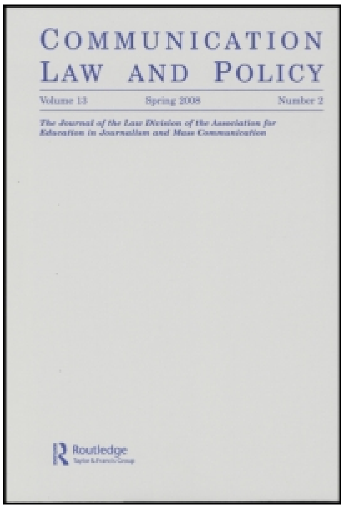

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BEYOND CYNICISM: A REVIEW OF THE FCC'S REASONING FOR MODIFYING THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE

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In 1975, the FCC established the newspaper / broadcast cross-ownership rule prohibiting common ownership of a daily newspaper and a full-power broadcast station that serve the same city. Unpopular among owners of media conglomerates since its inception, the rule has remained at the heart of the contentious debate over media ownership consolidation. More than three years after its failed attempt to justify modification in Prometheus Radio v. FCC*, the FCC has again voted to change the rule. This article reviews the Report & Order, assessing the Commission's central arguments used to justify its position and posits that these arguments are largely unsubstantiated. The Commission clings to contestable assertions and stakeholder comments, while ignoring extensive empirical data that refute each claim. The lack of empirical evidence presented to justify such a major (and unpopular) decision suggests that the FCC might have been motivated by a neoliberal agenda and / or influenced by the corporate media lobby.*

> Based on the past actions. . . . of the FCC I believe that my cynicism regarding this hearing is justified. I believe that the decision regarding media consolidation has already been bought and paid for by large corporate media interests, and that I am colluding through this hearing in a public relations exercise that makes a mockery of democracy. . . . tell me it isn't so.[1]

A series of events that preceded the Federal Communications Commission's recent decision to modify the newspaper/broadcast cross-ownership rule provide the cynical with cause for concern.[2] On

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[1]*Federal Communications Commission, Public Hearing On Media Ownership* 181 (Seattle, Wash., Nov. 9, 2007), *available at* http://www.fcc.gov/ownership/hearing-seattle110907.html (testimony of David Deshler, emeritus professor, Cornell University, public comment 13 of 169).

[2]The previous newspaper/broadcast cross-ownership rule/ban prohibits "common ownership of a full-power broadcast station and a daily newspaper when the broadcast station's service contour encompasses the newspaper's city of publication." Federal Communications Commission, Report & Order on Reconsideration

November 13, 2007, FCC Chairman Kevin Martin published an op-ed piece entitled "The Daily Show" in the *New York Times.*[3] The piece discussed the FCC's latest review of its media ownership rules and the process of deliberations which included "six public hearings, 10 economic studies and hundreds of thousands of comments."[4] The op-ed was clear in that it also articulated the chairman's intention to repeal the newspaper/broadcast cross-ownership ban.

That same morning, at a hotel in Chicago, Martin and his chief of staff had breakfast with billionaire Sam Zell.[5] Zell's desire to take the Tribune Company private was well known; all that was standing in his way was the FCC's newspaper/broadcast cross-ownership rule. Should the ban be lifted before the year's end, Zell could enjoy the maximum tax benefits from his takeover and restructuring of the corporation. What transpired at the meeting is unclear. What *is* clear is that a month later, after a 3-2 vote along party lines,[6] the FCC approved the chairman's proposal and modified the rule.[7] Two days later, Zell took control of the Tribune Company.[8]

07-216 10 (2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-216A1.pdf [hereinafter R&O 2008].

[3]Kevin J. Martin, *The Daily Show*, N.Y. TIMES, Nov. 13, 2007, at A29, *available at* http://www.nytimes.com/2007/11/13/opinion/13martin.html.

[4]*Id.*

[5]*See* Michael Oneal & Phil Rosenthal, *Tribune "Baffled" By Twists at FCC – Ownership-Rule May Hinder Go-Private Deal; Needed Waivers Could Come This Week,* CHICAGO TRIB., Nov. 18, 2007, at Business 1.

[6]The three Republican members — Chairman Kevin Martin and Commissioners Robert McDowell and Deborah Tate — voted for the change, defeating the two dissenting Democratic members, Jonathan Adelstein and Michael Copps.

[7]The Report & Order was adopted Dec. 18, 2007. *See* R&O 2008, *supra* note 2, at 63-74. It should be noted that on May 15, 2008, the U.S. Senate voted to adopt a "resolution of disapproval," sponsored by Byron Dorgan (D-ND) and twenty-six other senators, nullifying the FCC's decision to modify the newspaper/broadcast cross-ownership rule. *See* John Dunbar, *Senate Votes To Roll Back Media Ownership Rule,* USA TODAY, May 16, 2008, *available at* http://www.usatoday.com/news/washington/2008-05-15-38997126_x.htm. Then Senator Barack Obama (D-IL) noted, "Today the Senate stood up to Washington special interests by voting to reverse the FCC's disappointing media consolidation rules that I have fought against. . . . Our nation's media market must reflect the diverse voices of our population, and it is essential that the FCC promotes the public interest and diversity in ownership." *Id.* at ¶14. Commissioner Adelstein said:

> This unequivocal, bipartisan rebuke of the FCC is a wake-up call for us to serve the public rather than the media giants we oversee. Chairman Inouye, Senator Dorgan, Vice Chairman Stevens, Senator Snowe and the many other Senate leaders and public interest organizations who pushed this forward deserve our congratulations and the thanks of the American people.

News Release, Federal Communications Commission, Commissioner Jonathan S. Adelstein Responds to Senate Resolution on Media Ownership 1 (2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-282231A1.pdf

[8]*See* Richard Pérez-Peña, *New Guard Arrives At Tribune, A Developer Who Speaks His Mind*, N.Y. TIMES, Dec. 21, 2007, at C4.

The assertion that corporate interests could have influenced the FCC vote finds ample support. C. Edwin Baker, commenting on the FCC's 2003 media ownership deliberations wrote, "[T]he primary causal explanation for the FCC's ill-starred action may lie in the power and economic self-interest of major media companies."[9] In his appended comments to the Report & Order released after the most recent review, dissenting Democratic Commissioner Michael Copps testified to the realities of corporate influence:[10]

> Despite all the talk you may hear today about the threat to newspapers from the Internet and new technologies, today's Order actually deals with something quite old-fashioned. Powerful companies are using political muscle to sneak through rule changes that let them profit at the expense of the public interest.[11]

While the access provided to stakeholders like Zell may have an impact, the "political muscle" Copps refers to is flexed primarily by the corporate media lobby in Washington, D.C. Well-connected and well-organized, the lobby consistently floods the FCC's office with industry insiders — among them many former senior Commission staff, ex-FCC Commissioners and chairs.[12] Indeed, it would seem as though the promise of future employment has traditionally been a bargaining chip available to the media lobby. In fact: "Every former [FCC] chair for the last three decades has gone to work in one way or another with the media and telecommunications industry. . . . As one aide to an FCC Commissioner privately remarked, 'People leave here on Friday and are lobbying me the following Monday!'"[13]

While these references to "political muscle" could easily lead us down a path lined with cynical suppositions, this article attempts to move beyond the cynicism. Though the FCC may be influenced by the media lobby, there are other sources of influence as well – the results of empirical analyses and the public interest for example. The question remains, which influence(s) led to the FCC's recent action to repeal the newspaper/broadcast cross-ownership ban? This is the question our current inquiry intends to explore.

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[9] C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS 1 (2007).

[10] Democratic Commissioners Michael Copps and Jonathan Adelstein dissented to the decision and in their appended comments alluded to the corporate media lobby's influence. R&O 2008*, supra* note 2, at 106-17.

[11] *Id.* at 109.

[12] *See* JEFF CHESTER, DIGITAL DESTINY: NEW MEDIA AND THE FUTURE OF DEMOCRACY 47 (2007).

[13] *Id.* at 50.

It must be acknowledged that the task of determining the primary sources of influence over the FCC's final decision is certainly a difficult one, as the dynamics of the political environment surrounding this recent decision call into question the accuracy of any description of the process provided by the individual Commissioners in public statements or interviews.[14] For this reason, this study will conduct a more formal inquiry, and will assess the FCC's Report & Order — the official document released at the conclusion of the review process that outlines both the official decision and the arguments formulated as justification. Of course it would be naïve to assume that the R&O operates outside the sphere of political influence, however, since it exists as both the culmination of the FCC's formal review process (which involved numerous public interactions with various sources of influence) and exists as the primary forum through which the Commission can demonstrate how its decision is supported by empirical research and the public interest, the

[14]The media ownership debate has amplified partisan and ideological tensions between the Republican and Democratic commissioners. One clear example of this tension occurred before the current review as the Democratic commissioners, upset about the lack of public hearings addressing the media ownership issue (Michael Powell was chairman at the time), hosted their own town hall meetings across the country independent of the three Republican commissioners. The two Democratic commissioners have consistently been very vocal not only about their ideological differences with Chairman Martin, but also regarding his methods for conducting the review. *See* Press Release, Federal Communications Commission, Joint Statement by commissioners Copps and Adelstein on Chairman Martin's Cross-Ownership Proposal (2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278142A1.pdf. *See also* Press Release, Federal Communications Commission, Joint Statement by FCC Commissioners Michael J. Copps and Jonathan S. Adelstein on Release Of Media Ownership Order (2008), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280001A1.pdf. By comparison, the Republican commissioners seem often to be in complete agreement with Chairman Martin, hardly, if ever, articulating any concerns regarding his proposals or method. Martin articulated the tensions with the two Democratic commissioners in the R&O:

> I appreciate that some of my colleagues and I do not share the same views on the [sic] amending the newspaper broadcast cross-ownership rule. But I reject the claims that the process has been unfair or even too rushed. At every step of the process during the last 18 months, whether it came to picking dates or cities for public hearings or Commissioning independent studies, I have continually sought, albeit unsuccessfully, consensus with my colleagues. . . . [M]y Democratic colleagues have been quick to say no to whatever was proposed but never getting to yes or even putting forward their own ideas on the substance of the issues before us. They wanted public hearings. We agreed. And we provided six. They asked for independent studies. We agreed. . . . They asked for the studies to be peer reviewed. We agreed. . . . They then criticized me for making the proposal public in *The New York Times*. They asked for time for the public to comment on my proposal. I agreed. . . . For a year and half, I have attempted to respond to the legitimate concerns about conducting an open and transparent process with ample opportunity for public input. At each step along the way, as I was crossing the goal line, the goal posts were moved. While I have and will continue to seek consensus, I have come to the conclusion that it won't ever be possible to ever reach consensus on the media ownership issue.

R&O 2008, *supra* note 2, at 101-02.

R&O provides us with a unique opportunity to assess the relationship between sources of influence and FCC justification and action.

The R&O adopted by the FCC in December of 2007[15] presented five primary arguments[16] supporting the decision to modify the newspaper/broadcast cross-ownership rule:[17]

1. The functional equivalency argument: "[A] complete ban is unwarranted due to the presence (i.e. competition) of other media sources in local markets, such as the Internet and cable."[18]
2. The convergence argument: "[T]he ban could undermine localism by preventing efficient combinations that would allow for the production of high-quality local news."[19]
3. The industry sustainability argument: The modification must be made in order to help save the struggling newspaper industry.[20]
4. The ownership and viewpoint argument: "The ban is not necessary on grounds of diversity because of insufficient evidence that ownership influences viewpoint."[21]

[15]The R&O was released to the public Feb. 4, 2008.

[16]The five arguments addressed here were not organized by the FCC as such. In the section of the R&O where the newspaper/broadcast cross-ownership rule was discussed, the Commission outlined its arguments in a "Discussion" section which included the following components: an analysis of relevant marketplace developments, the Commission's relevant policy goals, and the specific components of the rule change. The five arguments addressed here were presented in various forms throughout each of these components. Thus, it should be clarified that the Commission's justifications have been organized into five argument here and labeled accordingly for the purpose of analysis.

[17]It has been the longstanding mandate of the FCC to construct and maintain rules that promote the public interest. *See* Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 606 (1998). *See also* FCC v. RCA Commc'ns, Inc., 346 U.S. 86 (1953); FCC v. Pottsville Broad. Co., 309 U.S. 134 (1940). Competition, diversity and localism are three terms that have been employed to operationalize the public interest concept. *See* PHILIP M. NAPOLI, FOUNDATIONS OF COMMUNICATIONS POLICY: PRINCIPLES AND THE PROCESS IN THE REGULATION OF ELECTRONIC MEDIA (2001). Therefore, if the FCC can demonstrate that the proposed rule changes can contribute to the fulfillment of each of these concepts/goals (or conversely, that maintenance of the rule will impede these concepts/goals) the FCC's proposed rule changes will be validated, as the FCC will have acted in accordance with its longstanding mandate of upholding the public interest.

[18]R&O 2008, *supra* note 2, at 12.

[19]*Id.* "Localism" has been defined by the Commission as "air(ing) programming responsive to the needs and interests of their communities of License." Federal Communications Commission, Broadcast Localism (NOI) (2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-129A1.pdf

[20]*Id.* at 21.

[21]*Id.* at 12. "Diversity" in this respect is defined as "a diverse and robust marketplace of ideas." Federal Communications Commission, Report and Order and Notice of Proposed Rulemaking 03-127 8 (2003), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-127A1.pdf [hereinafter R&O/NOPR 2003].

5. The cautious/modest approach argument: "[O]ur new rule lifts the complete ban but does so in a modest manner in order to ensure. . . that our goals of competition, localism, and diversity are not compromised."[22]

This article considers the validity of these five arguments. All are reviewed and their assertions compared with the findings of current empirical research. In the end, if the FCC's arguments are found to be unsubstantiated, this would suggest that the Commission came to its decision without the influence of empirical research and thus without proof that the public interest would be served by the rule change – note that the arguments attempt to demonstrate how the decision would benefit competition, diversity and localism, three terms that operationalize the public interest concept.[23] In this instance, it would follow that the FCC's decision to repeal the newspaper/broadcast cross-ownership ban would likely have been motivated by a neo-liberal, deregulatory agenda and/or influenced by the demands of the pro-consolidation media lobby.[24] On the other hand, should the arguments presented by the FCC be found to be both logically sound and supported by empirical research, then any suggestion of corporate favoritism would certainly be refuted. As it has been the long-standing mandate of the FCC to place the public interest ahead of corporate interest,[25] this inquiry is justified in that it addresses whether the FCC has in fact adhered to its mandate or behaved contrary to the tenets upon which it was founded.

THE HISTORY OF THE NEWSPAPER-BROADCAST CROSS-OWNERSHIP RULE

The Communications Act of 1934 gave the FCC the authority to grant licenses that would allow private organizations the exclusive use of certain parts of the broadcast spectrum. Considering the broadcast spectrum to be a scarce resource, Congress required that the FCC determine "whether the public interest, convenience, and necessity will be served" by the granting of each license.[26]

[22] *Id.* at 13.

[23] *See* NAPOLI, *supra* note 17, at 24. *See also* R&O 2008*, supra* note 2, at 7.

[24] Such a deregulatory agenda would suggest support for the neo-liberal ideology that views government restrictions as potential impediments to the success attainable *via* the free market (whether it be economic success or that which is associated with the satisfaction of the public interest.) *See* Christopher s. Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L.R. 669 (2005).

[25] *See* Krasnow & Goodman*, supra* note 17, at 611.

[26] Communications Act of 1934, 47 U.S.C. §309(a) (1934).

Thus, one of the original mandates of the FCC was to determine and protect the public interest when constructing and applying communication policy. An often-debated concept, the term "public interest" was provided with a general definition by the first federal body charged with applying the standard to communication policy – the Federal Radio Commission. The Commission determined in its 1928 annual report that "the emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster or the advertiser."[27]

Following this line of reasoning, early FCC regulations reflected the presumption that it would not be in the public's interest for a single entity to hold more than one broadcast license in the same community.[28] The view was that the public would benefit from a diverse array of owners because it would lead to a diverse array of program and service viewpoints. Above all, however, was the recognition that the public should be protected from the problems associated with the concentration of economic power.[29]

Numerous rules following the philosophy that the public's interest – not private interests – should be given priority were established in the years that followed the enactment of the Communications Act of 1934. In 1975, the FCC established the newspaper/broadcast cross-ownership rule.[30] The ban prohibited the common ownership of a daily newspaper and any full-power broadcast station that serviced the same community.[31] This rule epitomized the aforementioned philosophy, emphasizing the need to ensure that a broad-array of voices were afforded the opportunity to communicate *via* different outlets in each market.[32]

In 1996, the prevalence of deregulation that had been growing since the Reagan administration[33] gave way to the Telecommunications Act

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[27] Krasnow & Goodman, *supra* note 17, at 611.

[28] *See* Prometheus Radio Project v. FCC, 373 F.3d 372, 383 (3d Cir. 2004). *See also* Genesee Radio Corporation, 5 F.C.C. 183, 186–87 (1938).

[29] *See* FCC v. Nat'l Citizens Commc'n for Broad., 436 U.S. 775, 780 (1978).

[30] Amendment of §§73.34, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 50 F.C.C. 2d 1046 (1975).

[31] R&O 2008, *supra* note 2, at 10.

[32] In 1978, the Supreme Court upheld the rule as a reasonable means of promoting the diversification of the mass media as a whole. FCC v. Nat'l Citizens Commc'n for Broadcast, 436 U.S. 775 (1978). *See also* C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS 124-25 (1995).

[33] The effects of President Ronald Reagan's neo-liberalist approach continue to be felt. These effects are evident not only in the dynamics of a consolidated media system but also as a result of his popularization of the neo-liberal political-economic philosophy. *See* DES FREEDMAN, THE POLITICS OF MEDIA POLICY 18-19 (2008). President Reagan's neo-liberal media policies are often associated with the actions of FCC Chairman Mark

of 1996.[34] One of the requirements of the act – noted in Section 202(h) – was that the FCC must conduct a biennial review of its media ownership rules "and shall determine whether any of such rules are necessary in the public interest as the result of competition." In addition, the Commission was ordered to "repeal or modify any regulation it determines to be no longer in the public interest."[35]

ATTEMPTS TO CHANGE THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE

In September 2002, the FCC issued a Notice of Proposed Rulemaking stating that the Commission would re-evaluate its media ownership rules pursuant to the obligation specified in the Telecommunications Act of 1996.[36] In addition to the definitions of the public interest that had traditionally been applied to such an evaluation, the FCC also sought to ensure that competition, diversity and localism were being promoted[37] – three terms that have been determined to operationalize the public interest concept.[38]

Fowler, whom he appointed, and Fowler's successor Dennis Patrick. Fowler's deregulatory fervor was quite evident. In his infamous *Texas Law Review* article he wrote, "[B]roadcasters best serve the public by responding to market forces rather than governmental directives." Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach To Broadcast Regulation,* 60 TEX. L. REV. 207, 256 (1981-82). He also wrote that "the perception of broadcasters as community trustees should be replaced by a view of broadcasters as marketplace participants." *Id.* at 209. In an address before the North Carolina Association of Broadcasters Oct. 23, 1982, Fowler stated,

> [B]roadcasters should be as free from regulation as the newspaper you share the press table with and compete with for advertisers. No renewal filings, no ascertainment exercises, no content regulation, no ownership restrictions beyond those that apply to media generally, free resale of properties, no petitions to deny, no brownie points for doing this right, no finger-wagging for doing that wrong.

Daniel Brenner, *Policy-Making at the Fowler FCC: How Speeches Figured In,* 10 HASTINGS COMM. ENT. L.J. 539, 545 (1987–1988). Fowler has also been quoted as saying, "I pledge myself to take deregulation to the limits of existing law." DOUGLAS KELLNER, TELEVISION AND THE CRISIS OF DEMOCRACY 92 (1990). Though many of the FCC's major (and more recent) deregulatory acts occurred under other presidents (the Telecommunications Act of 1996 was passed by Congress while President Clinton was in office), the dominance that neo-liberal ideology still enjoys in the arena of U.S. media policymaking is often attributed to the actions of the Reagan administration.

[34] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[35] *Id.* at §202(h).

[36] Press Release, Federal Communications Commission, FCC Initiates Third Biennial Review Of Broadcast Ownership Rules: Cites Goal Of Updating Rules To Reflect Modern Marketplace (Sept. 12, 2002), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-226188A1.pdf.

[37] *Id.* at 1.

[38] *See* NAPOLI, *supra* note 17, at 24. *See also* R&O 2008*, supra* note 2, at 7.

In June 2003, after its deliberations — which included a single public hearing and the review of nearly two-million pieces of correspondence from the public opposing further relaxation of the ownership rules[39] — the FCC voted 3-2 to repeal the newspaper/broadcast cross-ownership ban and to make changes to or repeal a number of its other ownership rules as well.[40] In the order, the FCC noted that the newspaper/broadcast cross-ownership rule was no longer necessary in the public interest to maintain competition, diversity or localism.[41] The rule was not completely removed, but was modified using "cross-media limits."[42] To determine these limits, the Commission developed a system called the "diversity index,"[43] a modification of the Herfindahl-Hirschman Index,[44] to determine whether market consolidation could be problematic.

In the months that followed, a number of public interest and consumer advocacy groups[45] petitioned judicial review of the Commission's R&O, "contending that its deregulatory provisions contravened the Commission's statutory mandates as well as the Administrative Procedure Act."[46] A number of broadcasters and newspaper owners[47]

[39]*See Prometheus Radio Project*, 373 F.3d 372, 386 (3d Cir. 2004).

[40]For example, the local television multiple ownership rule and the national television ownership cap (among others). *See* R&O/NOPR 2003*, supra* note 21, at 3-4.

[41]*Id.*

[42]These limits were "designed specifically to check the acquisition by any single entity of a dominant position in local media markets – not in economic terms, but in the sense of being able to dominate public debate – through combinations of cross-media properties" *Id*. at 173.

[43]The "diversity index" was designed "to measure the degree to which any local market could be regarded as concentrated for purposes of diversity." *Id*.

[44]This traditionally has been a measure used by the Deptartment of Justice to assess industry concentration. The HHI is calculated by summing the squared market shares of every firm in a particular market; markets scoring less than 1,000 are unconcentrated, between 1,000 and 1,800 moderately concentrated, and above 1,800 as highly concentrated. *See* NAPOLI, *supra* note 17, at 140.

[45]The United States Court of Appeals for the Third Circuit Court called the group "citizen petitioners" and noted,

> [W]e will use this designation throughout our opinion to refer, jointly or severally, to the petitioners and intervenor who raise anti-deregulatory challenges to the Order, including Prometheus Radio Project, Media Alliance, National Council of the Churches of Christ in the United States, Fairness and Accuracy in Reporting, Center for Digital Democracy, Consumer Union and Consumer Federation of America, Minority Media and Telecommunications Council (representing numerous trade, consumer, professional, and civic organizations concerned with telecommunications policy as it relates to racial minorities and women), and Office of Communication of the United Church of Christ (intervenor). The Network Affiliated Stations Alliance, representing the CBS Television Network Affiliates Association, the NBC Television Affiliates, and the ABC Television Affiliates, and Capitol Broadcasting Company, Inc. (intervenor) also raised antideregulatory challenges to the national television ownership rule.

Prometheus Radio Project v. FCC, 373 F.3d 372, 382 (3d Cir. 2004).

[46]*Id.* at 381.

[47]The Third Circuit Court called this group "Deregulatory Petitioners," which was comprised of Clear Channel Communications, Inc.; Emmis Communications Corporation;

also petitioned the Report and Order, but noted that the FCC didn't deregulate *enough* pursuant to the statutory mandates established by the Telecommunications Act of 1996 and the Constitution of the United States.[48] The eventual decision of the United States Court of Appeals for the Third Circuit Court stated that replacing the ban with cross-media limits was justified as the current rule was determined to no longer be in the public interest.[49] While the court agreed that repealing the ban would foster competition, localism and diversity, it did not uphold the cross-media limits that the FCC determined, because the court found the FCC's arguments for the limits were insufficient. The court determined that the FCC should re-examine this element before modifying the rule.[50]

THE CURRENT REVIEW

In June 2006, the FCC adopted a Further Notice of Proposed Rulemaking (FNPR)[51] to address the issues raised by the United States Court of Appeals for the Third Circuit and also to perform the recurring evaluation of the media ownership rules required by the Telecommunications Act.[52] The deliberations would draw upon three formal sources of input:[53] (1) the submission of comments, (2) ten Commissioned studies, and (3) six public hearings.

Comment Submission

The FCC called upon stakeholders, experts and members of the general public to submit comments as well as empirical data regarding the impact of the current ownership rules and potential rule-changes on

Fox Entertainment Group, Inc.; Fox Television Stations, Inc.; Media General, Inc.; National Association of Broadcasters; National Broadcasting Company, Inc.; Paxson Communications Corporation; Sinclair Broadcast Group; Telemundo Communications Group, Inc.; Tribune Company; Viacom, Inc.; Belo Corporation; Gannett Corporation; Morris Communications Company; Millcreek Broadcasting, LLC; Nassau Broadcasting Holdings; Nassau Broadcasting II, LLC; Newspaper Association of America; and Univision Communications, Inc. *Id.* at 382.

[48] *Id.* at 381-82.

[49] *Id.* at 398.

[50] *Id.* at 397.

[51] Federal Communications Commission, Further Notice of Proposed Rulemaking (2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-93A1.pdf [hereinafter FNPR].

[52] Pub. L. No. 104-104, §202(h), 110 Stat. 56, 111-112 (1996).

[53] Perhaps there were informal sources of influence as well; for example, communication with politicians, lobbyists, stakeholders and any other groups involved in direct lobbying efforts.

the Commission's competition, diversity and localism policy goals.[54] The Commission also asked for submissions that presented proposals for improving minority, female and independent ownership of media outlets, and the dynamics of advertising markets, the ability for independent stations to compete, the availability of independent/family/children's programming and levels of indecent programming. Commenters were also asked to address the impact of new media technologies on media consumption and all other ownership issues.

Commissioned Studies

In July 2007, the FCC released ten studies that it had commissioned to address the issues under consideration.[55] Chairman Martin stated in his appended comments to the eventual Report and Order that the FCC spent $700,000 Commissioning these studies.[56] Seven of the studies were conducted by outside researchers, and three were conducted by Commission staff. Upon release, the studies underwent peer-review by a number of select, unaffiliated academics.[57] The Commission also

[54]FNPR, *supra* note 51, at 4.

[55]Study 1, "How People Get News and Information," was conducted by Nielsen Media Research. Study 2, "Ownership Structure and Robustness of Media," was conducted by Kiran Duwadi, Scott Roberts and Andrew Wise of the FCC. Study 3, "Television Station Ownership Structure and the Quantity and Quality of TV Programming," was conducted by Gregory S. Crawford, Department of Economics, University of Arizona. Study 4, "News Operations," was comprised of four individual studies: 4.1, "The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming," by Daniel Shiman; 4.2, "Ownership Structure, Market Characteristics and the Quantity of News and Public Affairs Programming: An Empirical Analysis of Radio Airplay," by Kenneth Lynch; 4.3 "Factors that Affect a Radio Station's Propensity to Adopt a News Format," by Craig Stroup; 4.4, "The Effect of Ownership and Market Structure on News Operations," by Pedro Almoguera (all authors were from the FCC). Study 5, "Station Ownership and Programming in Radio," was conducted by Tasneem Chipty, CRA International. Study 6, "The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News," was conducted by Jeffrey Milyo, Center for Applied Economics, University of Kansas, School of Business and the Department of Economics and Truman School of Public Affairs, University of Missouri. Study 7, "Minority and Female Ownership in Media Enterprises" was conducted by Arie Beresteanu and Paul B. Ellickson, Dept. of Economics, Duke University. Study 8, "The Impact of the FCC's TV Duopoly Rule Relaxation on Minority and Women Owned Broadcast Stations 1999-2006," was conducted by Allen S. Hammond IV, Santa Clara University School of Law. Study 9, "Vertical Integration and the Market for Broadcast and Cable Television Programming" was conducted by Austan Goolsbee, University of Chicago, Graduate School of Business. Study 10, "Review of the Radio Industry, 2007," was conducted by George Williams of the FCC.

[56]R&O 2008, *supra* note 2, at 100.

[57]This article only addresses studies 1, 3, 4.1 and 6 because the findings of the studies were especially relevant to the newspaper/ broadcast cross-ownership rule review. Studies 3, 4.1 and 6 are especially noteworthy as the results were discussed at length in the R&O. The peer reviews for these studies were conducted as follows: Study 1,

held a comment-period within which interested parties could submit comments about the studies.[58]

Public Hearings

Chairman Martin announced that the Commission would hold six public hearings in "diverse locations around the country"[59] in an attempt to "fully involve the public"[60] in the review process. The hearings were to address the impact of the rules and potential rule changes on the Commission's general policy goals as well as minority ownership, family/children's programming, religious programming, independent programming, campaign and community event coverage, music and the creative arts, the growth of the internet, jobs and the economy, advertisers, senior citizens, rural America, and the disabled community.

Dr. John B. Horrigan, associate director for research, Pew Internet & American Life Project; Study 3, Dr. Lisa M. George, assistant professor of economics from Hunter College and Dr. Philip M. Napoli, associate professor of communications & media management at Fordham University; Study 4.1, Dr. Phillip Leslie, associate professor of economics and strategic management at Stanford University; Dr. Philip Napoli of Fordham University; Dr. Kenneth Goldstein, professor of political science at the University of Wisconsin-Madison; Dr. Matthew Hale, assistant professor at the Center for Public Service at Seton Hall University and Dr. Martin Kaplan, research professor at the University of Southern California's Annenberg School for Communication; and Study 6, Dr. Matthew Gentzkow, associate professor of economics at the University of Chicago and Dr. Goldstein's group.

[58]*See* Public Notice, Federal Communications Commission, FCC Seeks Comment On Research Studies On Media Ownership (2007), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A1.pdf. *See also* Press Release, Federal Communications Commission, Joint Statement by FCC Commissioners Michael J. Copps and Jonathan S. Adelstein on Release of Media Ownership Studies (July 31, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-275674A1.pdf (joint statement from the Democratic commissioners criticizing the chairman for only allowing a sixty-day comment period). *See also* Public Notice, Federal Communications Commission, Media Bureau Extends Filing Deadlines For Comments On Media Ownership Studies (Sept. 28, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-4097A1.pdf (deadline to submit comments extended).

[59]Press Release, Federal Communications Commission, FCC Announces Public Hearing in Los Angeles on Media Ownership 1 (Sept. 8, 2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267288A1.doc. The hearings were held in Los Angeles and El Segundo, Calif., Oct. 3, 2006; Nashville, on Dec. 11, 2006; Harrisburg, Pa. on Feb. 23, 2007; Tampa on Apr. 30, 2007; Chicago on Sept. 20, 2007; and Seattle on Nov. 9, 2007.

[60]Public Notice, Federal Communications Commission, FCC Announces Details for Public Hearing on Media Ownership in Harrisburg, Pennsylvania 1 (Feb. 16, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270612A1.doc.

The Deliberations and Report & Order

In his appended comments to the R&O, Chairman Martin noted that throughout the deliberations the Commission reviewed more than 166,000 comments filed by industry stakeholders, lobbyists, union members, public interest groups and members of the general public.[61] All ten Commissioned studies, their peer reviews and the submissions from the subsequent comment period were also taken into consideration, as was the information gathered from the six public hearings which lasted more than forty-four hours and included testimonies from 125 stakeholder/expert panelists and 732 members of the general public.[62]

After its deliberations, in December 2007 the FCC voted 3-2 to modify the newspaper/broadcast cross-ownership rule;[63] none of the other rules under consideration was modified.[64] The FCC's Report and Order that was released to the public on February 4, 2008, was 124 pages long and included various sections outlining the rule change and the reasoning behind it. The R&O also contained numerous shorter sections describing why the other rules under review had not been changed. Various procedural sections were also included. Appended to the R&O were statements of support by the three Republican Commissioners, Chairman Martin, Commissioners Tate and McDowell, and statements of dissent from the two Democrats, Commissioners Copps and Adelstein.

The section of the R&O outlining the FCC's justification for modifying the newspaper/broadcast cross-ownership rule began with a subsection

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[61]R&O 2008, *supra* note 2, at 99-100.

[62]Jonathan A. Obar & Amit M. Schejter, *Inclusion Or Illusion? An Analysis Of The FCC's Public Hearings On Media Ownership 2006-*2007, J. OF BROAD. & ELEC. MEDIA (forthcoming June 2010).

[63]As noted in the R&O, the modifications allowed in the top-twenty markets, cross-ownership between any daily newspaper and radio station, or between a daily and a broadcast television station – so long as the television station isn't among the top four stations in the market and that there are eight "major media voices" in the market. In markets twenty-one and below, cross-ownership between a daily newspaper and a broadcast station will be allowed only if the combination will increase local news production and/or if one of the media outlets is failing. The Commission also noted that if neither of these exceptions is met, it will still consider applications for cross-ownership if it can be shown that: (1) the combination will increase local news production, (2) each entity will have independent news production, (3) there are appropriate levels of concentration in the market, and (4) there are considerable concerns regarding the financial viability of the stations. R&O 2008, *supra* note 2, at 9-10. As noted earlier, on May 15, 2008, the U.S. Senate voted to adopt a "resolution of disapproval," sponsored by Democrat Byron Dorgan of North Dakota and twenty-six other senators, nullifying the FCC's decision to modify the newspaper/broadcast cross-ownership rule. *See* John Dunbar, *Senate Votes to Roll Back Media Ownership Rule,* USA TODAY, May 16, 2008, *available at* http://www.usatoday.com/news/washington/2008-05-15-38997126_x.htm.

[64]The other rules under consideration were the radio/television cross-ownership rule, local television ownership rule, local radio ownership rule, national television ownership rule, and the dual network rule.

that provided the history of the rule and the ongoing debate, and was followed by a subsection that outlined how the rule would be modified and the justifications for making the change. These justifications were presented by referring to submitted comments, studies, additional forms of empirical data, and variegated assertions from proceedings past and present. The central justifications presented by the Commission to support its decision have been organized here as five primary arguments: functional equivalency, convergence, industry sustainability, ownership and viewpoint, and cautious/modest approach.[65]

ARGUMENT ONE: FUNCTIONAL EQUIVALENCY

The most compelling justification the Report and Order presents for modifying the newspaper/broadcast cross-ownership rule is the functional equivalency argument. The FCC posits that by providing consumers with equivalent services to those offered by traditional media – specifically, quality sources for news and information, especially local – new media are subverting the market dominance once enjoyed by newspapers and broadcast stations. This supposed audience fragmentation demonstrates that traditional media are encountering vibrant competition, and thus, cross-ownership between a newspaper and a broadcast company that serve the same market would not produce a drastic reduction in the multiplicity of voices essential to the public interest of individual markets.[66]

In developing this argument, the Commission emphasizes the relevance of the Internet, but also addresses the impact of other media technologies. Regarding online sources, the FCC asserts that "the Internet as a major distribution channel for content has accelerated this audience fragmentation."[67] To provide empirical support for this assertion, the Commission cites one Pew Research Center study from 2006 that asked 3,011 individuals to identify their various sources for news.[68]

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[65]As noted earlier, the Commission presented its arguments in a "Discussion" section without formally organizing or labeling them. In order to assess the validity of each assertion, the Commission's justifications have been organized and labeled here as five arguments.

[66]The FCC posited:

> The data before us now show that the media environment has changed considerably over the past three decades. The emergence of new forms of electronic media in recent years has come at the expense of traditional media, and of newspapers in particular. . . . Faced with these facts, we, like our predecessors, remain cognizant of our obligation to adjust our regulations to "adequately reflect the situation as it is, not was."

R&O 2008, *supra* note 2, at 14.

[67]*Id.* at 16.

[68]John B. Horrigan, Pew Internet & American Life Project, Online News: For Many Home Broadband Users, The Internet Is A Primary News Source (Mar. 22, 2006),

The FCC does not present any of the statistical findings from the study, but in a footnote states, "Internet resources may be used as a primary source for news and information, or they may be used in conjunction with broadcast stations and newspapers."[69] Referring to this argument in her appended comments, Commissioner Tate added, "With the multiplicity of sources now available at the click of a button, the historic concerns underlying the newspaper-broadcast cross-ownership ban would seem to be alleviated"[70]

Further attempts to describe the contemporary media marketplace as fragmented were made as the FCC provided an extensive list of media technologies that have been developed since 1975 and have flooded the market with additional sources for news and information that undermine the dominance of traditional outlets.[71] Empirical data describing how these technologies act as functionally equivalent substitutes for traditional media were not included.

Coupled with rhetoric describing the rule as both excessive and dated, these assertions outline the Commission's functional equivalency argument,[72] and support the Commission's claim that there is "ample evidence in the record that marketplace conditions have indeed changed [which justifies . . .] a recalibration at this time."[73]

http://www.pewinternet.org/~/media//Files/Reports/2006/PIP_News.and.Broadband.pdf.pdf.

[69]R&O 2008, *supra* note 2, at 16 n.83.

[70]*Id.* at 119.

[71]For example:

> The modern era of fragmentation began in the late 1970s, with the emergence of what has grown to be hundreds of video programming channels available over cable and, later, by satellite distribution. . . . [A]pproximately 86 percent of U.S. households subscribe to video service provided by an MVPD, which includes cable, SMATV systems, direct broadcast satellite (DBS), fiber-optic network service, wireless cable, and other such delivery systems. . . . [I]ncreased efficiencies in the use of terrestrial broadcast spectrum allowed for increased numbers of television and radio stations on the air since 1975; the number of radio stations increased by approximately 76 percent, while there has been an 83.5 percent growth in the number of television stations over the same period.

R&O 2008, *supra* note 2, at 15-16. In his appended comments to the R&O, Commissioner McDowell added, "[A] plethora of wireless devices. . . iPods, Wi-Fi. . . . And that's not counting the myriad (of) new technologies and services that are coming over the horizon such as those resulting from our Advanced Wireless Services auction of last year, or the upcoming 700 MHz auction." *Id.* at 123.

[72]An additional element of the Commission's argument suggested that "as new digital technologies are being introduced, audiences continue to splinter, and advertising dollars continue to shift with the changing structure of the marketplace." *Id.* at 16. This argument will not be addressed directly in this section because it refers primarily to the sustainability of the newspaper industry (argument three), the FCC is not required to ensure that companies can attract advertisers, and there is little empirical evidence that demand has indeed shifted away from traditional media.

[73]*Id.* at 13.

REBUTTAL TO THE FUNCTIONAL EQUIVALENCY ARGUMENT

The FCC's functional equivalency argument remains largely unsubstantiated as the empirical evidence demonstrating the relevance of traditional news sources far outweighs the evidence to the contrary. To support its assertion that the Internet as a source of news and information has caused audience fragmentation and thus subverted the market dominance of traditional outlets, the FCC cites one Pew study from 2006. The findings contribute only moderate support to the Commission's argument. The study found that among the 3,011 adults surveyed, 1,014 were broadband users. Of those users, 43% access news online "as part of the daily news diet;"[74] however, 57% said they utilize local TV for the same purpose, 49% said national TV, 49% radio and 38% the local paper. Traditional media were shown to be an even greater factor when all respondents were analyzed; 59% said their news diet included local TV, 47% said national TV, 44% radio and 38% the local paper; 23% said the Internet.[75]

Indeed, the FCC demonstrates that some individuals are utilizing new media sources when accessing news and information, but the question remains, are these sources functionally equivalent substitutes to traditional media that are subverting the importance of those traditional sources? Most of the empirical research available suggests that the answer is no (ironically, this point is acknowledged by the FCC in another section of the R&O).[76] The primary problem with the Pew study cited by the Commission is that it asks consumers about the elements of their "news diet" and does not focus on primary news sources.[77] Thus, the study cited in the R&O cannot determine whether consumers are accessing the Internet as a substitute for or supplement to traditional sources. Perhaps in an attempt to deal with this issue, one of the FCC's ten ownership studies (Commissioned for this review process) entitled, "How People Get News and Information" assessed which outlets

[74]Horrigan, *supra* note 68, at i.

[75]*Id.*

[76]Even though the Commission makes the argument for the contrary in an earlier section of the R&O, when discussing the concept "major media voices" it notes, "[W]e cannot conclude that other voices are major sources of local news or information. Our data reflects only that most consumers primarily rely on newspapers and broadcast television for local news." R&O 2008*, supra* note 2, at 35.

[77]For example, one of the questions posed by the Pew study asks, "Do you ever use the Internet to . . . get news online?" Pew Internet & American Life Project, Explore Survey Questions (Mar. 22, 2006), http://www.pewinternet.org/Reports/2006/Online-News-For-many-home-broadband-users-the-internet-is-a-primary-news-source.aspx. These findings also fail to provide information regarding the quality and type of news accessed online and via traditional sources.

consumers viewed as primary sources for news and information.[78] The study was based on interviews with 3,101 individuals. Of the respondents, 75.5% said either local newspapers (30.1%), broadcast television (38.2%) or radio (7.2%) were their primary sources of news an information. Only 6.7% said the Internet.[79]

Recent studies by Mark Cooper, of the Consumer Federation of American and Consumers Union,[80] and the Radio-Television News Directors Foundation[81] offer similar findings, demonstrating repeatedly that traditional media outlets continue to be the primary sources for local and national news and information. Pew Research recently provided further evidence regarding the continued dominance of traditional media, but with an emphasis on national news.[82] Research assessing where individuals got their news regarding the 2008 election showed that 80% of consumers viewed newspapers or broadcast outlets as their main sources for election coverage (62% television, 12% newspapers, 8% radio), whereas only 15% of those sampled noted the Internet as their primary source.[83]

Though the Commission does not include any reference to these findings in the section reserved for discussion relevant to its decision to repeal the newspaper/broadcast cross-ownership rule, they do include such a reference in the background section, noting,

> [W]hile the marketplace is fragmenting and the revenue needed to maintain traditional media operations appears to be declining, the data also show that mainstream media continue to hold a major position in the marketplace, particularly in the markets for the provision of news and information. Commission-sponsored studies and those of third parties indicate that consumers still rely most heavily on broadcast television stations and daily newspapers for local news and other non-entertainment fare.[84]

To further refute its own argument, the FCC notes that when consumers do go to the Internet for news, most go to sites owned and operated by companies that also own newspapers and broadcast stations:

[78] NIELSEN MEDIA RESEARCH, FEDERAL COMMUNICATIONS COMMISSION TELEPHONE STUDY (2007), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A2.pdf.

[79] *Id.* at 91.

[80] Mark Cooper, Study 7: Media Usage: Traditional Outlets Still Dominate Local News And Information (nd), http://www.stopbigmedia.com/filing/part_3.pdf.

[81] Bob Papper, Radio-Television News Directors Foundation, 2006 Future Of News Survey (Sept. 2006), http://www.rtnda.org/pages/media_items/the-future-of-news-survey239.php

[82] Pew Research, Social Networking and Online Videos Take Off: Internet's Broader Role in Campaign (2008), http://people-press.org/reports/pdf/384.pdf.

[83] *Id.* at 4.

[84] R&O 2008, *supra* note 2, at 7.

"This appears to be due in part to the power of 'branding' in a competitive marketplace; existing newspapers and broadcasters enjoy the benefits of years of consumer familiarity and trust."[85] Various Pew studies support this claim,[86] as do the FCC's own data.[87] Understanding this empirical evidence is essential when considering whether Internet sources are functionally equivalent substitutes to traditional sources. By stating that Internet sources are substitutes of this kind, it is being suggested that these sources are distinctive, unique voices and are thus expanding upon the diversity of choices available to the consumer. This seems to be the insinuation of Commissioner McDowell when he refers to the fragmented marketplace which includes, "the Internet and its millions of websites and bloggers" as well as Commissioner Tate when she describes how the multiplicity of sources available online have seemingly alleviated all concerns specific to the newspaper/broadcast cross-ownership rule.[88] In essence, if ever there was evidence that the majority of consumers watched CNN, MSNBC or even a local Fox or ABC station *via* online feeds or if most readers read the *New York Times* or *USA Today* online, this certainly shouldn't justify a rule-change that would allow the media conglomerates affiliated with these sites to consolidate power and purchase independent outlets, as the balance of power would have endured the shift to the online world.

The conclusion to be drawn from the empirical evidence labels online news consumption as a supplementary activity, secondary to the

[85] *Id.*

[86] *See* Horrigan, *supra* note 68, at iv. *See also* Pew Research Center Biennial News Consumption Survey, Maturing Internet News Audience – Broader Than Deep: Online Papers Modestly Boost Newspaper Readership (July 30, 2006), http://people-press.org/reports/pdf/282.pdf.

[87] *See* NIELSEN, *supra* note 78, at 37.

[88] R&O 2008, *supra* note 2, at 119. One additional source of concern is the "aggregator site" – a Web site that "aggregates" or collects content from other sources (traditional or online) and then exhibits that content on its own site. Examples like the Drudge Report and the Huffington Post have editors who manually collect headlines, articles and media clips, while other sites use complicated algorithms to automatically aggregate materials from the web. *See* Emma Heald, *Google News and Newspaper Publishers: Allies or Enemies?,* Editorsweblog.org, Mar. 11, 2009, http://www.editorsweblog.org/analysis/2009/03/google_news_and_newspaper_publishers_all.php. While aggregator sites may be popular sources for news online, and thus seem to operate as functionally equivalent substitutes for traditional sources, many do not develop and produce original news, they merely organize and offer materials created by others (there are a few examples like Huffington Post that do offer some original content, however, this does not discount the extensive amount of content aggregated by these sites, likely in an attempt to attract readers). Therefore, even though aggregator sites are becoming increasingly popular, they are not functionally equivalent alternatives to traditional sources as they usually require the content from traditional sources to operate. The overuse of newswire stories by traditional outlets does complicate this issue.

primary consumption of news and information from traditional outlets.[89] As noted in one Pew study,

> The arrival of the internet as a news option has not changed this basic pattern of news consumption over the past decade. In 1996, 52% used multiple news sources on a typical day, 33% just one source, and 15% got no news – little different from today. This stability reflects the fact that the internet is, for the vast majority of its users, a supplement to other traditional news sources. Of the 23% who get news online on a given day, the vast majority also use other news sources; just 4% of the public relies on the web alone. And the average online news consumer spends far more time per day getting news on TV, newspaper and radio than they do getting news online.[90]

The claim that traditional media are losing market dominance remains unsubstantiated. Ironically, in another section of the R&O, the Commission contradicts its functional equivalency argument by acknowledging that "although the future landscape of the online media world is difficult to predict, for the foreseeable period ahead it appears that traditional media outlets will remain important sources of news and information, especially at the local level."[91]

The majority of consumers are still drawn to traditional sources of media, in part because of branding, but most importantly because "[n]ewspapers and, to a somewhat lesser extent, broadcast stations still continue to serve as the most organized, systematic gatherers of news and information in their communities."[92] Until it can be demonstrated that consumers are truly engaged in a multiplicity of functionally equivalent media choices, cross-ownership between a newspaper and a broadcast station that serve the same market will hinder the multiplicity of voices available, and therefore, is not in the public interest.

ARGUMENT TWO: CONVERGENCE

A second argument presented in the R&O suggests that cross-ownership between a newspaper and broadcast station leads to the production of more local news. This increase is tied to the concept of media convergence – what some describe as the process of resource and

[89] *See* Cooper, *supra* note 80, at 132; Mark Cooper, Study 8: The Internet And Local News And Information (nd), http://www.stopbigmedia.com/filing/part_3.pdf. *See also* Pew Research Center Biennial News Consumption Survey, *supra* note 86, at 2.

[90] Pew Research Center Biennial News Consumption Survey, *supra* note 86, at 11-12.

[91] R&O 2008, *supra* note 2, at 7.

[92] *Id.* at 21.

cost sharing[93] and others describe (in terms of news production) as the collaboration between broadcast, print and online journalism.[94]

In developing its argument, the FCC cites stakeholder comments from Media General, Gannett, Belo Corp. and other media conglomerates supporting convergence.[95] These companies claim that convergence (*via* cross-ownership) leads to the production of more local news content because it enables media companies to spread the high fixed costs of newsgathering across multiple businesses, as well as pool their creative resources in converged newsrooms.[96]

To further its argument, the FCC also cites three of its ten recently Commissioned studies:[97] Study 6, "The Effects of Cross-ownership on the Local Content and Political Slant of Local Television News;" Study 3, "Television Station Ownership Structure and the Quantity and Quality of TV Programming," and Study 4.1, "The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming." Each study addressed the relationship between cross-ownership, convergence and the production of news and information and yielded findings suggesting that cross-owned stations produce more news (local news in some instances) than non-cross-owned stations.[98]

Once each study was completed, each underwent a very public and somewhat unprecedented (for the FCC) peer-review process. The Commission selected the reviewers, had them review the studies and then posted the studies, the review invitation letters – with reviewer names

[93]*See* Laura K. Smith, Andrea H. Tanner & Sonya F. Duhe, *Convergence Concerns in Local Television: Conflicting Views from the Newsroom*, 51 J. OF BROAD. & ELEC. MEDIA 555 (2007).

[94]*See* Jane B. Singer, *Partnerships And Public Service: Normative Issues For Journalists In Converged Newsrooms,* 21 J. OF MEDIA ETHICS 30 (2006).

[95]R&O 2008*, supra* note 2, at 11-12, 19, 21, 24-25, 41, 45-47.

[96]The R&O reported:

> We continue to find evidence that cross-ownership in the largest markets can preserve the viability of newspapers without threatening diversity by allowing them to spread their operational costs across multiple platforms. In doing so, they can improve or increase the news offered by the broadcaster and the newspaper. Numerous media owners provide examples of cost savings and shared resources leading to more local coverage and better quality news coverage. Numerous parties cite to examples of the introduction of new or additional newscasts due to cross-owned combinations in markets. Cox offers examples of its local programming and community service efforts in markets where it owns same-market broadcast stations and newspapers. Media General notes that its six cross-owned stations provide between 20.5 and 32 hours of local news per week.

R&O 2008, *supra* note 2, at 23-24.

[97]While all ten studies dealt with ownership issues, the three studies cited placed specific emphasis on cross-ownership issues.

[98]The production of local news was a central focus of the FCC's inquiry but was only addressed by studies 3 and 6, study 4.1 did not distinguish between local and non-local news.

included – and the peer-reviews on its Web site.[99] In each of the letters sent to the reviewers it was noted that,

> OMB [Office of Management and Budget] requires that influential scientific information on which a Federal Agency relies in a rule-making proceeding be subject to peer review to enhance the quality and credibility of the government's scientific information.. . . In performing these peer reviews, we ask that you evaluate and comment on the theoretical and empirical merit of the information.[100]

After presenting some of the findings of the three studies and commenting on the various peer reviews, the FCC also discussed the findings of various empirical studies[101] that had been submitted to the Commission which opposed the Commission's argument.[102] The FCC

[99]For each of the three studies, Michelle Connolly, chief economist for the FCC, and Jonathan Levy, deputy chief economist, sent letters of request to the reviewers. Connolly sent requests to Dr. Matthew Gentzkow (Study 6); Dr. Phillip Leslie (Study 4.1) and Dr. Lisa M. George (Study 3). Levy sent requests to Dr. Kenneth Goldstein (Study 6 & Study 4.1) and Dr. Philip M. Napoli (Study 4.1 & Study 3). While all of the peer reviewers are among the top academics in their respective fields, the (somewhat cynical) suggestion that political and philosophical leanings could have been a factor in the choices of Connolly and Levy must be mentioned. Clearly, Connolly decided that economists were the best choice for the review process, while Levy moved towards the social and political sciences. Connolly and Levy did seemingly try to make the process as objective as possible however, noting in the request letters that the process would not be anonymous, and also that each party was free to comment on the potential conflicts of interest of the other parties involved.

[100]United States Government, Memorandum: Peer Review of Influential Scientific Information in the Media Ownership Proceeding (2007), *available at* http://www.fcc.gov/mb/peer_review/prreqstudy6a.pdf. This is one of the fifteen review requests sent by either Michelle Connolly or Jonathan Levy to the various peer reviewers for the ten studies.). Some of the letters, using identical language, also noted:

> You should consider, among other things,whether: (1) the methodology and assumptions employed are reasonable and technically correct; (2) whether the methodology and assumptions are consistent with accepted economic theory and econometric practices; (3) whether the data used are reasonable and of sufficient quality for purposes of the analysis; and (4) whether the conclusions, if any, follow from the analysis.

Id. at 1. In addition, in the footnotes:

> The OMB Bulletin states in relevant part: "Peer reviewers can make an important contribution by distinguishing scientific facts from professional judgments. Furthermore, where appropriate, reviewers should be asked to provide advice on the reasonableness of judgments made from the scientific evidence. However, the charge should make clear that the reviewers are not to provide advice on the policy." OMB Bulletin, 70 Fed. Reg. at 2669.

Id. at 1, n.3.

[101]One study was submitted by Consumer's Union and the other was a study by Michael Yan submitted by the McGannon Research Center entitled, "Newspaper/television Cross-Ownership and Local News and Public Affairs on Television Stations: An Empirical Analysis."

[102]The Consumer's Union study suggested that "newspaper/television combinations do not increase the total quantity of local news in the market." R&O 2008, *supra* note 2, at

evaluated the data on both sides[103] along with the criticism levied against the three commissioned studies and concluded that "[w]e recognize that there is disagreement in the studies. On balance, however, we conclude 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."[104]

FCC Study 6: "The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News"

In Study 6,[105] Jeffrey Milyo content analyzed three days of evening newscasts that aired the week before the 2006 general election.[106] The study assessed newscasts from all twenty-nine cross-owned stations in

28. The Yan study suggested, "[T]hat while cross-owned stations are more likely to have local news programming, they do not broadcast more local news than other stations that also provide local news, and that cross-ownership has no significant relationship with the presence or the quantity of local public affairs programming on commercial television." *Id.* at 28.

[103]The R&O critiqued the two submitted studies opposing the Commission's argument. Regarding the first study the Commission noted that "due to numerous difficulties with CU's analysis, we find that we cannot rely on its conclusions." *Id.* For example, "[I]t is not clear what measure CU used for total quantity of local news, but it appears that the measure is limited to broadcast television news . . . As a result, CU's measurements are incomplete, and we cannot rely upon them." *Id.* Furthermore, "CU statistical results do not show a statistically significant effect of cross-ownership. . . . Media General submits a critique of CU's criticisms that agrees with these findings." *Id.* Regarding the Yan study:

> NAA submits a statement by Professor Jerry Hausman disagreeing with results [noting that. . .] the Yan Study actually shows that cross-owned stations air considerably more minutes of local news . . . even when the sample size is effectively limited through Yan's econometric model to stations that air local news and when other variables are taken into account. . . . Yan's conclusion is misleading because the absence of statistical significance most likely stems only from the small size used in the Study, not from any lack of relationship between cross-ownership and the quantity of local news aired.

Id. at 28-29. The FCC also notes that two other peer reviewers agreed with Hausman's critique. *Id.*

[104]*Id. at* 29.

[105]Study 6 was described in the R&O as follows:

> Three Media Ownership Studies analyzed the effects of newspaper/broadcast cross-ownership on television news coverage and local content. Study 6 concluded that "local television newscasts for cross-owned stations contain on average about 1-2 minutes more news coverage overall, or 4 to 8 percent more than the average for non-cross-owned stations." The author further concluded that newspaper cross-ownership is also "significantly and positively associated with both local news coverage and local political news coverage," finding that cross-owned stations show 7-10 percent more local news than do non-cross-owned stations. The study author also found that on average, cross-owned stations broadcast about 25 percent more coverage of state and local politics. The author also generally noted that newspaper/broadcast cross-ownership is associated with more candidate coverage, more candidate speaking time and more coverage of opinion polls.

R&O 2008, *supra* note 2, at 25-26.

[106]Jeffrey Milyo, The Effects Of Cross-Ownership On The Local Content And Political Slant Of Local Television News (Study 6) (2007), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A7.pdf

the United States and from a number of the non-cross-owned stations that compete in the same markets. The findings suggest that television stations cross-owned with newspapers present 4-8% more news than non cross-owned stations, 7–10% more local news and 25% more coverage of state and local politics.[107]

Peer Review

The first peer review was conducted by Matthew Gentzkow from the University of Chicago.[108] While he criticized the study for only looking at three days of news right before an election, he noted that the "data are reasonable and appear to be of very high quality."[109]

The second peer review was conducted by Kenneth Goldstein from the University of Wisconsin-Madison, Matthew Hale from Seton Hall Universtiy and Martin Kaplan from the University of Southern California.[110] The reviewers began quite differently from Gentzkow, noting that overall, the empirical data "are so limited that the study's conclusions do not and cannot possess the reasonable level of confidence necessary to provide policy makers with useful evidence on which to base their regulatory decisions."[111] The reviewers called the sample "inherently flawed."[112] They noted that numerous studies have demonstrated that news coverage before an election is markedly different from the rest of the year – raising issues regarding the representative nature of the sample—and that only reviewing three days of one type of newscast compounded this problem.[113] With regard to the findings, the reviewers harshly criticized the study for emphasizing weak or statistically insignificant findings that supported cross-ownership, while almost ignoring stronger, statistically significant findings that argued against it. They noted that four of the five regression models displayed no statistically significant increase in overall news by cross-owned stations and specific to the newspaper/broadcast cross-ownership rule, when sports and weather were taken out of the analysis, there was no statistically significant increase in local news associated with cross-owned newspapers under any of the study's models. Stated quite bluntly, the reviewers called the study's argument "at best, arbitrary; at worst, misleading."[114]

[107]*Id*. at title page.

[108]Matthew Gentzkow, Peer Review Evaluation: FCC Media Ownership Study #6 (2007), http://www.fcc.gov/mb/peer_review/prstudy6.pdf.

[109]*Id.* at 2.

[110]Kenneth Goldstein, Matthew Hale & Martin Kaplan, Invited Peer Review of FCC Media Ownership Study 6 (2007), http://www.fcc.gov/mb/peer_review/prstudy6a.pdf

[111]*Id.* at 1.

[112]*Id.*

[113]*Id.* at 1-3.

[114]*Id.* at 4.

Assessment of Study 6 and the Peer Review

While Goldstein, Hale and Kaplan's comments regarding the intent of the author are particularly harsh, their analysis (for the most part) is correct. Aside from the limitations of the methodology, the findings are certainly far from conclusive. As Milyo states over and over in the results section (but oddly not in the abstract), most of the initial data analysis lacks statistical significance.[115] For companies cross-owned with a newspaper, four of the five models show no statistically significant increase in total news or local news (when sports and weather are included), and none of the models show significant increases in state and local political coverage or local news when sports and weather are excluded.[116]

So if most of the primary data were insignificant, how was the author able to claim in the abstract that television stations cross-owned with newspapers produce 4-8% more overall news, 7–10% more local news and 25% more state and local political coverage? In short, he reworked the analysis. In a table placed at the back of the fifty-six-page document (Table A3 was the twenty-second of the twenty-four tables presented), Milyo constructed "pooled models" for two of the five initial models (his description of this analysis is very unclear in the document) and was able to produce statistical significance for total news, local news and state and local politics. The three results noted in the abstract were all taken from Table A3.[117] (It must be emphasized that these results figured very prominently in the R&O, being both the first non-footnoted reference to the Commissioned studies and the first and most extensive reference to the three studies cited in support of the convergence argument.)

It is troubling that Milyo, claiming to be objective, would not only frame his abstract in such a way as to make it seem like the majority of his findings were supported, but that he would also make the effort to tease-out statistical significance in support of the FCC's second argument (coincidentally providing support for the eventual rule-change) when strong statistical significance was found in other areas of the initial analysis. For example, radio cross-ownership was often associated with considerably less news coverage (in some instances upwards of seven minutes less).[118] These findings were strongly significant in all of the models assessing local news coverage (sports and weather excluded) and coverage of state and local politics.[119] Of course, these findings –

[115]The "initial data analysis" refers to Milyo's initial regression models; he later pooled the data from these models to produce significant findings.

[116]"Total news" seemingly requires that sports and weather are included, likely the reason that there isn't a "total news" analysis without these elements.

[117]Milyo, *supra* note 106, at title page, 19, 20, 21, 54.

[118]*Id.* at 17-18, 35.

[119]*Id.* at 37-38.

which did not need teasing-out – were excluded from the abstract. It is also confusing why the initial peer-review by Matthew Gentzkow first praised the data analysis, and then attempted to replicate most of the statistical findings except those in Table A3. Nevertheless, the fact remains that the study's findings were far from conclusive. That Milyo was able to rework the analysis to produce some statistical significance does little to negate the lack of statistical significance produced by the study's initial models. No matter how Milyo presented the abstract, the results of Study 6 were so inconclusive that they contributed very little to support the FCC's second argument. This point is essential to note, because in terms of support for the eventual rule-change, Milyo produced what is by far the FCC's most valuable study – likely why the data was displayed so prominently in the R&O. Of the three relevant studies, Study 6 was the only content analysis, the only study that looked at actual television content. The other studies (discussed momentarily) suffered from extensive methodological problems, primarily because the authors chose to analyze television schedules, limiting their ability to comment empirically on the amount of programming that actually aired.[120] This certainly makes Milyo's study the backbone of what is perhaps the FCC's strongest argument. It must be clarified that the current analysis is not suggesting that the findings of Milyo's study are entirely without merit; rather, the assertion being made here is that the findings are certainly far from conclusive, and thus should hardly be the basis upon which to substantiate a central argument.

FCC Study 4.1: "The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming"

Study 4[121] was a review of scheduled programming that aired between 2002 and 2005 on approximately 6,700 television stations.[122] The

[120]When performing empirical analyses for the purpose of comparing the number of seconds of local programming produced by stations with differing ownership structures, the choice to look at scheduled programming makes it almost impossible to assess how much actual local programming was produced, imposing a tremendous limitation on the study's validity.

[121]Study 4.1 was described in the R&O as follows:

> Study 4.1 collected data on the news and public affairs programming provided by television stations and analyzed the relationship between the quantity of such programming and the ownership structure of each television station. After examining the programming of approximately 1700 stations between 2002 and 2005, the author concluded that crossowned stations provided 11 percent (18 minutes) more news programming per day than other stations."

FCC, R&O 2008, *supra* note 2, at 27-28.

[122]Daniel Shiman, FCC Media Study 4: News Operations: Section I: The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming (2007), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A5.pdf

findings suggested that stations cross-owned with newspapers provided 11% (eighteen minutes) more news programming each day than non-cross-owned stations.

Peer Review

Goldstein's group[123] reviewed this study as well and criticized the choice to review scheduled news programming as opposed to actual news programming – findings regarding plans as opposed to action seemed flawed at the outset. Goldstein, Hale and Kaplan also criticized the decision to include all minutes devoted to each news block (including advertising, sports, weather, teasers and bumpers) in the total minutes analyzed. They noted that there was also no distinction made between local and non-local news in the minutes analyzed. Thus Shiman had no way of knowing how much local news actually aired on any of the channels: "It treats minutes of national newsmagazine programming and nightly network news the same as minutes spent on local school board races or hospital closings."[124] This point was also made by the two other reviewers, Philip Napoli of Fordham University[125] and Phillip Leslie of Stanford University.[126] In terms of the data analysis, Goldstein's group noted that "there is little done. . . to verify that the results are robust across different specifications and different time periods"[127] and that "given the nature of the dataset. . . standard errors should be calculated allowing for clustering. Failure to do so. . . may lead to conclusions that particular relationships are statistically significant when, in fact, they are not."[128] The group also noted that in comparison to the findings presented, the study downplayed other, stronger findings that conflicted with the overall argument that cross-ownership leads to more local news.[129]

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[123]Kenneth Goldstein, Matthew Hale & Martin Kaplan, Invited Peer Review Of FCC Media Ownership Study 4 Section 1 (2007), http://www.fcc.gov/mb/peer_review/prstudy4.1.pdf [hereinafter Goldstein Study 4.1 Review].

[124]*Id.* at 2.

[125]Philip M. Napoli, Peer Review Of FCC Media Ownership Study #4-1(2007), http://www.fcc.gov/mb/peer_review/prstudy4.1a.pdf [hereinafter Napoli Study 4.1 Review].

[126]Phillip Leslie, Review of "The Impact of Ownership Structure of Television Stations' News and Public Affairs Programming" by Daniel Shiman (2007), http://www.fcc.gov/mb/peer_review/prstudy4.pdf [hereinafter Leslie's Shiman Review].

[127]Goldstein Study 4.1 Review, *supra* note 123, at 4.

[128]*Id.*

[129]Specifically they note, "The principal finding emphasized by the study is that duopolies lead to increased news programming. Yet the study's own data . . . lead to two statistically significant conclusions that contradict this highlighted finding – conclusions which are neither mentioned in the study's Abstract, nor discussed except glancingly in the text of the report. These inconvenient findings are (1) that markets

Napoli's review began by noting that the statistical analyses and the amount of data gathered was seemingly a great improvement upon previous research in the area. He stated that he was "disappointed" that the study did not distinguish between local and non-local programming due to the extensive nature of the analysis.[130] The remainder of the review was somewhat critical of various elements of the data and analysis; for example, he noted that sampling from a "sweeps" period could perhaps make the data unrepresentative of the programming aired the rest of the year. Napoli also noted how the choice to analyze scheduled programming was also concerning because the TMS database[131] has been known to construct their labels too broadly.[132] In his review of study 3 (which also used the TMS database), he described the problem:

> [I]n a study of local public affairs programming, we once found a local station's program called "10's" listed as Public Affairs, but when we called the station to determine the nature of the program, it was described to us as "our local hot body contest." So, experience has taught me that some sort of verification process to assess the extent to which the programs are being coded correctly by TMS is useful.[133]

While Leslie's review was also critical of the combination of local and non-local news (in addition to a number of other specific areas of the data collection), he noted, "Despite these limitations the data are valuable and should be taken seriously— these aspects do not undermine the analysis, but they do lead me to question the broader relevance of the findings."[134] Throughout the remainder of the review, Leslie offered various suggestions for improving upon the methodology and data analysis, and concluded that "overall, the conclusions of the paper are substantiated by the analysis. However, the findings are puzzling in some

with more unrelated stations – i.e., markets with fewer or no duopolies – air *more* news minutes than markets with more duopolies; and (2) that the presence of additional unrelated stations in a market *increases* the amount of public affairs minutes, while the presence of duopolies *decreases* public affairs programming." *Id.* at 5.

[130] Napoli Study 4.1 Review*, supra* note 125, at 1.

[131] The Tribune Media Services (TMS) program schedule media database.

[132] Napoli Study 4.1 Review*, supra* note 125, at 3. Though he did note:

> I have used this data source a number of times and have found it to be as thorough and reliable a data source available in terms of local television program schedule information. . . . misclassifications in the program categorizations fortunately seem to happen relatively infrequently, so I'm not calling into question the use of the TMS database.

Id. at 3.

[133] Philip M. Napoli, Peer Review Of FCC Media Ownership Study #3, 3-4 (2007), http://www.fcc.gov/mb/peer_review/prstudy3a.pdf

[134] Leslie's Shiman Review*, supra* note 126, at 2.

respects, and the magnitudes of several of the estimates are sensitive to alternative specifications."[135]

Assessment of Study 4.1 and the Peer Review

Whether the findings of study 4.1 were significant or not, the extensive methodological problems the study faced cannot be discounted as they cast considerable doubt on the validity of the findings. The notion that non-news minutes (including advertising) were included in the conceptualization of news content is highly problematic, especially when analyses made comparisons based upon every *second* of news content produced – this was a point advanced to varying degrees by all three peer review groups. Above all, however, whether the data collection and analysis were performed correctly or not, it cannot be ignored that the eventual findings of the study provided little empirical support to the FCC's convergence argument. Study 4.1 addressed the relationship between ownership structure and *total* news content—it did not address *local* news content in any way. This is essential to note as all three studies were introduced in the R&O by the following statement:

> On balance, we believe the evidence suggests that some newspaper/broadcast cross-ownership combinations can enhance localism. Three Media Ownership Studies analyzed the effects of newspaper/broadcast cross-ownership on television news coverage and local content.[136]

As the FCC's convergence argument focuses specifically on the relationship between cross-ownership and the production of local news content, the fact that study 4.1 made no claim regarding this relationship suggests that that the study's findings did little to advance the FCC's case.

FCC Study 3: "Television Station Ownership Structure and the Quantity and Quality of TV Programming"

Study 3[137] by Gregory S. Crawford utilized the same TMS database employed in study 4.1 and analyzed the scheduled programming for more than 1,500 full-power broadcast television stations in the United

[135] *Id.* at 3.
[136] R&O 2008, *supra* note 2, at 25.
[137] Study 3 was described in the R&O as follows: "Study 3 analyzed the relationship between the ownership structure of television stations and quantity and quality of television programming between 2003 and 2006, finding that cross-owned television stations broadcast (approximately 3.0 percentage points) more local news programming." *Id.* at 26-27.

States from 2003 through 2006.[138] Among the findings relevant to this inquiry, the study concluded that newspaper cross-ownership leads to an increase in local news. It also noted, however, that while locally owned stations offer less local news, "this result disappears when controlling for other features of the ownership structure."[139] In some instances, ownership by a corporate parent was associated with an increase in local news, while in other instances it was associated with less.[140] Lastly, locally-owned stations aired more public affairs programming than cross-owned stations.

Peer Review

The peer reviews of this study were performed by Lisa George of Hunter College[141] and Philip Napoli.[142] George began by noting that "[o]verall the study considers an interesting question with appropriate data and methods and should ultimately prove useful for policy purposes."[143] She follows with a number of criticisms. Relevant to this inquiry, she notes first that the study does not "include specifications that would demonstrate the robustness, or reveal the fragility, of regression results."[144] George also notes that it would have been helpful for the author to include information on the data distributions in order to fully evaluate the quality of the results. George also would have preferred a more detailed description of the ownership variables and the methods of analysis; for example, she noted that the controls for "parent corporation" were not very clear.[145]

Napoli began by noting that while the study provided another contribution to an area lacking research, it suffered from numerous problems. First, the study was not properly grounded in the previous literature. Napoli again presented concerns regarding the labels used in the TMS

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[138]Gregory S. Crawford, Television Station Ownership Structure and the Quantity and Quality of TV Programming "Study 3" (2007), *available at* http://www.hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A4.pdf

[139]*Id.* at 23.

[140]The author notes, "The results. . . with DMA dummies suggest television stations owned by corporate parents with larger annual revenue offer more local news. . . . By contrast, using channel fixed effects, an increase in the size of a corporate parent's annual revenue is correlated with a decrease in the amount of local news." *Id.* at 23.

[141]Lisa M. George, Peer Review Of FCC Media Ownership (#3) (2007), http://www.fcc.gov/mb/peer_review/prstudy3.pdf [hereinafter Lisa Study 3 Review]

[142]Philip M. Napoli, PEER REVIEW OF FCC MEDIA OWNERSHIP STUDY #3 (2007), http://www.fcc.gov/mb/peer_review/prstudy3a.pdf [hereinafter Napoli Study 3 Review]

[143]Lisa Study 3 Review*, supra* note 141, at 1.

[144]*Id.* at 1.

[145]*Id.* at 5.

database as well as concerns regarding the use of data from a "sweeps" period.[146] He wrote:

> The biggest challenge that this study faces – and one that I'm not sure it successfully overcomes – involves substantial limitations in the availability of the data necessary to conduct the kinds of analyses attempted in this study. As the author makes quite clear at various points, there are a number of analytical compromises that needed to be made to accommodate varies [sic] idiosyncrasies and gaps in the available data.[147]

Napoli also wrote that he found it odd that the author differentiated between local news and non-local news, but not local public affairs programming and non-public affairs programming. He also was critical of the author's over-emphasis on the findings that demonstrated cross-ownership being associated with more local news as other conflicting findings were seemingly just as compelling, noting, "It wasn't clear to me what makes this finding stronger than any of the others, particularly since Newspaper-TV cross-ownership is not a significant independent variable when DMA and Channel fixed effects are simultaneously taken into consideration."[148]

Assessment of Study 3 and the Peer Review

In addition to the points raised by the peer review, Study 3 suffered from many of the same methodological problems as study 4.1, as it also wasn't a content analysis, and chose to analyze schedules instead of actual programming. These issues cast doubt on all of the findings as the researcher clearly valued quantity over definitive accuracy. Crawford did find that newspaper cross-ownership leads to an increase in local news in some instances; however, he also found that in other instances, consolidated media companies provide less local news. Crawford also found that locally-owned television stations provide more public affairs programming than cross-owned stations. Whether these results were compromised by methodological issues, when taken together, they provide little empirical support to the FCC's second argument, primarily because the findings support both sides of the issue.

After reviewing the three Commissioned FCC studies cited to support the convergence argument, perhaps taken together, the small advances might have contributed some support to the Commission's case. Considering that each of the studies suffered from extensive methodological

[146]Napoli Study 3 Review, *supra* note 133, at 2, 3, 4.
[147]*Id.* at 1.
[148]*Id.* at 5.

problems, however, and in the end only produced mediocre findings, it remains unclear whether convergence (*via* cross-ownership) leads to more local news, and as a result, the FCC's second argument remains unsubstantiated.

Additional Research

While the new FCC studies failed to yield the strongest of conclusions, other studies have demonstrated empirically, with statistically significant results, that consolidation of ownership in varying forms does not lead to an increase in local news content.[149] For example, a recent study found that news departments operated by a small media group produced more local news and more locally produced video than large chain-based broadcasting groups.[150] This study presented similar findings to the now infamous "hidden" FCC report[151] that found that local ownership resulted in almost five and a half more minutes of local news and over three minutes more of local on-location news.[152] Recent research by Philip Napoli and Michael Yan has demonstrated that duopolies have been linked to a decrease in the amount of local

[149]In the R&O Consumers Union and McGannon Research each submitted studies to the FCC that demonstrated that cross-ownership does not lead to the production of more local news; however, both were heavily criticized by the Commission in the R&O. R&O 2008, *supra* note 2, at 28-29.

[150]David K. Scott, Robert H. Gobetz & Mike Chanslor, Chain Versus Independent Television Station Ownership: Toward An Investment Model Of Commitment To Local News Quality, 59 COMM. STUDIES 84 (2008).

[151]The "hidden" report was a 2004 study commissioned by the FCC which demonstrated that ownership concentration was associated with less local television news. Adam Candeub, associate professor of law at Michigan State University, "said senior managers at the agency ordered that 'every last piece' of the report be destroyed. 'The whole project was just stopped - end of discussion,' he said. Candeub was a lawyer in the FCC's Media Bureau at the time." Associated Press (John Dunbar), *Media Study Was Ordered Destroyed, Lawyer Says*, USA TODAY, Sept. 14, 2006, *available at* http://www.usatoday.com/life/television/news/2006-09-14-media-study_x.htm. The study was later leaked to Sen. Barbara Boxer (D-Calif) who brought the study to the public's attention at Chairman Martin's Senate confirmation hearing. Martin denied any knowledge of the study. *See* Federal Communications Commission, Do Local Owners Deliver More Localism? Some Evidence From Local Broadcast News (Working Paper) (2004), hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267448A1.pdf.

[152]This study was peer-reviewed for the FCC by Dr. Matthew Shum, professor of economics, Johns Hopkins University. *See* Matthew Shum, Peer Review Of 'Do Local Owners Deliver More Localism? Some Evidence From Local Broadcast News' (nd), http://www.fcc.gov/mb/peer_review/docs/prtpshum.pdf. Shum was pleased with the data collected for the study. He did offer a few brief notes on how the analyses could have been improved - specifically he would have liked additional dummy variables included as controls; however, he noted the nature of the data would make this difficult. Shum concluded that the main conclusions do follow from the analysis. *Id.* at 1.

news programming.[153] In a separate study, they also demonstrated that ownership by one of the big four broadcast networks has been linked to a considerable decrease in the amount of televised local public affairs programming.[154] It should be noted that both studies by Napoli and Yan utilized the same TMS database the FCC was criticized for using in studies 3 and 4.1. While this suggests that the findings of the Napoli and Yan studies are equally as questionable due to the methodologies employed, Napoli and Yan conducted a verification process for every programming label noted "public affairs," perhaps attributing credibility to their research the others lacked.

Research addressing the relationship between newspaper/television cross-ownership and the production of local programming remains inconclusive. In fact the FCC noted in the R&O that "we recognize that there is disagreement in the studies."[155] Nevertheless, the FCC still concluded that "on balance... 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,"[156] and again, presented an unsubstantiated argument to justify its decision to modify the newspaper/broadcast cross-ownership rule.

ARGUMENT THREE: INDUSTRY SUSTAINABILITY

To assert the argument that the modification must be made in order to help save the newspaper industry, the R&O presents various forms of empirical data describing how the newspaper industry is struggling. The FCC notes that even though the population in the United States has increased more than 80% in the last fifty years, the number of daily newspapers and their readership have decreased considerably. The Commission, citing Department of Commerce data, reported that in 1975 more than 1,756 dailies were in operation with a total circulation of 60.7 million readers, compared to 1,452 dailies with a circulation of 53.3 million in 2005.[157] Furthermore,

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[153] Philip M. Napoli & Michael Z. Yan, *Media Ownership Regulations and Local News Programming on Broadcast Television: An Empirical Analysis,* 51 J. OF BROAD. & ELEC. MEDIA 39 (2007).

[154] Michael Yan & Philip M. Napoli, Market Structure, Station Ownership, and Local Public Affairs Programming on Local Broadcast Television (Oct. 2004) (paper presented at the 32d annual Telecommunication Policy Research Conference. Arlington, Va.), *available at* http://web.si.umich.edu/tprc/papers/2004/374/tprc2004_yan.pdf.

[155] R&O 2008, *supra* note 2, at 29.

[156] *Id.*

[157] *Id.* at 17.

> In the six-month period ending September 2007, the Audit Bureau of Circulations shows further declines in circulation for 700 daily newspapers across the country. Of the top 25. . . four showed gains. Circulation for newspapers such as *The New York Times, The Washington Post, The Denver Post*, and *The Boston Globe* showed declines ranging from 3.2 percent to 10 percent.[158]

The FCC follows this point by suggesting that these economic difficulties can be linked to the "sharp reduction in the number of professional journalists employed in the newspaper industry,"[159] which they see as detrimental to the newsgathering and dissemination function of the newspaper industry and thus to the public interest. The Commission then provides an extensive list of newspaper companies that have recently laid-off newsroom staff,[160] and discusses how the decline in circulation and the rise of Internet competition has led to a reduction in advertising revenues for newspapers – a problem that is coupled with the economic concerns associated with increased operational costs.[161]

The Commission states: "In light of the important role and current state of the newspaper industry, it is therefore critical that our rules do not unduly stifle efficient combinations that are likely to preserve or increase the amount and quality of local news available to consumers *via* newspaper and broadcast outlets."[162]

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[158] *Id.*

[159] *Id.*

[160] For example, Gannett announced in November 2007 that it would cut 45 newsroom positions, about 9% of its *USA Today* staff, in response to a decline in revenue of 6.6% over the previous year. NAA also noted additional cuts for 2007: *The Boston Globe,* twenty-four newsroom staff; *The Minneapolis Star-Tribune,* fifty newsroom staff; *The San-Jose Mercury News,* 17% newsroom reduction; *Los Angeles Times,* seventy newsroom staff; *The San Francisco Chronicle,* 25% newsroom reduction or about 100 jobs. *Id.* at 18.

[161] The Commission notes:

> The decline in newspapers' print circulation has, . . affected the advertising dollars that keep newspapers alive. Advertising revenues, which currently account for slightly more than 80 percent of the industry's total revenues. . . leveled off after 2000. Unfortunately, experts believe that the future looks worse.. . . The Internet has also had a particularly noteworthy effect in taking away advertising from newspapers, particularly classified advertising. Advertising oriented websites such as craigslist, eBay, and Zillow have siphoned off a large amount of revenue that newspapers. . . have counted on for decades. . . . At the same time newspaper operational expenses have continued to rise.. . . [T[otal input costs rose by 6.3 percent in the eight years from 1992 to 2000 and by 15.6 percent in the five years from 2000 to 2005.

Id. at 19, 20.

[162] *Id.* at 21.

The comments of industry stakeholders who claim to have the capability to produce more local news as a result of convergence were included to support this assertion.[163]

REBUTTAL TO THE INDUSTRY SUSTAINABILITY ARGUMENT

As noted in response to the convergence argument, little empirical evidence exists demonstrating that cross-ownership leads to the production of more local news, and, thus, the FCC's argument in this case can only cling to the admissions of industry stakeholders to support this assertion.

From another perspective, whether it is ever demonstrated empirically that convergence can help save the newspaper industry, where is there a mandate which specifies that the FCC is responsible for the fate of the newspaper industry? Indeed, there is no such mandate; the Commission's role is to protect the public interest, not to get involved in the market to protect private interests. As Commissioner Copps has said, "We are not the Federal Newspaper Commission."[164]

Contrary to FCC's claims, while perhaps profit margins are not as large as they once were, the newspaper industry is still reporting profit margins of considerable size – upwards of 20% around the time the R&O was adopted – "exceeding the average of S&P 500 companies."[165] Though there are indications that interest in the traditional newspaper is declining,[166] Commissioner Copps points out that "the death of the traditional news business is often greatly exaggerated."[167] In a letter to the editor of the *New York Times* printed in July of 2007, John F. Sturm, the president of the Newspaper Association of America noted

[163]For example, as noted in the R&O:

> Numerous parties cite to examples of the introduction of new or additional newscasts due to cross-owned combinations in markets. Cox offers examples of its local programming and community service efforts in markets where it owns same-market broadcast stations and newspapers. Media General notes that its six cross-owned stations provide between 20.5 and 32 hours of local news per week. Media General adds that newspapers are similarly launching hyper-local initiatives. . . . Gannett points to its critically acclaimed Phoenix combination, which provides more and better local news, including lengthy investigative reports, while retaining separate editorial viewpoints. In markets in which Belo currently owns and operates television duopolies, including Seattle-Tacoma and Phoenix, it cites to the introduction of daily newscasts for the first time on its stations.

Id. at 24.

[164]Frank Ahrens, *FCC Chief Rejects Call to Delay Vote: Senators Accuse Martin of Forcing Cross-Ownership Rule,* WASH. POST, Dec. 14, 2007, at D02, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/12/13/AR2007121301876.html.

[165]R&O 2008, *supra* note 2, at 117.

[166]In addition to circulation concerns, there is considerable evidence that newspaper advertising revenue is declining. *See also supra* note 161.

[167]R&0 2008, *supra* note 2, at 109.

that "the reality is that newspaper companies remain solidly profitable and significant generators of free cash flow."[168]

Of course, in the two years that have passed since Sturm's comment, things have certainly changed. In recent months media conglomerates including the Tribune Company, the Sun-Times Media Group and the Journal Register Company have filed for Chapter 11 bankruptcy protection,[169] evidence that the recent economic downturn has hurt the newspaper industry. It would be an oversimplification of the situation however, to suggest that the trouble these large, often overstretched media conglomerates are currently having paying off their debts is proof that the newspaper industry as a whole is near collapse.[170] To begin with, most newspapers in the United States are still viable businesses:

> "Not a lot of papers are operating at a loss," said John Morton, the veteran industry analyst. "There are roughly 1,400 daily newspapers. We only hear about the top markets. That leaves at least 1,300 papers out there." Publicly owned newspapers averaged an operating profit of 10.8% in the first three quarters of last year.[171]

Indeed, the recent Chapter 11 filings in most instances seemingly have less to do with problems associated with "plummeting advertising revenue" and more to do with the overzealous business strategies of their owners who have recently seen their stock prices plunge.[172] This certainly includes Sam Zell who purchased Tribune Company for $8.2 billion while only investing $315 million in equity mere months before the economic collapse.[173] Furthermore, the situation a company is in when it falls into bankruptcy protection is quite different from the situation that exists when a company must be liquidated. Evidence suggests that the Tribune Company in particular will likely weather the economic storm.[174]

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[168]John F. Sturm, Letter to the Editor, *Healthy Newspapers,* N.Y. TIMES, July 2, 2007, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C04E6DA143EF931A35754C0A9619C8B63.

[169]*See* Richard Pérez-Peña, *Sun-Times Files For Bankruptcy*, N.Y. TIMES, Apr. 1, 2009, at B7, *available at* http://www.nytimes.com/2009/04/01/business/media/01paper.html?ref=media; Press Release, Tribune Company, Tribune Company To Voluntarily Restructure Debt Under Chapter 11 (2008), *available at* http://www.tribune.com/pressroom/releases/2008/12082008.html.

[170]*See* Nat Ives, *It's Not Newspapers in Peril; It's Their Owners,* ADVERTISING AGE, Feb. 23, 2009, at 3-4.

[171]*Id.* at 3.

[172]Phil Rosenthal & Michael Oneal, *Tribune Co. Files for Bankruptcy Protection,* CHICAGO TRIBUNE, Dec. 9, 2008, *available at* http://archives.chicagotribune.com/2008/dec/09/business/chi-081208tribune-bankruptcy.

[173]*Id.* at ¶7.

[174]As noted in a Tribune Company press release:

Another essential point to consider — emphasized by the NAA president almost two years ago — is the reality that newspapers are increasingly making the successful transition online in an attempt to regain the revenues of the past. The NAA Web site recently reported Nielsen data showing that newspaper Web sites received more than 3.7 billion total hits in January of 2009 (74.8 million unique hits), up from 3.2 billion total hits (66.8 million unique hits) in January of 2008.[175] In fact, the FCC alludes to this point in the R&O, noting,

> Some evidence suggests that while television originally diverted audiences from radio and newspapers, the Internet and handheld devices may be helping to bring audiences back to these traditional forms of media. In fact, unique visitors to newspaper websites have increased over the past several years from 41 million in January 2004, to 43 million in January 2005, 57 million in January 2006, and 59 million in January 2007.[176]

Above all however, whether the traditional newspaper industry remains a viable business or not, as Commissioner Copps noted regarding the irrelevance of this issue to the FCC's mandate, "as Member after Member (sic) Congress has reminded us, our job is not to ensure that newspapers are profitable — which they mostly are. Our job is to protect the principles of localism, diversity and competition in our media."[177]

ARGUMENT FOUR: OWNERSHIP AND VIEWPOINT

Argument four asserted that "the ban is not necessary on grounds of diversity because of insufficient evidence that ownership influences viewpoint."[178] To argue this point in the R&O, the FCC began by stating that it supported the same argument presented in 2003 that was later affirmed by the Third Circuit Court.[179] The argument is also furthered in

> Tribune Company today announced that it is voluntarily restructuring its debt obligations under the protection of Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. The company will continue to operate its media businesses during the restructuring, including publishing its newspapers and running its television stations and interactive properties without interruption, and has sufficient cash to do so.

Press Release, Tribune Company, Tribune Company To Voluntarily Restructure Debt Under Chapter 11 ¶1 (2008), *available at* http://www.tribune.com/pressroom/releases/2008/12082008.html.

[175] Newspaper Association of America, Newspaper Websites (2008), http://www.naa.org/TrendsandNumbers/Newspaper-Websites.aspx.

[176] R&O 2008, *supra* note 2, at 16-17.

[177] *Id.* at 109.

[178] *Id.* at 12.

[179] *See* Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004).

the R&O by citing of stakeholder comments.[180] The NAA and conglomerates including Belo Corp. and Media General assert that cross-owned companies maintain independent production and editorial teams and, thus, are capable of ensuring a diversity of independent voices within their organization.[181] The R&O provides little else to support the argument, citing no research.

REBUTTAL TO THE OWNERSHIP AND VIEWPOINT ARGUMENT

Contrary to the Commission's argument, considerable empirical evidence exists that has repeatedly demonstrated that ownership can indeed influence viewpoint. In fact, though it asserted in 2003 that there was insufficient empirical evidence to support the newspaper/ broadcast cross-ownership rule in its present form, the Commission acknowledged:

> [T]he balance of the evidence, although not conclusive, appears to support our conclusion that outlet ownership can be presumed to affect the viewpoints expressed on that outlet. We therefore continue to believe that broadcast ownership limits are necessary to preserve and promote viewpoint diversity. A larger number of independent owners will tend to generate a wider array of viewpoints in the media than would a comparatively smaller number of owners. We believe this proposition, even without the benefit of conclusive empirical evidence, remains sound.[182]

Empirical research addressing this issue has assessed the effect of ownership on the viewpoint of single outlets as well as cross-owned outlets. Regarding the effect on the viewpoint of single outlets, in *Metro Broadcasting, Inc. v. FCC*[183] the Supreme Court asserted that "there is a nexus between minority ownership and broadcasting diversity"[184] and that this point is corroborated by a considerable amount of empirical evidence, noting that "evidence suggests that an owner's minority status

[180]R&O 2008, *supra* note 2, at 24, 30.

[181]For example, Media General reports that its "various news and information platforms, regardless of their method of disseminating content, operate separately in developing their content." *Id*. at 30. The NAA comments provided "examples of programming and viewpoint diversity to argue that evidence reinforces the Commission's prior conclusion that newspaper/broadcast combinations do not speak with a single coordinated voice." *Id*.

[182]R&O/NOPR 2003*, supra* note 21, at 11. Later in the R&O, however, the FCC presented an opposing statement: "[T]he record does not contain data or other information demonstrating that common ownership of broadcast stations and daily newspapers in the same community poses a widespread threat to diversity of viewpoint or programming." *Id*. at 150.

[183]497 U.S. 547 (1990)

[184]*Id. at* 580.

influences the selection of topics for news coverage and the presentation of editorial viewpoint, especially on matters of particular concern to minorities."[185]

The Court cited a Congressional Research Service study that assessed 8,720 broadcast radio and television stations and found that "while only 20 percent of stations with no Afro-American ownership responded that they attempted to direct programming at Afro-American audiences, 65 percent of stations with Afro-American ownership reported that they did so."[186] The Court also referred to a University of Wisconsin-Madison study which found that radio stations targeted at African Americans that were owned by African Americans had more diverse playlists than similar stations owned by non-African Americans,[187] and to a study presented at the Fifteenth Annual Howard University Communications Conference that demonstrated that minority ownership can have an impact on the types of images presented in local television news.[188] Referring to another study from the University of Massachusetts – Boston the Court also noted that "minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities."[189]

Empirical research has also addressed the impact of ownership on the viewpoint diversity of cross-owned outlets. For example, specific to newspaper/broadcast combinations, for the review which preceded the 2003 R&O, an FCC commissioned study by David Pritchard[190] examined the content of ten cross-owned companies (newspaper/television only) and found that in half of the cases the coverage by a company's television station was similar to that of their cross-owned newspaper.[191] In another study which preceded the 2003 R&O, Martin Gilens

[185]*Id. at* 580-81.

[186]*Id. at* 580 (citing Congressional Research Service, Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus? (June 29, 1988)).

[187]*Id.* (citing J.P. Jeter, A Comparative Analysis of the Programming Practices of Black-Owned Black-Oriented Radio Stations and White-Owned Black-Oriented Radio Stations 130, 139 (1981)). *See also* M.L. Spitzer, Justifying Minority Preferences in Broadcasting, California Institute of Technology Working Paper No. 718, 19-29 (1990).

[188]*Id.* at 581 (citing M.D. Fife, The Impact of Minority Ownership on Minority Images in Local TV News, in *Communications: A Key to Economic and Political Change*, Selected Proceedings from the 15th Annual Howard University Communications Conference 113 (1986)). *See also* M. Fife, The Impact of Minority Ownership on Broadcast News Content: A Multi-Market Study 52 (June 1986) (report submitted to National Association of Broadcasters).

[189]*Id.* at 581 (citing Kirk A. Johnson, Media Images of Boston's Black Community 16-29 (1987) (William Monroe Trotter Institute)).

[190]David Pritchard, Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign "Study 2" (2002), http://www.fcc.gov/ownership/materials/already-released/viewpoint090002.pdf.

[191]In the 2003 R&O, the FCC referred to this study as "the principal record evidence purporting to demonstrate a lack of connection between ownership and viewpoint."

and Craig Hertzman[192] provided statistically significant findings that demonstrated that newspapers with owners who stood to gain from the proposed loosening of television ownership caps by the Telecommunications Act of 1996 "offered their readers favorable coverage of the proposed changes, with positive consequences outnumbering negative consequences by over two to one."[193] Conversely, coverage by newspapers whose owners would not benefit from the change was "overwhelmingly unfavorable, with negative consequences appearing over three times as often as positive consequences."[194] Other empirical studies have presented similar findings – noting that the newspaper editorials they reviewed were more likely to present regulatory changes that benefited television owners in a positive light if the owners of those newspapers had a vested interest in television.[195]

A relevant anecdotal example which highlights similar concerns occurred in 1980 when the *Los Angeles Times* failed to report on a $2 billion tax-paid water project in California that the Times-Mirror Company, was going to benefit from. By comparison, the *New York Times* and the *Bakersfield Californian* found the story newsworthy.[196] Thus, influence over viewpoint may not necessarily be limited to what is included in coverage, but also could affect what is excluded.

R&O/NOPR 2003, *supra* note 21, at 11. It also noted, however, that the study contained a major methodological flaw — no control group, stating, "The absence of a baseline control group in this study precludes us from placing significant probative value on this study's assessment of ownership and viewpoint." *Id.* at 11. Taking into account the issues with the Pritchard study (which received extensive criticism), and after reviewing the other empirical evidence that had been submitted, the Commission acknowledged that "the balance of the evidence, although not conclusive, appears to support our conclusion that outlet ownership can be presumed to affect the viewpoints expressed on that outlet," *Id.* at 11. But "[T]he degree to which it does so cannot be established with any certitude." *Id.* at 147. Thus, "In order to sustain a blanket prohibition on cross-ownership, we would need, among other things, a high degree of confidence that cross-owned properties were likely to demonstrate uniform bias. The record does not support such a conclusion." *Id.* This assertion eventually contributed to the Third Circuit Court confirming that "the Commission reasonably concluded that it did not have enough confidence in the proposition that commonly owned outlets have a uniform bias to warrant sustaining the cross-ownership ban." Prometheus Radio Project v. FCC, 373 F.3d 372, 399 (3d Cir. 2004).

[192] Martin Gilens & Craig Hertzman, *Corporate Ownership And News Bias: Newspaper Coverage Of The 1996 Telecommunications Act,* 62 J. POL. 369 (2000).

[193] *Id.* at 383.

[194] *Id.*

[195] *See* Alf Pratte & Gordon Whiting, *What Newspaper Editorials Have Said About Deregulation of Broadcasting*, 61 JOURNALISM Q. 56 (1986); James H. Snider & Benjamin I. Page, Does Media Ownership Affect Media Stands? The Case Of The Telecommunications Act of 1996 (Apr. 10-12, 1997) (paper presented at the annual meetings of the Midwest Political Science Association, Chicago, IL.).

[196] *See* R&O/NOPR 2003, *supra* note 21, at 147. *See also* BEN H. BAGDIKIAN, THE MEDIA MONOPOLY (4th ed.1992); PAMELA J. SHOEMAKER & STEPHEN D. REESE, MEDIATING THE MESSAGE: THEORIES OF INFLUENCES ON MASS MEDIA CONTENT (1996).

Indeed, the power corporate entities wield over the ability for their news outlets to conduct investigative journalism has been an area of concern for many years.[197] A recent incident involving corporate owner Sam Zell and a photographer at an *Orlando Sentinel* staff meeting epitomizes these concerns:

> Zell: My attitude on journalism is very simple, I wanna make enough money so I can afford you. . . . You need to in effect help me, by being a journalist that focuses on what our readers want and therefore generates more revenue. . . .
>
> Photographer: But what readers want is puppy dogs, . . we also need to inform the community.
>
> Zell: You're giving me the classic. . . journalistic arrogance. . . . What I'm interested in is how can we generate additional interest in our product and additional revenue so we can make our product better and better, and *hopefully we get to the point where our revenue is so significant that we can do puppies and Iraq.*[198]

After his remarks, the photographer supposedly turned her back on Zell, he uttered quite audibly "fuck you"[199] — apparently putting "journalistic arrogance" in its place.

In the end, even with the extensive amount of empirical evidence available demonstrating how forms of ownership can diversify and/or restrict viewpoint, the FCC maintained its inconclusive stance. The Commission cited no research, referred primarily to the comments of stakeholders, and presented another unsubstantiated argument as grounds for modifying the newspaper/broadcast cross-ownership rule.

ARGUMENT FIVE: A CAUTIOUS AND MODEST APPROACH

The Commission framed the actual rule change as "cautious" and "modest," noting, "[O]ur new rule lifts the complete ban but does so in a modest manner in order to ensure. . . that our goals of competition, localism, and diversity are not compromised."[200] By presenting its

[197] *See* C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS (2007); EDWARD S. HERMAN & NOAM CHOMSKY, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA (1988); ROBERT W. MCCHESNEY, THE PROBLEM OF THE MEDIA: U.S. COMMUNICATION POLITICS IN THE 21ST CENTURY (2004).

[198] Molly Selvin, *Challenge Authority, If You Dare,* L.A. TIMES, Feb. 5, 2008, *available at* http://www.latimes.com/business/la-fi-workrules5feb05,1,1965053.story (emphasis added). The confrontation is available on youtube: http://www.youtube.com/watch?v=LDy7vn7-LX4.

[199] *Id.* at 1. *See also* http://www.youtube.com/watch?v=LDy7vn7-LX4

[200] R&O 2008, *supra* note 2, at 32.

approach as modest, the FCC attempted to justify its decision by describing it as measured and careful and as a result, reasonable. The Commission noted a number of reasons why its approach was cautious. First, it reported that the change will provide the greatest leniency only to cross-ownership requests made in the top-twenty markets. The FCC noted that allowing cross-ownership in these markets is consistent with the public interest because "such combinations in the largest markets in the country generally raise fewer diversity concerns because such media markets are more vibrant and have more media outlets."[201] The approach was also described as modest because of the additional restrictions put in place. For example, in these markets, cross-ownership will only be allowed between a daily newspaper and a television station if the station isn't among the top four in the market and only if there are eight "major media voices" in the market.

The Commission's cautious approach will also allow cross-ownership in markets twenty-one and below, but only under specific circumstances. If one of the media outlets is failing and/or if it can be shown that the combination will produce considerably more local news than before (seven hours more per week for a broadcast station), the Commission will reverse its presumption that cross-ownership in markets twenty-one and below is not in the public interest and allow the transaction.[202] In addition, should neither of these circumstances arise, the FCC will also allow cross-ownership in these markets if it can be shown that: (1) the combination will increase local news production, (2) each outlet will maintain independent news production, (3) there are appropriate levels of concentration in the market, and (4) there are considerable concerns regarding the financial viability of the stations.[203] The Commission asserted that proving the satisfaction of each of these elements will increase its belief that the transaction will be in the public interest, increasing the likelihood that the cross-ownership deal will be approved.

REBUTTAL TO THE CAUTIOUS AND MODEST APPROACH ARGUMENT

The FCC's inability to substantiate its first four arguments makes the cautious/modest approach argument irrelevant. The FCC failed to prove that cross-ownership between a daily newspaper and a broadcast station benefits the public interest via competition, diversity or localism and thus provided little justification for any rule change allowing

[201] *Id.* at 32.
[202] *Id.* at 38-40.
[203] *Id.* at 40.

further consolidation, no matter what restrictions are included. Furthermore, the assertion that cross-ownership should be allowed in the top twenty markets because "such combinations in the largest markets in the country generally raise fewer diversity concerns because such media markets are more vibrant and have more media outlets"[204] makes little sense. Is the Commission justifying cross-ownership in the top twenty markets because of the existence of a supposed surplus of diversity? Numerous empirical studies have argued to the contrary, noting that diversity is most certainly lacking in the realm of media ownership.[205]

Taken from another perspective, it is plausible that the Commission's argument in this instance refutes the central assertion of the R&O. If the FCC is arguing that consolidation should be allowed in the top twenty markets because of a vibrancy/diversity surplus, it is implying that cross-ownership will actually reduce these elements in specific markets, but that this reduction is acceptable because of the vibrancy to spare. This notion contradicts the central argument presented throughout the R&O, asserting that cross-ownership would lead to increases in competition, diversity and localism – the elements that contribute to the vibrancy of a media market.

The Commission's plans for reviewing cross-ownership requests outside the top twenty markets seem logical, but the Commission's recent actions cast doubt on its ability to conduct such a review. Will the Commission allow stations to include advertising blocks in their reporting of the seven hours of local news to which it has committed? Will the FCC allow companies to send in a postcard with the box "separate editorial desks" checked? Will a true analysis of the within-market dynamics actually be completed in each case? Unfortunately, there can only be speculation as to the future actions of the FCC. Above all however, it is essential to emphasize that in the R&O, the Commission failed to demonstrate that modifying the rule will benefit competition, diversity

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[204] *Id*. at 32.

[205] Numerous empirical studies have argued that when it comes to minority and female ownership there is certainly not a diversity surplus. According to a study by Derek Turner and Mark Cooper, as of October 2007, blacks comprise 13% of the U.S. population and own .6% of the full-power commercial television stations in the country (eight stations – down from nineteen in 2006); Hispanics and Latinos, 15% of the population, own 1.25% (17 stations); Asians, 4.5% of population own .95% (13 stations); non-Hispanic whites 66.4% of population own 1,116 stations or 81.9% of all full-power commercial television stations in the United States. Women comprise 50% of the population but own 5.87% of the stations (eighty stations). S. Derek Turner & Mark Cooper, Out of the Picture 2007: Minority & Female TV Station Ownership in the United States (2007), *available at* http://www.freepress.net/files/otp2007.pdf. In another study, Turner found that as of June 2007, African Americans own only 3.4% of the full-power commercial broadcast radio stations, Hispanics/Latinos 2.9%, Asians .88%, non-Hispanic whites 87.2% and women 6%. S. Derek Turner, Off The Dial: Female and Minority Radio Station Ownership in the United States (2007), http://www.stopbigmedia.com/files/off_the_dial.pdf.

and localism, and thus, failed to prove (as Section 202(h) requires) that the newspaper/broadcast cross-ownership ban is "no longer in the public interest,"[206] and as a result, the specific components of the rule change are irrelevant.

CONCLUSION

Section 202(h) of the Telecommunication Act of 1996 requires the Federal Communications Commission to review its media ownership rules biennially to "determine whether any of such rules are necessary in the public interest as the result of competition." It goes on to note that "the Commission shall repeal or modify any regulation it determines to be no longer in the public interest." While these requirements clearly favor a deregulatory agenda, whose goal seems to be the eventual removal of the FCC from the media ownership arena, the mandate that the public interest be protected above all remains the central tenet to which these proceedings must refer. In order to interpret the often-debated term "public interest" when evaluating the media ownership rules, the FCC has maintained the stance that it will emphasize the promotion of competition, diversity and localism — three terms that operationalize the public interest concept.[207] The satisfaction of each of these three terms has been argued by the FCC in the R&O: competition by the functional equivalency argument, localism by the convergence argument, diversity by the ownership and viewpoint argument, and a combination of the three by the industry sustainability and cautious/modest approach argument.

Referring in each case to empirical evidence that argues to the contrary, this article refutes all five of the FCC's primary arguments for modifying the newspaper/broadcast cross-ownership rule. In presenting its functional equivalency argument, the Commission asserted that new media (the Internet especially) are subverting the market dominance once enjoyed by traditional media, and as a result of this increased competition, cross-ownership between a newspaper and a broadcast company serving the same market would not drastically reduce the multiplicity of voices essential to the public interest of individual markets. The rebuttal to the FCC's argument cited extensive empirical research that continues to demonstrate both that traditional media remain the primary source consumers turn to for news and information and that the use of new media remains only a supplementary activity. Furthermore, when individuals go online to get news, they usually access sites

[206] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, §202(h), 110 Stat. 56, 111-112.
[207] *See* NAPOLI, *supra* note 17, at 24. *See also* R&O 2008*, supra* note 2, at 7.

operated by the same conglomerates that dominate the traditional media system,[208] maintaining the balance of power. Finally, as the FCC itself concluded, "Although the future landscape of the online media world is difficult to predict, for the foreseeable period ahead it appears that traditional media outlets will remain important sources of news and information, especially at the local level,"[209] and thus, supported the conclusion that its own functional equivalency argument remains unsubstantiated.

The Commission presented the convergence argument by citing the comments of stakeholders who offered examples of how convergence has enabled them to produce more local news, and also by referring to three of the ten FCC Commissioned studies which attempted to demonstrate this same assertion.[210] Through careful analysis of all three studies and of the peer review, the rebuttal posited that the extensive methodological problems and mediocre (and in some instances insignificant) findings associated with each study failed to substantiate the Commission's argument. Additional empirical research demonstrating how local, independent ownership can in some instances lead to more local programming was presented to further refute the Commission's argument. In the end it was asserted that the lack of consistent, empirical support on either side of the issue has perpetuated the inconclusive nature of the convergence argument, refuting the FCC's claim.

In asserting its industry sustainability argument, the Commission presented various forms of empirical data to demonstrate how newspaper circulation and the industry as a whole have been faltering. Stakeholder comments regarding the benefits of convergence to the newspaper industry were also included. The rebuttal began by quoting Commissioner Copps who stated that "the death of the traditional news business is often greatly exaggerated."[211] The argument that followed emphasized that while the largest newspaper conglomerates are finding it difficult to keep their massive (and often overzealous) investments afloat, this does not suggest that the newspaper industry as a whole (which includes approximately 1,400 dailies – most of which are profitable) is in jeopardy.[212] Evidence also suggests that many of the so-called "struggling" newspapers are slowly making the transition to

[208]*See* R&O 2008*, supra* note 2, at 7. *See also* Horrigan, *supra* note 68, at iv; Pew Research Center Biennial News Consumption Survey*, supra* note 86; NIELSON, *supra* note 78, at 37.

[209]R&O 2008*, supra* note 2, at 7.

[210]*Id.* at 25-28.

[211]*Id.* at 109.

[212]*See* Nat Ives, *It's Not Newspapers in Peril; It's Their Owners,* ADVERTISING AGE, Feb. 23, 2009, at 3-4.

the online world. With the NAA reporting close to seventy-five million unique newspaper Web site visitors in January 2009 alone (with approximately 3.725 billion total hits),[213] it appears that the online newspaper has a future. Above all, however, the FCC has never had a mandate that required it to get involved in the market; its role has always been to protect the public interest, not to save the interests of private industry. These assertions demonstrated that the FCC's third argument was unsubstantiated.

The Commission presented the ownership and viewpoint argument first by referring to the decision of the Third Circuit Court[214] which held that the ban is not necessary on grounds of diversity because of insufficient evidence that ownership influences viewpoint.[215] The Commission then cited various stakeholder comments which stated that consolidated operations do operate with independent production and editorial facilities. Aside from anecdotal evidence, the Commission did not present any empirical data to support this argument. The rebuttal countered by noting that the Supreme Court has pointed to the extensive empirical evidence that exists demonstrating the effect ownership can have on viewpoint.[216] As well, the rebuttal referred to various additional studies that have assessed newspaper/broadcast combinations that have produced empirical evidence that ownership can influence viewpoint. The lack of empirical data on the FCC's side, coupled with anecdotes that counter those offered by the Commission, demonstrated that the ownership and viewpoint argument was largely unsubstantiated.

The final cautious/modest approach argument justified the Commission's decision by describing the rule-change as measured, careful and thus, reasonable. The rebuttal noted that whether or not the Commission's approach was cautious, its inability to demonstrate that the decision would benefit competition, diversity and localism (and thus the public interest) makes the specifics of the rule change irrelevant. Furthermore, the rebuttal emphasized that the Commission's claim that "such combinations in the largest markets in the country generally raise fewer diversity concerns because such media markets are more vibrant and have more media outlets"[217] seemingly refutes the central assertion of the R&O by implying that cross-ownership will actually reduce the vibrancy/diversity of individual markets, epitomizing the misguided nature of the FCC's entire case.

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[213]Newspaper Association of America, Newspaper Websites (2008), http://www.naa.org/TrendsandNumbers/Newspaper-Websites.aspx

[214]Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004).

[215]R&O 2008, *supra* note 2, at 12.

[216]*Id. (citing* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990)).

[217]R&O 2008, *supra* note 2, at 32.

All in all, the FCC's R&O failed to present anything close to a conclusive argument to substantiate the claim that the modification of the newspaper/broadcast cross-ownership rule would be in the public interest. Though practically ignored by the FCC's R&O, there exists further evidence that media consolidation and FCC deregulation fail to meet the public interest standard. As noted in *Prometheus Radio v. FCC*,[218] when the FCC attempted to modify its ownership rules in 2003, "nearly two million people weighed in by letters, postcards, e-mails, and petitions to oppose further relaxation of the rules."[219] A recent study suggests that public opinion has not changed.[220] Of the 732 individuals who testified at the FCC's six public hearings on media ownership held throughout 2006-2007, 52.6% spoke in opposition to further media consolidation/deregulation while only 1.4% spoke in support. Perhaps taking these facts into account, Commissioner Adelstein – who has traveled throughout the country with Commissioner Copps over the past six years holding public hearings to further involve the public in the process — expressed his concern in his appended comments to the R&O:

> By moving forward now with relaxation of the newspaper-broadcast cross-ownership rule, the majority ignores the repeated pleas of the American people and their representatives in Congress. . . . In fact, we were asked by leaders in Congress, including our oversight committees, to defer today and conduct a more inclusive process. That we are moving forward when the voices that matter are asking us to refrain defies the imagination.[221]

Determining the specific sources that influenced the FCC's decision is a difficult task. Though Commissioner Adelstein's comments seem genuine, the complex political environment the Commission operates within calls into question the accuracy of any description of the process provided by the individual Commissioners. For this reason, our current inquiry chose a more formal approach and evaluated the central arguments developed and expressed in the Report and Order. The R&O provided a somewhat more objective source for evaluation as it presented the Commission with the opportunity to thoroughly substantiate its claims with empirical evidence and proof that their decision served the public interest. It has been asserted herein, that the FCC's attempt at empirical substantiation failed. The FCC could not demonstrate that modifying the newspaper/broadcast cross-ownership rule would benefit

[218]373 F.3d 372 (3d Cir. 2004).
[219]*Id.* at 386.
[220]*See* Obar & Schejter, *supra* note 62.
[221]R&O 2008, *supra* note 2, at 113.

competition, diversity and localism, and thus, failed to prove (as Section 202(h) of the Telecommunications Act of 1996 requires) that the newspaper/broadcast cross-ownership ban is “no longer in the public interest.”[222]

This article asserted that if the arguments presented by the FCC were found to be both logically sound and supported by empirical evidence, then any suggestion of corporate favoritism would certainly have been refuted. On the other hand, it was also asserted that should the Commission fail to substantiate its arguments with empirical evidence and proof of public interest satisfaction, it would be difficult to ignore the possibility that alternative sources of influence were involved. Baffled by the lack of empirical evidence presented by the FCC to justify such a major (and unpopular) decision, this inquiry has difficulty ignoring the possibility of the latter. While it is arguable that a neo-liberal, deregulatory agenda may have pushed the Republican Commissioners towards their decision to modify the newspaper/broadcast cross-ownership rule, it remains difficult in this instance to move beyond the cynical suggestion that the Commission was influenced by the demands of industry stakeholders, and as a result, placed the interests of the corporate media lobby ahead of the interest of the American public.

[222]Telecommunications Act of 1996, Pub. L. No. 104-104, §202(h), 110 Stat. 56, 111-112.