Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 06-121
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

RESPONSE OF PROMETHEUS RADIO PROJECT TO THE CHAIRMAN'S REQUEST FOR SUBMISSIONS

On November 13, 2003, the Chairman issued a press release containing the text of a proposed modification of the Commission's newspaper/broadcast cross-ownership rule ("NBCO"). By counsel, Media Access Project, Prometheus Radio Project ("Prometheus") respectfully submits this response.

The Chairman's Press Release Is Not A Legally Valid Request for Comments

These comments are submitted to protect Prometheus' position with respect to what it regards as an informal suggestion of one member of the Commission. However, in making this submission, Prometheus does not acknowledge that the Chairman's press release constitutes a valid request for comments within the meaning of the Administrative Procedure Act. Prometheus believes that the issuance of this press release did not provide adequate public notice under, or constitute

substantial compliance with, the APA. Under the APA, requests for public participation must be adopted by the Commission and published in the Federal Register. While Prometheus and its counsel are familiar with the Commission's processes, untold thousands of potential participants who rely on the *Federal Register* for notice have been excluded from their right to participate in this proceeding.

The Record Does Not Establish That the Very Viability of the Newspaper Publishing Industry Is at Stake

In his November 13, 2007 press release and the *New York Times* Op-Ed column which accompanied it,[1] the Chairman points to circulation declines, the demise of many daily newspapers and the current financial state of the newspaper industry. He asserts that "[i]f we don't act to improve the health of the newspaper industry, we will see newspapers wither and die.

The Chairman's premise is wrong. As is discussed in the attached testimony delivered on December 5, 2007 to the House Energy and Commerce Committee's Subcommittee on Telecommunications and the Internet, viewed over the long term the newspaper industry earns a high rate of return on an operating basis.[2] Indeed, according to the CEO of one of the largest newspaper publishing companies in the country, the industry is "very, very, very profitable." Industrywide, publicly traded newspapers have lately been generating 16-18% profit margins.

Advertiser supported media are affected by the business cycle, and there is little doubt that there is a short term dip in growth of broadcasting as well as newspaper ad revenues. And it is also the case that some classified advertising revenue is moving to the internet, although it is also worth

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[1]Martin, "The Daily Show," *New York Times*, November 13, 2007.

[2]To the extent some of the larger publishers have undertaken usually large amounts of debt in recent years, the Commission should not place itself in the position of bailing them out.

noting that several of the largest online classified advertising sites are owned by newspaper publishers. The long term picture is quite different. Over the last few decades, the overall trend of advertising revenue has been one of great growth, just about doubling since 1985. Moreover, newspapers' websites are experiencing double digit growth in banner advertising revenue, making up for much of the deficiency on the print side.

Examined in context, the Chairman's reference to long term circulation declines in newspapers is unduly alarmist. Some of the loss is from the closure of afternoon dailies, as a result of economic shifts of a generation ago. Given the Chairman's reliance on circulation loss as an indicator of threat to the viability of newspapers, it is particularly relevant to point of out much circulation loss has been the result of conscious abandonment of exurban customers by metropolitan dailies. According to John Morton, perhaps the leading industry analyst,

> Large chains acquired many such papers and quickly eliminated circulation much beyond a paper's home market, for the simple reason that the papers spend more to print and deliver distant circulation than they made from it. Also largely scrapped were the news bureaus that supported the circulation.

Morton, "Self-Inflicted Wounds," *American Journalism Review*, October/November 2006.

Nor is the internet a threat to viability of the industry. In fact, it is an opportunity. Free Press has calculated that newspapers are picking up as many as five website readers for every lost print reader.[3] Thus, far from presaging the industry's demise, the newspaper industry's increasing dominance in the internet space is likely the source of its future growth, even if the Commission were to do nothing to facilitate newspaper/broadcast cross-ownership.

[3] Free Press, "Devil in the Details," 2006, n. 28.

Relaxation of the NBCO Is Not Needed to Obtain the Benefits of Cost Sharing

The Chairman is off base in asserting that "[p]ermitting cross-ownership can preserve the viability of newspapers by allowing them to share their operational costs across multiple media platforms."

Even if the Chairman's hyperbolic claim were true, and the literal viability of the newspaper industry were at stake, it is impossible to claim that allowing greater cross-ownership in the top 20 markets would address such a grave, albeit hypothetical existential crisis. More importantly, and more realistically, however, the Chairman's drastic solution is not needed to accomplish the same result.

As Prometheus has already shown in its January 2007 *Reply Comments* at pp. 40-42, hundreds of newspapers already "share operational costs across multiple media platforms" through joint ventures with local broadcasters. These existing and thriving partnerships demonstrate that common ownership simply is not necessary to realize these benefits. Just last month, at a Media Bureau hearing concerning its license renewal, the licensee of WWOR-TV in New York bragged about its recently established joint venture with the *Bergen Record* in northern New Jersey. Indeed, that station capitalizes more on this joint venture than it does on the relationship it has with the commonly owned *New York Post*.

The Chairman's Proposal Is Riddled with Loopholes and Would Permit Far More Cross-ownership than Appears to Be the Case.

Chairman Martin's November 13 proposal is far more sweeping than he has attempted to portray it. Under the current rules, the FCC has granted only four permanent waivers, not counting the unprecedented - and unasked for - giveaway to the Tribune Company announced on November

30. To get a permanent waiver, an applicant must demonstrate that one of the merging properties is in danger of going out of business without the waiver.

Chairman Martin would now give permanent relief - not waivers - to any applicant in the top 20 markets (about 43% of the country). All it needs to do is to promise to carry more news and that it will operate its newsrooms independently of each other (synergies be damned). Then, supposedly after considering the degree of concentration in the market and the properties' "financial condition," the Commission will grant the application. Applicants in smaller markets will have an unspecified higher degree of burden, but they, too will, be eligible to obtain FCC authorization for a cross-ownership.

This standard is no standard at all. The truth is that the necessary degree of "concentration" and "financial condition" which will permit approval of cross-ownership applications will always be whatever three FCC Commissioners say they are.

This plan has no benchmarks and no means of verification. There is no effective means of enforcing the two simple promises that the applicants must make. There is no protection for the public. It is little more than a cleverly packaged repeal of the cross-ownership ban in every market in the United States.

Moreover, FCC Chairman Martin's current proposal for substantially eliminating cross-ownership limits in the top 20 markets is likely to reduce minority ownership as prior ownership deregulation. Nearly half of the TV stations owned by people of color are in the top 20 markets, and not one of them is in the top four of their markets. Thus, almost every one of those stations will bein

the cross-hairs as potential acquisition targets. The dearth of minority ownership will be even worse if the FCC ultimately votes to go further than the Chairman's current plan.

Respectfully submitted,

/s/

Andrew Jay Schwartzman

Media Ac/cess Project
Suite 1000
1625 K Street, NW
Washington, DC 20006
(202) 232-4300

December 11, 2007

ATTACHMENT

TESTIMONY OF
ANDREW JAY SCHWARTZMAN
PRESIDENT AND CEO, MEDIA ACCESS PROJECT

Delivered to the
Subcommitee on Telecommunications and the Internet
of the
Committee on Energy and Commerce
United States House of Representatives

OVERSIGHT OF THE FEDERAL COMMUNICATIONS COMMISSION: MEDIA OWNERSHIP

December 5, 2007

1625 K STREET, NW - SUITE 1000 WASHINGTON, DC 20006 PHONE: (202) 232-4300 FACSIMILE: (202) 466-7656
HTTP://WWW.MEDIAACCESS.ORG

SUMMARY

> ***It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.***
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> ***Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969)(citations omitted)***

Chairman Martin's purported justification for modifying the newspaper/broadcast cross-ownership rule is ill-placed. The newspaper industry is a mature, but very profitable and healthy industry, albeit one facing the challenge of changing technology.

The evolution of national media platforms for the delivery of programming via cable, satellite and the internet has not diminished the influence of local broadcasting and daily newspapers.

Most of the supposed synergies of common operation of newspapers and broadcast properties can be obtained without ownership by means of joint ventures. There are hundreds of such partnerships presently in operation.

Newspaper/broadcast cross-ownership results in a loss of a diverse voice and a marketwide diminution of the total amount of local news available to the public. Cross-ownership crowds out the competition. The public receives less, and lower quality, service as a result.

Repeal of the newspaper/broadcast cross-ownership rule would have an especially deleterious impact on minority and female ownership.

Chairman Martin's November 13 proposal for ownership deregulation is deceptively packaged to conceal the fact that it is actually a radical repeal of existing rules.

The FCC is rushing to judgment based on a manipulated and flawed research record. The Commission continues to suppress information, has failed to comply with the peer review requirements of the Data Quality Act and evidently intends to adopt a rule which cannot possibly take into account thousands of pages of new information which has just been filed.

Last week's waivers given to the Tribune Company add insult to injury. In its zeal to eviscerate FCC procedure and precedent, the majority constructed a scheme which is clearly intended to undercut the U.S. Court of Appeals for the Third Circuit, which has retained jurisdiction over the FCC's ownership rules proceeding.

Independent agencies such as the FCC exercise authority delegated by Congress. When agencies demonstrate that they are unable or unwilling to carry out their legislative mandate, Congress must act affirmatively to rein them in.

That time has come. Congress should enact legislation to terminate the FCC's authority to modify its ownership rules and to provide the transparency that the American public is entitled to receive at one of the most important agencies in the federal government.

I begin with the core constitutional principle underlying the Communications Act: it is the public's First Amendment right to have access to diverse sources of information which is, in the words of the Supreme Court, "paramount." It is important then, to bear in mind that this debate is not about hypothetical synergies. It is not about what the internet may be like some day. Rather, it is about democracy, and the impact that relaxing the Commission's ownership rules would have on the American public.

WHY WE SHOULD RETAIN THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE

Chairman Martin, in his infamous November 13, 2007 "Notice of Proposed Press Release," announced that he contemplated a significant revision to the Commission's newspaper/ broadcast cross ownership rules. Although it is deceptively packaged to seem more benign than it really is, Chairman Martin's plan would gut the current rules and replace it with a system that would allow permanent cross-ownerships in large and small markets alike.

Newspapers Are Not in Trouble

Chairman Martin did not use the *Federal Register* to announce his proposal. Instead, he delivered an op-ed column to the *New York Times*. He bases his argument on the publishers' lament that the newspaper business is struggling financially. It is certainly true that this is a tougher than usual period, but newspaper publishing's operating profits are among the highest of any industry. According to W. Dean Singleton, CEO of MediaNews Group, and one of Mr. Sturm's most prominent members, the newspaper industry is "very, very, very profitable" and it will continue to be so "for a very long time."[1]

[1] "Singleton Sold on Newspapers," *Chicago Tribune*, June 21, 2006.

Newspaper publishing is a mature business facing the emergence of disruptive technological change. But, as Mr. Singleton recently said, "It's not a dying business, it's a changing business."[2]

On October 25, 2007, Mr. Singleton delivered a speech to the Associated Press Managing Editors conference in Baltimore.[3] I will quote from it at length, because he makes many of the points I wish to make, perhaps more persuasively than I can.

For one thing, it is true that newspaper circulation is down somewhat, although some of it is the result of metropolitan newspapers intentionally abandoning exurban subscribers.[4] But let Mr. Singleton place this in proper context:

> As you all know, circulation figures have been trending down for more than a decade ... dropping from more than 62 million copies for both weekday and Sunday newspapers ... to less than 60 million on Sunday ... and under 56 million daily.
> When we talk about those numbers, we need to keep our perspective.
> 56 million copies a day still find their way to a lot of eyeballs ... and more people still read an average Sunday newspaper than watched the Super Bowl.
> And when you look at those numbers closely ... there is a lot of good news.
> Our readers rank high in income ... big-ticket purchases ... home ownership ... education ... and lots of other measures that say we're reaching an attractive demographic.
> And even with the decline ... we're holding up better than most other media. But there is one other strength that is particularly important to our future ... and particularly important to what happens in the newsroom.
> And that is our local connection.

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[2]"Newspapers Won't Work Without Net," *Denver Post*, August 14, 2007.

[3]"Newspapers Are the Cornerstones of Convergence," available at http://www. iwant-media.com/ people/people21.html

[4]Moreover as Mr. Singleton points out, smaller newspapers such as Mr. Bliss' are especially profitable and robust. According to Mr. Singleton's own newspaper, the *Denver Post*,

> Singleton...said that while advertising dollars may be falling away from large metropolitan dailies, newspapers between 20,000 and 250,000 are thriving.

"Newspapers Won't Work Without Net," *Denver Post*, August 14, 2007.

The Evolution of Cable, Satellite and the Internet Platforms Has Not Diminished the Influence of Local Broadcasting and Daily Newspapers

Mr. Singleton thus brings me to this extremely important point: over the air broadcasting and daily newspapers are - by far - the most powerful forces shaping ***local*** public opinion. The internet, satellite services and cable TV simply do not matter when it comes to local advertising and local coverage of local issues. That is why those of us who seek a diverse marketplace of ideas seek to maintain the newspaper/broadcast cross-ownership rule. In fact, the FCC's own data make this point very forcefully.

- 89% of those surveyed list newspapers or broadcasting as both their first and second important sources of local news.

- only 3% of respondents say the internet or cable are their first and second most important sources of local news.

- 88% of respondents say they use traditional media for local news and current affairs.

- only one percent of respondents say they rely exclusively on alternative media for local news and current affairs.[5]

For those who, quite understandably, don't entirely trust the FCC's numbers, here is what Mr. Singleton had to say:

> Study after study shows that we are the number-one choice for local news, business, sports ... everything that impacts the lives of our readers where they live, where they work.
> We don't just reflect the community. We don't just report on the community. We are a part of it.
> We are as imbedded in the lives of the people who live there as they are in us.

The NNA and some of the newspaper publishers have produced long lists of purportedly

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[5]These data are discussed at great length in the October 21, 2007 comments filed by Consumer Federation of America, Consumers Union and Free Press ("CFA, *et al.*"), from which these statistics were obtained.

competitive local internet sites. However, CFA, *et al.* analyzed these claims and found that only 3.6% of the stories from cited websites contained original reporting on hard news, *i.e.*, what one would call "journalism." And they found that newspaper web sites had 50 times as much traffic.

The fact that the internet extends the reach of newspapers rather than the other way around is affirmed by Mr. Singleton, who points out that the internet actually expands newspapers' local dominance:

> A recent study of 80 markets showed that online newspapers have a commanding lead over other Web sites for local news and information. And of the nation's Top 20 Web sites today, 10 are newspaper sites.
> One of the more interesting things we've also discovered is that our Web presence is not eroding our print readership ... quite the opposite, in fact.
> A study by media research firm Belden Associates showed that newspaper Web sites actually sell newspapers.
> Belden researchers found a clear jump in single-copy sales among people who visited a newspaper's Web site ... 21 percent bought more newspapers.
> The impact on overall readership was even more dramatic ... 31 percent said they look at the print edition more often since they started visiting the newspaper's Web site

Common Ownership Is Not Necessary to Achieve the "Synergies" That Newspaper Publishers Claim to Seek.

The centerpiece of the argument for common ownership of newspapers and broadcasting stations is that common ownership somehow allows for efficiencies and permits collaboration on special projects that neither the broadcaster nor the newspaper could do on its own.

The fact is that common ownership is not necessary to achieve such synergies. This is not speculative, but is proved by everyday experience. Indeed, just last week I attended an FCC staff hearing on TV service to New Jersey in which WWOR-TV bragged about a new joint newsgathering venture with the *Bergen Record* to improve its coverage of northern New Jersey. Indeed, WWOR-TV appears to have many more synergies with the separately owned *Record* than it does with the

commonly owned *New York Post*.

Such joint ventures are hardly rare. More than 100 local TV and radio stations ***not*** under common ownership realize the same kind of benefits by forming partnerships with each other to share information and resources. According to the Ball State University's Center for Media Design, "Half of the television station news operations in the United States have a news partnership with a newspaper and those partnerships exist across market size."[6] Thus, while Gannett has touted the benefit of its common ownership of a TV station and a newspaper in Phoenix, it does not need to own a TV station to obtain essentially similar synergies for the Knoxville *News-Sentinel* because it has an agreement to share resources with station WBIR. In fact,

> cooperation is the norm for Gannett-owned WBIR and the News-Sentinel. Reporters collaborate on four big projects a year, newspaper editors appear regularly on the station's newscasts, and managers are in daily contact.[7]

According to the Ball State Report, "news directors report their partnerships frequently perform many functions associated with convergence: cross-promotion of partners' content and some sharing of daily news lineups." Thus, if the concern is that the public interest can better be served through the efficiencies and synergies of cooperation, repeal or modification of the cross-ownership rule is not necessary to achieve this goal.

Repeal or Modification Would Cause Harm to the American Public

Despite the FCC's suppression of unfavorable reports, and its result-oriented effort to gin up research to justify repeal of the newspaper/broadcast cross-ownership rule, the dataset generated by

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[6] *Television Newsroom Partnership Survey, Executive Summary* (June 2005) ("Ball State Report").

[7] Allison Romano, *Newspapers and Stations Try Cross-Pollination*, Broadcasting and Cable, July 25, 2005, p. 16. *See also,* Michael Roberts, *Lets Get Together*, Westword, October 31, 2002.

the FCC, when properly examined, strongly supports retention of the cross-ownership ban.

The effect of cross-ownership on a market place is doubly harmful. First, it results in the loss of a diverse voice. And second, it reduces the overall amount of news available to the public.

While I don't think it is necessarily the only, or the superior, measure, the FCC has decided that the best proxy for measuring benefits to the public is the quantity of local broadcast news produced. Simply put, using this criterion and the FCC's own dataset, CFA, *et al.* have forcefully demonstrated that common ownership of newspaper results in a ***net loss*** in the amount of local broadcast news that is produced across local markets.

- Cross-ownership crowds out the competition. The presence of a cross-owned station leads other stations in the market to curtail their news output by 25 percent.
- Cross-owned stations - and markets with cross-owned stations - do not produce more local news.
- Cross-ownership does not increase the number of stations providing news in a market.
- There is no evidence to support the FCC's research hypothesis that allowing cross ownership will increase the amount of news even in smaller markets.

Data submitted by the NNA and various individual newspaper publishers focuses entirely on whether the cross-owned broadcaster carries more news than its competitors. Given the economic clout that comes with common ownership, it is hardly surprising that these stations do outperform their weaker competitors. But this does not mean that these stations carry more news than they would carry if they were not commonly owned and, indeed, the data shows they do not.

There is another important, if less easily quantified, form of damage caused by cross-ownership. The community's news product is often qualitatively damaged. According to Craig Aaron

of Free Press:

> In markets without cross-ownership, local TV news stations generally take their cues from the local newspaper. Since these papers are independently owned, all the local TV news departments have reasonably equal access to the newspaper's reporters and editors.
>
> However, this mutually beneficial relationship is destroyed in markets with cross-ownership. Cross-owned TV stations are able to use their exclusive access to the local newspaper to shut out competitors from the stories that they would normally report. This leads these stations to curtail their local news operations.

Repeal of the Cross-Ownership Rule Would Have an Especially Deleterious Impact on Minority and Female Ownership

Every time the FCC has relaxed its broadcast ownership rules, more minority owners have been forced out. When larger deeper-pocketed companies can bid for available properties, they outbid less well-connected competitors, including minorities and women.

FCC Chairman Martin's current proposal for substantially eliminating cross-ownership limits in the top 20 markets is just as likely to reduce minority ownership as prior ownership deregulation. Nearly half of the TV stations owned by people of color are in the top 20 markets, and not one of them is in the top four of their markets. Thus, almost every one of those stations will be in the cross-hairs as potential acquisition targets. The dearth of minority ownership will be even worse if the FCC ultimately votes to go further than the Chairman's current plan.

Chairman Martin's Plan Is Deceptively Packaged to Conceal the Fact That it Is Actually a Radical Repeal of the Existing Cross-Ownership Rules.

Chairman Martin's November 13 proposal is far more sweeping than he has attempted to portray it. Under the current rules, the FCC has granted only four permanent waivers, not counting last Friday's unprecedented - and unasked for - giveaway to the Tribune Company. To get a permanent waiver, an applicant must demonstrate that one of the merging properties is in danger of

going out of business without the waiver.

Chairman Martin would now give permanent relief - not waivers - to any applicant in the top 20 markets (about 43% of the country). All it needs to do is to promise to carry more news and that it will operate its newsrooms independently of each other (synergies be damned). Then, supposedly after considering the degree of concentration in the market and the properties' "financial condition," the Commission will grant the application. Applicants in smaller markets will have an unspecified higher degree of burden, but they, too will, be eligible to obtain FCC authorization for a cross-ownership.

This standard is no standard at all. The truth is that the necessary degree of "concentration" and "financial condition" which will permit approval of cross-ownership applications will always be whatever three FCC Commissioners say they are.

This plan has no benchmarks and no means of verification. There is no effective means of enforcing the two simple promises that the applicants must make. There is no protection for the public. It is little more than a cleverly packaged repeal of the cross-ownership ban in every market in the United States.

The FCC Is Rushing To Judgment Based on A Manipulated and Flawed Research Record

The FCC's disgraceful process for administering its ownership rules proceeding is no better than the substance that it has created. First, there is the question of timing. Although it has been two and a half years since the end of the litigation which sent the ownership issue back to the FCC, the FCC spent two years doing very little and six months rushing to complete its inquiry.[8] Final action

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[8]The Supreme Court denied petitions for *certiorari* in *Prometheus v. FCC* in June, 2005. The FCC did not initiate its ownership rulemaking until July, 2006. Comments and reply comments were filed by January, 2007. Although the Chief Economist laid out her plans to commission research in

at this time is, to put it mildly, premature.

Between October 22 and November 1 of this year, the FCC has received several thousand pages of highly substantive research which calls into question the studies the FCC released this summer. Between October 1 and October 16, the FCC received hundreds of pages of new filings about the impact of the Commission's ownership rules on minority ownership.[9]

Although any serious review of this newly filed information would certainly take weeks, at a minimum, just days after the last comments were filed, on November 13, Chairman Martin released his proposed final rule - in a press release. He has requested comments by December 11, and announced an intention to hold a vote on December 18. Leaving aside the Chairman's blatant disregard for the requirements of the Administrative Procedure Act, there is no way the FCC's hard-working and methodical staff can possibly assimilate the material which has been filed and take it into account in any decision to be adopted by December 18.

Next, there is the matter of transparency or, more properly, the lack of it.

It is, of course, now well known that the FCC attempted to suppress two important studies which demonstrated the harmful impact of consolidation and thus supported continuation of the current regulatory scheme.[10] The Commission has now commissioned a series of research studies

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June, 2006, the studies were not commissioned until well into the spring of 2007, and the studies were not released until July, 2007.

[9]In its *Prometheus* decision three years ago, the U.S. Court of Appeals specifically directed the FCC to consider this question. The Commission inexplicably took no action on this matter even after August, 2006, when the Minority Media Telecommunications Council filed a petition specifically calling on the FCC to implement the Court's directive. Finally, in August, 2007, notice was not published in the *Federal Register* establishing a comment period as directed by the Court.

[10]In September, 2006, Senator Boxer revealed that the Commission had failed to release a 2004 study which showed that locally owned TV stations produced more news coverage than their

in an ill-fated and flawed attempt to support its preordained result.

Because of our belief that we need to know more about what is going on at the FCC, my colleague Angela Campbell of the Georgetown Law Center's Institute for Public Representation has spent over 15 months trying to extract data from the FCC about the conduct of its ownership proceeding. The Commission continues, without explanation, to withhold some 1400 pages of evidence. Professor Campbell has now sued the FCC.

There is good reason to seek this data, because there is considerable doubt about the *bona fides* of the FCC's review. While we do not know what the FCC is withholding, we do know that the documents Professor Campbell has already unearthed contain damning evidence of the FCC's bias in favor of deregulation. One document in particular stands out. It is a June 2006 internal memorandum written by the FCC's Chief Economist which shamelessly lays out a roadmap for deregulation. The memo states

> This document is an attempt to share some thoughts and ideas I have about how the FCC can approach relaxing newspaper-broadcast cross-ownership restrictions.

A year later, the Commission finally released a series of studies including three which exactly followed the scheme laid out in the Chief Economist's memo.

The Commission gave parties an extremely short period of time - two months - to review these all-important and highly questionable studies. Moreover, the material necessary to examine them did not come until a month later.

Congress has established standards to insure that decisionmaking is not based on junk

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competitors and concluded that media consolidation would likely harm local news gathering. Shortly thereafter, Senator Boxer obtained a second previously unreleased study which raised questions about consolidation in the radio industry.

science. As is detailed in two pending Data Quality Act complaints, the Commission followed outrageously impermissible procedures. It released its commissioned studies on July 31, 2007. Under OMB Guidelines, peer review is supposed to be conducted ***before*** it is disseminated to the public. However, the FCC did not even solicit peer review until after the studies were released, and posted the "peer review" comments on September 4, well over one month into the comment period. The underlying data was finally made available to researchers under extremely strict conditions on September 6.

The Waivers Given the Tribune Company Add Insult to Injury

The FCC majority's treatment of last week's Tribune Company merger decision is the latest, and greatest, departure from normal and appropriate procedure. In its zeal to eviscerate FCC procedure and precedent, the majority constructed in a complex and mindnumbingly contorted decision designed to force the Commission to complete its review of the newspaper/broadcast cross-ownership rules by the end of the year and inviting, even forcing, Tribune to start a lawsuit in the District of Columbia. This artificially inseminated litigation is plainly intended to undercut the four year-old litigation citizens groups successfully brought in Philadelphia to challenge the FCC's earlier ownership deregulation efforts.

To explain this fully would require more detail and more legal procedure than this subcommittee could possibly wish to hear. But here is the essence of it:

- Lawsuits challenging decisions relating to FCC broadcast licenses, such as Tribune's, may be brought only in the District of Columbia Circuit Court of Appeals.
- It is a basic principle of administrative law that when a party receives a partial waiver of a rule, it may not accept the waiver and also challenge it in court.

- In 2003, citizens groups, led by Prometheus Radio Project, chose to bring their challenge to the earlier ownership decision in Philadelphia, where the U.S. Court of Appeals for the Third Circuit ultimately rejected the FCC's June, 2003 decision and retained jurisdiction of the matter after its remand.

In last week's action, the Commission majority cunningly packaged the Tribune decision as a ***denial*** of its request for temporary waivers and then effectively granted Tribune ***more*** than it sought. Specifically, while Tribune asked only for temporary waivers, and despite the absence of any showing of financial distress, the Commission majority nonetheless gave Tribune an unprecedented ***permanent*** waiver for its Chicago properties. As to the other cities, Tribune's requested temporary waivers were purportedly denied, although the Commission gave essentially the same relief through special waivers which would last for six months past the end of any lawsuit Tribune might bring in the District of Columbia Court. As Commissioner Copps explained in his dissent, this artifice actually forces Tribune to file a law suit in the District of Columbia and thereby create the possibility of a conflict among the circuit courts that increases the possibility of Supreme Court review. Commissioner Adelstein quite properly described this as using Tribune as a "human shield" to advance Chairman Martin's agenda.

Conclusion

Independent agencies such as the FCC exercise authority delegated by Congress. When agencies demonstrate that they are unable or unwilling to carry out their legislative mandate, Congress must act affirmatively to rein them in.

That time has come. Congress should enact legislation to terminate the FCC's authority to modify its ownership rules and to provide the transparency that the American public is entitled to receive at one of the most important agencies in the federal government.