TESTIMONY OF GEORGE L. MAHONEY

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FCC MEDIA OWNERSHIP WORKSHOP
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My name is George Mahoney, and I am Vice President, Secretary and General Counsel of Media General, Inc. I would like to address the FCC's currently effective ban on the cross-ownership of newspapers and broadcast stations in the same market. I start from the premise that the rule is unconstitutional, both under the First and Fifth Amendments, and that its continued retention violates administrative law and Section 202(h) and of the 1996 Telecommunications Act, which requires the FCC periodically to determine whether its rules are "necessary" in the public interest as a result of competition and then repeal or modify those that are not. I emphasize that the statute authorizes inquiry in this quadrennial review into just that one factor -- competition.

The FCC's complete ban as to common ownership of newspaper and television stations in the same market was adopted in 1975 in a completely different media world; it was liberalized very minimally in 2008 in ways that have not yet become effective. To hold such combinations, therefore, parties need to obtain waivers, which the FCC has very sparingly granted in the last 34 years. The rule is truly a regulatory relic that was adopted at the behest of the Nixon Administration to punish "liberal" media like the *Washington Post* in the wake of Watergate. The ban remains in effect today despite the FCC's minimal attempts to modify it because of pending litigation over those regulatory actions and a stay that was imposed in 2003 by the federal court handling earlier appeals and never lifted.

Before I address these legal points in any detail, I want to give a little background on Media General's experience with the rule. This is experience that, I believe, is particularly relevant in today's economic downturn, which has had such a severe impact on the media industry. Media General has found that cross-ownership provides a very potent means for not only delivering, but increasing, high quality local news and information programming in small- and medium-sized markets. Today, more than ever, that approach can help to ensure the survival of high quality local news, strong journalism, and investigative reporting.

I. The Media General Experience: The Benefits of Cross-Ownership

Media General is a leading publicly traded provider of news, information, and entertainment across multiple media platforms, serving consumers and advertisers in strong local markets, primarily in the southeastern United States. Media General's operations are organized into five geographic market segments and a sixth segment called "Digital Media."

Our operations include 18 network-affiliated TV stations and associated websites; 21 daily newspapers and associated websites; more than 200 specialty publications that include weekly newspapers; and niche publications targeted to various demographic, geographic, and topical communities of interest. Many of our specialty publications have associated websites. Media General also operates three interactive advertising services companies: Blackdot, which specializes in interactive entertainment and advergaming technologies; DealTaker.com, a coupon and shopping website; and NetInformer, a leading provider of wireless media and mobile marketing services.

At the beginning of 1995, Media General owned just three daily newspapers, and as of the start of 1997, it held only three broadcast television station licenses. Over the last 14 years, Media General has acquired media outlets in a number of markets and, as part of this expansion,

has brought together ownership and operation of local newspapers and local television stations. In the process, Media General has become one of the media industry's leading practitioners of "convergence."

Media General's News Center in Tampa, Florida is the most advanced convergence laboratory in the nation, and the only one, as far as Media General is aware, in which the news staffs of a newspaper (*The Tampa Tribune*), broadcast television station (WFLA), and online operation (TBD.com) are housed together under one roof. Besides this strong presence in Tampa-St. Pete, the nation's 14th-ranked Designated Market Area ("DMA"), Media General has similar convergence efforts underway in four additional markets where it owns television broadcast stations and daily newspapers -- Roanoke-Lynchburg, Virginia, the 67th-ranked DMA; Tri-Cities, Tennessee/Virginia, the 93rd-ranked DMA; Myrtle Beach-Florence, South Carolina, the 104th-ranked DMA; and Columbus, Georgia, the 128th-ranked DMA.

Tampa. Media General's interests in *The Tampa Tribune* and WFLA date to 1965 and are grandfathered under the 1975 rule. Our efforts at convergence there began in the mid-1990s when WFLA and *The Tampa Tribune* began to take a coordinated approach to covering local high school football and other sports in addition to stories about religion. Shortly thereafter, the two platforms began sharing expensive political polling information and joining forces to provide enhanced political coverage by sponsoring local events like candidate debates and "town halls." The response from the community and advertisers was so overwhelmingly positive that in 2000, when it came time to build expensive new digital television facilities in response to the Commission's mandate, Media General moved the staffs of all three Tampa platforms into a new $35 million state-of-the-art facility, The News Center. Over the last decade, FCC Chairmen, Commissioners, and staff have toured The News Center on multiple occasions. I would

encourage any FCC representatives interested in seeing how convergence works in practice, day-in and day-out, to contact us to arrange a tour for you of that very vibrant facility.

In Tampa, each of the three platforms has its own specific news and editorial staffs that make independent, final decisions about content. These three staffs work together at a central news desk, facilitating the rapid exchange of story ideas, news content, and video images. All three platforms also maintain their own news "budgets" (compilations of planned stories on a building-wide "intranet") and the staffs of each platform can access the news "budgets" of the other properties. Moreover, it has become commonplace that newspaper reporters write scripts for television newscasts and appear on-air, and television reporters write stories that are published in the newspaper. The newspaper also makes its archives available to the other two platforms. With the provision of special equipment to the photographers of all three platforms earlier this decade, *The Tampa Tribune* and TBO.com have been able to add pictures to stories that otherwise would have been only text. Similarly, *The Tampa Tribune*'s photojournalists have been able to provide WFLA and TBO.com with video footage.

The pooling of news-gathering resources has significantly increased the output of news content and ensured the delivery of better, faster, and deeper news in Tampa. These improvements can be seen in at least the following four areas, resulting in the best quality local breaking news, journalism, and investigative reporting for Tampa-St. Pete residents:

- *Breaking News*. With convergence has come "more eyes, more ears, and more mouths" on the street, meaning Media General's platforms are that much more likely to learn of breaking news developments and disseminate them quickly. In instances repeated on a daily basis, this has led to more extensive and immediate coverage of local events from jury verdicts in celebrated trials to hostage

situations to traffic emergencies to developments affecting the region's sports teams and players.

- *Expanded News Content*. Expanded and more in-depth coverage of the market has flowed naturally from these convergence efforts. As is common in the industry, *The Tampa Tribune* has many times the number of reporters that WFLA has, even though the station has a staff that is typical for large market network affiliated television stations. With convergence, WFLA gains access to the newspaper's reporters who cover beats and have areas of expertise far beyond those the television station's staff can cover or develop. For example, *The Tampa Tribune*'s real estate reporter has for years provided on-air reports on local real estate issues for WFLA, and *Tribune* reporters who cover other business-related topics report on those issues on-air. These and other *Tribune* reporters frequently provide special on-air reports in their areas of expertise.
- *Investigative and Enterprise Pieces*. The three outlets have joined forces to produce specials and investigative reports that none of them could have done alone. Over the years, they jointly investigated the hurricane-preparedness plans of Tampa area governments, provided investigative and special reports on the actions of a possible serial rapist in nearby Ybor City, traveled the backroads of Mississippi and Louisiana delivering different reports to all three platforms on the impact of Hurricane Katrina on small towns and their historical sites, and flown to Iraq, Afghanistan, and Germany to report for all three outlets on the experiences of local troops serving in those areas.

- *Greater Understanding of the Community*. "Better sourcing," that is greater access to more leaders and community institutions achievable through three sets of reporters, allows the platforms to provide improved depth, understanding, and sensitivity in their coverage of diverse stories about the community. These same factors also aid the platforms in identifying solutions to community problems. Examples here included a series on the experiences of parents who have lost children to cancer and the tragedy that struck Indianapolis Colts football coach Tony Dungy and his Tampa-based family when his son committed suicide, both of which featured helping services available in the community. By working together, the three platforms have gained better access to political candidates and government officials for the Tampa Bay citizenry. Together, they have conducted their own joint polls, held "town hall" meetings, and organized other events, such as health fairs and community telephone banks that simply would not have been feasible without common ownership.

It is important to note that Media General's convergence efforts were not borne of an intent to reduce staff. Indeed, they did not result in staff reductions in Tampa, either overall or in news operations; rather, and contrary to popular criticisms of cross-ownership, overall employment at WFLA and employment in the station's newsroom increased. This should not be surprising since WFLA's local news output also increased by 30 minutes each weekday. When the economic downturn hit several years ago, the Tampa combination, like all Media General properties, was forced to make budgetary and staff reductions. Media General believes, however, that because of cross-ownership the amount and quality of local news has been less

affected by adverse economic factors than in situations faced by other local broadcasters and newspapers that did not practice convergence.

Other Convergence Markets. As in Tampa, the newspapers and television stations in each of Media General's other convergence markets maintain separate news and editorial staffs. Although they do not have the advantages of co-location as in Tampa, the news staffs at the co-owned properties regularly share story ideas electronically and by telephone. All of Media General's converged properties have for several years equipped their print photojournalists with digital video cameras to provide video to the television stations; they provide their television cameramen with equipment that allows the newspapers to retrieve print-quality photos. The newspapers also make their extensive archives available to the television stations. As was also true in Tampa, the news staffs at each of Media General's cross-owned television stations grew following the implementation of convergence, and most of these stations also added appreciably to the number of hours of news programming that they offered each week.

Unlike Tampa, the combinations in these other markets were not grandfathered under the 1975 decision adopting the rule. Media General has owned and operated them since their acquisition pursuant to two different types of waivers. *First,* from their acquisition until 2008, Media General held all but one of the smaller market combinations under a "constructive waiver" policy put in place by the 1975 decision. (In the one exception, the newspaper is published in a town located beyond the relevant television contours, and the rule is not implicated.) Under this policy, which the FCC adopted in recognition of its complete lack of regulatory jurisdiction over newspaper acquisitions, Media General acquired newspapers in Tri-Cities, Myrtle Beach and Columbus where it already owned television stations. In such cases, the FCC's policy allowed Media General to hold both properties in each market for one year or

until the time of the television stations' next renewal, whichever was longer. Absent this policy, it is doubtful whether the previous owners of the newspapers ever would have sold them to Media General because, absent a substantial monetary premium on the purchase price, the sellers would not have wanted their deals delayed or put at risk by the need to seek FCC advance approval.

Second, in adjudicatory portions of the 2006 Quadrennial Review Decision, which was released in February 2008, the FCC granted Media General permanent waivers of the cross-ownership rule in these "constructive waiver" markets, allowing continued ownership of the three newspaper/television combinations in Tri-Cities, Myrtle Beach-Florence, and Columbus. In the decision, which has been challenged on reconsideration, the FCC reviewed comments from those in the affected communities and found that the public interest was served by granting these permanent waivers for a number of reasons, including the following:

- The combinations involved just one television station and one newspaper;
- The combinations had been in existence since at least 2001;
- During this period, the combinations had provided innovative new services to their local communities and built on their synergies; and
- Forced divestiture would have disrupted the proven record of local benefits.

The FCC, in essence, "grandfathered" these combinations just as the FCC had done with most cross-ownerships, such as Tampa, that existed in 1975 when the FCC first banned cross-ownership. Although deemed "permanent," these waivers continue only so long as Media General owns the combinations. Absent application for a new waiver, the properties may not be sold in tandem. That is also the case with Tampa's grandfathered status. In both instances, that inability to sell in tandem is unfortunate, particularly in today's economic downturn because,

were the properties for sale, buyers would likely want any option possible for maximizing synergies in delivering local news and information.

On March 25, 2008, the FCC's Media Bureau denied challenges and granted Media General's pending license renewal applications for the television stations in its three smaller convergence markets, finding that the stations had served the public interest and that objections based on cross-ownership had been mooted by issuance of the "permanent" waivers. An application for review of that action is pending before the full Commission.

II. The Rule's Tortured History and the FCC's Numerous Attempts To Repeal and Reform It Lead to the Conclusion That No Policy Basis Remains To Support It.

In 1975, the Commission asserted authority under the Communications Act to adopt a rule which flatly prohibits newspaper publishers from acquiring and operating broadcast stations in markets in which their newspapers are published. The Commission based adoption of the rule on sheer speculation that it would foster "diversity" rather than in response to any demonstrable showing of harm to diversity from common ownership. The Commission acknowledged that it lacked any "basis in fact or law for finding newspaper owners unqualified as a group for future broadcast ownership," and adopted the rule solely because "[w]e think that any new licensing should be expected to add to local diversity."[1]

Although now sometimes cited as established fact, this determination represented nothing more than conjecture that the rule would improve diversity, conjecture that ignored a number of contrary empirical findings in the record. Even in 1975, the FCC acknowledged that "most" of the commenting parties who had commonly owned newspaper and broadcast facilities reported

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[1] Amendment of Sections 73.34 [sic], 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, *Second Report and Order,* 50 FCC 2d 1046, 1075 (1975) ("*1975 Second Report and Order*"), *modified by Nat'l Citizens Comm. For Broad. v. FCC,* 555 F.2d 938 (D.C. Cir. 1977), *aff'd in part and rev'd in part, FCC v. Nat'l Citizens Comm. For Broad.,* 436 U.S. 775 (1978) (*"NCCB"*).

that their stations and newspapers had separate management, facilities, and staff, including the news staffs.[2] "Some even claim[ed] that because they have separate editorial boards they present editorials in one outlet which are opposed in the other."[3] The parties also pointed to "built-in protections" against common expressions of viewpoint resulting from common ownership. These included the professionalism among journalists and industry practices and ethical codes that transcend employer-employee loyalties and result in independence among journalistic staff members and editors.[4] As the FCC noted, these same parties had commented that, if commonly owned outlets had prevented or stymied the dissemination of views, the public would have been complaining vociferously about actual abuses. A number of parties observed that the silence from consumers on this point was the most telling argument against the need for the rule. Moreover, a 1973 FCC staff study of broadcast licensee programming, cited in the decision, found that newspaper-owned broadcast stations delivered *more* local news, *more* local non-entertainment programming, and *more* total local programming than other television stations.[5]

Based on this material, the FCC found that there generally was significant diversity or "separate operation" between commonly owned broadcast stations and newspapers.[6] Even on appeal, in 1977, the United States Court of Appeals for the District of Columbia Circuit found that the FCC had adopted the rule "without compiling a substantial record of tangible harm"; the court noted that the rule was based on a record that included "little reliable 'hard' information."[7]

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[2] *Id.* at 1059.

[3] *Id.*

[4] *Id.* at 1059-60.

[5] *Id.* at 1078 n.26.

[6] *Id.* at 1089.

[7] *Nat'l Citizens Comm. for Broad. v. FCC*, 555 F.2d at 944, 956.

In affirming the FCC's adoption of the rule, the United States Supreme Court recognized that the FCC's diversity rationale represented "'a mere hoped-for gain in diversity'."[8]

In the two decades that followed, the FCC proceeded to relax or repeal other structural ownership regulations, acknowledging that the conjecture that ownership diversity would lead to diversity of content and viewpoint was ill-founded and invalid. Despite this acknowledgement and liberalization of other media ownership rules, the newspaper/broadcast cross-ownership rule went untouched and unreviewed.

Beginning in the mid-1990s, clearly recognizing the significant changes that had occurred in the media landscape since 1975, the FCC began calling for changes in the rule. In February 1996, the FCC granted Capital Cities a temporary 12-month waiver of the rule to allow its ownership of daily newspapers and radio stations in the Detroit and Dallas-Ft. Worth DMAs. In doing so, the FCC stated it would proceed "expeditiously" to consider revising the rule, with then Chairman Hundt writing separately that the FCC should be able to complete the proceeding within the year before the temporary waiver expired. The same year, the FCC issued a Notice of Inquiry concerning potential relaxation of its policy for waiving the NBCO rule as it applied to newspaper/radio cross-ownership.

In 1997, the newspaper industry's trade association, the Newspaper Association of America ("NAA"), filed a petition for rulemaking, urging repeal or relaxation of the rule. The FCC did not act on that petition or the pending newspaper/radio Notice of Inquiry.

Instead, as required by Section 202(b) of the Telecommunications Act of 1996, the FCC in 1998 commenced a biennial review of all its media ownership rules. In the course of this docket, which treated the NAA petition (as well as a second NAA "Emergency Petition" filed in

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[8] *NCCB,* 436 U.S. at 786.

1999) as comments, the FCC received overwhelming support for repeal or modification of the rule. In the report issued at the conclusion of the proceeding in June 2000, the FCC said it would soon initiate a notice of proposed rulemaking seeking comment on repeal of the rule because it might not be necessary to achieve its intended public interest benefits in all instances. Two years later, in the report concluding its 2000 Biennial Review proceeding, the FCC again said it would be issuing a notice of proposed rulemaking on the rule.

The beginning of this decade again saw fits and starts as the FCC toyed with moving forward. In September 2001, the FCC finally released a notice of proposed rulemaking, seeking comment on elimination of the rule. In response, the FCC received virtually unanimous industry support for repealing the rule, and numerous economic and programming studies demonstrated such repeal would be in the public interest. Out of 49 substantive comments, five opposed repeal. Despite compilation of an extensive record, the FCC, concerned over recent appellate decisions criticizing the agency's approach to rulemaking, announced in late spring 2002 that it would defer action for yet another rulemaking, an omnibus review that would examine all of the agency's media ownership rules.

That rulemaking did not come until September 2002, when the FCC released a notice of proposed rulemaking seeking comment on all media ownership rules. In the course of the proceeding, the FCC released 12 studies it had commissioned. The six studies bearing some tangential relationship to the cross-ownership rule documented that its repeal would enhance the public interest. In both the cross-ownership specific and omnibus proceedings, "consumer" and labor groups opposing repeal failed to support their opinions about the need for the cross-ownership rule's retention with any substantive, empirical studies that met Section 202(h)'s burden for sustaining the rule.

In July 2003, the FCC released its 2002 Biennial Regulatory Review decision on all of its media ownership rules. In the report, it found that the cross-ownership rule was no longer justifiable under the standard set forth in Section 202(h), and it repealed the rule. The FCC found that the rule was not necessary in the public interest for three reasons: it did not promote competition in local markets since advertisers viewed newspaper and broadcast advertising as imperfect substitutes; it undermined localism by preventing efficient combinations that allowed for the creation and dissemination of high-quality local news; and the FCC lacked sufficient evidence of any link between diversity of ownership and diversity of viewpoint to sustain the ban. The FCC termed that link "tenuous, ill-defined, and difficult to measure." The Third Circuit affirmed repeal of the cross-ownership rule, finding the FCC's determination reasonable. In addition, the court noted that no party on appeal had even challenged the FCC's determination that restrictions were unnecessary to protect competition, and it agreed with the FCC the cross-ownership promotes localism.

That same 2003 FCC decision, however, replaced the discredited NBCO rule with new "cross-media limits" ("CMLs") that the FCC said were more precisely targeted at specific types of markets in which particular combinations were, it said, most likely to harm diversity. In markets with nine or more broadcast television stations, the CMLs lifted the ban entirely. In markets with three or fewer broadcast television stations, the CMLs retained an absolute ban. In markets with between four and eight broadcast television stations, the CMLs allowed a single entity to hold a newspaper and varying, but still very limited, combinations of broadcast and radio stations. The FCC adopted this graduated approach based on a "diversity index," which it claimed quantified diversity in markets. The Third Circuit found that the FCC did not provide a reasoned analysis for the CMLs and remanded to the FCC, instructing it to modify or justify the

CMLs. In the meantime, the court kept in place a stay it had imposed shortly after the appeals were first filed.

Over two years later, the FCC issued a further notice of proposed rulemaking that served the dual purpose of fulfilling the agency's Section 202(h) periodic review mandate, which Congress in 2004 had made a four-year obligation, and responded to issues raised in the Third Circuit's remand. The proceeding generated yet another massive record on newspaper/broadcast cross-ownership, with the FCC receiving comments and reply comments, commissioning 10 peer-reviewed studies (on which the FCC received additional comments and reply comments), and conducting six official field hearings.

In an order released in February 2008, the FCC again found that a wholesale ban on cross-ownership was not justified based on the record and market conditions. Among other things, the Commission found that "evidence in the record continues to support the Commission's earlier decision that retention of a complete ban is not necessary in the pubic interest as a result of competition, diversity, and localism." The FCC, however, kept the original cross-ownership rule, as it was adopted in 1975, on the books and grafted onto it extremely modest and limited waiver criteria, with relief presumptively available only in the Top 20 markets. Various parties appealed this decision to multiple circuits, and the case was eventually transferred to the Third Circuit, which has held the appeal in abeyance due to reconsideration petitions filed at the FCC against the February 2008 decision, also keeping the 2003 stay in effect. Thus, despite the Commission having concluded on numerous occasions that an absolute ban on newspaper/broadcast cross-ownership no longer serves the public interest, and notwithstanding the Third Circuit's affirmance of that determination, the blanket prohibition remains in effect today.

III. Complete Cross-Ownership Relief Is Needed Now More Than Ever.

Since the FCC last addressed the cross-ownership rule in February 2008, the availability and popularity of new sources of news and information have continued to grow at an ever-increasing rate, further fragmenting audiences and siphoning audiences and advertising revenue from "traditional" media -- newspaper and broadcast stations -- the sole sources of mass media in 1975. This growth in alternative providers has come at a particularly difficult time for newspapers, as key advertisers like the auto industry, real estate firms, and retail stores have been hard hit by the economic downturn. For television broadcasters, the increased competition has come on top of the need for the industry to spend billions of dollars to implement the mandated DTV transition *and* at a point when compensation previously available from programming networks has almost universally changed to "reverse compensation."

In 2008, in making the most modest of tweaks to the cross-ownership rule, the FCC noted the financial challenges faced by newspapers across the country, reporting that some 300 daily newspapers had ceased publication in the preceding 30 years. In its own filings focusing on small- and medium-sized markets, Media General noted that more detailed data showed that the majority of the daily newspaper failures in the preceding decade had occurred outside the Top 20 markets. Since then, of course, the economic downturn has been particularly tough on newspaper publishers, with six major companies declaring bankruptcy in the last year, many papers laying off staff, including by closing bureaus in major domestic cities and abroad, and many publishers curtailing sections in their papers and cutting back on circulation routes and frequency of publication.

These changes have clearly been driven by the precipitous drop in advertising revenues. In 2008, the newspaper industry's total advertising revenue declined 16.6%, and revenue

attributable to print advertising declined 17.7%.[9] During the first two quarters of 2009, the decline in the industry's total advertising revenue accelerated, dropping 28.6% compared to the first two quarters of 2008, with revenue attributable to print advertising dropping 29.9%.[10] Even online advertising on newspaper websites -- once cited as the most promising service for future growth -- declined in 2008 and accounted for less than 10% of overall revenue.[11]

The broadcast industry, facing the DTV costs and network changes noted above, has seen similar financial reversals. Local television advertising revenue dropped 7% in 2008, and is expected to fall by an additional 7% to 11% in 2009.[12] At the same time, expectations of online advertising revenue from station websites, which had been predicted to grow by 47% in 2008, have been cut substantially to 8%.[13]

These developments have prompted the industry, academicians, pundits, and lawmakers to begin a quest for solutions, particularly ones that they envision will help continue the quality of American journalism. Media General's response to the consistent, clarion, and pessimistic call that marketplace developments are delivering about the future of free over-the-air broadcasting and its free local news has been to urge repeal of the structural regulation that has long hampered cross-ownership of broadcast stations and newspapers. As shown by Media

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[9] Annual Advertising Expenditures, http://www.naa.org/TrendsandNumbers/Advertising-Expenditures.aspx (last visited Nov. 2, 2009); *see also* Pew Project for Excellence in Journalism, *2009 State of the News Media: An Annual Report on American Journalism*, at 3 (2009), http://www.stateofthemedia.org/2009/chapter%20pdfs/COMPLETE%20EXEC%20SUMMARY%20PDF.pdf ("*PEJ 2009 Report*") (last visited Nov. 2, 2009).

[10] Quarterly Advertising Expenditures, http://www.naa.org/TrendsandNumbers/Advertising-Expenditures.aspx (last visited Nov. 2, 2009).

[11] *See PEJ 2009 Report*, at 9; *see also* Annual Advertising Expenditures, http://www.naa.org/TrendsandNumbers/Advertising-Expenditures.aspx (last visited Nov. 2, 2009).

[12] *See PEJ 2009 Report*, at 20.

[13] *Id.* at 21.

General's experiences in Tampa and the other markets where it has practiced convergence, cross-ownership will produce more local broadcast news, expand news content, increase investigative and enterprise pieces, and lead to a greater understanding of the community and its political and social forces. Particularly in light of the financial challenges facing newspapers and television stations today, there is no reason to deny these outlets, and the communities they serve, this opportunity.

IV. The 1996 Telecommunications Act Sets a High Standard of Proof for Retention of the 1975 Rule, and, Given the Clear Competitive Threat Now Posed to Broadcast Stations and Their Free and Local Content by New Media Players, That Standard Can No Longer Be Met.

Section 202(h) of the Telecommunications Act of 1996 requires the FCC to evaluate market conditions every four years and determine whether any of its ownership rules remain "necessary in the public interest as the result of competition."[14] The FCC must "repeal or modify any regulation" that is no longer in the public interest.[15] By its terms, this provision imposes substantive criteria against which the FCC must justify its rules ("necessary in the public interest as the result of competition"), a required remedy ("modify or repeal"), and an explicit statutory deadline for action ("quadrennially").[16] In light of the overwhelming "competition for eyeballs" chronicled above, it is clear cross-ownership restrictions are no longer "necessary in the public interest as a result of competition," even under the most deferential standard of "necessary" imaginable.[17] More than 13 years later, of course, the environment is

[14] Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 112 (1996), as amended by Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004).

[15] *Id.*

[16] The 1996 Act initially required biennial review, which was amended in 2004 to require quadrennial review. *See id.*

[17] The legislative history of the 1996 Telecommunications Act explains that Congress imposed this review requirement to deal exactly with the type of competitive milieu now before the

intensely more competitive. The regulations governing it, like the cross-ownership rule, have become even more anachronistic. The FCC already has twice found, and the United States Court of Appeals for the Third Circuit has agreed, that a ban is not necessary to fulfill the FCC's interest in promoting competition, localism, or viewpoint diversity, and that it counterproductively *harms* localism.

The *Prometheus* court "sum[med] up" the standard of review that it would apply in any future evaluation of the FCC's actions: "In a periodic review under § 202(h), the Commission is required to determine whether its then-extant rules remain useful in the public interest; if no longer useful, they must be repealed or modified."[18] Nothing in the records that the FCC amassed in previous dockets showed that the cross-ownership rule remains "useful" or that any need remains under Section 202(h) to substitute lessened regulation. The FCC and the court have already found the cross-ownership rule unnecessary to advance competition or localism, and the annually increasing abundance of sources of news and information, particularly local, has mooted any further FCC concern over "diversity." And, now that review is quadrennial, the FCC's statutory burden to ensure that its rules keep pace with marketplace realities is that much stronger.

Commission. Specifically, Congress concluded that, because of "the explosion of video distribution technologies and subscription-based programming sources . . . Congress and the [FCC] must reform Federal policy and the current regulatory framework to reflect [ ] new marketplace realities." H.R. Rep. No. 104-204, at 55 (1995) *reprinted in* 1996 U.S.C.C.A.N. 10, 18-19. In Congress' view, the industry even in 1995 was "operating under archaic rules that better suited the 1950's than the 1990's," even though "the broadcast environment today is the most competitive it's ever been." S. Rep. No. 104-23, at 64 (1995) (Statement of Sen. Burns). Senator Burns explicitly included the newspaper/broadcast cross-ownership ban as among the rules he felt needed reevaluation because they "may not be appropriate for tomorrow's broadcasting marketplace." *Id.*

[18] *Prometheus Radio Project v. FCC,* 373 F.3d 372, 395 (3d Cir. 2004) ("*Prometheus*"), *cert. denied*, 545 U.S. 1123 (2005).

Long-established administrative law precedents equally compel total repeal of the cross-ownership rule. The FCC itself acknowledged in 1975 that there was no evidence of a competitive harm mandating regulation of newspaper/broadcast cross-ownership, and the speculative "hoped-for" gain in diversity upon which it premised adoption of the 1975 rule has never materialized. The FCC thus has no legal choice but to repeal this rule: a regulation reasonable in the face of a problem becomes highly capricious when the problem is shown not to exist;[19] even a statute, the validity of which depends on a premise supported at the time of enactment, becomes invalid subsequently if the predicate disappears.[20]

In fact, changing course at this point and doing anything short of repealing cross-ownership restrictions would similarly violate administrative law precedent. Any change would require clear and compelling evidentiary support and a detailed and persuasive explanation for tightening standards.[21] Nothing in the record warrants a change in regulatory direction, such as consideration of more stringent regulation, particularly given, as discussed below, the constitutional infirmities that plague any regulation in this area.

V. Restrictions on Newspaper/Broadcast Cross-Ownership Are Unconstitutional.

When the Commission adopted the 1975 rule, it was declared to be justified based on the so-called "scarcity doctrine" enunciated by the Supreme Court in *Red Lion Broadcasting. Co. v. FCC,* 395 U.S. 367 (1969) ("*Red Lion*"). In upholding the now-jettisoned Commission "fairness doctrine" against a First Amendment challenge, *Red Lion* had concluded that the broadcast spectrum is a "scarce resource." Based on this conclusion, *Red Lion* held that "the Government

[19] *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977). *See Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992), *cert. denied,* 506 U.S. 816 (1992). *See also Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993).

[20] *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979).

[21] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

is permitted to put restraints on [broadcast] licensees in favor of others whose view should be expressed on this unique medium."[22]

In 1975, the validity of "scarcity" was at least debatable. Radio, television, and newspapers were the *only* forms of mass communication. In 1975,

- there was no Internet, email, or broadband service of any type;
- there was no satellite television or satellite radio;
- there were no consumer wireless services (and no cell phones); and
- cable television served less than 15% of the nation's households.

Today, a starkly different technological landscape exists, one which renders the "scarcity doctrine" a legal dinosaur: the Internet, giving access to billions of web pages, eight million blogs,[23] and streaming video and audio from hundreds if not thousands of radio and television stations and, increasingly, thousands of other sources, is ubiquitous; 88.6% percent of the nation's households receive cable and satellite video service, with hundreds of channels typically available; consumer wireless data services (including video transmissions) are available on most cell phones; and satellite radio is available nationwide.

Over 20 years ago, in 1987, the Commission itself (in carrying out its recognized responsibility to evaluate existing regulations in light of the technological changes) concluded that the "scarcity doctrine" had outlived its justification:

> *[T]he Commission*, in its task of managing an ever-changing technological and economic marketplace, *has the responsibility to consider new developments in*

[22] *Red Lion,* 395 U.S. at 389-90.

[23] *See* Media Bureau Staff Research Paper entitled "*The Scarcity Rationale For Regulating Traditional Broadcasting: An Idea Whose Time Has Passed*,"(March 2005) by John W. Berresford ("*Media Bureau Research Paper*"), at 11 & n.62, *citing* Press Release, *FCC Selects Digital Radio Technology* (Oct 10, 2005), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-227261A1.pdf.

> *reviewing existing, and in applying new, rationales in that marketplace*. . . . We further believe that the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press. Therefore, . . . we believe that the standard applied in *Red Lion* should be reconsidered and that *the constitutional principles applicable to the printed press should be equally applicable to the electronic press*.[24]

Like the Emperor in Hans Christian Anderson's fairy tale, shorn of the illusory "scarcity doctrine," newspaper/broadcast cross-ownership restrictions have no clothes. Without the protection of the "scarcity doctrine," those restrictions are subject to heightened First Amendment scrutiny, scrutiny they cannot withstand because they serve neither a compelling state interest nor are they narrowly tailored. For the reasons set forth below, the Commission must recognize this reality and eliminate the unconstitutional newspaper/broadcast cross-ownership rule.

A. The Sole Justification for Deferential First Amendment Review of the Newspaper/Broadcast Cross-Ownership Restrictions -- the "Scarcity Doctrine" -- Is Analytically Flawed and Has Been Rendered Completely Obsolete by Regulatory and Technological Change.

Broadcasters are "entitled under the First Amendment to exercise the widest journalistic freedom."[25] As a result, any restriction "that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action."[26] "[E]ven regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."[27] Moreover, "laws that single out the press, or certain

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[24] In re Compl. of Syracuse Peace Council, *Memorandum Opinion and Order,* 2 FCC Rcd. 5043, 5052-5053 (1987) ("*Syracuse Peace Council*") (emphasis supplied), *pet. for review denied*, 867 F.2d 654 (D.C. Cir. 1989).

[25] *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (internal quotation omitted).

[26] *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592-593 (1983) ("*Minneapolis Star*").

[27] *Id.* at 592.

elements thereof, for special treatment" must be subject to some measure of heightened scrutiny.[28]

Nine years after *Red Lion*, the Supreme Court was called upon to apply these principles in a First Amendment challenge to the cross-ownership rule.[29] In rejecting the challenge and concluding that the rule passed constitutional muster, the *NCCB* Court, relying on *Red Lion*'s "scarcity doctrine," said:

> The physical limitations of the broadcast spectrum are well known. Because of problems of interference between broadcast signals, a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public. *In light of this physical scarcity, Government allocation and regulation of broadcast frequencies are essential . . . . [G]iven that need, we see nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the "public interest" in diversification of the mass communications media*.[30]

Thus, the *NCCB* Court rested its decision approving the rule on the premise that broadcast spectrum is a uniquely scarce resource that government should regulate differently than any other form of communication. Accordingly, the *NCCB* Court submitted the rule only to extremely deferential rational-basis review, holding that the Commission "acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints."[31]

Red Lion itself had acknowledged that technological advances might render the "scarcity doctrine" obsolete, resting its holding on "the present state of commercially acceptable technology."[32] In 1984, in *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984)

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[28] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640-41 (1994) ("*Turner I*").

[29] *See NCCB,* 436 U.S. at 796.

[30] *Id.* at 799 (emphasis supplied).

[31] *Id*. at 796.

[32] *Red Lion*, 395 U.S. at 388.

("*League of Women Voters*"), the Supreme Court noted the continuing criticism of the "scarcity doctrine" resulting from technological change:

> The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that *with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the "scarcity doctrine" is obsolete. . . .*[33]

In explicitly recognizing that the doctrine's continued vitality was a rebuttable presumption dependent on the state of technological advance, the Supreme Court stated that it would reconsider the doctrine if there were "some signal from Congress or *the FCC that technological developments have advanced so far* that some revision of the system of broadcast regulation may be required."[34]

The *NCCB* Court's rebuttable premise that broadcast spectrum is a uniquely scarce resource has ceased for three reasons to serve as a continuing justification for the newspaper/broadcast cross-ownership rule. First, the contention that broadcast spectrum is scarce is analytically flawed: spectrum is not more scarce than any other commercial good; its "purported" scarcity accordingly cannot justify a reduced level of First Amendment scrutiny. Second, regulatory change -- Congress' decision to limit the Commission's role in awarding new spectrum -- eliminates any principled basis for the "scarcity doctrine." Third, technological change leading to the exponential growth in new media outlets and "compression" techniques for using broadcast spectrum even more efficiently have rendered the "scarcity doctrine" (to the extent it was ever justified) completely obsolete.

[33] *League of Women Voters*, 468 U.S. at 376 n.11 (emphasis supplied).

[34] *Id.* (emphasis supplied).

1. NCCB's Reduced Scrutiny of Cross-Ownership Restrictions Was Based on an Analytically Flawed Premise: That Broadcast Spectrum Is Uniquely Scarce.

The "scarcity doctrine," upon which *NCCB's* reduced scrutiny of cross-ownership restrictions is based, applies not only to broadcast spectrum, but to everything else used in commerce; there is, therefore, no basis for the special, discriminatory treatment embodied in newspaper/broadcast cross-ownership restrictions. Other items used in the delivery of mass communication, including computers, fiber-optic cable, and even newsprint, also are similarly limited at any particular point in time. As Judge Bork stated almost 20 years ago,

> It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. *Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another*. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.[35]

Several years later, in *Action for Children's Television v. FCC*, 58 F.3d 654, 674-675 (D.C. Cir. 1995) ("*ACT*"), then Chief Judge Edwards echoed the same disagreement with the theoretical underpinnings of the "scarcity doctrine":

> For years, scholars have argued that the scarcity of the broadcast spectrum is neither an accurate technological description of the spectrum, nor a "unique characteristic" that should make any difference in terms of First Amendment protection. First, *in response to the problem of broadcast interference when multiple broadcasters attempt to transmit on the same frequency, critics point out that this problem does not distinguish broadcasting from print and is easily remedied with a system of administrative licensing or private property rights*.[36]

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[35] *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986) ("*TRAC*") (emphasis supplied); *see also Branch v. FCC*, 824 F.2d 37, 49 (D.C. Cir. 1987) (expressing doubt whether the "scarcity rationale is adequate to support differing degrees of first amendment protection for print and electronic media.").

[36] *ACT*, 58 F.3d at 675 (Edwards, C.J., dissenting) (emphasis supplied). A recent Commission *Media Bureau Research Paper* made the same point several years ago:

These excerpts (by two judges not usually known for similar thinking) make clear that the erroneous notion of spectrum shortage cannot, as a matter of economic and analytical principle, justify violating the free speech rights of broadcasters and newspaper owners through a cross-ownership restriction.

2. Congress' Decision To Limit the Commission's Role in Awarding New Spectrum Further Eliminates Any Principled Basis for the "Scarcity Doctrine."

Congress additionally has eliminated any principled foundation for the "scarcity doctrine" by years ago dramatically curtailing the Commission's oversight role in choosing among competing applicants for new spectrum. If spectrum scarcity ever were a valid rationale for restricting broadcasters' First Amendment rights, that rationale was only appropriate because the Commission held comparative hearings, picking "winners" and "losers." As the Supreme Court observed in *Red Lion*, "[w]here there are substantially more individuals who want to broadcast than there are frequencies to *allocate*, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish."[37] More recently, the Supreme Court has cited the "scarcity of available frequencies at

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> There is also, at any given time, a finite amount of land, wood, and many other resources. The U.S. government does not, however, control all the land in the United States and license its use for free to a few persons who promise to use it in approved ways. Guitars are made from trees that grew on government land, but the government does not limit the supply of guitars and license a few for free in each area to persons who promise to play certain kinds of music on them. At times, in American history, paper has been in very short supply, but government has not considered either licensing newspapers or granting rights of access to them. *Thus, the fact that possible spectrum use is finite makes a weak foundation for the Scarcity Rationale and for any regulation of spectrum use beyond allocation and "traffic control."*

Media Bureau Research Paper at 10 (citations omitted) (emphasis supplied).

[37] 395 U.S. at 388 (emphasis supplied).

its *inception*" as support for "regulation of the broadcast media that are not applicable to other speakers. . . ."[38]

In *NCCB*, the Supreme Court predicated its approval of the cross-ownership rule on this selection process and the consequent idea that "[g]overnment allocation and regulation of broadcast frequencies are essential."[39] Because the Commission "was forced to choose among applicants for the same facilities," the Supreme Court concluded that the Commission was entitled to exercise the power to restrict ownership in ways the agency deemed likely to advance the public interest.[40]

Today, however, the Commission no longer is engaged, in any meaningful sense, in the business of *choosing* among applicants for broadcast construction permits. Pursuant to the Balanced Budget Act of 1997, available spectrum now must be assigned at its inception through competitive bidding or auction procedures, rather than comparative proceedings requiring the Commission to evaluate the public interest qualifications and comparative merits of prospective initial permittees.[41]

Because Congress has adopted a price mechanism as the method for awarding licenses for the use of broadcast spectrum, the Commission has no basis for continued regulation based on spectrum scarcity. Broadcast television and radio licenses are, for all practical purposes, traded on the open market, and there is nothing unique about broadcast spectrum that

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[38] *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997) (emphasis added) (citations omitted) ("*Reno v. ACLU*").

[39] *NCCB,* 436 U.S. at 799.

[40] *Id.* at 802.

[41] More than a decade ago, in the Balanced Budget Act of 1997, Congress expanded the Commission's competitive bidding authority under Section 309(j) of the Communications Act of 1934, 47 U.S.C. Sec. 309(j), by *requiring* the use of auctions to select among mutually exclusive

distinguishes it from other commercial goods.[42] As noted above, if spectrum is scarce, it is scarce only in the sense that all economic goods are scarce,[43] and, therefore, claims of scarcity cannot provide a legitimate constitutional basis for regulating speech.

3. Changes in Media Also Have Rendered the "Scarcity Doctrine" Obsolete.

Since the time of the *NCCB* decision in 1978, there has been an explosion in the way consumers receive information and programming. These changes also render the "scarcity doctrine" obsolete.

First, when *NCCB* was decided, there was no Internet, little cable television, no satellite television or radio, no digital television or HD radio, and no consumer broadband or wireless services, with the wealth of content all of these platforms deliver, some on a completely unregulated basis. Today, consumers have access to all these sources of news and information. A citizen in an average American city in 1975 had access to three television stations, a handful or

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applicants for commercial broadcast station licenses. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, 11 Stat. 251 (1997).

[42] Pursuant to 47 U.S.C.A. § 310(d) (2001), the Commission still reviews the basic licensee qualifications of proposed owners of broadcast facilities before allowing the consummation of license transfers and assignments, but this review, designed to ensure compliance with other broadcast policies such as the prohibition on alien ownership and on acquisition by individuals with records of certain adjudicated civil or criminal violations, does not arise from concerns over spectrum scarcity. This statutory section explicitly forbids the FCC from considering whether someone else would be a better licensee of the station in question.

[43] As Judge Bork further observed in 1986:

> [A]lmost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists. Land, labor and capital are all scarce, but this, of itself, does not call for government regulation. It is true that some mechanism has to be employed to decide who, out of the many claimants, should be allowed to use the scarce resources. *But the way this is usually done in the American economic system is to employ the price mechanism, and this allocates resources to users without the need for governmental regulation.*

TRAC, 801 F.2d at 508 n.3 (emphasis supplied) *citing* Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON, 1, 14 (1959).

so of commercial radio stations, and a couple of daily newspapers. Three decades later, the average American has access to literally thousands and thousands of channels of information through the Internet alone:

> More new content is available on the Internet, of course -- billions of web pages, both portals such as the Drudge Report, the personal web pages of millions of individuals, small organizations, and bloggers . . . . The latter have a potentially transformative potential for the dissemination of not only opinion, but also facts and news in competition with "mainstream media." Almost all of the millions of persons who operate portals and web pages would have been unable to gain access to the traditional broadcast media, much less grow large on it. The Internet, in contrast, gives them easy entry and access to a far larger audience, namely billions of screens and the people watching them, at a fraction of the cost of earlier media. The Internet also makes available, at any time and any place, including schools and libraries, content such as newspapers, magazines, radio stations and TV programs that were previously available only in small areas, or to small numbers of subscribers, or at certain times. . . .[44]

Similarly, cable television, satellite radio and television, wireless and broadband services, and other technologies, today provide the average American thousands of additional channels of communication.

Second, the number of traditional broadcast stations has dramatically increased since 1975. Nationally, the number of full-power traditional television and radio stations has risen from 7,411 in 1969 when *Red Lion* was decided to 16,140 today.[45] And the Internet, through streaming video and audio, has allowed reception of hundreds to thousands of these stations far outside their traditional signal reach.

Third, the broadcast spectrum itself is not characterized by static "scarcity." To the contrary, technological advances have increased the amount of broadcast spectrum available for

[44] *Media Bureau Research Paper* at 16-17.

[45] FCC news, "Broadcast Station Totals as of June 30, 2009," released Sept. 4, 2009.

use and have allowed more intense and efficient use of that spectrum.[46] As the *Media Bureau Research Paper* noted:

> It is also incorrect to imply that because the possible spectrum use is finite at any given moment, there is a fixed maximum usage in the long term. A finite amount of land can accommodate more and more persons as technology makes it possible to build higher buildings. With buses, paved roads, and better engines, more people and goods can be moved along the same road. Throughout the history of radio, new techniques and technologies have enabled more and more communications to occur via spectrum use. *Recently announced techniques and technologies of this type include secondary markets, "overlay" and underlay" rights, easements, "commons" models, Ultra Wide Band, Software Defined Radios, Frequency Agile Radios, Digital Television, and Digital Radio. Thus, scarcity is not an inherent barrier to more and more users and communication, but an horizon that continually recedes as inventions advance*.[47]

The DTV transition has brought with it multicasting, and broadcasters will soon use their existing frequencies to supply Mobile DTV. At the same time, broadcasters continue to make innovative uses of their spectrum, trying to put more content over the streams, showing that increasing spectrum efficiency belies the concept of scarcity.[48]

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[46] *See*, *e.g.*, *Syracuse Peace Council*, 2 FCC Rcd at 5052-55; Christopher S. Yoo, *The Rise & Demise of the Technology-Specific Approach to the First Amendment*, 91 Geo. L.J. 245, 279-81 (2003) ("*Yoo*") ("[T]echnological progress has steadily expanded the range of the electromagnetic spectrum available for commercial use."). *See also ACT*, 58 F.3d at 675 (Edwards, C.J., dissenting) ("[T]he nation enjoys a proliferation of broadcast stations, and should the country decide to increase the number of channels, it need only devote more resources toward the development of the electromagnetic spectrum.").

Indeed, as one commentator has observed, the scarcity of broadcast frequencies at the time of *Red Lion* was a result of a series of regulatory decisions limiting the amount of spectrum allocated to broadcasting, combined with the government's decision to give away new licenses and renew existing licenses for free. *See Yoo* at 269-80. *Red Lion* in effect accepted the Commission's then existing broadcast regulations as the "constitutional baseline" for reviewing whether additional regulations violated the First Amendment. *Id.*

[47] *Media Bureau Research Paper* at 11 (emphasis supplied).

[48] M. Grotticelli, "Squeezing 20 Channels through a 19 Mb/s pipe," *Broadcast Engineering*, Sept. 3, 2009, available at http://broadcastengineering.com/news/20-channels-19mbps-pipe-090709/index.html (last visited Nov. 2, 2009), J. Meril, "HD Double-Take," *TV Technology*, Oct. 6, 2009, available at http://www.tvtechnology.com/article/88220 (last visited Nov. 2, 2009).

This growth in mass communication outlets and advancing technology related to spectrum use have led the numerous distinguished courts noted above, the Commission itself, various Commissioners individually, and the *Media Bureau Research Paper* to agree that rejection of the "scarcity doctrine"'s rationale is overdue.

The courts and jurists also have noted that these changes have eroded any basis for the "scarcity doctrine."[49] Indeed, the United States Court of Appeals for the District of Columbia Circuit has clearly stated that, if the FCC were faced with a rulemaking petition, the agency would be "arbitrary and capricious if it refused to reconsider [the newspaper/broadcast cross-ownership rule] in light of persuasive evidence that the scarcity rationale is no longer tenable."[50] Not surprisingly, the academics noted above and many others strongly support the views of that court and other distinguished jurists.[51]

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[49] *See*, *e.g.*, *Sinclair Broadcasting. Group., Inc. v. FCC*, 284 F.3d 148, 172 (D.C. Cir. 2002) (Sentelle dissenting) (criticizing the scarcity principle); *Time Warner Entm't Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) ("*Time Warner I*") ("intense criticism [of *Red Lion* stems partly from] the perception that the 'scarcity' rationale never made sense—in either its generic form (the idea that an excess of demand over supply at a price of zero justifies a unique First Amendment regime) or its special form (that broadcast channels are peculiarly rare [and partly from] the growing number of available broadcast channels.") (opinion dissenting from denial of rehearing *en banc*); *ACT,* 58 F.3d at 675 (Edwards, C.J., dissenting) ("Today, however, the nation enjoys proliferation of broadcast stations, . . . [a]nd with the development of cable, spectrum-based communications media now have an abundance of alternatives, essentially rendering the economic scarcity argument superfluous."); *TRAC*, 801 F.2d at 508, n.4 ("Broadcast frequencies are much less scarce now then when the scarcity rationale first arose.").

The Supreme Court itself has rejected attempts to extend the "scarcity doctrine" broadcast regime to the mail, telephony, and the Internet. *See Reno v. ACLU*, 521 U.S. 844, 868 (1997) (Internet); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 124 (1989) ("*Sable Communications*") (telephony); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 10 n.6 (1986) (plurality opinion) (mail); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (mail); *Consol. Edison Co. v. Pub. Service Comm'n*, 447 U.S. 530, 542-43 (1980) (mail) ("*Consolidated Edison*").

[50] *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998).

[51] Laurence H. Winer, *Public Interest Obligations and First Principles*, at 5 (The Media Institute 1998) ("In a digital age offering a plethora of electronic media from broadcast to cable to

The Commission itself has resoundingly repudiated the "scarcity doctrine." In ruling on challenges to the Fairness Doctrine, the Commission specifically responded to the Supreme Court's invitation in *League of Women Voters* for a "signal" that it was time to reconsider the "scarcity doctrine":

> [I]n response to the question raised by the Supreme Court in *League of Women Voters*, we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press.[52]

As the Commission explained, "the dramatic transformation in the telecommunications marketplace provides a basis for the Court to reconsider its application of diminished First Amendment protection to the electronic media."[53] In particular, the Commission noted that the number of broadcast television and radio stations had increased dramatically since *Red Lion*, and that "the advent and increased availability of such other technologies as cable and satellite television services have dramatically enhanced . . . access" to "a multiplicity of media outlets."[54]

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satellite to microwave to the Internet, the mere mention of 'scarcity' seems oddly anachronistic."); Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 Duke L. J. 899, 904 (1998) ("By the 1980s . . . the emergence of a broadband media, primarily in the form of cable television . . . . was supplanting conventional, single-channel broadcasting - and with it the foundation on which the public interest obligations had been laid. If it ever made sense to predicate regulation on the use of a scarce resource, the radio spectrum, it no longer did."); Rodney M. Smolla, *Free Air Time For Candidates and the First Amendment,* at 5 (The Media Institute 1998) ("Scarcity no longer exists. There are now many voices and they are all being heard, through broadcast stations, cable channels, satellite television, Internet resources such as the World Wide Web and e-mail, videocassette recorders, compact disks, faxes -- through a booming, buzzing electronic bazaar of wide-open and uninhibited free expression."); Lillian R. BeVier, *Campaign Finance Reform Proposals: A First Amendment Analysis*, *CATO Policy Analysis*, No. 282 at 1, 13, 14 (Sept. 4, 1997) ("There is no longer a factual foundation for the argument that spectrum scarcity entitles the government, in the public interest, to control the content of broadcast speech.").

[52] *Syracuse Peace Council*, 2 FCC Rcd at 5053.

[53] *Id*. at 5058.

[54] *Id.* at 5051.

The Commission again recognized as much in its July 2003 omnibus media ownership decision, emphasizing that "[t]he average American has a far richer and more varied range of media voices from which to choose today than at any time in history."[55] As noted, the Commission there determined that the cross-ownership rule "actually works to inhibit [local news and information] programming," and prevents the efficiencies and increased quality of programming that results from "combining a newspaper's local news-gathering resources with a broadcast platform"; thus, "the question confronting media companies today is not whether they will be able to dominate the distribution of news and information in any market, but whether they will be able to be heard at all among the cacophony of voices vying for the attention of Americans."[56]

Finally, the *Media Bureau Research Paper* likewise concludes that the "scarcity doctrine" should be abandoned:

> In sum, the decades since The Scarcity Rationale took shape have seen an explosion in the number of distribution networks and channels, both via radio and other media -- more traditional broadcasters, cable television, DBS, DARS, Internet, WiFi and WiMax -- and in the mass of content that fills them. *By no rational, objective standard can it still be said that, today in the United States, channels for broadcasting are scarce*.[57]

For all of these reasons, any newspaper/broadcast cross-ownership restriction must be subject to heightened constitutional scrutiny.

[55] 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, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620 (2003) ("*July 2003 Decision*"), *aff'd and remanded sub nom., Prometheus.*

[56] *Id*.

[57] *Media Bureau Research Paper* at 18 (emphasis supplied).

4. Any Newspaper/Broadcast Cross-Ownership Restriction Cannot Survive Heightened Constitutional Scrutiny

Any newspaper/broadcast cross-ownership restriction today must be justified under the same heightened constitutional standards that apply to all other governmental regulation of protected speech. The cross-ownership rule cannot survive that scrutiny whether strict or intermediate.

a. Strict Scrutiny. Any newspaper/broadcast cross-ownership restriction singles out newspaper owners for especially onerous restrictions and suppresses their broadcast speech in favor of the speech of non-newspaper licensees. As a result, such a restriction must be evaluated under the standard of strict scrutiny.[58] That standard requires the Commission to show that its ownership restrictions are the "*least restrictive means [available of achieving] a compelling [state] interest*."[59] "[I]t is the rare case in which . . . a law survives strict scrutiny."[60] As one prominent authority has noted, when this "form of heightened scrutiny is applied, the law may properly be regarded as presumptively invalid, and likely to be struck down."[61]

The Commission's cross-ownership restrictions clearly cannot withstand challenge under this standard. As *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 355 (D.C. Cir. 1998),

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[58] *See Minneapolis Star*, 460 U.S. at 583 (concluding that a regulation that singles out the press imposes a "heavier burden of justification on the State"); *New York Times v. Sullivan*, 376 U.S. 254 (1964). *See also Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("[G]overnment may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others.")

[59] *Sable Communications*, 492 U.S. at 126 (emphasis added).

[60] *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

[61] 1 Rodney A. Smolla & Melville B. Nimmer, *Freedom of Speech* § 4:3 (1999).

concluded, "it is impossible to conclude that the government's interest [in diversity of programming], no matter how articulated, is a compelling one."

Second, a cross-ownership restriction, either a ban or one that essentially presumes regulation is needed outside of the Top 20 markets is obviously not the "least restrictive means" available of achieving the purported compelling state interest.[62] If any rule were to survive such review, it would need to demonstrate that denial of presumptive relief outside the Top 20 markets is based on an examination of factors in individual markets.

b. Intermediate Scrutiny. Even if reviewed under the less rigorous intermediate scrutiny standard (which the Commission has suggested should apply),[63] a newspaper/broadcast cross-ownership restriction still would not pass constitutional muster. Pursuant to this standard, the Commission must show that the rule satisfies three separate requirements. As established below, none of these requirements can be met.

First, the Commission must "demonstrate that the recited harms" -- *i.e.*, the harms to diversity posed by common ownership of newspapers and broadcast outlets -- are "real, not merely conjectural."[64] The Commission has never established, as it must, that this standard has been met. To the contrary, the United States Supreme Court has noted that when the

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[62] *Sable Communications*, 492 U.S. at 126.

[63] *See July 2003 Decision,* 18 FCC Rcd at 13793 (Commission acknowledged that any cross-ownership rule would "limit the speech opportunities not only for broadcasters, but also for other entities that may seek to own and operate broadcast outlets (including those with the fullest First Amendment protection--newspapers)," and therefore concluded that it "should draw the rule as narrowly as possible in order to serve our public interest goals while imposing the least possible burden on the freedom of expression."). *See also 1998 Biennial Regulatory Review*, *Biennial Review Report,* 15 FCC Rcd 11058, 11121 (2000) (acknowledging that the cross-ownership rule would be sustained against claims that it violates the First Amendment if it satisfies the intermediate scrutiny standard announced in *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

[64] *Turner I*, 512 U.S. at 664.

Commission adopted the 1975 rule, it "did not find that existing co-located newspaper-broadcast combinations had not served the public interest, or that such combinations necessarily 'spea[k] with one voice,' or are harmful to competition."[65] Indeed, in adopting the rule, the Commission made affirmative empirical findings that, in general, there was significant diversity or "separate operation" between commonly owned broadcast stations and newspapers, and that newspaper-owned affiliates tended to be superior licensees in terms of delivering locally-oriented service.[66] In 2003, the FCC noted the link between diversity of ownership and diversity of viewpoint was "tenuous, ill-defined, and difficult to measure."[67] Without concrete evidence that common ownership of newspapers and broadcast facilities reduces diversity, the Commission's "broad prophylactic rule" is inherently "suspect" and the supposed harms wholly "conjectural."[68]

Second, because "[c]onstitutional authority to impose some limit is not authority to impose any limit imaginable,"[69] the Commission must "show a record that validates the regulation" itself and not just the agency's "abstract statutory authority" to regulate.[70] In that, the Commission must show that "the regulation will in fact alleviate these harms in a direct and material way."[71] To date, the Commission has not been presented with any *factual* or

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[65] *NCCB*, 436 U.S. at 786. The United States Court of Appeals for the District of Columbia Circuit, in first reviewing the rule, had similarly observed that the administrative record "contained little 'hard' information" and no evidence of specific anti-competitive acts by cross-owned stations. *Nat'l Citizens Comm. for Broad. v. FCC,* 555 F.2d at 956, 959.

[66] *1975 Second Report and Order*, 50 FCC 2d at 1050, 1079, 1089.

[67] *2003 Decision,* 18 FCC Rcd at 13767.

[68] *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (internal quotations omitted).

[69] *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1129-30 (D.C. Cir. 2001) ("*Time Warner Entm't Co*.").

[70] *Id.* at 1130, 1137.

[71] *Turner I,* 512 U.S. at 664.

empirically-based showing that a newspaper/broadcast cross-ownership restriction would directly advance its goal of increasing diversity in the media marketplace. Indeed, the Commission in the *July 2003 decision* determined that the cross-ownership rule upheld in *NCCB* "actually works to inhibit [local news and information] programming," and prevents the efficiencies and increased quality of programming that result from "combining a newspaper's local news-gathering resources with a broadcast platform."[72] Nor did the Commission there even attempt to show that its ownership rule would make a material impact on media diversity.

Third, the Commission must show that any newspaper/broadcast cross-ownership restriction that may be adopted is "narrowly tailored to further a substantial governmental interest."[73] To satisfy the element of "narrow tailoring," the agency would have to show that its restriction on common ownership of co-located daily newspapers and broadcast stations "does not burden substantially more speech than necessary to further" its professed interests in increasing diversity.[74]

The Commission did not, however, and plainly will be very hard pressed to, show that any newspaper/broadcast cross-ownership restriction is "narrowly tailored" so as to burden no more speech than is necessary to further its diversity aims. Absent the lack of any record evidence of a non-conjectural harm, narrow tailoring becomes an unobtainable goal, and any cross-ownership restriction would be a blunt instrument at best. A regulation that "burdens

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[72] *July 2003 Decision*, 18 FCC Rcd at 13756.

[73] *League of Women Voters*, 468 U.S. at 380; *Time Warner Entm't Co.*, 240 F.3d 1126 (striking down limits on national cable ownership and carriage of vertically integrated programming); *C&P v. United States*, 42 F.3d 181 (4th Cir. 1984) (striking down cable/telco cross-ownership ban).

[74] *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189 (1997).

substantially more speech than is necessary to further the government's legitimate interests is not narrowly tailored."[75]

For all these reasons, any restriction on newspaper/broadcast cross-ownership cannot survive any level of heightened First Amendment scrutiny.

B. A Newspaper/Broadcast Cross-Ownership Restriction Is No Longer Entitled to Deferential Review Under the Equal Protection Component of the Fifth Amendment.

Under settled law, government restrictions that single out the press, or any element of it (like newspapers), for differential treatment are subject to heightened judicial scrutiny not only under the First Amendment, but under the equal protection component of the Due Process Clause.[76] As demonstrated below, a newspaper/broadcast cross-ownership restriction cannot survive equal protection scrutiny now because newspapers are the *only* non-broadcast medium subject to discriminatory cross-ownership restrictions.

"The Equal Protection clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives."[77] Even when they do not affect the exercise of First Amendment rights, all regulatory classifications that differentiate between similarly-situated groups or individuals must be "rationally related to a legitimate state interest."[78] The

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[75] *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (*"Ward"*); *United States v. Albertini*, 472 U.S. 675, 689 (1985). Indeed, cross-ownership rules that instituted a "complete ban" on telephone companies' ownership of cable systems did not pass intermediate scrutiny because they were not narrowly tailored restrictions on the telephone companies' free speech. *US WEST, Inc. v. United States*, 48 F.3d 1092, 1104-1106 (9th Cir. 1995) (vacated as moot 516 U.S. 1155 (1996)); *Chesapeake & Potomac Tel. Co.*, 42 F.3d at 202.

[76] *See*, *e.g.*, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) (citing cases) ("*Arkansas Writers' Project*"). *Cf. Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding that Due Process Clause of Fifth Amendment includes component analogous to Equal Protection Clause of Fourteenth Amendment).

[77] *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 101 (1972) ("*Mosley*").

[78] *Pennel v. City of San Jose*, 485 U.S. 1, 14 (1988) (internal quotation omitted).

Supreme Court has not hesitated to strike down on equal protection grounds ordinances and laws that discriminate between similarly-situated speakers.

For example, in *Carey v. Brown*, 447 U.S. 455 (1980), the Court struck down on equal protection grounds a ban on residential picketing that excepted peaceful picketing outside a home that was also used as a place of employment and was involved in a labor dispute. The Court held that the ban's distinction between labor picketing and all other peaceful demonstrations was overly broad and not narrowly tailored to the government's stated purpose of protecting residential privacy because it made no attempt to distinguish among various sorts of non-labor picketing on the basis of the harms they would inflict on the privacy interest. At the same time, the Court deemed the ordinance too under-inclusive to directly advance the government's privacy objectives because it permitted forms of picketing that were equally likely to intrude on the tranquility of the home.[79]

Over three decades ago, in 1978, when radio, television, and newspapers were the *only* media of mass communication, the Supreme Court rejected an equal protection challenge to the Commission's newspaper/broadcast cross-ownership ban. The newspaper owners there argued that the ban "unfairly 'singled out' newspaper owners for more stringent treatment than other license applicants."[80] Based on the then current technological and regulatory landscape, however, the *NCCB* Court disagreed, holding that the ban "treat[ed] newspaper owners in

[79] Similarly, in *Mosley*, 408 U.S. at 93-95, the Supreme Court invalidated a statute that prohibited picketing and demonstrations within 150 feet of local schools, but that also exempted "peaceful picketing" related to a labor dispute within the school. The Court found that the classification regarding permissible picketing was a violation of the equal protection guarantee in the absence of an overriding state interest to support a distinction between labor pickets and picketing by other speakers. The Court held that, when statutory classifications affect "expressive conduct within the protection of the First Amendment," it was inappropriate to review them under traditional rational basis standards. *Id.* at 98-99.

[80] *NCCB*, 436 U.S. at 801 & n.19.

essentially the same fashion as other owners of the major media of mass communications."[81] Because, in *NCCB*'s long-ago day, the only other "major media of mass communications" besides newspapers were broadcast television and radio, applying a broadcast ownership ban to the single non-broadcast medium of newspapers did not unfairly single out that medium, since similar prohibitions applied to owners of radio and television stations.

Today, the communications revolution has rendered that holding wholly untenable. Although newspapers are singled out as the only non-broadcast medium subject to a broadcast cross-ownership ban, it is no longer true that newspapers are the only non-broadcast "major medi[um] of mass communications."[82] The major media outlets of today unquestionably include not only cable television, but also the Internet and multichannel video program distributors like satellite and broadband services -- none of which is subject to the Commission's continued restrictions on broadcast cross-ownership. Indeed, in 2002, the United States Court of Appeals for the District of Columbia Circuit vacated the FCC's restriction on the cross-ownership of cable systems and television broadcast stations.[83] As established above, these additional media provide thousands of channels of news and information to the average American.

Moreover, even if *Red Lion* remained the law, the government's imposition of restrictions on newspapers that are not generally imposed on other non-broadcast media must trigger heightened judicial scrutiny:

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[81] *Id.* at 801.

[82] *Id.*

[83] *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1049 ("*Fox*"), *rehearing denied*, 293 F.3d 537 (D.C. Cir. 2002).

> [L]aws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State,' and so are always subject to at least some degree of heightened First Amendment scrutiny.[84]

"[D]ifferential treatment … suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional."[85]

Any FCC action that treats newspapers discriminatorily cannot satisfy this required heightened constitutional scrutiny. Newspapers remain the *only* non-broadcast medium subject to discriminatory cross-ownership restrictions. It makes no sense whatsoever that a cable company may buy a broadcast station when a newspaper may not. In fact, the Commission has previously recognized that "the information market relevant to diversity concerns includes not only TV and radio outlets, but cable [and] other video media."[86] Cable, DBS, other video service providers, and Internet content providers make comparable contributions to diversity and competition for audiences, but owners of these media have been freely able to acquire in-market newspapers.

C. Any Newspaper/Broadcast Cross-Ownership Restriction Specifically Directed at Promoting Diversity Would Not Be Content Neutral and Would Trigger First Amendment Review.

Finally, separate and independent from the two grounds set forth above, any FCC newspaper/broadcast cross-ownership restrictions would be subject to heightened judicial scrutiny for the simple reason that they are content-based. The whole *point* of such restrictions,

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[84] *Turner I*, 512 U.S. at 640-41 (quoting *Arkansas Writers' Project*, 481 U.S. at 228). *See also Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

[85] *Minneapolis Star*, 460 U.S. at 585.

[86] Amendment of Section 73.3555, *Report and Order*, 100 FCC 2d 17, 25 (1984). *See also* Review of the Commission's Regulations Governing Television Broadcasting, *Report and Order*, 14 FCC Rcd 12903, 12953 (1999) (concluding that cable systems, broadcast stations, and newspapers are all "important source[s] of news and information on issues of local concern" and compete with each other as news and advertising outlets).

according to the decision adopting the rule and the *February* 2008 and *July 2003 decisions*, is to enhance "diversity" in broadcasting. Because this objective necessarily relates to the *content* of the relevant speech, such restrictions are not "justified without reference to the content of the regulated speech," and are hence content-based.[87]

Under settled law, government restrictions based on the content of speech -- no matter how benign their motivation -- are subject to heightened First Amendment scrutiny.[88] Such scrutiny is particularly appropriate with respect to a newspaper/broadcast cross-ownership restriction because there is no evidence that the content-based rationale of such restriction is even effective in promoting a "diversity" of broadcast voices in the first place.

The *NCCB* Court acknowledged that the premise of the 1975 rule was to "enhance the possibility of achieving greater diversity of viewpoints."[89] And while it did offer a passing comment rejecting a content based analysis ("the regulations are not content related"),[90] it did so only in *dicta* in a one-sentence snippet distinguishing authority relating to a different issue.[91]

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[87] *Ward*, 491 U.S. at 791. *See* 2006 Quadrennial Regulatory Review – Review of the Commc'ns Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Report and Order and Order on Reconsideration*, 23 FCC Rcd 2010, 2019, 2022 (2008); *July 2003 Decision*, 18 FCC Rcd at 13630 ("[R]egulating ownership is an appropriate means to promote viewpoint diversity."); 13760 ("[W]e continue to believe that diversity of ownership can advance our goal of diversity of viewpoint."). *See also Turner I*, 512 U.S. at 658 (regulation content-based if "concerned with the communicative impact of the regulated speech").

[88] *See*, *e.g.*, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991); *Arkansas Writers' Project*, 481 U.S. at 228.

[89] *NCCB*, 436 U.S. at 796.

[90] *Id.* at 801.

[91] The *NCCB* Court made this comment while addressing the petitioners' argument "that the regulations unconstitutionally condition receipt of a broadcast license upon forfeiture of the right to publish a newspaper." *NCCB*, 436 U.S. at 800. After concluding this argument was ill-founded because "a newspaper owner need not forfeit anything in order to acquire a license for a station located in another community," the Court distinguished the case law upon which petitioners based this argument as addressing a different point, *i.e.*, "the content of

Moreover, in this *dicta*, the *NCCB* Court blurred the line between content and viewpoint neutrality, which more recent Supreme Court authority has crystallized. While a newspaper/broadcast cross-ownership restriction may not be targeted at the viewpoint of speech, that does not mean that such a rule is not targeted at the content of speech and would not immunize it from heightened scrutiny.[92]

Thus, the more recent Supreme Court authority cited above, including *Ward* and *Consolidated Edison*, establish that such a content-based restriction must be subjected to heightened scrutiny. Because any FCC newspaper/broadcast cross-ownership restriction would be content based, it would be subject to heightened scrutiny *regardless* of whether *Red Lion's* "scarcity doctrine" remains the law of the land. Even under the *Red Lion* regime, a content-based restriction is subject to heightened judicial scrutiny.[93] *League of Women Voters* underscores that not all broadcast regulation is subject to deferential review and that "[t]he First

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constitutionally protected speech." *Id.* at 800-801. It was in this context that the Court opined that in *dicta* that the ban was "not content related." *Id.* at 801.

[92] *See*, *e.g.*, *Consolidated Edison*, 447 U.S. at 537 ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular *viewpoints*, but" also to regulations seeking "to restrict expression because of its message, its ideas, *its subject matter, or its content.*") (emphasis added; internal quotation omitted). A newspaper/broadcast cross-ownership restriction, of any stripe, literally prohibits a newspaper from bringing its journalistic and local market expertise and viewpoint to bear in an entire medium, thereby limiting the public's access to ideas. "Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998).

[93] *See League of Women Voters*, 468 U.S. 364. In *League of Women Voters*, the Supreme Court struck down a statute prohibiting broadcasters from "expressi[ng] editorial opinion[s] on controversial issues of public importance," in part because "the scope of [the] ban [was] defined solely on the basis of the content of the suppressed speech." *Id.* at 381 (internal quotation omitted), 383.

Amendment's hostility to content-based regulation" requires the Court to be "particularly wary" in reviewing a content-based regulation of broadcasting.[94]

Limiting the speech of some to enhance the speech of others is fundamentally antithetical to the First Amendment.[95] The First Amendment, after all, "rests on the premise that it is government power, rather than private power, that is the main threat to free expression."[96]

Accordingly, any newspaper/broadcast cross-ownership restrictions would be content based and, as a result, must be tested subject to strict scrutiny under the First Amendment, requiring the Commission to show that such standards are the "least restrictive means [available of achieving] a compelling [state] interest."[97] As established above, the Commission can not satisfy this standard.

VI. Restrictions on Cross-Ownership Are Particularly Unwarranted in Medium and Small Markets.

A continued ban on newspaper/broadcast cross-ownership cannot be sustained under any factual or legal rationale. Similarly, retention of a modified rule that is discriminatorily applicable to medium and small markets is equally indefensible. There are at least seven reasons why across-the-board repeal of the rule is the only sustainable approach.

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[94] *Id.* at 384 (internal quotation omitted).

[95] *See*, *e.g.*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.30 (1978) (rejecting, as inconsistent with "basic tenets of First Amendment jurisprudence," the notion that the government "may control the volume of expression by the wealthier, more powerful corporate members of the press in order to enhance the relative voices of smaller and less influential members.") (internal quotation omitted); *Buckley v. Valeo*, 424 U.S. at 48-49 (emphasizing that the "government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others").

[96] *Turner I*, 512 U.S. at 685 (dissenting opinion).

[97] *Sable Communications*, 492 U.S. at 126 (emphasis added).

First, any newspaper/broadcast cross-ownership rule discriminating against smaller markets would be legally improper given that *vacatur* of the cable television/television cross-ownership rule applied in all markets.[98] When it ordered *vacatur* of that rule, the court did not suggest any need to retain it in smaller markets. Neither did the Commission ever mention such a concept when it sought rehearing of that decision, and the agency has allowed the rule to disappear nationwide. If there is no reason to follow a discriminatory market approach in repealing cross-ownership of broadcast television and cable television, two platforms the FCC *does* regulate, there is even less reason to do so for combinations of television stations and newspapers, which are otherwise unregulated by the FCC.

Second, there is no factual basis for a rule discriminating against smaller markets. In the empirical studies related to programming produced by newspaper-owned television stations, market size had no effect on the conclusions. A review of non-entertainment programming, which Media General submitted in 2001 and has updated in 2006, found that, in comparing stations in markets with co-ownership and those without, stations in the three smallest Media General convergence markets still aired more non-entertainment programming than stations in the immediately higher-ranked DMAs. Indeed, the programming study that the FCC staff itself undertook in 1973 in the proceeding that led to the 1975 decision adopting the rule included television stations from variously sized markets. As it noted, stations in the seven largest markets were specifically excluded from the study, which found that, on average, television stations owned by newspapers offered more news, non-entertainment, and overall local programming than other television stations.[99]

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[98] *Fox*, 280 F.3d at 1049.

[99] Appendix C, *1975 Second Report and Order*, 50 FCC 2d at 1095 n.4.

Third, small markets have been equally affected by the dramatic growth in the number of "traditional" media outlets and more recent new technological entrants over the last 30 years. On three occasions, Media General has prepared and filed costly and voluminous market-by-market reviews of the availability of content providers in the markets where it has practiced convergence; those volumes of data showed this profusion to be universal.

Fourth, the empirical studies filed throughout the last decade with the FCC that related specifically to advertising competition showed no reason to discriminate against small-market stations in repealing or modifying the cross-ownership rule. Most significantly, in 2003 and again in 2008, the FCC found broadcast advertising and newspaper advertising represent different product markets. Geographic location is, therefore, rendered meaningless in standard antitrust analysis. Moreover, comprehensive studies of advertising rates prepared by Economists Incorporated in 1998 and updated in 2002 drew on data from large and small markets across the country; market size made no difference in the findings; they found no statistically significant difference between advertising prices of cross-owned newspapers and those of other papers in medium and small markets.[100] On appeal, the United States Court of Appeals noted that no party before it had challenged the FCC's 2003 determination that a newspaper/broadcast combination cannot adversely affect competition in any market.[101]

Fifth, good journalism is expensive to produce no matter what the market size. Cutbacks in local television newscasts and newsroom staffs have been particularly pronounced in small

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[100] Economists Incorporated, "Behavioral Analysis of Newspaper-Broadcast Cross-Ownership Rules in Medium and Small Markets," January 2002, submitted with Reply Comments of Media General, Inc. in MM Docket Nos. 01-235, *et al.* (Feb. 15, 2002); Economists Incorporated, "Structural and Behavioral Analysis of the Newspaper-Broadcast Cross-Ownership Rule," July 1998, submitted with the Comments of the Newspaper Assoc. of America in MM Docket No. 98-38 (July 21, 1998).

[101] *Prometheus*, 373 F.3d at 398-400.

and medium size markets. Indeed, cutbacks in network compensation, which began at the beginning of this decade, were particularly deep and hard for affiliates in smaller markets; in most cases, network compensation has now been eliminated and in many cases become "reverse compensation."

Sixth, local media -- again, particularly those in small markets -- face increasing competition from national players who, given the development of technologies over the last 30 years, can now easily send, beam, or transmit their content and advertising into every market in the nation. The national players siphon off advertising dollars that may otherwise have gone to the communities receiving their material, and they generally have no local presence or commitment. These national players frequently prosper by creating large numbers of specialized video channels or websites, each of which serves a small dispersed audience in each locale, but collectively aggregate many viewers and users. At the same time, the local newspaper and the local broadcast station, each of which is dedicated to covering the local community, are facing growing costs of local news operations and increasingly fragmented audiences. To survive in the new environment of "competition for eyeballs," local content providers must be allowed to move beyond traditional structural ownership regulations and the confines of traditional media boundaries to reach audiences the way they want to be reached -- with multiple streams of information when, where, and how the audiences demand it.

Finally, there is no reason in anything previously put before the Commission nor is there any reason in common sense to deny small market media operators and consumers the same innovation and benefits that flow from convergence and that are available to their counterparts in larger markets. If anything, the costs and difficulties faced by small-market operators make such change even more deserved and compelling. Similarly, consumers in these markets are entitled

to access to as much local information as operators in their markets can possibly produce, just as is the case in larger markets. Media General's experience in medium and small markets, as described above and documented today and in the past for the FCC, demonstrates the myriad public interest benefits that can redound to consumers in such markets through convergence. From increased coverage of elections and political events to greater and more in-depth focus on community issues to the highlighting of local weather and sports developments to the conduct of new community-centered events, convergence yields tangible improvements in the public interest.

Nothing in the record the FCC has accumulated in the past shows -- and I venture nothing it will gather in this new 2010 Quadrennial Review will show -- that any action short of total elimination of restrictions on newspaper/broadcast cross-ownership would be judicially sustainable or in the public interest. The rule should have never been adopted. It has stifled the production of high quality, local news and information, good journalism and investigative reporting for too long, and its repeal is long, long, long overdue.