the meeting, Mr. Mahoney discussed the positions that Media General has taken over the years in advocating for repeal of the newspaper/broadcast cross-ownership rule ("NBCO Rule"). The discussions included Media General's focus on delivering high quality local news and information and its belief that consumers are now platform agnostic. The attached materials were discussed and distributed at the meeting.

Subsequent to the meeting, a copy of the following document, which is available from the FCC and in the noted dockets, was provided to the participants: Statement of Professor Adam Clayton Powell, III with Exhibits (Appendix 4A to Media General's Comments filed on October 23, 2006 in MB Docket Nos. 06-121 and 02-277 and MM Docket Nos. 01-235, 01-317 and 00-244).

As required by Section 1.1206(b), as modified by the policies applicable to electronic filings, an electronic copy of this letter is being submitted in the above-referenced docket.

Very truly yours,

M. Anne Swanson

cc (by email):
Jonathan Baker
Tracy Waldon

Dow Lohnes PLLC
Attorneys at Law
www.dowlohnes.com

WASHINGTON, DC | ATLANTA, GA

1200 New Hampshire Avenue, NW, Suite 800
Washington, DC 20036-6802
T 202.776.2000 F 202.776.2222

Attachment 1

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

In the Matter of	)	
	)	
Structuring of the 2010 Quadrennial Regulatory	)	MB Docket No. 09-182
Review of the Commission's Broadcast	)	
Ownership Rules	)	

COMMENTS

Media General, Inc., by its attorneys, hereby files these comments in response to the FCC Public Notice, released October 21, 2009, announcing media ownership workshops that were held on November 2-4, 2009, and seeking comment on the structuring of the 2010 Quadrennial Regulatory Review of media ownership rules.[1] The workshops included discussion of local Internet news sites, and Media General below provides evidence and metrics to guide the FCC's further inquiry. The workshops also included discussion of the measurement of news in cross-owned markets and, based on the record developed in the 2006 Quadrennial Regulatory Review proceeding, Media General submits that suggestions that such measurement be made on a market-wide basis are not credible and should be avoided by the Commission.

Local Internet News Sites. During the workshops, several participants raised questions about the prevalence and use of Internet sites that provide local news and are unaffiliated with existing media outlets in a market. Media General has found that, while such websites may not be as prominently branded as national news sites or national aggregators' websites, they are growing quickly in number and attaining substantial audiences.

[1] FCC Public Notice, "Media Bureau Announces Agenda and Participants for Initial Media Ownership Workshops and Seeks Comment on Structuring of the 2010 Media Ownership Review Proceeding," DA 09-2209, MB Docket No. 09-182, released October 21, 2009.

To demonstrate this point, and also to suggest a means by which the FCC may collect additional data on this point, Media General randomly selected a market in each quartile of the first 100 Nielsen Designated Market Areas ("DMAs").[2] This exercise yielded Boston (DMA #7), Austin (DMA #48), Charleston-Huntington (DMA #63), and Chattanooga (DMA #86) as the randomly selected markets. Media General then researched the availability of websites in each market, not owned by existing media, that provide local news. In each instance, the research yielded between three and eight sites, totals that are not exhaustive and would have grown with the expenditure of more research time. These websites are listed in Appendix A.

Using information from free site profiles available at Compete.com, Media General then calculated the number of "unique visitors" and "total visitors" to each site over a twelve-month period.[3] The data show that each site had significant use with "visits" rivaling the circulation figures of local newspapers, demonstrating that residents in markets of all sizes have embraced independent local internet news sites and are using them extensively. Such sites have become another established outlet for local content and compete for "eyeballs" and, in many cases, for advertisers.

As it proceeds with the 2010 Quadrennial Regulatory Review, the FCC must evaluate the availability of news on the Internet and should expand on this type of evidence. Media General is confident that such analyses will show that the Internet vigorously competes with more

[2] Media General first divided the Top 100 DMAs into four groups of 25 each, with the first consisting of markets 1-25, the second consisting of markets 26-50, the third consisting of markets 51-75, and the fourth consisting of markets 76-100. Next, each of the four groups was placed on a separate Excel spreadsheet, to which Media General applied the Microsoft Excel "=rand()" command in the cell next to each market. This command assigns a randomly generated number to each market. Media General then selected the market in each of the quartiles that had the lowest randomly generated number assigned to it.

[3] *See* http://siteanalytics.compete.com

traditional outlets, removing any doubt as to its significant contribution to content and competition in all markets, large and small.

Measurement of News in Cross-Owned Markets. In the 2006 Quadrennial Regulatory Review proceeding, three FCC peer-reviewed studies demonstrated that the newspaper/broadcast cross-ownership rule harms the public interest because of the correlation that they showed between cross-ownership and a greater quantity and better quality of news and informational programming.[4] In comments in that docket, parties advocating tighter regulation ("Regulatory Parties") labeled these studies "junk science" and offered what they claimed were their own "studies."[5] According to the Regulatory Parties, their analyses, which claimed to measure television news in a market overall rather than on individual stations, purportedly showed that the presence of cross-owned properties tended to decrease the amount of news in a market.

At the workshops earlier this month, the Regulatory Parties' "studies" were mentioned, along with suggestions that the FCC might want to adopt their methodology and market definitions in measuring news in cross-owned markets. Such an approach is not only unnecessary, but would be mistaken. In two thorough econometric critiques submitted in the 2006 Quadrennial Regulatory Review, Media General and the Newspaper Association of America devoted extensive resources to demonstrating that the Regulatory Parties' "studies"

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[4] Gregory Crawford, "Television Station Ownership Structure and the Quantity and Quality of TV Programming: FCC Media Ownership Study #3," DA 07-3470A4, July 2007; 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; "The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News," DA 07-3470A7, as revised September 2007.

[5] Further Comments of Consumers Union, Consumer Federation of America and Free Press, MB Dkt Nos. 06-121 *et al.*, filed October 22, 2007.

suffered from a number of fundamental and econometric mistakes that undermined their reliability.[6] These mistakes included the following:

1. Misstatement of basic statistical terminology;
2. Inappropriately distinguishing between grandfathered and other cross-ownerships in their regression analyses;
3. A failure to establish causation with respect to cross-ownership; and
4. Regression analyses that included undefined variables without transparent data.

These and other flaws are discussed at length in the critiques attached hereto as Appendix B. As one of the econometric reviews of the "studies" noted, "[i]ndividually, these shortcomings limit the analytical techniques employed in [Regulatory Parties'] Comments. Collectively, they substantially limit the reliability of the findings."[7]

In proceeding with the 2010 Quadrennial Regulatory Review, the FCC should view skeptically calls for reformulated analyses that may be based on the faulty "studies" discussed in Appendix B. The Commission has limited resources. Undertaking market definitions or analytical techniques that have already been discredited and shown to be flawed is not a wise expenditure of those resources or FCC staff time.

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[6] "Statement of Dr. Harold Furchtgott-Roth," attached as Appendix A to Reply Comments on FCC Research Studies on Media Ownership, Media General, Inc., MB Docket Nos. 06-121, *et al.*, filed Nov. 1, 2007; Kurt W. Mikkelsen, "Effects of Newspaper-Television Cross-Ownership on Total Market News Minutes: Response to 'Further Comments of Consumer Union, Consumer Federation of America and Free Press,'" attached to Reply Comments of the Newspaper Association of America on Media Ownership Research Studies, MB Docket Nos. 06-121, *et al.*, filed Nov. 1, 2007.

[7] Statement of Dr. Furchtgott-Roth, *supra*, note 6 at 4-5.

Media General applauds the Commission's willingness to start thinking about its 2010 Quadrennial Regulatory Review before 2009 has concluded and urges the FCC to proceed posthaste to conduct the review mandated by Section 202(h) of the 1996 Telecommunications Act.[8] Media General has every confidence that the Quadrennial Review will once again produce evidence conclusively showing that the newspaper broadcast cross-ownership rule is no longer "necessary in the public interest as the result of competition."[9]

Respectfully submitted,

MEDIA GENERAL, INC.

By ______________________

John R. Feore, Jr.
M. Anne Swanson

of

Dow Lohnes PLLC
1200 New Hampshire Avenue, NW
Washington, DC 20036-6802
(202) 776-2534

November 20, 2009

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[8] Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 112 (1996), as amended by Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004).

[9] *Id.*

APPENDIX A

Usage of Local Independent Internet News Sites

Website	*Unique Visitors (November 2008-October 2009)*	*Total Visits (November 2008-October 2009)*
	Boston	
www.universalhub.com	509,056	1,184,701
www.bluemassgroup.com	134,638	819,401
www.bostonist.com	567,333	727,228
www.hinghamweather.com	78,850	220,699
www.massresistance.org	152,451	207,823
www.bpdnews.com	145,110	202,849
www.openmediaboston.org	41,255	44,375
www.thathottness.com	7,284	7,841
	Austin	
www.austinist.com	364,515	748,062
www.burntorangereport.com	198,851	406,728
www.austinpost.org[1]	31,566	95,221
www.republicofaustin.com[2]	7,364	9,193
	Charleston-Huntington	
www.huntingtonnews.net	215,577	1,178,826
www.putnamlive.com	72,377	330,809
www.wvutoday.wvu.edu	118,797	157,949
www.wvablue.com	25,168	26,395
www.abetterwestvirginia.com	4,026	4,181
	Chattanooga	
www.chattanoogan.com	1,150,821	3,526,258
www.chattarati.com	32,861	55,418
www.sigmtn.com	18,212	19,486

Source: Usage estimates based on free site profiles from Compete.com (available at http://siteanalytics.compete.com.)

Note: "Unique Visitors" reported above represents the sum of the number of unique visitors each month over a year-long period. Within each month, Compete.com's count of "unique visitors" includes a person only one time regardless of how many times he or she visits a site in that month. "Total Visits" represents the total number of visits to a site. A "visit" is initiated when a user first enters a site during an internet session and is considered "live" until that user's interaction with the entire internet session has ceased for 30 minutes. *See* Compete. Com Metric Descriptions at http://www.compete.com/help/s2.

[1] Data available only from 7/09 through 10/09.

[2] Data available only from 7/09 through 10/09.

APPENDIX B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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

REPLY COMMENTS ON FCC RESEARCH STUDIES ON MEDIA OWNERSHIP

John R. Feore, Jr.
Michael D. Hays
M. Anne Swanson
Daniel A. Kirkpatrick
Joshua N. Pila (Law Clerk)

Dow Lohnes PLLC
1200 New Hampshire Avenue, NW
Washington, DC 20036-6802
(202) 776-2534

Attorneys for Media General, Inc.

November 1, 2007

support and a detailed and persuasive explanation for altering the direction laid out in 2003.[8] Reregulatory Parties thus face a high bar in trying to argue that the 1975 Ban should be retained. As shown below, their latest comments on the FCC studies do not advance their goal.

II. REREGULATORY PARTIES' "STUDIES" ARE RIDDLED WITH EMPIRICAL AND ECONOMETRIC MISTAKES THAT UNDERMINE THEIR RELIABILITY AND RENDER THEM USELESS IN PETITIONERS' ATTEMPT TO REFUTE THE FCC'S PEER REVIEWED STUDIES

The centerpiece of the Reregulatory Parties' attack on the FCC's studies is a 321-page opus with over 2,000 pages of printouts from regression analyses.[9] Despite the great length and the public fanfare these materials have received, they offer no reason for the FCC to do anything but repeal the 1975 Ban.

In the comments that Media General and other industry parties filed on October 22, 2007, in support of FCC Studies 3, 4.1, and 6, they discussed how those studies demonstrate that the rule harms localism because of the correlation that they show between cross-ownership and a greater quantity and better quality of news and informational programming and the lack of any correlation between cross-ownership and "viewpoint diversity."[10] In comments filed the same day, Reregulatory Parties labeled those studies

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

[9] Further Comments of Consumers Union, Consumer Federation of America and Free Press in MB Docket No. 06-121 (Oct. 22, 2007) ("CU Comments"). While echoing some of the same broad themes, the comments of other Reregulatory Parties fail to present any empirical information or empirical analysis akin to that set forth in the CU Comments. *See, e.g.* Comments of Office of Communication of United Church of Christ, Inc., National Organization for Women, Media Alliance, Common Cause, and Benton Foundation in MB Docket. No. 06-121 (Oct. 22, 2007) ("UCC Comments") at 12-27 (asserting critiques of the studies that overlap in places those in the CU Comments).

[10] Further Comments of Tribune Company on Research Studies on Media Ownership in MB Docket No. 06-121 (Oct. 22, 2007) ("Tribune Comments") at 3-8; Comments of the

"junk science" and offered what they claimed were their own "studies" filed in the CU Comments to support their point. As the econometric report attached as Appendix A shows, however, the Reregulatory Parties' "studies" are the ones that actually deserve that pejorative appellation. [11]

The attached Econometric Review concentrates on Chapters IV, VII, and VIII of the CU Comments, which bear the following titles:

Chapter IV --	Market Level and Station-Levels [sic] Analysis with Properly Defined Variables and Statistical Models
Chapter VII --	Station Revenue and News Production in Small Markets
Chapter VIII --	Assessing the Methodologies and Robustness of the Official Cross-Ownership Studies

While these chapters each address somewhat different aspects of the cross-ownership debate, the Econometric Review shows that they all share a number of fundamental economic and econometric mistakes that undermine their reliability. These mistakes include the following:

1. Reregulatory Parties incompletely discuss and review the comments of the peer reviewers of the FCC studies;
2. Reregulatory Parties assail, but do not refute, the statistical results of the peer reviewed FCC studies;
3. Regulatory Parties misstate basic statistical terminology;
4. Reregulatory Parties inappropriately distinguish between grandfathered and other cross-ownerships in their regression analyses;

Newspaper Association of America on Media Ownership Research Studies in MB Docket No. 06-121 (Oct. 22, 2007) ("NAA Comments") at 4-18; Comment on Research Studies on Media Ownership of Media General in MB Docket No. 06-121 (Oct. 22, 2007) ("Media General Comments") at 6-12.

[11] Statement of Dr. Harold W. Furchtgott-Roth ("Econometric Review"), attached as Appendix A.

5. Reregulatory Parties' approach does not establish causation with respect to cross-ownership; and
6. Reregulatory Parties run regressions with undefined variables and without transparent data.[12]

As the Econometric Review notes, "[i]ndividually, these shortcomings limit the analytical techniques employed in the Further Comments. Collectively, they substantially limit the reliability of the findings of the Further Comments."[13] The Econometric Review then presents separate discussions of the failures in each of CU's Chapters IV, VII, and VIII.

On the subject of the peer reviews, in particular, the Econometric Review points out the selective manner in which the Reregulatory Parties quote from the fifteen peer reviews of the FCC studies, failing to note in the case of FCC Studies 3, 4.1, and 6 that the peer reviewers, despite minor flaws they had flagged, endorsed the finding of those studies on an overall basis.[14] The Econometric Review also notes that the Reregulatory Parties do little to refute the statistical analyses and reliability of the FCC studies:

> Indeed, although in some instances Consumer Commenters transform existing information, add new variables, and suggest new specifications these alterations at most provide alternative explanations of the underlying data rather than render the FCC studies unreliable. Fifteen independent peer reviewers were unable to conclude that the results of the FCC studies were unreliable; the Consumer Commenters' Further Comments do not provide specific analyses that render the results of the FCC studies unreliable.[15]

While Reregulatory Parties claim that the FCC's studies improperly focused on station-level, rather than market-level data, the Econometric Review explains that aggregation in applied econometrics frequently leads to bias and masks the specific characteristics of

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[12] *Id.* at 3-15.

[13] *Id.* at 4.

[14] *Id.* at 4-5.

[15] *Id.* at 8 (footnotes omitted).

heterogeneous firms, characteristics which may have substantial effects on the production of news by a firm.[16]

As to Reregulatory Parties' keystone claim that their use of the FCC data in their own regressions yielded a decrease in news quantity when cross-ownerships are present, the Econometric Review attributes this result simply to incorrect specification of variables. 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."[17]

In short, the FCC studies' peer reviewers got it right. Their peer reviews failed to detect any significant or fatal errors in Studies 3, 4.1, and 6, errors which might have undercut the studies' results. Instead, the peer reviews found the studies' overall findings to be reliable. The Econometric Review concludes that, despite the Reregulatory Parties' attempts at econometric sophistication, their latest filings fail to show that either the FCC's studies or the peer reviews are wrong.

III. THE DATA QUALITY ACT AND IMPLEMENTING GUIDELINES PROVIDE ABSOLUTELY NO GROUND ON WHICH TO CHALLENGE THE FCC'S MEDIA OWNERSHIP STUDIES

In their latest comments as well as in several pleadings filed prior to October 22, 2007, Reregulatory Parties put forth what they allege are ways in which the FCC's process related to the 10 media ownership studies failed to comply with the Data Quality Act ("DQA") and Office of Management and Budget ("OMB") guidelines implementing the DQA.[18] CU's allegations regarding the DQA, however, must be dismissed as that statute

[16] *Id.* at 17.

[17] *Id.* at 18.

[18] CU Comments at 4-5, 72-76. The DQA was passed as part of the Treasury and Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515, *codified at* 44 U.S.C. § 3516 Historical and Statutory Notes. *See also* Office of Management and

Appendix A

ECONOMETRIC REVIEW

By
DR. HAROLD FURCHTGOTT-ROTH
FURCHTGOTT-ROTH ECONOMIC ENTERPRISES
WASHINGTON, DC

NOVEMBER 2007

I. Introduction

A. Qualification

My name is Harold W. Furchtgott-Roth. I am president of Furchtgott-Roth Economic Enterprises, an economic consulting firm. I was a commissioner of the Federal Communications Commission (FCC) from November 1997 through the end of May 2001. My statements as a commissioner at the FCC have been cited by federal courts. I have been a guest speaker at many conferences for the telecommunications industry. I serve on two corporate boards and several non-profit advisory boards.

From June 2001 through March of 2003, I was a visiting fellow at the American Enterprise Institute for Public Policy Research (AEI) in Washington, DC. I have worked for many years as an economist. From 1995 to 1997, I was chief economist of the House Committee on Commerce where one of my responsibilities was to serve as one of the principal staff members helping to draft the Telecommunications Act of 1996.

From 1988 to 1995, I served as a senior economist at Economists Incorporated where I worked on econometric matters in regulatory, antitrust, and commercial litigation cases. These cases included many matters in the broadcast, cable, and telecommunications industries. From 1984 to 1988, I served as a research analyst at the Center for Naval Analyses where I conducted quantitative studies on behalf of the Department of the Navy.

My academic research concerns economics and regulation. I am the author or coauthor of four books: *A Tough Act To Follow: The Telecommunications Act of 1996 and the Separation of Powers* (Washington, DC: American Enterprise Institute) 2006; *Cable TV: Regulation or Competition*, with R.W. Crandall, (Washington, DC: The Brookings Institution), 1996; *Economics of A Disaster: The Exxon Valdez Oil Spill*, with B.M. Owen, D.A. Argue, G.J. Hurdle, and G.R. Mosteller, (Westport, Connecticut: Quorum books), 1995; and *International Trade in Computer Software*, with S.E. Siwek, (Westport, Connecticut: Quorum Books), 1993. I am a frequent commenter on economic matters, and daily newspapers, including the *Wall Street Journal*, have published my opinion pieces. I have a weekly column in the business section of the *New York Sun*. I have testified on many occasions before committees of the U.S. Senate and House of Representatives.

I received my undergraduate training in economics at MIT, and I received a Ph.D. in economics from Stanford University. My resume is attached as Appendix 1.

B. Assignment

I have been asked by Media General, Inc. to review the Further Comments of Consumers Union, Consumer Federation of America, and Free Press (hereinafter, "Consumer Commenters") for economic and econometric reliability. I have also been asked to review the comments filed jointly by the Office of Communications of the

United Church of Christ, National Organization of Women, Media Alliance, Common Cause, and the Benton Foundation (hereinafter, "UCC"). Since the latter comments do not present new empirical analyses, my review focuses on the Further Comments of the Consumer Commenters.

II. Summary of findings

I have reviewed the Further Comments of Consumer Commenters and the Comments of UCC. In focusing on Chapters IV, VII, and VIII of the Consumer Commenters, I reach the following conclusions:

- Consumer Commenters make several economic and econometric mistakes throughout the report that undermine its reliability;
- The Consumer Commenters make several economic and econometric mistakes in Chapter IV that render the chapter results unreliable;
- The Consumer Commenters make several economic and econometric mistakes in Chapter VII that render the chapter results unreliable; and
- The Consumer Commenters make several economic and econometric mistakes in Chapter VIII that render the chapter results unreliable.

III. Consumer Commenters make several economic and econometric mistakes throughout the report that undermine its reliability

Several shortcomings appear throughout the Consumer Commenters' Further Comments. These include the following:

- Consumer Commenters incompletely review the peer review comments;
- Consumer Commenters assail but do not refute the statistical results of the peer-reviewed FCC studies;
- Consumer Commenters misstate statistical terminology;
- The Consumer Commenters inappropriately distinguish between grandfathered and other cross-ownerships in regression analyses;
- Consumer Commenters' approach does not establish causation with respect to cross-ownership; and
- The Consumer Commenters run regressions with undefined variables and without transparent data.

Individually, these shortcomings limit the analytical techniques employed in the Further Comments. Collectively, they substantially limit the reliability of the findings of the Further Comments.

A. Consumer Commenters incompletely review the peer review comments.

Throughout the Further Comments, Consumer Commenters challenge and seek to discredit the findings of the series of research papers on media ownership issued by the FCC.[1] One stumbling block for challenging the FCC papers is that they were prepared by reputable scholars and were peer reviewed by other reputable scholars. Those peer reviews make suggestions and comments but largely support the methods employed and findings reached in the FCC studies.[2]

Nonetheless, the Consumer Commenters' Further Comments attempt to use the peer reviews to discredit the FCC studies. The Further Comments refer to the FCC's "peer review" comments in 80 instances but largely focus on alleged deficiencies in the peer review process.[3] The Consumer Commenters' Further Comments suggest that the peer reviews find that the FCC studies "suffer numerous methodological problems"[4] further listed with page references to the peer review comments in Exhibit III-2.[5] Yet Exhibit III-2 is merely a listing of peer review critical comments primarily for only three of the FCC "output" studies, studies 3, 4.1, and 5.[6] Each comment was addressed to one of the individual FCC studies, but the Consumer Commenters' Further Comments list them in aggregate as if they apply to all studies because, allegedly, "Many of the criticisms offered by the more conscientious reviewers apply to the studies reviewed by the less conscientious reviewers."[7] Yet it is speculative, even irresponsible, to assume that any of the criticisms listed in Exhibit III-2 apply to any matter beyond which the criticism was addressed, much less to all of the FCC studies.

More importantly, the discussion in the Consumer Commenters' Further Comments focuses only on the negative comments with respect to the FCC studies in the peer reviews. Yet each of the peer reviews also had positive comments about the FCC studies that are not mentioned in the Consumer Commenters' Further Comments. Exhibit III-2 focuses on the peer reviews of Professors George, Leslie, and Sweeting. Yet Prof. George in reviewing FCC study 3 states: "Overall, the study considers an interesting question with appropriate data and methods and should ultimately prove useful for policy purposes."[8] Professor Leslie in reviewing Study 4.1 concludes: "Overall, the conclusions of the paper are substantiated by the analysis."[9] Professor Sweeting observes with respect to study 5, "With this caveat (and others I outline below),

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[1] See Source Documents at http://www.fcc.gov/mb/peer_review/peerreview.html.
[2] See Peer Reviews, at http://www.fcc.gov/mb/peer_review/peerreview.html.
[3] Further Comments at 72-76.
[4] Ibid. at 76.
[5] Ibid., at 78.
[6] Ibid. Exhibit III-2 lists Study 6, but no references in the Exhibit are made to the peer review of Study 6 by Matthew Gentzkow. For that review, largely positive about FCC Study 6, see http://www.fcc.gov/mb/peer_review/prstudy6.pdf. In contrast, Exhibit III-2 does not include Study 5 in its header, yet includes the comments of A. Sweeting, a reviewer for FCC study 5.
[7] Ibid, at 77.
[8] See letter from Prof. L. George to M. Connolly, August 30, 2007, http://www.fcc.gov/mb/peer_review/prstudy3.pdf.
[9] P. Leslie, Review of FCC Study 4.1, http://www.fcc.gov/mb/peer_review/prstudy4.pdf.

do these highlighted results reflect a fair reading of the statistical results? I believe that the answer is yes."[10] Similar comments are found in other peer reviews.[11]

The Consumer Commenters' Further Comments selectively present some of the comments of Professor George with respect to Study 3, and Professor Leslie with respect Study 4.1, as guideposts for reassessing the FCC studies but omit and ignore the comments of Professor Gentkow entirely.[12] Although the Further Comments claim to have "conducted the suggested lines of analysis identified by the peer reviewers as necessary,"[13] any adjustments that are actually made are clearly on a selective rather than comprehensive basis.

Despite focusing attention on the peer reviews, most of the adjustments to the empirical analyses by the Consumer Commenters are not based on suggestions from the peer reviews. The Consumer Commenters transform station-level data to market level data,[14] try to distinguish between waived and grandfathered cross-ownership conditions,[15] insert various other new variables,[16] and apply a Heckman estimation technique for a censored dependent variable.[17] These alterations were not suggested by the peer reviews. Indeed, as will be seen below, many of the adjustments made by Consumer Commenters are incorrect.

Although some of the reviews suggest the possibility of examining other specifications, considering other data, and employing other estimation techniques, these comments by themselves do not undermine the reliability of the results presented in the FCC studies. None of the peer reviews concludes that any of the underlying FCC studies is unreliable, or lacking merit, or unworthy of consideration. Although the peer reviews provide important insights into the interpretations and limitations of the FCC studies, they do not provide a basis to undermine the credibility of the FCC studies or their findings.

B. Consumer Commenters assail but do not refute the statistical results of the peer-reviewed FCC studies

Even with the peer reviews supporting the FCC studies, other comments could nonetheless criticize the FCC studies. Such comments, if based on reasonable economic and econometric foundations and if sufficiently raising doubts about the techniques or results of the FCC studies, could potentially undermine the data, techniques, or findings of those studies.

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[10] A. Sweeting, Review of FCC Study 5, http://www.fcc.gov/mb/peer_review/prstudy5.pdf.
[11] See, e.g., the peer review of FCC Study 6 by Matthew Gentzkow, http://www.fcc.gov/mb/peer_review/prstudy6.pdf.
[12] Further Comments at 188-189.
[13] Further Comments at 2.
[14] Ibid., at 87-89.
[15] Ibid., at 89-91.
[16] Ibid., at 91-93.
[17] Ibid., at 204.

Despite claims to the contrary,[18] the Consumer Commenters' Further Comments do little to refute the statistical analyses and reliability of the FCC-sponsored studies. Indeed, although in some instances Consumer Commenters transform existing information, add new variables, and suggest new specifications,[19] these alterations at the very most provide alternative explanations of the underlying data rather than render the FCC studies and their conclusions unreliable. Fifteen independent peer reviewers were unable to conclude that the results of the FCC studies and their conclusions were unreliable;[20] the Consumer Commenters' Further Comments do not provide specific analyses that render the results of the FCC studies unreliable.

Much of the Consumer Commenters' Further Comments focuses on the alleged shortcomings in the *conception* of the FCC studies[21] rather than in detailed refutation of the results. Much of the remainder of the Further Comments then presents alternative analyses of the data—various forms of sensitivity analyses—and bemoans the absence of certain policy considerations such as minority ownership.[22] Little of the report, however, substantially undermines the credibility of the specific techniques, data, or findings of the FCC studies.

C. *Consumer Commenters misstate statistical terminology*

Throughout their report, Consumer Commenters are not precise in the use of statistical terminology. The imprecise language undermines the credibility of the Further Comments.

1. Reporting the signs of estimated coefficients

Usually, in applied econometric studies, the signs of estimated coefficients are noted when they are significantly different from zero. Throughout their report, Consumer Commenters emphasize the sign of estimated coefficients that are not significantly different from zero. For these estimated coefficients, the estimated standard errors are relatively large. Because in these instances one cannot determine the sign of the underlying coefficient from the estimated parameter, there is little reason to emphasize the sign of the estimated coefficient.

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[18] "In these comments we supply a thoroughgoing critique of the FCC studies based on policy relevant definitions and concepts as well as a rigorous approach to statistical analysis that we have developed and consistently applied throughout this proceeding." Further Comments at 1.
"Consumer Commenters will show that the FCC's official studies in this proceeding are an ad hoc collection of inconsistent, incompetent and incoherent pieces of research cobbled together to prove a foregone conclusion." Further Comments at 1.

[19] See Further Comments at 2.

[20] See http://www.fcc.gov/mb/peer_review/peerreview.html.

[21] See Further Comments at 17-85.

[22] See Further Comments at 86-321.

2. Reporting the parameter estimates for cross-ownership

Some of the parameter estimates in the regression analyses in these studies are for cross-ownership variables that may help explain the dependent variables such as the number of minutes of news programming. A researcher might stipulate, for example, that more news programming is in the public interest, and the researcher could then perform a statistical test on the estimated parameter associated with cross-ownership conditions, holding other factors in the regression analysis constant.

Under this proper statistical approach, a finding that an estimated parameter for cross-ownership is not statistically different from zero means that one can reject the hypothesis that the cross-ownership restriction is necessary in the public interest for that particular set of quantifiable information. A finding that a parameter estimate is insignificant supports repeal of the cross-ownership rule. Implicitly, this is the approach taken in the FCC studies.

The Consumer Commenters' Further Comments present a different—and, by my understanding, legally incorrect—position on statistical testing for cross-ownership rules.[23] The Further Comments shift the statistical test to "Does Cross-ownership increase competition or improve diversity and localism?"[24] Under this improper statistical approach, a finding that an estimated parameter for cross-ownership is not statistically different from zero means that one can reject the hypothesis that the cross-ownership restriction is unnecessary in the public interest for that particular set of quantifiable information. Parsing through the language, this incorrect standard means that a finding of an insignificant coefficient on cross-ownership supports keeping the cross-ownership rule. This is an incorrect statistical burden, and it further means that rules that have no measurable benefit should be kept. Implicitly, this incorrect approach is taken in the Consumer Commenters studies.

3. Both quantifiable and non-quantifiable factors

FCC rules on restrictions on the ownership by broadcast licensees of newspapers are governed by Section 202 of the Telecommunications Act of 1996. Under Section 202(h), the Commission shall "review ... all of its ownership rules ... as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition."[25] For the Commission to retain an ownership rule such as newspaper cross-ownership, the obligation on the Commission is not to determine whether the rule does no harm but rather affirmatively to determine that the rule is "necessary in the public interest as the result of competition."

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[23] See Further Comments at 58-59.
[24] Ibid., at 59.
[25] Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 112 (1996), as amended by Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004).

Both quantifiable and non-quantifiable factors may enter into a determination of whether a rule is "necessary in the public interest as the result of competition." The regression analyses presented in both the FCC studies and the Consumer Commenters' Further Comments are based only on quantitative information and present quantitative information on which statistical tests can be conducted. Classical statistical inference allows a researcher to posit a testable hypothesis and then either reject or fail to reject the hypothesis; under classical statistics, one cannot "prove" the positive outcome of a hypothesis such as whether a rule is "necessary in the public interest as the result of competition."

Formal statistical tests cannot be altered to accommodate non-quantifiable information. The Consumer Commenters appear to recognize this impossibility but still suggest altering the statistical tests:

> It is difficult to know how much of an increase in the total news output is worth the loss of a major independent source of news, but there ought to be a substantial increase. Thus, we think the research hypothesis should be a substantial increase [in news]...
>
> To put the matter simply; if cross-ownership does not lead to a substantial increase in the amount of news produced in the market, it cannot promote the public interest because it eliminates an important independent source of news in the market. Even if there is a substantial increase in the amount of news, one might not conclude that cross-ownership is in the public interest because the loss of an independent voice is not worth the increase in the quantity of news.[26]

This articulation of the hypothesis tests is clearly wrong. The regression analyses can reveal the association of cross-ownership with quantities of news, but the regression analyses cannot weigh news with non-quantifiable factors.

D. The Consumer Commenters inappropriately distinguish between grandfathered and other cross-ownerships in regression analyses

The consumer Commenters inappropriately distinguish between cross-ownership situations that are grandfathered and cross-ownership situations created pursuant to temporary waivers. There is no clear theoretical reason for the distinction. In several instances, the Consumer Commenters speculate about economic behavior without any verifiable evidence:

- The Consumer Commenters speculate that there is a difference in behavior between grandfathered cross-ownership operations and those operating pursuant to waivers.[27] Consumer Commenters claim that licensees with waivers are on "good behavior" and therefore air more local news. It is unlikely that econometric tests will provide definitive evidence about motivation, but it is

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[26] Ibid., at 88.
[27] At 89-91.

possible to test whether there are statistically different measures of local news. Given the many shortcomings in the econometric analyses of the Consumer Commenters, it would be difficult to construct a proper test with their methods, but the Consumer Commenters do not even attempt such a test. [28]

- The Consumer Commenters speculate that grandfathered operations reflect the "long-term effect of cross-ownership" and the waiver situations do not.[29] Yet many of the waivers have been in place for many years with anticipation of permanent authority, so that many waiver situations also reflect the "long-term effect of cross-ownership." Ultimately, the basis for the distinction is little more than speculation.

Even if there were a reasonable theoretical basis to distinguish between grandfathered newspaper cross-ownership operations and those relying on waivers, the data bases likely do not permit meaningful econometric distinctions. Although there appear to be at least 26 total cross-ownership situations in the data base from FCC Studies 3 and 4,[30] only 8 of those cross-ownership situations involve waivers for the 3 years of data with 207 DMAs.[31] The data base for FCC Study 4 also has only 8 cross-ownership waiver conditions for 4 years of data for 207 DMAs.[32]

The paucity of cross-ownership observations does not limit that station-level analyses in the FCC studies or in Chapters VII and VIII of the Consumer Comments, but the small number of cross-ownership conditions limits the market-level data analyses in Chapter IV of the Consumer Commenters. In those market-level analyses, the cross-ownership dummy variables merely capture the deviations of those DMAs with cross-ownership conditions relative to the sample means. Those deviations may reflect similar cross-ownership conditions but also other unmeasured common traits of the DMAs. The larger number of DMAs with cross-ownership conditions, the more likely cross-ownership is the primary common characteristic. With fewer DMAs with cross-ownership conditions, the more likely other common factors are captured in the dummy variables. In the case of cross-ownership waiver situations, only 8 DMAs are included in the Consumer Commenters' market-level reviews.

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[28] Assuming for argument's sake that the econometric methods of Consumer Commenters were correct, they could have proceeded according to the following discussion. Consumer Commenters have two dummy variables: one for grandfathered licenses and one for waiver licenses; but a formal test of restricting the coefficients on the two variables to be the same, easily performed, is never presented. Alternatively, any other specification would have a dummy variable for all cross-ownership licensees and a separate dummy-variable for either grandfathered or waiver situations. The simple test would be whether the coefficient on the separate dummy variable is zero.

[29] Further Comments at 89.

[30] According to Exhibit IV-3, there are 621 market observations corresponding to the 3 years of FCC study 3 and 840 market observations corresponding to the 4 years of FCC study 4. For the incidence of cross-ownership conditions, see Exhibit IV-10 at 108.

[31] According to Exhibit IV-10, there is 0.0386 incidence for waiver conditions in the study 3 data base, or 24 total, or 8 per year. For the study 4 data base, the incidence is 0.0381, or 32 total over 4 years, or 8 per year. The 207 DMAs can be seen in the regression results presented in the statistical appendix. See, e.g., Part2.pdf at 70-74.

[32] Ibid.

As can be seen in Consumer Commenters' statistical appendices where there are dozens of regression analyses with station-level data and DMA-specific dummy variables, there is substantial variation in news production and other factors across DMAs holding other factors constant. For example, for the regression presented in the fifth column of Exhibit VIII-6,[33] DMA dummy variables were used for 206 of the 207 DMAs with the Study 3 data.[34] The range of DMA effects unrelated to cross-ownership was as follows: -508 (significantly different from zero) in DMA 40 to +197 (not significantly different from zero) in DMA 191. For this regression, the measured effect of cross-ownership is 25.9 (not significantly different from zero).

At the station level, the effect of cross-ownership is small relative to the effect of DMA differences. One would expect to find similar underlying results with market-level data. It would not be surprising to find that differences in DMA characteristics unrelated to cross-ownership will be greater than the effect of cross-ownership in the 8 DMAs with cross-ownership waivers.

E. Consumer Commenters' approach does not establish causation with respect to cross-ownership

In reviews of econometric results, correlation is often confused with causation, something Consumer Commenters recognize.[35] In other instances, Consumer Commenters assert causation without offering any foundation: "Not only does cross-ownership not increase the amount of news available in a market, it actually decreases the amount of news. Allowing cross-ownership reduces both the quantity and diversity of news in the market."[36] There are other instances of claims of causation that simply cannot be supported.[37]

F. The Consumer Commenters run regressions with undefined variables and without transparent data

The Consumer Commenters construct many different variables. Some of these are aggregations of station-level information, which will be discussed in more detail below. Much of the data in Chapter IV appear to be aggregated from data presented in the FCC studies. Ultimately, none of the Consumer Commenters' transformed data or

[33] Further Comments, at 198.
[34] One DMA is omitted for identification purposes.
[35] "To claim that the behavior of the acquired stations reflects the effects of cross-ownership is simply incorrect – in the form of an error of confusing correlation with causation. Cross-ownership did not create the behavior." Consumer Commenters, Further Comments, at 89.
[36] Ibid., at 88-89.
[37] For example, the following statement is incorrect both in terms of characterizing the actual results of the study and causation: "In fact, the FCC's data show the opposite result. Newspaper-broadcast cross-ownership results in a net loss in the amount of local news that is produced across local markets by broadcast stations." Consumer Commenters at 2. Similar incorrect statements of causation are: "At the market level, cross-ownership results in the loss of an independent voice as well as a decline in marketwide news production." Consumer Commenters at 2; and "Cross-ownership reduces the total amount of local news available in the market," Consumer Commenters at 7. These examples of causation are not exhaustive of those in the Further Comments.

new variables is immediately accessible to the public. Consequently, reviewers must take both the data and the regression results at face value.[38]

IV. The Consumer Commenters make several economic and econometric mistakes in Chapter IV that render the chapter results unreliable

The Consumer Commenters make several mistakes in Chapter IV. Among these are the following:

- Aggregating to market level to examine the effect of cross-ownership is incorrect;
- The specifications chosen by Consumer Commenters are clearly wrong;
- The use and interpretation of "policy variables" are incorrect;
- Consumer Commenters' theory of broadcaster behavior is speculative and not tested;
- The analysis of small markets in chapter IV is undocumented and wrong; and
- The conclusions presented for Chapter IV are inaccurate.

Each of these mistakes undermines the regression analyses and results presented in the chapter. Collectively, they render the results of the chapter unreliable.

A. Aggregating to market level to examine the effect of cross-ownership is incorrect

In response to the several station-level analyses in the FCC studies, including studies of cross-ownership, none of the peer reviews states that the FCC analyses are invalid because they should have been conducted at the market level. Yet Consumer Commenters argue that the proper level of analysis for the effect of cross-ownership is at the market level.[39] Curiously, despite the central importance that they attach to market-level analysis,[40] Consumer Commenters later in their report focus their attention on station-level analyses.[41]

Consumer Commenters suggest that "[t]he policy concern is about the total amount and diversity of news available to citizens in the market."[42] Although Consumer Commenters do not describe, much less provide a data base, of how the news variable used in their market-level regression analyses is constructed in each market, it appears to be based on hours of broadcast television news only. Excluded is news provided by

[38] Particularly given positions that Consumer Commenters have taken in the past about public accessibility of information, it would be ironic if decision makers were to use the results of the analyses presented in the Further Comments.
[39] Consumer Commenters, Further Comments, at 87-89.
[40] "The most important step is to undertake a **market level analysis**. This is the central policy question, but the three studies that targeted the newspaper-TV ownership limit failed to conduct this type of analysis." Ibid., at 87.
[41] Ibid, e.g,. at 114-216.
[42] Ibid., at 88.

newspapers, radio stations, internet sites, etc.[43] Thus, despite claiming the centrality of total news and diversity of news in a market, Consumer Commenters' revised regressions presented in Chapter IV measure neither.[44]

Without aggregation, one observes the output of news by station. Within the same DMA, variations in news output can be attributed to variations in specific characteristics of the station such as ownership. When data are aggregated, the news output for a DMA reflects only the characteristics of the DMA, with more hours of broadcast news not surprisingly associated with larger DMAs in which there are more stations. Moreover, there are several econometric reasons that analysis of station-level data, where available, is preferable to more aggregated market-level data including the following:

- Aggregation is a common problem in applied econometrics and can lead to bias.[45] Aggregation from firm-level data to the market-level data masks the specific characteristics of heterogeneous firms. Many of those characteristics may have substantial effects on the production of news by the firm. Aggregating data loses this firm-specific information, such as ownership, affiliation, channel location, etc.
- In this specific instance, researchers are attempting to identify firm-level information—increases in news at the station-level—that cannot be identified with market-level data.
- With time-series cross-section data, a market-level aggregation would leave one with observations of news output for a DMA that likely vary little over time, certainly with less annual variation than station-level data. Clustering standard errors on DMAs does not compensate for including three or four observations for each DMA with little variation other than time in either explanatory or dependent variables. Not surprisingly, most of the market-level regression analyses find little significance in time-specific dummy variables.

B. The specification chosen by Consumer Commenters is clearly wrong

Most broadcast stations offer some news.[46] Consequently, in a market-level approach, if the quantity of broadcast news in a market is measured simply as the sum of news offered by each broadcast station in a market, one of the strongest predictors of the quantity of broadcast news in a market would be the number of stations in the market. That single variable, curiously, is omitted in the specifications by Consumer Commenters

[43] It is unclear whether cable local news, included in FCC study 3, is used by the Consumer Commenters in their studies.
[44] Ibid., at 87-109.
[45] The classical discussions of aggregation and aggregation bias are in H. Theil, *Principles of Econometrics*, John Wiley & Sons, Inc., 1971, at 556-570.
[46] See discussion of censored data with respect to Heckman regression techniques in the Consumer Commenters report. Ibid. at 204-07.

in Chapter IV.[47] The omission of that variable means that the regression results are much less precise.

Some of the variables included in the Chapter IV specifications are obvious proxies for the number of stations, but far less precise than would have been achieved directly by including a variable for the number of stations. The variable for DMA homes is a measure both of the size of the DMA and a proxy, although an inadequate substitute, for the number of stations in the DMA. Not surprisingly, as DMA homes increase, Consumer Commenters find the quantity of news and public affairs programming increases.[48]

The HHI for station revenues is not fully explained by the Consumer Commenters in describing their regression analyses.[49] The higher the HHI, the more likely that there are fewer stations and thus less news. Not surprisingly, as HHI increases, Consumer Commenters find the quantity of news and public affairs programming decreases.[50] But this is just an artifact of not directly including the number of stations rather than any reflection on the competition for news in the local market.

The regression factors described in the paragraphs above, together with the constant, are the consistent significant findings in the regression analyses presented in Exhibit IV-3. The regression results would likely have been more precise if, instead of these proxies, the regressions had included one variable: the number of broadcast stations.

C. The use and interpretation of "policy variables" is incorrect

Consumer Commenters examine a series of "policy variables" in Chapter IV with percentages in the regression analyses.[51] Some of these percentages become proxies for the number of commercial stations. For example, the percentage of Big 3 stations among commercial stations has an estimated negative coefficient, meaning that as the percentage of commercial stations that are Big 3 increases, the measured number of minutes of local news decreases.[52] The estimated coefficient is negative because the Big 3 are almost ubiquitously present, and thus the percentage of Big 3 stations is larger where there are fewer commercial stations, and thus there is less total local news in the market given the overall decline in station number.[53] The uninformed interpretation would be that more Big 3 stations lead to less news; this is exactly the opposite of the underlying data.

[47] Curiously, such variables are included in regressions presented in Chapter VII. See Further Comments at 174-179.
[48] Ibid., Exhibit 3, at 96.
[49] This assumes that the HHI for station revenues is measured correctly. Consumer Commenters at 91 note that they will measure HHI, but there is no precise description of how it is constructed from underlying data.
[50] Consumer Commenters' Further Comments, Exhibit IV-3, at 96.
[51] Ibid., at 91.
[52] Ibid., at Exhibits IV-3, at 96.
[53] Stated slightly differently, the relevant variable, the number of commercial stations, is in the denominator of the variable, and the number of Big 3 stations is in the numerator. News and the number of stations are

A better and more accurate method to measure the contribution of various types of stations to total news would have been to have a dummy variable for each major network or ownership type as was done in FCC Study 3.[54] In that manner, one could more precisely attribute incremental news to different categories of stations.

Consumer Commenters interpret the policy variables and cross-ownership variables presented in Exhibit IV-3 as meaning that cross-ownership leads to less news;[55] this interpretation is incorrect for several reasons. The misinterpretation of causation is described above. Some of the problems with the underlying construction of variables are described above. Most of the estimated coefficients are insignificant. The Consumer Commenters note that some of the estimated coefficients for cross-ownership are negative, but most of these estimated coefficients should not be emphasized because they are still largely insignificant.

D. Consumer Commenters' theory of broadcaster behavior is speculative and not tested

Consumer Commenters postulate a theory of broadcaster behavior in markets with newspaper cross-ownership that has at least three parts:

1. Stations with newspaper cross-ownership possibly may air more news;
2. Other stations in the market will react by offering less news; and
3. The net sum of broadcast news in a market will decline.[56]

The proper test for at least the second part of this theory is not the market-level regression analysis suggested, but never actually run, by Consumer Commenters. Rather, a better test would be based on station-level data with a dummy variable for cross-owned stations and a separate dummy variable for non-cross-owned stations in the same market with cross-owned stations. With a specification similar to that of Crawford, Table 17,[57] one would then test whether the estimated coefficient on non-cross-owned stations in the same market with cross-owned stations is negative and significantly different from zero, or at least less and significantly different from the estimated coefficient for cross-ownership. If one can reject the hypothesis, then one has a foundation to claim that decreases in news market wide, at least as measured,[58] is associated with increases in cross-ownership. If one cannot reject the hypothesis described above for the estimated

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closely and positively related. The estimated coefficient for any variable with number of stations in the denominator will likely be negative.

[54] G.S. Crawford, "Television Station Ownership Structure and the Quantity and Quality of TV Programming," July 2007, FCC Study 3, Tables 17-26.

[55] Consumer Commenters' Further Comments at 95-98.

[56] Consumer Commenters' Further Comments at 88.

[57] Crawford, at 46.

[58] One is still left with the task of measuring overall news or programming in a market. As noted earlier, the Consumer Commenters only appear to include broadcast television programming, omitting all other forms of news such as newspapers, radios, cable, internet, etc.

coefficient on the non-cross-owned station for step 2 above, one need not proceed with constructing a test for step 3, based on the overall market.

E. The analysis of small markets in chapter IV is undocumented and wrong

In Section IV, Consumer Commenters present an analysis of cross-ownership in small markets comparing all markets and small markets both with respect to the minutes of news produced and the number of stations airing news.[59] The regression results for the number of stations airing news do not appear to be presented in the statistical appendices. Moreover, the mean of the number of stations airing news is 7 for all markets and 4.2 for small markets.[60] With dependent variables that are almost entirely single-digit integers, ordinary least squares (OLS) regression analysis, the approach used by Consumer Commenters, is not likely an appropriate estimation technique. A limited dependent variable regression technique would be more appropriate.

Even if the Consumer Commenters had used a more appropriate regression technique, even if the documentation of their analyses were more complete, and even if all of the other errors in Consumer Commenters' econometric analyses described in this report were solved, the splitting of the sample for market level variables is inappropriate for analysis of cross-ownership effects.[61] As described above, there are too few observations of DMAs with cross-owned properties to permit meaningful measurement and distinctions between grandfathered situations and waiver situations in a market-level analysis. To further divide the sample into two parts increasingly diminishes the interpretation of the cross-ownership variables. Fewer observations of cross-ownership in a partitioned data set mean that the DMA-level cross-ownership dummy variables are more likely to capture DMA information unrelated to cross-ownership.

Sample statistics are not even available to determine how many cross-ownership situations fall into large and small markets in this analysis, much less which ones. The further splitting of a small number of cross-ownership DMA observations in small markets into DMAs with separate grandfathered situations and DMAs with cross-ownership operations with waivers almost certainly yields a very small number of observations for each.[62] The resulting estimated coefficients on these variables in the analyses presented by the Consumer Commenters cannot be meaningfully interpreted.

F. The conclusions presented for Chapter IV are inaccurate

Among the conclusions that Consumer Commenters present in Chapter IV with respect to cross-ownership based on their analyses constructed from market-level data are the following:

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[59] Consumer Commenters' Further Comments at 98-101.
[60] Ibid., Exhibit Iv-4 at 100.
[61] Surprisingly, Consumer Commenters provide no formal tests of whether estimated coefficients are the same for the partitioned data set.
[62] Indeed, Consumer Commenters, in a different context with station-level data, note the problems associated with partitioning data into small samples. See Consumer Commenters with respect to WGN at 208.

- Cross ownership in a market reduces the amount of news available in that market.
- Cross ownership in a market does not significantly increase the number of stations providing news.
- Cross ownership in small markets does not significantly increase the number of stations providing news or the quantity of news provided.[63]

The initial conclusion—even if the Consumer Commenter regression analyses were all fundamentally sound and correct, which, as explained above, they are not—is simply incorrect. The results in Consumer Commenters' own Exhibit IV-3 tend to show no significant effect of cross-ownership on levels of news or public affairs programming aired in a market, meaning that a conclusion cannot be drawn one way or the other. These results of no significant effect are at variance with many of the findings in the FCC studies of a significantly positive effect of cross-ownership on news programming.[64]

The next two conclusions of Consumer Commenters with respect to the effect of cross-ownership on the number of stations offering news programming—even assuming the Consumer Commenter methodology is correct which it is not— may or may not be accurate. The results for these analyses summarized in the report are not documented or reflected in the statistical appendix in a manner that can be reviewed and replicated.

The entire separate analysis of small markets is so flawed for so many reasons described above that the results with respect to cross-ownership cannot be meaningfully interpreted.

V. The Consumer Commenters make economic and econometric mistakes in Chapter VII that render the chapter results unreliable

In Chapter VII, the Consumer Commenters make several findings with respect to the factors affecting station revenue.[65] To examine the relationship between station revenues and various factors, the Consumer Commenters perform a series of OLS regression analyses with the results presented in Exhibits VII-9 through VII-14.

Curiously, the specification includes the number of minutes of programming, including local and national news as predictors of station revenue. But, given the high cost of producing news, station revenue is also likely a predictor of the number of minutes of local news that a station produces and the number of minutes of national news that a station implicitly purchases. Moreover, in much of Chapters IV and VIII, the Consumer Commenters go to great lengths to use regression analysis to estimate the

[63] Further Comments at 109. They also include "Ownership matters, as measured by slant in political coverage." I have not reviewed this issue in-depth here.
[64] See Crawford, FCC Study 3.
[65] Ibid., at 174-186.

factors determining the number of minutes of local news programming. The proper approach to models in Chapter VII is to treat them as a simultaneous equations problem, yet the Consumer Commenters choose to estimate their regressions instead with OLS. A description of the resulting coefficient biases and other problems with such estimations can be found in any introductory econometrics text book. The results of the OLS regression analysis are particularly deficient because the estimated coefficients of interest are those associated with the number of minutes of local news.[66] Those estimated coefficients are likely to be biased. The Consumer Commenters in Chapter VII claim to make several findings about station revenues and differences between large and small markets. Those findings are unreliable given that they were estimated with an improper regression technique.

VI. The Consumer Commenters make economic and econometric mistakes in Chapter VIII that render the chapter results unreliable

The Consumer Commenters make several mistakes in constructing Chapter VIII including the following:

- The Consumer Commenters misinterpret the results of FCC study 3 with respect to station-specific effects;
- The Consumer Commenters misinterpret the overwhelming corporate parent-specific fixed effects;
- The Consumer Commenters verify but largely ignore the positive effect of cross-ownership on news in FCC study 4.1;
- The partitioning of the database into smaller subsamples may mask the effects of cross-ownership;
- The Consumer Commenters do not adequately document or explain the Heckman regression analyses; and
- The Consumer Commenters make incorrect conclusions from the analyses in Chapter VIII.

A. The Consumer Commenters misinterpret the results of FCC study 3 with respect to station-specific effects.

The Consumer Commenters misinterpret the results of FCC study 3 and consequently conclude that their regression results are substantially different. In fact, they are quite similar.

The FCC Study 3 by Professor Crawford presents two different sets of regression results for the effects of ownership (including newspaper cross-ownership) on the news production of local broadcast television stations.[67] One set of regression results is based

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[66] Ibid., at 177-180.
[67] Crawford Study, at http://fjallfoss.fcc.gov/edocs_public/openAttachment.do?link=DA-07-3470A4.pdf.

on DMA fixed effects presented in Table 17 and finds a significant positive coefficient with newspaper cross-ownership.[68] The other set of regression results is based on station fixed effects as presented in Table 26 and does not find a significant coefficient for newspaper cross-ownership.[69] Both specifications are presented, and Professor Crawford emphasizes that the former rather than the latter represents the "strongest" results.[70] Perhaps that is because the station fixed effects may make it more difficult to identify the varying effect of one station effect, such as cross-ownership. In any event, Professor Crawford was certainly aware of the regression results with station fixed effects.

The Consumer Commenters focus only on the results from Table 17 of the Crawford study and label column 9 as "Study 3's preferred model."[71] When the Consumer Commenters add a few station factors such as age and VHF status, the estimated coefficient on cross-ownership is no longer significantly different from zero, meaning that there is no measurable relationship of cross-ownership to news production.[72] The same result holds for adding station-effects for parent-ownership specific effects in Exhibits VIII-5 and VIII-6.[73]

> But the most damming [sic] result is seen in the addition of the missing station-level control variables. As shown in Exhibits 1 and 2, the results from a linktest for ommited [sic] variables indicates that the model 17-9 does indeed omit important variables. When we add the VHF, station age, and LMA variables, the linktest no longer indicates ommited [sic] variables. Furthermore, the variables for station age and VHF status are highly significant and (in the case of VHF) the effect size is large. When these controls are added the cross-ownership variable no longer remains significant, and the magnitude of the coefficient is cut by two-thirds.[74]

Yet the results that Consumer Commenters find are neither "damming" nor "damning" at all. These results simply reflect the results with station fixed effects already presented by Crawford in Table 26.

Professor Crawford's results for the estimated cross-ownership parameters in Table 17 measure the difference between the news aired by a cross-owned station and non-cross-owned station in the same DMA. That is a meaningful distinction because the threshold question is whether a station is cross-owned or not. As it turns out, holding DMA factors constant, the amount of news aired by a cross-owned station is estimated to be greater than the amount of news aired by a non-cross-owned station. In other words, if a station that is not cross-owned in any market were to be purchased by the unspecified parent of a local newspaper, the expected news aired by the station would *increase* as measured by the single cross-ownership variable.

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[68] Crawford, at 46.
[69] Crawford at 55.
[70] Crawford at 4 and 26.
[71] Consumer Commenters at 191. This is not Crawford's description.
[72] Ibid., at 192-194.
[73] Ibid., at 197-198.
[74] Ibid. at 194.

In contrast, the results in Table 26 with station-specific information, presumably including ownership, yield an entirely different type of estimated cross-ownership coefficient. Those estimated coefficients, similar to those estimated by Consumer Commenters and presented in Exhibit VIII-9 and VIII-10,[75] measure the expected difference between the news aired by a station owned by a specific parent in one DMA and a station owned by the same parent company in the same DMA without cross-ownership. As a specific example, if a station that is not cross-owned in a market were to be purchased by Company A, the expected change in news aired by the station would depend on both the Company A ownership dummy variable and whether Company A owns a newspaper in the DMA.[76] On the other hand, if the same station were to be purchased instead by Company B, the expected change in news aired by the station would depend on both the Company B ownership dummy variable and whether Company B owns a newspaper in the DMA. Based on the regression results underlying Exhibits VIII-9 and VIII-10, the range of the estimated corporate-parent-specific effects is quite large, much larger than the estimated cross-ownership specific effect.[77] Thus, the expected difference in news depends not only on cross-ownership but on the identity of the parent.

Knowledge of parent identities does not discredit the straightforward finding that Professor Crawford presents in Table 17: cross-owned stations holding DMA factors constant air more news. Thus, it is not surprising that Professor Crawford emphasizes the results of Table 17.

B. The Consumer Commenters misinterpret the overwhelming corporate parent-specific fixed effects

Consumer Commenters present regression results for their preferred specifications with the addition of corporate-parent specific effects in Exhibits VIII-5, VIII-6, and VIII-9, and VIII-10.[78] Consumer Commenters observe that the estimated coefficient on cross-ownership becomes negative for grandfathered stations with the addition of the parent corporation dummy variable.[79] A negative coefficient in this case means that a station in a specific DMA with a specific ownership is estimated to have less news output with cross-ownership. All of these other factors have estimated coefficients that are large

[75] Ibid., at 202-203.

[76] The standard error of the combined effect can only be calculated with information from the variance-covariance matrix. Moreover, if one wants to measure the expected difference in news for a specific DMA for a specific transaction, one would also include the DMA-specific factors from the regression analysis.

[77] For example, a review of the parent-specific effects for the regression in the last column in Exhibit VIII-6 reveals an extraordinary range of news outputs depending on the station's parent. (To review the estimated results for this regression, see Consumer Commenters pdf file Part3.pdf at 58-74.) There are 544 ownership variables, only a few of which were dropped for this regression. Although the estimated coefficients for all of these variables were not significant, many were significant. The magnitudes of the estimated coefficients range from approximately -800 to +1,600. These parent-specific effects completely overwhelm the estimated effects of cross-ownership, the estimated coefficients for both of which were much less than 100 and insignificant.

[78] Further Comments, at 197-203.

[79] Ibid., at 198.

relative to the estimates of pure cross-ownership factors presented by Consumer Commenters in Exhibits VIII-9 and VIII-10. A review of these other estimated coefficients suggests that they are likely to overwhelm the pure cross-ownership effect.[80]

To examine the effect of cross-ownership on a specific parent company in a specific market, one must measure the sum of the changes in all relevant variables and measure the standard error based on the variance-covariance matrix. The result leads to a market-specific and company-specific effect of cross-ownership. The challenges of correctly interpreting these results for cross-ownership are discussed above.

Perhaps the most obvious misinterpretation of corporate parent specific effects is with respect to the analyses of data from FCC study 6.[81] The data set contains 312 observations for stations in markets with cross-ownership. Without parent specific effects, the estimated coefficients on newspaper cross-ownership are insignificant.[82] With 44 parent specific dummy variables, the estimated coefficient on cross-ownership is large, negative, and significant different from zero.[83] But for some of these parent companies, the only stations in the sampled markets are cross-owned; for others, none is cross-owned.

The proper interpretation of the estimated cross-ownership variable is again in combination with the estimated parent ownership coefficient. The estimated corporate dummy variables for the regression in the first column of Exhibit VIII-17 range from -385 to +793.[84] If a parent company with a cross-owned paper in a market has an estimated coefficient greater than 259, the net result for a station is *more* news. Thirteen of the 44 parent variables have an estimated coefficient greater than 259.[85] Moreover, one must look at the variance-covariance matrix to determine whether the combination of the effect of cross-ownership and parent ownership leads to an estimated coefficient different from zero. None of this analysis for any cross-owned station is provided in Consumer Commenters' report.

C. The Consumer Commenters verify but largely ignore the positive effect of cross-ownership on news in FCC study 4.1

The Consumer Commenters find positive and significant association of newspaper cross-ownership with news based on the data from FCC study 4.1 as reported in Exhibit VIII-13.[86] Consumer Commenters report the results but discount their importance because: "We think that the lessons from Study 4 on the impact of cross-

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[80] For example, a review of the parent-specific effects for the regression in the last column in Exhibit VIII-6 reveals an extraordinary range of news outputs depending on the station's parent. (See Consumer Commenters pdf file Part3.pdf at 58-74.)
[81] Further comments, at 213-215.
[82] Ibid., Exhibit VIII-16 at 214.
[83] Ibid., Exhibit VIII-17 at 215.
[84] To see the estimated results for this regression, see Consumer Commenters pdf file Part4.pdf at 165-167.
[85] Ibid.
[86] Consumer Commenters Further Report, at 208-209.

ownership are limited by the study's lack of observations on local news programming."[87] To the contrary, Study 4.1 provides substantial insights into the effects of cross-ownership on news programming.

D. The partitioning of the database into smaller subsamples may mask the effects of cross-ownership

The Consumer Commenters present in a favorable manner the partitioning of the data set between big-4 stations and other stations.[88] There may be sound econometric reasons to partition the database, but the Consumer Commenters do not present straightforward tests for the partitioning and any testing as to whether one can reject the hypothesis that estimated parameters are the same in each subsample. More importantly, if the purpose of the exercise is to determine the effect of newspaper cross-ownership on broadcast news, there may be good reason not to partition the database. Specifically, there are so few observations of newspaper cross-ownership that their effect becomes more difficult to identify with fewer observations in each subsample. The Consumer Commenters recognize an extreme form of this problem:

> We see that in our full preferred model that grandfathered non-Big 4 stations do air more local news, but this effect disappears when parent fixed effects are included. Indeed, this is precisely because there is only one non-Big 4 grandfathered station in the country, Tribune's WGN in Chicago.[89]

The same problems of partitioning the database apply to the analyses of the data from Study 4.[90]

E. The Consumer Commenters do not adequately document or explain the Heckman regression analyses

The Consumer Commenters correctly observe that there is potentially a statistical censoring issue because some stations produce zero news. The volume of news produced is a two-step process: first, determine whether to produce any news; second, if a station determines to produce news, determine how much to produce. To model this process, Consumer Commenters suggest one type of Heckman regression analysis.[91]

The results of the Heckman regression analyses are presented in Exhibits VIII-11 and VIII-12[92] for the data from FCC study 3 and Exhibit VIII-15 for the data from FCC study 4. Few of the reported estimated coefficients, including those for cross-ownership, are significant. The Consumer Commenters present surprisingly little information about the specification of the Heckman analysis; they do not present the estimates of lambda and other parameters associated with a Heckman analysis. Based on the reported

[87] Ibid., at 208.
[88] Ibid., at 199-204.
[89] Ibid., at 203.
[90] Ibid., at 210-212.
[91] Ibid., at 204-207.
[92] Ibid., at 206-207.

information alone, it is impossible to determine either precisely how the model is specified or whether the analysis has been properly conducted.

F. The Consumer Commenters make incorrect conclusions from the analyses in Chapter VIII.

Consumer Commenters make summary comments for Chapter VIII that are not supported by the analyses.

> In summary, the conclusion from Study 3 that cross-owned stations air more local news simply does not hold up to proper model specification. We have shown that this result is based on omitted variable bias, with the missing variables of VHF status and station age accounting for the result, not cross-ownership. This result is extremely robust to various model specifications. Combined with the result that cross-ownership produces less total news output at the market level and that there is no financial benefit to cross-ownership outside of the largest markets, the path for the Commission is clear: maintain the ban to ensure a diversity of news-producing voices.[93]

The analyses in Chapter VIII merely replicate the findings of Chapter 3 rather than reach different conclusions. There is no statistically significant result that cross-ownership leads to less news at the market level, nor is there any credible evidence that there is no financial benefit to cross-ownership outside the largest markets. Thus, the concluding advice on a "clear" path for the commission is unsupported—and therefore results in the wrong path.

[93] Ibid., at 207-208.

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

REPLY COMMENTS OF THE NEWSPAPER ASSOCIATION OF AMERICA ON MEDIA OWNERSHIP RESEARCH STUDIES

John F. Sturm
President and Chief Executive Officer
NEWSPAPER ASSOCIATION OF AMERICA
4401 Wilson Boulevard
Suite 900
Arlington VA 22203-1867
571.366-1001

Paul J. Boyle, Senior Vice President, Public Policy
Laura Rychak, Legislative Counsel
NEWSPAPER ASSOCIATION OF AMERICA
529 14th Street NW
Washington, DC 20045-1402
202.638.4770

Richard E. Wiley
James R. Bayes
Martha E. Heller
Sam Q. Le
of
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
202.719.7000

Its Attorneys

November 1, 2007

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"

Kent W Mikkelsen

November 1, 2007

1. My name is Kent W Mikkelsen. I am a Senior Vice President at Economists Incorporated, an economic research and consulting firm. I hold a Ph.D. in Economics from Yale University. I have extensive experience analyzing both the newspaper industry and the television industry. I have prepared a number of reports on the subject of newspaper-television cross-ownership that were submitted in earlier Commission proceedings on behalf of the Newspaper Association of America (NAA).

2. I have been asked by counsel for NAA to analyze a portion of "Further Comments of Consumers Union, Consumer Federation of America and Free Press (CU/CFA/FP)," submitted in this proceeding on October 22, 2007. In particular, I was asked to comment on the CU/CFA/FP analysis contained in Chapter 4 relating to the effects of newspaper-television cross-ownership on television news minutes in a market.

3. Early in this chapter, CU/CFA/FP cites with approval a statement by Dr. Leslie Marx, the former Chief Economist at the FCC:

> In what follows, I assume that cross-ownership has the potential to decrease the quantity or quality of news coverage of local public affairs available in the local media. If it does not, then one could justify dropping or significantly relaxing the cross-ownership restriction on those grounds alone.[1]

The standard laid out in this statement is one that would be adopted by most economists: if certain conduct causes no harm, then the conduct should not be prohibited. Applying this standard, I find that the analysis of the effect of cross-ownership on news minutes within a market presented in CU/CFA/FP—assuming its validity—supports "dropping or

[1] CU/CFA/FP pp. 87-88, quoting Leslie M. Marx, "Summary of Ideas on Newspaper-Broadcast Cross-Ownership," June 15, 2006, p. 3.

significantly relaxing" the newspaper-television cross-ownership restriction rather than retaining it. The results presented in CU/CFA/FP show no statistically significant reduction in total market news minutes when a market has a cross-owned television station.

4. Before turning to the statistical results, it is important to point out that, in addition to there being no significant statistical evidence for a decrease in news minutes within a market with cross-ownership, CU/CFA/FP provides no coherent theory of why one might expect a market-wide decrease in broadcast news minutes to result from cross-ownership. CU/CFA/FP's argument appears to run as follows. First, CU/CFA/FP apparently accepts that a cross-owned station will have an advantage in producing news, and that as a result it will tend to produce more minutes of news than if it were not cross-owned, holding other factors constant. CU/CFA/FP then asserts without support that other stations will react by reducing the amount of news they provide. The reader is left to make the leap from potential reductions by other stations in the market to a conclusion that any such reductions would exceed the increase in news minutes at the cross-owned station, thereby reducing total news minutes in the market.

5. Several studies, including three sponsored by the FCC for this proceeding, have found that a cross-owned television station tends to have more news minutes. The principal reason for this result appears to be that when a television station is cross-owned with a newspaper, resource sharing reduces the station's cost of producing news. When the cost of production for a firm is reduced, economic theory predicts that the firm will expand output, other factors being equal. With a given level of demand for news in the market, this would tend to increase the share of total news minutes produced by the cross-owned station. However, the net effect on total news minutes should be positive, not negative. Even if one or more of the non-cross-owned stations were to decrease their news output—which has not been shown to be the case—no theory has been offered that predicts they would reduce their news minutes by an amount greater than the amount of the increase by the cross-owned station. Following the reduction of cost for a firm in the market, the market should be able to sustain profitably more news minutes—or certainly no fewer news minutes—than without the cross-ownership.

6. CU/CFA/FP's statistical result—finding no significant decrease in market-wide news minutes associated with cross-owned stations—is therefore unsurprising. The principle results are shown in CU/CFA/FP's Exhibit IV-3. CU/CFA/FP uses data from FCC-sponsored Study 3 and Study 4 to create market-level variables for news minutes and public affairs minutes. Regressions are estimated using a set of market-level variables. The estimated coefficient on the variable indicating the presence of a cross-owned firm in the market, though negative, is statistically not significantly different from zero in any of the four regressions. Failure to find a statistically significant negative effect is support for eliminating the restrictions on cross-ownership.

7. I have not tested how sensitive CU/CFA/FP's results are to the particular variables included in the regressions. It is my understanding that the transformed data CU/CFA/FP used for its regressions has not been made available. There are a number of peculiarities in the choice of variables and the way those variables were defined. For example, in enumerating the ways in which its analysis improves on various FCC-sponsored studies, CU/CFA/FP claims as a virtue of its study that it includes "all of the other policy relevant variables in the analysis—duopolies, local ownership, female ownership, minority ownership, TV-radio cross-ownership, and TV-newspaper cross-ownership." (p. 91) First, this claim appears to be incorrect. TV-radio cross-ownership is not listed as a variable included in the regressions in CU/CFA/FP's Exhibit IV-2 or on pages 94-95, nor does it show up in the regression results in Exhibit IV-3. Second, even though some of these may be policy variables of interest to the FCC, it is appropriate to include them as explanatory variables in a regression only if there is some reason to believe that they influence the dependent variable, total news minutes in the market. On page 97, CU/CFA/FP states that there is no hypothesis that female-owned or minority-owned stations will carry more minutes of news. One wonders how the results of CU/CFA/FP's regressions were affected by the omission of one variable CU/CFA/FP claims to be relevant and the inclusion of two other variables it believes are irrelevant—but which could nonetheless alter the regression estimates.

8. Another peculiarity in CU/CFA/FP's regressions is the way that certain variables were defined. It is not unreasonable to suppose that stations affiliated with one of the major broadcast networks will tend to produce more news minutes, other factors being the same, than stations without such an affiliation. It is odd, however, that CU/CFA/FP treats affiliation with Fox quite differently than it treats affiliation with ABC, CBS or NBC ("big 3"). At the market level, CU/CFA/FP calculates the number of stations in a market affiliated with one of the "big 3" as a percentage of the commercial stations in the market. The practical effect of this procedure is that the effect of a "big 3" affiliate in a market with many stations is smaller than the effect of such an affiliation in a market with few stations. By contrast, CU/CFA/FP assumes that the presence of a Fox affiliate in the market changes the total news minutes by some standard amount that does not vary with the number of other commercial stations in the market. The effect of stations being owned and operated by ABC, CBS, NBC or Fox is treated like the "big 3" affiliation—i.e., calculated as a percentage of commercial stations in the market—except that in this case Fox O&Os are included in the same variable as O&Os of the other major networks. The effect of cross-ownership on total market news minutes is assumed to have the same form as the presence of a Fox affiliate—i.e., the presence of a cross-owned station in the market is assumed to increase or decrease total news minutes by a standard amount that does not vary with the number of other commercial stations in the market. Again, one wonders whether CU/CFA/FP's regression results would be altered if these variables were defined in a consistent fashion.

9. CU/CFA/FP searches further for a statistically significant result from cross-ownership by distinguishing between "grandfathered" cross-owned stations, which were already cross-owned when the FCC's 1975 cross-ownership ban was introduced, and "waived" cross-owned stations that were granted temporary permission after 1975. CU/CFA/FP's rationale for examining grandfathered and waived cross-owned stations separately is that the behavior of the waived stations may be altered because they are "on their best behavior." (p. 90) When regressions are run permitting the presence of a grandfathered cross-owned station to have a different effect on total news minutes than a waived cross-owned station, CU/CFA/FP achieves (with grandfathered cross-owned sta-

tions) the only negative result that is statistically significant at the conventional 5 percent level.

10. Unfortunately, the reason CU/CFA/FP gives for making this distinction is contradicted by other statements that CU/CFA/FP makes. On page 194, CU/CFA/FP notes that "waived stations were outperforming grandfathered stations. This is consistent with our theory of 'good behavior' by the owners of these stations." To further clarify the meaning of "good behavior," one can consult CU/CFA/FP's Exhibit VIII-2 on page 193. There it is reported that a waived cross-owned station has a greater increase in news minutes (relative to a non-cross-owned station) than a grandfathered cross-owned station. In other words, "good" or "best" behavior by a waived cross-owned station means increasing its output of news minutes by a large amount.

11. This finding can now be applied back to the market-level effects of cross-ownership that are the subject of Chapter 4. The theory in Chapter 4, as described above, is that an increase in news minutes by a cross-owned station causes other stations in the market to decrease their news minutes by such a large amount that total news minutes in the market are reduced. Given that waived stations on their "best behavior" have a larger increase in news minutes than grandfathered cross-owned stations, as CU/CFA/FP affirms on pages 193-4, one would expect that if there is a reduction in total market news minutes associated with cross-ownership, it should be larger for waived cross-owned stations than for grandfathered cross-owned stations. But this is the exact opposite of what CU/CFA/FP finds when they estimate separate waived and grandfathered cross-ownership effects on total market news minutes.

12. In fact, if it were true that cross-ownership led to a reduction in total market news minutes, there is no reason to think it would be appreciably different for waived and grandfathered cross-owned stations. If, as CU/CFA/FP believes, rival stations will respond to a cross-owned station by reducing their news minutes, it would not take long to put this decision into effect. There is no basis to believe that only stations in markets with grandfathered cross-owned stations would have had time to make such an adjustment.

13. In conclusion, most economists believe that regulations should only be maintained if they are demonstrably deterring some harmful behavior. While there are questions that can be raised about the details of its methods, CU/CFA/FP's findings provide support for the elimination of the FCC's cross-ownership rule, not for their retention. Taken at face value, CU/CFA/FP's analysis provides evidence that the cross-ownership of television stations and newspapers is not demonstrably harmful to total television news minutes in a market.

Attachment 2

WRITTEN TESTIMONY OF JOHN R. SCHUELER
Market Leader, Florida, and President, Florida Communications Group
Media General, Inc.

FCC MEDIA OWNERSHIP WORKSHOP
Tampa, Florida -- April 20, 2010

My name is John Schueler, and I am the Market Leader, Florida, and President of Media General, Inc.'s Florida Communications Group. I would like to address the FCC's restrictions on cross-ownership of newspapers and broadcast stations in the same market.

Media General starts from the premise that the rule is unconstitutional, both under the First and Fifth Amendments, and that its continued retention violates administrative law and the 1996 Telecommunications Act, which requires the FCC periodically to determine whether its rules are "necessary" in the public interest as a result of competition and then repeal or modify those that are not. Media General believes that the statute authorizes inquiry in this quadrennial review into just that one factor -- competition. Because I am not a lawyer, I'm additionally incorporating by reference the attached excerpt of earlier FCC testimony by George Mahoney, our General Counsel, who addresses several additional legal points. My testimony will focus primarily on our history with cross-ownership, operational matters, industry trends and the need to treat small markets no differently than large markets.

The FCC's complete ban on common ownership of newspaper and television stations in the same market was adopted in 1975 in a very different media world; it was liberalized minimally in 2008 in ways that just became effective last month when the United States Court of Appeals for the Third Circuit lifted a stay it had imposed. To hold most cross-owned properties, parties still need to obtain waivers, which the FCC has very sparingly approved in the last 35 years. The rule is truly a regulatory relic that was adopted at the behest of the Nixon Administration to punish the *Washington Post* in the wake of Watergate.

I first want to provide a little background on Media General's experience with the rule. This is experience that, I believe, is particularly relevant in today's economic downturn, which has had such a severe impact on the media industry. Media General has found that cross-ownership provides a very potent means for not only delivering, but increasing, high-quality local news and information programming in small- and medium-sized markets. Today, more than ever, our approach can help to ensure the survival of high-quality local news, journalism, and investigative reporting.

After describing the current status of our cross-owned combinations, I'll outline the stated objectives for the 1975 rule and show that there is absolutely no basis for its continued existence. As I'll also show, the rule's damaging effects are particularly acute in small- and middle-sized markets like those where Media General has most of its operations.

I. The Media General Experience: The Benefits of Cross-Ownership

Media General is a leading publicly traded provider of news, information and entertainment across multiple media platforms, serving consumers and advertisers in strong local markets, primarily in the southeastern United States. Media General's operations are organized into five geographic market segments and a sixth, broader advertising services segment.

Our market-based operations include 18 network-affiliated TV stations and associated websites, 21 daily newspapers and associated websites, more than 200 specialty publications that include weekly newspapers and niche publications targeted to various demographic, geographic, and topical communities of interest. Many of our specialty and niche publications have associated websites.

At the beginning of 1995, Media General owned just three daily newspapers, and as of the start of 1997, it held only three broadcast television station licenses. Over the next decade and a half, Media General acquired media outlets in a number of markets and, as part of this expansion, we brought together ownership and operation of local newspapers and local television stations. In the process, we became one of the media industry's leading practitioners of "convergence."

Media General's News Center in Tampa, Florida, is the most advanced convergence laboratory in the nation, and the only one, as far as we are aware, in which the news staffs of a newspaper (*The Tampa Tribune*), a broadcast television station (WFLA), and an online operation (TBO.com) are housed together under one roof. Besides this strong presence in Tampa-St. Pete, the nation's 14th-ranked Designated Market Area ("DMA"), Media General has similar convergence efforts underway in four additional markets where it owns television broadcast stations and daily newspapers -- Roanoke-Lynchburg, Virginia, the 67th-ranked DMA; Tri-Cities, Tennessee/Virginia, the 93rd-ranked DMA; Myrtle Beach-Florence, South Carolina, the 104th-ranked DMA; and Columbus, Georgia, the 128th-ranked DMA.

Tampa. Media General's interests in *The Tampa Tribune* and WFLA date to 1965 and are grandfathered under the 1975 rule. Our efforts at convergence here began in earnest in the mid-1990s when WFLA and *The Tampa Tribune* started to take a coordinated approach to covering local high school football and other sports in addition to stories about religion. Shortly thereafter, the two platforms began sharing expensive political polling information and joining forces to provide enhanced political coverage by sponsoring local events like candidate debates and "town halls." The response from the community and advertisers was so overwhelmingly positive that in 2000, when it came time to build expensive new digital television facilities in response to the Commission's mandate, we moved the staffs of all three Tampa platforms into a new $35 million state-of-the-art facility, The News Center. Over the last decade, FCC Chairmen, Commissioners and staff have toured The News Center on multiple occasions. Media General encourages any FCC representatives interested in seeing how convergence works in practice, day-in and day-out, to contact us to arrange a tour of our very vibrant facility.

In Tampa, each of our three platforms makes its own final decisions about content. Representatives of these three platforms work together at a central news desk, facilitating the rapid exchange of story ideas, news content and video images. All three platforms also maintain their own news "budgets" (compilations of planned stories on a building-wide "intranet"), and each platform can access the news "budgets" of the others. Moreover, it has become commonplace that newspaper reporters write scripts for television newscasts and appear on-air, and television reporters write stories that are published in the newspaper. The newspaper also makes its archives available to the other two platforms. With the provision of special equipment to the photographers of all three platforms earlier this decade, *The Tampa Tribune* and TBO.com have been able to add pictures to stories that otherwise would have been only text. Similarly, *The Tampa Tribune*'s photojournalists have been able to provide WFLA and TBO.com with video footage.

This convergence has significantly increased the output of news content and ensured the delivery of better, faster and deeper local news in Tampa. These improvements can be seen in at least the following four areas, resulting in the best-quality local breaking news, journalism, and investigative reporting for Tampa-St. Pete residents:

- *Breaking News*. Convergence allows more feet on the street, meaning Media General's platforms are that much more likely to learn of breaking news developments and disseminate them quickly. In instances repeated on a daily basis, this has led to more extensive and immediate coverage of local events from jury verdicts in celebrated trials to hostage situations to traffic and weather emergencies to developments affecting the region's sports teams and players.

- *Expanded News Content*. Expanded and more in-depth coverage of the market also has flowed naturally from these convergence efforts. Each of our platforms, for example, gains access to reporters who cover particular beats everyday and so have a greater depth of experience than typically would be the case, in particular, for other television stations and websites, all allowing us to deliver greater subject-matter expertise to each of our audiences.
- *Enhanced Investigative and Enterprise Pieces*. Our three platforms also have joined forces to produce specials, government "watchdog" reports and investigative series that none of them could have done as well alone. Our multimedia assets additionally mean that we can deliver this important journalism in more interesting and engaging ways for our community.
- *Greater Understanding of the Community*. With our combined strength, we also enjoy better access to more leaders and community institutions, allowing our platforms to provide improved depth, understanding, and sensitivity in their coverage of diverse stories about the community. These same factors aid our multimedia platforms in identifying solutions to community problems. For example, our community outreach efforts currently include "Putting Tampa Bay Back to Work," a cross-platform project to help our community more effectively address unemployment, a continuing and critical issue in our area. By working

together, our three platforms also have gained better access to political candidates and government officials for our Tampa Bay community. Together, they have conducted their own joint polls, held "town hall" meetings and organized other events, such as health fairs and community telephone banks, that simply would not have been feasible without common ownership.

It is important to note that, from the beginning, Media General's convergence efforts were not borne of an intent to reduce staff. Indeed, as they were implemented, they did not result in staff reductions in Tampa, either overall or in our news operations; rather, and contrary to rote criticisms of cross-ownership, overall employment at WFLA and employment in the station's newsroom increased. This should not be surprising since WFLA's local news output also increased by 30 minutes each weekday. When the economic downturn hit several years ago, our Tampa platforms, like all Media General properties, were forced to make budgetary and staff reductions. I know that, because of the strength and resiliency we have gained from cross-ownership, the amount and quality of our local news has been less affected by these adverse economic factors than otherwise would have been the case.

Other Convergence Markets. Our multimedia, cross-platform model is delivering these same kinds of benefits to the communities we serve in our other convergence markets. Although they do not have the advantages of co-location that we enjoy in Tampa, the news staffs at our other co-owned properties regularly share story ideas electronically and by telephone. Additionally, all of Media General's converged properties have for several years equipped their print photojournalists with digital video cameras to provide video to the television stations; they provide their television cameramen with equipment that allows the newspapers to retrieve print-quality photos. The newspapers also make their extensive archives available to the television stations. As in Tampa, the news staffs at each of Media General's cross-owned television stations grew following the implementation of convergence, and most of these stations also added appreciably to the number of hours of news programming that they offered each week.

Unlike Tampa, the combinations in these other markets were not grandfathered under the 1975 decision adopting the rule. Media General has owned and operated them since their acquisitions pursuant to two different types of waivers. *First*, from their acquisition until 2008, Media General held all but one of our smaller market combinations under a "constructive waiver" policy put in place by the 1975 decision. (In the Roanoke DMA, the one exception, our daily newspapers in Lynchburg and Danville are published in towns located beyond the relevant television contours, and the rule is not implicated.) Under this policy, which the FCC adopted in recognition of its complete lack of regulatory jurisdiction over newspaper acquisitions, Media General acquired newspapers in the Tri-Cities DMA encompassing western Virginia and eastern Tennessee, the Myrtle Beach-Florence DMA, and the Columbus, Georgia DMA, where we already owned television stations. In these cases, the FCC's policy allowed Media General to hold both properties in each market for one year or until the time of the television stations' next renewal, whichever was longer. Absent this policy, it is doubtful whether the previous owners of the newspapers ever would have sold them to Media General because, absent a substantial monetary premium on the purchase price, the sellers would not have wanted their deals delayed or put at risk by the need to seek FCC advance approval.

Second, the 2006 Quadrennial Review Decision, which was released in February 2008, granted Media General permanent waivers of the cross-ownership rule in these three "constructive waiver" markets, allowing our continued ownership of the newspaper/television combinations in Tri-Cities, Myrtle Beach-Florence, and Columbus. In the decision, which has been challenged on reconsideration and in the courts, the FCC reviewed numerous comments on the subject and found that the public interest was served by granting these permanent waivers for a number of reasons, including the following:

- the combinations involved just one television station and one newspaper;
- the combinations had been in existence since at least 2001;
- during this period, the combinations had provided innovative new services to their local communities and built on their synergies; and
- forced divestiture would have disrupted the proven record of local benefits.

The FCC, in essence, "grandfathered" these combinations just as it had done with most cross-ownerships, such as Tampa, that existed in 1975 when the Commission first adopted the cross-ownership ban.

Although deemed "permanent," these 2008 waivers continue only so long as Media General owns the combinations. Absent applications for a new waiver, the properties may not be sold in tandem. (That is also the case with Tampa's grandfathered status.) In these instances, the inability to sell in tandem is unfortunate, particularly in today's economic downturn because, were the properties ever to be put up for sale, buyers would likely want to maintain the same valuable synergies we have enjoyed in delivering local news and information.

On March 25, 2008, the FCC's Media Bureau denied challenges and granted Media General's pending license renewal applications for the television stations in our three smaller convergence markets, finding that the stations had served the public interest and that objections based on cross-ownership had been mooted by issuance of the "permanent" waivers. An application for review of that action is pending before the full Commission.

II. The Rule's Tortured History and the FCC's Numerous Attempts To Repeal and Reform It Lead to the Conclusion That No Policy Basis Remains To Support It.

In 1975, the Commission adopted a rule that flatly prohibits newspaper publishers from acquiring and operating broadcast stations in markets in which their newspapers are published. The Commission based adoption of this rule on sheer speculation that it would foster "diversity"; there had been no demonstrable showing of harm to diversity from the commonly owned combinations that had existed to that point. Indeed, the Commission acknowledged that it lacked any "basis in fact or law for finding newspaper owners unqualified as a group for future broadcast ownership," and it said that it was adopting the rule solely because "[w]e think that any new licensing should be expected to add to local diversity."[1]

Although now sometimes cited as established fact, this determination represented nothing more than conjecture that the rule would improve diversity. Even in 1975, the FCC acknowledged that "most" of the commenting parties who had commonly owned newspaper and broadcast facilities reported that their stations and newspapers had separate management, facilities and staff, including the news staffs.[2] "Some even claim[ed] that because they have separate editorial boards they present editorials in one outlet which are opposed in the other."[3] The parties also pointed to "built-in protections" against common expressions of viewpoint resulting from common ownership. These included the professionalism among journalists and industry practices and ethical codes that transcended employer-employee loyalties and resulted

[1] Amendment of Sections 73.34 [sic], 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, *Second Report and Order*, 50 FCC 2d 1046, 1075 (1975) ("*1975 Second Report and Order*"), *modified by Nat'l Citizens Comm. For Broad. v. FCC*, 555 F.2d 938 (D.C. Cir. 1977), *aff'd in part and rev'd in part, FCC v. Nat'l Citizens Comm. For Broad.,* 436 U.S. 775 (1978) ("*NCCB*").

[2] *Id.* at 1059.

[3] *Id.*

in independence among journalistic staff members and editors.[4] As the FCC noted, these same parties had commented that, if commonly owned outlets had prevented or stymied the dissemination of views, the public would have been complaining vociferously about actual abuses. A number of parties observed that the silence from consumers on this point was the most telling argument against the need for the rule. Moreover, a 1973 FCC staff study of broadcast licensee programming, cited in the decision, found that newspaper-owned broadcast stations delivered *more* local news, *more* local non-entertainment programming and *more* total local programming than other television stations.[5]

Based on this material, the FCC found that there generally was significant diversity or "separate operation" between commonly owned broadcast stations and newspapers.[6] Even on appeal, in 1977, the United States Court of Appeals for the District of Columbia Circuit found that the FCC had adopted the rule "without compiling a substantial record of tangible harm"; the court noted that the rule was based on a record that included "little reliable 'hard' information."[7] In affirming the FCC's adoption of the rule, the United States Supreme Court notably recognized that the FCC's diversity rationale represented "'a mere hoped-for gain in diversity.'"[8]

In the two decades that followed, the FCC proceeded to relax or repeal other structural ownership regulations, acknowledging (as I'll detail in the next several pages) that the conjecture that ownership diversity would lead to diversity of content and viewpoint had been ill-founded

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[4] *Id.* at 1059-60.

[5] *Id.* at 1078 n.26.

[6] *Id.* at 1089.

[7] *Nat'l Citizens Comm. for Broad. v. FCC*, 555 F.2d at 944, 956.

[8] *NCCB*, 436 U.S. at 786.

and was, in fact, invalid. Despite this acknowledgement and liberalization of other media ownership rules, the newspaper/broadcast cross-ownership rule went untouched and unreviewed.

Beginning in the mid-1990s, and after recognizing the significant changes that had occurred in the media landscape since 1975, the FCC allowed a small exception to the rule. In February 1996, the FCC granted Capital Cities a temporary 12-month waiver of the rule to allow its ownership of daily newspapers and radio stations in the Detroit and Dallas-Ft. Worth DMAs. In doing so, the FCC stated it would proceed "expeditiously" to consider revising the rule, with then Chairman Hundt writing separately that the FCC should be able to complete the proceeding within the year before the temporary waiver expired. The same year, the FCC issued a Notice of Inquiry concerning potential relaxation of its policy for waiving the NBCO rule as it applied to newspaper/radio cross-ownership.

In 1997, the newspaper industry's trade association, the Newspaper Association of America ("NAA"), filed a petition for rulemaking, urging repeal or relaxation of the rule. But, the FCC did not act on that petition or the pending newspaper/radio Notice of Inquiry.

Instead, as required by the Telecommunications Act of 1996, the FCC in 1998 commenced a biennial review of all its media ownership rules. In the course of that docket, which treated the NAA petition (as well as a second NAA "Emergency Petition" filed in 1999) as comments, the FCC received overwhelming support for repeal or modification of the rule. In the report issued at the conclusion of the proceeding in June 2000, the FCC said it would soon initiate a notice of proposed rulemaking seeking comment on repeal of the rule because it might not be necessary to achieve its intended public interest benefits in all instances. Two years later, in the report concluding its 2000 Biennial Review proceeding, the FCC again said it would be issuing a notice of proposed rulemaking on the rule.

The beginning of the last decade saw additional fits and starts. In September 2001, the FCC finally released a notice of proposed rulemaking, seeking comment on elimination of the cross-ownership rule. In response, the FCC received virtually unanimous industry support for repealing it, and numerous economic and programming studies demonstrated such repeal would be in the public interest. Out of 49 substantive comments, five opposed repeal. Despite its compilation of an extensive record, the FCC, concerned over recent appellate decisions criticizing the agency's approach to rulemaking, announced in late spring 2002 that it would defer action for yet another rulemaking, an omnibus review that would examine all of the agency's media ownership rules.

That rulemaking began in September 2002 with a notice of proposed rulemaking seeking comment on all the Commission's media ownership rules. In the course of the ensuing proceeding, the FCC released 12 studies it had commissioned. The six studies bearing some tangential relationship to the cross-ownership rule documented that its repeal would enhance the public interest. In both the cross-ownership-specific and omnibus proceedings, "consumer" and labor groups opposing repeal failed to support their opinions about the need for the cross-ownership rule's retention with any substantive, empirical studies that met the 1996 Telecommunications Act's burden for sustaining the rule.

In July 2003, the FCC released its 2002 Biennial Regulatory Review decision on all of its media ownership rules. In the report, the Commission importantly found that the cross-ownership rule was no longer justifiable under the standard set forth in the 1996 Telecommunications Act, and it repealed the rule. The FCC found that the rule was not necessary in the public interest for three reasons: it did not promote competition in local markets since advertisers viewed newspaper and broadcast advertising as imperfect substitutes; it undermined localism by preventing efficient combinations that allowed for the creation and dissemination of high-quality local news; and the FCC lacked sufficient evidence of any link between diversity of ownership and diversity of viewpoint to sustain the ban. The FCC termed that link "tenuous, ill-defined, and difficult to measure." The following summer, Third Circuit affirmed repeal of the cross-ownership rule, finding the FCC's determinations reasonable. In addition, the court noted that no party on appeal had even challenged the FCC's conclusion that the restrictions were unnecessary to protect competition, and it agreed with the FCC that cross-ownership promotes localism.

That same 2003 FCC decision, however, had replaced the discredited NBCO rule with new "cross-media limits" ("CMLs") that the FCC said were more precisely targeted at specific types of markets in which particular combinations were, it said, most likely to harm "diversity." In markets with nine or more broadcast television stations, the CMLs lifted the ban entirely. In markets with three or fewer broadcast television stations, the CMLs retained an absolute ban. In markets with between four and eight broadcast television stations, the CMLs allowed a single entity to hold a newspaper and varying, but still very limited, combinations of broadcast and radio stations. The FCC adopted this graduated approach based on a "diversity index," which it claimed quantified diversity in markets. The Third Circuit found that the FCC had not provided a reasoned analysis for the CMLs, and it remanded the decision to the FCC, instructing it to modify or justify the CMLs. In the meantime, the court kept in place a stay it had imposed shortly after the appeals were first filed.

Over two years later, the FCC issued a further notice of proposed rulemaking intended to serve the dual purpose of fulfilling the agency's periodic review mandate (which Congress in 2004 had made a four-year obligation) and responding to issues raised in the Third Circuit's remand. This proceeding generated yet another massive record on newspaper/broadcast cross-ownership, with the FCC receiving comments and reply comments, commissioning 10 peer-reviewed studies (on which the Commission received additional comments and reply comments) and conducting six official field hearings.

In an order released in February 2008, the FCC again found that a wholesale ban on cross-ownership was not justified based on the record and market conditions. Among other things, the Commission found that "evidence in the record continues to support the Commission's earlier decision that retention of a complete ban is not necessary in the pubic interest as a result of competition, diversity, and localism." The FCC, however, kept the original cross-ownership rule, as it was adopted in 1975, on the books and grafted onto it extremely modest and limited waiver criteria, with relief presumptively available only in the Top 20 markets. Various parties appealed this decision to multiple circuits, and the case was eventually transferred to the Third Circuit, which, until last month, had held the appeal in abeyance due to a reconsideration petition filed at the FCC against the February 2008 decision, and also keeping the 2003 stay in effect. Only within the last month has the court lifted that stay and allowed Media General and other parties to file briefs challenging the rule's retention. Those briefs are due on May 17, 2010.

III. Complete Cross-Ownership Relief Remains Imperative.

Since the FCC last addressed the cross-ownership rule in February 2008, the availability and popularity of new sources of news and information have continued to grow at an ever-increasing rate, further fragmenting audiences and siphoning them as well as advertising revenue from "traditional" media -- newspapers and broadcast stations, which were the sole sources of mass media in 1975. This growth in alternative providers has come at a particularly difficult time for newspapers, as key advertisers like the auto industry, real estate firms, and retail stores have been hit hard by the economic downturn. For television broadcasters, the increased competition has come on top of the need for the industry to spend billions of dollars to implement the mandated DTV transition and at a point when compensation previously available from the networks has almost universally changed to "reverse compensation."

In 2008, in making the most modest of tweaks to the cross-ownership rule, the FCC noted the financial challenges faced by newspapers across the country, reporting that some 300 daily newspapers had ceased publication in the preceding 30 years. In its own filings focusing on small- and medium-sized markets, Media General noted that more detailed data showed that the majority of the daily newspaper failures in the preceding decade had occurred outside the Top 20 markets. Since then, of course, the economic downturn has been particularly difficult for newspaper publishers, with at least six major companies declaring bankruptcy in the last year; many papers laying off staff, including by closing bureaus in major domestic cities and abroad; and many publishers curtailing sections in their papers and cutting back on circulation routes and frequency of publication.

These changes have been driven by the precipitous drop in advertising revenues. In 2009, the newspaper industry's total advertising revenue declined 26%, bringing the total loss over the past three years to 41%.[9] Even online advertising on newspaper websites -- once cited as the most promising service for future growth -- declined by more than 10% in 2009 and accounted for just 10% of overall revenue.[10]

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[9] *PEJ 2010 State of the Media Report*, Executive Summary at 1, 8-9, http://www.stateofthemedia.org/2010/chapter%20pdfs/2010_execsummary.pdf (last visited Apr. 7, 2010).

[10] *See id.*, Newspapers, Summary Essay at 2, Economics at 20-21.

The broadcast industry, facing the DTV costs and network changes noted above, has seen similar financial reversals. Local television advertising revenue dropped 24% in 2009, following a 7% decline in 2008.[11] While stations did experience modest growth in advertising revenue from their websites in 2009, these earnings amounted to only 8% of their revenues.[12]

These developments have prompted the industry, academicians and lawmakers to begin a quest for solutions, particularly ones that they envision will help continue the quality of American journalism.

Media General's consistent response throughout this cross-ownership saga has been to urge the complete repeal of the cross-ownership ban. As shown by our experiences in Tampa and our other convergence markets, cross-ownership has produced more local broadcast news, expanded news content and increased investigative and enterprise pieces, all better informing the communities we serve. Particularly in light of the financial challenges facing newspapers and television stations across the nation, the multimedia benefits we have seen in Tampa (including our ability to better weather economic downturns) should be made available, urgently, in markets of all sizes.

IV. Restrictions on Cross-Ownership Are Particularly Unwarranted in Medium and Small Markets.

A continued ban on newspaper/broadcast cross-ownership cannot be sustained under any factual or legal rationale. And, retention of a modified, market-sized rule that discriminates against medium and small markets is similarly indefensible. There are at least seven reasons why across-the-board repeal of the cross-ownership rule is the only viable approach.

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[11] *See id.*, Executive Summary at 1.

[12] *Id.*

First, there is no factual basis for a rule discriminating against smaller and middle-sized markets. In the empirical studies related to programming produced by newspaper-owned television stations, market size had no effect on the conclusions. A review of non-entertainment programming, which Media General submitted in 2001 and updated in 2006, found that, in comparing stations in markets with co-ownership and those without, stations in the three smallest Media General convergence markets still aired more non-entertainment programming than stations in the immediately higher-ranked DMAs. Indeed, the programming study that the FCC staff itself undertook in 1973 in the proceeding that led to the original 1975 decision included television stations from variously sized markets. As noted at that time, television stations owned by newspapers outside the largest seven markets offered more news, non-entertainment, and overall local programming than other television stations.[13]

Second, small markets have been equally affected by the dramatic growth in the number of "traditional" media outlets and more recent new technological entrants over the last 30 years. On three occasions, Media General has prepared and filed costly and voluminous market-by-market reviews of the availability of content providers in the markets where it has practiced convergence; those volumes of data showed this profusion to be universal.

Third, the empirical studies that related specifically to advertising competition which were filed throughout the last decade with the FCC showed no reason to discriminate against small-market stations in repealing or modifying the cross-ownership rule. Most significantly, in 2003, and again in 2008, the FCC found broadcast advertising and newspaper advertising represent different product markets. Geographic location is, therefore, rendered meaningless in standard antitrust analysis. Moreover, comprehensive studies of advertising rates prepared by

[13] Appendix C, *1975 Second Report and Order*, 50 FCC 2d at 1095 n.4.

Economists Incorporated in 1998 and updated in 2002 drew on data from large and small markets across the country; market size made no difference in the findings; they found no statistically significant difference between advertising prices of cross-owned newspapers and those of other papers in medium and small markets.[14] On appeal, the United States Court of Appeals for the Third Circuit noted that no party before it had challenged the FCC's 2003 determination that a newspaper/broadcast combination cannot adversely affect competition in any market.[15]

Fourth, good journalism is expensive to produce no matter what the market size. Cutbacks in local television newscasts and newsroom staffs have occurred across-the-board, impacting small and medium markets as well. Indeed, cutbacks in network compensation, which began at the beginning of this decade, were particularly deep and hard for affiliates in smaller markets; in most cases, network compensation has now been eliminated and in many cases become "reverse compensation."

Fifth, local media -- again, particularly those in small markets -- face increasing competition from national players who, given the development of technologies over the last 30 years, can now easily send, beam, or transmit their content and advertising into every market in the nation. The national players siphon off advertising dollars that may otherwise have gone to the communities receiving their material, and they generally have no local presence or

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[14] Economists Incorporated, "Behavioral Analysis of Newspaper-Broadcast Cross-Ownership Rules in Medium and Small Markets," January 2002, submitted with Reply Comments of Media General, Inc. in MM Docket Nos. 01-235, *et al.* (Feb. 15, 2002); Economists Incorporated, "Structural and Behavioral Analysis of the Newspaper-Broadcast Cross-Ownership Rule," July 1998, submitted with the Comments of the Newspaper Assoc. of America in MM Docket No. 98-38 (July 21, 1998).

[15] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 398-400 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005).

commitment. These national players frequently prosper by creating large numbers of specialized video channels or websites, each of which serves a small dispersed audience in each locale, but collectively aggregate many viewers and users. At the same time, the local newspaper and local broadcast stations, which are dedicated to covering the local community, are facing growing costs of local news operations and increasingly fragmented audiences. To survive in the new environment of "competition for eyeballs," local content providers in markets of all sizes must be allowed to reach audiences the way they want to be reached -- with multiple streams of information when, where, and how those audiences demand it.

Sixth, any newspaper/broadcast cross-ownership rule discriminating against smaller markets would be highly unfair given that judicial authorities have found that vacating the FCC's former cable television/television cross-ownership rule was appropriate in all markets.[16] When it ordered *vacatur* of that rule, the court did not suggest any need to retain it in smaller markets. Neither did the Commission ever mention such a concept when it sought rehearing of that decision, and the agency has allowed the rule to disappear nationwide. If there is no reason to follow a discriminatory market approach in repealing cross-ownership of broadcast television and cable television, two platforms the FCC *does* regulate, there is even less reason to do so for combinations of television stations and newspapers, in which there is only partial jurisdiction by the FCC.

Finally, there is no reason in anything previously put before the Commission, nor is there any reason in common sense to deny small- and mid-sized market media operators and consumers the same innovations and benefits that flow from convergence and that are available

[16] *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1049 (D.C. Cir. 2002), *reh'g granted*, 293 F.3d 537 (D.C. Cir. 2002).

to their counterparts in larger markets. If anything, the costs and difficulties faced by small- and middle-sized market operators make such changes even more compelling. Similarly, consumers in these markets are entitled to access to as much local information as can possibly be produced, just as is the case in larger markets. Media General's experience in medium and small markets, as described above and documented today and in the past for the FCC, demonstrates the myriad public interest benefits that can redound to consumers through convergence. From increased coverage of elections and political events, to greater and more in-depth focus on community issues, to the coverage of local weather and sports developments, to the conduct of new community-centered events, convergence yields tangible public interest improvements.

Nothing in the record the FCC has accumulated in the past shows -- and I venture nothing it will gather in this new 2010 Quadrennial Review could possibly show -- that any action short of total elimination of restrictions on newspaper/broadcast cross-ownership would be in the public interest. The rule never should have been adopted. It has stifled the production of high-quality local news and information, good journalism and investigative reporting for too long. Its full repeal is long, long, long overdue.

EXCERPT FROM
<u>TESTIMONY OF GEORGE L. MAHONEY</u>
Vice President, General Counsel and Secretary
Media General, Inc.

FCC MEDIA OWNERSHIP WORKSHOP
Washington, DC -- November 4, 2009

IV. <u>The 1996 Telecommunications Act Sets a High Standard of Proof for Retention of the 1975 Rule, and, Given the Clear Competitive Threat Now Posed to Broadcast Stations and Their Free and Local Content by New Media Players, That Standard Can No Longer Be Met.</u>

Section 202(h) of the Telecommunications Act of 1996 requires the FCC to evaluate market conditions every four years and determine whether any of its ownership rules remain "necessary in the public interest as the result of competition."[1] The FCC must "repeal or modify any regulation" that is no longer in the public interest.[2] By its terms, this provision imposes substantive criteria against which the FCC must justify its rules ("necessary in the public interest as the result of competition"), a required remedy ("modify or repeal"), and an explicit statutory deadline for action ("quadrennially").[3] In light of the overwhelming "competition for eyeballs" chronicled above, it is clear cross-ownership restrictions are no longer "necessary in the public interest as a result of competition," even under the most deferential standard of "necessary" imaginable.[4] More than 13 years later, of course, the environment is intensely more competitive.

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[1] Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 112 (1996), as amended by Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004).

[2] *Id.*

[3] The 1996 Act initially required biennial review, which was amended in 2004 to require quadrennial review. *See id.*

[4] The legislative history of the 1996 Telecommunications Act explains that Congress imposed this review requirement to deal exactly with the type of competitive milieu now before the Commission. Specifically, Congress concluded that, because of "the explosion of video distribution technologies and subscription-based programming sources . . . Congress and the [FCC] must reform Federal policy and the current regulatory framework to reflect [ ] new

The regulations governing it, like the cross-ownership rule, have become even more anachronistic. The FCC already has twice found, and the United States Court of Appeals for the Third Circuit has agreed, that a ban is not necessary to fulfill the FCC's interest in promoting competition, localism, or viewpoint diversity, and that it counterproductively *harms* localism.

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 longer useful, they must be repealed or modified."[5] Nothing in the records that the FCC amassed in previous dockets showed that the cross-ownership rule remains "useful" or that any need remains under Section 202(h) to substitute lessened regulation. The FCC and the court have already found the cross-ownership rule unnecessary to advance competition or localism, and the annually increasing 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.

Long-established administrative law precedents equally compel total repeal of the cross-ownership rule. The FCC itself acknowledged in 1975 that there was no evidence of a competitive harm mandating regulation of newspaper/broadcast cross-ownership, and the

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marketplace realities." H.R. Rep. No. 104-204, at 55 (1995) *reprinted in* 1996 U.S.C.C.A.N. 10, 18-19. In Congress' view, the industry even in 1995 was "operating under archaic rules that better suited the 1950's than the 1990's," even though "the broadcast environment today is the most competitive it's ever been." S. Rep. No. 104-23, at 64 (1995) (Statement of Sen. Burns). Senator Burns explicitly included the newspaper/broadcast cross-ownership ban as among the rules he felt needed reevaluation because they "may not be appropriate for tomorrow's broadcasting marketplace." *Id.*

[5] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 395 (3d Cir. 2004) ("*Prometheus*"), *cert. denied*, 545 U.S. 1123 (2005).

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 this rule: a regulation reasonable in the face of a problem becomes highly capricious when the problem is shown not to exist;[6] even a statute, the validity of which depends on a premise supported at the time of enactment, becomes invalid subsequently if the predicate disappears.[7]

In fact, changing course at this point and doing anything short of repealing cross-ownership restrictions would similarly violate administrative law precedent. Any change would require clear and compelling evidentiary support and a detailed and persuasive explanation for tightening standards.[8] Nothing in the record warrants a change in regulatory direction, such as consideration of more stringent regulation, particularly given, as discussed below, the constitutional infirmities that plague any regulation in this area.

V. Restrictions on Newspaper/Broadcast Cross-Ownership Are Unconstitutional.

When the Commission adopted the 1975 rule, it was declared to be justified based on the so-called "scarcity doctrine" enunciated by the Supreme Court in *Red Lion Broadcasting. Co. v. FCC*, 395 U.S. 367 (1969) ("*Red Lion*"). In upholding the now-jettisoned Commission "fairness doctrine" against a First Amendment challenge, *Red Lion* had concluded that the broadcast spectrum is a "scarce resource." Based on this conclusion, *Red Lion* held that "the Government is permitted to put restraints on [broadcast] licensees in favor of others whose view should be expressed on this unique medium."[9]

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[6] *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).

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

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

[9] *Red Lion*, 395 U.S. at 389-90.

In 1975, the validity of "scarcity" was at least debatable. Radio, television, and newspapers were the *only* forms of mass communication. In 1975,

- there was no Internet, email, or broadband service of any type;
- there was no satellite television or satellite radio;
- there were no consumer wireless services (and no cell phones); and
- cable television served less than 15% of the nation's households.

Today, a starkly different technological landscape exists, one which renders the "scarcity doctrine" a legal dinosaur: the Internet, giving access to billions of web pages, eight million blogs,[10] and streaming video and audio from hundreds if not thousands of radio and television stations and, increasingly, thousands of other sources, is ubiquitous; 88.6% percent of the nation's households receive cable and satellite video service, with hundreds of channels typically available; consumer wireless data services (including video transmissions) are available on most cell phones; and satellite radio is available nationwide.

Over 20 years ago, in 1987, the Commission itself (in carrying out its recognized responsibility to evaluate existing regulations in light of the technological changes) concluded that the "scarcity doctrine" had outlived its justification:

> *[T]he Commission*, in its task of managing an ever-changing technological and economic marketplace, *has the responsibility to consider new developments in reviewing existing, and in applying new, rationales in that marketplace*. . . . We further believe that the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press. Therefore, . . . we believe that the standard applied in *Red Lion* should be reconsidered and that *the constitutional principles*

[10] *See* Media Bureau Staff Research Paper entitled "*The Scarcity Rationale For Regulating Traditional Broadcasting: An Idea Whose Time Has Passed*," (March 2005) by John W. Berresford ("*Media Bureau Research Paper*"), at 11 & n.62, *citing* Press Release, *FCC Selects Digital Radio Technology* (Oct 10, 2005), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-227261A1.pdf.

> *applicable to the printed press should be equally applicable to the electronic press*.[11]

Like the Emperor in Hans Christian Anderson's fairy tale, shorn of the illusory "scarcity doctrine," newspaper/broadcast cross-ownership restrictions have no clothes. Without the protection of the "scarcity doctrine," those restrictions are subject to heightened First Amendment scrutiny, scrutiny they cannot withstand because they serve neither a compelling state interest nor are they narrowly tailored. For the reasons set forth below, the Commission must recognize this reality and eliminate the unconstitutional newspaper/broadcast cross-ownership rule.

A. The Sole Justification for Deferential First Amendment Review of the Newspaper/Broadcast Cross-Ownership Restrictions -- the "Scarcity Doctrine" -- Is Analytically Flawed and Has Been Rendered Completely Obsolete by Regulatory and Technological Change.

Broadcasters are "entitled under the First Amendment to exercise the widest journalistic freedom."[12] As a result, any restriction "that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action."[13] "[E]ven regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."[14] Moreover, "laws that single out the press, or certain elements thereof, for special treatment" must be subject to some measure of heightened scrutiny.[15]

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[11] In re Compl. of Syracuse Peace Council, *Memorandum Opinion and Order*, 2 FCC Rcd. 5043, 5052-5053 (1987) ("*Syracuse Peace Council*") (emphasis supplied), *pet. for review denied*, 867 F.2d 654 (D.C. Cir. 1989).

[12] *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (internal quotation omitted).

[13] *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592-593 (1983) ("*Minneapolis Star*").

[14] *Id.* at 592.

[15] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640-41 (1994) ("*Turner I*").

Nine years after *Red Lion*, the Supreme Court was called upon to apply these principles in a First Amendment challenge to the cross-ownership rule.[16] In rejecting the challenge and concluding that the rule passed constitutional muster, the *NCCB* Court, relying on *Red Lion*'s "scarcity doctrine," said:

> The physical limitations of the broadcast spectrum are well known. Because of problems of interference between broadcast signals, a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public. *In light of this physical scarcity, Government allocation and regulation of broadcast frequencies are essential . . . . [G]iven that need, we see nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the "public interest" in diversification of the mass communications media*.[17]

Thus, the *NCCB* Court rested its decision approving the rule on the premise that broadcast spectrum is a uniquely scarce resource that government should regulate differently than any other form of communication. Accordingly, the *NCCB* Court submitted the rule only to extremely deferential rational-basis review, holding that the Commission "acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints."[18]

Red Lion itself had acknowledged that technological advances might render the "scarcity doctrine" obsolete, resting its holding on "the present state of commercially acceptable technology."[19] In 1984, in *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984) ("*League of Women Voters*"), the Supreme Court noted the continuing criticism of the "scarcity doctrine" resulting from technological change:

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[16] *See NCCB*, 436 U.S. at 796.

[17] *Id.* at 799 (emphasis supplied).

[18] *Id*. at 796.

[19] *Red Lion*, 395 U.S. at 388.

> The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that *with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the "scarcity doctrine" is obsolete. . . .*[20]

In explicitly recognizing that the doctrine's continued vitality was a rebuttable presumption dependent on the state of technological advance, the Supreme Court stated that it would reconsider the doctrine if there were "some signal from Congress or *the FCC that technological developments have advanced so far* that some revision of the system of broadcast regulation may be required."[21]

The *NCCB* Court's rebuttable premise that broadcast spectrum is a uniquely scarce resource has ceased for three reasons to serve as a continuing justification for the newspaper/broadcast cross-ownership rule. First, the contention that broadcast spectrum is scarce is analytically flawed: spectrum is not more scarce than any other commercial good; its "purported" scarcity accordingly cannot justify a reduced level of First Amendment scrutiny. Second, regulatory change -- Congress' decision to limit the Commission's role in awarding new spectrum -- eliminates any principled basis for the "scarcity doctrine." Third, technological change leading to the exponential growth in new media outlets and "compression" techniques for using broadcast spectrum even more efficiently have rendered the "scarcity doctrine" (to the extent it was ever justified) completely obsolete.

1. NCCB's Reduced Scrutiny of Cross-Ownership Restrictions Was Based on an Analytically Flawed Premise: That Broadcast Spectrum Is Uniquely Scarce.

The "scarcity doctrine," upon which *NCCB's* reduced scrutiny of cross-ownership restrictions is based, applies not only to broadcast spectrum, but to everything else used in

[20] *League of Women Voters*, 468 U.S. at 376 n.11 (emphasis supplied).

commerce; there is, therefore, no basis for the special, discriminatory treatment embodied in newspaper/broadcast cross-ownership restrictions. Other items used in the delivery of mass communication, including computers, fiber-optic cable, and even newsprint, also are similarly limited at any particular point in time. As Judge Bork stated almost 20 years ago,

> It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. *Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another*. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.[22]

Several years later, in *Action for Children's Television v. FCC*, 58 F.3d 654, 674-675 (D.C. Cir. 1995) ("*ACT*"), then Chief Judge Edwards echoed the same disagreement with the theoretical underpinnings of the "scarcity doctrine":

> For years, scholars have argued that the scarcity of the broadcast spectrum is neither an accurate technological description of the spectrum, nor a "unique characteristic" that should make any difference in terms of First Amendment protection. First, *in response to the problem of broadcast interference when multiple broadcasters attempt to transmit on the same frequency, critics point out that this problem does not distinguish broadcasting from print and is easily remedied with a system of administrative licensing or private property rights*.[23]

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[21] *Id.* (emphasis supplied).

[22] *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986) ("*TRAC*") (emphasis supplied); *see also Branch v. FCC*, 824 F.2d 37, 49 (D.C. Cir. 1987) (expressing doubt whether the "scarcity rationale is adequate to support differing degrees of first amendment protection for print and electronic media.").

[23] *ACT*, 58 F.3d at 675 (Edwards, C.J., dissenting) (emphasis supplied). A recent Commission *Media Bureau Research Paper* made the same point several years ago:

> There is also, at any given time, a finite amount of land, wood, and many other resources. The U.S. government does not, however, control all the land in the United States and license its use for free to a few persons who promise to use it in approved ways. Guitars are made from trees that grew on government land, but the government does not limit the supply of guitars and license a few for free in each area to persons who promise to play certain kinds of music on them. At

These excerpts (by two judges not usually known for similar thinking) make clear that the erroneous notion of spectrum shortage cannot, as a matter of economic and analytical principle, justify violating the free speech rights of broadcasters and newspaper owners through a cross-ownership restriction.

2. Congress' Decision To Limit the Commission's Role in Awarding New Spectrum Further Eliminates Any Principled Basis for the "Scarcity Doctrine."

Congress additionally has eliminated any principled foundation for the "scarcity doctrine" by years ago dramatically curtailing the Commission's oversight role in choosing among competing applicants for new spectrum. If spectrum scarcity ever were a valid rationale for restricting broadcasters' First Amendment rights, that rationale was only appropriate because the Commission held comparative hearings, picking "winners" and "losers." As the Supreme Court observed in *Red Lion*, "[w]here there are substantially more individuals who want to broadcast than there are frequencies to *allocate*, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish."[24] More recently, the Supreme Court has cited the "scarcity of available frequencies at its *inception*" as support for "regulation of the broadcast media that are not applicable to other speakers. . . ."[25]

> times, in American history, paper has been in very short supply, but government has not considered either licensing newspapers or granting rights of access to them. *Thus, the fact that possible spectrum use is finite makes a weak foundation for the Scarcity Rationale and for any regulation of spectrum use beyond allocation and "traffic control."*

Media Bureau Research Paper at 10 (citations omitted) (emphasis supplied).

[24] 395 U.S. at 388 (emphasis supplied).

[25] *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997) (emphasis added) (citations omitted) ("*Reno v. ACLU*").

In *NCCB*, the Supreme Court predicated its approval of the cross-ownership rule on this selection process and the consequent idea that "[g]overnment allocation and regulation of broadcast frequencies are essential."[26] Because the Commission "was forced to choose among applicants for the same facilities," the Supreme Court concluded that the Commission was entitled to exercise the power to restrict ownership in ways the agency deemed likely to advance the public interest.[27]

Today, however, the Commission no longer is engaged, in any meaningful sense, in the business of *choosing* among applicants for broadcast construction permits. Pursuant to the Balanced Budget Act of 1997, available spectrum now must be assigned at its inception through competitive bidding or auction procedures, rather than comparative proceedings requiring the Commission to evaluate the public interest qualifications and comparative merits of prospective initial permittees.[28]

Because Congress has adopted a price mechanism as the method for awarding licenses for the use of broadcast spectrum, the Commission has no basis for continued regulation based on spectrum scarcity. Broadcast television and radio licenses are, for all practical purposes, traded on the open market, and there is nothing unique about broadcast spectrum that distinguishes it from other commercial goods.[29] As noted above, if spectrum is scarce, it is

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[26] *NCCB*, 436 U.S. at 799.

[27] *Id.* at 802.

[28] More than a decade ago, in the Balanced Budget Act of 1997, Congress expanded the Commission's competitive bidding authority under Section 309(j) of the Communications Act of 1934, 47 U.S.C. Sec. 309(j), by *requiring* the use of auctions to select among mutually exclusive applicants for commercial broadcast station licenses. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, 11 Stat. 251 (1997).

[29] Pursuant to 47 U.S.C.A. § 310(d) (2001), the Commission still reviews the basic licensee qualifications of proposed owners of broadcast facilities before allowing the consummation of license transfers and assignments, but this review, designed to ensure compliance with other

scarce only in the sense that all economic goods are scarce,[30] and, therefore, claims of scarcity cannot provide a legitimate constitutional basis for regulating speech.

3. Changes in Media Also Have Rendered the "Scarcity Doctrine" Obsolete.

Since the time of the *NCCB* decision in 1978, there has been an explosion in the way consumers receive information and programming. These changes also render the "scarcity doctrine" obsolete.

First, when *NCCB* was decided, there was no Internet, little cable television, no satellite television or radio, no digital television or HD radio, and no consumer broadband or wireless services, with the wealth of content all of these platforms deliver, some on a completely unregulated basis. Today, consumers have access to all these sources of news and information. A citizen in an average American city in 1975 had access to three television stations, a handful or so of commercial radio stations, and a couple of daily newspapers. Three decades later, the average American has access to literally thousands and thousands of channels of information through the Internet alone:

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broadcast policies such as the prohibition on alien ownership and on acquisition by individuals with records of certain adjudicated civil or criminal violations, does not arise from concerns over spectrum scarcity. This statutory section explicitly forbids the FCC from considering whether someone else would be a better licensee of the station in question.

[30] As Judge Bork further observed in 1986:

> [A]lmost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists. Land, labor and capital are all scarce, but this, of itself, does not call for government regulation. It is true that some mechanism has to be employed to decide who, out of the many claimants, should be allowed to use the scarce resources. *But the way this is usually done in the American economic system is to employ the price mechanism, and this allocates resources to users without the need for governmental regulation*.

TRAC, 801 F.2d at 508 n.3 (emphasis supplied) *citing* Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON, 1, 14 (1959).

> More new content is available on the Internet, of course -- billions of web pages, both portals such as the Drudge Report, the personal web pages of millions of individuals, small organizations, and bloggers . . . . The latter have a potentially transformative potential for the dissemination of not only opinion, but also facts and news in competition with "mainstream media." Almost all of the millions of persons who operate portals and web pages would have been unable to gain access to the traditional broadcast media, much less grow large on it. The Internet, in contrast, gives them easy entry and access to a far larger audience, namely billions of screens and the people watching them, at a fraction of the cost of earlier media. The Internet also makes available, at any time and any place, including schools and libraries, content such as newspapers, magazines, radio stations and TV programs that were previously available only in small areas, or to small numbers of subscribers, or at certain times. . . .[31]

Similarly, cable television, satellite radio and television, wireless and broadband services, and other technologies, today provide the average American thousands of additional channels of communication.

Second, the number of traditional broadcast stations has dramatically increased since 1975. Nationally, the number of full-power traditional television and radio stations has risen from 7,411 in 1969 when *Red Lion* was decided to 16,140 today.[32] And the Internet, through streaming video and audio, has allowed reception of hundreds to thousands of these stations far outside their traditional signal reach.

Third, the broadcast spectrum itself is not characterized by static "scarcity." To the contrary, technological advances have increased the amount of broadcast spectrum available for use and have allowed more intense and efficient use of that spectrum.[33] As the *Media Bureau Research Paper* noted:

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[31] *Media Bureau Research Paper* at 16-17.

[32] FCC news, "Broadcast Station Totals as of June 30, 2009," released Sept. 4, 2009.

[33] *See*, *e.g.*, *Syracuse Peace Council*, 2 FCC Rcd at 5052-55; Christopher S. Yoo, *The Rise & Demise of the Technology-Specific Approach to the First Amendment*, 91 Geo. L.J. 245, 279-81 (2003) ("*Yoo*") ("[T]echnological progress has steadily expanded the range of the electromagnetic spectrum available for commercial use."). *See also ACT*, 58 F.3d at 675 (Edwards, C.J., dissenting) ("[T]he nation enjoys a proliferation of broadcast stations, and should

> It is also incorrect to imply that because the possible spectrum use is finite at any given moment, there is a fixed maximum usage in the long term. A finite amount of land can accommodate more and more persons as technology makes it possible to build higher buildings. With buses, paved roads, and better engines, more people and goods can be moved along the same road. Throughout the history of radio, new techniques and technologies have enabled more and more communications to occur via spectrum use. *Recently announced techniques and technologies of this type include secondary markets, "overlay" and underlay" rights, easements, "commons" models, Ultra Wide Band, Software Defined Radios, Frequency Agile Radios, Digital Television, and Digital Radio. Thus, scarcity is not an inherent barrier to more and more users and communication, but an horizon that continually recedes as inventions advance*.[34]

The DTV transition has brought with it multicasting, and broadcasters will soon use their existing frequencies to supply Mobile DTV. At the same time, broadcasters continue to make innovative uses of their spectrum, trying to put more content over the streams, showing that increasing spectrum efficiency belies the concept of scarcity.[35]

This growth in mass communication outlets and advancing technology related to spectrum use have led the numerous distinguished courts noted above, the Commission itself, various Commissioners individually, and the *Media Bureau Research Paper* to agree that rejection of the "scarcity doctrine"'s rationale is overdue.

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the country decide to increase the number of channels, it need only devote more resources toward the development of the electromagnetic spectrum.").

Indeed, as one commentator has observed, the scarcity of broadcast frequencies at the time of *Red Lion* was a result of a series of regulatory decisions limiting the amount of spectrum allocated to broadcasting, combined with the government's decision to give away new licenses and renew existing licenses for free. *See Yoo* at 269-80. *Red Lion* in effect accepted the Commission's then existing broadcast regulations as the "constitutional baseline" for reviewing whether additional regulations violated the First Amendment. *Id.*

[34] *Media Bureau Research Paper* at 11 (emphasis supplied).

[35] M. Grotticelli, "Squeezing 20 Channels through a 19 Mb/s pipe," *Broadcast Engineering*, Sept. 3, 2009, available at http://broadcastengineering.com/news/20-channels-19mbps-pipe-090709/index.html (last visited Nov. 2, 2009), J. Meril, "HD Double-Take," *TV Technology*, Oct. 6, 2009, available at http://www.tvtechnology.com/article/88220 (last visited Nov. 2, 2009).

The courts and jurists also have noted that these changes have eroded any basis for the "scarcity doctrine."[36] Indeed, the United States Court of Appeals for the District of Columbia Circuit has clearly stated that, if the FCC were faced with a rulemaking petition, the agency would be "arbitrary and capricious if it refused to reconsider [the newspaper/broadcast cross-ownership rule] in light of persuasive evidence that the scarcity rationale is no longer tenable."[37] Not surprisingly, the academics noted above and many others strongly support the views of that court and other distinguished jurists.[38]

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[36] *See, e.g.*, *Sinclair Broadcasting. Group., Inc. v. FCC*, 284 F.3d 148, 172 (D.C. Cir. 2002) (Sentelle dissenting) (criticizing the scarcity principle); *Time Warner Entm't Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) ("*Time Warner I*") ("intense criticism [of *Red Lion* stems partly from] the perception that the 'scarcity' rationale never made sense—in either its generic form (the idea that an excess of demand over supply at a price of zero justifies a unique First Amendment regime) or its special form (that broadcast channels are peculiarly rare [and partly from] the growing number of available broadcast channels.") (opinion dissenting from denial of rehearing *en banc*); *ACT*, 58 F.3d at 675 (Edwards, C.J., dissenting) ("Today, however, the nation enjoys proliferation of broadcast stations, . . . [a]nd with the development of cable, spectrum-based communications media now have an abundance of alternatives, essentially rendering the economic scarcity argument superfluous."); *TRAC*, 801 F.2d at 508, n.4 ("Broadcast frequencies are much less scarce now then when the scarcity rationale first arose.").

The Supreme Court itself has rejected attempts to extend the "scarcity doctrine" broadcast regime to the mail, telephony, and the Internet. *See Reno v. ACLU*, 521 U.S. 844, 868 (1997) (Internet); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 124 (1989) ("*Sable Communications*") (telephony); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 10 n.6 (1986) (plurality opinion) (mail); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (mail); *Consol. Edison Co. v. Pub. Service Comm'n*, 447 U.S. 530, 542-43 (1980) (mail) ("*Consolidated Edison*").

[37] *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998).

[38] Laurence H. Winer, *Public Interest Obligations and First Principles*, at 5 (The Media Institute 1998) ("In a digital age offering a plethora of electronic media from broadcast to cable to satellite to microwave to the Internet, the mere mention of 'scarcity' seems oddly anachronistic."); Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 Duke L. J. 899, 904 (1998) ("By the 1980s . . . the emergence of a broadband media, primarily in the form of cable television . . . . was supplanting conventional, single-channel broadcasting - and with it the foundation on which the public interest obligations had been laid. If it ever made sense to predicate regulation on the use of a scarce resource, the radio spectrum, it no longer did."); Rodney M. Smolla, *Free Air Time For Candidates and the First Amendment*, at 5 (The Media Institute 1998) ("Scarcity no longer exists. There are now many voices and they

The Commission itself has resoundingly repudiated the "scarcity doctrine." In ruling on challenges to the Fairness Doctrine, the Commission specifically responded to the Supreme Court's invitation in *League of Women Voters* for a "signal" that it was time to reconsider the "scarcity doctrine":

> [I]n response to the question raised by the Supreme Court in *League of Women Voters*, we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press.[39]

As the Commission explained, "the dramatic transformation in the telecommunications marketplace provides a basis for the Court to reconsider its application of diminished First Amendment protection to the electronic media."[40] In particular, the Commission noted that the number of broadcast television and radio stations had increased dramatically since *Red Lion*, and that "the advent and increased availability of such other technologies as cable and satellite television services have dramatically enhanced . . . access" to "a multiplicity of media outlets."[41]

The Commission again recognized as much in its July 2003 omnibus media ownership decision, emphasizing that "[t]he average American has a far richer and more varied range of media voices from which to choose today than at any time in history."[42] As noted, the

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are all being heard, through broadcast stations, cable channels, satellite television, Internet resources such as the World Wide Web and e-mail, videocassette recorders, compact disks, faxes -- through a booming, buzzing electronic bazaar of wide-open and uninhibited free expression."); Lillian R. BeVier, *Campaign Finance Reform Proposals: A First Amendment Analysis*, *CATO Policy Analysis*, No. 282 at 1, 13, 14 (Sept. 4, 1997) ("There is no longer a factual foundation for the argument that spectrum scarcity entitles the government, in the public interest, to control the content of broadcast speech.").

[39] *Syracuse Peace Council*, 2 FCC Rcd at 5053.

[40] *Id*. at 5058.

[41] *Id*. at 5051.

[42] 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,

Commission there determined that the cross-ownership rule "actually works to inhibit [local news and information] programming," and prevents the efficiencies and increased quality of programming that results from "combining a newspaper's local news-gathering resources with a broadcast platform"; thus, "the question confronting media companies today is not whether they will be able to dominate the distribution of news and information in any market, but whether they will be able to be heard at all among the cacophony of voices vying for the attention of Americans."[43]

Finally, the *Media Bureau Research Paper* likewise concludes that the "scarcity doctrine" should be abandoned:

> In sum, the decades since The Scarcity Rationale took shape have seen an explosion in the number of distribution networks and channels, both via radio and other media -- more traditional broadcasters, cable television, DBS, DARS, Internet, WiFi and WiMax -- and in the mass of content that fills them. *By no rational, objective standard can it still be said that, today in the United States, channels for broadcasting are scarce*.[44]

For all of these reasons, any newspaper/broadcast cross-ownership restriction must be subject to heightened constitutional scrutiny.

4. Any Newspaper/Broadcast Cross-Ownership Restriction Cannot Survive Heightened Constitutional Scrutiny

Any newspaper/broadcast cross-ownership restriction today must be justified under the same heightened constitutional standards that apply to all other governmental regulation of protected speech. The cross-ownership rule cannot survive that scrutiny whether strict or intermediate.

Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 (2003) ("*July 2003 Decision*"), *aff'd and remanded sub nom., Prometheus*.

[43] *Id*.

[44] *Media Bureau Research Paper* at 18 (emphasis supplied).

a. Strict Scrutiny. Any newspaper/broadcast cross-ownership restriction singles out newspaper owners for especially onerous restrictions and suppresses their broadcast speech in favor of the speech of non-newspaper licensees. As a result, such a restriction must be evaluated under the standard of strict scrutiny.[45] That standard requires the Commission to show that its ownership restrictions are the "*least restrictive means [available of achieving] a compelling [state] interest*."[46] "[I]t is the rare case in which . . . a law survives strict scrutiny."[47] As one prominent authority has noted, when this "form of heightened scrutiny is applied, the law may properly be regarded as presumptively invalid, and likely to be struck down."[48]

The Commission's cross-ownership restrictions clearly cannot withstand challenge under this standard. As *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 355 (D.C. Cir. 1998), concluded, "it is impossible to conclude that the government's interest [in diversity of programming], no matter how articulated, is a compelling one."

Second, a cross-ownership restriction, either a ban or one that essentially presumes regulation is needed outside of the Top 20 markets is obviously not the "least restrictive means" available of achieving the purported compelling state interest.[49] If any rule were to survive such

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[45] *See Minneapolis Star*, 460 U.S. at 583 (concluding that a regulation that singles out the press imposes a "heavier burden of justification on the State"); *New York Times v. Sullivan*, 376 U.S. 254 (1964). *See also Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("[G]overnment may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others.")

[46] *Sable Communications*, 492 U.S. at 126 (emphasis added).

[47] *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

[48] 1 Rodney A. Smolla & Melville B. Nimmer, *Freedom of Speech* § 4:3 (1999).

[49] *Sable Communications*, 492 U.S. at 126.

review, it would need to demonstrate that denial of presumptive relief outside the Top 20 markets is based on an examination of factors in individual markets.

b. Intermediate Scrutiny. Even if reviewed under the less rigorous intermediate scrutiny standard (which the Commission has suggested should apply),[50] a newspaper/broadcast cross-ownership restriction still would not pass constitutional muster. Pursuant to this standard, the Commission must show that the rule satisfies three separate requirements. As established below, none of these requirements can be met.

First, the Commission must "demonstrate that the recited harms" -- *i.e.*, the harms to diversity posed by common ownership of newspapers and broadcast outlets -- are "real, not merely conjectural."[51] The Commission has never established, as it must, that this standard has been met. To the contrary, the United States Supreme Court has noted that when the Commission adopted the 1975 rule, it "did not find that existing co-located newspaper-broadcast combinations had not served the public interest, or that such combinations necessarily 'spea[k] with one voice,' or are harmful to competition."[52] Indeed, in adopting the rule, the Commission made affirmative empirical findings that, in general, there was significant diversity or "separate

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[50] *See July 2003 Decision,* 18 FCC Rcd at 13793 (Commission acknowledged that any cross-ownership rule would "limit the speech opportunities not only for broadcasters, but also for other entities that may seek to own and operate broadcast outlets (including those with the fullest First Amendment protection--newspapers)," and therefore concluded that it "should draw the rule as narrowly as possible in order to serve our public interest goals while imposing the least possible burden on the freedom of expression."). *See also 1998 Biennial Regulatory Review, Biennial Review Report,* 15 FCC Rcd 11058, 11121 (2000) (acknowledging that the cross-ownership rule would be sustained against claims that it violates the First Amendment if it satisfies the intermediate scrutiny standard announced in *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

[51] *Turner I,* 512 U.S. at 664.

[52] *NCCB*, 436 U.S. at 786. The United States Court of Appeals for the District of Columbia Circuit, in first reviewing the rule, had similarly observed that the administrative record "contained little 'hard' information" and no evidence of specific anti-competitive acts by cross-owned stations. *Nat'l Citizens Comm. for Broad. v. FCC,* 555 F.2d at 956, 959.

operation" between commonly owned broadcast stations and newspapers, and that newspaper-owned affiliates tended to be superior licensees in terms of delivering locally-oriented service.[53] In 2003, the FCC noted the link between diversity of ownership and diversity of viewpoint was "tenuous, ill-defined, and difficult to measure."[54] Without concrete evidence that common ownership of newspapers and broadcast facilities reduces diversity, the Commission's "broad prophylactic rule" is inherently "suspect" and the supposed harms wholly "conjectural."[55]

Second, because "[c]onstitutional authority to impose some limit is not authority to impose any limit imaginable,"[56] the Commission must "show a record that validates the regulation" itself and not just the agency's "abstract statutory authority" to regulate.[57] In that, the Commission must show that "the regulation will in fact alleviate these harms in a direct and material way."[58] To date, the Commission has not been presented with any *factual* or empirically-based showing that a newspaper/broadcast cross-ownership restriction would directly advance its goal of increasing diversity in the media marketplace. Indeed, the Commission in the *July 2003 decision* determined that the cross-ownership rule upheld in *NCCB* "actually works to inhibit [local news and information] programming," and prevents the efficiencies and increased quality of programming that result from "combining a newspaper's

[53] *1975 Second Report and Order*, 50 FCC 2d at 1050, 1079, 1089.

[54] *2003 Decision*, 18 FCC Rcd at 13767.

[55] *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (internal quotations omitted).

[56] *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1129-30 (D.C. Cir. 2001) ("*Time Warner Entm't Co*.").

[57] *Id.* at 1130, 1137.

[58] *Turner I*, 512 U.S. at 664.

local news-gathering resources with a broadcast platform."[59] Nor did the Commission there even attempt to show that its ownership rule would make a material impact on media diversity.

Third, the Commission must show that any newspaper/broadcast cross-ownership restriction that may be adopted is "narrowly tailored to further a substantial governmental interest."[60] To satisfy the element of "narrow tailoring," the agency would have to show that its restriction on common ownership of co-located daily newspapers and broadcast stations "does not burden substantially more speech than necessary to further" its professed interests in increasing diversity.[61]

The Commission did not, however, and plainly will be very hard pressed to, show that any newspaper/broadcast cross-ownership restriction is "narrowly tailored" so as to burden no more speech than is necessary to further its diversity aims. Absent the lack of any record evidence of a non-conjectural harm, narrow tailoring becomes an unobtainable goal, and any cross-ownership restriction would be a blunt instrument at best. A regulation that "burdens substantially more speech than is necessary to further the government's legitimate interests is not narrowly tailored."[62]

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[59] *July 2003 Decision*, 18 FCC Rcd at 13756.

[60] *League of Women Voters*, 468 U.S. at 380; *Time Warner Entm't Co.*, 240 F.3d 1126 (striking down limits on national cable ownership and carriage of vertically integrated programming); *C&P v. United States*, 42 F.3d 181 (4th Cir. 1984) (striking down cable/telco cross-ownership ban).

[61] *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189 (1997).

[62] *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) ("*Ward*"); *United States v. Albertini*, 472 U.S. 675, 689 (1985). Indeed, cross-ownership rules that instituted a "complete ban" on telephone companies' ownership of cable systems did not pass intermediate scrutiny because they were not narrowly tailored restrictions on the telephone companies' free speech. *US WEST, Inc. v. United States*, 48 F.3d 1092, 1104-1106 (9th Cir. 1995) (vacated as moot 516 U.S. 1155 (1996)); *Chesapeake & Potomac Tel. Co.*, 42 F.3d at 202.

For all these reasons, any restriction on newspaper/broadcast cross-ownership cannot survive any level of heightened First Amendment scrutiny.

B. A Newspaper/Broadcast Cross-Ownership Restriction Is No Longer Entitled to Deferential Review Under the Equal Protection Component of the Fifth Amendment.

Under settled law, government restrictions that single out the press, or any element of it (like newspapers), for differential treatment are subject to heightened judicial scrutiny not only under the First Amendment, but under the equal protection component of the Due Process Clause.[63] As demonstrated below, a newspaper/broadcast cross-ownership restriction cannot survive equal protection scrutiny now because newspapers are the *only* non-broadcast medium subject to discriminatory cross-ownership restrictions.

"The Equal Protection clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives."[64] Even when they do not affect the exercise of First Amendment rights, all regulatory classifications that differentiate between similarly-situated groups or individuals must be "rationally related to a legitimate state interest."[65] The Supreme Court has not hesitated to strike down on equal protection grounds ordinances and laws that discriminate between similarly-situated speakers.

For example, in *Carey v. Brown*, 447 U.S. 455 (1980), the Court struck down on equal protection grounds a ban on residential picketing that excepted peaceful picketing outside a home that was also used as a place of employment and was involved in a labor dispute. The

[63] *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) (citing cases) ("*Arkansas Writers' Project*"). *Cf. Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding that Due Process Clause of Fifth Amendment includes component analogous to Equal Protection Clause of Fourteenth Amendment).

[64] *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 101 (1972) ("*Mosley*").

[65] *Pennel v. City of San Jose*, 485 U.S. 1, 14 (1988) (internal quotation omitted).

Court held that the ban's distinction between labor picketing and all other peaceful demonstrations was overly broad and not narrowly tailored to the government's stated purpose of protecting residential privacy because it made no attempt to distinguish among various sorts of non-labor picketing on the basis of the harms they would inflict on the privacy interest. At the same time, the Court deemed the ordinance too under-inclusive to directly advance the government's privacy objectives because it permitted forms of picketing that were equally likely to intrude on the tranquility of the home.[66]

Over three decades ago, in 1978, when radio, television, and newspapers were the *only* media of mass communication, the Supreme Court rejected an equal protection challenge to the Commission's newspaper/broadcast cross-ownership ban. The newspaper owners there argued that the ban "unfairly 'singled out' newspaper owners for more stringent treatment than other license applicants."[67] Based on the then current technological and regulatory landscape, however, the *NCCB* Court disagreed, holding that the ban "treat[ed] newspaper owners in essentially the same fashion as other owners of the major media of mass communications."[68] Because, in *NCCB*'s long-ago day, the only other "major media of mass communications" besides newspapers were broadcast television and radio, applying a broadcast ownership ban to

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[66] Similarly, in *Mosley,* 408 U.S. at 93-95, the Supreme Court invalidated a statute that prohibited picketing and demonstrations within 150 feet of local schools, but that also exempted "peaceful picketing" related to a labor dispute within the school. The Court found that the classification regarding permissible picketing was a violation of the equal protection guarantee in the absence of an overriding state interest to support a distinction between labor pickets and picketing by other speakers. The Court held that, when statutory classifications affect "expressive conduct within the protection of the First Amendment," it was inappropriate to review them under traditional rational basis standards. *Id.* at 98-99.

[67] *NCCB*, 436 U.S. at 801 & n.19.

[68] *Id.* at 801.

the single non-broadcast medium of newspapers did not unfairly single out that medium, since similar prohibitions applied to owners of radio and television stations.

Today, the communications revolution has rendered that holding wholly untenable. Although newspapers are singled out as the only non-broadcast medium subject to a broadcast cross-ownership ban, it is no longer true that newspapers are the only non-broadcast "major medi[um] of mass communications."[69] The major media outlets of today unquestionably include not only cable television, but also the Internet and multichannel video program distributors like satellite and broadband services -- none of which is subject to the Commission's continued restrictions on broadcast cross-ownership. Indeed, in 2002, the United States Court of Appeals for the District of Columbia Circuit vacated the FCC's restriction on the cross-ownership of cable systems and television broadcast stations.[70] As established above, these additional media provide thousands of channels of news and information to the average American.

Moreover, even if *Red Lion* remained the law, the government's imposition of restrictions on newspapers that are not generally imposed on other non-broadcast media must trigger heightened judicial scrutiny:

> [L]aws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State,' and so are always subject to at least some degree of heightened First Amendment scrutiny.[71]

"[D]ifferential treatment … suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional."[72]

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[69] *Id.*

[70] *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1049 ("*Fox*"), *rehearing denied*, 293 F.3d 537 (D.C. Cir. 2002).

[71] *Turner I*, 512 U.S. at 640-41 (quoting *Arkansas Writers' Project*, 481 U.S. at 228). *See also Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

[72] *Minneapolis Star*, 460 U.S. at 585.

Any FCC action that treats newspapers discriminatorily cannot satisfy this required heightened constitutional scrutiny. Newspapers remain the *only* non-broadcast medium subject to discriminatory cross-ownership restrictions. It makes no sense whatsoever that a cable company may buy a broadcast station when a newspaper may not. In fact, the Commission has previously recognized that "the information market relevant to diversity concerns includes not only TV and radio outlets, but cable [and] other video media."[73] Cable, DBS, other video service providers, and Internet content providers make comparable contributions to diversity and competition for audiences, but owners of these media have been freely able to acquire in-market newspapers.

C. Any Newspaper/Broadcast Cross-Ownership Restriction Specifically Directed at Promoting Diversity Would Not Be Content Neutral and Would Trigger First Amendment Review.

Finally, separate and independent from the two grounds set forth above, any FCC newspaper/broadcast cross-ownership restrictions would be subject to heightened judicial scrutiny for the simple reason that they are content-based. The whole *point* of such restrictions, according to the decision adopting the rule and the *February* 2008 and *July 2003 decisions*, is to enhance "diversity" in broadcasting. Because this objective necessarily relates to the *content* of the relevant speech, such restrictions are not "justified without reference to the content of the regulated speech," and are hence content-based.[74]

[73] Amendment of Section 73.3555, *Report and Order*, 100 FCC 2d 17, 25 (1984). *See also* Review of the Commission's Regulations Governing Television Broadcasting, *Report and Order*, 14 FCC Rcd 12903, 12953 (1999) (concluding that cable systems, broadcast stations, and newspapers are all "important source[s] of news and information on issues of local concern" and compete with each other as news and advertising outlets).

[74] *Ward*, 491 U.S. at 791. *See* 2006 Quadrennial Regulatory Review – Review of the Commc'ns Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Report and Order and Order on Reconsideration*, 23 FCC Rcd 2010, 2019, 2022 (2008); *July 2003 Decision*, 18 FCC Rcd at 13630 ("[R]egulating ownership is an appropriate

Under settled law, government restrictions based on the content of speech -- no matter how benign their motivation -- are subject to heightened First Amendment scrutiny.[75] Such scrutiny is particularly appropriate with respect to a newspaper/broadcast cross-ownership restriction because there is no evidence that the content-based rationale of such restriction is even effective in promoting a "diversity" of broadcast voices in the first place.

The *NCCB* Court acknowledged that the premise of the 1975 rule was to "enhance the possibility of achieving greater diversity of viewpoints."[76] And while it did offer a passing comment rejecting a content based analysis ("the regulations are not content related"),[77] it did so only in *dicta* in a one-sentence snippet distinguishing authority relating to a different issue.[78] Moreover, in this *dicta*, the *NCCB* Court blurred the line between content and viewpoint neutrality, which more recent Supreme Court authority has crystallized. While a newspaper/broadcast cross-ownership restriction may not be targeted at the viewpoint of speech,

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means to promote viewpoint diversity."); 13760 ("[W]e continue to believe that diversity of ownership can advance our goal of diversity of viewpoint."). *See also Turner I*, 512 U.S. at 658 (regulation content-based if "concerned with the communicative impact of the regulated speech").

[75] *See, e.g.*, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991); *Arkansas Writers' Project*, 481 U.S. at 228.

[76] *NCCB*, 436 U.S. at 796.

[77] *Id.* at 801.

[78] The *NCCB* Court made this comment while addressing the petitioners' argument "that the regulations unconstitutionally condition receipt of a broadcast license upon forfeiture of the right to publish a newspaper." *NCCB*, 436 U.S. at 800. After concluding this argument was ill-founded because "a newspaper owner need not forfeit anything in order to acquire a license for a station located in another community," the Court distinguished the case law upon which petitioners based this argument as addressing a different point, *i.e.*, "the content of constitutionally protected speech." *Id.* at 800-801. It was in this context that the Court opined that in *dicta* that the ban was "not content related." *Id.* at 801.

that does not mean that such a rule is not targeted at the content of speech and would not immunize it from heightened scrutiny.[79]

Thus, the more recent Supreme Court authority cited above, including *Ward* and *Consolidated Edison*, establish that such a content-based restriction must be subjected to heightened scrutiny. Because any FCC newspaper/broadcast cross-ownership restriction would be content based, it would be subject to heightened scrutiny *regardless* of whether *Red Lion's* "scarcity doctrine" remains the law of the land. Even under the *Red Lion* regime, a content-based restriction is subject to heightened judicial scrutiny.[80] *League of Women Voters* underscores that not all broadcast regulation is subject to deferential review and that "[t]he First Amendment's hostility to content-based regulation" requires the Court to be "particularly wary" in reviewing a content-based regulation of broadcasting.[81]

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[79] *See, e.g.*, *Consolidated Edison*, 447 U.S. at 537 ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular *viewpoints*, but" also to regulations seeking "to restrict expression because of its message, its ideas, *its subject matter, or its content.*") (emphasis added; internal quotation omitted). A newspaper/broadcast cross-ownership restriction, of any stripe, literally prohibits a newspaper from bringing its journalistic and local market expertise and viewpoint to bear in an entire medium, thereby limiting the public's access to ideas. "Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998).

[80] *See League of Women Voters*, 468 U.S. 364. In *League of Women Voters*, the Supreme Court struck down a statute prohibiting broadcasters from "expressi[ng] editorial opinion[s] on controversial issues of public importance," in part because "the scope of [the] ban [was] defined solely on the basis of the content of the suppressed speech." *Id.* at 381 (internal quotation omitted), 383.

[81] *Id.* at 384 (internal quotation omitted).

Limiting the speech of some to enhance the speech of others is fundamentally antithetical to the First Amendment.[82] The First Amendment, after all, "rests on the premise that it is government power, rather than private power, that is the main threat to free expression."[83]

Accordingly, any newspaper/broadcast cross-ownership restrictions would be content based and, as a result, must be tested subject to strict scrutiny under the First Amendment, requiring the Commission to show that such standards are the "least restrictive means [available of achieving] a compelling [state] interest."[84] As established above, the Commission can not satisfy this standard.

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[82] *See, e.g.*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.30 (1978) (rejecting, as inconsistent with "basic tenets of First Amendment jurisprudence," the notion that the government "may control the volume of expression by the wealthier, more powerful corporate members of the press in order to enhance the relative voices of smaller and less influential members.") (internal quotation omitted); *Buckley v. Valeo*, 424 U.S. at 48-49 (emphasizing that the "government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others").

[83] *Turner I*, 512 U.S. at 685 (dissenting opinion).

[84] *Sable Communications*, 492 U.S. at 126 (emphasis added).

Attachment 3

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

In the Matter of	)	
	)	
2010 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. 09-182

COMMENTS OF MEDIA GENERAL, INC.
ON NOTICE OF INQUIRY

John R. Feore, Jr.
M. Anne Swanson
Jason E. Rademacher
Dow Lohnes PLLC
1200 New Hampshire Ave., NW
Suite 800
Washington, DC 20036
(202) 776-2534

Its Attorneys

July 12, 2010

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<u>**SUMMARY**</u>

Despite the wide-ranging nature of the *NOI*, the FCC must keep in mind that, with respect to the newspaper/broadcast cross-ownership rule, it has previously made definitive determinations supporting repeal. Unless clear and compelling evidence of changed conditions emerges, these determinations circumscribe the FCC's current review.

In repealing the cross-ownership ban in 2003, the FCC already determined that such regulation is unnecessary to protect competition because newspapers and broadcasters compete for advertisers in different product markets. No party challenged this determination on appeal. The FCC in 2008 said it agreed with the analysis. Given this fundamental finding, no vestige of cross-ownership regulation is needed to protect competition.

The issue of whether localism requires *any* cross-ownership restriction has also been conclusively resolved. In both 2003 and 2008, the FCC found that such restriction works to inhibit the production of local news; cross-ownership actually promotes localism. The 2003 determination was judicially affirmed. This issue does not remain open for debate.

When the FCC adopted the 1975 ban, its action was predicated on a "hoped-for" diversity gain. In 2003, the FCC specifically ruled that the ban was not necessary to protect "viewpoint diversity," defined as the "*availability* of media content reflecting a variety of perspective"; it noted that evidence showed the link between cross-ownership and common viewpoint to be "tenuous, ill-defined, and difficult to measure." Efficiencies from cross-ownership, it found, actually lead to presentation of diverse viewpoints. The court agreed that the FCC reasonably concluded it lacked evidence that common ownership produced unfair bias requiring a ban. When the FCC, in 2008, retreated from its 2003 repeal, it still acknowledged examples of independent editorial judgment among commonly owned properties. The 2008 decision did not discredit the 2003 determination that the speculative link between cross-ownership restriction

and increased diversity was unsupportable; it simply said it could not rule it out in *every* single instance, an insurmountable and improper test. The current review must acknowledge that the conjectural link has been shown not to exist.

Even if the FCC disregards its prior determinations, it will find abundant evidence that cross-ownership advances both localism and diversity. Media General's own experience, including its recent Pulitzer Prize for public service in one of its medium-sized convergence markets, shows that cross-ownership enhances the resources available for production of exemplary journalism. Similarly, the resources available from cross-ownership allowed Media General to launch a very successful Spanish-language weekly newspaper, *CENTRO*.

The advent and popularity of new technologies also should put to rest any concern the FCC has over the "availability of media content reflecting a variety of perspectives." Not just the Internet, but newer delivery options like iPads and other mobile devices, must be taken into account in analyzing the need for any vestige of cross-ownership restriction.

As the FCC recognized in 2008, these technologies have caused an upheaval in traditional media's business model. This tumult, combined with the current recession, has hit all traditional media hard, but has been particularly damaging in small and medium-sized markets, as Media General can attest from its own observations. Cross-ownership with its synergies and proven local news benefits provides a partial but important antidote to these difficulties.

The NBCO Rule is an anachronism, no longer supported by any policy rationale or logical fact. But it is not just an innocent relic of the past. It is an actual, serious detriment to the broadcast and newspaper industries, and it hurts consumers and local communities, particularly small- and medium-sized ones that are most jeopardized by the pinch of today's lower revenues and higher costs of news gathering. The NBCO Rule must be eliminated.

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

In the Matter of	)	
	)	
2010 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. 09-182

**COMMENTS OF MEDIA GENERAL, INC.
ON NOTICE OF INQUIRY**

Media General, Inc. ("Media General"), by its attorneys, hereby files these comments in response to the *Notice of Inquiry* in the above-captioned proceeding,[1] which comes as part of the Commission's fifth media ownership review since enactment of Section 202(h) in the Telecommunications Act of 1996.[2] The *NOI* seeks comment on "fundamental questions" regarding the "scope" of the Commission's review of its broadcast ownership rules and "considerations that should underlie media ownership rules for today's environment."[3]

As discussed below, the massive record the Commission has adopted in its four previous reviews strongly supports repeal of newspaper/broadcast cross-ownership restrictions, a determination that has already been judicially affirmed. Basic administrative law principles

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[1] 2010 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, *Notice of Inquiry*, MB Docket No. 09-182, DA 10-92 (rel. May 25, 2010) (the "*NOI*").

[2] Telecommunications Act of 1996, PUB. L. No. 104-104, § 202(h), 119 Stat. 56, 111-12 (1996) ("1996 Act"); Consolidated Appropriations Act of 2004, PUB. L. No. 108-199, § 629, 118 Stat. 3 (2004) (amending Section 202(h) of the 1996 Act).

[3] *NOI*, at ¶¶ 1-2.

mandate that these previous determinations be respected and used to guide the scope of this review of the current rule, 47 C.F.R. § 73.3555(d) ("NBCO Rule"). The previous reviews have demonstrated that preventing cross-ownership no longer advances the Commission's policy goals (if it ever did), and the public interest would be well served by repeal of the NBCO Rule. In fact, more recent factual developments from around the country, and Media General's markets in particular, show that no reasoned basis remains to retain any vestige of the NBCO Rule.

The NBCO Rule is a regulatory relic (and not an innocent one) that has long outlived the speculative purpose ("hoped-for" gain in diversity) for which it was adopted over 35 years ago. As the Commission continues to study other ownership rules, it should act promptly to sever consideration of the NBCO Rule from that lengthy process and promptly repeal it. Given the status of today's media industries and the benefits cross-ownership delivers, anything short of repeal would not represent reasoned decision-making and, therefore, would not be judicially sustainable.

I. INTRODUCTION.

Media General is a leading publicly traded provider of news, information, and entertainment across multiple platforms, serving consumers and advertisers in numerous local markets, primarily in the southeastern United States. Its operations include 18 network-affiliated TV stations and associated websites; 21 daily newspapers and associated websites; more than 20 specialty publications that include weekly newspapers; and niche publications targeted to various demographic, geographic, and topical communities of interest. Many of its specialty publications have associated websites. Media General also operates several interactive advertising services enterprises, including an advergaming and entertainment company, a coupon and shopping company, and a wireless mobile marketing company.

Media General is the nation's preeminent practitioner of newspaper/broadcast cross-ownership, which it began in Tampa, Florida, and over the last decade has pursued in medium- and small-sized markets. Media General's News Center in Tampa, Florida is the most advanced convergence laboratory in the nation, and the only one, as far as Media General is aware, in which the news staffs of a newspaper (*The Tampa Tribune*), broadcast television station (WFLA), and online operation (TBO.com) are housed together under one roof. Besides this strong presence in Tampa-St. Pete, the nation's 14th-ranked Designated Market Area ("DMA"), Media General has similar convergence efforts underway in four additional markets where it owns television broadcast stations and daily newspapers – Roanoke-Lynchburg, Virginia, the 67th-ranked DMA; Tri-Cities, Tennessee/Virginia, the 93rd-ranked DMA; Myrtle Beach-Florence, South Carolina, the 104th-ranked DMA; and Columbus, Georgia, the 128th-ranked DMA.

Because of its strong belief in the benefits of cross-ownership, Media General, for almost a decade, has been an active participant in the Commission's debate over its media ownership rules. Media General applauded the Commission's willingness to launch its 2010 Quadrennial Regulatory Review Process last fall with workshops, and Media General actively participated in the workshops in Washington, DC on November 4, 2009, and Tampa, Florida on April 20, 2010. As part of that process, Media General submitted extensive written testimony setting forth many of its principal legal arguments in favor of repeal of the NBCO Rule. The written testimony of its Vice President, Secretary and General Counsel, George Mahoney, on November 4, 2009, is attached as Exhibit A, and those arguments are hereby incorporated by reference.[4]

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[4] Media General also submitted written testimony of John R. Schueler, Florida Market Leader, on April 20, 2010, and filed comments on November 20, 2009 to supplement Mr. Mahoney's November 4, 2009 testimony. In addition, on May 7, 2010, Media General submitted "Comments" in the FCC's "Examination of the Future of Media and Information

Media General files now to add several supplemental points to the record. First, the Commission has already found on two occasions that its policy goals of competition, localism, and diversity are not advanced by retention of a ban on newspaper/broadcast cross-ownership, and basic administrative law principles severely constrain the Commission's ability to depart from this determination and the findings upon which it was based. Second, recent examples from Media General's own experience in operating converged properties show that cross-ownership actually continues to advance the goals of localism and diversity. Third, since the Commission last examined this issue, the advent and popularity of new technologies have accelerated, further fragmenting traditional media's audiences and siphoning away advertisers. As a result, traditional media have found their basic business model, already severely tested by the overall economic decline, put in question.

Cross-ownership with its synergies and proven benefits for local news production provides a partial but important antidote to the difficulties faced by today's distressed traditional media properties. As discussed below, the Commission has a legal obligation, based on its previous reviews and these more recent developments, to make that relief promptly available.

II. THE LEGAL DETERMINATIONS SUPPORTING NBCO REPEAL IN PREVIOUS COMMISSION REVIEWS STRICTLY CONFINE THE COMMISSION'S CURRENT CONSIDERATION OF THE NBCO RULE.

The *NOI* is extremely wide-ranging in its proposed areas of review. With respect to the NBCO Rule, however, the Commission is bound by a number of determinations that it has already made in its recent reviews of the rule under Section 202(h), findings that have already been judicially affirmed. In such a case, absent clear and compelling evidence of changed

Needs of Communities in a Digital Age," GN Docket No. 10-25 ("Future of Media" proceeding), and hereby incorporates those comments by reference.

conditions, the Commission may not alter its course.[5] Because such evidence does not exist, the Commission's review of the NBCO Rule should be narrow and prompt. Any course but repeal is not sustainable.

In the *July 2003 Decision*, the FCC determined that the former ban on cross-ownership, adopted in 1975, was no longer necessary in the public interest for three reasons: (i) a ban was not necessary to promote competition in local markets because most advertisers do not view newspapers and broadcast stations as close substitutes;[6] (ii) a ban undermines localism by preventing efficient combinations that would allow for the production of high-quality local news;[7] and (iii) insufficient evidence exists to conclude that ownership influences viewpoint to warrant a ban, thus making it indefensible on diversity grounds.[8] The United States Court of Appeals for the Third Circuit affirmed the FCC's repeal of the wholesale ban, finding that the Commission's determinations on each of these points were reasonable.[9] In 2008, the FCC again concluded that "[e]vidence in the record continues to support the Commission's earlier decision

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[5] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). The Supreme Court's recent caution in *Fox Television Stations, Inc. v. FCC*, 129 S.Ct. 1800 (2009), echoes this requirement. In that case, the court held that an agency that departs from prior determinations must "provide a more detailed justification . . . when . . . its new policy rests upon factual findings that contradict those which underlay its prior policy." *Id.* at 1811.

[6] 2002 Biennial Regulatory Review – Review of the Comm'ns Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996: Cross-Ownership of Broad. Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broad. Stations in Local Markets, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 13,620, 13,749 (2003) ("*July 2003 Decision*"), *aff'd in part, remanded in part*, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) ("*Prometheus*"), *cert. denied*, 545 U.S. 1123 (2005).

[7] *Id.* at 13,754.

[8] *Id.* at 13,764-13,765.

[9] *Prometheus*, 373 F.3d at 398-400.

that retention of a complete ban is not necessary in the public interest as a result of competition, diversity, or localism."[10] As a result, no matter how broad-ranging the Commission's current review, whether a wholesale ban has any merit whatsoever is a subject completely foreclosed from debate.

First, in 2003, in reaching its conclusion that the ban was no longer needed for competitive reasons, the FCC made extensive findings about the lack of substitutability between newspapers and broadcast advertising, a determination that makes the issue of competition irrelevant to review of any vestige of the former ban.[11] No matter whether the advertising is national or local in nature, the FCC said these two products – newspaper advertising and broadcast advertising – are imperfect substitutes.[12] In its decision, the FCC could not have been clearer in its fundamental determination that "[a] newspaper-broadcast combination therefore . . . cannot adversely affect competition in any product market."[13] As the Third Circuit recognized, no party challenged this determination.[14] In the *July 2003 Decision*, the FCC also recognized that, if there is any unique group of advertisers "that benefit from using various media to advertise their products," federal and state antitrust remedies are adequate to protect these

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10 2006 Quadrennial Regulatory Review – Review of the Comm'ns Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Report and Order and Order on Reconsideration*, 23 FCC Rcd 2010, 2021 ("*February 2008 Decision*"), *appeal pending sub nom.*, *Prometheus Radio Project v. FCC*, Nos. 08-3078, *et al.* (3d Cir. filed July 15, 2008).

11 *July 2003 Decision*, 18 FCC Rcd at 13,749-52.

12 *Id.* at 13,751.

13 *Id.* at 13,749.

14 *Prometheus*, 373 F.3d at 398.

business interests.[15] In 2008, the Commission said it "continued to support . . . [the] conclusion" that "newspaper/broadcast combinations cannot adversely affect competition in any relevant product market."[16] Competition, as it relates to the NBCO Rule, is an issue beyond the scope of what the FCC should consider in this review.

Second, the issue of whether *any* newspaper/broadcast cross-ownership restriction is necessary to ensure localism has also been conclusively resolved. As the FCC found in 2003, such a restriction "is not necessary to promote broadcasters' provision of local news and information programming and . . . *the rule actually works to inhibit such programming*."[17] The United States Court of Appeals for the Third Circuit found the evidence upon which the FCC relied in this regard – the FCC's Media Ownership Working Group Study ("The Measurement of Local Television News and Public Affairs Programs") and findings by the Project for Excellence in Journalism – persuasive support on this point; the Third Circuit agreed with the FCC that newspaper/broadcast combinations promote localism.[18] In 2008, the Commission again concluded that "the weight of evidence indicates that cross-ownership can promote localism by increasing the amount of news and information transmitted by the co-owned outlets."[19] After nine years of studying the problem, concluding that common ownership promotes localism, and receiving court affirmance, neither the Commission nor any party can contend that this issue remains open for debate.

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15 *July 2003 Decision*, 18 FCC Rcd at 13,752-53.

16 *February 2008 Decision*, 23 FCC Rcd at 2,032 n.131.

17 *July 2003 Decision*, 18 FCC Rcd at 13,753-60 (emphasis supplied).

18 *Prometheus*, 373 F.3d at 398-99.

19 *February 2008 Decision*, 23 FCC Rcd at 2,038.

Third, when the FCC adopted the ban in 1975, its action was based on a "hoped-for" gain in diversity, and the FCC's recent decisions as well as the Third Circuit's review have found that this speculative concern has never materialized.[20] In 2003, the FCC specifically ruled that a cross-ownership ban was not necessary to protect "viewpoint diversity," which it defined as the "*availability* of media content reflecting a variety of perspectives."[21] In reviewing the record before it, the Commission concluded, "evidence shows that the link between common ownership of newspapers and broadcast outlets and common viewpoint is tenuous, ill-defined, and difficult to measure."[22] Moreover, it found that "the synergies and efficiencies that can be achieved by commonly located newspaper/broadcast combinations can and do lead to . . . diverse viewpoints."[23] On appeal, the Third Circuit affirmed that the FCC "reasonably concluded that it did not have enough confidence in the proposition that commonly owned outlets have an unfair bias to warrant sustaining the cross-ownership ban."[24] The court also found that the FCC properly considered that "diverse viewpoints from other media sources in local markets, such as cable and the Internet, compensate" for any concerns some may raise about cross-ownership.[25]

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20 As the attached Testimony of Mr. Mahoney discusses at greater length, even though the FCC's 1975 determination that new licensing "should be expected to add to local diversity" is sometimes now cited as established fact, that conjecture ignored a number of contrary empirical findings in the FCC's mid-seventies record, something even the D.C. Circuit recognized in its 1977 review of the FCC's adoption of the ban. *See* Exhibit A at pages 9-11.

21 *July 2003 Decision*, 18 FCC Rcd at 13,767.

22 *Id.* at 13,767.

23 *Id.* at 13,761.

24 *Prometheus*, 373 F.3d at 399-400.

25 *Id.* at 400.

Two years later, in 2008, the FCC although acknowledging the record included "examples of commonly owned outlets exercising independent editorial control," put a new twist on its review of the diversity issue. The FCC, without any reason in the record, established an insurmountable and improper test for dispelling the speculation long linking the NBCO Rule and the concept of diversity: "We are not in a position to conclude that ownership can *never* influence viewpoint."[26] Based on this perpetuation of the "diversity myth" as it relates to cross-ownership, the FCC, contrary to the *2003 Order* and *Prometheus*, reinstated the NBCO Rule, simply grafting onto it extremely modest waiver provisions that presumptively prohibit cross-ownership outside all but the largest markets.[27] (Media General has appealed this result.) The FCC's 2008 action and its ill-formed rationale for it, however, do not negate the 2003 determination that the link between cross-ownership and diversity is baseless. Absent compelling evidence of any decline in "the *availability* of media content reflecting a variety of perspectives," something that cannot be shown in light of the last decade's proliferation of new media alternatives, the current review need not debate the old discredited myth that cross-ownership restrictions are needed for a "hoped-for" gain in diversity.

Thus, the scope of the Commission's inquiry is constrained by its previous recognition that the NBCO Rule is not necessary to protect competition and advance localism and that the conjectured link between diversity and cross-ownership does not exist. The material that Media General has supplied in this docket already, the facts included herein, and the showings that other industry parties are making today demonstrate that cross-owned properties now provide even *more* public interest benefits in their markets than was the case in 2003 or 2008. The

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26 *February 2008 Decision*, 23 FCC Rcd 2,038-39 (emphasis supplied).

27 *Id.* at 2,040-57.

earlier determinations discrediting the bases for cross-ownership regulation govern the scope of this proceeding and leave the Commission no choice but to repeal the NBCO Rule.

III. MEDIA GENERAL'S CROSS-OWNED PROPERTIES CONTINUE TO DELIVER EXCEPTIONAL LEVELS OF HIGH QUALITY LOCAL NEWS AND INFORMATION, PROVIDING UNPARALLELED PUBLIC SERVICE THAT ENHANCES LOCALISM AND PRESENTS DIVERSE POINTS OF VIEW.

If this Commission disregards its previous determinations and instead chooses to delve into the issues of localism and diversity as they relate to the NBCO Rule, Media General's own record of public service in its cross-owned markets is where the review should begin.

Three times now (in comments filed in 2001, 2002, and 2006), Media General has supplied the Commission with extensive market-by-market documentation of the high volume of high quality news programming its cross-owned television stations provide.[28] Media General's most recent documentation, a two-inch thick volume prepared by Adam Clayton Powell III, then Director of the University of Southern California's Integrated Media Systems Center, discussed in detail how cross-ownership of Media General's television stations and its daily newspapers has resulted in increased news coverage, expanded public affairs service, and greater community service than would have been the case absent convergence.[29] Mr. Mahoney's attached

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28 At the same time Media General has presented volumes chronicling the extensive "*availability* of media content reflecting a variety of perspectives" in each of its markets, so the Commission could get a sense of the profound competition it faces and the incredible number of diverse voices residents of its markets receive. Comments of Media General, Inc., MB Docket No. 06-121, *et al.*, Oct. 23, 2006, at Vol. III, Appendices 9-14 ("Media General October 2006 Comments"); Comments of Media General, Inc., MB Docket No. 02-277, *et al.*, Jan. 2, 2003, at Vol. II, Appendices 9-14; Comments of Media General, Inc., MM Docket No. 01-235, *et al.*, Dec. 3, 2001, Vol. II, Appendices 9-14.

29 Media General October 2006 Comments, Vol. II, Appendix 4A.

November 2009 testimony also summarizes and updates the discussion of the specific benefits in the Tampa market and briefly describes Media General's overall approach in other markets.[30]

Two recent developments at Media General add conclusive proof that its convergence efforts serve viewers and readers well in Tampa and its smaller markets. First, just three months ago, the *Bristol Herald Courier*, Media General's newspaper in Bristol, Virginia, won the Pulitzer Prize for public service for its reporting on the mismanagement of natural gas royalties owed to thousands of Virginia landowners. The newspaper is located in the Tri-Cities, TN/VA market (DMA No. 93), one of Media General's convergence markets, where it also owns and operates WJHL-TV, Johnson City, Tennessee. The greater resources available in the market because of the presence of Media General's multiple news outlets, including the television station, helped provide the newspaper's staff (which numbers only seven reporters) with the ability to develop its multi-part award-winning series, while also covering other developments in the DMA, an area roughly the size of Connecticut.

Second, in Tampa, the resources available from cross-ownership have allowed Media General to launch *CENTRO*, a Spanish-language publication that has brought more localism and greater diversity to the area. *CENTRO* resulted from local, market-based innovation. Media General's research in Tampa showed that there might be an opportunity for a Spanish-language news outlet, but it also found a great deal of diversity within Tampa's Hispanic community. So because it was easier – and, importantly, less expensive – to launch a web product rather than a full-fledged print publication, Media General experimented first with a site that gathered, organized, and displayed news relevant to each of the 10 principal Spanish-language communities in Tampa. Media General thereafter launched its weekly *CENTRO* newspaper that

30 Exhibit A at pages 3-7.

today has audited circulation of nearly 40,000 and has become the leading Spanish-language publication in the Tampa Bay market.

These examples demonstrate what many empirical studies in the records of previous reviews have shown. Cross-ownership enhances localism and does not harm diversity; in fact, as Media General has always contended, cross-ownership increases the "*availability* of media content reflecting a variety of perspectives." Media General's cross-owned properties advance both policy goals.

IV. THE ADVENT AND POPULARITY OF THE AMAZING NUMBER OF NEW TECHNOLOGIES THAT HAVE BECOME AVAILABLE SINCE 1975, AND PARTICULARLY IN THE LAST COUPLE YEARS, SHOULD PUT TO REST ANY CONCERN THE FCC HAS OVER AVAILABILITY OF DIVERSE VOICES IN CROSS-OWNED MARKETS.

No one can seriously dispute that the media world of 2010 is radically different than that before the FCC in 1975 when it adopted the NBCO Rule and that, since then, American consumers – and advertisers who want to reach them – have gained an infinite number of varied and diverse new sources of news and information at the local, national, and international levels. As noted earlier, the Third Circuit held that diverse viewpoints from media sources other than broadcast and newspapers, such as cable and the Internet, should be taken into account in any Commission review of its media rules, specifically "that it was acceptable for the Commission to find that cable and the Internet contribute to viewpoint diversity."[31] Since then in a slightly different context, the Supreme Court has emphasized that the FCC must take technological advances into account.[32]

[31] *Prometheus*, 373 F.3d at 400.

[32] *FCC v. Fox*, 129 S.Ct. at 1813 (noting that technological advances in bleeping technology supports stepped-up indecency enforcement policy).

Although six years ago the Third Circuit questioned the importance of the Internet as a source of *local* news,[33] the record presented to the FCC on remand in 2006-07 conclusively demonstrated that the Internet contributes new and diverse sources of information at the local level.[34] Since then, the FCC's own work in the broadband arena has shown that the Internet has become the "go-to" place for local information. For example, John Horrigan, who authored "Broadband Adoption and Use in America," one of the FCC's Omnibus Broadband Initiative studies, reported that by late 2009, over 75 percent of adult Internet users reported accessing community or local news online.[35]

Twice within the last year, Media General has submitted additional evidence on the wide availability of local Internet sites unaffiliated with existing media outlets. First, in comments in this docket filed on November 20, 2009, Media General randomly selected markets in each quartile of the first 100 DMAs and demonstrated the availability in each market of between three

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33 *Prometheus*, 373 F.3d at 406-407.

34 For instance, the record on remand showed that Independent Media Center websites, which the court had cited as an example of sources serving as aggregators and distillers of local information over the Internet, *id.* at 406 n.36, had increased sevenfold to reach 62 markets as of December 2007. Comments of Media General, Inc., MB Docket No. 06-121, *et al.*, Dec. 11, 2007, at 22 n.67. As the National Association of Broadcasters noted, "the New York market *alone* has at least 55 locally-oriented websites, only a handful of which are affiliated with traditional media . . . [the] Charlotte market . . . has more than a dozen such locally oriented websites." Reply Comments of National Association of Broadcasters, MB Docket No. 06-121, *et al.*, Jan. 16, 2007, at 23-24. Media General's own comments chronicled hundreds of sites, with varying kinds of content – news, social, consumer journalism – available from local sources. Media General October 2006 Comments, Vol. III, at Appendices 9-14 (Internet Lists).

35 John B. Horrigan, *Broadband Adoption and Use in America*, OBI Working Paper No. 1 (Feb. 2010), at 16, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296442A.1.pdf (last visited May 13, 2010).

and eight local news and information sites, unaffiliated with existing media.[36] These totals were not exhaustive and would have increased with more research. Media General then showed that each of these sites had thousands, and sometimes millions, of unique and total visitors over the preceding calendar year.

Second, in the "Future of Media" proceeding, Media General submitted more data, this time from Tri-Cities, TN/VA, which, as noted above, is one of the medium-sized markets in which it owns both a newspaper and a television station. The data from this market, which has abundant and high quality local news, demonstrated the presence of over 20 independent Internet sites dedicated to providing local news and information to residents of the Tri-Cities DMA. In an attachment to those comments, Media General listed and organized the sites according to the categories suggested in a recent and still ongoing study by Michele McLellan, Reynolds Journalism Institute Fellow and a consultant to the Knight Foundation.[37] This study, which is available on the FCC's website, itself lists hundreds of local Internet news sites not affiliated with existing media outlets.

Organized according to Ms. McLellan's criteria, the data from Tri-Cities showed (i) an independent state investigative journalism site and a local site on sports written by professional journalists who previously worked with more traditional outlets – "New Traditional" sites; (ii) "Community" sites, which, as Ms. McLellan describes, "often rely on professional journalists but . . . tend to be bootstrappers who focus on community building"; (iii) "Microlocal" sites,

[36] Comments, submitted by Media General, Inc., in MB Docket No. 09-182, Nov. 20, 2009, at 1-3 & Appendix A.

[37] *See* McLellan's list of best local and microlocal news sites, http://reboot.fcc.gov/futureofmedia/blog?entryID=391366 (citing Michele McLellan, "Michele's List: Promising local news sites," *available at* http://www.rjionline.org/projects/mcellan/stories/community-news-sites/index.php) (last visited July 12, 2010).

which provide highly granular news of a defined neighborhood or town; (iv) "Niche" sites, which "focus tightly" on specific topics, such as entertainment, health, or the environment; (v) "Mini Sites," which are "typically run by one or two people [and] . . . tend to be idiosyncratic in [their] selection of stories"; (vi) "Local News System" sites, which "are highly local, low cost sites created with a regional or national template, often by a corporation"; and (vii) "Aggregator" sites, which lead local residents to more news about their communities produced by other outlets.[38]

In terms of size and rank, Tri-Cities is in the "middle" of the five DMAs where Media General owns and operates a cross-owned newspaper and television station, and it is representative of medium-sized markets. The availability in this market of so many local news and information Internet sites, not affiliated with existing media, is typical of what the FCC will find in markets throughout the nation and provides assurance of the "*availability* of media content reflecting a variety of perspectives."

Since the *February 2008 Decision*, mobile video applications have become widely available, offering increased content options for consumers and yet more competition for traditional media outlets. According to a recent Nielsen survey, the percentage of subscribers watching video on a mobile phone increased by 51.2% from the fourth quarter of 2008 to the fourth quarter of 2009.[39] The Nielsen report presenting the survey results noted that for the first time the mobile video audience surpassed 20 million.[40] The popularity of the iPhone, among

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38 *Id.*

39 *See* The Nielsen Company, *A2/M2 Three Screen Report: 1st Quarter 2010*, at 2, 3, *available at* http://en-us.nielsen.com/content/dam/nielsen/en_us/documents/pdf/Three%20Screen%20Reports/Nielsen_Three%20Screen%20Report_Q12010.PDF (last visited July 12, 2010).

40 *Id.* at 2.

other devices, has driven the creation of iPhone web applications that make news and information accessible whenever and wherever the consumer wants. For instance, a recent search of the iPhone website for "news" applications (*excluding* sports and weather applications) produced a list of some 485 applications, such as *Cherokee Phoenix*, a news source highlighting developments concerning the Cherokee Nation; *Cornell University Headline News* and similar "apps" presenting university-themed news; and *Nashville 24/7*, a hyper-local news site.[41] On April 3, 2010, the WiFi version of Apple's larger-screen iPad went on sale, and on April 30, 2010, Apple began selling 3G versions of the iPad. Their popularity has been immediate, with sales volumes on track to make the iPad the fastest selling mobile device to date. Their success provides more diversity and more intense competition for audience.[42] The introduction of the iPad alone has brought thousands of new content options to residents of all markets and has prompted the development and release of numerous new "apps," all of which – particularly those with local content – are relevant to the Commission's review.[43]

The overwhelming evidence of the widespread availability and massive popularity of the Internet and other outlets providing news and diverse information must silence any debate about the "availability of media content reflecting a variety of perspectives." In today's world of what some would argue is "too much information," the NBCO Rule has absolutely no utility.

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41 Apple Web, http://www.apple.com/webapps/news (last visited July 11, 2010).

42 *See* Jay Yarow and Kamelia Angelova, *CHART OF THE DAY: iPad Is On Track To Be The Fastest Selling Mobile Device Ever*, BUSINESS INSIDER SAI, June 22, 2010, *available at* http://www.businessinsider.com/chart-of-the-day-ipad-sales-2010-6 (last visited July 11, 2010).

43 Ferman Aziz, *iPad Hits 10,000 Apps*, PELWAVES, June 12, 2010, *available at* http://pelwaves.com/2010/06/12/ipad-hits-10000-apps (last visited July 11, 2010).

V. NEW TECHNOLOGIES HAVE IMPERILED TRADITIONAL MEDIA'S BUSINESS MODEL AND, AS IT DID IN 2008, THE FCC MUST ADDRESS THE FINANCIAL CHALLENGES FACING NEWSPAPERS AND BROADCASTERS AND THIS TIME, ONCE AND FOR ALL, REPEAL THE NBCO RULE.

Even in early 2008, the Commission acknowledged the serious impact that the advent and popularity of new technologies were having on traditional media outlets: "the record before us reveals a state of tumult in the business environment that has supported the traditional local media's production of news and information for decades. We recognize that technology advancements have triggered upheavals for these entities' business models beyond any they have previously experienced."[44] As specific evidence, the FCC noted that "statistics over the past decade show an industry containing fewer newspapers, facing declining circulation, bringing in stagnant revenues, suffering from increased costs, and employing fewer journalists."[45] While chronicling the threats to the viability of traditional media, the FCC also specifically noted that cross-ownership presents an opportunity for financially troubled media companies by "[a]llowing a struggling newspaper or broadcast station to combine with a strong outlet," which could "improve its ability to provide local news and information, thus benefiting the public interest."[46]

Since 2008, the overall economy has deteriorated as the nation officially entered the current recession. This decline added to already existing concerns over the permanent, secular changes the Internet and new technologies had begun to cause, and the hardships experienced by traditional media have only worsened. Newspaper circulation has continued its downward spiral,

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44 *February 2008 Decision*, 23 FCC Rcd at 2,013.

45 *Id.* at 2,029-30.

46 *Id.* at 2,053-54.

reaching its lowest point in nearly 70 years as of October 2009.[47] Advertising revenues, which traditionally make up 80 percent of overall newspaper revenues, have dropped 43 percent from 2007 through 2009.[48] Several newspaper publishers have sought bankruptcy protection, while others have ended their print editions.[49] Those that remain in business have closed domestic and foreign bureaus, laying off thousands of journalists.[50] Indeed, approximately 15,000 full-time reporters and editors have lost their jobs in the past three years – a 27 percent decrease in the

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47 Frank Ahrens, *The Accelerating Decline of Newspapers*, WASH. POST, Oct. 27, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/10/26/AR2009102603272.html?nav=emailpage (last visited July 11, 2010).

48 Pew Project for Excellence in Journalism, *The State of the News Media* (2010) ("*2010 Pew State of Media*"), Executive Summary at 1, 8-9, *available at* http://www.stateofthemedia.org/2010/chapter%20pdfs/2010_execsummary.pdf (last visited July 11, 2010).

49 In late 2008, Tribune Company, owner of daily newspapers and broadcast stations in multiple cities, sought bankruptcy protection, as did other major newspaper publishers in 2009, including the owners of the *Philadelphia Daily News* and *Chicago Sun-Times*. *See* In re Tribune Co., *et al.*, Nos. 08-13141, *et al.* (KJC) (Bankr. D. Del. filed Dec. 8, 2008); Richard Pérez-Peña, *Sun-Times Files for Bankruptcy*, N.Y. TIMES, Mar. 31, 2009, *available at* http://www.nytimes.com/2009/04/01/business/media/01paper.html (last visited July 12, 2010); Robert MacMillan, *Philadelphia Papers Owner Files for Bankruptcy Protection*, REUTERS, Feb. 23, 2009, *available at* http://www.reuters.com/article/idUSTRE51M1M720090223 (last visited July 12, 2010). In the last two years, numerous broadcast companies besides Tribune, including Equity Media Holdings, Pappas Telecasting, and Young Broadcasting have filed for bankruptcy. Lauren Horwitch, *Wave of Bankruptcies Further Weaken TV Market*, The Wrap: Covering Hollywood, March 26, 2009, *available at* www.thewrap.com/television/article/wave-bankruptcies-further-weaken-tv-market-2086 (last visited July 12, 2010). In 2009, E.W. Scripps Co. closed Denver's *Rocky Mountain News* after failing to find a buyer, and Hearst Corp. ended the *Seattle Post-Intelligencer*'s print edition. Howard Kurtz, *Final Edition: Rocky Mountain News to Shut Down Today*, WASH. POST, Feb. 27, 2009, at D03, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/02/26/AR2009022602108.html (last visited July 12, 2010); Phillip Meyer, *Let's Not Stop the Presses*, USA TODAY, Apr. 29, 2009, at 9A, *available at* http://www.usatoday.com/printedition/news/20090429/column29_st.art.htm (last visited July 12, 2010).

50 *2010 Pew State of Media*, Newspapers, Summary Essay at 1.

total number of such jobs in the newspaper industry.[51] Broadcast companies have also endured the effects of increased use of new media sources for news.[52]

The increased prevalence of new media sources providing local news and information (including Internet sites unaffiliated with existing media outlets in a market) has hit small and medium-sized markets especially hard. In the past two years, several newspapers in those markets, such as the *Albuquerque Tribune* and *Ann Arbor News*, have closed or scaled back their operations.

As the owner of newspapers in numerous small and medium-sized markets throughout the country, Media General has directly experienced the competitive impact of new media sources for news. For instance, over the last couple years, Media General has had to match its cost structure to the revenues that have been available in its markets. Overall, that means it has had to reduce its workforce from about 7,100 people to about 5,200 – a very painful, but necessary change. Throughout this difficult period, however, cross-ownership has helped its converged properties maintain their high volume and high quality of news. Media General's television stations are typically ranked number one or two in their markets in local news, and that is particularly true in its convergence markets, where it has multiple platforms – that is, multiple access points – to reach consumers with the news they demand, by nearly whatever means they demand it. The Media General model – cross-ownership of newspapers and television stations – has allowed this performance to continue despite financial challenges. That opportunity is needed in all markets.

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51 *Id.*

52 *2010 Pew State of Media*, Local TV, Summary Essay at 1, Economics at 9.

The NBCO Rule is an anachronism, no longer supported by any logical facts. But it is not just an innocent relic of the past. It is an actual, serious detriment to the broadcast and newspaper industries, and it hurts consumers and local communities, particularly small- and medium-sized markets, the ones most jeopardized by the pinch of today's lower revenues and the higher costs of news gathering. The NBCO Rule must be eliminated.

VI. **CONCLUSION.**

For the foregoing reasons, the NBCO Rule must be promptly eliminated. Media General urges the Commission to do so, including consideration of severing the NBCO Rule from this proceeding and moving quickly to repeal it.

Respectfully submitted,

MEDIA GENERAL, INC.

By ______________________

John R. Feore, Jr.
M. Anne Swanson
Jason E. Rademacher

Its Attorneys

Dow Lohnes PLLC
1200 New Hampshire Ave., NW
Suite 800
Washington, DC 20036
(202) 776-2534

July 12, 2010

EXHIBIT A

TESTIMONY OF GEORGE MAHONEY

See attached

<u>TESTIMONY OF GEORGE L. MAHONEY</u>
Vice President, General Counsel and Secretary
Media General, Inc.

FCC MEDIA OWNERSHIP WORKSHOP
Washington, DC -- November 4, 2009

My name is George Mahoney, and I am Vice President, Secretary and General Counsel of Media General, Inc. I would like to address the FCC's currently effective ban on the cross-ownership of newspapers and broadcast stations in the same market. I start from the premise that the rule is unconstitutional, both under the First and Fifth Amendments, and that its continued retention violates administrative law and Section 202(h) and of the 1996 Telecommunications Act, which requires the FCC periodically to determine whether its rules are "necessary" in the public interest as a result of competition and then repeal or modify those that are not. I emphasize that the statute authorizes inquiry in this quadrennial review into just that one factor -- competition.

The FCC's complete ban as to common ownership of newspaper and television stations in the same market was adopted in 1975 in a completely different media world; it was liberalized very minimally in 2008 in ways that have not yet become effective. To hold such combinations, therefore, parties need to obtain waivers, which the FCC has very sparingly granted in the last 34 years. The rule is truly a regulatory relic that was adopted at the behest of the Nixon Administration to punish "liberal" media like the *Washington Post* in the wake of Watergate. The ban remains in effect today despite the FCC's minimal attempts to modify it because of pending litigation over those regulatory actions and a stay that was imposed in 2003 by the federal court handling earlier appeals and never lifted.

Before I address these legal points in any detail, I want to give a little background on Media General's experience with the rule. This is experience that, I believe, is particularly relevant in today's economic downturn, which has had such a severe impact on the media industry. Media General has found that cross-ownership provides a very potent means for not only delivering, but increasing, high quality local news and information programming in small- and medium-sized markets. Today, more than ever, that approach can help to ensure the survival of high quality local news, strong journalism, and investigative reporting.

I. The Media General Experience: The Benefits of Cross-Ownership

Media General is a leading publicly traded provider of news, information, and entertainment across multiple media platforms, serving consumers and advertisers in strong local markets, primarily in the southeastern United States. Media General's operations are organized into five geographic market segments and a sixth segment called "Digital Media."

Our operations include 18 network-affiliated TV stations and associated websites; 21 daily newspapers and associated websites; more than 200 specialty publications that include weekly newspapers; and niche publications targeted to various demographic, geographic, and topical communities of interest. Many of our specialty publications have associated websites. Media General also operates three interactive advertising services companies: Blackdot, which specializes in interactive entertainment and advergaming technologies; DealTaker.com, a coupon and shopping website; and NetInformer, a leading provider of wireless media and mobile marketing services.

At the beginning of 1995, Media General owned just three daily newspapers, and as of the start of 1997, it held only three broadcast television station licenses. Over the last 14 years, Media General has acquired media outlets in a number of markets and, as part of this expansion, has brought together ownership and operation of local newspapers and local television stations. In the process, Media General has become one of the media industry's leading practitioners of "convergence."

Media General's News Center in Tampa, Florida is the most advanced convergence laboratory in the nation, and the only one, as far as Media General is aware, in which the news staffs of a newspaper (*The Tampa Tribune*), broadcast television station (WFLA), and online operation (TBD.com) are housed together under one roof. Besides this strong presence in Tampa-St. Pete, the nation's 14th-ranked Designated Market Area ("DMA"), Media General has similar convergence efforts underway in four additional markets where it owns television broadcast stations and daily newspapers -- Roanoke-Lynchburg, Virginia, the 67th-ranked DMA; Tri-Cities, Tennessee/Virginia, the 93rd-ranked DMA; Myrtle Beach-Florence, South Carolina, the 104th-ranked DMA; and Columbus, Georgia, the 128th-ranked DMA.

<u>*Tampa*</u>. Media General's interests in *The Tampa Tribune* and WFLA date to 1965 and are grandfathered under the 1975 rule. Our efforts at convergence there began in the mid-1990s when WFLA and *The Tampa Tribune* began to take a coordinated approach to covering local high school football and other sports in addition to stories about religion. Shortly thereafter, the two platforms began sharing expensive political polling information and joining forces to provide enhanced political coverage by sponsoring local events like candidate debates and "town halls." The response from the community and advertisers was so overwhelmingly positive that in 2000, when it came time to build expensive new digital television facilities in response to the Commission's mandate, Media General moved the staffs of all three Tampa platforms into a new $35 million state-of-the-art facility, The News Center. Over the last decade, FCC Chairmen, Commissioners, and staff have toured The News Center on multiple occasions. I would

encourage any FCC representatives interested in seeing how convergence works in practice, day-in and day-out, to contact us to arrange a tour for you of that very vibrant facility.

In Tampa, each of the three platforms has its own specific news and editorial staffs that make independent, final decisions about content. These three staffs work together at a central news desk, facilitating the rapid exchange of story ideas, news content, and video images. All three platforms also maintain their own news "budgets" (compilations of planned stories on a building-wide "intranet") and the staffs of each platform can access the news "budgets" of the other properties. Moreover, it has become commonplace that newspaper reporters write scripts for television newscasts and appear on-air, and television reporters write stories that are published in the newspaper. The newspaper also makes its archives available to the other two platforms. With the provision of special equipment to the photographers of all three platforms earlier this decade, *The Tampa Tribune* and TBO.com have been able to add pictures to stories that otherwise would have been only text. Similarly, *The Tampa Tribune*'s photojournalists have been able to provide WFLA and TBO.com with video footage.

The pooling of news-gathering resources has significantly increased the output of news content and ensured the delivery of better, faster, and deeper news in Tampa. These improvements can be seen in at least the following four areas, resulting in the best quality local breaking news, journalism, and investigative reporting for Tampa-St. Pete residents:

- *Breaking News*. With convergence has come "more eyes, more ears, and more mouths" on the street, meaning Media General's platforms are that much more likely to learn of breaking news developments and disseminate them quickly. In instances repeated on a daily basis, this has led to more extensive and immediate coverage of local events from jury verdicts in celebrated trials to hostage situations to traffic emergencies to developments affecting the region's sports teams and players.

- *Expanded News Content*. Expanded and more in-depth coverage of the market has flowed naturally from these convergence efforts. As is common in the industry, *The Tampa Tribune* has many times the number of reporters that WFLA has, even though the station has a staff that is typical for large market network affiliated television stations. With convergence, WFLA gains access to the newspaper's reporters who cover beats and have areas of expertise far beyond those the television station's staff can cover or develop. For example, *The Tampa Tribune*'s real estate reporter has for years provided on-air reports on local real estate issues for WFLA, and *Tribune* reporters who cover other business-related topics report on those issues on-air. These and other *Tribune* reporters frequently provide special on-air reports in their areas of expertise.
- *Investigative and Enterprise Pieces*. The three outlets have joined forces to produce specials and investigative reports that none of them could have done alone. Over the years, they jointly investigated the hurricane-preparedness plans of Tampa area governments, provided investigative and special reports on the actions of a possible serial rapist in nearby Ybor City, traveled the backroads of Mississippi and Louisiana delivering different reports to all three platforms on the impact of Hurricane Katrina on small towns and their historical sites, and flown to Iraq, Afghanistan, and Germany to report for all three outlets on the experiences of local troops serving in those areas.

- *Greater Understanding of the Community*. "Better sourcing," that is greater access to more leaders and community institutions achievable through three sets of reporters, allows the platforms to provide improved depth, understanding, and sensitivity in their coverage of diverse stories about the community. These same factors also aid the platforms in identifying solutions to community problems. Examples here included a series on the experiences of parents who have lost children to cancer and the tragedy that struck Indianapolis Colts football coach Tony Dungy and his Tampa-based family when his son committed suicide, both of which featured helping services available in the community. By working together, the three platforms have gained better access to political candidates and government officials for the Tampa Bay citizenry. Together, they have conducted their own joint polls, held "town hall" meetings, and organized other events, such as health fairs and community telephone banks that simply would not have been feasible without common ownership.

It is important to note that Media General's convergence efforts were not borne of an intent to reduce staff. Indeed, they did not result in staff reductions in Tampa, either overall or in news operations; rather, and contrary to popular criticisms of cross-ownership, overall employment at WFLA and employment in the station's newsroom increased. This should not be surprising since WFLA's local news output also increased by 30 minutes each weekday. When the economic downturn hit several years ago, the Tampa combination, like all Media General properties, was forced to make budgetary and staff reductions. Media General believes, however, that because of cross-ownership the amount and quality of local news has been less affected by adverse economic factors than in situations faced by other local broadcasters and newspapers that did not practice convergence.

Other Convergence Markets. As in Tampa, the newspapers and television stations in each of Media General's other convergence markets maintain separate news and editorial staffs. Although they do not have the advantages of co-location as in Tampa, the news staffs at the co-owned properties regularly share story ideas electronically and by telephone. All of Media General's converged properties have for several years equipped their print photojournalists with digital video cameras to provide video to the television stations; they provide their television cameramen with equipment that allows the newspapers to retrieve print-quality photos. The newspapers also make their extensive archives available to the television stations. As was also true in Tampa, the news staffs at each of Media General's cross-owned television stations grew following the implementation of convergence, and most of these stations also added appreciably to the number of hours of news programming that they offered each week.

Unlike Tampa, the combinations in these other markets were not grandfathered under the 1975 decision adopting the rule. Media General has owned and operated them since their acquisition pursuant to two different types of waivers. *First*, from their acquisition until 2008, Media General held all but one of the smaller market combinations under a "constructive waiver" policy put in place by the 1975 decision. (In the one exception, the newspaper is published in a town located beyond the relevant television contours, and the rule is not implicated.) Under this policy, which the FCC adopted in recognition of its complete lack of regulatory jurisdiction over newspaper acquisitions, Media General acquired newspapers in Tri-Cities, Myrtle Beach and Columbus where it already owned television stations. In such cases, the FCC's policy allowed Media General to hold both properties in each market for one year or until the time of the television stations' next renewal, whichever was longer. Absent this policy, it is doubtful whether the previous owners of the newspapers ever would have sold them to Media General because, absent a substantial monetary premium on the purchase price, the sellers would not have wanted their deals delayed or put at risk by the need to seek FCC advance approval.

Second, in adjudicatory portions of the 2006 Quadrennial Review Decision, which was released in February 2008, the FCC granted Media General permanent waivers of the cross-ownership rule in these "constructive waiver" markets, allowing continued ownership of the three newspaper/television combinations in Tri-Cities, Myrtle Beach-Florence, and Columbus. In the decision, which has been challenged on reconsideration, the FCC reviewed comments from those in the affected communities and found that the public interest was served by granting these permanent waivers for a number of reasons, including the following:

- The combinations involved just one television station and one newspaper;
- The combinations had been in existence since at least 2001;
- During this period, the combinations had provided innovative new services to their local communities and built on their synergies; and
- Forced divestiture would have disrupted the proven record of local benefits.

The FCC, in essence, "grandfathered" these combinations just as the FCC had done with most cross-ownerships, such as Tampa, that existed in 1975 when the FCC first banned cross-ownership. Although deemed "permanent," these waivers continue only so long as Media General owns the combinations. Absent application for a new waiver, the properties may not be sold in tandem. That is also the case with Tampa's grandfathered status. In both instances, that inability to sell in tandem is unfortunate, particularly in today's economic downturn because, were the properties for sale, buyers would likely want any option possible for maximizing synergies in delivering local news and information.

On March 25, 2008, the FCC's Media Bureau denied challenges and granted Media General's pending license renewal applications for the television stations in its three smaller convergence markets, finding that the stations had served the public interest and that objections based on cross-ownership had been mooted by issuance of the "permanent" waivers. An application for review of that action is pending before the full Commission.

II. The Rule's Tortured History and the FCC's Numerous Attempts To Repeal and Reform It Lead to the Conclusion That No Policy Basis Remains To Support It.

In 1975, the Commission asserted authority under the Communications Act to adopt a rule which flatly prohibits newspaper publishers from acquiring and operating broadcast stations in markets in which their newspapers are published. The Commission based adoption of the rule on sheer speculation that it would foster "diversity" rather than in response to any demonstrable showing of harm to diversity from common ownership. The Commission acknowledged that it lacked any "basis in fact or law for finding newspaper owners unqualified as a group for future broadcast ownership," and adopted the rule solely because "[w]e think that any new licensing should be expected to add to local diversity."[1]

Although now sometimes cited as established fact, this determination represented nothing more than conjecture that the rule would improve diversity, conjecture that ignored a number of contrary empirical findings in the record. Even in 1975, the FCC acknowledged that "most" of the commenting parties who had commonly owned newspaper and broadcast facilities reported

[1] Amendment of Sections 73.34 [sic], 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, *Second Report and Order*, 50 FCC 2d 1046, 1075 (1975) ("*1975 Second Report and Order*"), *modified by Nat'l Citizens Comm. For Broad. v. FCC*, 555 F.2d 938 (D.C. Cir. 1977), *aff'd in part and rev'd in part, FCC v. Nat'l Citizens Comm. For Broad.*, 436 U.S. 775 (1978) ("*NCCB*").

that their stations and newspapers had separate management, facilities, and staff, including the news staffs.[2] "Some even claim[ed] that because they have separate editorial boards they present editorials in one outlet which are opposed in the other."[3] The parties also pointed to "built-in protections" against common expressions of viewpoint resulting from common ownership. These included the professionalism among journalists and industry practices and ethical codes that transcend employer-employee loyalties and result in independence among journalistic staff members and editors.[4] As the FCC noted, these same parties had commented that, if commonly owned outlets had prevented or stymied the dissemination of views, the public would have been complaining vociferously about actual abuses. A number of parties observed that the silence from consumers on this point was the most telling argument against the need for the rule. Moreover, a 1973 FCC staff study of broadcast licensee programming, cited in the decision, found that newspaper-owned broadcast stations delivered *more* local news, *more* local non-entertainment programming, and *more* total local programming than other television stations.[5]

Based on this material, the FCC found that there generally was significant diversity or "separate operation" between commonly owned broadcast stations and newspapers.[6] Even on appeal, in 1977, the United States Court of Appeals for the District of Columbia Circuit found that the FCC had adopted the rule "without compiling a substantial record of tangible harm"; the court noted that the rule was based on a record that included "little reliable 'hard' information."[7]

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[2] *Id.* at 1059.

[3] *Id.*

[4] *Id.* at 1059-60.

[5] *Id.* at 1078 n.26.

[6] *Id.* at 1089.

[7] *Nat'l Citizens Comm. for Broad. v. FCC*, 555 F.2d at 944, 956.

In affirming the FCC's adoption of the rule, the United States Supreme Court recognized that the FCC's diversity rationale represented "'a mere hoped-for gain in diversity'."[8]

In the two decades that followed, the FCC proceeded to relax or repeal other structural ownership regulations, acknowledging that the conjecture that ownership diversity would lead to diversity of content and viewpoint was ill-founded and invalid. Despite this acknowledgement and liberalization of other media ownership rules, the newspaper/broadcast cross-ownership rule went untouched and unreviewed.

Beginning in the mid-1990s, clearly recognizing the significant changes that had occurred in the media landscape since 1975, the FCC began calling for changes in the rule. In February 1996, the FCC granted Capital Cities a temporary 12-month waiver of the rule to allow its ownership of daily newspapers and radio stations in the Detroit and Dallas-Ft. Worth DMAs. In doing so, the FCC stated it would proceed "expeditiously" to consider revising the rule, with then Chairman Hundt writing separately that the FCC should be able to complete the proceeding within the year before the temporary waiver expired. The same year, the FCC issued a Notice of Inquiry concerning potential relaxation of its policy for waiving the NBCO rule as it applied to newspaper/radio cross-ownership.

In 1997, the newspaper industry's trade association, the Newspaper Association of America ("NAA"), filed a petition for rulemaking, urging repeal or relaxation of the rule. The FCC did not act on that petition or the pending newspaper/radio Notice of Inquiry.

Instead, as required by Section 202(b) of the Telecommunications Act of 1996, the FCC in 1998 commenced a biennial review of all its media ownership rules. In the course of this docket, which treated the NAA petition (as well as a second NAA "Emergency Petition" filed in

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[8] *NCCB*, 436 U.S. at 786.

1999) as comments, the FCC received overwhelming support for repeal or modification of the rule. In the report issued at the conclusion of the proceeding in June 2000, the FCC said it would soon initiate a notice of proposed rulemaking seeking comment on repeal of the rule because it might not be necessary to achieve its intended public interest benefits in all instances. Two years later, in the report concluding its 2000 Biennial Review proceeding, the FCC again said it would be issuing a notice of proposed rulemaking on the rule.

The beginning of this decade again saw fits and starts as the FCC toyed with moving forward. In September 2001, the FCC finally released a notice of proposed rulemaking, seeking comment on elimination of the rule. In response, the FCC received virtually unanimous industry support for repealing the rule, and numerous economic and programming studies demonstrated such repeal would be in the public interest. Out of 49 substantive comments, five opposed repeal. Despite compilation of an extensive record, the FCC, concerned over recent appellate decisions criticizing the agency's approach to rulemaking, announced in late spring 2002 that it would defer action for yet another rulemaking, an omnibus review that would examine all of the agency's media ownership rules.

That rulemaking did not come until September 2002, when the FCC released a notice of proposed rulemaking seeking comment on all media ownership rules. In the course of the proceeding, the FCC released 12 studies it had commissioned. The six studies bearing some tangential relationship to the cross-ownership rule documented that its repeal would enhance the public interest. In both the cross-ownership specific and omnibus proceedings, "consumer" and labor groups opposing repeal failed to support their opinions about the need for the cross-ownership rule's retention with any substantive, empirical studies that met Section 202(h)'s burden for sustaining the rule.

In July 2003, the FCC released its 2002 Biennial Regulatory Review decision on all of its media ownership rules. In the report, it found that the cross-ownership rule was no longer justifiable under the standard set forth in Section 202(h), and it repealed the rule. The FCC found that the rule was not necessary in the public interest for three reasons: it did not promote competition in local markets since advertisers viewed newspaper and broadcast advertising as imperfect substitutes; it undermined localism by preventing efficient combinations that allowed for the creation and dissemination of high-quality local news; and the FCC lacked sufficient evidence of any link between diversity of ownership and diversity of viewpoint to sustain the ban. The FCC termed that link "tenuous, ill-defined, and difficult to measure." The Third Circuit affirmed repeal of the cross-ownership rule, finding the FCC's determination reasonable. In addition, the court noted that no party on appeal had even challenged the FCC's determination that restrictions were unnecessary to protect competition, and it agreed with the FCC the cross-ownership promotes localism.

That same 2003 FCC decision, however, replaced the discredited NBCO rule with new "cross-media limits" ("CMLs") that the FCC said were more precisely targeted at specific types of markets in which particular combinations were, it said, most likely to harm diversity. In markets with nine or more broadcast television stations, the CMLs lifted the ban entirely. In markets with three or fewer broadcast television stations, the CMLs retained an absolute ban. In markets with between four and eight broadcast television stations, the CMLs allowed a single entity to hold a newspaper and varying, but still very limited, combinations of broadcast and radio stations. The FCC adopted this graduated approach based on a "diversity index," which it claimed quantified diversity in markets. The Third Circuit found that the FCC did not provide a reasoned analysis for the CMLs and remanded to the FCC, instructing it to modify or justify the

CMLs. In the meantime, the court kept in place a stay it had imposed shortly after the appeals were first filed.

Over two years later, the FCC issued a further notice of proposed rulemaking that served the dual purpose of fulfilling the agency's Section 202(h) periodic review mandate, which Congress in 2004 had made a four-year obligation, and responded to issues raised in the Third Circuit's remand. The proceeding generated yet another massive record on newspaper/broadcast cross-ownership, with the FCC receiving comments and reply comments, commissioning 10 peer-reviewed studies (on which the FCC received additional comments and reply comments), and conducting six official field hearings.

In an order released in February 2008, the FCC again found that a wholesale ban on cross-ownership was not justified based on the record and market conditions. Among other things, the Commission found that "evidence in the record continues to support the Commission's earlier decision that retention of a complete ban is not necessary in the pubic interest as a result of competition, diversity, and localism." The FCC, however, kept the original cross-ownership rule, as it was adopted in 1975, on the books and grafted onto it extremely modest and limited waiver criteria, with relief presumptively available only in the Top 20 markets. Various parties appealed this decision to multiple circuits, and the case was eventually transferred to the Third Circuit, which has held the appeal in abeyance due to reconsideration petitions filed at the FCC against the February 2008 decision, also keeping the 2003 stay in effect. Thus, despite the Commission having concluded on numerous occasions that an absolute ban on newspaper/broadcast cross-ownership no longer serves the public interest, and notwithstanding the Third Circuit's affirmance of that determination, the blanket prohibition remains in effect today.

III. Complete Cross-Ownership Relief Is Needed Now More Than Ever.

Since the FCC last addressed the cross-ownership rule in February 2008, the availability and popularity of new sources of news and information have continued to grow at an ever-increasing rate, further fragmenting audiences and siphoning audiences and advertising revenue from "traditional" media -- newspaper and broadcast stations -- the sole sources of mass media in 1975. This growth in alternative providers has come at a particularly difficult time for newspapers, as key advertisers like the auto industry, real estate firms, and retail stores have been hard hit by the economic downturn. For television broadcasters, the increased competition has come on top of the need for the industry to spend billions of dollars to implement the mandated DTV transition *and* at a point when compensation previously available from programming networks has almost universally changed to "reverse compensation."

In 2008, in making the most modest of tweaks to the cross-ownership rule, the FCC noted the financial challenges faced by newspapers across the country, reporting that some 300 daily newspapers had ceased publication in the preceding 30 years. In its own filings focusing on small- and medium-sized markets, Media General noted that more detailed data showed that the majority of the daily newspaper failures in the preceding decade had occurred outside the Top 20 markets. Since then, of course, the economic downturn has been particularly tough on newspaper publishers, with six major companies declaring bankruptcy in the last year, many papers laying off staff, including by closing bureaus in major domestic cities and abroad, and many publishers curtailing sections in their papers and cutting back on circulation routes and frequency of publication.

These changes have clearly been driven by the precipitous drop in advertising revenues. In 2008, the newspaper industry's total advertising revenue declined 16.6%, and revenue attributable to print advertising declined 17.7%.[9] During the first two quarters of 2009, the decline in the industry's total advertising revenue accelerated, dropping 28.6% compared to the first two quarters of 2008, with revenue attributable to print advertising dropping 29.9%.[10] Even online advertising on newspaper websites -- once cited as the most promising service for future growth -- declined in 2008 and accounted for less than 10% of overall revenue.[11]

The broadcast industry, facing the DTV costs and network changes noted above, has seen similar financial reversals. Local television advertising revenue dropped 7% in 2008, and is expected to fall by an additional 7% to 11% in 2009.[12] At the same time, expectations of online advertising revenue from station websites, which had been predicted to grow by 47% in 2008, have been cut substantially to 8%.[13]

These developments have prompted the industry, academicians, pundits, and lawmakers to begin a quest for solutions, particularly ones that they envision will help continue the quality of American journalism. Media General's response to the consistent, clarion, and pessimistic call that marketplace developments are delivering about the future of free over-the-air broadcasting and its free local news has been to urge repeal of the structural regulation that has long hampered cross-ownership of broadcast stations and newspapers. As shown by Media

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[9] Annual Advertising Expenditures, http://www.naa.org/TrendsandNumbers/Advertising-Expenditures.aspx (last visited Nov. 2, 2009); *see also* Pew Project for Excellence in Journalism, *2009 State of the News Media: An Annual Report on American Journalism*, at 3 (2009), http://www.stateofthemedia.org/2009/chapter%20pdfs/COMPLETE%20EXEC%20SUMMARY%20PDF.pdf ("*PEJ 2009 Report*") (last visited Nov. 2, 2009).

[10] Quarterly Advertising Expenditures, http://www.naa.org/TrendsandNumbers/Advertising-Expenditures.aspx (last visited Nov. 2, 2009).

[11] *See PEJ 2009 Report*, at 9; *see also* Annual Advertising Expenditures, http://www.naa.org/TrendsandNumbers/Advertising-Expenditures.aspx (last visited Nov. 2, 2009).

[12] *See PEJ 2009 Report*, at 20.

[13] *Id.* at 21.

General's experiences in Tampa and the other markets where it has practiced convergence, cross-ownership will produce more local broadcast news, expand news content, increase investigative and enterprise pieces, and lead to a greater understanding of the community and its political and social forces. Particularly in light of the financial challenges facing newspapers and television stations today, there is no reason to deny these outlets, and the communities they serve, this opportunity.

IV. The 1996 Telecommunications Act Sets a High Standard of Proof for Retention of the 1975 Rule, and, Given the Clear Competitive Threat Now Posed to Broadcast Stations and Their Free and Local Content by New Media Players, That Standard Can No Longer Be Met.

Section 202(h) of the Telecommunications Act of 1996 requires the FCC to evaluate market conditions every four years and determine whether any of its ownership rules remain "necessary in the public interest as the result of competition."[14] The FCC must "repeal or modify any regulation" that is no longer in the public interest.[15] By its terms, this provision imposes substantive criteria against which the FCC must justify its rules ("necessary in the public interest as the result of competition"), a required remedy ("modify or repeal"), and an explicit statutory deadline for action ("quadrennially").[16] In light of the overwhelming "competition for eyeballs" chronicled above, it is clear cross-ownership restrictions are no longer "necessary in the public interest as a result of competition," even under the most deferential standard of "necessary" imaginable.[17] More than 13 years later, of course, the environment is

[14] Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 112 (1996), as amended by Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004).

[15] *Id.*

[16] The 1996 Act initially required biennial review, which was amended in 2004 to require quadrennial review. *See id.*

[17] The legislative history of the 1996 Telecommunications Act explains that Congress imposed this review requirement to deal exactly with the type of competitive milieu now before the

intensely more competitive. The regulations governing it, like the cross-ownership rule, have become even more anachronistic. The FCC already has twice found, and the United States Court of Appeals for the Third Circuit has agreed, that a ban is not necessary to fulfill the FCC's interest in promoting competition, localism, or viewpoint diversity, and that it counterproductively *harms* localism.

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 longer useful, they must be repealed or modified."[18] Nothing in the records that the FCC amassed in previous dockets showed that the cross-ownership rule remains "useful" or that any need remains under Section 202(h) to substitute lessened regulation. The FCC and the court have already found the cross-ownership rule unnecessary to advance competition or localism, and the annually increasing 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.

Commission. Specifically, Congress concluded that, because of "the explosion of video distribution technologies and subscription-based programming sources . . . Congress and the [FCC] must reform Federal policy and the current regulatory framework to reflect [ ] new marketplace realities." H.R. Rep. No. 104-204, at 55 (1995) *reprinted in* 1996 U.S.C.C.A.N. 10, 18-19. In Congress' view, the industry even in 1995 was "operating under archaic rules that better suited the 1950's than the 1990's," even though "the broadcast environment today is the most competitive it's ever been." S. Rep. No. 104-23, at 64 (1995) (Statement of Sen. Burns). Senator Burns explicitly included the newspaper/broadcast cross-ownership ban as among the rules he felt needed reevaluation because they "may not be appropriate for tomorrow's broadcasting marketplace." *Id.*

[18] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 395 (3d Cir. 2004) ("*Prometheus*"), *cert. denied*, 545 U.S. 1123 (2005).

Long-established administrative law precedents equally compel total repeal of the cross-ownership rule. 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 this rule: a regulation reasonable in the face of a problem becomes highly capricious when the problem is shown not to exist;[19] even a statute, the validity of which depends on a premise supported at the time of enactment, becomes invalid subsequently if the predicate disappears.[20]

In fact, changing course at this point and doing anything short of repealing cross-ownership restrictions would similarly violate administrative law precedent. Any change would require clear and compelling evidentiary support and a detailed and persuasive explanation for tightening standards.[21] Nothing in the record warrants a change in regulatory direction, such as consideration of more stringent regulation, particularly given, as discussed below, the constitutional infirmities that plague any regulation in this area.

V. Restrictions on Newspaper/Broadcast Cross-Ownership Are Unconstitutional.

When the Commission adopted the 1975 rule, it was declared to be justified based on the so-called "scarcity doctrine" enunciated by the Supreme Court in *Red Lion Broadcasting. Co. v. FCC*, 395 U.S. 367 (1969) ("*Red Lion*"). In upholding the now-jettisoned Commission "fairness doctrine" against a First Amendment challenge, *Red Lion* had concluded that the broadcast spectrum is a "scarce resource." Based on this conclusion, *Red Lion* held that "the Government

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[19] *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).

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

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

is permitted to put restraints on [broadcast] licensees in favor of others whose view should be expressed on this unique medium."[22]

In 1975, the validity of "scarcity" was at least debatable. Radio, television, and newspapers were the *only* forms of mass communication. In 1975,

- there was no Internet, email, or broadband service of any type;
- there was no satellite television or satellite radio;
- there were no consumer wireless services (and no cell phones); and
- cable television served less than 15% of the nation's households.

Today, a starkly different technological landscape exists, one which renders the "scarcity doctrine" a legal dinosaur: the Internet, giving access to billions of web pages, eight million blogs,[23] and streaming video and audio from hundreds if not thousands of radio and television stations and, increasingly, thousands of other sources, is ubiquitous; 88.6% percent of the nation's households receive cable and satellite video service, with hundreds of channels typically available; consumer wireless data services (including video transmissions) are available on most cell phones; and satellite radio is available nationwide.

Over 20 years ago, in 1987, the Commission itself (in carrying out its recognized responsibility to evaluate existing regulations in light of the technological changes) concluded that the "scarcity doctrine" had outlived its justification:

> *[T]he Commission*, in its task of managing an ever-changing technological and economic marketplace, *has the responsibility to consider new developments in*

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[22] *Red Lion*, 395 U.S. at 389-90.

[23] *See* Media Bureau Staff Research Paper entitled "*The Scarcity Rationale For Regulating Traditional Broadcasting: An Idea Whose Time Has Passed*,"(March 2005) by John W. Berresford ("*Media Bureau Research Paper*"), at 11 & n.62, *citing* Press Release, *FCC Selects Digital Radio Technology* (Oct 10, 2005), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-227261A1.pdf.

> *reviewing existing, and in applying new, rationales in that marketplace*. . . . We further believe that the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press. Therefore, . . . we believe that the standard applied in *Red Lion* should be reconsidered and that *the constitutional principles applicable to the printed press should be equally applicable to the electronic press*.[24]

Like the Emperor in Hans Christian Anderson's fairy tale, shorn of the illusory "scarcity doctrine," newspaper/broadcast cross-ownership restrictions have no clothes. Without the protection of the "scarcity doctrine," those restrictions are subject to heightened First Amendment scrutiny, scrutiny they cannot withstand because they serve neither a compelling state interest nor are they narrowly tailored. For the reasons set forth below, the Commission must recognize this reality and eliminate the unconstitutional newspaper/broadcast cross-ownership rule.

A. The Sole Justification for Deferential First Amendment Review of the Newspaper/Broadcast Cross-Ownership Restrictions -- the "Scarcity Doctrine" -- Is Analytically Flawed and Has Been Rendered Completely Obsolete by Regulatory and Technological Change.

Broadcasters are "entitled under the First Amendment to exercise the widest journalistic freedom."[25] As a result, any restriction "that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action."[26] "[E]ven regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."[27] Moreover, "laws that single out the press, or certain

[24] In re Compl. of Syracuse Peace Council, *Memorandum Opinion and Order,* 2 FCC Rcd. 5043, 5052-5053 (1987) ("*Syracuse Peace Council*") (emphasis supplied), *pet. for review denied*, 867 F.2d 654 (D.C. Cir. 1989).

[25] *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (internal quotation omitted).

[26] *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592-593 (1983) ("*Minneapolis Star*").

[27] *Id.* at 592.

elements thereof, for special treatment" must be subject to some measure of heightened scrutiny.[28]

Nine years after *Red Lion*, the Supreme Court was called upon to apply these principles in a First Amendment challenge to the cross-ownership rule.[29] In rejecting the challenge and concluding that the rule passed constitutional muster, the *NCCB* Court, relying on *Red Lion*'s "scarcity doctrine," said:

> The physical limitations of the broadcast spectrum are well known. Because of problems of interference between broadcast signals, a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public. *In light of this physical scarcity, Government allocation and regulation of broadcast frequencies are essential . . . . [G]iven that need, we see nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the "public interest" in diversification of the mass communications media*.[30]

Thus, the *NCCB* Court rested its decision approving the rule on the premise that broadcast spectrum is a uniquely scarce resource that government should regulate differently than any other form of communication. Accordingly, the *NCCB* Court submitted the rule only to extremely deferential rational-basis review, holding that the Commission "acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints."[31]

Red Lion itself had acknowledged that technological advances might render the "scarcity doctrine" obsolete, resting its holding on "the present state of commercially acceptable technology."[32] In 1984, in *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984)

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[28] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640-41 (1994) ("*Turner I*").

[29] *See NCCB*, 436 U.S. at 796.

[30] *Id.* at 799 (emphasis supplied).

[31] *Id*. at 796.

[32] *Red Lion*, 395 U.S. at 388.

("*League of Women Voters*"), the Supreme Court noted the continuing criticism of the "scarcity doctrine" resulting from technological change:

> The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that *with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the "scarcity doctrine" is obsolete. . . .*[33]

In explicitly recognizing that the doctrine's continued vitality was a rebuttable presumption dependent on the state of technological advance, the Supreme Court stated that it would reconsider the doctrine if there were "some signal from Congress or *the FCC that technological developments have advanced so far* that some revision of the system of broadcast regulation may be required."[34]

The *NCCB* Court's rebuttable premise that broadcast spectrum is a uniquely scarce resource has ceased for three reasons to serve as a continuing justification for the newspaper/broadcast cross-ownership rule. First, the contention that broadcast spectrum is scarce is analytically flawed: spectrum is not more scarce than any other commercial good; its "purported" scarcity accordingly cannot justify a reduced level of First Amendment scrutiny. Second, regulatory change -- Congress' decision to limit the Commission's role in awarding new spectrum -- eliminates any principled basis for the "scarcity doctrine." Third, technological change leading to the exponential growth in new media outlets and "compression" techniques for using broadcast spectrum even more efficiently have rendered the "scarcity doctrine" (to the extent it was ever justified) completely obsolete.

[33] *League of Women Voters*, 468 U.S. at 376 n.11 (emphasis supplied).

[34] *Id.* (emphasis supplied).

1. <u>NCCB's Reduced Scrutiny of Cross-Ownership Restrictions Was Based on an Analytically Flawed Premise: That Broadcast Spectrum Is Uniquely Scarce.</u>

The "scarcity doctrine," upon which *NCCB's* reduced scrutiny of cross-ownership restrictions is based, applies not only to broadcast spectrum, but to everything else used in commerce; there is, therefore, no basis for the special, discriminatory treatment embodied in newspaper/broadcast cross-ownership restrictions. Other items used in the delivery of mass communication, including computers, fiber-optic cable, and even newsprint, also are similarly limited at any particular point in time. As Judge Bork stated almost 20 years ago,

> It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. *Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another*. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.[35]

Several years later, in *Action for Children's Television v. FCC*, 58 F.3d 654, 674-675 (D.C. Cir. 1995) ("*ACT*"), then Chief Judge Edwards echoed the same disagreement with the theoretical underpinnings of the "scarcity doctrine":

> For years, scholars have argued that the scarcity of the broadcast spectrum is neither an accurate technological description of the spectrum, nor a "unique characteristic" that should make any difference in terms of First Amendment protection. First, *in response to the problem of broadcast interference when multiple broadcasters attempt to transmit on the same frequency, critics point out that this problem does not distinguish broadcasting from print and is easily remedied with a system of administrative licensing or private property rights*.[36]

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[35] *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986) ("*TRAC*") (emphasis supplied); *see also Branch v. FCC*, 824 F.2d 37, 49 (D.C. Cir. 1987) (expressing doubt whether the "scarcity rationale is adequate to support differing degrees of first amendment protection for print and electronic media.").

[36] *ACT*, 58 F.3d at 675 (Edwards, C.J., dissenting) (emphasis supplied). A recent Commission *Media Bureau Research Paper* made the same point several years ago:

These excerpts (by two judges not usually known for similar thinking) make clear that the erroneous notion of spectrum shortage cannot, as a matter of economic and analytical principle, justify violating the free speech rights of broadcasters and newspaper owners through a cross-ownership restriction.

2. Congress' Decision To Limit the Commission's Role in Awarding New Spectrum Further Eliminates Any Principled Basis for the "Scarcity Doctrine."

Congress additionally has eliminated any principled foundation for the "scarcity doctrine" by years ago dramatically curtailing the Commission's oversight role in choosing among competing applicants for new spectrum. If spectrum scarcity ever were a valid rationale for restricting broadcasters' First Amendment rights, that rationale was only appropriate because the Commission held comparative hearings, picking "winners" and "losers." As the Supreme Court observed in *Red Lion*, "[w]here there are substantially more individuals who want to broadcast than there are frequencies to *allocate*, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish."[37] More recently, the Supreme Court has cited the "scarcity of available frequencies at

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> There is also, at any given time, a finite amount of land, wood, and many other resources. The U.S. government does not, however, control all the land in the United States and license its use for free to a few persons who promise to use it in approved ways. Guitars are made from trees that grew on government land, but the government does not limit the supply of guitars and license a few for free in each area to persons who promise to play certain kinds of music on them. At times, in American history, paper has been in very short supply, but government has not considered either licensing newspapers or granting rights of access to them. *Thus, the fact that possible spectrum use is finite makes a weak foundation for the Scarcity Rationale and for any regulation of spectrum use beyond allocation and "traffic control."*

Media Bureau Research Paper at 10 (citations omitted) (emphasis supplied).

[37] 395 U.S. at 388 (emphasis supplied).

its *inception*" as support for "regulation of the broadcast media that are not applicable to other speakers. . . ."[38]

In *NCCB*, the Supreme Court predicated its approval of the cross-ownership rule on this selection process and the consequent idea that "[g]overnment allocation and regulation of broadcast frequencies are essential."[39] Because the Commission "was forced to choose among applicants for the same facilities," the Supreme Court concluded that the Commission was entitled to exercise the power to restrict ownership in ways the agency deemed likely to advance the public interest.[40]

Today, however, the Commission no longer is engaged, in any meaningful sense, in the business of *choosing* among applicants for broadcast construction permits. Pursuant to the Balanced Budget Act of 1997, available spectrum now must be assigned at its inception through competitive bidding or auction procedures, rather than comparative proceedings requiring the Commission to evaluate the public interest qualifications and comparative merits of prospective initial permittees.[41]

Because Congress has adopted a price mechanism as the method for awarding licenses for the use of broadcast spectrum, the Commission has no basis for continued regulation based on spectrum scarcity. Broadcast television and radio licenses are, for all practical purposes, traded on the open market, and there is nothing unique about broadcast spectrum that

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[38] *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997) (emphasis added) (citations omitted) ("*Reno v. ACLU*").

[39] *NCCB*, 436 U.S. at 799.

[40] *Id.* at 802.

[41] More than a decade ago, in the Balanced Budget Act of 1997, Congress expanded the Commission's competitive bidding authority under Section 309(j) of the Communications Act of 1934, 47 U.S.C. Sec. 309(j), by *requiring* the use of auctions to select among mutually exclusive

distinguishes it from other commercial goods.[42] As noted above, if spectrum is scarce, it is scarce only in the sense that all economic goods are scarce,[43] and, therefore, claims of scarcity cannot provide a legitimate constitutional basis for regulating speech.

3. Changes in Media Also Have Rendered the "Scarcity Doctrine" Obsolete.

Since the time of the *NCCB* decision in 1978, there has been an explosion in the way consumers receive information and programming. These changes also render the "scarcity doctrine" obsolete.

First, when *NCCB* was decided, there was no Internet, little cable television, no satellite television or radio, no digital television or HD radio, and no consumer broadband or wireless services, with the wealth of content all of these platforms deliver, some on a completely unregulated basis. Today, consumers have access to all these sources of news and information. A citizen in an average American city in 1975 had access to three television stations, a handful or

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applicants for commercial broadcast station licenses. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, 11 Stat. 251 (1997).

[42] Pursuant to 47 U.S.C.A. § 310(d) (2001), the Commission still reviews the basic licensee qualifications of proposed owners of broadcast facilities before allowing the consummation of license transfers and assignments, but this review, designed to ensure compliance with other broadcast policies such as the prohibition on alien ownership and on acquisition by individuals with records of certain adjudicated civil or criminal violations, does not arise from concerns over spectrum scarcity. This statutory section explicitly forbids the FCC from considering whether someone else would be a better licensee of the station in question.

[43] As Judge Bork further observed in 1986:

> [A]lmost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists. Land, labor and capital are all scarce, but this, of itself, does not call for government regulation. It is true that some mechanism has to be employed to decide who, out of the many claimants, should be allowed to use the scarce resources. *But the way this is usually done in the American economic system is to employ the price mechanism, and this allocates resources to users without the need for governmental regulation*.

TRAC, 801 F.2d at 508 n.3 (emphasis supplied) *citing* Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON, 1, 14 (1959).

so of commercial radio stations, and a couple of daily newspapers. Three decades later, the average American has access to literally thousands and thousands of channels of information through the Internet alone:

> More new content is available on the Internet, of course -- billions of web pages, both portals such as the Drudge Report, the personal web pages of millions of individuals, small organizations, and bloggers . . . . The latter have a potentially transformative potential for the dissemination of not only opinion, but also facts and news in competition with "mainstream media." Almost all of the millions of persons who operate portals and web pages would have been unable to gain access to the traditional broadcast media, much less grow large on it. The Internet, in contrast, gives them easy entry and access to a far larger audience, namely billions of screens and the people watching them, at a fraction of the cost of earlier media. The Internet also makes available, at any time and any place, including schools and libraries, content such as newspapers, magazines, radio stations and TV programs that were previously available only in small areas, or to small numbers of subscribers, or at certain times. . . .[44]

Similarly, cable television, satellite radio and television, wireless and broadband services, and other technologies, today provide the average American thousands of additional channels of communication.

Second, the number of traditional broadcast stations has dramatically increased since 1975. Nationally, the number of full-power traditional television and radio stations has risen from 7,411 in 1969 when *Red Lion* was decided to 16,140 today.[45] And the Internet, through streaming video and audio, has allowed reception of hundreds to thousands of these stations far outside their traditional signal reach.

Third, the broadcast spectrum itself is not characterized by static "scarcity." To the contrary, technological advances have increased the amount of broadcast spectrum available for

[44] *Media Bureau Research Paper* at 16-17.

[45] FCC news, "Broadcast Station Totals as of June 30, 2009," released Sept. 4, 2009.

use and have allowed more intense and efficient use of that spectrum.[46] As the *Media Bureau Research Paper* noted:

> It is also incorrect to imply that because the possible spectrum use is finite at any given moment, there is a fixed maximum usage in the long term. A finite amount of land can accommodate more and more persons as technology makes it possible to build higher buildings. With buses, paved roads, and better engines, more people and goods can be moved along the same road. Throughout the history of radio, new techniques and technologies have enabled more and more communications to occur via spectrum use. *Recently announced techniques and technologies of this type include secondary markets, "overlay" and underlay" rights, easements, "commons" models, Ultra Wide Band, Software Defined Radios, Frequency Agile Radios, Digital Television, and Digital Radio. Thus, scarcity is not an inherent barrier to more and more users and communication, but an horizon that continually recedes as inventions advance*.[47]

The DTV transition has brought with it multicasting, and broadcasters will soon use their existing frequencies to supply Mobile DTV. At the same time, broadcasters continue to make innovative uses of their spectrum, trying to put more content over the streams, showing that increasing spectrum efficiency belies the concept of scarcity.[48]

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[46] *See, e.g.*, *Syracuse Peace Council*, 2 FCC Rcd at 5052-55; Christopher S. Yoo, *The Rise & Demise of the Technology-Specific Approach to the First Amendment*, 91 Geo. L.J. 245, 279-81 (2003) ("*Yoo*") ("[T]echnological progress has steadily expanded the range of the electromagnetic spectrum available for commercial use."). *See also ACT*, 58 F.3d at 675 (Edwards, C.J., dissenting) ("[T]he nation enjoys a proliferation of broadcast stations, and should the country decide to increase the number of channels, it need only devote more resources toward the development of the electromagnetic spectrum.").

Indeed, as one commentator has observed, the scarcity of broadcast frequencies at the time of *Red Lion* was a result of a series of regulatory decisions limiting the amount of spectrum allocated to broadcasting, combined with the government's decision to give away new licenses and renew existing licenses for free. *See Yoo* at 269-80. *Red Lion* in effect accepted the Commission's then existing broadcast regulations as the "constitutional baseline" for reviewing whether additional regulations violated the First Amendment. *Id.*

[47] *Media Bureau Research Paper* at 11 (emphasis supplied).

[48] M. Grotticelli, "Squeezing 20 Channels through a 19 Mb/s pipe," *Broadcast Engineering*, Sept. 3, 2009, available at http://broadcastengineering.com/news/20-channels-19mbps-pipe-090709/index.html (last visited Nov. 2, 2009), J. Meril, "HD Double-Take," *TV Technology*, Oct. 6, 2009, available at http://www.tvtechnology.com/article/88220 (last visited Nov. 2, 2009).

This growth in mass communication outlets and advancing technology related to spectrum use have led the numerous distinguished courts noted above, the Commission itself, various Commissioners individually, and the *Media Bureau Research Paper* to agree that rejection of the "scarcity doctrine"'s rationale is overdue.

The courts and jurists also have noted that these changes have eroded any basis for the "scarcity doctrine."[49] Indeed, the United States Court of Appeals for the District of Columbia Circuit has clearly stated that, if the FCC were faced with a rulemaking petition, the agency would be "arbitrary and capricious if it refused to reconsider [the newspaper/broadcast cross-ownership rule] in light of persuasive evidence that the scarcity rationale is no longer tenable."[50] Not surprisingly, the academics noted above and many others strongly support the views of that court and other distinguished jurists.[51]

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[49] *See, e.g.*, *Sinclair Broadcasting. Group., Inc. v. FCC*, 284 F.3d 148, 172 (D.C. Cir. 2002) (Sentelle dissenting) (criticizing the scarcity principle); *Time Warner Entm't Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) ("*Time Warner I*") ("intense criticism [of *Red Lion* stems partly from] the perception that the 'scarcity' rationale never made sense—in either its generic form (the idea that an excess of demand over supply at a price of zero justifies a unique First Amendment regime) or its special form (that broadcast channels are peculiarly rare [and partly from] the growing number of available broadcast channels.") (opinion dissenting from denial of rehearing *en banc*); *ACT*, 58 F.3d at 675 (Edwards, C.J., dissenting) ("Today, however, the nation enjoys proliferation of broadcast stations, . . . [a]nd with the development of cable, spectrum-based communications media now have an abundance of alternatives, essentially rendering the economic scarcity argument superfluous."); *TRAC*, 801 F.2d at 508, n.4 ("Broadcast frequencies are much less scarce now then when the scarcity rationale first arose.").

The Supreme Court itself has rejected attempts to extend the "scarcity doctrine" broadcast regime to the mail, telephony, and the Internet. *See Reno v. ACLU*, 521 U.S. 844, 868 (1997) (Internet); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 124 (1989) ("*Sable Communications*") (telephony); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 10 n.6 (1986) (plurality opinion) (mail); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (mail); *Consol. Edison Co. v. Pub. Service Comm'n*, 447 U.S. 530, 542-43 (1980) (mail) ("*Consolidated Edison*").

[50] *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998).

[51] Laurence H. Winer, *Public Interest Obligations and First Principles*, at 5 (The Media Institute 1998) ("In a digital age offering a plethora of electronic media from broadcast to cable to

The Commission itself has resoundingly repudiated the "scarcity doctrine." In ruling on challenges to the Fairness Doctrine, the Commission specifically responded to the Supreme Court's invitation in *League of Women Voters* for a "signal" that it was time to reconsider the "scarcity doctrine":

> [I]n response to the question raised by the Supreme Court in *League of Women Voters*, we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press.[52]

As the Commission explained, "the dramatic transformation in the telecommunications marketplace provides a basis for the Court to reconsider its application of diminished First Amendment protection to the electronic media."[53] In particular, the Commission noted that the number of broadcast television and radio stations had increased dramatically since *Red Lion*, and that "the advent and increased availability of such other technologies as cable and satellite television services have dramatically enhanced . . . access" to "a multiplicity of media outlets."[54]

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satellite to microwave to the Internet, the mere mention of 'scarcity' seems oddly anachronistic."); Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 Duke L. J. 899, 904 (1998) ("By the 1980s . . . the emergence of a broadband media, primarily in the form of cable television . . . . was supplanting conventional, single-channel broadcasting - and with it the foundation on which the public interest obligations had been laid. If it ever made sense to predicate regulation on the use of a scarce resource, the radio spectrum, it no longer did."); Rodney M. Smolla, *Free Air Time For Candidates and the First Amendment*, at 5 (The Media Institute 1998) ("Scarcity no longer exists. There are now many voices and they are all being heard, through broadcast stations, cable channels, satellite television, Internet resources such as the World Wide Web and e-mail, videocassette recorders, compact disks, faxes -- through a booming, buzzing electronic bazaar of wide-open and uninhibited free expression."); Lillian R. BeVier, *Campaign Finance Reform Proposals: A First Amendment Analysis*, *CATO Policy Analysis*, No. 282 at 1, 13, 14 (Sept. 4, 1997) ("There is no longer a factual foundation for the argument that spectrum scarcity entitles the government, in the public interest, to control the content of broadcast speech.").

[52] *Syracuse Peace Council*, 2 FCC Rcd at 5053.

[53] *Id*. at 5058.

[54] *Id.* at 5051.

The Commission again recognized as much in its July 2003 omnibus media ownership decision, emphasizing that "[t]he average American has a far richer and more varied range of media voices from which to choose today than at any time in history."[55] As noted, the Commission there determined that the cross-ownership rule "actually works to inhibit [local news and information] programming," and prevents the efficiencies and increased quality of programming that results from "combining a newspaper's local news-gathering resources with a broadcast platform"; thus, "the question confronting media companies today is not whether they will be able to dominate the distribution of news and information in any market, but whether they will be able to be heard at all among the cacophony of voices vying for the attention of Americans."[56]

Finally, the *Media Bureau Research Paper* likewise concludes that the "scarcity doctrine" should be abandoned:

> In sum, the decades since The Scarcity Rationale took shape have seen an explosion in the number of distribution networks and channels, both via radio and other media -- more traditional broadcasters, cable television, DBS, DARS, Internet, WiFi and WiMax -- and in the mass of content that fills them. *By no rational, objective standard can it still be said that, today in the United States, channels for broadcasting are scarce*.[57]

For all of these reasons, any newspaper/broadcast cross-ownership restriction must be subject to heightened constitutional scrutiny.

[55] 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 (2003) ("*July 2003 Decision*"), *aff'd and remanded sub nom., Prometheus*.

[56] *Id*.

[57] *Media Bureau Research Paper* at 18 (emphasis supplied).

4. Any Newspaper/Broadcast Cross-Ownership Restriction Cannot Survive Heightened Constitutional Scrutiny

Any newspaper/broadcast cross-ownership restriction today must be justified under the same heightened constitutional standards that apply to all other governmental regulation of protected speech. The cross-ownership rule cannot survive that scrutiny whether strict or intermediate.

a. Strict Scrutiny. Any newspaper/broadcast cross-ownership restriction singles out newspaper owners for especially onerous restrictions and suppresses their broadcast speech in favor of the speech of non-newspaper licensees. As a result, such a restriction must be evaluated under the standard of strict scrutiny.[58] That standard requires the Commission to show that its ownership restrictions are the "*least restrictive means [available of achieving] a compelling [state] interest*."[59] "[I]t is the rare case in which . . . a law survives strict scrutiny."[60] As one prominent authority has noted, when this "form of heightened scrutiny is applied, the law may properly be regarded as presumptively invalid, and likely to be struck down."[61]

The Commission's cross-ownership restrictions clearly cannot withstand challenge under this standard. As *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 355 (D.C. Cir. 1998),

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[58] *See Minneapolis Star*, 460 U.S. at 583 (concluding that a regulation that singles out the press imposes a "heavier burden of justification on the State"); *New York Times v. Sullivan*, 376 U.S. 254 (1964). *See also Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("[G]overnment may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others.")

[59] *Sable Communications*, 492 U.S. at 126 (emphasis added).

[60] *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

[61] 1 Rodney A. Smolla & Melville B. Nimmer, *Freedom of Speech* § 4:3 (1999).

concluded, "it is impossible to conclude that the government's interest [in diversity of programming], no matter how articulated, is a compelling one."

Second, a cross-ownership restriction, either a ban or one that essentially presumes regulation is needed outside of the Top 20 markets is obviously not the "least restrictive means" available of achieving the purported compelling state interest.[62] If any rule were to survive such review, it would need to demonstrate that denial of presumptive relief outside the Top 20 markets is based on an examination of factors in individual markets.

b. Intermediate Scrutiny. Even if reviewed under the less rigorous intermediate scrutiny standard (which the Commission has suggested should apply),[63] a newspaper/broadcast cross-ownership restriction still would not pass constitutional muster. Pursuant to this standard, the Commission must show that the rule satisfies three separate requirements. As established below, none of these requirements can be met.

First, the Commission must "demonstrate that the recited harms" -- *i.e.*, the harms to diversity posed by common ownership of newspapers and broadcast outlets -- are "real, not merely conjectural."[64] The Commission has never established, as it must, that this standard has been met. To the contrary, the United States Supreme Court has noted that when the

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[62] *Sable Communications,* 492 U.S. at 126.

[63] *See July 2003 Decision,* 18 FCC Rcd at 13793 (Commission acknowledged that any cross-ownership rule would "limit the speech opportunities not only for broadcasters, but also for other entities that may seek to own and operate broadcast outlets (including those with the fullest First Amendment protection--newspapers)," and therefore concluded that it "should draw the rule as narrowly as possible in order to serve our public interest goals while imposing the least possible burden on the freedom of expression."). *See also 1998 Biennial Regulatory Review*, *Biennial Review Report,* 15 FCC Rcd 11058, 11121 (2000) (acknowledging that the cross-ownership rule would be sustained against claims that it violates the First Amendment if it satisfies the intermediate scrutiny standard announced in *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

[64] *Turner I,* 512 U.S. at 664.

Commission adopted the 1975 rule, it "did not find that existing co-located newspaper-broadcast combinations had not served the public interest, or that such combinations necessarily 'spea[k] with one voice,' or are harmful to competition."[65] Indeed, in adopting the rule, the Commission made affirmative empirical findings that, in general, there was significant diversity or "separate operation" between commonly owned broadcast stations and newspapers, and that newspaper-owned affiliates tended to be superior licensees in terms of delivering locally-oriented service.[66] In 2003, the FCC noted the link between diversity of ownership and diversity of viewpoint was "tenuous, ill-defined, and difficult to measure."[67] Without concrete evidence that common ownership of newspapers and broadcast facilities reduces diversity, the Commission's "broad prophylactic rule" is inherently "suspect" and the supposed harms wholly "conjectural."[68]

Second, because "[c]onstitutional authority to impose some limit is not authority to impose any limit imaginable,"[69] the Commission must "show a record that validates the regulation" itself and not just the agency's "abstract statutory authority" to regulate.[70] In that, the Commission must show that "the regulation will in fact alleviate these harms in a direct and material way."[71] To date, the Commission has not been presented with any *factual* or

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[65] *NCCB*, 436 U.S. at 786. The United States Court of Appeals for the District of Columbia Circuit, in first reviewing the rule, had similarly observed that the administrative record "contained little 'hard' information" and no evidence of specific anti-competitive acts by cross-owned stations. *Nat'l Citizens Comm. for Broad. v. FCC,* 555 F.2d at 956, 959.

[66] *1975 Second Report and Order*, 50 FCC 2d at 1050, 1079, 1089.

[67] *2003 Decision,* 18 FCC Rcd at 13767.

[68] *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (internal quotations omitted).

[69] *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1129-30 (D.C. Cir. 2001) ("*Time Warner Entm't Co*.").

[70] *Id.* at 1130, 1137.

[71] *Turner I,* 512 U.S. at 664.

empirically-based showing that a newspaper/broadcast cross-ownership restriction would directly advance its goal of increasing diversity in the media marketplace. Indeed, the Commission in the *July 2003 decision* determined that the cross-ownership rule upheld in *NCCB* "actually works to inhibit [local news and information] programming," and prevents the efficiencies and increased quality of programming that result from "combining a newspaper's local news-gathering resources with a broadcast platform."[72] Nor did the Commission there even attempt to show that its ownership rule would make a material impact on media diversity.

Third, the Commission must show that any newspaper/broadcast cross-ownership restriction that may be adopted is "narrowly tailored to further a substantial governmental interest."[73] To satisfy the element of "narrow tailoring," the agency would have to show that its restriction on common ownership of co-located daily newspapers and broadcast stations "does not burden substantially more speech than necessary to further" its professed interests in increasing diversity.[74]

The Commission did not, however, and plainly will be very hard pressed to, show that any newspaper/broadcast cross-ownership restriction is "narrowly tailored" so as to burden no more speech than is necessary to further its diversity aims. Absent the lack of any record evidence of a non-conjectural harm, narrow tailoring becomes an unobtainable goal, and any cross-ownership restriction would be a blunt instrument at best. A regulation that "burdens

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[72] *July 2003 Decision*, 18 FCC Rcd at 13756.

[73] *League of Women Voters*, 468 U.S. at 380; *Time Warner Entm't Co.*, 240 F.3d 1126 (striking down limits on national cable ownership and carriage of vertically integrated programming); *C&P v. United States*, 42 F.3d 181 (4th Cir. 1984) (striking down cable/telco cross-ownership ban).

[74] *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189 (1997).

substantially more speech than is necessary to further the government's legitimate interests is not narrowly tailored."[75]

For all these reasons, any restriction on newspaper/broadcast cross-ownership cannot survive any level of heightened First Amendment scrutiny.

B. A Newspaper/Broadcast Cross-Ownership Restriction Is No Longer Entitled to Deferential Review Under the Equal Protection Component of the Fifth Amendment.

Under settled law, government restrictions that single out the press, or any element of it (like newspapers), for differential treatment are subject to heightened judicial scrutiny not only under the First Amendment, but under the equal protection component of the Due Process Clause.[76] As demonstrated below, a newspaper/broadcast cross-ownership restriction cannot survive equal protection scrutiny now because newspapers are the *only* non-broadcast medium subject to discriminatory cross-ownership restrictions.

"The Equal Protection clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives."[77] Even when they do not affect the exercise of First Amendment rights, all regulatory classifications that differentiate between similarly-situated groups or individuals must be "rationally related to a legitimate state interest."[78] The

[75] *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) ("*Ward*"); *United States v. Albertini*, 472 U.S. 675, 689 (1985). Indeed, cross-ownership rules that instituted a "complete ban" on telephone companies' ownership of cable systems did not pass intermediate scrutiny because they were not narrowly tailored restrictions on the telephone companies' free speech. *US WEST, Inc. v. United States*, 48 F.3d 1092, 1104-1106 (9th Cir. 1995) (vacated as moot 516 U.S. 1155 (1996)); *Chesapeake & Potomac Tel. Co.*, 42 F.3d at 202.

[76] *See, e.g.*, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) (citing cases) ("*Arkansas Writers' Project*"). *Cf. Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding that Due Process Clause of Fifth Amendment includes component analogous to Equal Protection Clause of Fourteenth Amendment).

[77] *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 101 (1972) ("*Mosley*").

[78] *Pennel v. City of San Jose*, 485 U.S. 1, 14 (1988) (internal quotation omitted).

Supreme Court has not hesitated to strike down on equal protection grounds ordinances and laws that discriminate between similarly-situated speakers.

For example, in *Carey v. Brown*, 447 U.S. 455 (1980), the Court struck down on equal protection grounds a ban on residential picketing that excepted peaceful picketing outside a home that was also used as a place of employment and was involved in a labor dispute. The Court held that the ban's distinction between labor picketing and all other peaceful demonstrations was overly broad and not narrowly tailored to the government's stated purpose of protecting residential privacy because it made no attempt to distinguish among various sorts of non-labor picketing on the basis of the harms they would inflict on the privacy interest. At the same time, the Court deemed the ordinance too under-inclusive to directly advance the government's privacy objectives because it permitted forms of picketing that were equally likely to intrude on the tranquility of the home.[79]

Over three decades ago, in 1978, when radio, television, and newspapers were the *only* media of mass communication, the Supreme Court rejected an equal protection challenge to the Commission's newspaper/broadcast cross-ownership ban. The newspaper owners there argued that the ban "unfairly 'singled out' newspaper owners for more stringent treatment than other license applicants."[80] Based on the then current technological and regulatory landscape, however, the *NCCB* Court disagreed, holding that the ban "treat[ed] newspaper owners in

[79] Similarly, in *Mosley*, 408 U.S. at 93-95, the Supreme Court invalidated a statute that prohibited picketing and demonstrations within 150 feet of local schools, but that also exempted "peaceful picketing" related to a labor dispute within the school. The Court found that the classification regarding permissible picketing was a violation of the equal protection guarantee in the absence of an overriding state interest to support a distinction between labor pickets and picketing by other speakers. The Court held that, when statutory classifications affect "expressive conduct within the protection of the First Amendment," it was inappropriate to review them under traditional rational basis standards. *Id.* at 98-99.

[80] *NCCB*, 436 U.S. at 801 & n.19.

essentially the same fashion as other owners of the major media of mass communications."[81] Because, in *NCCB*'s long-ago day, the only other "major media of mass communications" besides newspapers were broadcast television and radio, applying a broadcast ownership ban to the single non-broadcast medium of newspapers did not unfairly single out that medium, since similar prohibitions applied to owners of radio and television stations.

Today, the communications revolution has rendered that holding wholly untenable. Although newspapers are singled out as the only non-broadcast medium subject to a broadcast cross-ownership ban, it is no longer true that newspapers are the only non-broadcast "major medi[um] of mass communications."[82] The major media outlets of today unquestionably include not only cable television, but also the Internet and multichannel video program distributors like satellite and broadband services -- none of which is subject to the Commission's continued restrictions on broadcast cross-ownership. Indeed, in 2002, the United States Court of Appeals for the District of Columbia Circuit vacated the FCC's restriction on the cross-ownership of cable systems and television broadcast stations.[83] As established above, these additional media provide thousands of channels of news and information to the average American.

Moreover, even if *Red Lion* remained the law, the government's imposition of restrictions on newspapers that are not generally imposed on other non-broadcast media must trigger heightened judicial scrutiny:

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[81] *Id.* at 801.

[82] *Id.*

[83] *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1049 ("*Fox*"), *rehearing denied*, 293 F.3d 537 (D.C. Cir. 2002).

> [L]aws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State,' and so are always subject to at least some degree of heightened First Amendment scrutiny.[84]

"[D]ifferential treatment … suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional."[85]

Any FCC action that treats newspapers discriminatorily cannot satisfy this required heightened constitutional scrutiny. Newspapers remain the *only* non-broadcast medium subject to discriminatory cross-ownership restrictions. It makes no sense whatsoever that a cable company may buy a broadcast station when a newspaper may not. In fact, the Commission has previously recognized that "the information market relevant to diversity concerns includes not only TV and radio outlets, but cable [and] other video media."[86] Cable, DBS, other video service providers, and Internet content providers make comparable contributions to diversity and competition for audiences, but owners of these media have been freely able to acquire in-market newspapers.

C. Any Newspaper/Broadcast Cross-Ownership Restriction Specifically Directed at Promoting Diversity Would Not Be Content Neutral and Would Trigger First Amendment Review.

Finally, separate and independent from the two grounds set forth above, any FCC newspaper/broadcast cross-ownership restrictions would be subject to heightened judicial scrutiny for the simple reason that they are content-based. The whole *point* of such restrictions,

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[84] *Turner I*, 512 U.S. at 640-41 (quoting *Arkansas Writers' Project*, 481 U.S. at 228). *See also Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

[85] *Minneapolis Star*, 460 U.S. at 585.

[86] Amendment of Section 73.3555, *Report and Order*, 100 FCC 2d 17, 25 (1984). *See also* Review of the Commission's Regulations Governing Television Broadcasting, *Report and Order*, 14 FCC Rcd 12903, 12953 (1999) (concluding that cable systems, broadcast stations, and newspapers are all "important source[s] of news and information on issues of local concern" and compete with each other as news and advertising outlets).

according to the decision adopting the rule and the *February* 2008 and *July 2003 decisions*, is to enhance "diversity" in broadcasting. Because this objective necessarily relates to the *content* of the relevant speech, such restrictions are not "justified without reference to the content of the regulated speech," and are hence content-based.[87]

Under settled law, government restrictions based on the content of speech -- no matter how benign their motivation -- are subject to heightened First Amendment scrutiny.[88] Such scrutiny is particularly appropriate with respect to a newspaper/broadcast cross-ownership restriction because there is no evidence that the content-based rationale of such restriction is even effective in promoting a "diversity" of broadcast voices in the first place.

The *NCCB* Court acknowledged that the premise of the 1975 rule was to "enhance the possibility of achieving greater diversity of viewpoints."[89] And while it did offer a passing comment rejecting a content based analysis ("the regulations are not content related"),[90] it did so only in *dicta* in a one-sentence snippet distinguishing authority relating to a different issue.[91]

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[87] *Ward*, 491 U.S. at 791. *See* 2006 Quadrennial Regulatory Review – Review of the Commc'ns Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Report and Order and Order on Reconsideration*, 23 FCC Rcd 2010, 2019, 2022 (2008); *July 2003 Decision*, 18 FCC Rcd at 13630 ("[R]egulating ownership is an appropriate means to promote viewpoint diversity."); 13760 ("[W]e continue to believe that diversity of ownership can advance our goal of diversity of viewpoint."). *See also Turner I*, 512 U.S. at 658 (regulation content-based if "concerned with the communicative impact of the regulated speech").

[88] *See, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991); *Arkansas Writers' Project*, 481 U.S. at 228.

[89] *NCCB*, 436 U.S. at 796.

[90] *Id.* at 801.

[91] The *NCCB* Court made this comment while addressing the petitioners' argument "that the regulations unconstitutionally condition receipt of a broadcast license upon forfeiture of the right to publish a newspaper." *NCCB*, 436 U.S. at 800. After concluding this argument was ill-founded because "a newspaper owner need not forfeit anything in order to acquire a license for a station located in another community," the Court distinguished the case law upon which petitioners based this argument as addressing a different point, *i.e.*, "the content of

Moreover, in this *dicta*, the *NCCB* Court blurred the line between content and viewpoint neutrality, which more recent Supreme Court authority has crystallized. While a newspaper/broadcast cross-ownership restriction may not be targeted at the viewpoint of speech, that does not mean that such a rule is not targeted at the content of speech and would not immunize it from heightened scrutiny.[92]

Thus, the more recent Supreme Court authority cited above, including *Ward* and *Consolidated Edison*, establish that such a content-based restriction must be subjected to heightened scrutiny. Because any FCC newspaper/broadcast cross-ownership restriction would be content based, it would be subject to heightened scrutiny *regardless* of whether *Red Lion's* "scarcity doctrine" remains the law of the land. Even under the *Red Lion* regime, a content-based restriction is subject to heightened judicial scrutiny.[93] *League of Women Voters* underscores that not all broadcast regulation is subject to deferential review and that "[t]he First

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constitutionally protected speech." *Id.* at 800-801. It was in this context that the Court opined that in *dicta* that the ban was "not content related." *Id.* at 801.

[92] *See, e.g.*, *Consolidated Edison*, 447 U.S. at 537 ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular *viewpoints*, but" also to regulations seeking "to restrict expression because of its message, its ideas, *its subject matter, or its content.*") (emphasis added; internal quotation omitted). A newspaper/broadcast cross-ownership restriction, of any stripe, literally prohibits a newspaper from bringing its journalistic and local market expertise and viewpoint to bear in an entire medium, thereby limiting the public's access to ideas. "Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998).

[93] *See League of Women Voters*, 468 U.S. 364. In *League of Women Voters*, the Supreme Court struck down a statute prohibiting broadcasters from "expressi[ng] editorial opinion[s] on controversial issues of public importance," in part because "the scope of [the] ban [was] defined solely on the basis of the content of the suppressed speech." *Id.* at 381 (internal quotation omitted), 383.

Amendment's hostility to content-based regulation" requires the Court to be "particularly wary" in reviewing a content-based regulation of broadcasting.[94]

Limiting the speech of some to enhance the speech of others is fundamentally antithetical to the First Amendment.[95] The First Amendment, after all, "rests on the premise that it is government power, rather than private power, that is the main threat to free expression."[96]

Accordingly, any newspaper/broadcast cross-ownership restrictions would be content based and, as a result, must be tested subject to strict scrutiny under the First Amendment, requiring the Commission to show that such standards are the "least restrictive means [available of achieving] a compelling [state] interest."[97] As established above, the Commission can not satisfy this standard.

VI. Restrictions on Cross-Ownership Are Particularly Unwarranted in Medium and Small Markets.

A continued ban on newspaper/broadcast cross-ownership cannot be sustained under any factual or legal rationale. Similarly, retention of a modified rule that is discriminatorily applicable to medium and small markets is equally indefensible. There are at least seven reasons why across-the-board repeal of the rule is the only sustainable approach.

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[94] *Id.* at 384 (internal quotation omitted).

[95] *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.30 (1978) (rejecting, as inconsistent with "basic tenets of First Amendment jurisprudence," the notion that the government "may control the volume of expression by the wealthier, more powerful corporate members of the press in order to enhance the relative voices of smaller and less influential members.") (internal quotation omitted); *Buckley v. Valeo*, 424 U.S. at 48-49 (emphasizing that the "government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others").

[96] *Turner I*, 512 U.S. at 685 (dissenting opinion).

[97] *Sable Communications*, 492 U.S. at 126 (emphasis added).

First, any newspaper/broadcast cross-ownership rule discriminating against smaller markets would be legally improper given that *vacatur* of the cable television/television cross-ownership rule applied in all markets.[98] When it ordered *vacatur* of that rule, the court did not suggest any need to retain it in smaller markets. Neither did the Commission ever mention such a concept when it sought rehearing of that decision, and the agency has allowed the rule to disappear nationwide. If there is no reason to follow a discriminatory market approach in repealing cross-ownership of broadcast television and cable television, two platforms the FCC *does* regulate, there is even less reason to do so for combinations of television stations and newspapers, which are otherwise unregulated by the FCC.

Second, there is no factual basis for a rule discriminating against smaller markets. In the empirical studies related to programming produced by newspaper-owned television stations, market size had no effect on the conclusions. A review of non-entertainment programming, which Media General submitted in 2001 and has updated in 2006, found that, in comparing stations in markets with co-ownership and those without, stations in the three smallest Media General convergence markets still aired more non-entertainment programming than stations in the immediately higher-ranked DMAs. Indeed, the programming study that the FCC staff itself undertook in 1973 in the proceeding that led to the 1975 decision adopting the rule included television stations from variously sized markets. As it noted, stations in the seven largest markets were specifically excluded from the study, which found that, on average, television stations owned by newspapers offered more news, non-entertainment, and overall local programming than other television stations.[99]

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[98] *Fox*, 280 F.3d at 1049.

[99] Appendix C, *1975 Second Report and Order*, 50 FCC 2d at 1095 n.4.

Third, small markets have been equally affected by the dramatic growth in the number of "traditional" media outlets and more recent new technological entrants over the last 30 years. On three occasions, Media General has prepared and filed costly and voluminous market-by-market reviews of the availability of content providers in the markets where it has practiced convergence; those volumes of data showed this profusion to be universal.

Fourth, the empirical studies filed throughout the last decade with the FCC that related specifically to advertising competition showed no reason to discriminate against small-market stations in repealing or modifying the cross-ownership rule. Most significantly, in 2003 and again in 2008, the FCC found broadcast advertising and newspaper advertising represent different product markets. Geographic location is, therefore, rendered meaningless in standard antitrust analysis. Moreover, comprehensive studies of advertising rates prepared by Economists Incorporated in 1998 and updated in 2002 drew on data from large and small markets across the country; market size made no difference in the findings; they found no statistically significant difference between advertising prices of cross-owned newspapers and those of other papers in medium and small markets.[100] On appeal, the United States Court of Appeals noted that no party before it had challenged the FCC's 2003 determination that a newspaper/broadcast combination cannot adversely affect competition in any market.[101]

Fifth, good journalism is expensive to produce no matter what the market size. Cutbacks in local television newscasts and newsroom staffs have been particularly pronounced in small

[100] Economists Incorporated, "Behavioral Analysis of Newspaper-Broadcast Cross-Ownership Rules in Medium and Small Markets," January 2002, submitted with Reply Comments of Media General, Inc. in MM Docket Nos. 01-235, *et al.* (Feb. 15, 2002); Economists Incorporated, "Structural and Behavioral Analysis of the Newspaper-Broadcast Cross-Ownership Rule," July 1998, submitted with the Comments of the Newspaper Assoc. of America in MM Docket No. 98-38 (July 21, 1998).

[101] *Prometheus*, 373 F.3d at 398-400.

and medium size markets. Indeed, cutbacks in network compensation, which began at the beginning of this decade, were particularly deep and hard for affiliates in smaller markets; in most cases, network compensation has now been eliminated and in many cases become “reverse compensation.”

Sixth, local media -- again, particularly those in small markets -- face increasing competition from national players who, given the development of technologies over the last 30 years, can now easily send, beam, or transmit their content and advertising into every market in the nation. The national players siphon off advertising dollars that may otherwise have gone to the communities receiving their material, and they generally have no local presence or commitment. These national players frequently prosper by creating large numbers of specialized video channels or websites, each of which serves a small dispersed audience in each locale, but collectively aggregate many viewers and users. At the same time, the local newspaper and the local broadcast station, each of which is dedicated to covering the local community, are facing growing costs of local news operations and increasingly fragmented audiences. To survive in the new environment of “competition for eyeballs,” local content providers must be allowed to move beyond traditional structural ownership regulations and the confines of traditional media boundaries to reach audiences the way they want to be reached -- with multiple streams of information when, where, and how the audiences demand it.

Finally, there is no reason in anything previously put before the Commission nor is there any reason in common sense to deny small market media operators and consumers the same innovation and benefits that flow from convergence and that are available to their counterparts in larger markets. If anything, the costs and difficulties faced by small-market operators make such change even more deserved and compelling. Similarly, consumers in these markets are entitled to access to as much local information as operators in their markets can possibly produce, just as is the case in larger markets. Media General's experience in medium and small markets, as described above and documented today and in the past for the FCC, demonstrates the myriad public interest benefits that can redound to consumers in such markets through convergence. From increased coverage of elections and political events to greater and more in-depth focus on community issues to the highlighting of local weather and sports developments to the conduct of new community-centered events, convergence yields tangible improvements in the public interest.

Nothing in the record the FCC has accumulated in the past shows -- and I venture nothing it will gather in this new 2010 Quadrennial Review will show -- that any action short of total elimination of restrictions on newspaper/broadcast cross-ownership would be judicially sustainable or in the public interest. The rule should have never been adopted. It has stifled the production of high quality, local news and information, good journalism and investigative reporting for too long, and its repeal is long, long, long overdue.