

**ORAL ARGUMENT SCHEDULED FOR FEBRUARY 11, 2004**

**Nos. 03-3388, 03-3577, 03-3578, 03-3580, 03-3581, 03-3582, 03-3651, 03-3665,  
03-3673, 03-3708, 03-3894, 03-3950, 03-3951, 03-4073**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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PROMETHEUS RADIO PROJECT, *et al.*,  
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION  
AND  
THE UNITED STATES OF AMERICA,  
Respondents.

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**ON PETITION FOR REVIEW FROM THE  
FEDERAL COMMUNICATIONS COMMISSION**

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**BRIEF FOR INTERVENORS NEWSPAPER ASSOCIATION OF  
AMERICA, BELO CORP., GANNETT CO., INC., AND MORRIS  
COMMUNICATIONS COMPANY, LLC**

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November 3, 2003

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Third Circuit Local Rules of Appellate Procedure, the Newspaper Association of America (“NAA”), Belo Corp. (“Belo”), Gannett Co., Inc. (“Gannett”), and Morris Communications Company, LLC (“Morris”) hereby submit a joint Corporate Disclosure Statement.

NAA is a non-profit organization representing the newspaper industry and over 2,000 newspapers in the United States and Canada. No publicly owned corporation has a financial interest in NAA and NAA is not affiliated with any publicly owned corporation.

Belo and its subsidiaries own and operate a diversified group of market-leading broadcasting, publishing, cable, programming, and interactive media assets. Belo owns 19 television stations reaching 13.7 percent of U.S. television households; publishes four daily newspapers; owns or operates six regional cable news channels; and provides a wide range of Internet-based services and products. Belo has no parent company. No publicly owned company owns more than 10% of its stock.

Gannett is a large diversified news and information company. Gannett owns 22 television stations reaching 17.7 percent of U.S. television households; publishes 100 daily newspapers, including USA TODAY, owns a variety of non-daily publications, and has more than 100 web sites in the U.S. In addition,

Gannett owns Newsquest plc, the second largest newspaper publisher in the United Kingdom, and its wholly-owned subsidiaries are involved, among other things, in offset printing, advertising, telemarketing, and media technology. Gannett has no parent company. No publicly held company owns more than 10% of its stock.

Morris is a privately held media company with diversified holdings including newspaper publishing and radio broadcasting. Morris is wholly owned by its sole member, Morris Communications Holding Company, LLC (“Morris Holding”), which, in turn, is wholly owned by its sole member, Shivers Trading & Operating Company (“Shivers”). Neither Morris, Morris Holding, nor Shivers are publicly owned. No publicly owned company owns more than 10% of the stock of Morris, Morris Holding, or Shivers.

Respectfully submitted,

By: \_\_\_\_\_  
James R. Bayes

November 3, 2003

## TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST.....	1
STATEMENTS OF JURISDICTION AND RELATED CASES, STATUTES, AND STANDARD OF REVIEW .....	1
STATEMENT OF THE CASE AND STATEMENT OF FACTS .....	1
STATEMENT OF THE ISSUES.....	2
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	5
I. BECAUSE THE FCC'S ABSOLUTE BAN ON NEWSPAPER/ BROADCAST CROSS-OWNERSHIP WAS NOT SUSTAINABLE UNDER THE GOVERNING LEGAL FRAMEWORK, THE COMMISSION WAS COMPELLED TO REPEAL OR, AT A MINIMUM, TO MODIFY THE RESTRICTION.....	5
A. Section 202(h) Sets a Heightened Standard for Review of the Necessity of Retaining Media Ownership Restraints .....	6
B. Traditional Administrative Law Principles and the First Amendment Also Dictate Repeal of the Newspaper/Broadcast Cross-Ownership Ban .....	12
II. THE AGENCY'S DECISION TO ELIMINATE ITS CROSS- OWNERSHIP BAN WAS BASED ON A LENGTHY AND OPEN PROCESS THAT AFFORDED AMPLE OPPORTUNITY FOR ALL INTERESTED PARTIES TO PARTICIPATE.....	15
A. The Agency's Decision Was the Result of a Painstakingly Long Process and a Remarkably Comprehensive Record .....	15
B. The FCC Provided Interested Parties More than Sufficient Notice .....	20
III. GIVEN THE COMPELLING EVIDENCE THAT NEWSPAPER- OWNED BROADCAST STATIONS PROVIDE SUPERIOR LOCAL NEWS AND INFORMATIONAL PROGRAMMING, THE FCC CORRECTLY FOUND THAT THE CROSS-OWNERSHIP BAN WAS NEEDLESSLY FRUSTRATING ITS PUBLIC INTEREST OBJECTIVES .....	23
A. Substantial Empirical Evidence Makes Clear that Newspaper- Owned Broadcast Stations Provide Superior Locally Oriented News and Informational Services .....	24

B.	The Experiences of Existing Cross-Owners Resoundingly Confirm the Empirical Findings on the Record .....	27
C.	The Anti-Deregulatory Parties Have Presented No Credible Evidence Refuting the FCC’s Conclusions Regarding the Benefits of Cross-Ownership .....	36
IV.	THE COMMISSION CORRECTLY DETERMINED THAT, IN TODAY’S ABUNDANT MEDIA MARKETPLACE, A FLAT BAN ON NEWSPAPER/BROADCAST CROSS-OWNERSHIP IS NOT NECESSARY FOR VIEWPOINT DIVERSITY .....	37
A.	The Commission Correctly Found that There Is Scant Evidence that Existing Combinations Express Monolithic Viewpoints .....	38
B.	In Today’s Local Media Markets, Where Consumers Have Access to a Wealth of Alternative Outlets, Any Isolated Incidents of Viewpoint Coordination Would Have Little Relevance .....	40
V.	THE SUGGESTION THAT THE FCC’S NEWSPAPER/ BROADCAST CROSS-OWNERSHIP DECISION WILL RESULT IN UNDUE MEDIA CONCENTRATION IS WITHOUT MERIT AND BASED ON A FUNDAMENTAL MISINTERPRETATION OF THE AGENCY’S REASONING.....	41
A.	Anti-Deregulatory Parties’ Criticisms of the FCC’s “Diversity Index” Provide No Basis for Retention of the Cross-Ownership Ban .....	42
1.	Anti-Deregulatory Parties misconstrue the basis for the Commission’s decision to eliminate the newspaper ban and adopt limited restraints on cross-media ownership .....	42
2.	The Diversity Index substantially underestimates the actual level of diversity in today’s local markets.....	44
B.	The FCC’s Decision Was a Long Overdue but Cautious Response to a Diverse and Competitive Marketplace .....	47
VI.	CONCLUSION.....	52
	CERTIFICATION OF BAR MEMBERSHIP .....	53
	CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) .....	54

## TABLE OF AUTHORITIES

Cases	Pages
<i>AT&amp;T v. Iowa Utilities Board</i> , 525 U.S. 366 (1999).....	8
<i>Acceptance Insurance Co. v. Sloan</i> , 263 F.3d 278 (3d Cir. 2001) .....	8
<i>Adams Fruit Company v. Barrett</i> , 494 U.S. 638 (1990).....	9, 10
<i>America Iron &amp; Steel Institute v. EPA</i> , 568 F.2d 284 (3d Cir. 1977) .....	21
<i>America Trucking Associates, Inc. v. Atchison</i> , 387 U.S. 397 (1967).....	12
<i>Arkansas Writers' Project, Inc. v. Ragland</i> , 481 U.S. 221 (1987).....	14
<i>Bechtel v. FCC</i> , 957 F.2d 873 (D.C. Cir. 1992), <i>rev'd and remanded</i> , 10 F.3d 875 (D.C. Cir. 1993).....	12, 13
<i>Cellular Telecommunications &amp; Internet Association v. FCC</i> , 330 F.3d 502 (D.C. Cir. 2003).....	11
<i>Chesapeake &amp; Potomac Telegraph Co. v. United States</i> , 42 F.3d 181 (4th Cir. 1994), <i>cert. granted</i> , 515 U.S. 1157 (1996), <i>remanded and vacated</i> .....	14
<i>Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984).....	13
<i>Cowart v. Nicklos Drilling Company</i> , 505 U.S. 469 (1992).....	7
<i>Director, Office of Worker's Compensation Programs v. Sunship, Inc.</i> , 150 F.3d 288 (3d Cir. 1998) .....	10

<i>Fox Television Stations, Inc. v. FCC,</i> 280 F.3d 1027, <i>reh'g granted in part</i> , 293 F.3d 537 (D.C. Cir. 2002) .....	<i>passim</i>
<i>Fox Television Stations v. FCC,</i> 293 F.3d 537 (D.C. Cir. 2002).....	6
<i>Idahoan Fresh v. Advantage Produce,</i> 157 F.3d 197 (3d Cir. 1998) .....	7
<i>James v. Quinlan,</i> 866 F.2d 627 (3d Cir. 1989) .....	20
<i>Mail Order Association of America v. United States Postal Service,</i> 986 F.2d 509 (D.C. Cir. 1993).....	8
<i>NBC v. United States,</i> 319 U.S. 190 (1943).....	12
<i>Pennsylvania Department of Environmental Resources v. Tri-State Clinical Laboratories, Inc.</i> ,178 F.3d 685 (3d Cir. 1999) .....	9
<i>Regions Hospital v. Shalala,</i> 522 U.S. 448 (1998).....	9
<i>Reves v. Ernst &amp; Young,</i> 494 U.S. 56 (1990) .....	9
<i>Robinson v. Shell Oil Co.,</i> 519 U.S. 337 (1997).....	7
<i>Sinclair Broadcast Group v. FCC,</i> 284 F.3d 148 (D.C. Cir. 2002).....	10
<i>U.S. National Bank v. Independent Insurance Agents of America,</i> 508 U.S. 439 (1993) .....	9

## Statutes and Regulations

5 U.S.C. §553(b).....	20, 23
Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(h) .....	<i>passim</i>
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, preamble .....	9

## Congressional Materials

S. Conf. Rep. No. 104-230, at 1 (1996).....	10
---	----

## Administrative Agency Decisions

<i>1998 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules</i> , 13 FCC Rcd 11276 (1998).....	17
<i>1998 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules</i> , 15 FCC Rcd 11058 (2000) .....	18
<i>2000 Biennial Regulatory Review</i> , 16 FCC Rcd 1207 (2001) .....	18
<i>2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules</i> , 17 FCC Rcd 18503 (2002).....	<i>passim</i>
<i>2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules</i> , 18 FCC Rcd 13620 (2003).....	<i>passim</i>
<i>Capital Cities/ABC, Inc.</i> , 11 FCC Rcd 5841 (1996) .....	16, 17
<i>Cross-Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Waiver Policy</i> , 16 FCC Rcd 17283 (2001) .....	<i>passim</i>
<i>Multiple Ownership of Standard, FM &amp; Television Broadcast Stations</i> , 50 F.C.C.2d 1046 (1975).....	16

<i>Newspaper/Radio Cross Ownership Waiver Policy,</i> 11 FCC Rcd 13003 (1996) .....	17
--	----

**Administrative Agency Filings**

Belo Corp. Comments in MM Docket No. 01-235 (Dec. 3, 2001).....	18, 28, 32
--	------------

Belo Corp. Comments in MB Docket No. 02-277 (Jan. 2, 2003).....	19, 28, 32, 39
--	----------------

Consumers Union, <i>et. al</i> Comments in MM Docket No. 01-235 (Dec. 3, 2001).....	19
--	----

Consumers Union, <i>et. al</i> Comments in MB Docket No. 02-277 (Jan. 2, 2003).....	19
--	----

Cox Enterprises, Inc. Comments in MM Docket No. 01-235 (Dec. 3, 2001).....	35
---	----

Gannett Co., Inc. Comments in MM Docket No. 01-235 (Dec. 3, 2001).....	18, 29, 39
---	------------

Gannett Co., Inc., Comments in MB Docket No. 02-277 (Jan. 2, 2003).....	19, 29
--	--------

Media General, Inc. Comments in MM Docket No. 01-235 (Dec. 3, 2001).....	18, 28
---	--------

Morris Communications Corporation Comments in MM Docket No. 01-235 (Dec. 3, 2001).....	18, 35
---	--------

Morris Communications Corporation Comments in MB Docket No. 02-277 (Jan. 2, 2003).....	19, 35
---	--------

News Corporation Limited and Fox Television Holdings, Inc. Comments in MM Docket No. 01-235 (Dec. 3, 2001) .....	35
---	----

Newspaper Association of America, *Petition for Rulemaking, Amendment of*

<i>Section 73.3555 of the Commission’s Rules to Eliminate Restrictions on Newspaper/Broadcast Cross-Ownership</i> (April 27, 1997).....	17
Newspaper Association of America Comments in MM Docket No. 01-235 (Dec. 3, 2001).....	<i>passim</i>
Newspaper Association of America <i>Comments</i> in MB Docket No. 02-277 (Jan. 2, 2003).....	19
New York Times Company Comments in MM Docket No. 01-235 (Dec. 3, 2001).....	31
Office of Communication, Inc. of the United Church of Christ, <i>et al.</i> Comments in MM Docket No. 01-235 (Dec. 3, 2001) .....	19
Office of Communication, Inc. of the United Church of Christ, <i>et al.</i> Comments in MB Docket No. 02-277 (Jan. 2, 2003) .....	19
Schurz Communications, Inc. Comments in MM Docket No. 01-235 (Dec. 3, 2001).....	34
Star Printing Company Comments in MM Docket No. 01-235 (Dec. 3, 2001).....	35
Tribune Company Comments in MM Docket No. 01-235 (Dec. 3, 2001).....	18, 30, 32
Gray Television, Inc. <i>Ex Parte</i> , Presentation in MB Docket No. 02-277 (April 7, 2003).....	33
<b>Miscellaneous</b>	
Chris Baker, “FCC Relaxes Rules for Media Ownership,” The Washington Times (Date?).....	45-46
BIA Financial Network, <i>2003 Investing In Radio Market Report</i> (2d ed. Winter 2003) .....	50
Broadcasting & Cable Yearbook 2002-2003 .....	34, 50

<i>Editor and Publisher International Yearbook</i> (83rd ed. 2003).....	50
<i>Merriam Webster's Collegiate Dictionary</i> (10th ed. 2000) .....	8
David Pritchard, <i>Viewpoint Diversity in Cross-Owned Newspapers and Television Stations</i> , Media Ownership Working Group Study 2, released in MB Docket No. 02-277 (Sept. 2002)) .....	38
Project for Excellence in Journalism, <i>Does Ownership Matter in Local Television News</i> , released February 17, 2003, updated April 29, 2003 .....	26
Scott Roberts, Jane Frenette, and Dione Stearns, <i>A Comparison of Media Outlets and Owners For Ten Selected Markets</i> , Media Ownership Working Group Study 1, released in MB Docket No. 02-277 (September 2002)) .....	47
Thomas C. Spavins, Loretta Denison, Scott Roberts, and Jane Frenette, <i>The Measurement of Local Television News and Public Affairs Programs</i> , Media Ownership Working Group Study 7, released in MB Docket No. 02-277 (September 2002)).....	24-26

## **STATEMENT OF INTEREST**

The Newspaper Association of America (“NAA”), a national organization representing the newspaper industry, and Belo Corp. (“Belo”), Gannett Co., Inc. (“Gannett”), and Morris Communications Company, LLC (“Morris”), each of which has interests in both daily newspapers and broadcast stations (jointly, “Newspaper Intervenors”) support the decision by the Federal Communications Commission (“FCC” or “Commission”) to eliminate the absolute ban on cross-ownership of daily newspapers and broadcast stations and respond herein primarily to arguments of Anti-Deregulatory Parties who favor reinstating the prohibition.<sup>1</sup>

## **STATEMENTS OF JURISDICTION AND RELATED CASES, STATUTES, AND STANDARD OF REVIEW**

Newspaper Intervenors adopt the above sections from the brief of Petitioner Clear Channel Communications, Inc.

## **STATEMENT OF THE CASE AND STATEMENT OF FACTS**

The above sections are set forth in the Brief submitted by Tribune and Media General and consequently are not duplicated herein.

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<sup>1</sup> See Brief for Citizen Petitioners and Intervenors Prometheus Radio Project, *et al.* at 14, 33-37 (“CPI Br.”). These parties are referred to herein as the “Anti-Deregulatory Parties.” In addition, Newspaper Intervenors support certain arguments presented by Petitioners Media General, Inc. (“Media General”) and Tribune Company (“Tribune”). Accordingly, Newspaper Intervenors are filing this brief on the date specified for Deregulatory Petitioners.

## STATEMENT OF THE ISSUES

1. Whether the Federal Communications Commission (“FCC”) correctly concluded that it must eliminate the outdated ban on newspaper/broadcast cross-ownership in view of (i) the congressional mandate to repeal or modify any ownership regulation that cannot be shown to be “necessary in the public interest” in view of competition and (ii) compelling administrative law and First Amendment considerations.

2. Whether the FCC’s seven-year, multifaceted process provided full notice and adequate opportunity for comment on the propriety of eliminating the anachronistic ban on newspaper/broadcast cross-ownership.

3. Whether the FCC correctly concluded, on the basis of extensive record evidence that newspaper-owned broadcast stations provide superior news and informational programming, that retention of the cross-ownership ban would serve only to frustrate important public interest objectives.

4. Whether the FCC correctly determined that, in today’s richly diverse and competitive media marketplace, a flat ban on cross-ownership is neither necessary nor productive to further viewpoint diversity.

## **SUMMARY OF ARGUMENT**

Contrary to the assertions of the Anti-Deregulatory Parties, the FCC's decision to eliminate its long-outdated absolute ban on newspaper/broadcast cross-ownership was a required outcome of its 2002 Biennial Review. Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(h) ("Section 202(h)" of the "1996 Act"), establishes a presumption in favor of deregulation requiring the FCC to take a searching look at its media ownership rules and eliminate or modify those that cannot be shown to be required, in the contemporary media marketplace, to serve specific and concrete public interest objectives. Even if Section 202(h) imposed no more than an "ordinary rulemaking" standard, however, the record evidence unequivocally compelled deregulatory action and, indeed, supported complete repeal of the cross-ownership ban. First Amendment imperatives serve only to confirm the legal necessity of removing this outdated restriction.

In light of the seven-year process that the Commission undertook before reaching its decision, and the extraordinarily comprehensive evidence that was amassed on cross-ownership issues, there is no merit to the claims of Anti-Deregulatory parties that the agency's decision to eliminate the newspaper ban was in any sense rushed or based on an insufficient record. The FCC unquestionably

met its obligation to provide interested parties with adequate notice and the opportunity to provide input on the action ultimately taken.

The overwhelming weight of the evidence—including empirical studies and, most importantly, the experiences of the numerous newspaper/broadcast combinations currently in existence—demonstrates that broadcast stations jointly owned with daily newspapers provide superior local news and informational services. The nominal efforts that the Anti-Deregulatory Parties make to address this critical component of the agency’s finding that the cross-ownership ban was affirmatively *counterproductive* to its public interest goals are entirely off-target and unpersuasive.

The Anti-Deregulatory Parties focus on the contention that the elimination of the ban on newspaper/broadcast cross-ownership will result in excessive “media concentration,” thereby threatening the diversity of viewpoints available to local communities. The FCC correctly found, however, that there is scant evidence linking common ownership of newspaper and broadcast outlets to the expression of uniform viewpoints. More fundamentally, the agency properly concluded that the abundance of options in today’s local media markets has eviscerated any basis for concern about isolated incidents of viewpoint coordination that may occur.

The agency made clear, moreover, that its decision was based on the entire record before it and that the Diversity Index (“DI”) it developed was intended to

serve only as an analytical tool to inform its assessment of broad market trends—not, as the Anti-Deregulatory Parties insist, as a precise measure of the diversity in individual media markets. In any case, given the conservative assumptions built into the DI, any flaws it may have cannot support claims that the FCC’s decision was overly deregulatory.

To the contrary, given the explosive growth in the media landscape since the ban was put in place more than a quarter century ago, the affirmative public interest benefits inherent in cross-ownership, and the absence of countervailing harms, the actions taken by the agency with respect to cross-ownership can properly be characterized only as cautious, but entirely justified, steps in the right direction.

## ARGUMENT

### **I. BECAUSE THE FCC'S ABSOLUTE BAN ON NEWSPAPER/ BROADCAST CROSS-OWNERSHIP WAS NOT SUSTAINABLE UNDER THE GOVERNING LEGAL FRAMEWORK, THE COMMISSION WAS COMPELLED TO REPEAL OR, AT A MINIMUM, TO MODIFY THE RESTRICTION**

The Court will be presented with extensive arguments in other briefs that explain the high legal burden imposed by both the statute and the Constitution on the FCC to justify retention of its old ownership restraints.<sup>2</sup> The Newspaper Intervenors will endeavor not to duplicate those arguments, but to focus here

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<sup>2</sup> See, e.g., Brief for Clear Channel Communications, Inc. at 19-27 (“CC Br.”) and Brief for Tribune and Media General at 24-25 (“T/MG Br.”).

primarily on responding to the contentions of the Anti-Deregulatory Parties as they apply to restrictions on newspaper/broadcast cross-ownership. *See* CPI Br. at 14, 33-37. The fundamental issue of the proper legal standard is a simple one: every canon of statutory construction requires that Section 202(h) be read to impose a heightened burden on the agency in favor of deregulation, and judicial precedent to date consistently supports this reading. Yet even assuming *arguendo* that the legal standard might be lower, the record evidence still compels, at a minimum, significant relaxation of the former newspaper/broadcast ban under traditional standards of administrative law. Further, the serious constitutional flaws of a regulatory scheme that handicaps a single class of potential speakers also required that the FCC eliminate the absolute cross-ownership ban.

**A. Section 202(h) Sets a Heightened Standard for Review of the Necessity of Retaining Media Ownership Restraints**

Contrary to the claims of the Anti-Deregulatory Parties, and an inconsistent reference by the FCC itself,<sup>3</sup> the Commission was correct in stating that Section

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<sup>3</sup> The FCC's cursory treatment of the statutory standard question has prompted confusion among various parties as to what the agency itself considers the standard to be. Its favorable citation to *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (“*Fox I*”), *reh'g granted in part*, 293 F.3d 537 (D.C. Cir. 2002) (“*Fox II*”), in the text of the *Order* sits oddly with its citation to its construction elsewhere of another provision of the 1996 Act, Section 11, which also includes the phrase “necessary in the public interest.” JA0041-42 (2002 *Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, ¶ 11 & n.15 (2003) (*citing 2002 Biennial Regulatory*

202(h) “carries with it a presumption in favor of repealing or modifying the ownership rules” and “upends” traditional administrative law principles by requiring that the agency affirmatively justify any decision to retain its broadcast ownership restrictions. JA0041 (¶ 11); *see* CPI Br. at 21. The Anti-Deregulatory Parties would have the Court ignore the plain meaning of Section 202(h), disregard the import of lawmakers’ efforts to change the status quo, contradict prior judicial interpretations, and effectively read the provision out of existence.<sup>4</sup> That position is plainly untenable.

***Text of the Provision***—Section 202(h) expressly requires that the FCC review its media ownership rules every two years to “determine whether any of such rules are necessary in the public interest as the result of competition,” and “repeal or modify any regulation it determines to be no longer in the public interest.” 1996 Act, § 202(h). The text thus introduces two new clauses that modify the original “public interest” standard of the 1934 Act with respect to media ownership rules, importing both a rule of necessity and a linkage to

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*Review*, 18 FCC Rcd 4726, 4730 ¶ 13 (2003)) (“*Order*”) (hereinafter cited by reference to the Joint Appendix and relevant paragraph numbers only)).

<sup>4</sup> Statutory language must be examined by “reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997); *see also Idahoan Fresh v. Advantage Produce*, 157 F.3d 197, 202 (3d Cir. 1998) (citing *Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)).

competitive facts in the field. The Anti-Deregulatory Parties do not explain how the FCC could ignore these modifications of the old standard without violating the canon which requires construction “so that no provision is rendered inoperative or superfluous, void or insignificant.” *Mail Order Ass’n of Am. v. United States Postal Serv.*, 986 F.2d 509, 515 (D.C. Cir. 1993); *Acceptance Ins. Co. v. Sloan*, 263 F.3d 278, 283 (3d Cir. 2001). Instead, they advance lengthy contortions of logic that largely ignore both the text and design of Section 202(h) itself.<sup>5</sup>

The language of the statute provides the clearest indication of its intent, however: the common or ordinary definition of “necessary” is “absolutely required,” “indispensable,” or “essential.” *Merriam Webster’s Collegiate Dictionary*, 774 (10th ed. 2000). Construing the amended standard as meaning nothing more than “appropriate” is “simply not in accord with the ordinary and fair meaning of [the statute’s] terms.” *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 390 (1999).

***Design and Context of the Statute***—The structure and subject matter of the 1996 Act confirms that Congress expected the statute to drive comprehensive

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<sup>5</sup> In contending that *Fox II* eviscerated the deregulatory “presumption” established in *Fox I*, CPI Br. at 22-23, the Anti-Deregulatory Parties fail to acknowledge that *Fox II* modified only a single paragraph of the original opinion—leaving intact its statement concerning the presumption as well as the deregulatory outcome of the case. The Anti-Deregulatory Parties rely in part on a tortured argument that the presumption applies only to court remedies, CPI Br. at 25, which Clear Channel refutes. See CC Br. at 24-25, n.13.

deregulation of the communications industry.<sup>6</sup> The Act’s preamble recites that its enactment is intended “to promote competition and *reduce regulation.*” 1996 Act, preamble (emphasis added). The deregulatory design of Section 202 itself also is striking. After reciting six explicit changes that eliminate or relax existing restraints, the provision concludes with what might be considered an affirmative “mop-up” mandate: the FCC must continue the work that Congress has begun by reevaluating the agency’s ownership limits regularly in light of competitive marketplace developments and then “repeal[ing] or modify[ing]” the rules as contemporary facts require. *Fox I*, 280 F.3d at 1032 (“process of deregulation” to extend into the future). As set forth below, removal of this unnecessary impediment to more efficient ownership combinations is the only course consistent with “the backdrop of what Congress was attempting to accomplish” in rewriting the Communications Act. *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990).

***Legislative history***—Should there be any lingering doubt about the meaning of a statutory provision after a searching examination of its language and design, a court may turn to legislative history to illuminate Congress’ intent. *See, e.g.,*

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<sup>6</sup> The Supreme Court has emphasized that “context counts, and [we] stress in this regard [that] we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.” *Regions Hosp. v. Shalala*, 522 U.S. 448, 460 n.5 (1998) (internal citations omitted); *see also, e.g., U.S. Nat’l Bank v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 455 (1993) (“Statutory construction ... is a holistic endeavor.”); *Pa. Dep’t of Env’tl. Resources v. Tri-State Clinical Labs., Inc.*, 178 F.3d 685, 688 (3d Cir. 1999) (internal citations omitted).

*Director, Office of Worker's Comp. Programs v. Sunship, Inc.*, 150 F.3d 288, 291 (3d Cir. 1998) (citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 642 (1990)). In this case, the legislative history confirms that the intent of the statute was to eliminate unnecessary regulation. *See, e.g.*, S. Conf. Rep. No. 104-230, at 1 (1996) (statute was meant to provide a “pro-competitive, de-regulatory, national policy framework”); *see also* CC Br. at 22, n. 12. Again, the Anti-Deregulatory Parties offer nothing to the contrary.

**Judicial Precedent**—The deregulatory thrust of, and evidentiary burden-shifting imposed by, Section 202(h) was clear to the court that previously construed it.<sup>7</sup> The D.C. Circuit squarely determined that the provision contains a “presumption in favor of deregulation,” *Fox I*, 280 F.3d at 1048; *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002), and that the FCC may not now rely solely upon “predictive judgments,” as it once did, to support retention of any media ownership rule. 280 F.3d at 1051.

On remand, the FCC finally confronted the facts that contradict the agency’s outdated and untested premises for banning common ownership of newspapers and broadcast stations. The FCC correctly found that the flat ban is not needed to protect competition, appears to retard localism, and is not required to support

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<sup>7</sup> As other parties have set forth in detail, the precedent established in earlier phases of this proceeding is entitled to consideration by this Court as the “law of the case.” *See, e.g.*, CC Br. at 10, n. 5.

diversity in the majority of communities. JA0186 (¶¶ 368-69). The FCC then complied with the D.C. Circuit’s directive that the statute mandates deregulation when the agency lacks evidence to support retention of an outdated ownership restriction. *See Fox I*, 280 F.3d at 1042 (“[t]he Commission’s wait and see approach cannot be squared with its statutory mandate”).<sup>8</sup>

At most, the Anti-Deregulatory Parties’ argument concerning case precedent raises the question of whether the rule of necessity within Section 202(h) is absolute or merely heightened above the usual deferential standard accorded to administrative agencies. The text and design of the provision make plain that the burden on the FCC here is significantly higher than it was prior to the 1996 Act, and all existing precedent supports that reading.

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<sup>8</sup> This outcome also is consistent with decisions construing similarly deregulatory provisions of the 1996 Act. *See, e.g., Cellular Telecomms. & Internet Ass’n v. FCC*, 330 F.3d 502, 510, 512 (D.C. Cir. 2003) (rules “necessary” under Section 11 if “required to achieve a desired goal” as demonstrated by “the existence of a strong connection” between its regulation and the goal it seeks to accomplish); *see also* CC Br. at 21-22.

**B. Traditional Administrative Law Principles and the First Amendment Also Dictate Repeal of the Newspaper/Broadcast Cross-Ownership Ban**

In contending that Section 202(h) is a nullity that leaves the FCC’s former, broadly discretionary “public interest” power intact, CPI Br. at 25, the Anti-Deregulatory Parties also neglect to address the black-letter law that governs agency action even under that standard. Federal courts for at least six decades have made clear that the FCC cannot rest on a rule if “time and changing circumstances reveal that the ‘public interest’ is not served by application of the Regulation[ ].” *NBC v. United States*, 319 U.S. 190, 225 (1943). Thus, the FCC must “evaluate its policies over time to ascertain whether they work—that is, whether they actually produce the benefits the Commission originally predicted they would.” *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992), *rev’d and remanded*, 10 F.3d 875 (D.C. Cir. 1993).<sup>9</sup> These principles have special force in the case of the newspaper/broadcast ban, which the FCC admitted at the time of its creation was based only on supposition, not evidence.<sup>10</sup>

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<sup>9</sup> “Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation’s needs in a volatile, changing economy.” *Am. Trucking Assocs., Inc. v. Atchison*, 387 U.S. 397, 416 (1967).

<sup>10</sup> Courts have admonished that “[t]he Commission’s necessarily wide latitude to make policy judgments based upon predictive judgments deriving from its general expertise implies a correlative duty to evaluate its policies over time to ascertain whether they work—that is, whether they actually produce the benefits

Through several interrelated dockets stretching back into the mid-1990s, the FCC has amassed an extensive, consistent collection of real-world facts that show the flat ban has not produced the benefits that the agency anticipated. Thus, even if Section 202(h) had not increased the showing required for retaining the old, sweeping prohibition, the FCC's decision to substantially relax the ban was required under the traditional administrative standard and would be entitled to traditional *Chevron* deference upon court review. *See Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

As reflected in the T/MG Br. at 20-23, the former absolute ban on cross-ownership also suffers from numerous First Amendment flaws. Indeed, the FCC itself recognized that the prior regime could not be constitutionally sustained because the rules were not a reasonable means to accomplish the agency's public interest purposes. JA0043-44 (¶ 16). Although the Newspaper Intervenors disagree with the agency's conclusion that its media ownership rules should be evaluated under a rational basis standard, JA0042-43 (¶ 13), we concur that the newspaper/broadcast ban could not be maintained even under that minimal standard; whatever diminished force the scarcity rationale may retain today is

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the Commission originally predicted they would." *See Bechtel v. FCC*, 10 F.3d at 880.

certainly insufficient to justify a complete ban on newspaper/broadcast cross-ownership.<sup>11</sup>

If the evidentiary record in this proceeding were in equipoise, the FCC would be required—at a minimum—to substantially relax the newspaper/broadcast ban to satisfy the demands of the 1996 Act, basic principles of administrative law, and overriding First Amendment imperatives. But the evidence is not in equipoise. To the contrary, the facts gleaned from actual experience in market after market demonstrate that the newspaper ban only frustrates the creation of more efficient combinations that would better serve their local communities through the gathering and dissemination of more and higher quality local news and informational programming.

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<sup>11</sup> As the Newspaper Intervenors have long maintained, the Court should recognize that a restriction on ownership of broadcast stations by newspapers is subject to a higher degree of First Amendment scrutiny. *See* T/MG Br. at 23-24; *see also* Newspaper Association of America Comments in MM Docket No. 01-235, at 101-111 (Dec. 3, 2001) (“NAA 2001 Comments”).

The old newspaper/broadcast cross-ownership ban discriminated against newspaper publishers as a class—subjecting them alone to a blanket restraint that no other media owner faces. Such a broad speaker-based restraint is plainly suspect under the intermediate scrutiny standard, much less the highest level of First Amendment protection. *See, e.g., Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 199-202 (4th Cir. 1994), *cert. granted*, 515 U.S. 1157 (1996), *remanded and vacated as moot*, Nos. 93-2340, 93-2341 (4th Cir. Apr. 17, 1996); *see also, e.g., Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (strict scrutiny required for speaker-based regulations).

**II. THE AGENCY’S DECISION TO ELIMINATE ITS CROSS-OWNERSHIP BAN WAS BASED ON A LENGTHY AND OPEN PROCESS THAT AFFORDED AMPLE OPPORTUNITY FOR ALL INTERESTED PARTIES TO PARTICIPATE**

The Anti-Deregulatory Parties claim that the FCC’s decision to eliminate its absolute ban on newspaper/broadcast cross-ownership was an ill-considered one based on an inadequate record and rulemaking process. *See* CPI Br. at 2, 9-12, 39-41. In fact, the decision was based upon the most comprehensive record ever amassed on media ownership issues and was reached only after a protracted series of interrelated proceedings that afforded *all* interested parties repeated opportunities *over a period of seven years* to submit information and opinions relevant to the benefits or detriments of newspaper/broadcast combinations.

**A. The Agency’s Decision Was the Result of a Painstakingly Long Process and a Remarkably Comprehensive Record**

To provide historical perspective for, and to place in proper context, the claims by Anti-Deregulatory Parties that the FCC has “radically overhauled” its restriction on newspaper/broadcast cross-ownership, *see* CPI Br. at 2, it is important to note that the ban was adopted nearly three decades ago, in a media environment that has been dramatically and irreversibly transformed in the intervening years. *See generally* JA0065-85 (¶¶ 86-128). As Tribune and Media General point out, even in its decision adopting the ban, the Commission recognized the pioneering spirit of cross-owners and specifically concluded that

newspaper-affiliated stations tended to be superior licensees in terms of locally oriented service. *Multiple Ownership of Standard, FM & Television Broadcast Stations*, 50 F.C.C. 2d 1046, 1074, 1078-81 (1975) (“1975 Multiple Ownership Report”); see T/MG Br. at 3-5. To justify its cross-ownership ban, moreover, the FCC relied on what the agency itself acknowledged to be a “mere hoped for gain in diversity.” *1975 Multiple Ownership Report* at 1078; see T/MG Br. at 4-5 (discussing absence of evidence of harm to competition or reduction in viewpoint diversity).

Given this shaky foundation, it is not at all surprising that the cross-ownership ban has long been in question. As early as 1996, in approving the merger of ABC and The Walt Disney Company in *Capital Cities/ABC, Inc.*, 11 FCC Rcd 5841, 5895 (1996) (“ABC/Disney”), the Commission stated unequivocally its intention to “commence an appropriate proceeding to obtain a fully informed record in this area and to complete that proceeding expeditiously.” *Id.* at 5888. Then-Chairman Reed Hundt, appointed by President Clinton, issued a separate statement emphasizing his concern that “there is reason to believe that . . . the newspaper-broadcast cross-ownership rule, is right now impairing the future prospects of an important national source of education and information: the

newspaper industry.” *Id.* at 5906.<sup>12</sup> The agency subsequently reneged on this promise, however, initiating an inquiry only with respect to the narrower issue of amending the existing waiver policy for newspaper/*radio* cross-ownership. *See* JA2458-86 (*Newspaper/Radio Cross Ownership Waiver Policy*, 11 FCC Rcd 13003, 13004 (1996)).<sup>13</sup>

Without completing that proceeding, the FCC released in March 1998 a notice of inquiry to commence the first biennial review proceeding pursuant to Section 202(h). *1998 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*, 13 FCC Rcd 11276 (1998). In addition to seeking comment on all of its media ownership rules, the agency noted that it “anticipate[d] taking action in the [newspaper/radio waiver proceedings] during 1998.” *Id.* at 11280. The Commission took no action at all in the 1998 biennial review proceedings until June 2000 when, after Congress had set a specific

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<sup>12</sup> *See also ABC/Disney*, 11 FCC Rcd at 5915 (separate statement of Commissioner Barrett) (“The fact that this rule is over twenty (20) years old provides an even more compelling justification for the Commission’s initiation of a rulemaking proceeding to determine the future applicability of this rule.”).

<sup>13</sup> The NAA in 1997 filed a petition for rulemaking detailing changes in the marketplace and regulatory environment, documenting the excellent service provided by existing newspaper/broadcast combinations, and calling upon the FCC to commence a proceeding to reexamine the cross-ownership rule itself, and not just the waiver policy. NAA Petition for Rulemaking, *Amendment of Section 73.3555 of the Commission’s Rules to Eliminate Restrictions on Newspaper/Broadcast Cross-Ownership* (filed Apr. 28, 1997). The NAA Petition was incorporated into the subsequent proceedings identified below.

deadline, the agency finally issued its *1998 Biennial Review Report*. 15 FCC Rcd 11058 (2000). Recognizing that “there may be circumstances in which the [newspaper/broadcast] rule may not be necessary to achieve the rule’s public interest [objectives],” the FCC committed to “initiate a rulemaking proceeding to consider tailoring the rule accordingly.” *Id.* at 11102.

Well over a year later, the Commission finally issued the long-awaited notice of proposed rulemaking, seeking comment on a broad list of questions ranging from retention of the rule to complete repeal. *Cross-Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Waiver Policy*, 16 FCC Rcd 17283 (2001) (“*2001 NPRM*”).<sup>14</sup> Extensive comments were filed by a wide array of industry participants—including Media General, Tribune, and all of the Newspaper Intervenors<sup>15</sup>—as well as interest groups including Media Access Project, Consumers Union/Consumer Federation of America, Center for

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<sup>14</sup> In the interim, the FCC had concluded, in the space of just seven months, its 2000 Biennial Regulatory Review. The Commission’s *2000 Biennial Regulatory Review Report*, 16 FCC Rcd 1207 (2001), was devoted largely to a recitation of the conclusions reached in the 1998 Biennial Review and a concurrent proceeding on television ownership matters, and did not alter the conclusions reached in those proceedings. *See id.* at 1217, 1225-26.

<sup>15</sup> *See, e.g.*, Media General, Inc. Comments (“Media General 2001 Comments”); Tribune Company Comments (“Tribune 2001 Comments”); NAA 2001 Comments; Belo Corp. Comments (“Belo 2001 Comments”); Gannett Co., Inc. Comments (“Gannett 2001 Comments”); and Morris Communications Corporation (“Morris 2001 Comments”). All were filed in MM Docket No. 01-235 on December 3, 2001.

Digital Democracy, the Office of Communication, Inc. of the United Church of Christ, and Media Alliance.<sup>16</sup>

Although the 2001 cross-ownership proceeding was ripe for decision, the FCC decided to roll it into its 2002 proceeding (“*Omnibus Rulemaking*”), which would include consideration of several other media ownership rules and be designated as the Commission’s 2002 Biennial Review. JA3450-3523 (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*, 17 FCC Rcd 18503 (2002) (“2002 *Omnibus NPRM*”). Yet again, extensive comments on cross-ownership were submitted by a wide range of parties, many of whom had participated in the prior proceeding.<sup>17</sup>

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<sup>16</sup> See, e.g., Consumers Union, Consumer Federation of America, Civil Rights Forum, Center for Digital Democracy, Leadership Conference on Civil Rights, and Media Access Project Comments; and Office of Communication, Inc. of the United Church of Christ, National Organization for Women, and Media Alliance Comments. All were filed in MM Docket No. 01-235 on December 3, 2001. These anti-deregulatory comments and exhibits totaled nearly 350 pages.

<sup>17</sup> Belo Corp. Comments (“Belo 2003 Comments”); Gannett Co., Inc. Comments (“Gannett 2003 Comments”); Morris Communications Corporation Comments (“Morris 2003 Comments”); Newspaper Association of America Comments; Consumers Union, Consumer Federation of America, Center for Digital Democracy, and Media Access Project Comments; and Comments of Office of Communication, Inc. of the United Church of Christ, Black Citizens for a Fair Media, Civil Rights Forum, Philadelphia Lesbian and Gay Task Force, and Women’s Institute for Freedom of the Press Comments. All were filed in MB Docket No. 02-277 on January 2, 2003. The comments and exhibits of these parties alone totaled over 600 pages. The mammoth record in the 2002 proceeding included not only the comments submitted in the *Omnibus Rulemaking*, but also those filed in the 2001 proceeding as well as certain submissions from the 1998 Biennial Review and 1996 inquiry on the radio/newspaper waiver policy.

The Commission finally announced the results of its proceeding in June 2003, releasing the text of the *Omnibus Media Ownership Order* (“*Omnibus Order*” or “*Order*”) in early July. JA0037-0350

**B. The FCC Provided Interested Parties More than Sufficient Notice**

Despite the protracted length and obvious purpose of the Commission’s consideration of its newspaper/broadcast cross-ownership ban, the Anti-Deregulatory Parties complain that they were given inadequate notice of the action taken by the agency. In particular, they claim that the FCC’s failure to propose “specific rule changes” in the *2002 Omnibus NPRM* and its decision not to seek additional comment on one of the analytical tools used to craft the new cross-media rules—the Diversity Index—constituted “gross violation[s]” of the requirement under the Administrative Procedure Act (“APA”) for agencies to provide adequate public notice of proposed changes to administrative rules. *See* CPI Br. at 9-12, 39-41.

The APA specifically provides, however, that agencies are not required to include the specific terms of proposed rules in their rulemaking notices so long as they provide an adequate “description of the subjects and issues involved.” 5 U.S.C §553(b)(3). This Court repeatedly has held that there is adequate notice if the agency has “fairly apprise[d] interested persons of the ‘subjects and issues’ before the agency.” *See, e.g., James v. Quinlan*, 866 F.2d 627, 631 (3d Cir. 1989)

(quoting *Am. Iron & Steel Inst. v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977)). When agencies do propose specific rules, moreover, they are not necessarily bound to undertake a new round of notice and comment before “adopt[ing] a rule which is different—even substantially different—from the proposed rule.” *Id.* (quoting *Am. Iron & Steel Inst. v. EPA*, 568 F.2d at 293).

The notice provided by the FCC regarding proposed changes to the newspaper/broadcast cross-ownership ban easily meets applicable APA and judicial standards. In its *2001 NPRM*, the agency sought comment on a broad list of possibilities ranging from retention to repeal and expressly stated that it “could modify [its] newspaper/broadcast cross-ownership rule in a number of ways to ensure that it best serves [the agency’s] competition and diversity goals.” *2001 NPRM*, 16 FCC Rcd at 17297. The options the FCC identified for modification included redefinition of the relevant geographic area, adoption of a “market concentration” standard, use of a “voice count” test, mandatory structural separation of co-owned properties, and outright elimination of the restriction. *Id.* at 17297-304. Moreover, the Commission expressly noted that “commenters proposing modifications not discussed in this *Notice* should explain why the public interest supports their proposal.” *Id.* at 17297.

Incorporating its 2001 proceeding into the *2002 Omnibus NPRM*, the FCC again gave notice that the full range of options contemplated in the prior

proceeding remained on the table. JA3452-53 (2002 *Omnibus NPRM*, 17 FCC Rcd at 18505-06). In evaluating its diversity objectives, moreover, the Commission specifically asked “[w]hat other measures of diversity, quantitative or qualitative” it should consider aside from its traditional “voices” test and “what tools [it had] to measure diversity with a reasonable degree of accuracy.” JA3467 (*Id.* at 18520). The Commission further indicated that it was considering “creating a new metric” to “reformulate [its] mechanism for measuring diversity and competition in a market,” and that it was contemplating “design[ing] a test that accords different weights to different outlet types.” JA3486-87 (*Id.* at 18539-40).

The FCC’s decision to eliminate its absolute ban on cross-ownership and replace it with more flexible cross-media limits plainly was covered by the broad range of options discussed in the Commission’s two *NPRMs*. Likewise, the Diversity Index—described by the agency as “a method for analyzing and measuring the availability of outlets that contribute to viewpoint diversity in local media markets,” JA0194 (¶ 391)—fits within the category of media “metrics” contemplated in the *Omnibus NPRM*. Thus, the Anti-Deregulatory Parties have no legitimate claim that the agency acted in haste or that it failed to afford any interested party full and fair notice and the opportunity to comment.<sup>18</sup>

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<sup>18</sup> There is no merit to the Anti-Deregulatory Parties’ implied argument that notice in the *Omnibus Rulemaking* was somehow defective simply because the proceeding was launched with a *NPRM* rather than a Notice of Inquiry. See *CPI Br.* at 9. The APA does not require agencies to issue Notices of Inquiry in order to

**III. GIVEN THE COMPELLING EVIDENCE THAT NEWSPAPER-OWNED BROADCAST STATIONS PROVIDE SUPERIOR LOCAL NEWS AND INFORMATIONAL PROGRAMMING, THE FCC CORRECTLY FOUND THAT THE CROSS-OWNERSHIP BAN WAS NEEDLESSLY FRUSTRATING ITS PUBLIC INTEREST OBJECTIVES**

As explained in detail in the Tribune/Media General Brief, the FCC correctly determined in its *Order* that, based on “the overwhelming evidence that [newspaper/broadcast] combinations can promote the public interest by producing more and better local news coverage,” a flat cross-ownership ban “is not necessary to promote our localism goal and . . . , in fact, is likely to hinder its attainment.” JA0178 (¶ 354); *see* T/MG Br. at 9-10, 27-28. The Commission further recognized that the public interest benefits inherent in cross-ownership are a factor of tangible economic efficiencies as well as the extensive newsgathering resources and commitment to in-depth local coverage that characterize the newspaper publishing industry. *See* JA0172-73, 0174-75 (¶¶ 342, 347). These conclusions were firmly based on a comprehensive and unambiguous record that consisted of FCC-commissioned and independent studies as well as a broad array of real-world

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provide adequate notice of proposed rule changes. *See* 5 U.S.C. §553(b). Moreover, because the *Omnibus NPRM* was issued pursuant to the Commission’s biennial review mandate, parties were on notice that an Order repealing or modifying any rules that the Commission concluded were “no longer necessary in the public interest” was the required outcome of the proceeding. 1996 Act, §202(h). In addition, as noted above, the *Omnibus NPRM* was the culmination of a seven-year series of FCC and judicial proceedings—including two broad-ranging notices of inquiry as well as the *2001 NPRM*—in which the issues and options had been fully ventilated.

experiences reported by existing newspaper/broadcast combinations and other parties.

The Anti-Deregulatory Parties devote very little attention to these central factors in the agency's decision to relax the rule and offer only perfunctory and unsupported efforts to rebut the record before the agency. Once the FCC record is properly evaluated, however, it becomes unequivocally clear that, far from being "necessary in the public interest," the anachronistic cross-ownership ban was affirmatively counterproductive to the agency's public interest goals.

**A. Substantial Empirical Evidence Makes Clear that Newspaper-Owned Broadcast Stations Provide Superior Locally Oriented News and Informational Services**

Among the twelve Media Ownership Working Group ("MOWG") Studies commissioned by the FCC was one that assessed both the quantity and the quality of the local news operations at a wide range of broadcast network affiliates, comparing those that are jointly owned with daily newspapers to those that are not. JA3568-90 (MOWG Study #7, Thomas C. Spavins, Loretta Denison, Scott Roberts, and Jane Frenette, *The Measurement of Local Television News and Public Affairs Programs*, released in MB Docket No. 02-277 (September 2002)).<sup>19</sup> The

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<sup>19</sup> The four measures of local news operations included in the Study were: (1) ratings for the 5:30 p.m. and 6:00 p.m. newscasts during the November 2000 sweeps period; (2) total hours devoted to news and public affairs programming; (3) awards earned from the Radio-Television News Directors Association ("RTNDA") in 2000 and 2001; and (4) A.I. Dupont Silver Baton awards earned from the Columbia University School of Journalism between 1991 and 2001. JA3570-73 (Study # 7 at Section II).

Study found that “[a]ffiliates co-owned with newspapers experience noticeably greater success under our measures of quality and quantity of local news programming than other network affiliates.” JA3569 (*Id.*, Executive Summary); *see also* JA0173-74 (¶¶ 343-344). Specifically, Study #7 concluded that newspaper-owned affiliates aired far more local news and public affairs programming than other affiliates, providing an average of 50 percent more weekly hours of such programming.<sup>20</sup> The cross-owned stations also greatly outperformed other stations in news ratings and industry awards.<sup>21</sup>

Significantly, Study #7 confirmed the superiority of television stations owned by parties engaged in newspaper publishing, even where the newspaper properties were not co-located with the TV station. The results were even more pronounced for newspaper/broadcast combinations in the same local market; affiliates that were part of local newspaper/broadcast combinations aired an average of 25.9 weekly hours of news and public affairs programming, or nearly 74 percent more than the 14.9 hours provided, on average, by affiliates that were

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<sup>20</sup> While newspaper-owned affiliates aired an average of 21.9 hours of local news and public affairs programming on a weekly basis, the other affiliates provided an average of only 14.9 hours. JA3572 (*Id.* at Section II).

<sup>21</sup> Newspaper-owned stations received 319 percent of the national average for Radio-Television News Directors Association Murrow Awards and 200 percent of the national average for the A.I. DuPont Awards. In comparison, independent affiliates received only 39 percent and 22 percent of the national average, respectively. Likewise, the average newscast rating for newspaper-owned affiliates in the 5:30 p.m. and 6:00 p.m. timeslots during the study period was 8.0, compared to only 6.2 for all other affiliates. *See* JA3572-73 (*Id.*)

not associated with daily newspapers.<sup>22</sup> Similarly, stations in local newspaper/TV combinations had average ratings of 9.8 and 11 for the 5:30 p.m. and 6 p.m. newscasts respectively, dramatically higher than the average ratings of 5.7 and 6.7 earned by independent affiliates during the same timeslots.

The results of Study #7 were confirmed shortly thereafter by a study released by the Project for Excellence in Journalism (“PEJ”) of Columbia University. JA5113-17 (Project for Excellence in Journalism, *Does Ownership Matter in Local Television News*, released February 17, 2003, updated April 29, 2003 (“PEJ Study”)); *see also* JA0174 (¶ 345).<sup>23</sup> Based on detailed analyses of over 23,000 stories, the PEJ Study found that “stations in cross-ownership situations were more than twice as likely to receive an ‘A’ grade than were other stations.” JA5114, 5116 (PEJ Study at 1, 11). On the whole, these stations “were more likely to do stories that focused on important community issues,” “more likely to provide a wide mix of opinions, and “less likely to do celebrity human-

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<sup>22</sup> See JA3576 (Study #7 at Appendix A). Six stations that are part of local newspaper/broadcast combinations were included in the Study: (1) Belo’s WFAA-TV (co-owned with *The Dallas Morning News*); (2) WSB-TV (co-owned with *The Atlanta Journal and Constitution*); (3) WFLA-TV (co-owned with the *Tampa Tribune*); (4) Gannett’s KPNX-TV (co-owned with the *Arizona Republic*); (5) WTMJ-TV (co-owned with the *Milwaukee Journal Sentinel*); and (6) WBNS-TV (co-owned with *The Columbus Ohio Dispatch*). *Id.*

<sup>23</sup> Although the Commission found that the results of the PEJ Study were not statistically significant, the agency did find that they provided anecdotal support. JA0174 (¶ 345).

interest features,” focusing instead on “stories that looked at important trends and ideas in their communities.” JA5117 (*Id.* at 12).

**B. The Experiences of Existing Cross-Owners Resoundingly Confirm the Empirical Findings on the Record**

While these and other empirical studies represent highly persuasive evidence of the public interest benefits inherent in cross-ownership, the individual experiences of existing newspaper/broadcast combinations provide the most powerful evidence on this issue. *See* T/MG Br. at 27-28. There are nearly forty combinations still in existence that were grandfathered when the Commission adopted the cross-ownership ban in 1975, as well as several combinations that exist pursuant to waivers of the cross-ownership ban or that were created through recent newspaper acquisitions that do not fall under the restriction until license renewal proceedings in 2005 and 2006. *See* NAA 2001 Comments at 16-17.<sup>24</sup> The performances of these combinations—which are located in all corners of the nation and across a broad range of market sizes—provide compelling case studies of the superior news and informational services fostered by cross-ownership.

For instance, Belo Corp., the longstanding owner of both *The Dallas Morning News* and WFAA-TV in the Dallas-Fort Worth market, explained how cross-ownership has enabled it to provide enhanced local news coverage. *See*

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<sup>24</sup> As of 2001, the grandfathered combinations consisted of 11 TV/newspaper combinations, 18 radio/newspaper combinations, and 9 TV/radio/newspaper combinations. *See* NAA 2001 Comments at 16.

JA2561-64 (Belo 2001 Comments at 4-7); JA3901-06 (Belo 2003 Comments at 3-8); *see also* JA0175-76 (¶ 348). Through information sharing and coordination between the separate news staffs, both outlets have been able to cover a wider range of stories and have repeatedly been recognized as community-leading news outlets. The station's evening news broadcasts consistently have ranked first in the local market since the 1980s. *Good Morning Texas*, a live morning program of talk, information and entertainment, has led its time period nearly every quarter since its debut in 1994. Furthermore, WFAA's journalistic excellence has been recognized over the years with numerous industry awards, including three George Foster Peabody Awards and seven duPont-Columbia University Awards, broadcast journalism's equivalent of the Pulitzer Prize.

Media General, Inc., the owner of *The Tampa Tribune*, WFLA-TV, and Tampa Bay Online ("TBO.com"), has worked diligently to bring the benefits of cross-ownership to the Tampa, Florida market. *See* JA2653-56 (Media General 2001 Comments at 6-9). The Company transferred all of its news staff and content operations into a state-of-the-art news center several years ago. Although each of the outlets has its own news and editorial staffs that make independent decisions about content, a central news desk facilitates the rapid exchange of story ideas, news content, and video images. The pooling of newsgathering resources has enabled the newspaper, TV station, and website to present stories from different

angles. In addition, WFLA-TV's and TBO.com's access to the *Tribune* archives and research desk has helped these electronic outlets bring more depth and perspective to their stories.

Gannett's common ownership of *The Arizona Republic* and television station KPNX in the Phoenix market—as well as <azcentral.com>, a top web site in the State of Arizona—has similarly enhanced its ability to disseminate news and information to the local community. *See* JA2574-78, JA2587-2607 (Gannett 2001 Comments at 7-11, Exhibit A); JA4043-47 (Gannett 2003 Comments at 4-8); *see also* JA0175-76 (¶ 348). The Company's coverage of the Rodeo-Chediski wildfire that broke out in June 2002 offers a particularly illustrative example of how the three outlets have been able to join forces to the benefit of the public. To cover the massive fire, the largest in Arizona history, *The Arizona Republic* quickly dispatched 25 reporters, a dozen photographers and five graphic artists, while KPNX called upon 9 reporters, 9 photojournalists, 3 field producers, 4 technicians and a helicopter pilot. Because of the extensive resources of the newspaper, KPNX provided hourly updates and expanded three daily newscasts by a half-hour to offer one-hour newscasts at 11 AM, 6 PM and 10 PM; <azcentral.com> streamed these newscasts as well as daily briefings from the Forest Service and other agencies involved in managing the fire.

In addition, KPNX's coverage of local and national politics has expanded significantly since Gannett's acquisition of *The Arizona Republic* in 2000. See JA2577, JA2591 (Gannett 2001 Comments at 10, Exhibit A at 4). For example, newspaper staffers assigned to cover local ballot initiatives or other political issues of local importance now routinely offer their knowledge and insight through interviews on KPNX's morning news programs. *The Arizona Republic's* Washington Bureau Reporter and its Editorial Page Editor provide reports on local and national political issues on the station—the Editorial Editor even joined the *12 News* election night broadcast team.

Regular interaction between the Chicago Tribune and WGN-TV—both of which are owned by the Tribune Company (“Tribune”) in Chicago—has allowed each outlet to provide higher quality journalism to the local community. See JA3022 (Tribune 2001 Comments, at 47). By way of example, *Chicago Tribune* reporters examined nearly 300 Illinois death penalty cases in 1999, raising numerous troubling questions about the state's death penalty system. The story was aired soon thereafter by WGN-TV. Early in 2000, Illinois Governor George Ryan imposed a moratorium on the death penalty in the state, noting the important

contributions of the Tribune Company in demonstrating the unfairness and unreliability of the system.<sup>25</sup>

The benefits of cross-ownership have not been limited to television stations. The New York Times Company's common ownership of radio station WQXR-FM in the same local market as its flagship newspaper—and the station's "consequent access to [*The New York Times*'] extraordinary staff of reporters and commentators"—has been "directly responsible for many of the programming services provided by WQXR." *See* JA2830 (New York Times Company Comments in MM Docket No. 01-235, at 8 (Dec. 3, 2001)). Among the services described were "The Front Page Preview," a summary of the stories being considered for page one of the following morning's newspaper; "Washington Report," a daily morning commentary by reporters from the newspaper's Washington Bureau; "Art and Antiques;" and "On the Trail," a former program that reported on presidential campaigns. JA2830-31, JA2868-73 (*Id.* at 8-9, Attachment 3).

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<sup>25</sup> Journal Broadcast Corporation offers a similar example through its joint ownership of WTMJ-TV, WTMJ(AM), and the *Milwaukee Journal Sentinel*. *See* NAA 2001 Comments at 24-25. While the newspaper and broadcast stations do not share staff or news bureaus, the Company achieves substantial cost savings by sharing some of the same news sources as well as a number of centralized business and administrative operations. The radio station is able to maintain a 24-hour news operation, with more than twice the news staff of any other radio station in the market. It is consistently the top-rated radio station in Milwaukee. The TV station, likewise, is the news leader in southeastern Wisconsin.

In addition to providing more and higher caliber broadcast news, newspaper/broadcast combinations also have an impressive record of launching innovative informational services. Several commenters have provided descriptions of newspaper/broadcast combinations that have pooled their resources to create all-news cable channels, thereby bringing local audiences a new and typically around-the-clock source of local news and information. Belo has combined the resources of *The Dallas Morning News* and WFAA-TV to create Texas Cable News (“TXCN”), a 24-hour news-on-demand service currently serving approximately one million viewers in Texas. *See* JA2563 (Belo 2001 Comments at 6); JA3902 (Belo 2003 Comments at 4); *see also* JA0175-76 (¶ 348). Although TXCN has independent news-gathering sources, it also draws on the resources of all four of Belo’s Texas television stations, including WFAA-TV. Moreover, reporters from *The Dallas Morning News* frequently appear on the network, providing coverage of a wide range of news and informational topics.

Similarly, the Tribune Company has combined the resources of the *Chicago Tribune* and WGN-TV to create an additional news outlet in the Chicago market: ChicagoLand Television News (“CLTV”), a 24-hour all-news local cable channel. *See* JA3023 (Tribune 2001 Comments at 48). CGEM, a local cable news channel was launched in 1994 by Quincy Broadcasting Company—the owner of the *Quincy Herald-Whig*, WGEM-TV, and WGEM(AM) in the much smaller Quincy,

Illinois market. *See* JA2907 (NAA 2001 Comments at 33). Programs on CGEM include “City Desk,” a weekly discussion of community issues, featuring senior editors from WGEM-TV and the newspaper; “Down to Business,” a weekly show with the newspaper’s business reporter; and “GEM archives,” a historical program featuring video from the WGEM News Library.<sup>26</sup>

As Tribune and Media General explain, moreover, the FCC correctly found in its *Order* that the benefits of cross-ownership are likely to have particular force in small markets, where broadcasting revenues tend to be significantly lower than those in large, metropolitan areas. JA0176 (¶ 350); *see* T/MG Br. at 27-28. While the escalating costs of producing local news have forced local broadcasters nationwide to scale back on news coverage and public affairs programming, *see* JA0102-04 (¶¶ 166-168), the impact has been felt disproportionately in smaller markets, where the costs of producing news and informational programming are comparable to those in larger markets, but advertising revenues are substantially lower. *See, e.g.*, Gray Television, Inc., Notice of Permitted *Ex Parte* Presentation in MB Docket No. 02-277 (April 7, 2003). Many illustrations of the

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<sup>26</sup> Existing newspaper/broadcast combinations also have utilized their aggregate expertise in publishing and audio/video journalism to develop state-of-the-art web sites offering unique locally oriented content. *See* JA2906 (NAA 2001 Comments at 32). For example, Journal Broadcasting Company’s <OnWisconsin.com> provides national and local news coverage, a comprehensive guide to arts and entertainment in Milwaukee and Wisconsin, and a search vehicle that provides access to a wide range of local news and information. Similarly, Gannett has developed <azcentral.com>, now the top web site in the state of Arizona, which provides a calendar of local events and links to a vast store of web sites mentioned in *The Arizona Republic*.

counterbalancing impact that cross-ownership can have in the face of these challenges are included in the record before the Commission.

For example, WJAG(AM), which for over 80 years has been owned in combination with *The Norfolk Daily News* in the Sioux City, Iowa market—the 144<sup>th</sup> local television market out of the 210 Designated Market Areas (“DMAs”) ranked by Nielsen Media Research by number of television households<sup>27</sup>—has served its community with exceptional local news and public affairs programming. Between 1999 and 2001 alone, the station was honored with more than 35 awards for broadcast excellence from a range of industry organizations—many more than most of its counterparts in larger markets. *See* JA2902 (NAA 2001 Comments at 28).<sup>28</sup>

The situation is somewhat different for Morris, which currently operates newspaper/radio combinations in Amarillo, Texas (the 128<sup>th</sup> market) and Topeka, Kansas (the 138<sup>th</sup> market) pursuant to temporary conditional waivers of the cross-ownership ban. At the time it acquired the radio stations, Morris committed to maintain separate staffs for the newspaper and broadcast outlets. Morris therefore

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<sup>27</sup> *See* Broadcasting & Cable Yearbook 2002-2003, at B-236-239.

<sup>28</sup> Similarly, because of Schurz Communications’ combined ownership of the *South Bend Tribune*, WSBT-TV, and two radio stations in South Bend, Indiana, the nation’s 87<sup>th</sup> largest market, the radio stations consistently have provided roughly twice as much news and informational programming as their competitors. *See* JA2964-65 (Schurz Communications, Inc. Comments in MM Docket No. 01-235, at 2-3 (Dec. 3, 2001)).

has been unable to take full advantage of the synergies and efficiencies typically generated through cross-ownership. The journalistic heritage that Morris has developed through its many years as a newspaper publisher nevertheless has translated into outstanding broadcast services for each of these small-market stations. *See* JA2805-2811 (Morris 2001 Comments, at 6-12); *see also* Morris 2003 Comments at 6-7.<sup>29</sup>

The above descriptions represent a mere sampling of those provided in the extensive record before the Commission.<sup>30</sup> The conclusion to be drawn from each of these many examples is incontrovertibly clear: as the FCC recognized, newspaper/broadcast combinations can and do provide markedly better news and informational services than would be the case absent cross-ownership.

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<sup>29</sup> For example, WIBW(AM), one of Morris' two stations in Topeka, broadcasts 11.5 hours of original, locally produced programming daily. For three of those hours, the station airs an all-news format. WIBW-FM has its own news staff and develops and presents its own newscasts as an integral part of its daily programs—unlike the “rip and read” approach common among FM stations, especially those in small markets. In addition, because agriculture is among the most important industries in Kansas, the two radio stations share a three-person farm reporting staff. KGNC(AM) and KGNC-FM, Morris' two stations in Amarillo, similarly offer local citizens superior service. KGNC(AM) produces a substantial amount of local news and talk programming and maintains a top-ranked agri-business department. KGNC-FM, in turn, is the only music station out of sixteen licensed to Amarillo that presents regular local news programming. Morris consistently has made clear, however, that if the separation requirements were lifted, even greater public interest benefits could be realized in each of these small markets. *See* JA2806-10 (Morris 2001 Comments at 7-11).

<sup>30</sup> *See, e.g.*, JA2567-72 (Cox Enterprises, Inc. Comments at 11-16); JA2881-89 (News Corporation Limited and Fox Television Holdings, Inc. Comments at 20-23, 34-36, 41-42); and JA2973-75 (Star Printing Co. Comments at 1-3). All were filed in MM Docket No. 01-235 on December 3, 2001. *See also* JA2890-2912 (NAA 2001 Comments at 16-38).

**C. The Anti-Deregulatory Parties Have Presented No Credible Evidence Refuting the FCC’s Conclusions Regarding the Benefits of Cross-Ownership**

In the face of this extensive and compelling record, the Anti-Deregulatory Parties have little to offer in rebuttal. While they assert that Study #7 should have been dismissed by the Commission because it was not strictly limited to same-market newspaper/broadcast combinations, they point to no empirical evidence of their own to contradict the conclusion that broadcasters that are part of same-market combinations offer superior news and informational services. *See* CPI Br. at 37. Nor do they offer any response to the strong conclusion of the Study that association of a broadcast outlet with a daily newspaper—even if they are not in the same market—significantly increases the quality and quantity of news and public affairs programming.

The Anti-Deregulatory Parties also fail to address any of the extensive record evidence regarding the benefits of cross-ownership provided by existing combinations.<sup>31</sup> Instead, they claim that the Commission wrongly ignored their own anecdotal examples, which they contend demonstrate that “common ownership has reduced local news and other local programming.” CPI Br. at 38. As the FCC correctly determined in its *Order*, however, none of this “evidence” involves the actual news coverage provided by jointly owned newspaper and

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<sup>31</sup> *See* Section III(B), *supra*; *see also* JA2896-2912 (NAA 2001 Comments at 22-38).

broadcast outlets and, thus, it has no bearing on the question of the public interest benefits inherent in such cross-ownership. *Id.*; JA0176-0177 (¶¶ 351-352). Based on the unambiguous evidence before it, the Commission thus correctly found that its absolute ban on newspaper/broadcast cross-ownership was counterproductive to its public interest objectives.

**IV. THE COMMISSION CORRECTLY DETERMINED THAT, IN TODAY’S ABUNDANT MEDIA MARKETPLACE, A FLAT BAN ON NEWSPAPER/BROADCAST CROSS-OWNERSHIP IS NOT NECESSARY FOR VIEWPOINT DIVERSITY**

Implicit in the arguments advanced by the Anti-Deregulatory Parties is the assumption that common ownership of media outlets necessarily results in limited and monolithic news and informational programming and, therefore, that the Commission’s decision to eliminate the absolute ban on cross-ownership cannot be squared with its obligation to ensure the “widest possible dissemination of information from diverse and antagonistic sources.” *CPI Br.* at 4-5, 35 (quoting *Assoc. Press v. US*, 326 U.S. 1 (1945)). The FCC’s record, however, contains scant evidence linking common ownership with monolithic content or common viewpoints. *See* JA0182-83 (¶¶ 362-364); *T/MG Br.* at 29, 35-39. (In fact, as *Tribune* and *Media General* show, restrictions on newspaper ownership of broadcast stations “in practice are directly at odds” with the goal of increasing access to information. *T/MG Br.* at 13, 20.

The Commission's findings and conclusions are entirely consistent with Newspaper Intervenors' experience and the reality of the newspaper and television industries. In actuality, commercial incentives and marketplace forces more than adequately protect the public's access to a variety of viewpoints. Indeed, given the aggregate number of media outlets through which the public can access information and programming nationwide, there is no realistic chance that a single entity or owner can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion in any market.

**A. The Commission Correctly Found that There Is Scant Evidence that Existing Combinations Express Monolithic Viewpoints**

As Newspaper Petitioners emphasize, the Commission expressly found in its *Order* that the record does not support the conclusion that cross-owned properties are likely to demonstrate "uniform bias" sufficient to justify a newspaper/broadcast cross-ownership ban. JA0183 (¶ 364); T/MG Br. at 35. The evidence on this point includes a Study by Professor David Pritchard, which concluded that "common ownership of a newspaper and a television station in a community does not result in a predictable pattern of news coverage and commentary." JA3542-58 (MOWG Study #2, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations*, released in MB Docket No. 02-277 (Sept. 2002)); T/MG Br. at 37-38.

While the methodology of the Pritchard Study has been criticized, the results are entirely consistent with other evidence relied upon by the Commission. Like

Newspaper Petitioners, T/MG Br. at 38-39, it is the experience of Newspaper Intervenors that broadcast reporters and executives, as well as newspaper writers and editors, simply do not select and present stories with an eye toward satisfying the views of their owner. Moreover, jointly owned outlets have strong economic incentives to avoid exclusively espousing a particular viewpoint or speaking with one “voice.” *See, e.g.*, JA3902-03 (Belo 2003 Comments at 4-5); JA2578-80 (Gannett 2001 Comments at 11-13); JA2914-17 (NAA 2001 Comments at 40-43).

For example, while single-outlet owners may all compete for a lowest common-denominator market, an owner with several outlets is better served by targeting niche markets than by competing with itself and cannibalizing a single audience. Thus, media owners with multiple outlets, including newspaper/broadcast combinations, inevitably look to attract another segment of the broad audience by distinguishing one outlet from another, increasing rather than diminishing content and viewpoint diversity. *See, e.g.*, JA2918-20 (NAA 2001 Comments at 44-46).

In any case, as the Commission itself found, “[i]t is hardly an indictment of the media to point out that an outlet may be a proponent of an identifiable editorial viewpoint. And the fact that such viewpoints may reflect popular opinion or have widespread appeal is not a ground for government intervention in the marketplace of ideas.” JA0177-78 (¶ 352). The FCC further correctly observed that the

“Constitution forbids government action to pre-select the winners in this competition or to guarantee the circulation of any particular set of ideas.” *Id.*

**B. In Today’s Local Media Markets, Where Consumers Have Access to a Wealth of Alternative Outlets, Any Isolated Incidents of Viewpoint Coordination Would Have Little Relevance**

More fundamentally, the Commission expressly and correctly found in its *Order* that, even to the extent isolated incidents of viewpoint coordination may occur between commonly owned newspapers and broadcast outlets, the wealth of diversity in today’s media marketplace has rendered any such occurrences irrelevant. *See* JA0184-85 (¶¶ 365-67); T/MG Br. at 30-33. Thus, the Commission’s analysis turns not on whether cross-owned properties are likely to demonstrate a common viewpoint, but on whether sufficient antagonistic viewpoints exist in today’s marketplace such that, even *if* certain news comment and coverage were self-interested, the public would not be left uninformed. JA0183 (¶ 364). Accordingly, Anti-Deregulatory Parties’ suggestion that permitting common ownership of newspapers and broadcast stations will threaten the delicate balance of viewpoint diversity in local markets was correctly rejected by the Commission.

**V. THE SUGGESTION THAT THE FCC’S NEWSPAPER/ BROADCAST CROSS-OWNERSHIP DECISION WILL RESULT IN UNDUE MEDIA CONCENTRATION IS WITHOUT MERIT AND BASED ON A FUNDAMENTAL MISINTERPRETATION OF THE AGENCY’S REASONING**

Anti-Deregulatory Parties’ arguments in favor of reinstating the newspaper/broadcast cross-ownership ban rely on hypothetical fears and speculative predictions that ignore the bulk of the evidence, and misinterpret much of the reasoning, in the Commission’s *Order*. They assume that the marketplace in which newspaper publishers and broadcasters operate is overly “concentrated” and that nothing short of a full cross-ownership ban can serve the Commission’s stated goals of preserving competition and diversity. That assumption is plainly anachronistic and factually unfounded.

The Anti-Deregulatory Parties focus their attack primarily on the Commission’s use of the Diversity Index (“DI”). Their assertion that a complete ban on newspaper/broadcast cross-ownership ban must be *reinstated* because of alleged flaws in the DI, however, is based on a faulty analysis of the FCC’s reasoning. The agency used the DI primarily as an analytical tool to “inform” its judgments with respect to the new cross-media limits (“CML”). Given the amorphous nature of diversity, however, the Commission’s formulation of the DI incorporated numerous conservative assumptions, the effect of which was to understate—not overstate—the levels of diversity in contemporary media markets.

**A. Anti-Deregulatory Parties' Criticisms of the FCC's "Diversity Index" Provide No Basis for Retention of the Cross-Ownership Ban**

Ignoring the bulk of the record evidence and the plain language of the Commission's *Order*, Anti-Deregulatory Parties misleadingly claim that the "irrational[]" and "self-serving[]" DI was the "central analytical measure" in the FCC's decision to rescind the cross-ownership ban. CPI Br. at 20, 40. The DI, however, simply was not pivotal in the Commission's decision to eliminate the newspaper/broadcast cross-ownership rule.<sup>32</sup> Therefore, Anti-Deregulatory Parties' claims that the DI is imperfect have little if any bearing on whether the agency's decision was arbitrary and capricious.

**1. Anti-Deregulatory Parties misconstrue the basis for the Commission's decision to eliminate the newspaper ban and adopt limited restraints on cross-media ownership**

The Anti-Deregulatory Parties' myopic focus on the DI portrays the FCC's cross-ownership analysis in a very misleading manner. *See* CPI Br. at 39-49. Fundamental to the Commission's determination to eliminate its flat ban on cross-ownership was not the DI, but the impressive records of existing combinations, empirical and real-world evidence regarding the lack of economic competition between newspapers and broadcast outlets, the significant public interest benefits

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<sup>32</sup> As Newspaper Petitioners explain, the Commission's *Order* contained bifurcated analyses concerning: (1) its determination that a flat ban on cross-ownership rule was no longer necessary in the public interest; and (2) its reasoning for creating new cross-media limits. T/MG Brief at 9-11.

to be gained through common ownership, and the evidence regarding the explosive growth in local media outlets since the ban was implemented. JA0186 (¶¶ 368-69); T/MG Br. at 9-10.

The Commission used the DI primarily to inform its judgments and give its new CML some “empirical footing.” JA0194 (¶391). At most, the DI should be recognized as a “methodological tool” to help the Commission organize the data in the record. JA0209 (¶ 433). In fact, the *Order* expressly states that the DI “informs, but does not replace [the FCC’s] judgment in establishing rules of general applicability that determine where it should draw lines between diverse and concentrated markets.” JA0194 (¶ 391). Instead, the agency states, the CML “are based on a set of assumptions drawn directly from the record evidence in this proceeding and premises that are consistent with past Commission policy and practice.” JA0209-10 (¶ 435).

Anti-Deregulatory Parties further claim that “absurd” results stem from the application of the DI to individual media markets.<sup>33</sup> *See* CPI Br. at 48. The Commission repeatedly and explicitly emphasized, however, that the DI cannot be

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<sup>33</sup> The Anti-Deregulatory Parties’ attempt to apply the DI to individual markets and their uniform criticism of the results amount, in effect, to a resurrection of their arguments in favor of FCC review of all media transactions on a case-by-case basis. The Commission, however, properly eschewed case-by-case analysis in favor of bright line rules, expressly recognizing that bright line rules provide certainty to outcomes, conserve resources, reduce administrative delays, lower transaction costs, increase the transparency of the agency’s processes, and ensure consistency in decisions. JA0062-64 (¶¶ 80-85).

applied on a particularized basis. Rather, the DI “is a blunt tool,” useful “only in the aggregate” and “cannot, and will not, be applied by the Commission to measure diversity in specific markets.” JA0197 (¶ 398).

As the FCC observed, measuring diversity is “as much art as science.” JA0212 (¶ 441). In confronting the challenge of identifying markets that might give it cause for concern in terms of preserving diversity of viewpoint, the Commission observed that “[d]iversity is not susceptible to microscopic examination; it cannot be mapped with any known formal system or reduced to mathematical equations.” *Id.* Given the elusive nature of diversity and the unambiguous language of the Commission’s *Order*, it is clear that the Commission could not and did not rely exclusively, or even primarily, on the DI as its basis for eliminating the newspaper/broadcast cross-ownership ban. Even if application of the DI may not provide the optimal result in all cases, by no means do any flaws inherent in the DI standing alone render the FCC’s decision with regard to elimination of the cross-ownership ban arbitrary or capricious.

2. **The Diversity Index substantially underestimates the actual level of diversity in today’s local markets**

Assuming, *arguendo*, that the DI rises to the level of importance ascribed to it by Anti-Deregulatory Parties, it cannot fairly be said that the DI overstates the levels of diversity available to today’s consumers in local media markets. In fact, by the Commission’s own admission, the DI errs on the side of caution by

*excluding* certain outlets that contribute to viewpoint diversity, including cable television, magazines, low power television and radio stations, despite record evidence that these outlets serve as important sources of local news and information. The DI also incorporates the conservative assumption that each local market has only one weekly newspaper. JA0194-95 (¶ 392); T/MG Br. at 43-44.

Anti-Deregulatory Parties argue, conversely, that the DI is *overly inclusive* because it incorporates media that offer little or no local news. They claim, for example, that the Internet, which is included in the Index, is inherently non-local. But the Commission correctly found otherwise: “There is a virtual universe of information sources on the Internet and there are websites not maintained by existing news media conveying information on everything from fringe political groups to local civic events.” JA0207 (¶ 427). As the Commission properly recognized in its *Order*, the Internet has enhanced greatly the ability of consumers to perform their own local newsgathering function, aggregating information from the web sites of their local government, courthouse, schools, or community centers. *See also* NAA 2001 Comments, Appendix I at 18-20 (discussing development of Internet into rich source of local news).<sup>34</sup>

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<sup>34</sup> Public participation in the Commission’s ownership proceeding is in itself testament to the power of the Internet in enhancing the ability of citizens to be informed about complex issues and express their opinions effectively in civic discourse. *See* Chris Baker, “FCC Relaxes Rules for Media Ownership,” The Washington Times (June 3, 2003), *available at* <http://www.washtimes.com/business/20030602-102133-4079r.htm> (visited Nov. 2, 2003). Similarly, the power of the Internet to “spread information and to create ad

The Anti-Deregulatory Parties also claim that the DI fails to meet the FCC's stated objective of assessing diversity because it assumes equal market shares for all broadcast outlets in a market. CPI Br. at 44-45. Instead, these parties argue, the Commission should have incorporated a usage measure in order to reflect actual behavior. The FCC considered and correctly rejected that course, however, expressly stating that its "goal is not to prescribe what content citizens access, but to ensure that a wide range of viewpoints have an opportunity to reach the public." JA0206 (¶ 425). Thus, the DI logically accounts for the general availability of media, not the popularity of specific outlets within the same medium, in assessing whether a particular viewpoint could be "blocked from transmission to the public." JA0205 (¶ 420).

In sum, the DI was neither meant to be "perfect, nor absolutely precise." JA0194 (¶ 391). If anything, given its understatement of the level of viewpoint diversity available in local markets, T/MG Br. at 43-44, the Commission's use of the DI in informing its judgments about cross-media ownership restrictions should be viewed as unnecessarily cautious and not overly deregulatory.

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hoc organizations" was demonstrated by the overwhelming response to the FCC's first hearing on localism held in Charlotte, NC on October 22, 2003. *See* Inside Radio (October 24, 2003).

**B. The FCC’s Decision Was a Long Overdue but Cautious Response to a Diverse and Competitive Marketplace**

The Anti-Deregulatory Parties’ concerns that the FCC’s newly revised ownership rules will significantly alter the American media landscape, hurt competition, and cause severe reductions in the number of independent voices available to the public are—if not entirely baseless—greatly exaggerated. *See* CPI Br. at 14-15. Both the record and common sense support the obvious conclusion that the marketplace in which newspaper publishers and broadcasters operate today is not the marketplace of the 1960s and 1970s. T/MG Br. at 30. The Commission found that “the vast majority of local media markets are healthy, well-functioning, and diverse.” JA0209 (¶ 433). Given the multitude and ready accessibility of other news and informational outlets in today’s marketplace, broadcasters simply do not and cannot function as information gatekeepers or foreclose full and open discourse. Moreover, despite the expansion of media holdings by some companies, the record demonstrates that media ownership concentration has decreased significantly since the media ownership rules were put in place. *See, e.g.,* JA3524-41 (MOWG Study #1, Scott Roberts, Jane Frenette, and Dione Stearns, *A Comparison of Media Outlets and Owners For Ten Selected Markets*, released in MB Docket No. 02-277 (September 2002)).

While Anti-Deregulatory Parties’ attempt to make a case against additional “media concentration” is somewhat open-ended, it would appear their principal

concern is that the Commission’s decision to permit certain cross-media combinations will result in control of public debate. *See* CPI Br. at 34-37. The Commission correctly found that “[g]iven the growth in media outlets, the influence of any single viewpoint source is sharply attenuated.” JA0185 (¶ 366); *see also* T/MG Br. at 30; Section IV(B), *supra*. Anti-Deregulatory Petitioners’ attempts to link “media concentration” to insufficient viewpoint diversity are, therefore, untenable.

To the extent Anti-Deregulatory Parties’ arguments about “media concentration” may reflect concern about the competitive ills that could result from newspaper/broadcast combinations, they are similarly unfounded. *See* CPI Br. at 48-49. Anti-Deregulatory Parties ignore the FCC’s finding that “a newspaper/broadcast combination . . . is not a horizontal merger and cannot adversely affect competition in any market,” and casually disregard the fact the record contains *no* evidence that existing grandfathered or other permissible newspaper/broadcast combinations—many involving market leading, network-affiliated television stations and widely read dailies—wield undue economic power. JA0168-71 (¶¶ 332-37); T/MG Br. at 26-27.

While the agency found no need to create new economic protections, it erred on the side of caution with respect to diversity, creating the new CML to ensure that no combination of cross-media properties would be in a position to “dominate

public debate.” JA0209 (¶ 432). Under the revised restrictions, cross-ownership among daily newspapers, television stations and radio stations will not be permitted in the nation’s small markets—those with three or fewer television stations. Similarly, the FCC continued to impose limits on cross-ownership in the middle tier of markets—those with four to eight television stations. Only in the nation’s largest markets were the cross-ownership restrictions lifted. In those markets, the Commission correctly found that there are abundant alternatives. JA0217-23 (¶¶ 456-72).

Even in these largest markets, however, significant constraints will remain. In addition to the CML, the agency’s separate local television and radio ownership limits will serve to further protect diversity.<sup>35</sup> Accordingly, any permissible newspaper/broadcast combination will face competition from at least three (and generally several more) independently owned television stations and multiple

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<sup>35</sup> Anti-Deregulatory Parties assert that the Commission’s *Order* is “internally inconsistent” because it concludes that while the newspaper/broadcast cross-ownership rule is no longer necessary to protect viewpoint diversity, the local radio limits are. CPI Br. at 38. The ban on newspaper/broadcast cross-ownership adopted by the Commission in 1975 is the *only* media ownership rule that had not been recalibrated by the agency to reflect current marketplace realities. By contrast, the limits on local and national radio ownership have been incrementally relaxed over the past two decades. Moreover, unlike the cross-ownership restrictions, the local radio limits are essentially competition, not diversity, based and apply only to media outlets in the same service. Nothing in the FCC’s discussion concerning the local radio limits contradicts its determination that the proliferation of media outlets has obviated the need for a cross-media prohibition on same-market newspaper/broadcast outlets to protect viewpoint diversity.

competing radio outlets, not to mention the numerous other print and electronic media that characterize the existing marketplace.

Anti-Deregulatory Parties' attempt to use an illustration from the Philadelphia market to underscore their claims is highly unrealistic and grossly exaggerated. "[I]n Philadelphia," these parties claim, the *Philadelphia Inquirer* may now own the first-, fifth- and sixth- ranked TV stations, along with eight radio stations (including the all-news stations)." *See* CPI Br. at 34. This statement assumes, first, that there would be no competitive buyers for these media properties, an extremely improbable scenario. Second, it fails to account for review of proposed mergers by agencies other than the FCC. Should such a proposed merger raise competitive issues, it would not likely survive antitrust review by the Department of Justice. Finally, the Anti-Deregulatory Parties neglect to mention that the hypothetical combination would still face competition from 12 commercial and 5 noncommercial television stations, 35 radio stations, a competing daily newspaper and a host of additional media.<sup>36</sup>

The Commission's decision to relax the absolute prohibition on newspaper/broadcast combinations was, in fact, a cautious response to an extensive record that unambiguously demonstrates that today's marketplace is characterized

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<sup>36</sup> *See* Broadcasting & Cable Yearbook 2002-2003, at B-208; BIA Financial Network, *2003 Investing in Radio Market Report* (2d ed. Winter 2003); *Editor and Publisher Yearbook*, at I-352-79 (83<sup>rd</sup> ed. 2003).

not by media monopolies, but by healthy competition and an unprecedented amount of choice. The FCC correctly recognized that it is not “media concentration” that has the potential to harm the public interest, but the possibility that outdated and unnecessary restrictions such as the newspaper/broadcast cross-ownership ban will limit improvements in media markets and technologies, thus crippling the ability of the broadcast and print media to provide significant benefits to the public.

## VI. CONCLUSION

For the foregoing reasons, the Court should reject the claims of Anti-Deregulatory Parties and uphold the FCC's decision to repeal the absolute prohibition on newspaper/broadcast cross-ownership. That decision was compelled by the governing legal principles and fully supported by the record, which, in fact, justifies outright elimination of cross-ownership restrictions.

Respectfully submitted,

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November 3, 2003

**CERTIFICATION OF BAR MEMBERSHIP**

I, James R. Bayes, hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

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James R. Bayes

**CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P.  
32(A)(7)(C)**

Pursuant to Fed. R. App. P. 32 (A)(7)(C), counsel for Newspaper Intervenors certifies that this brief complies with the applicable type-volume limitations. The attached brief for Petitioner is printed using a proportionally spaced, 14-point Times New Roman typeface and contains 12,159 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This certificate was prepared in reliance on the word count of the word-processing system (Microsoft Word) used to prepare this brief.

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James R. Bayes

**CERTIFICATE OF SERVICE**

I, Wanda L. Thorpe, hereby certify that on November 3, 2003, I caused a copy of the foregoing Brief for Intervenors Newspaper Association of America, Belo Corp., Gannett Co., Inc., and Morris Communications Corporation to be delivered via UPS Next Day Air mail to the following:

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