

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Cross-Ownership of Broadcast Stations and Newspapers)	MM Docket No. 01-235
)	
Newspaper/Radio Cross-Ownership Waiver Policy)	MM Docket No. 96-197
)	

REPLY COMMENTS OF THE NEWSPAPER ASSOCIATION OF AMERICA

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SUMMARY

In its opening Comments in this proceeding, NAA demonstrated through a comprehensive factual record that there is no justification for retaining the newspaper/broadcast cross-ownership ban. Specifically, by providing a detailed analysis of the current media environment, NAA showed that the factual premises for the rule are non-existent and that the ban is incongruous in the current regulatory environment. Drawing on the experiences of the existing newspaper/broadcast combinations, NAA offered numerous illustrations of the real and substantial public interest benefits such combinations can provide, without any threat to diversity. NAA further explained that eliminating the ban would not harm competition in any legitimately identifiable market. Thus, NAA demonstrated that, pursuant to the demanding legal standards the Commission faces in this proceeding, the agency is obligated to repeal the long-outdated ban.

The vast majority of commenters agreed with NAA's position, and many supplied detailed empirical evidence regarding the outstanding public-interest oriented local news and informational services that newspaper/broadcast combinations have offered in the past and the enhanced services that could be offered if the ban were eliminated. On the other hand, the commenters favoring retention of the prohibition failed to back up their blanket assertions with any relevant factual evidence. These commenters chose instead to rely on unproven assumptions regarding any form of media joint ownership and an uncompromising insistence on maximizing the number of outlet owners, rather than—as the Commission explicitly requested—on empirical evidence regarding existing newspaper/broadcast combinations.

While most commenters who addressed the issue also agreed with NAA that repeal of the ban would not pose any legitimate threat to competition, the few proponents of the restriction again relied on speculative theories and misdirected analogies to argue that the opposite would

be true. For example, these commenters relied heavily on the recent consolidation in the radio industry as an argument against elimination of the prohibition on newspaper/broadcast cross-ownership. Intramarket consolidation is irrelevant to the issues in this proceeding, however, newspaper/broadcast cross-ownership has nothing to do with consolidation *within* independent markets comprised of a single type of media outlet.

More importantly, even those commenters favoring retention of the ban agreed with NAA that newspapers and broadcasters do not compete in a single narrow product market. Under applicable principles of antitrust law, however, a finding that newspapers and broadcast stations compete in a definable product market is a necessary precondition to a finding that competition will be threatened by common ownership. As NAA and other parties showed in the opening comments, any product market broad enough to encompass newspapers and broadcasters also would have to include the broad array of other media outlets relied upon by advertisers. Under this scenario, the substantial existing level of competition for advertising revenue, as well as antitrust principles and existing FCC ownership laws, would effectively guard against any potential anticompetitive harm.

Finally, as NAA showed in its initial Comments and as many other commenters confirmed, the FCC must be guided by strong legal imperatives in this proceeding. The efforts by those favoring retention of the ban to turn these legal obligations on their head—by arguing that the biennial review provision of the 1996 Act imposes no additional obligations on the Commission, that controlling administrative law precedent militates against repealing outdated agency regulations, and that the First Amendment analysis in this case is governed solely by the long-outdated “scarcity rationale”—are completely unavailing. These commenters fail to recognize that the biennial review provision requires the agency to determine not only that the

ban serves generalized public interest goals, but that it is necessary to the achievement of a specific and substantial public interest goal. This high standard is buttressed by well-established principles of administrative law and prevailing First Amendment jurisprudence. Based on these demanding legal standards and the strong record in this proceeding, NAA submits, the Commission must move forward quickly to repeal the antiquated ban on newspaper/broadcast cross-ownership.

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REPLY COMMENTS OF THE NEWSPAPER ASSOCIATION OF AMERICA

The Newspaper Association of American (“NAA”) hereby submits its Reply Comments in the above-captioned proceeding pursuant to the Commission’s September 20, 2001 *Order and Notice of Proposed Rulemaking*.¹

INTRODUCTION

As NAA demonstrated in its opening Comments, filed December 3, 2001,² in its several earlier submissions incorporated by reference therein,³ and as further shown herein, the newspaper/broadcast cross-ownership ban should be repealed. The prohibition is an outdated relic of a marketplace environment that has been radically transformed and a regulatory regime that has been disassembled, piece by piece, by the Commission, the Congress, and the courts in the more than a quarter of a century that has passed since the ban was put in place in 1975. Today, the prohibition unfairly discriminates against the very parties who are the best qualified

¹ *Cross-Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Waiver Policy, Notice of Proposed Rulemaking* in MM Docket Nos. 01-235, 96-197, FCC 01-262 (rel. Sept. 20, 2001) (“*NPRM*”). By *Order*, DA 01-2918 (rel. Dec. 14, 2001), the Commission extended the date for reply comments until February 15, 2002.

² *Comments of Newspaper Association of America* in MM Docket Nos. 01-235 and 96-197 (filed Dec. 3, 2001) (“*NAA Comments*”).

³ *NAA Comments* at 4-6 and n.12.

and the most highly incentivized to increase the quantity and enhance the quality and diversity of the news, informational programming, and other public service offerings of local broadcast stations. Further, the ban unnecessarily frustrates the ability of newspaper publishers and broadcasters to pursue the economies of scale and efficiencies of joint operation that make possible the rapid development of new and innovative information services and additional and alternative media outlets.

NAA's Comments, as well as the overwhelming weight of the evidence set forth in the comments of the several dozen other parties who made substantive submissions in this proceeding,⁴ confirm that the newspaper/broadcast ban is not necessary to further any identifiable public interest objective in the highly diverse and intensely competitive contemporary media marketplace. To the contrary, the facts—and in particular the experiences of existing newspaper/broadcast combinations—show that:

- The media marketplace is more robust than ever—there are more broadcast stations, radio stations, cable and other MVPD households, weekly and alternative newspapers, and Internet subscribers than at any other time in U.S. history;⁵
- In markets of all sizes, newspaper/broadcast combinations have excelled in providing local news and other informational offerings without any appreciable reduction in content or viewpoint diversity;
- Newspaper/broadcast combinations have been able to integrate resources and employee talents to develop information delivery mechanisms that appeal to

⁴ The record includes numerous e-mails and one page letters, many of which appear to have been generated through a website operated by the Center for Digital Democracy, which joined in a lengthy set of comments that are discussed below. In view of their brevity, similarity, and lack of supporting documentation, these other submissions are not addressed by NAA in these Reply Comments.

⁵ NAA documented the tremendous growth that has occurred in the number and variety of media outlets in Appendix I to its opening Comments. As the Commission recently recognized in its Eighth Annual Report to Congress regarding competition in the market for delivery of video programming, significant additional growth has occurred over the last year. Appendix I attached hereto provides additional evidence of increased competition in the multi-channel video programming market, including broadcast, cable, DBS, MMDS, SMATV, Internet video, and broadband service, derived from the Eight Annual Report.

every need and taste, allowing consumers to receive information when they want it, and in the forms they find most useful and enjoyable;

- Synergies created by these combinations have given advertisers the benefits of “one-stop shopping” and custom-tailored media mixes that more effectively target potential customers; and
- The inherent differences in the very nature of the print and broadcast media, reinforced by powerful economic incentives to reach the broadest possible overall audiences, ensure that content remains varied, that competing viewpoints will continue to be heard, and that competition in the advertising marketplace will remain robust.

The handful of parties who advocate retention of the newspaper/broadcast cross-ownership restriction have failed utterly to provide persuasive empirical evidence to support their position, relying instead on the same speculative but still unproven assumptions about diversity and competition that were advanced in support of the prohibition in the 1970s. In these circumstances, and based upon the record now before it, NAA submits that the Commission is compelled by the demanding legal standards applicable in this proceeding to move forward quickly and eliminate the ban.

I. CONGRESS’ EXPLICIT DIRECTIVE IN THE BIENNIAL REVIEW STATUTE, AS WELL AS GOVERNING PRINCIPLES OF ADMINISTRATIVE LAW AND COMPELLING FIRST AMENDMENT IMPERATIVES, REQUIRE THE COMMISSION TO REPEAL THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP PROHIBITION

NAA demonstrated in its initial Comments that the Commission faces specific and substantial legal imperatives in this proceeding. Pursuant to the statutory biennial review mandate, the FCC has an affirmative duty to show not only that the newspaper/broadcast cross-ownership ban is consistent with its generalized public interest goals, but also that the rule remains “necessary” to serve a particular, significant interest. This obligation is reinforced by longstanding principles of administrative law. Moreover, in light of today’s vastly transformed media marketplace and changed regulatory and judicial environment, the agency can no longer

hide behind the lenient level of constitutional scrutiny for broadcast regulation adopted over two decades ago by the *Red Lion* court. In the face of these formidable legal constraints, the Commission cannot justify retention of the long outdated cross-ownership ban.

The majority of commenters who address these issues in their comments have bolstered NAA's showing. The handful who disagree are unconvincing in their attempts to argue that the biennial review mandate imposes no new obligations on the Commission, that administrative law standards somehow militate against repeal of outdated agency rules, and that the long-outdated and highly criticized scarcity rationale governs the First Amendment analysis in this proceeding and requires retention of the archaic and counterproductive cross-ownership ban.

A. The Opening Comments Confirm That the FCC Faces a Substantial Burden in This Proceeding Under Both the Biennial Review Mandate and Governing Administrative Law Standards

1. The Isolated Efforts to Negate the FCC's Duty in This Proceeding Fail to Acknowledge That the Biennial Review Mandate Provides Specific Direction to the Agency and Overrides the More Generalized Public Interest Standard

The biennial review mandate of the Telecommunications Act of 1996 ("1996 Act") imposes an exacting standard of review on the Commission, requiring the agency to eliminate the newspaper/broadcast cross-ownership ban if it cannot affirmatively conclude that the prohibition is required to serve a significant public interest.⁶ Among the commenters who address the issue, there is widespread agreement with NAA regarding the substantial burden that the biennial review provision imposes on the agency.⁷

⁶ *Telecommunications Act of 1996*, Pub. L. No. 104-104, 100 Stat. 56 §202(h) ("1996 Act")

⁷ See, e.g., *Comments of Media General, Inc.* in MM Docket Nos. 01-235 and 96-197, at 58-60 (filed Dec. 3, 2001) ("*Media General Comments*"); *Comments of The News Corporation Limited and Fox Television Holdings, Inc.* in MM Docket Nos. 01-235 and 96-197, at 13-16 (filed Dec. 3, 2001) ("*News Corp/Fox Comments*"); *Comments of The National Association of Broadcasters* in MM Docket Nos. 01-235 and 96-197, at 16-18 (filed Dec. 3, 2001) ("*NAB Comments*"); *Comments of Gannett Co., Inc.* in MM Docket Nos. 01-235 and 96-197, at 21-22 (filed Dec. 3, 2001) ("*Gannett Comments*"); *Comments of Tribune Company* in MM Docket Nos. 01-235 and 96-197, at 66-68

Consumers Union, *et al.*, on the other hand, offer a reading of the biennial review mandate that would eliminate its force. Specifically, the Consumers Union Comments contend that the statutory provision does not impose any obligation on the Commission to “rejustify” its broadcast ownership rules.⁸ That, however, is precisely what the statute does require; the Commission’s statutory duty to “determine whether [its ownership] rules are necessary in the public interest as the result of competition”⁹ clearly obligates the agency to provide affirmative justification for each of its broadcast ownership restrictions.¹⁰ Other commenters agree. For example, Media General notes that “the FCC must repeal or modify the [newspaper/broadcast cross-ownership] regulation unless it is affirmatively shown to be necessary to protect competition,”¹¹ while Tribune states that pursuant to Section 202(h), any Commission decision to retain the ban “must be supported by a complete explanation of the diversity objective sought to be achieved and a clear demonstration that market forces do not produce the desired objective.”¹²

Indeed, the agency’s duty under the biennial review mandate goes beyond a requirement to simply “rejustify” the newspaper/broadcast cross-ownership ban. Thus, the Commission must do more than find that the newspaper/broadcast cross-ownership ban is consistent with or

(filed Dec. 3, 2001) (“*Tribune Comments*”); *Comments of Hearst Corporation* in MM Docket Nos. 01-235 and 96-197, at 5 (filed Dec. 3, 2001) (“*Hearst Corp. Comments*”).

⁸ *Comments of Consumers Union, Consumer Federation of America, Civil Rights Forum, Center for Digital Democracy, Leadership Conference on Civil Rights and Media Access Project* in MM Docket Nos. 01-235 and 96-197, at 22 (filed Dec. 3, 2001) (“*Consumers Union Comments*”).

⁹ *1996 Act* §202(h).

¹⁰ *NAA Comments* at 90.

¹¹ *Media General Comments* at 59; *see also id.* at 58 (“[U]nless the FCC can make a probative showing on the record that the newspaper/broadcast cross-ownership ban is necessary to protect competition, the ban cannot be retained.”); *News Corp/Fox Comments* at 15 (“[T]he Commission must affirmatively find that the newspaper/broadcast cross-ownership rule remains necessary in the public interest.”).

¹² *Tribune Comments* at 68.

further generalizes public interest goals. Rather, under the clear directive of the statute, the agency cannot maintain the ban unless it finds that the regulation is essential to the achievement of a significant and substantiated public interest objective.¹³ The arguments raised by Consumers Union, *et al.* thus are misdirected; they fail to acknowledge that the biennial review provision informs and overrides the generalized public interest standard that ordinarily governs the Commission's evaluation of its rules, and mandates a specific and rigorous standard for reevaluation of the cross-ownership ban.

2. Governing Administrative Law Standards Confirm the Commission's Affirmative Duty to Eliminate the Ban

Other commenters in this proceeding have reinforced NAA's showing that, in addition to the duties established in the 1996 Act, underlying principles of administrative law obligate the Commission to review and repeal its outdated prohibition on newspaper/broadcast cross-ownership. Indeed, well-established administrative law standards make clear that agencies have an ongoing obligation to reevaluate their rules in light of changed circumstances and a corresponding duty to repeal those rules that—like the newspaper/broadcast cross-ownership ban—no longer serve their intended purposes.¹⁴ Further, because the agency's original reasons for adopting the newspaper/broadcast cross-ownership ban were entirely speculative, the FCC has a heightened duty to examine the rule closely.¹⁵

The Media General Comments likewise correctly note that pursuant to fundamental principles of administrative law established in *Bechtel v. FCC* and similar cases, “the Commission must reexamine and repeal [the rule] because changes in the media marketplace and

¹³ *NAA Comments* at 86-90.

¹⁴ *Id.* at 92-96.

¹⁵ *Id.* at 97-99.

concrete evidence . . . have undermined the *factual assumptions* underlying the policy it adopted in 1975.”¹⁶ Relying on a long line of judicial decisions, the National Association of Broadcasters (“NAB”) similarly notes in its Comments that “[e]specially because the FCC’s bases for adopting the cross-ownership rule were so weak,” the Commission “cannot, after 26 years, continue to rely on speculative hopes and theories to justify the cross-ownership rule.”¹⁷ Rather, the agency “must now produce evidence establishing that the rule has actually enhanced diversity and that any diversity gains are great enough to outweigh the costs and burdens of the rule.”¹⁸

Consumers Union, *et al.* attempt to turn these fundamental principles of administrative law on their head. Rather than acknowledging the FCC’s duty to reevaluate its rules in the face of changed circumstances, they contend that the Administrative Procedure Act includes a presumption against an agency’s decision to repeal outdated regulations.¹⁹ This argument, however, is based on a misreading of *Motor Vehicles Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance* (“*State Farm*”).²⁰

In the portion of *State Farm* on which Consumers Union, *et al.* rely, the Supreme Court considered whether a decision to repeal a rule should be judged under the ordinary “arbitrary and capricious test” or the considerably narrower standard used to evaluate an agency’s refusal to

¹⁶ *Media General Comments* at 61-62 (citing *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992) (emphasis added); *Columbia Broadcasting Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973); *Petroleum Communication, Inc. v. FCC*, 22 F.3d 1164 (D.C. Cir. 1994)).

¹⁷ *NAB Comments* at 16; see also *Gannett Comments* at 22 (“The FCC’s responsibility to eliminate the newspaper/broadcast ownership rule is particularly clear given that the rule has never been supported by empirical evidence.”); *Hearst Corp. Comments* at 5.

¹⁸ *Id.*

¹⁹ *Consumers Union Comments* at 23-24.

²⁰ *Motor Vehicles Manufacturers Ass’n v. State Farm Mutual Auto. Ins.*, 463 U.S. 29 (1983) (“*State Farm*”).

promulgate a new rule.²¹ The Court determined that a decision to eliminate a rule should be reviewed under the traditional arbitrary-and-capricious standard. The Court also explained that, pursuant to this standard, an agency must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”²² Thus, *State Farm* does not establish a blanket presumption against repeal of regulations. Rather, in rejecting the argument that a narrower standard of review should apply, the Court simply noted that there is a presumption “against changes in current policy *that are not justified by the record.*”²³ The decision in no way contradicts the *Bechtel* line of cases concerning review of outdated regulations. Nor could it, in any event, nullify the affirmative duty of review subsequently imposed by Congress in the biennial review mandate.

As NAA and many other commenters have amply demonstrated, the substantial factual record established in this proceeding provides far more than a “rational” basis for eliminating the outdated restriction. Thus, a Commission decision to repeal the newspaper/broadcast cross-ownership ban would be entirely consistent with—and, indeed, is compelled by—the “arbitrary and capricious” standard relied on in the *State Farm* case.

²¹ *Id.* at 41.

²² *Id.* at 43. The Court further explained that in reviewing an agency explanation in this context, it must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Id.*; see also *United Church of Christ v. FCC*, 707 F.2d 1413, 1424 (D.C. Cir. 1983) (holding that FCC decision to deregulate radio industry is reviewed to insure that the “decision is not contrary to law, is rational, has support in the record, and is based on a consideration of the relevant factors”).

²³ *State Farm*, 463 U.S. at 42 (emphasis added).

3. The So-Called “Pedigree” of the Rule Does Not in Any Way Alter the Commission’s Obligations in This Proceeding

While the vast majority of commenters in this proceeding agree that the Commission’s review of the obsolete ban on newspaper/broadcast cross-ownership is long overdue,²⁴ Consumers Union, *et al.* contend that the long existence and “pedigree” of the rule somehow heighten the burden that the agency must face before eliminating it.²⁵ Specifically, Consumers Union, *et al.* argue that the agency faces such a heightened duty because the rule has received the endorsement of Congress, implements the “prime directive of the Communications Act,” and has been upheld by the Supreme Court.²⁶

None of these factors impacts the agency’s obligation to take a serious and critical look at the ban under both the biennial review standard and general principles of administrative law. The imposition of legislative riders precluding the Commission from spending appropriated funds to repeal or reexamine the newspaper/broadcast cross-ownership ban, an action undertaken without the benefit of hearings or a public record, hardly constituted an “official endorsement” of the rule by Congress. Such riders, moreover, were abandoned years ago. In any case, by enacting the biennial review provision, Congress codified its current belief that extensive reform of traditional broadcast regulation was needed. As Tribune Company observes in its Comments, Section 202(h) “evidences Congress’ conclusion that the public interest is best served by

²⁴ See, e.g., *Comments of Cox Enterprises, Inc.* in MM Docket Nos. 01-235 and 96-197, at 1 (filed Dec. 3, 2001) (“*Cox Comments*”); *NAB Comments* at 2; *Gannett Comments* at 3; *Comments of Belo Corp.* in MM Docket Nos. 01-235 and 96-197, at 10-12 (filed Dec. 3, 2001) (“*Belo Comments*”); *Comments of Morris Communications Corp.* in MM Docket Nos. 01-235 and 96-197, at 1-2 (filed Dec. 3, 2001) (“*Morris Comments*”); *Comments of The New York Times Company* in MM Docket Nos. 01-235 and 96-197, at 6 (filed Dec. 3, 2001) (“*New York Times Comments*”).

²⁵ *Consumers Union Comments* at 22-23.

²⁶ *Id.* at 22.

competitive market forces.”²⁷ The Media General Comments likewise point out that Congress recognized in adopting the 1996 Act that the broadcast industry was “operating under archaic rules that better suited the 1950s than the 1990s” and that there was thus a need for Congress and the FCC to “reform Federal policy and the current regulatory framework to reflect [] new marketplace realities.”²⁸ That the Commission’s ability to repeal or modify the rule was once restricted by an appropriations rider is irrelevant in light of the subsequent enactment of the 1996 Act and Section 202(h).

Similarly, the fact that the ban was upheld over twenty years ago in the *NCCB* decision²⁹ is not dispositive today. As discussed in NAA’s initial Comments and as explained further below, the newspaper/broadcast cross-ownership rule could not survive First Amendment scrutiny today, in light of the record before the Commission.³⁰ Moreover, as the D.C. Circuit held in remanding the Commission’s personal attack and political editorial rules despite the fact that both rules were explicitly upheld in the *Red Lion* decision, the mere fact that a rule has been found to be constitutional in the past “does not therefore mean that its perpetuation is not arbitrary and capricious.”³¹ The Court further noted that the Commission’s “reli[ance] on a thirty-three-year-old conclusion that the challenged rules survive First Amendment scrutiny” was flawed and failed to “justify the decision not to repeal [the rules] in the face of modern

²⁷ *Tribune Comments* at 66; see also *id.* at 68 (“This explosion of programming distribution sources calls for a substantial reform of Congressional and Commission oversight of the way the broadcasting industry develops and competes.”) (quoting H.R. Rep. No. 104-204, at 54 (1995)).

²⁸ *Media General Comments* at 58 (quoting H.R. Rep. No. 104-204, at 55 (1995); S. Rep. No. 104-23, at 64 (1995) (Statement of Sen. Burns)); see also *News Corp/Fox Comments* at 15.

²⁹ See generally *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

³⁰ *NAA Comments* at 99-116.

³¹ *Radio-Television News Directors Association v. FCC*, 184 F.3d 872, 882 (D.C. Cir. 1999).

challenges to [their] consistency with the FCC’s regulatory mandate.”³² The same conclusion applies here: the mere fact that the newspaper/broadcast cross-ownership rule survived First Amendment scrutiny over two decades ago in *NCCB* does not mean that retaining the rule in today’s vastly changed media marketplace can be justified.

B. Retention of the Newspaper/Broadcast Cross-Ownership Ban Would Violate the First Amendment

The great majority of commenters who address the issue agree with NAA that the Commission’s retention of the newspaper/broadcast cross-ownership ban would violate the First Amendment.³³ The sweeping changes that have transformed the media marketplace and the regulatory environment over the past two decades, combined with important developments in First Amendment law, have eviscerated the rationales behind the 1978 Supreme Court decision upholding the ban.³⁴

Like NAA and the majority of other commenters, Cox Enterprises concludes that “First Amendment principles demand the repeal of the newspaper-broadcast cross-ownership prohibition.”³⁵ NAB similarly states its belief that “the Commission will be unable to meet the burden of justifying retention of the cross-ownership rules due to the First Amendment implications raised by the ban,”³⁶ and the analysis by Media General concludes that “the daily

³² *Id.*

³³ *Media General Comments* at 66-76; *NAB Comments* at 27-31; *Cox Comments* at 3-8; *Tribune Comments* at 56-66; *Comments of West Virginia Radio Corporation* in MM Docket Nos. 01-235 and 96-197, at 34-40 (filed Dec. 3, 2001) (“*West Virginia Radio Comments*”); *Comments of Freedom of Expression Foundation, Inc.* in MM Docket Nos. 01-235 and 96-197, at 32-38 (filed Dec. 3, 2001) (“*Freedom of Expression Comments*”).

³⁴ *NAA Comments* at 99-116.

³⁵ *Cox Comments* at 4.

³⁶ *NAB Comments* at 27.

newspaper/broadcast cross-ownership rule cannot survive First Amendment scrutiny and must be repealed.”³⁷

Two commenters, however, argue that the 24-year-old *NCCB* decision lays the constitutional question to rest. Specifically, Consumers Union, *et al.* and the United Church of Christ, *et al.* (“UCC, *et al.*”) invoke the decades-old scarcity rationale and contend that the prohibition on newspaper/broadcast cross-ownership should continue to be judged under the diminished level of scrutiny adopted by the *Red Lion* court in 1969 and applied in *NCCB*.³⁸ UCC, *et al.* argue that the scarcity doctrine remains fully applicable because it is still true that “far more people want to use the [broadcast] spectrum than can be accommodated” and because “companies are willing to pay staggering sums to obtain the right to use the spectrum.”³⁹

Whatever merits these contentions may have had in the media marketplace and regulatory environment that existed three decades ago, however, they cannot withstand analysis or justify retention of the ban today. Given the abundant media marketplace that exists now, the scarcity doctrine should be considered neither an obstacle to the Commission’s elimination of the ban nor a basis for a reviewing court to apply a reduced level of constitutional scrutiny.⁴⁰ In fact, the Commission itself has long since repudiated the scarcity doctrine underlying the *Red Lion* decision, concluding that, “[the scarcity] rationale that supported the [fairness] doctrine in years

³⁷ *Media General Comments* at 76.

³⁸ *Comments of the Office of Communication, Inc. of the United Church of Christ, National Organization for Women and Media Alliance* in MM Docket Nos. 01-235 and 96-197, at 23-27 (filed Dec. 3, 2001) (“*UCC Comments*”); *Consumers Union Comments* at 24-25. Notably, neither Consumers Union, *et al.* nor UCC, *et al.* even attempt to show that the newspaper/broadcast cross-ownership ban could survive the intermediate scrutiny test applied to all other media.

³⁹ *UCC Comments* at 25-26.

⁴⁰ *NAA Comments* at 102-107; *Media General Comments* at 66-72; *Cox Comments* at 3-8; *West Virginia Radio Comments* at 39-40; *Freedom of Expression Comments* at 38-39.

past is no longer sustainable in the vastly transformed, diverse [communications] market that exists today.”⁴¹ UCC, *et al.*’s supporting contention that the public continues to place a high premium on broadcast spectrum through auctions and FCC applications suggests only that the spectrum is *economically* scarce. As numerous courts and the Commission repeatedly have recognized, there is nothing unique or constitutionally significant about economic scarcity.

In rejecting economic scarcity as a significant rationale, the D.C. Circuit noted over a decade ago in *Telecommunications Research and Action Center v. FCC* that “[i]t is a commonplace of economics that that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce.”⁴² The Court thus concluded that because “scarcity is a universal fact, it can hardly explain regulation in one context and not another.”⁴³ In its *Syracuse Peace Council* decision, the Commission expressly agreed with the Court’s assessment of scarcity as a “universal fact.”⁴⁴ More recently, then-Commissioner Powell noted that “all economic resources are scarce by definition” in criticizing the *Red Lion* framework.⁴⁵ Moreover, as Media General explained in its Comments, the basis for

⁴¹ *Inquiry into Section 73.1910 of the Commission’s Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 FCC 2d 145 (1985); *see also Meredith Corp. v. FCC*, 809 F.2d 863, 867 (D.C. Cir. 1987); *NAA Comments* at 102-107.

⁴² *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 508 n.3 (D.C. Cir. 1986) (“*TRAC v. FCC*”), *cert denied*, 428 U.S. 919 (1987) (quoting Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & Econ. 1, 14 (1959)).

⁴³ *Id.* The Court in that case further observed that this “attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.” *Id.*

⁴⁴ *In re Complaint of Syracuse Peace Council*, 2 FCC Rcd. 5043, 5054 (1987) (citing *TRAC v. FCC*, 801 F.2d at 508).

⁴⁵ *In the Matter of Repeal or Modification of the Personal Attack and Political Editorial Rules*, 15 FCC Rcd. 19973, 19994 (2000) (Separate Statement of Commissioner Michael K. Powell); *see also In the Matter of Review of the Commission’s Regulations Governing Television Broadcasting*, 14 FCC Rcd. 12903, 12997 (1999) (Dissenting Statement of Commissioner Harold Furchtgott-Roth) (“[T]here is nothing unique about the scarcity of radio frequencies. They are no more scarce than any other natural resource, such as oil, timber or gas, that is an essential input to other industries.”).

distinguishing broadcast spectrum from other economic goods is even weaker now that broadcast licenses are awarded via auctions and thus are essentially traded on the open market.⁴⁶

Beyond their reliance on the outdated scarcity doctrine, neither Consumers Union, et al. nor UCC, et al. address the constitutionality of the newspaper/broadcast cross-ownership ban's disproportionate effect on newspaper publishers as opposed to other media owners. Central to the Supreme Court's decision in *NCCB* was the observation that "the regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communications were already treated under the Commission's multiple ownership rules."⁴⁷ In the years since *NCCB* was decided, however, the FCC has eliminated or relaxed virtually all of the regulations that precluded a party from owning more than one station or other media outlet in the same market. The Commission surely does not need a reviewing court to tell it that continuing to prohibit newspapers from owning broadcast stations while at the same time allowing other media owners to acquire multi-station groups cannot be justified by the *NCCB* decision. In fact, such discriminatory treatment violates the First Amendment.⁴⁸

⁴⁶ *Media General Comments* at 71-72.

⁴⁷ *FCC v. Nat'l Citizens Comm. For Broad.*, 436 U.S. 775, 801 (1978) ("*NCCB*"). Significantly, in distinguishing *NCCB* from an earlier disparate impact case involving a specific tax on newspapers (*Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936)), the Court relied on the parity in the multiple ownership regulations to justify its decision. Thus, the Court noted that "owners of radio stations, television stations, and newspapers alike are now restricted in their ability to acquire licenses for co-located broadcast stations ... [*Grosjean*] is thus distinguishable in the degree to which newspapers were singled out for special treatment." *Id.* at 801. In a regulatory environment in which duopolies and multiple television-radio combinations are permitted as a matter of course, the constitutionality of prohibiting newspapers from owning broadcast stations plainly is suspect.

⁴⁸ In *Ruggiero v. FCC*, 2002 WL 191747 (D.C. Cir. Feb. 8, 2002) the D.C. Circuit reversed a statutorily mandated restriction on station licensing because it served as an "automatic and permanent restriction on . . . future lawful speech." *Id.* at *9. In discussing the appropriate standard of review, the *Ruggiero* Court expressly observed that "neither *NCCB* nor any subsequent Supreme Court case supports the Commission's position that all 'reasonable' broadcasting restrictions automatically pass constitutional muster." *Id.* at *5. The Court went on to state that when restrictions "permanently limit the speech of certain specific individuals," those broadcast regulations merit "heightened scrutiny." More specifically, "the applicable level of Constitutional scrutiny increases with the extent to which a challenged provision relies on the identity of the speaker or the content of the covered speech. *Id.* (*emphasis added*) (citing *News America Publishing, Inc. v. Federal Communications Commission*, 844 F.2d 800,

Both the Consumers Union and the UCC Comments also attempt to argue that ,because of the continuing applicability of the scarcity rationale, the D.C. Circuit’s recent First Amendment analysis in *Time Warner Entertainment Co., L.P. v. FCC* (“*Time Warner II*”)⁴⁹ has no relevance to the broadcast ownership restriction at issue in this proceeding.⁵⁰ This argument fails. As NAA and other commenters in this proceeding have amply shown, there is no longer any basis for providing broadcasters with a lower level of First Amendment protection than other media outlets, including cable operators. In addition, the *Time Warner II* decision makes clear that, as a general matter, the Commission has an affirmative obligation to support its ownership rules with concrete evidence and reasoned analysis—regardless of the level of First Amendment scrutiny involved in a court’s review. As the Court noted in finding that the FCC had failed to adequately justify its so-called “channel occupancy” rules, “to pass even the arbitrary and capricious standard, the agency must at least reveal a rational connection between the facts found and the choice made.”⁵¹ Here, as was the case in *Time Warner II*, the agency cannot meet its burden – under any level of constitutional scrutiny – of demonstrating the existence of any sort

812 (D.C. Cir. 1988)). While the Court in *Ruggiero* discussed the *NCCB* decision insofar as it applied to the newspaper/broadcast cross-ownership ban at the time of the decision, it did not address the changed circumstances that obtain today. It is clear that a similar court reviewing the current regulation under the *Ruggiero* framework would be hard pressed to reach the same conclusion, given the dramatic changes in the media marketplace and the evolution of the ownership regulatory scheme into one in which duopolies and multiple television-radio combinations are permitted as a matter of course.

⁴⁹ See generally *Time Warner Entertainment Co., LP v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (“*Time Warner II*”), *cert denied*, 122 U.S. 644 (2001).

⁵⁰ *Consumers Union Comments* at 24-25; *UCC Comments* at 21-24.

⁵¹ *Time Warner II*, 240 F.3d at 1137 (internal quotations omitted). NAA notes in this regard that this holding also would be applicable to any market-size or voice-count test the Commission might adopt as an alternative to full repeal of the rule. As the Court noted in rejecting the agency’s bases for selecting a 40 percent channel-occupancy limit, the FCC is obligated to “link the numerical limits to the benefits and detriments depicted.” *Id.* at 1138. NAA believes that the Commission would be unable to adequately justify any alternative to complete elimination of the ban. Notably, none of the principal commenters favoring retention of the rule even attempted to come up with a viable voice-count test.

of rational connection between the evidence on the record and retention of the newspaper/broadcast cross-ownership ban.

II. THE HANDFUL OF PARTIES WHO SUPPORT THE BAN HAVE FAILED TO REFUTE THE OVERWHELMING WEIGHT OF THE EVIDENCE THAT NEWSPAPER/BROADCAST COMBINATIONS HAVE SERVED THE PUBLIC INTEREST WELL, AND THAT ELIMINATION OF THE BAN WILL FOSTER THE DELIVERY OF MORE DIVERSE, LOCALLY ORIENTED NEWS AND INFORMATION TO CONSUMERS

As noted above, the overwhelming majority of the comments in this proceeding support elimination of the newspaper/broadcast cross-ownership ban. The handful of parties who filed substantive comments in favor of retention of the prohibition rest their arguments on a confusing amalgam of speculative theories and unproven assumptions about the effect of media ownership on content diversity. The principal advocates for retention of the rule—Consumers Union, *et al.* UCC, *et al.* and AFL-CIO—thus urge the Commission to continue to preclude newspaper publishers from acquiring interests in co-located broadcast stations largely on the basis of their intuitive belief that maximization of the number of owners of media outlets is the one and only means by which to ensure diversity in the information marketplace and, apparently, that “51 voices are better than 50.” Despite the Commission’s explicit request that “commenters . . . provide specific information about the effects th[at the grandfathered] combinations have had in their markets,”⁵² none of these parties offers any empirical evidence to demonstrate the existence of a nexus between rigid ownership limits and content or viewpoint diversity, much less to support perpetuation of an absolute ban on newspaper/broadcast cross-ownership in today’s highly diverse and competitive information marketplace. NAA and others who support repeal of

⁵² *NPRM* ¶ 1; *see also id.* ¶ 28 (stating that the Commission wants information about existing combinations “because they provide concrete examples”).

the newspaper ban, in contrast, have heeded the FCC’s call for a “solid and complete factual foundation”⁵³ that fully justifies elimination of the cross-ownership restriction.

For example, UCC, *et al.* point to studies of broadcast station ownership in ten selected markets which, they observe, reflect a reduction in the number of independent station owners and an increase in the combined commercial market share of the “top four” owners between 1993 and 2001.⁵⁴ UCC’s limited market studies, however, focus on radio and television ownership separately and in isolation, and thus can hardly be deemed probative with respect to the overall level of media diversity in any particular market. Moreover, in view of the time period selected—from 1993 to 2001—it is hardly remarkable that consolidation has occurred; that period spans the years that have passed since first the Commission and then Congress significantly relaxed the local radio ownership limits, as well as the time frame in which the television duopoly rule was relaxed to allow joint ownership of two stations in the same market for the first time.⁵⁵ Any changes in ownership patterns in the time period selected by UCC, *et al.* merely reflect that station owners have in fact moved forward and entered into the transactions that clearly were contemplated and made possible by the 1996 Act and other changes in the FCC’s local station ownership rules.

By contrast, NAA submitted with its Comments a study by Economists Inc. which compared combined daily newspaper and broadcast station ownership patterns in 1975—when the newspaper ban was first adopted—with those in 2000. The study included 21 markets, representing the full range of market sizes from the Top 10 to the 204th Designated Market Area

⁵³ *Id.* ¶ 1.

⁵⁴ See *UCC Comments* at 3-8 and Attach. 2, 3.

⁵⁵ See 1996 Act § 202(b); *Review of the Commission’s Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903 (1999) (“1999 Television Ownership Order”)

(“DMA”). Based on this more complete sampling of markets, Economists Inc. determined that “concentration levels have decreased significantly since the adoption of the rule.”⁵⁶ Further, the results of the study actually “significantly overstate the actual levels of concentration,” since they do not take into account other outlets such as cable, non-daily newspapers, direct mail, yellow pages, outdoor, and the Internet.⁵⁷

Media General included, with its Comments, a list of all media outlets in each of its six commonly owned markets.⁵⁸ Media General reviewed all television, radio, LPFM, cable, DBS, print, wireless cable and Internet outlets in its market ranging from the 14th largest to the 159th largest DMA. This comprehensive study clearly demonstrates the explosive growth over the past two and a half decades not only in traditional media outlets in existence in 1975, but also in newer, less regulated offerings such as the Internet.⁵⁹ Similarly, the Hearst Corporation provided a detailed survey of the media outlets in Albany, NY; San Antonio, TX; and San Francisco, CA.⁶⁰ In all of these markets, Hearst’s survey demonstrates the abundance of both traditional and new media outlets available to consumers.⁶¹

Based largely on their concerns with respect to recent consolidation in broadcast—and particularly radio–station-ownership—UCC, *et al.* go on to argue conclusorily that “[p]ermitting common ownership of a daily newspaper and broadcast station in local markets would only

⁵⁶ Economists Incorporated, *Horizontal and Vertical Structural Issues and the Newspaper-Broadcast Cross-Ownership Ban*, at 8, Table 4 (Dec. 2001) (“*Economists Inc.*”); *NAA Comments* at 72.

⁵⁷ *Id.*

⁵⁸ *Media General Comments* at 19-26, App. 9-14.

⁵⁹ *Media General Comments* at 26-29.

⁶⁰ *Hearst Corp. Comments* at App. A-C.

⁶¹ *Id.* at 10-16. Many other commenters provided similar evidence of the level of diversity and competition among the media in their local markets.

further reduce diversity and competition in those markets.”⁶² UCC, *et al.* offer no specific evidentiary support for their broad claims, however; they instead rely on the same “source diversity” mantra that proponents of ownership restrictions have recited since the 1970s. Consumers Union, *et al.* express similar concerns with respect to consolidation in media ownership and argue, broadly, that “[a]ll relevant First Amendment diversity depends on ownership diversity.”⁶³

Interestingly, Consumers Union, *et al.* agree with NAA and other proponents of elimination of the newspaper/broadcast cross-ownership ban that “newspapers provide a different type of information service with different impact” from television or radio broadcast stations.⁶⁴ According to the Consumers Union Comments, newspapers provide “much longer and in depth treatment of issues” and “have adapted to a role that is distinct from television.”⁶⁵ Thus, “[n]ewspapers devote greater attention to local news and provide a distinct role through broad, deep coverage and investigative reporting.”⁶⁶ Consumers Union, *et al.* go on to assert, nevertheless, that “public policy intervention” is required to promote “[i]nstitutional diversity reflect[ing] the special expertise and culture” of these differing media.⁶⁷

According to Consumers Union, *et al.*, allowing cross-media consolidation would somehow undermine institutional diversity and, moreover, result in a “tyranny of the majority,” characterized by “standardized, lowest common denominator [programming] products” that

⁶² UCC Comments at 1-2.

⁶³ Consumers Union Comments at 30.

⁶⁴ *Id.* at 62.

⁶⁵ *Id.*

⁶⁶ *Id.* at 63.

⁶⁷ *Id.* at 50.

exclude minority audiences and unpopular points of view.⁶⁸ These commenters, joined by AFL-CIO, also express concern that, if newspaper/broadcast cross-ownership is allowed, news and public affairs programming will suffer. AFL-CIO, for example, suggests that elimination of the cross-ownership ban “will exacerbate the trends of declining local media voices and of national programming driving out local-programming, that has [sic] been fostered by concentration of media ownership.”⁶⁹ Consumers Union, *et al.* similarly cite concerns about the loss of local content, and in particular local news programming, “which has always been the most expensive kind of programming to produce.”⁷⁰ As discussed below, for precisely these reasons, the Commission should encourage, and not preclude, ownership of broadcast stations by local daily newspapers.

UCC, *et al.*, Consumers Union, *et al.*, and AFL-CIO do not offer any probative empirical evidence to support their parade of theoretical horrors. As discussed above, UCC, *et al.*’s “market studies” of radio and television station ownership are irrelevant to questions of *cross-ownership* of different media. AFL-CIO’s Comments include no empirical studies at all, much less any addressing the effects of newspaper/broadcast cross-ownership. And while Consumers Union, *et al.* included with their Comments three academic pieces totaling 130 pages in length, none was directed to the issues presented in this proceeding.

⁶⁸ *Id.* at 12.

⁶⁹ *Comments of Am. Fed’n of Labor and Cong. of Indus. Org.* in MM Docket Nos. 01-235 and 96-197, at 8 (filed Dec. 3, 2001) (“*AFL-CIO Comments*”). AFL-CIO also claims that cross-ownership “will create additional pressures on local news editors and directors to curtail public affairs programming.” *Id.* at 16-17.

⁷⁰ *Consumers Union Comments* at 57 and n.100 (citing Charles Fairchild, *Deterritorializing Radio: Deregulation and the Continuing Triumph of the Corporatist Perspective in the USA*, Media, Culture & Society, 1999, 557-59).

For example, the Consumers Union Comments rely heavily on a study by Joel Waldfogel, a professor at the Wharton School of the University of Pennsylvania.⁷¹ Professor Waldfogel's study examines the effects that the size and racial composition of a local population have on the types of programming offered and finds, not at all surprisingly, that local programming targeted to minority viewers is more prevalent in markets with large minority populations.⁷² Thus, because program preferences differ sharply between black, white, and Hispanic populations, the Waldfogel Study concludes that blacks and Hispanics are better off, in their capacity as television viewers, in markets with larger black and Hispanic populations.⁷³

These findings have no apparent tie to the issue of whether the Commission should retain the newspaper/broadcast cross-ownership ban. While the Waldfogel Study does conclude that minority populations disproportionately depend on local programming to serve their interests,⁷⁴ it would appear to suggest that audience needs and interests, and not ownership, dictate programming content. As explained in NAA's Comments, newspaper publishers would have a particular incentive and ability to focus on local issues in producing local television or radio programming.⁷⁵

Consumers Union, *et al.* also submitted a lengthy essay by C. Edwin Baker of New York University that offers a broad assessment of media concentration issues.⁷⁶ The Baker Essay

⁷¹ Joel Waldfogel, *Who Benefits Whom in Local Television Markets?*, Nov. 15, 2001, attached to *Consumers Union Comments* at App. B ("Waldfogel Study").

⁷² *Id.* at 2, 13-16.

⁷³ *Id.* at 8-13, 16-19

⁷⁴ *Id.* at 12-13.

⁷⁵ *NAA Comments* at 27-29.

⁷⁶ C. Edwin Baker, *Giving Up on Democracy: The Legal Regulation of Media Ownership*, November 25, 2001, attached to *Consumers Union Comments* at App. C ("Baker Essay").

provides an overview of the evolution of media ownership regulation, discusses objections to mass media concentration, and suggests that media ownership laws generally should be recast to extend beyond the limits imposed by antitrust law.⁷⁷ It does not specifically discuss the newspaper/broadcast cross-ownership rule. Moreover, by its own admission, the essay “is not detailed enough to suggest the specifics of an ideal media ownership policy” and is not backed up by “empirical” evidence.⁷⁸

The Statement of Ben Bagdikian, a former Dean of the Graduate School of Journalism at the University of California at Berkeley, similarly fails to substantiate the vague assertions in the Consumers Union Comments regarding the loss of diversity that would ensue from elimination of the ban.⁷⁹ Bagdikian’s claims that “cross-media mutual criticism and evaluation becomes minimal when both the local newspaper and a local broadcast station come under common ownership” and that newspaper/broadcast combinations present “homogenize[d] . . . news and commentary” are not borne out by any specific examples.⁸⁰ Rather, Bagdikian attempts to “analogize” these claims to changes in programming resulting from recent consolidation in the radio industry.⁸¹ The trend toward producing nationally syndicated radio programming, however, has nothing to do with the diversity of content that will be offered at the *local* level by jointly owned newspaper and broadcast stations. The isolated examples that Bagdikian offers

⁷⁷ *Id.* at 3-5, 86-88

⁷⁸ *Id.* at 75, 86.

⁷⁹ Statement of Ben Bagdikian, attached to *Consumers Union Comments* at App. A (“*Bagdikian Statement*”).

⁸⁰ *Id.* at 2-4.

⁸¹ *Id.* at 3.

regarding the alleged influence of financial considerations over journalistic reporting obligations have the same obvious flaw.⁸²

By contrast, NAA included in its Comments detailed descriptions of the experiences of existing newspaper/broadcasting combinations ranging from Belo Corp.'s *Dallas Morning News* and WFAA-TV in the 7th ranked market, to Journal Communications' *Milwaukee Journal*, WTMJ-TV, WTMJ(AM), and WKTI-FM in the 33rd-ranked Milwaukee DMA, to Quincy Broadcasting Company's *Quincy (IL) Herald-Whig*, WGEM-TV, and WGEM(AM), in the 163rd market.⁸³ Numerous other parties filed comments based upon their ownership of same-market daily newspapers and broadcast stations⁸⁴—combinations that were grandfathered when the Commission adopted the ban in 1975 or established pursuant to waiver or through the permissible acquisition of newspaper properties in the years since. As noted above, in its *NPRM*, the Commission expressly invited commenters to provide specific information about the effect these combinations have had in their markets.⁸⁵ The Commission thus recognized that such experiential evidence provided a far more reliable basis for assessing the need for or effect of its regulations than any amount of speculative theory or untested assumptions.

⁸² *Bagdikian Statement* at 6 (discussing alleged pressure that General Electric has placed on NBC to make reporting decisions based on considerations regarding corporate stock prices).

⁸³ *NAA Comments* at 27, 28.

⁸⁴ *Tribune Comments* at 42-51; *Gannett Comments* at 8-13; *Media General Comments* at 22-29, 36; *Cox Comments* at 12-14; *Belo Comments* at 5-7; *Comments of E. W. Scripps Co.*, in MM Docket Nos. 01-235 and 96-197, at 1-3 (filed Dec. 3, 2001) ("*Scripps Comments*"); *New York Times Comments* at 5-16; *News Corp/Fox Comments* at 26, 35-36, 40-42; *Comments of Journal Broadcast Corp.*, in MM Docket Nos. 01-235 and 96-197, at 2 (filed Dec. 3, 2001) ("*Journal Comments*"); *Comments of Schurz Communications Inc.*, in MM Docket Nos. 01-235 and 96-197, at 8-10 (filed Dec. 3, 2001) ("*Schurz Comments*"); *The Post Company Comments* in MM Docket Nos. 01-235 and 96-197, at 1-2 (filed Dec. 3, 2001) ("*Post Comments*").

⁸⁵ *NPRM* ¶¶ 1, 28.

The empirical evidence advanced by NAA and the owners of newspaper/broadcast combinations who joined in urging repeal of the ban clearly and consistently establishes that:

- In even the smallest markets, newspaper publishers and broadcast station licensees face intense and ever-increasing competition from a diverse array of competing media outlets.⁸⁶
- American consumers can select from a vast array of news information sources on every subject and issue, from international or national to local in origin.⁸⁷
- Existing newspaper/broadcast combinations, in markets ranging in size from the largest to the smallest, have excelled in providing local news and other informational offerings.⁸⁸
- Such combinations are better able to coordinate their newsgathering resources and more widely disseminate important information to their communities through their newspaper and broadcast facilities and other new and innovative service offerings such as websites and cable news channels. These efficiencies benefit consumers, who have access to improved news coverage and informational offerings, delivered to them in the forms and at the times they prefer.⁸⁹
- Combinations also can achieve efficiencies that flow to the benefit of advertisers, who enjoy the benefits of “one-stop shopping” and individually tailored media mixes.⁹⁰
- Finally, common ownership cannot be assumed to reduce content or viewpoint diversity. Existing combinations compete vigorously and tend to differentiate themselves through the distinctive approaches to reporting and editorializing that characterize the print and broadcast media. The inherent differences in these

⁸⁶ See, e.g., *NAA Comments* at 15, 79-81; *New York Times Comments* at 2-7; *Cox Comments* at 5-7; *Tribune Comments* at 7-34; *News Corp/Fox Comments* at 7-13; *Belo Comments* at 8-9; *Schurz Comments* at 4-5; *Media General Comments* at 19-29, 80-29; *Comments of Hearst-Argyle Television Inc.* in MM Docket Nos. 01-235 and 96-197, at 8-12 (filed Dec. 3, 2001) (“*Hearst-Argyle Comments*”).

⁸⁷ See, e.g., *NAA Comments* at 11-15, App. I; *Tribune Comments* at 7-34; *Media General Comments* at 19-29.

⁸⁸ See, e.g., *NAA Comments* at 18-43; *New York Times Comments* at 6, 16-18; *News Corp/Fox Comments* at 40-42; *Belo Comments* at 4-5; *Gannett Comments* at 8-9; *Media General Comments* at 26-29; *Schurz Comments* at 8; *Post Comments* at 1-3; *Hearst Corp. Comments* at 16-19.

⁸⁹ See, e.g., *NAA Comments* at 18-43; *New York Times Comments* at 6, 16-17; *Tribune Comments* at 36-17; *News Corp/Fox Comments* at 34-39; *Gannett Comments* at 10-11; *Schurz Comments* at 17; *Media General Comments* at 13-17; *Hearst Corp. Comments* at 16-18.

⁹⁰ See, e.g., *NAA Comments* at 38-40, 74-75; *New York Times Comments* at 18-24; *Tribune Comments* at 18-19; *Media General Comments* at 56-57.

media, which are reinforced by powerful economic incentives to reach the broadcast possible overall audiences, ensure that content will remain varied and that competing viewpoints will be heard.⁹¹

In this connection, concurrently with the filing of the opening comments in this proceeding, the results of a study on the diversity of viewpoints offered by jointly owned newspapers and broadcast stations in three major media markets were published in the *Federal Communications Law Journal*. That study, by David Pritchard, a Professor of Journalism and Mass Communication at the University of Wisconsin-Milwaukee, focused on the diversity of news and information viewpoints offered by cross-owners in Chicago (the *Chicago Tribune*, WGN-TV, WGN-AM), Dallas (*The Dallas Morning News*, WFAA-TV), and Milwaukee (the *Journal Sentinel*, WTMJ-TV, and WTMJ-AM) during the final weeks of the 2000 presidential campaign.⁹² In order to determine the influence of ownership on the diversity of views presented, the study evaluated the “slant” (*i.e.*, pro-Bush, pro-Gore, or neutral) of items published or broadcast by each of the cross-owned media regarding the campaign.

The study found substantial diversity in the news and commentary offered by each of the newspaper/broadcast combinations considered.⁹³ Specifically, Pritchard observed that “[t]he slant of campaign coverage broadcast by a company’s radio and television stations tended to differ from the slant of news published by the company’s newspaper” and that overall there was “a wealth of ‘diverse and antagonistic’ information in situations of newspaper/broadcast cross-ownership.”⁹⁴ Thus, the study concluded that the evidence did not support “the fears of those

⁹¹ See, e.g., *NAA Comments* at 40-43; *New York Times Comments* at 6-7, 16-17; *Cox Comments* at 15-16; *Tribune Comments* at 40-42; *News Corp/Fox Comments* at 21-23; *Media General Comments* at 30-36.

⁹² David Pritchard, *A Tale of Three Cities: “Diverse and Antagonistic” Information in Situations of Local Newspaper/Broadcast Cross-Ownership*, 54 *Fed. Comm. L.J.* 31 (2001).

⁹³ *Id.* at 33.

⁹⁴ *Id.* at 49.

who claim that common ownership . . . inevitably leads to a narrowing, whether intentional or unintentional, of the range of news and opinions in the community.”⁹⁵

In sum, the Comments of NAA and the many newspaper/broadcast combination owners who detailed their experiences demonstrate, very persuasively, that the newspaper/broadcast ban is not necessary to further any substantial diversity interest, nor to ensure vigorous competition in the media marketplace. Indeed, the prohibition clearly has been counterproductive, as it has prevented the realization of the many public interest benefits that can be achieved through cross-ownership. In these circumstances, NAA submits, the FCC cannot justify maintenance of the long-outdated prohibition on newspaper/broadcast cross-ownership.

III. THE COMMENTS FAVORING RETENTION OF THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP PROHIBITION FAIL TO DEMONSTRATE THAT THE BAN IS REQUIRED TO MAINTAIN COMPETITION IN TODAY’S MASS MEDIA MARKETPLACE

A. Even the Handful of Commenters Who Advocate Maintenance of the Ban Agree That There Is No Monolithic Advertising Market in Which Newspapers and Broadcast Stations Compete, Rendering the Ban Wholly Unnecessary to Protect Competition for Advertising Dollars

Although the Commission adopted the newspaper/broadcast cross-ownership restriction without any evidence of anticompetitive conduct by common owners,⁹⁶ the ban has since been justified in some part by a purported need to protect competition in an ill-defined market for local advertising revenue.⁹⁷ As the Commission acknowledged in the *NPRM*, however, under

⁹⁵ *Id.*

⁹⁶ See *Commission’s Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 50 FCC 2d 1046, 1072 (1975) (“1975 Multiple Ownership Order”); *FCC v. NCCB*, 436 U.S. at 786 (recognizing that the Commission had never found that “existing co-located newspaper-broadcast combinations . . . are harmful to competition.”); see also *1975 Multiple Ownership Order*, 50 FCC 2d at 1079-80 (acknowledging that its role in preserving competition in advertising markets is extremely limited, because concerns about advertising rates bear little or no relation to the FCC’s primary goal of ensuring that the public interest is served).

⁹⁷ *NPRM* ¶ 19.

traditional antitrust analysis, a finding that newspapers and broadcast stations compete in a definable product market is a necessary prerequisite to a determination that allowing common ownership will harm competition in any such market.⁹⁸ The opening comments in this proceeding, including even those submitted by proponents of the rule, are nearly uniform in their agreement that there is no single narrow product market in which newspapers and broadcast stations compete.⁹⁹ Certainly, no party has presented *factual evidence* or *empirical analysis* that would be sufficient to support a finding that newspapers and broadcast stations compete in a single undifferentiated advertising product market.¹⁰⁰

The lack of evidence is particularly significant in this proceeding, as the Commission has not previously found a basis to treat newspapers and broadcast stations as part of a separate and self-contained market¹⁰¹ and the Commission explicitly requested such information in the *NPRM*.¹⁰² Moreover, governing administrative law principles require evidence of competitive harm if maintenance of the rule is to be justified on competition grounds.¹⁰³ The opening comments compel a finding that newspapers and broadcast stations do not compete in a single narrow product market, rendering maintenance of the ban on common ownership untenable.

⁹⁸ *Id.* ¶ 21 (“Our first task is to define the relevant product market.”).

⁹⁹ See, e.g., *Consumers Union Comments* at 70, 81; *UCC Comments* at 13; *NAA Comments* at 55, 60-65; *New York Times Comments* at 18-24, Att. 6-8; *News Corp/Fox Comments* at 31; *Media General Comments* at 46-50; see also *ALTS Comments* at 7; *AFL-CIO Comments* at 9, 14.

¹⁰⁰ In the FCC’s Television Ownership proceeding, the Commission similarly requested “quantitative, behavioral studies estimating the extent to which broadcast television actually faced substitutes from any and all sources in the marketplace,” but received no data. *1999 Television Ownership Order*, 14 FCC Rcd at 12935 (1999).

¹⁰¹ *NAA Comments* at 56-57; see also *Gannett Comments* at 22.

¹⁰² *NPRM* ¶¶ 21-23.

¹⁰³ *NAA Comments* at 64-65.

Indeed, Consumers Union, *et al.* highlight the uniqueness of each form of media as advertising vehicles and their lack of substitutability, stating that:

Broadcast TV, multichannel [video], newspapers, radio and the Internet are separate products that are not close substitutes. They are used in different ways by the public, based on different business models and address different advertising markets. . . . The[] markets [served by each form of media] are adjacent to each other, rather than in competition with each other. . . . These are separate markets that *are not yet, and may not ever be* substitutes for one another.¹⁰⁴

Similarly, UCC, *et al.* state that broadcast advertising is not a substitute for print advertising in classified advertising and provides only some competition in local advertising in certain areas.¹⁰⁵

The only specific example included in the UCC Comments as an area in which newspapers and broadcast stations compete for a portion of local advertising revenues is the local auto retail advertising market.¹⁰⁶ UCC, *et al.* have not presented empirical analysis to support even this contention, and, in any event, an assertion that newspapers and broadcast stations compete to some degree in one retail area is plainly insufficient to warrant retention of the rule.

Consumers Union, *et al.* reach the same conclusion with respect to the substitutability of different media as communications vehicles:

[E]ach media type falls into a distinct commercial product space. TV, which is by far, the dominant political advertising vehicle, has a special influence on political discourse, through its influence on political attitudes and behaviors, and its prominent place in

¹⁰⁴ *Consumers Union Comments* at 70 (*emphasis added*); *see id.* at 65 (stating that “TV in general, and network TV in particular, has become the premier vehicle for political advertising. The differential impact of television advertising is clear.”) (*citing* Jon R. Sinclair, *Reforming Television’s Role in American Political Campaigns: Rationale for the Elimination of Paid Political Advertisements*, Communications and the Law, March 1995); *id.* at 81 (stating that “[n]ewspapers and radio . . . capture a very different type of advertising dollar than TV.”).

¹⁰⁵ *UCC Comments* at 12-13.

¹⁰⁶ *Id.* at 13.

election campaigns. Newspapers provide a distinct role through broad, deep coverage and investigative reporting.¹⁰⁷

Thus, those who argue in favor of retaining the ban agree in large part with NAA and others supporting repeal on the essential question of whether newspapers and broadcast stations compete in a single narrow product market. The answer to that question, according to those on both sides of the issues, is no.¹⁰⁸

Under antitrust principles, there can be no demonstrable risk that a single entity could exercise “market power” if there is no “market” within which to measure such power.¹⁰⁹ The concession by those who support maintenance of the newspaper/broadcast cross-ownership rule that newspapers and broadcast stations *do not compete* in definable narrow advertising or other communications markets thus negates the Commission’s ability to rely on a need to protect competition for advertising to support retention of the ban.

¹⁰⁷ *Consumers Union Comments* at 71; *see id.* at 72 (stating that “people use different media in different ways, spend vastly different amounts of time in different media environments, consume services under different circumstances and pay for them in different ways.”); *id.* at 75 (stating that “television and newspapers do not compete with each other.”); *id.* at 82 (stating that “[r]adio has fallen into a special niche—it serves as background for people as they engage in other activities such as working or driving.”) (citing Thomas J. Johnson, *et al*, *Measure for Measure: The Relationship Between Different Broadcast Types, Formats, Measures and Political Behaviors and Cognitions*, J. of Broad. & Elec. Media, 2000, at 4; S. Chaffee, *How Americans Get Their Political Information: Print versus Broadcast News*, *Annals of the Am. Acad. of Pol. & Soc. Sci.*, 1996, at 546).

¹⁰⁸ The analysis employed by the U.S. Postal Service (“USPS”) in setting postal rates also supports the conclusion that newspapers and broadcast stations do not compete in a single narrow product market. Prior to 1997, USPS utilized the advertising rates of newspapers, radio stations and television stations in the formula used to estimate postal volume. Later, radio and television rates were removed from the formula, while newspaper advertising rates remained a factor, suggesting that the three forms of media are not interchangeable. *See Testimony of U.S. Postal Service Witness Thomas Thress*, USPS-T-8 at 46, USPS Docket No. R-2001-1 (stating that “In R97-1, the Standard demand equations included cost per-thousand (CPM) data for magazines, newspapers, television and radio advertising provided by McCann-Erickson. In R2000-1, an alternative measure of the price of newspaper advertising was taken from the Bureau of Labor Statistics, which measured the wholesale price of newspaper advertising.”).

¹⁰⁹ Phillip E. Areeda, *et al.*, *Antitrust Law, Vol. IIA: An Analysis of Antitrust Principles and Their Application* ¶ 531a (Little, Brown and Company, 1995) (stating that “Market definition is the initial step in assessing a market’s structure. Structure, in turn, might indicate whether a single dominant firm controls the market or whether an oligopoly can coordinate prices effectively.”); *id.* ¶ 531b (noting that courts require proof of a product and geographic market in antitrust cases).

B. The Level of Competition for Advertising Revenue, Combined with Existing FCC Ownership Limits and the Antitrust Laws, Effectively Guards Against Any Anti-Competitive Concerns

NAA and others who support repeal of the newspaper/broadcast cross-ownership ban established in their opening comments that any local advertising market defined broadly enough to include newspapers and broadcast stations also would have to include other sources of competition, such as cable, weekly newspapers,¹¹⁰ yellow pages, magazines, direct mail, outdoor advertising and the Internet, as well as other outlets that advertisers could reasonably be expected to use to reach their audiences.¹¹¹ As shown in NAA's Comments, the available evidence establishes that newspapers and broadcast stations face ample competition from these other media for advertising revenue.¹¹² Furthermore, economic analysis and experience establish that

¹¹⁰ Consumers Union, *et al.* contend that a weekly newspaper should be counted essentially as one-seventh of a daily newspaper for purposes of measuring competition, simply because weekly newspapers come out once a week while daily newspapers come out every day. See *Consumers Union Comments* at 83. The Consumers Union Comments attempt to bolster this position by arguing that "weeklies have a 'promotional flavor' and are 'strong on neighborhood shopping advertisements.'" *Id.* (citing Phyllis Kaniss, *Making Local News* 154 (1991)). These contentions are wholly without merit. A weekly newspaper is no less a "voice" in the marketplace or a competitor for advertising revenue simply because it is published less frequently than other papers. Moreover, the majority of neighborhood shopping advertisements that appear in newspapers are placed in Sunday papers, which, like weekly newspapers, come out only once a week.

¹¹¹ See, e.g., *NAA Comments* at 65-73; *Cox Comments* at 9-10 (collecting cases); *News Corp/Fox Comments* at 26-31, Tables B-3, B-4, B-6, B-7, B-8, B-10; *Media General Comments* at 51; *Hearst Corp. Comments* at 14-16; *ALTS Comments* at 4-5; *West Virginia Radio Comments* at 7-23; *Freedom of Expression Comments* at 25; *Morris Comments* at 17-24; see also *Scripps Comments* at 2; *New York Times Comments* at 2-6, Att. 1-2.

¹¹² *NAA Comments* at 65-73; *ALTS Comments* at 7; *Morris Comments* at 17-24. *Caribbean International News Corporation* also argues that in the vast majority of media markets, there are a sufficient number of independently-owned and relatively equally sized competitors to ensure that a newspaper/broadcast combination would not adversely affect competition. See *Comments of Caribbean Int'l News Corp.* in MM Docket Nos. 01-235 and 96-197, at 31-32 (filed Dec. 3, 2001) ("*Caribbean News Corp. Comments*"). *Caribbean News Corp.* contends, however, that in certain geographic markets, such as Puerto Rico, there is a single dominant media owner, and that in such cases, allowing a combination would threaten competition. See *id.*; see also *Comments of ARSO Radio Corp.* in MM Docket Nos. 01-253 and 96-197, at 3-4 (filed Dec. 3, 2001) ("*ARSO Radio Corporation Comments*") (arguing that the broadcast and newspaper markets in Puerto Rico are concentrated, warranting retention of the rule and extension of it to Spanish language newspapers as necessary to protect competition). *Caribbean News Corp.* and *ARSO Radio* allege that the unique characteristics of the Puerto Rico market justify retention of the ban. *Caribbean News Corp. Comments* at 31-32; *ARSO Radio Comments* at 3; see also *Comments of the Midwest Family Stations* in MM Docket Nos. 01-235 and 96-197, at 2, 6 (filed Dec. 3, 2001) ("*Midwest Family Stations*") (urging the Commission to retain the ban in monopoly markets). Whatever the marketplace realities in Puerto Rico, they are insufficient to warrant retention of the ban on common ownership throughout the entire United States. As discussed

newspaper/broadcast combinations may lead to lower advertising rates, and there is absolutely no evidence that cross-owners tend to raise advertising prices.¹¹³ Finally, repeal of the newspaper/broadcast cross-ownership rule would not leave publishers free to enter into transactions unchecked. Instead, in the unlikely event that a particular combination raised competitive concerns, the FCC's existing multiple ownership rules and the DOJ/FTC merger review process would continue to guard against undue concentration.¹¹⁴

No party to this proceeding has even attempted to rebut the market reality that most advertisers who use a mix of newspaper and broadcast advertising also view alternative media as viable outlets through which to reach potential customers.¹¹⁵ Those who argue for retention of the rules also have failed to refute the specific evidence presented in this proceeding that competition from other forms of media is sufficient to prevent the exercise of market power by a newspaper/broadcast combination and that common ownership does not lead to higher advertising rates. UCC, *et al.*'s argument that allowing common ownership of newspapers and broadcast stations will permit the exercise of monopoly power is supported by nothing other than information regarding consolidation *within* individual markets (radio-only, TV-only, or newspaper-only),¹¹⁶ which is insufficient to warrant a restriction on cross-ownership. Even if

below, the antitrust laws are sufficient to address any competitive harms that might arise in isolated individual markets.

¹¹³ *NAA Comments* at 74-75.

¹¹⁴ *See, e.g., NAA Comments* at 77-78; *News Corp/Fox Comments* at 23-25; *Media General Comments* at 52-56; *Hearst Corp. Comments* at 13; *West Virginia Radio Corp. Comments* at 29-30.

¹¹⁵ *See NAA Comments* at 63; *see also Testimony of Orlando Baro on Behalf of the Alliance of Independent Store Owners and Professionals*, UAISOP-T-2 at 3, USPS Docket No. R2000-1 (“Because of postal rates, the most cost-effective mass media ad program for big stores is usually the media mix that combines TV, radio, and newspapers. Medium and larger advertisers may continue to use [free papers]. . . [b]ut they also use other, less expensive media.”).

¹¹⁶ In these Comments, NAA refers to the consolidation within a radio-only, TV-only, or newspaper-only market as “intramarket consolidation.”

such intramarket consolidation were somehow deemed relevant to questions concerning common ownership of media properties across different markets, the UCC Comments advance nothing more than unsupported speculation that common ownership will lead to higher advertising rates.¹¹⁷ Moreover, the anecdotal evidence presented by UCC, *et al.* suggests, at most, that common owners might be able to offer multi-media packages to advertisers that better serve their needs and thus make it difficult for small media outlets to compete. For example, UCC, *et al.* attach a statement from Jim Helenthal, Publisher of the *Tri-State Shopper* in Quincy, Illinois that discusses alleged difficulties in competing with one grandfathered combination.¹¹⁸ This contention, however, has been affirmatively refuted by another single-outlet owner in the same market during testimony before Congress.¹¹⁹ In any event, the unsupported and isolated allegations presented by UCC, *et al.*, again are insufficient to justify maintenance of the ban on newspaper/broadcast cross-ownership.

In addition, although the *NPRM* specifically requested commenters to provide “studies and other evidence” regarding the effects of common ownership on advertising rates,¹²⁰ those advocating maintenance of the rule have offered nothing other than unsupported speculation that

¹¹⁷ See *UCC Comments* at 13 (stating that “UCC, *et al.* believe that if a daily newspaper were commonly owned along with broadcast stations . . . the level of concentration in the local market would increase substantially. This in turn would likely reduce competing outlets and increase advertising rates. . . . Accordingly, UCC, *et al.* believe that any revision to the Newspaper/Broadcast cross-ownership rule should be rejected due to the likely anti-competitive effects that would occur in the advertising market as a result of such change.”); see also *Midwest Family Comments* at 5-6.

¹¹⁸ See *UCC Comments* at Attach. 6. The UCC Comments also include three statements from publishers of community-owned weekly newspapers in other markets who believe that they are at a disadvantage in competing with common owners of newspaper and broadcast properties. See *id.* at Attach. 7-9.

¹¹⁹ See *Broadcast Ownership Regulations: Hearings Before the House Comm. on Commerce, Subcomm. on Telecom., Trade, and Cons. Prot.*, 106th Cong., 1st Sess. 56 (1999) (statement of James K. Yager, President and COO, Benedek Broadcasting) (stating, in response to question from Rep. Shimkus (R-Ill.), that he does not feel that his station in Quincy, Illinois is at a competitive disadvantage because of the presence of the co-owned Quincy Newspaper and WGEM).

¹²⁰ *NPRM* ¶¶ 25-26.

owners of newspaper/broadcast combinations might charge higher rates for advertising than are charged by separately owned newspapers and broadcast stations.¹²¹ In contrast, at least one study referenced by the Commission in the *NPRM* shows that newspaper/broadcast cross-ownership may result in lower advertising rates,¹²² and numerous newspaper/broadcast owners have reported that they have been able to offer package deals that cover both media at lower prices.¹²³ Additionally, a 1998 study submitted by NAA in this proceeding demonstrated that “there was no statistically significant difference between advertising prices of cross-owned newspapers and those of other papers.”¹²⁴ Finally, NAA notes that even one of the academic pieces attached to the Consumers Union Comments itself states that it is “unlikely” that joint ownership of a newspaper and broadcast station will increase the owner’s market power over advertising rates.¹²⁵ In short, the record contains no evidence that allowing newspaper/broadcast combinations will result in increased advertising prices, and no basis in competition concerns for retention of the outdated ban on common ownership.

The commenters supporting retention of the ban also fail to demonstrate that other existing safeguards would be insufficient to guard against competitive harms in the unlikely

¹²¹ See, e.g., *UCC Comments* at 13 (stating that “UCC, et al. believe” that allowing cross ownership would “increase advertising rates”); *Midwest Family Comments* at 5.

¹²² James Ferguson, *Daily Newspaper Advertising Rates, Local Media Cross-Ownership, Newspaper Chains, and Media Competition*, 3 J.L. & Econ. 635, 651 (1983) (cited in *NPRM* ¶ 21 n.69).

¹²³ See, e.g., *New York Times Comments* at 10, 12-13; *Tribune Comments* at 39 n.167.

¹²⁴ *NAA Comments* at 75 (citing Economists Incorporated, *Structural and Behavioral Analysis of the Newspaper-Broadcast Cross-Ownership Rules*, at 15 (July 1998) attached as App. B to *Comments of the Newspaper Association* in MM Docket No. 98-35 (filed July 20, 1998) (“*NAA 1998 Biennial Review Comments*”). As NAA noted in its opening Comments, this finding is consistent with earlier studies that found no effect from cross-ownership. See *id.* (citing John Peterman, *Concentration of Control and the Price of Television Time*, 61 Am. Econ. Rev. (1971); RMC Incorporated, *A Quantitative Analysis of the Price Effects of Joint Mass Communication Ownership*, Report #UR-150 (attached to *NAB Comments* in FCC Docket No. 18110); A.M. Lago, *The Price Effects of Joint Mass Media Ownership*, 16 Antitrust Bull. (1971)).

¹²⁵ See *Baker Essay* at 61.

event that common ownership of a newspaper and a broadcast station in a particular market might significantly increase market power.¹²⁶ The FCC's existing multiple ownership rules would continue to prevent newspaper publishers from amassing an excessive number of media properties. Additionally, the DOJ/FTC merger review process, administered by the agencies that are best equipped to analyze the competitive effects of a proposed transaction, provides a check on consolidation that is deemed effective in virtually every other industry in this country. Finally, the antitrust laws would provide an adequate remedy for proven cases of unfair pricing tactics, should they in fact occur.¹²⁷ The existence of these additional safeguards further counsels against retaining the restriction on newspaper/broadcast cross-ownership.

C. Prohibiting Newspaper Publishers as a Group From Acquiring Broadcast Outlets Has No Effect on Preventing Further Consolidation Within Individual Media Markets

Even considering an artificially narrow advertising market comprised of only newspapers and broadcast stations, concentration levels have decreased significantly in the quarter-century since the adoption of the rule.¹²⁸ Specifically, the economic study attached to NAA's Comments demonstrated a 40 percent or greater decrease in concentration since 1975.¹²⁹

The parties advocating retention of the outdated restriction on common ownership of newspaper and broadcast properties rely exclusively on evidence of increased intramarket concentration, and their comments do not even attempt to analyze a composite market containing

¹²⁶ *Id.* at 59-64.

¹²⁷ *See Elimination of Unnecessary Broadcast Regulation*; 59 RR 2d (Pike & Fisher) 1500, 1514-15 (1986) (repealing policies forbidding joint sales and combination rates, stating that "the policies were premised upon only a 'potential' for abuse, rather than actual antitrust violations, and . . . this is not an appropriate basis for regulation").

¹²⁸ *NAA Comments* at 71-73; Economists Incorporated, *Horizontal and Vertical Structural Issues and the Newspaper-Broadcast Cross-Ownership Ban*, at 2-10, Table 4 (Dec. 2001) (attached as App. IV to *NAA Comments*).

¹²⁹ *Id.* at 8-10, Table 4.

newspapers and broadcast stations.¹³⁰ As discussed above, concentration levels within individual markets (*e.g.*, radio or TV) are irrelevant to diversity issues, and also have no bearing on competition concerns, in broader “cross-media” markets. The newspaper/broadcast cross-ownership ban was not designed to address consolidation within individual media markets, and it has no relevance to or ability to affect levels of concentration within such individual markets, or even within a generic “broadcast” market. In concrete terms, allowing a newspaper owner to buy a radio or television station within its home market from a third party does not reduce the number of owners or change the level of *intramarket* concentration, and those in favor of the rule cannot logically demonstrate otherwise.

The contentions advanced in favor of maintenance of the newspaper/broadcast cross-ownership ban regarding intramarket consolidation represent nothing other than belated attempts to reassert arguments that were presented and rejected in the Commission’s previous proceedings regarding radio and television ownership. Those arguing in favor of the rule are simply attempting to reverse the 1996 Act and the subsequent modifications to the Commission’s radio and television ownership rules—a result that is plainly outside of the scope of this proceeding. Prohibiting newspaper publishers as a class from owning broadcast stations will not have any effect on intramarket concentration levels, and, indeed, excludes the parties that often are the best qualified to provide locally focused informational programming and have a greater connection to the local community than perhaps any other group of potential media buyers. Existing intramarket concentration levels simply cannot be utilized as a basis to retain the newspaper/broadcast cross-ownership ban.

¹³⁰ *Consumers Union Comments* at 104-110; *UCC Comments* at 11-13, Attach. 5.

D. The Generalized Fears Expressed by Proponents of the Rule Do Not Provide Adequate Justification for Retaining the Ban

The Comments of Consumers Union, *et al.* are littered with attempts to convince the Commission that a parade of horrors will result if the newspaper/broadcast cross-ownership rule is repealed. Instead of explaining in concrete terms how the issues they raise are relevant to this proceeding, Consumers Union, *et al.* cite to “general literature” regarding the dangers of vertical and conglomerate mergers.¹³¹ A closer examination of the competitive issues they attempt to raise, however, reveals that a majority of their concerns are wholly inapplicable to newspaper/broadcast combinations in the first instance, and therefore cannot provide a basis for retaining the outdated cross-ownership ban.

Initially, NAA notes that Consumers Union, *et al.* recognize that most of their concerns arise only in the context of “vertical integration,” which they define as involving a merger between “companies in a customer-supplier relationship.”¹³² In this context, Consumers Union, *et al.*’s statement that newspaper/broadcast combinations will lead to “vertical integration” through “integrat[ion] of back office operations”¹³³ makes no sense. As their Comments recognize in the succeeding sentence, vertical integration involves a combination of companies that sell products to each other.¹³⁴ Newspapers and broadcast stations typically do not do so and, therefore, a merger between companies owning both types of media properties is not “vertical integration” at all. The commenters claim that “vertical integration facilitates price squeezes and

¹³¹ *Consumers Union Comments* at 110-113.

¹³² *Id.* at 110.

¹³³ *Id.*

¹³⁴ *Id.*

enhances price discrimination,”¹³⁵ but do not explain how either could possibly result from allowing newspaper/broadcast cross-ownership, let alone present evidence that existing combinations engage in such behavior.

Similarly, Consumers Union, *et al.* cite to generalized concerns regarding increased barriers to entry, and summarily conclude that new competitors will have difficulty entering the newspaper or broadcasting industry.¹³⁶ Consumers Union, *et al.* also cite “general” economic literature expressing the danger that cross-subsidization may result from a vertical merger.¹³⁷ These overly broad arguments not only suffer from the basic flaw outlined above, but also ignore market realities. Even without the ban, cross-ownership will continue to be the exception, rather than the rule. To significantly increase barriers to entry, the repeal of the ban would have to lead to a situation in which a newspaper could not continue to compete in a market absent purchase of a broadcast station, or vice versa. The sheer number of television and radio stations in a given market and, pursuant to the FCC’s ownership limits, the number of station owners in any such market, makes this eventuality impossible. Similarly, even without the newspaper/broadcast cross-ownership prohibition, most media properties are owned by diversified entities that hold interests in a variety of different businesses.¹³⁸ The opportunity for cross-subsidization from other lines of business already exists, and has not been shown to pose a problem from a competitive standpoint. Such generalized fears cannot support retention of the ban on cross-ownership.

¹³⁵ *Id.* at 113.

¹³⁶ *Consumers Union Comments* at 110.

¹³⁷ *Id.*

¹³⁸ *See, e.g., Morris Comments* at 5-6; *Hearst-Argyle Comments* at 1-2.

Consumers Union, *et al.* express similarly sweeping and unsupported fears regarding dangers associated with conglomerate mergers, but fail to explain how the concerns they raise are relevant in this context and present no evidence that allowing newspaper/broadcast combinations would lead to the harms they describe. For example, the Consumers Union Comments define an “ideal” conglomerate merger as one in which an “unexpected entrant” acquires a “minor firm” and arrive at the far-reaching conclusion that “[n]ewspaper-broadcast mergers are the antithesis of “ideal” conglomerate mergers.¹³⁹ The only support or analysis presented for this all-encompassing proposition, however, is a diagram that simply catalogues the potential problems that *might* arise in a *hypothetical* conglomerate merger situation.¹⁴⁰

In sum, the comments submitted in this proceeding fail to provide any basis for concluding that maintenance of the archaic newspaper/broadcast cross-ownership ban is necessary to protect competition. Nearly all who addressed the issue agreed that newspapers and broadcast stations do not compete in a single narrow product market, mitigating any fear that competition will be harmed. Moreover, the commenters advocating retention of the rule have not provided evidence that alternative advertising outlets fail to provide adequate assurance against the exercise of market power by newspaper/broadcast combinations; that such combinations actually result in increased concentration, higher prices or demonstrable competitive harms; or that existing FCC regulations and antitrust laws provide insufficient competitive safeguards. As demonstrated by NAA and others in their opening comments, such

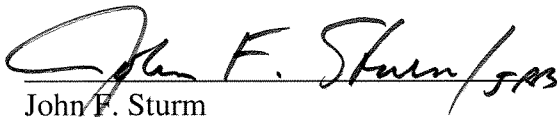
¹³⁹ *Consumers Union Comments* at 111. The comments define an “ideal” conglomerate merger as one in which an “unexpected entrant” acquires a “minor firm.” *Id.* Moreover, Consumers Union, *et al.* entirely overlook the fact that currently, due to the newspaper/broadcast cross-ownership ban, newspapers are not potential entrants in the broadcast industry at all, making their argument nonsensical at best.

¹⁴⁰ *Id.* at 111-12, Ex. IV-3.

vague and unsubstantiated concerns about economic competition are plainly insufficient to warrant maintenance of the anachronistic newspaper/broadcast cross-ownership restriction.

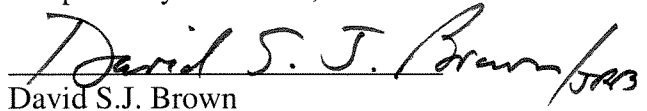
CONCLUSION

NAA submits that, based on the record in this proceeding, the FCC is obligated to repeal the newspaper/broadcast cross-ownership prohibition in its entirety. The overwhelming weight of the evidence shows that newspaper/broadcast combinations provide substantial public interest benefits and that, indeed, newspaper publishers are the candidates best situated and most likely to increase the quality and quantity of local broadcast news coverage. Thus, expeditious repeal of the prohibition would provide a logical counterweight to the recent trends in national media consolidation. Moreover, the record in this proceeding makes clear that elimination of the ban will not pose any threat to the Commission's competition and diversity goals. For all of these reasons, consumers unquestionably would benefit from a decision to promptly remove the outdated rule.

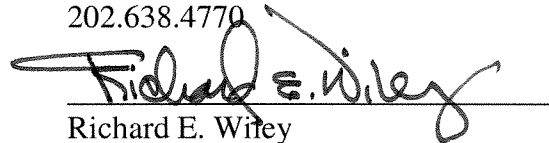


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APPENDIX I

Appendix I to NAA's opening comments provided an overview of the continuing growth in diversity and competition among the media from which American consumers obtain news, information, entertainment and other "content." Following the submission of those comments, the Commission released its Eighth Annual Report regarding the status of competition in the market for the delivery of video programming.¹⁴¹ This Appendix provides evidence of the development of additional competition among various media based on the Commission's findings.

Television/DTV

During 2000-2001, the combined prime time audience share of the seven national networks totaled only 57 percent, down from 59 percent during the previous year.¹⁴²

Cable

The number of cable subscribers continues to grow, reaching nearly 69 million as of June 2001, an increase of 1.9 percent from 67.7 million in June of 2000. Cable was estimated to pass 104 million homes at the end of June 2001, up from approximately 96.6 million homes in 1999.¹⁴³ Additionally, the number of homes subscribing to at least one premium cable service increased by 3.7 percent from 35.5 million for 1999 to 36.8 million for 2000. Also, growth in

¹⁴¹ *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, FCC 01-389 (rel. Jan. 14, 2002)(Eight Annual Report)("2001 Annual Competition Report"). Unless otherwise noted, all citations contained in this appendix are to the 2001 Annual Competition Report.

¹⁴² ¶ 80.

¹⁴³ ¶ 17.

premium cable subscribers continued during the first half of 2001, with premium cable reaching 37.2 million subscribers.¹⁴⁴

DBS

In the year between June 2000 and June 2001, DBS subscriptions grew to about 16 million U.S. households from the previous 13 million households, an increase of more than 9 percent. The growth in DBS subscribers is close to two and a half times the growth rate for cable subscribers.¹⁴⁵ The Satellite Broadcasting and Communications Association (“SBCA”), a national trade organization of the satellite television industry, indicates that DBS is gaining over 8,500 subscribers each day.¹⁴⁶

On December 7, 2001, the United States Court of Appeals for the Fourth Circuit upheld the must-carry provisions of the Satellite Home Viewer Improvement Act (“SHVIA”) against various Constitutional challenges. The court’s ruling affirmed that, as of January 1, 2002, satellite carriers that voluntarily decide to carry one local station in a market under the statutory copyright license granted under SHVIA must carry all requesting stations within the local market if any other local stations are broadcast.¹⁴⁷

Digital Video/Cable

The digital video market continues to grow with an estimated 12 million subscribers to digital video packages offered by cable systems as of June 2001. This marks a significant

¹⁴⁴ ¶ 18.

¹⁴⁵ ¶ 8.

¹⁴⁶ ¶ 58.

¹⁴⁷ ¶ 60.

increase from 2000, where digital video accounted for 8.7 million subscribers. Predictions indicate that digital video subscriptions will continue to grow, possible reaching 15.1 million by the end of 2001.¹⁴⁸

Internet Video

The market for Internet video has continued to grow since the Commission's last report. It continued to expand as the number of homes with access to the Internet grew from 52 percent as of July 2000 to 58 percent as of July 2001. The number of Internet users accessing Internet video increased in the last year with 41 million users having accessed Internet video as of July 2001.¹⁴⁹ The quantity of Internet video that is available to users also increased.¹⁵⁰

Home Video Sales and Rentals

Home video sales and rentals are considered a direct competitor in the video programming market with approximately 90 percent of all U.S. households owning at least one VCR and homes owning a DVD Player expected to reach 25 million by the end of 2001. From 1999 to 2000, there was a nearly 10 percent increase in money spent by U.S consumers for the rental or purchase of prerecorded video.¹⁵¹

Broadband Service Providers

Broadband service providers ("BSPs") were listed in the *2001 Annual Competition Report* for the first time as competitors in the video programming market. The FCC emphasized

¹⁴⁸ ¶ 38.

¹⁴⁹ ¶ 89.

¹⁵⁰ ¶ 13.

¹⁵¹ ¶ 96.

the importance of BSPs offering bundled service by overbuilding current cable systems with cutting edge systems. While they still face considerable challenges from well-established competitors, RCN, the largest BSP, now serves around 443,000 subscribers in New York City, Northern New Jersey, and the areas in and around Washington DC, South San Francisco and Philadelphia. The second largest BSP, Wide Open West, serves the Denver metropolitan area and approximately 300,000 subscribers.¹⁵²

MMDS

While MMDS subscribers remain around 700,000, service providers such as WorldCom and Nucentrix continue to tap into new markets through their offering of high-speed Internet access, often to rural areas. While Sprint, WorldCom and Nucentrix are still MMDS leaders, at least 24 other companies are now offering fixed wireless services in approximately 33 different counties.¹⁵³

¹⁵² ¶¶ 107-112.

¹⁵³ ¶ 71.