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03-3673, 03-3708, 03-3894, 03-3950, 03-3951, 03-4073**

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

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

v.

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

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

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

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SUMMARY OF ARGUMENT

The Newspaper Association of America, Belo Corp., Gannett Co., Inc., and Morris Communications Company, LLC (“Newspaper Intervenors”) respond herein principally to the continued efforts of Citizen Petitioners and Intervenors (the “Anti-Deregulatory Parties”) to persuade the Court that the FCC erred in eliminating its decades-old, absolute restriction on newspaper/broadcast cross-ownership and that the former outdated ban should be reinstated. In their reply brief, the Anti-Deregulatory Parties persist in ignoring the compelling record before the Commission and misinterpreting the reasoning underlying the agency’s decision.

Ironically, the Anti-Deregulatory Parties now contend that the Commission’s reading of Section 202(h) of the Telecommunications Act of 1996, by itself, constitutes grounds for reversal of the agency’s decision, notwithstanding the fact that the FCC appears to be construing the statute in precisely the manner that Anti-Deregulatory Parties have advocated throughout these proceedings. This argument is a red herring. While Newspaper Intervenors disagree with any contention that Section 202(h) embodies no more than an “ordinary rulemaking” standard, the exact construction of the biennial review mandate is not critical to the agency’s decision to jettison the former newspaper/broadcast cross-ownership ban. Under

any reasonable interpretation of the statute, that obsolete and counterproductive restriction was no longer sustainable.

The Anti-Deregulatory Parties also continue to drastically overplay the importance of the Diversity Index (“DI”), claiming that it was the sole justification for the FCC’s decision to eliminate the cross-ownership ban and replace it with three-tiered cross-media limits. The decision to reduce restrictions on cross-ownership was, in reality, based on a comprehensive and consistent record. Central to the FCC’s decision to repeal the former absolute prohibition were the extensive data regarding the dramatic growth in the media marketplace since the ban was implemented, the overwhelming evidence regarding the positive impact that newspaper ownership has on both the quality and the quantity of local news and information services offered by broadcast outlets, and the lack of evidence that cross-ownership will be accompanied by countervailing public interest harms. Indeed, the DI was not relied upon to support the Commission’s decision that the former cross-ownership ban no longer serves the public interest, but instead was used as an analytical “tool” by the FCC in formulating the more limited restrictions it decided to retain.

The Anti-Deregulatory Parties’ new contention that the Commission did not reconcile its revised local television ownership rule with the new cross-media limits similarly is based on a misconstruction of the FCC’s reasoning. The

argument that the agency should have incorporated a market-share component into the cross-media limits to mirror the television top-four rule ignores the differing policy objectives underlying the two provisions. As the Commission repeatedly explained in its *Order*, the primary purpose of the revised local television ownership rule is to advance its goal of protecting local competition, while the new cross-media limits are designed to serve the agency's diversity goals. The differing structures of the rules, then, are functions of the distinct policy objectives the agency was attempting to address and provide no basis for a return to more stringent cross-ownership restrictions.

ARGUMENT

I. THE ANTI-DEREGULATORY PARTIES' CONTENTION THAT THE FCC'S CONSTRUCTION OF SECTION 202(H) SOMEHOW JUSTIFIES REVERSAL AND REINSTATEMENT OF OUTMODED MEDIA OWNERSHIP REGULATIONS IS UNTENABLE

The Newspaper Intervenors as well as several other Deregulatory Parties¹ demonstrated in their opening briefs that Section 202(h) of the 1996 Act imposes a significantly heightened burden on the FCC to justify the retention of its decades-old ownership regulatory regime.² Indeed, the statute mandates repeal or relaxation of ownership restrictions that cannot be shown to be "essential" or

¹ See Clear Channel Communications, Inc. ("CC") Br. at 19-27; Tribune/Media General ("T/MG") Br. at 24-25; Fox Entertainment Group, Inc., *et al.* Br. at 17-21.

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

“required” in the modern information marketplace to serve specific and concrete public interest goals. *See* Newspaper Intervenors Br. at 3, 5-11.

As Newspaper Intervenors noted, the FCC correctly acknowledged in the decision here under review that Section 202(h) “carries with it a presumption in favor of repealing or modifying the ownership rules” and “appears to upend the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule.” JA 0041-42 (*2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules*, 18 FCC Rcd. 13620, ¶ 11 (2003) (“*Order*”) (hereinafter cited by reference to the Joint Appendix and relevant paragraph numbers only)).

The Commission included a footnote in its decision, however, citing the agency’s construction of another provision of the 1996 Act, Section 11. Under that construction, the FCC claims broad discretion in its biennial reviews of ownership restrictions, akin to its general “public interest” authority to adopt new regulations. JA 0041-42 (¶ 11, n.15). The FCC’s Brief includes a more extended discussion of its Section 11 interpretation. Further, it asserts the Commission’s view that, notwithstanding the 1996 Act in general and Section 202(h) in particular, the FCC retains “wide-ranging and flexible” power to adopt and revise broadcast ownership rules. FCC Br. at 21, 23-28.

For the reasons set forth in their initial brief, Newspaper Intervenors submit that construing Section 202(h) as an “ordinary rulemaking” standard is improper. *See* Newspaper Intervenors Br. at 5-11; *see also* CC Br. at 19-27; T/MG Br. at 24-25. Newspaper Intervenors will not repeat their arguments with respect to the statutory mandate in detail here. Instead, this reply brief addresses the surprising contention of the Anti-Deregulatory Parties that the FCC’s more expansive view of its authority to regulate under Section 202(h)—a view urged upon the Commission and the Court by the Anti-Deregulatory Parties themselves—somehow reflects a misapprehension of the governing legal standard that, alone, requires reversal of the agency’s decision and return to its antiquated former regulatory regime.

In their opening brief, the Anti-Deregulatory Parties argued that Section 202(h) should not be read to create a presumption in favor of relaxing or modifying its broadcast ownership rules. Rather, they contended, the “traditional public interest standard” should apply to the Commission’s decisions in this case. Citizen Petitioners and Intervenors (“CPI”) Br. at 21-32. Now, however, rather than applauding the FCC’s evident agreement with their position, the Anti-Deregulatory Parties contend that the Commission has made an “about-face.” CPI Reply Br. at 5. Thus, they claim that “the FCC either applied the wrong legal standard or was uncertain about what standard it did apply,” and that this error or confusion warrants reversal of the agency’s decision. *Id.* at 10. The supposed about-face by

the Commission, however, is illusory; the FCC's discussion of the Section 202(h) presumption in its brief tracks closely the statements the Commission made in the decision here under review. More importantly, any supposed error or confusion on the part of the FCC with respect to the governing legal standard would not, in any event, provide a basis for vacating the agency's decision to relax its cross-ownership ban.³ To the contrary, the appropriate inquiry here is not whether the FCC went too far in modifying its outmoded restrictions, but whether it went far enough to satisfy the directive of Congress and the previous judicial interpretations of Section 202(h).

As the Newspaper Intervenors demonstrated in their initial brief, the FCC was constrained to review its longstanding media ownership rules with an eye

³ The handful of cases cited by the Anti-Deregulatory Parties in support of this strained contention have no apparent bearing on the proper interpretation of the biennial review mandate in Section 202(h). *Townley v. Heckler*, 748 F.2d 109, 112 (2d Cir. 1984), and *Goatcher v. United States Dep't of Health and Human Serv.*, 52 F.3d 288, 289 (10th Cir. 1995), both involved failures by administrative law judges to apply the correct legal standards under regulations governing eligibility for social security disability benefits. *Dam Things from Denmark v. Russ Bernie & Co., Inc.*, 290 F.3d 548, 556 (3d Cir. 2002), involved a district court's application of an incorrect standard for copyright liability in evaluating likelihood of success on the merits under the four-part test for issuance of a preliminary injunction. Finally, *Schreiber v. Society for Sav. Bancorp.*, 11 F.3d 217, 220 (D.C. Cir. 1993) dealt with an erroneous determination of the scope of an evidentiary privilege in a decision on enforcement of a subpoena. Thus, all four of the cited cases turned on the application of an erroneous legal standard to the facts adduced and a consequent error in the ultimate result. Here, by contrast, the FCC's determination to repeal its former absolute ban on cross-ownership is fully supported by the record evidence and justified under any conceivable construction of Section 202(h). *Cf. Allison v. Dep't of Trans.*, 908 F.2d 1024, 1029 (D.C. Cir. 1990) (holding that FAA's use of inappropriate noise guidelines in approving a new airport did not constitute prejudicial error where substantial evidence supported the ultimate determination).

toward elimination of those that cannot be shown to be necessary in the contemporary marketplace. Proper application of this statutorily-mandated standard to the evidence on the record unquestionably dictated repeal or, at a minimum, very substantial relaxation of outmoded restrictions such as the newspaper/broadcast cross-ownership ban. *See* Section II, *infra*.

On the other hand, assuming *arguendo* that the FCC had latitude to proceed with a “business as usual” public interest inquiry, as the Anti-Deregulatory Parties urge, the agency certainly acted within its discretion in concluding that elimination of the archaic cross-ownership ban would advance the Commission’s localism objectives and provide an opportunity for enhanced news, public affairs and other informational programming services, without any appreciable threat to competition or diversity in the abundant media environment of the 21st Century. Regardless of the proper interpretation of Section 202(h), then—and even assuming the statutory provision did not alter the Commission’s general rulemaking responsibilities at all—the evidence clearly supported the FCC’s decision to rescind the outdated and counterproductive cross-ownership ban. *See* Newspaper Intervenors Br. at 12-14.

II. THE ANTI-DEREGULATORY PARTIES' EXCESSIVE FOCUS ON THE SIGNIFICANCE OF THE DIVERSITY INDEX IGNORES THE OVERWHELMING RECORD EVIDENCE SUPPORTING THE FCC'S DECISION TO ELIMINATE THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP BAN

In their reply brief, the Anti-Deregulatory Parties persist in characterizing the Diversity Index as the sole evidence on the record before the Commission justifying its decision to jettison the long-outdated ban on newspaper/broadcast cross-ownership and replace it with the less restrictive cross-media limits (“CML”). *See, e.g.*, CPI Br. at 25 (describing the Diversity Index as “the *only* concrete information in the record the Commission actually cited or [relied] upon in fashioning and updating the CML”); *id.* at 24 (“[T]here is no serious indication that the FCC actually considered anything other than the DI.”). Because the Diversity Index is flawed, these Parties contend, the agency’s entire cross-ownership analysis is inherently defective and must be thrown out. *See id.* at 26.

This argument ignores the overwhelming weight of the evidence before the FCC as well as the reasoning underlying its decision. In reality, the Commission’s decision to eliminate the former absolute prohibition on newspaper/broadcast cross-ownership was based on a substantial and multifaceted factual record. As a preliminary matter, the agency’s determination that a flat ban was no longer sustainable was guided by its comprehensive analysis of the growth that has permeated the media landscape since the restriction was put in place in 1975. *See*

generally JA 0065-85 (¶¶ 86-128). As the Commission specifically explained in the *Order*, it was “[a]gainst the backdrop of the last 27 years’ growth in the number, breadth, and scope of informational and entertainment media available” that it found that “a blanket prohibition on the common ownership of broadcast stations and daily newspapers in all communities and in all circumstances can no longer be justified as necessary to achieve and protect diversity.” JA 0179 (¶ 355).

Further, as the Newspaper Intervenors explained in detail in their opening brief, there was a wealth of empirical and real-world evidence before the Commission—including, in particular, the experiences of dozens of existing grandfathered and other combinations—demonstrating that newspaper-owned broadcast stations provide superior local news and informational services. *See* Newspaper Intervenors Br. at 23-40. After analyzing this impressive body of evidence in detail, *see generally* JA 0172-78 (¶¶ 342-54), the FCC expressly relied on it in deciding to eliminate the former cross-ownership restriction:

In light of the overwhelming evidence that combinations can promote the public interest by producing more and better overall local news coverage, we conclude that the current rule is not necessary to promote our localism goal and that it, in fact, is likely to hinder its attainment.

JA 0179 (¶ 356); *see also* FCC Br. at 70-72.

The lack of record evidence demonstrating that newspaper/broadcast cross-ownership will result in any appreciable public interest harms similarly factored

into the Commission’s decision to jettison the former cross-ownership ban. Having weighed the information supplied by parties on all sides of the cross-ownership issue as well as applicable empirical evidence, *see* JA 0181-83 (¶¶ 361-64), the FCC concluded that the “evidence shows that the link between common ownership of newspapers and broadcast outlets and common viewpoint is tenuous, ill-defined, and difficult to measure.” JA 0186 (¶ 369); *see also* FCC Br. at 75. The agency acknowledged contentions that individual outlets occasionally “may betray some bias,” but found that the “anecdotes” on the record to this effect did “not show a pattern of bias in the vast majority of news comment where [] self-interest is not implicated” and, in any case, did not mean that “the public was left uninformed . . . by other available media.” JA 0183 (¶ 364).⁴ Based on these considerations, the FCC appropriately determined that “the record does not contain data or other information demonstrating that [newspaper/broadcast cross-ownership] poses a widespread threat to diversity of viewpoint or programming.” JA 0186 (¶ 368).⁵

⁴ As Tribune and Media General explain in their reply brief, the “examples” provided by UCC purporting to show that common ownership inevitably leads to common viewpoint generally have no relevance to newspaper/broadcast cross-ownership and, in any case, are not sufficient to demonstrate a pattern of such behavior. *See* Office of Communication of the United Church of Christ, Inc. Br. at 27-29; T/MG Reply Br. at 26-28.

⁵ In addition, based on the results of one of its Media Ownership Working Group Studies as well as information provided by a number of commenters, the FCC determined that “newspapers, television, and radio are not good substitutes and . . . make up distinct product markets” and, thus, that “[a] newspaper/broadcast

Thus, the Anti-Deregulatory Parties' efforts to cast the Diversity Index as the sole factor in the Commission's decision to relax its restriction on newspaper/broadcast cross-ownership are misdirected. Only after the agency had decided that its former cross-ownership ban "was no longer necessary in the public interest" did the DI even come into play. JA 0186, 0194 (¶¶ 369, 391); *see also* FCC Br. at 76-77. At that point, as both the Newspaper Intervenors and the Commission already have explained to this Court, the Index was employed as a "tool to inform [the agency's] judgment and decision-making" regarding "where [it] should draw lines between diverse and concentrated markets." JA 0194 (¶ 391); *see* Newspaper Intervenors Br. at 41-44; FCC Br. at 77-79.⁶

As Newspaper Intervenors already have explained and the Commission has acknowledged, the DI excludes a number of alternative media outlets, despite record evidence that these outlets contribute to the diversity of local news and information. *See* Newspaper Intervenors Br. at 44-45; JA 0194-95 (¶ 392); T/MG Br. at 57-60. The effect of the conservative assumptions built into the DI is to understate, rather than overstate, the levels of local media diversity. *See* JA 0197 (¶ 400); Newspaper Intervenors Br. at 44-46; FCC Br. at 82. Thus, any

combination . . . cannot adversely affect competition in any product market." JA 0168 (¶ 332); *see also* FCC Br. at 69.

⁶ The Commission stated that it also had relied largely on "the record evidence" as well as its "independent judgments" and "agency expertise." JA 0209, 0216 (¶¶ 435, 453); *see also* FCC Br. at 78.

shortcomings in the Diversity Index would dictate further deregulation, not resurrection of the antiquated flat ban on cross-ownership.⁷

III. DIFFERENCES IN THE STRUCTURE OF THE LOCAL TELEVISION AND CROSS-MEDIA RULES REFLECT THE DISTINCT POLICY OBJECTIVES EACH RESTRICTION IS INTENDED TO ADDRESS

The Anti-Deregulatory Parties assert on reply that the Commission failed to harmonize its decision to prohibit mergers between top-four television stations with its decision to permit combinations between a daily newspaper and such a television station in some markets. CPI Br. at 31-33. This argument fails to recognize a principal component of the Commission's decision: its conclusion that the primary purpose of the revised local television ownership rule is to advance its goal of protecting local competition, while the new cross-media limits are designed to serve the agency's diversity goals.

In its *Order*, the Commission provided a detailed explanation of its underlying policy objectives and clearly distinguished its diversity objectives from its competition concerns. *See generally* JA 0044-60 (¶¶ 19-72). With respect to

⁷ Notwithstanding the Ant-Deregulatory Parties' obsessive focus on the DI, the Commission's decision, in fact, hinged on an expansive and incontrovertible record accumulated over the course of several years in two separate rulemaking proceedings. *See Cross-Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Waiver Policy*, 16 FCC Rcd 17283 (2001). Further, as Newspaper Intervenors explained in their opening brief, the FCC's commitment to reexamine the cross-ownership ban can be traced back at least to 1996, when the Commission expressly recognized the need to reconsider the restriction in the context of ABC/Disney merger. *See Newspaper Intervenors Br. at 16-17 (citing Capital Cities/ABC, Inc.*, 11 FCC Rcd 5841, 5895 (1996)).

viewpoint diversity, the Commission clarified that its specific concern is the “availability of media content reflecting a variety of perspectives.” JA 0044 (¶ 19). By contrast, the FCC described its competition objective as ensuring “pro-competitive market structures” and a “fair opportunity for open competition in the use of broadcasting facilities.” JA 0055, 0056 (¶¶ 54, 57); *see also* JA 0093-94 (¶ 150).

In evaluating each of its media ownership rules, the FCC clarified which of its policy objectives it believed were being served under both the pre-existing restrictions and the newly adopted rules. While finding that a restriction on local television ownership “is not the best means to promote [its] diversity goal” and “does not promote, and may even hinder, . . . localism,” the Commission concluded that “some limitations on local television ownership are necessary to promote competition.” JA 0086-87 (¶ 133). Leaving aside the merits of the FCC’s revised local television ownership rule, the top-four restriction thus represents a mechanism intended to ensure that no one station owner will have the ability to engage in anti-competitive behavior by controlling an undue share of the local programming or advertising markets. *See* JA 0114 (¶ 196); FCC Br. at 33.⁸

⁸ Although the Commission recognized that its revised local television ownership rule also could address diversity concerns, the caps were specifically “designed to promote and protect competition” in the local television market. JA 0210 (¶ 436); *see id.* JA 0211 (¶ 437) (noting that “intra-service caps designed to ameliorate competition concerns necessarily also will protect against undue concentration of speech outlets for diversity purposes”).

Conversely, the Commission expressly found that the joint ownership of a daily newspaper and broadcast station in the same local market “cannot adversely affect competition in any relevant product market.” JA 0172 (¶ 341); FCC Br. at 69. After finding that a blanket prohibition on the ownership of a daily newspaper and a broadcast station would likely “hinder” its localism goals and could “no longer be justified as necessary to achieve and protect diversity,” the FCC created the more limited cross-media limits to address its lingering diversity concerns. JA 0179, 0186 (¶¶ 355, 368-69); FCC Br. at 72, 76.

In crafting cross-media limits, it would not have made sense for the Commission to have imposed a strict market-share restriction, which could not have directly advanced the stated goal of ensuring that a certain number of local news and informational viewpoints remain accessible in local communities. Rather, the agency chose to address its objectives by permitting varying levels of cross-ownership based on the approximate number of owners of local news and informational sources available in a local market.

As the Court clarified in the *Sinclair* case, the FCC may craft rules that are based on different concerns and criteria, and thus that may seem facially inconsistent, so long as it provides a reasoned explanation for its decision. *See Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 162, 164 (D.C. Cir. 2002); *see also Prof'l Pilots Fed'n v. FAA*, 118 F.3d 758, 765 (D.C. Cir. 1997) (finding that

agency sufficiently “explained” apparently “inconsistent” pilot testing policies).

Thus, the criticisms of the Anti-Deregulatory Parties provide no basis for vacation of the FCC’s decision to reduce its outdated restrictions on cross-ownership.

IV. CONCLUSION

For the foregoing reasons, the Court should reject the claims of the Anti-Deregulatory Parties and uphold the Commission's decision to eliminate the absolute prohibition on newspaper/broadcast cross-ownership. In light of the relevant statutory mandate and the compelling record before the agency, that decision was a required outcome of the FCC's proceeding, and there is no basis whatsoever for a return to more stringent cross-ownership limitations.

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January 5, 2004

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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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 Intervenor certifies that this reply brief complies with the applicable type-volume limitations. The attached reply brief for Intervenor is printed using a proportionally spaced, 14-point Times New Roman typeface and contains 3541 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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CERTIFICATE OF SERVICE

I, Martha E. Heller, hereby certify that on January 3, 2004, I caused a copy of the foregoing Reply 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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