

# The Newspaper-Broadcast Cross-Ownership Rule: The Case for Regulatory Relief

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In 1975, Bruce Springsteen released his third album, *Born to Run*. Bill Clinton married Hillary Rodham, and Bill Gates used the term *Microsoft* for the first time in a letter to Paul Allen.<sup>1</sup> Newspaper readership was at its peak, and television viewers uniformly tuned in for evening news delivered by one of three network anchors: Walter Cronkite, John Chancellor, and Harry Reasoner.<sup>2</sup> AM Top 40 radio dominated, and FM had not yet reached the mainstream.<sup>3</sup> Cable systems were just sprouting,<sup>4</sup> and Sony marketed its innovative Betamax recorder for the exorbitant sum of \$2,295.<sup>5</sup> Given America's presumably unavoidable reliance on newspapers and broadcast outlets as sources of news and information, the Federal Communications Commission (FCC or Commission) in 1975 promulgated rules prohibiting a daily newspaper publisher from owning broadcast stations in the same community, ostensibly to prevent any single corporate entity from becoming too powerful a voice within a community.

Thirty years later, the Boss released his twentieth album but had to contend with digital piracy. Bill Clinton, impeached but popular, took a backseat as Senator Hillary Rodham Clinton announced over the Internet her own presidential intentions; and multibillionaire Bill Gates split his time between hawk-ing Microsoft products and philanthropic pursuits. Today, American consumers have virtually limitless choices in news and informational content on every subject imaginable, delivered in an ever-expanding variety of forms to

suit every taste and schedule.

The challenges facing companies that professionally gather and publish local, national, and international news and information have become acute. The newspaper industry is wrestling with declining circulation and rising competition for advertising, and prominent publishing companies are on the auction block. With similar challenges facing broadcasters, Disney remarked in comments to the Commission that “[g]iven the increase in, and attractiveness of, new media outlets, the Commission may soon find itself considering ways to incent, rather than restrict, ownership of over-the-air broadcast stations.”<sup>6</sup>

At the same time, in response to a congressional mandate, the FCC reviewed certain of its media ownership rules and attempted to relax some of them. After much legal wrangling and in the context of a dramatically different media sector, the U.S. Court of Appeals for the Third Circuit, although finding that the “blanket ban on newspaper/broadcast cross-ownership [is] no longer in the public interest,”<sup>7</sup> remanded the proposed rule changes to the FCC for further justification. Remarkably, in a world where traditional media companies are constantly revamping their business models in the face of new technologies and where the diversity of outlets vying for consumers’ attention can be overwhelming, common ownership of daily newspapers and broadcast stations serving the same market still is prohibited, except in certain limited circumstances.<sup>8</sup>

The newspaper-broadcast cross-ownership ban has existed without any modification for more than thirty years. Today, the traditional media industries are in tumult. Help, however, may not be imminently forthcoming. Today’s Commission appears caught in the vortex created by the Third Circuit’s remand of the agency’s attempt to reform its ownership rules, the claims of competing interest groups, and a shift in the political winds. Many therefore predict

that the FCC will be slow to implement any further ownership deregulation.

For the past three years, there has been no active legal dispute as to whether the complete prohibition of newspaper-broadcast cross-ownership should exist. Although both the agency and the Third Circuit agree that a global ban on newspaper-broadcast cross-ownership disserves the public interest and should not be preserved,<sup>9</sup> the blanket ban persists—not as a public benefit but as an artifact of the Commission’s failed attempt to unite its cross-ownership and local ownership policies into a single grand integrated theory of media ownership. The significance of such a ban is that as technological advances accelerate, the existing cross-ownership rule robs traditional media outlets of the option to compete, perhaps even to survive, during what can only be fairly characterized as a seismic shift in the media landscape.

## Thirty Years of Regulation

Given the tenure of the newspaper-broadcast cross-ownership ban (also known as the Newspaper Rule), commentators, courts, and FCC commissioners have summarized the rule hundreds, if not thousands, of times. Nonetheless, for those new to the discussion, a brief overview of the Newspaper Rule’s history follows.

In 1975, the Commission adopted regulations that prohibited a daily newspaper publisher from obtaining broadcast licenses in its paper’s community.<sup>10</sup> When it implemented the Newspaper Rule, the Commission believed that common ownership of daily newspapers and broadcast stations would not enhance the diversity of viewpoints available to the public; instead, the Commission feared that common ownership would preclude new voices from obtaining the decreasing number of available broadcast licenses.<sup>11</sup>

Even in its decision adopting the ban, the Commission acknowledged the potential detriments of the prohibition and

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the uncertain foundation on which it was enacted. In particular, the agency recognized the pioneering spirit of cross-owners and specifically concluded that newspaper-affiliated stations tended to be superior licensees, particularly in terms of locally oriented service.<sup>12</sup> To justify the restriction when it was adopted three decades ago, the FCC relied on what the agency itself acknowledged to be a “mere hoped for gain in diversity.”<sup>13</sup>

Given its speculative origins, it is not at all surprising that the efficacy of the cross-ownership ban has long been in question at the Commission. As early as 1996, in approving the merger of ABC and the Walt Disney Company,<sup>14</sup> the agency stated its intention to “commence an appropriate proceeding to obtain a fully informed record in this area and to complete that proceeding expeditiously.”<sup>15</sup> Then-Chairman Reed Hundt, appointed by President Clinton, issued a separate statement emphasizing his concern that “there is reason to believe that . . . the newspaper-broadcast cross-ownership rule, is right now impairing the future prospects of an important national source of education and information: the newspaper industry.”<sup>16</sup> The FCC subsequently reneged on the promise to conduct a broad review, however, initiating an inquiry only with respect to the much narrower issue of amending the existing waiver policy for newspaper-radio cross-ownership.<sup>17</sup>

### First Biennial Review

Without completing that proceeding, the FCC released in March 1998 a notice of inquiry to commence the first biennial review proceeding pursuant to Section 202(h) of the Telecommunications Act of 1996.<sup>18</sup> That inquiry represented the Commission’s first effort to carry out the congressional mandate to determine periodically whether any of its broadcast ownership restrictions “remain necessary in the public interest as the result of competition” and to repeal or modify any rules that do not meet this stringent test.<sup>19</sup> In addition to seeking comment on all of its media ownership rules, the agency noted that it “anticipate[d] taking action in the [newspaper-radio waiver proceedings] during 1998.”<sup>20</sup> The Commission, however, took no action until June 2000, when, after Congress intervened to set a specific deadline, the agency finally issued its 1998 Biennial Review Report.<sup>21</sup>

Recognizing that “there may be circumstances in which the rule may not be necessary to achieve its public interest [objectives],” the FCC committed to “initiate a rulemaking proceeding to consider tailoring the rule accordingly.”<sup>22</sup>

Well over a year later, the Commission finally sought comment on a broad list of questions ranging from retention of the rule in its existing form to complete repeal.<sup>23</sup> Extensive comments were filed by a wide array of industry participants, public interest organizations, and individual consumers.<sup>24</sup> Although the 2001 cross-ownership proceeding was ripe for decision, the FCC determined instead to roll it into its 2002 Omnibus Rulemaking, which included consideration of several other media ownership rules and was designated as the Commission’s 2002 Biennial Review.<sup>25</sup>

This omnibus proceeding was conducted in response to a series of decisions by the D.C. Circuit repudiating the reasoning underlying the FCC’s decisions to retain certain of its broadcast ownership restrictions in past biennial review orders. In both *Fox Television Stations v. FCC* and *Sinclair Broadcast Group v. FCC*, the court strongly reprimanded the agency for failing to buttress with solid factual evidence or logical reasoning its decisions to retain national and local limits on television station ownership.<sup>26</sup>

In response, the FCC tried to make its 2002 Omnibus Rulemaking the most “comprehensive” review of media ownership ever undertaken by the agency.<sup>27</sup> As the Third Circuit observed in its review of the agency’s decision in the proceeding, “interested parties filed thousands of pages of comments, consisting of legal, social, and economic analyses, empirical and anecdotal evidence, and industry and consumer data to respond to the issues identified in the Commission’s Notice.”<sup>28</sup> In conjunction with this proceeding, the FCC also established a Media Ownership Working Group (MOWG), which commissioned a number of independent studies, including several that focused specifically on issues related to newspaper-broadcast cross-ownership.<sup>29</sup> After extensive analysis of the mammoth record in the proceeding, the Commission released the text in June 2003.

### Tiered Approach

Based on its review of the existing record, the Commission determined that

it could no longer justify the complete ban on common ownership of daily newspapers and broadcast stations in the same market.<sup>30</sup> Although it found that a complete cross-ownership prohibition did not promote the public interest, the Commission chose to retain some limitations on media cross-ownership.<sup>31</sup> In its 2003 Report and Order, the Commission opted for a tiered approach in which (1) an outright ban would remain in markets containing fewer than four full-power television stations, (2) some cross-ownership would be permitted in markets with four to eight full-power television stations, and (3) cross-ownership would be freely permitted in markets with more than eight full-power television stations.<sup>32</sup> Few, if any, parties were completely satisfied with the Commission’s new approach to the Newspaper Rule or the other ownership rules under review. The resulting appeals were consolidated in the Third Circuit under *Prometheus Radio Project v. FCC*.

Although the Commission and the Third Circuit quibble over whether Section 202(h) is a “one-way [deregulatory] ratchet,” they seemed in accord that “regulation[s] deemed useful when promulgated must remain so” or be repealed or modified.<sup>33</sup> The appeals court agreed that the newspaper-broadcast cross-ownership ban no longer served the public interest and should therefore be eliminated. But because the court disagreed with the Commission’s justification for its tiered approach,<sup>34</sup> the total ban, which both bodies viewed as harmful to the public interest, remains in effect today. *Prometheus* thus ignited another round of rule making. Now that additional comments have been filed in the remand proceeding, which has been combined with a revised congressional mandate to review the media ownership rules quadrennially,<sup>35</sup> the industry awaits a Commission decision.

### The Saga Continues?

The Third Circuit put the Commission in an awkward position in its remand of the revisions to the Newspaper Rule. Although it agreed that the Commission was under a statutory mandate to “repeal or modify” a ban that no longer served the public interest, the Third Circuit allowed the Newspaper Rule to persist.

On remand, comments and studies from all points along the regulatory/ dereg-

ulatory spectrum have only fueled the cross-ownership debate. Despite the ownership proceedings' cumbersome record, the task before the Commission is, as a legal matter, imperative and straightforward: it must consider the record before it, account for the many changes that have taken place in the media marketplace since 2003 (as well as those that can be anticipated before its next review of the ownership rules in 2010), and move quickly to square its regulatory regime with the realities of an astonishingly diverse and demanding media marketplace.

Republican FCC Chairman Kevin Martin is seeking to avoid the intense criticism that his predecessor, Michael Powell, faced after Powell's Commission, by a partisan three-to-two vote, approved liberalizing the media ownership rules in 2003. However, Martin's cautious approach, combined with the shift in control of Congress, seems to have doused any prospect of swift agency action to conform cross-ownership regulation to technological reality. In response to criticism that the FCC's review of the media ownership rules was done largely behind closed doors in a secretive manner, the Commission is in the process of staging six so-called media ownership road shows designed to solicit additional public comment on the need for regulation.<sup>36</sup> In addition, the FCC has committed to concluding a long-standing proceeding on broadcast localism before turning to the media ownership dilemma.<sup>37</sup>

Despite the comprehensive record already in existence, the agency has commissioned ten new studies: How People Get News and Information; Ownership Structure and Robustness of Media; Effect of Ownership Structure and Robustness on the Quantity and Quality of TV Programming; News Operations; Station Ownership and Programming in Radio; News Coverage of Cross-Owned Newspapers and Television Stations; Minority Ownership (two separate studies); Vertical Integration; and Radio Industry Review: Trends in Ownership, Format, and Finance. Each of the studies will be completed and released for public comment before the Commission takes further action with regard to media ownership regulation.<sup>38</sup>

Although there has been some suggestion that consideration of the ban should be separated from the FCC's review of other media ownership rules (e.g., limits

on local radio and television ownership), that does not appear likely. As newspapers and broadcasters remain indefinitely *Prometheus* bound, opportunities to attain the synergies owners claim are associated with combined print, radio, television, and online news (e.g., cross-promotion, shared newsgathering resources, and packaged multimedia advertising deals) seem to have evaporated. On both sides of the debate, it has become increasingly clear that the debate must now be framed by developments in new media.

### **Trailing Behind Technology**

Innovation is annoyingly ignorant of pleading cycles, and, as many parties have noted, the media landscape has changed dramatically even over the five years since the Commission began its assessment of the cross-ownership ban in its 2002 Biennial Review. Although the current political environment seems to favor increased regulation, the Commission has ample cause to make cross-ownership restrictions the exception rather than the rule. Indeed, it would be folly not to do so.

In 2003, based on the wide-ranging record before it, the Commission concluded thus: "(1) the [newspaper-broadcast cross-ownership] rule cannot be sustained on competitive grounds, (2) the rule is not necessary to promote localism (and in fact may harm localism), and (3) most media markets are diverse, obviating a blanket prophylactic ban on newspaper-broadcast combinations."<sup>39</sup> The Third Circuit resoundingly upheld these critical judgments concerning newspaper-broadcast cross-ownership.

### **Local Markets Are Well-Served**

At this point, therefore, it would appear that the Commission need only speak to the court's limited concerns regarding perceived flaws in the agency's viewpoint diversity analysis. The FCC could simplify its task by eschewing any metric and focusing on whether consumers in individual media markets have a sufficient number of news and informational outlets available to them so as to ensure that they will be well informed and exposed to a variety of viewpoints. In this digital era, particularly given the evolution of the Internet into a fundamental and widely used source of world, national, and local news, information, and opinion, there is no question that audience members in lo-

cal markets of all sizes are well served by a vast range of traditional and alternative media outlets.

The most recent round of FCC comments, which belabor questions of localism and competition already resolved by the Third Circuit; the tenor of media ownership hearings held around the country; statements from congressional leaders; and the Commission's own reluctance to act suggest an unwillingness to accept the extent to which today's media landscape differs from that of 1975. To some, though, it seems obvious that the abundant sources of information, entertainment, and viewpoints available to today's consumers have rendered any discussion of whether structural ownership regulations are necessary to preserve diversity in today's media marketplace almost nonsensical. The realities of the twenty-first century marketplace and the experiences of same-market newspaper-broadcast combinations, as well as the obvious need for regulatory parity, overwhelmingly support repeal of the newspaper-broadcast cross-ownership ban.

### **A Reality Check**

If American media companies are to thrive, the Commission and the courts cannot continue to react as though it is 1999. In the three years since the Third Circuit's *Prometheus* decision, innovation has once again transformed Americans' appetite for information such that the 2002 Biennial Review and *Prometheus* now seem quaint. The past three years have seen the development of new classes of media outlets, new theories of information sharing, and new methods of information gathering. Since *Prometheus*, Americans have experienced so many technological revolutions that the term is beginning to lose its meaning.<sup>40</sup> Each passing revolution merely adds to the Commission's burden of justifying continued regulation of newspaper-broadcast cross-ownership. In responding to the Third Circuit's remand, the Commission must give sufficient weight to the development of several new types of media outlets as truly independent sources of local information as well as to the vicious competition spurred by the low-to-nonexistent barriers to entry for online media.

"A generation ago, only science fiction writers dreamed of satellite-delivered

television, cable was little more than a means of delivering broadcast signals to remote locations, and the seeds of the Internet were just being planted in a Department of Defense project.<sup>41</sup> By 2003, consumers “could select ‘from hundreds of channels of video programming . . . in every market in the country and, via the Internet, [could] access virtually any information, anywhere, on any topic.’”<sup>42</sup> Remarkably, in remanding the Commission’s numerical ownership limits, the Third Circuit noted that it could not rely on the Commission’s finding that Internet sources “mitigate the threat that local station consolidations pose to viewpoint diversity.”<sup>43</sup> The experiences of the past three years and the emergence of new media, particularly online media, refute the Third Circuit’s position.

### Media of Choice?

The Internet has made a remarkable contribution to the marketplace of ideas, and the expansion and fragmentation of the media marketplace has naturally changed the way in which consumers seek and receive their news. Although it is true that newspapers and broadcast stations remain important sources of local news and information,<sup>44</sup> nontraditional media draw an audience that rivals that of mainstream media sources.<sup>45</sup> In addition to traditional media’s high-traffic online offerings, micropolitan websites, blogs, and online citizen journalism have proliferated. Newspapers and broadcast stations are no longer the predominant sources of news and information they were in 1975.<sup>46</sup> For many, they are not considered the media of choice.<sup>47</sup>

Technology has also changed the traditional media’s role as an information gatekeeper. Now, any motivated Internet user can receive information in quantities and varieties previously known only to publishers and broadcasters that subscribed to costly wire services. By aggregating disparate news sources and providing customized filters to sift through the growing heaps of information, both mainstream search engines (Yahoo! and Google) and emerging services (bloglines.com) provide Internet users with a personalized virtual Teletype machine.

### Blogs

The term *weblog* was coined on December 17, 1997, by Jorn Barger, who created the term “to describe the

process of ‘logging the web’ as he surfed.”<sup>48</sup> The transmutation of *weblog* to *blog* (both in its noun and verb forms) is attributed to Peter Merholz and dates to April or May of 1999.<sup>49</sup> In 2004, the Third Circuit used neither the term *blog* nor *weblog* in its *Prometheus* decision, and Judge Scirica’s dissent included only one instance of the term *weblog*.<sup>50</sup> If use of the term *blog* is any measure of its relative importance over time, it is worthwhile to note that twenty-three commentators representing both pro-regulatory and deregulatory interests used *blog* 332 times in their opening comments to the 2006 Quadrennial Review.

The increasing local significance of blogs is supported by the discussions in the comments to the 2006 Quadrennial Review. Indeed, surveys conducted by the Pew Internet & American Life Project (Pew Internet Project) reveal that the number of blog readers is increasing at an explosive rate. In September 2005, the Pew Internet Project surveyed the Internet usage habits of American adults. Of the self-reporting Internet users, 27 percent indicated that they had read another person’s blog. Four months later, 39 percent of Internet users stated that they had read one or more blogs.<sup>51</sup>

Pro-regulatory advocates have mounted several attacks on blogs’ inclusion in diversity analyses. First, they argue that blogs are “not primarily a journalistic undertaking” and are “just not local news and information.”<sup>52</sup> Although such a belief may have been accurate at one time, blogs increasingly provide unique reporting on events of local and national concern, and the comments submitted in the 2006 Quadrennial Review proceeding demonstrate as much. For example, the bloggers at Firedoglake.com reported extensively on the recent trial of Vice President Cheney’s former chief of staff, I. Lewis “Scooter” Libby. Firedoglake.com’s coverage was widely reported in both new and traditional media.<sup>53</sup>

Blogs can provide original journalistic content on local affairs, too. Take, for example a March 23, 2007, posting on *dcist.com*, a blog devoted to local affairs in the District of Columbia. In the posting, a blogger discussed recent floor speech in the House of Representatives about the ongoing debate concerning the

District of Columbia’s congressional representation (or lack thereof). The blogger was intrigued by a floor statement made by a member of Congress, who argued against granting District of Columbia residents a congressional vote because each of the 535 members of Congress already has a vested interest in local affairs in the District of Columbia. Taking him at his word, the blogger provided readers with the congressman’s official contact information. Judging from the comments to the post, readers of *dcist.com* appear to be reaching out to members of Congress on “constituency” issues such as garbage collection and un-repaired potholes.<sup>54</sup>

Emerging local media outlets are not limited to text, however. For example, the photo website Flickr.com, launched in 2004, allows users to contribute, classify, and search an enormous database of photographs. A search for the tag *news* yields more than 30,000 images.<sup>55</sup> Although many of the photographs tagged with *news* are images related to the news industry itself (for example, news vans, television broadcasts, etc.), many photographs capture newsworthy events, such as local fires, vigils, protests, and concerts. Internet users are beginning to make similar use of YouTube.com for video content. YouTube.com, launched in 2005, allows users to search based on text or to browse predefined categories, which include a grouping for “News & Politics.”<sup>56</sup>

This expansion in online media is fueled, in part, by the low-to-nonexistent cost of creating a revenue-generating online media outlet. Anyone with Internet access and content can contribute to viewpoint diversity. Many sites, such as Blogger.com, provide free hosting to would-be bloggers. Moreover, bloggers have become increasingly attractive to online advertisers, and the free nature of hosting services does not deprive bloggers of a revenue stream from online advertising. Blogger.com, for example, permits users to recognize advertising revenue through services such as Google.com’s AdSense platform.

Over the past several years, the media market has become increasingly decentralized and diverse, and online media have emerged as independent sources of viewpoint diversity and as competing suppliers of advertising space. This decentralization of local

media outlets has not escaped the notice of traditional media. Indeed, *Time's* selection of You as its "Person of the Year" for 2006 surprised nearly everyone. Despite the ongoing conflict in Iraq, the trial and execution of a deposed Iraqi dictator, and the power-shifting midterm congressional elections, *Time's* editors saw 2006 primarily as "a story about community and collaboration on a scale never seen before."<sup>57</sup> People-powered media have arrived and are changing the way that Americans consume information.

### Learning from Experience

Given the cacophony of voices characterizing the modern media era, the Commission's diversity analysis appears relatively simple and straightforward. The reality, though, is that the Commission's analysis has been endlessly complicated by political influences. To combat the hue and cry over the evils of so-called Big Media, deregulatory proponents have continued to speak to the wealth of data demonstrating media cross-ownership's real-world benefits: newspaper-broadcast combinations across a broad spectrum of markets provide exceptional local content and community-oriented service.

When it banned newspaper-broadcast cross-ownership in 1975, the Commission chose not to break up then-existing combinations. The FCC elected to require divestitures only in a narrow range of circumstances because a "mere hoped for gain in diversity,"<sup>58</sup> which it previously described as an "abstract goal,"<sup>59</sup> could not justify sweeping divestiture requirements. These grandfathered combinations, along with newspaper-broadcast combinations that exist pursuant to waivers or under a policy that permits a broadcast station owner to acquire a newspaper in the same market and operate it until the end of the station's license-renewal term,<sup>60</sup> have demonstrated important advantages of cross-ownership.

As the newspaper and broadcast industries have evolved, local newspaper-owned television stations have had the unique opportunity to experiment and find synergies between the two businesses. On the whole, existing combinations show that local cross-ownership is a stabilizing economic force that allows for efficient use of assets to provide diverse

local programming. Given the ability of news industries to share newsgathering resources with sister outlets and the journalistic and community-oriented traditions that daily newspapers bring to the table, it makes perfect sense that cross-ownership would generate these benefits. Researchers have long concluded that the operational efficiencies made possible by cross-ownership enable outlets to compete more effectively and to focus on their core local service objectives.<sup>61</sup>

### That '70s Show

In its 1975 Report and Order, the Commission praised newspapers' "pioneering spirit" in the early days of radio; then it instituted a ban on all future newspaper-broadcast cross-ownership. At that time, the Commission focused on competition, viewpoint diversity, and ownership diversity but did not give sufficient weight to existing evidence that cross-ownership promotes localism.<sup>62</sup> Since then, the Commission has adopted localism as a third public interest goal; thus, it is interesting to note that what was true in 1973 remains so today: newspaper-broadcast combinations promote this public interest goal.<sup>63</sup>

In its 1975 Report and Order, the Commission made a passing reference to seven studies that, in today's terms, analyze issues of localism. With one outlier, the studies largely disprove the argument that cross-ownership harms localism.<sup>64</sup> More importantly, the Commission's Staff Study of 1973 Television Station Annual Programming Reports, which was the first study to use 1973 annual programming reports, showed a statistically significant increase in the amount of local programming broadcast by newspaper-owned television stations.<sup>65</sup> Specifically, the Commission staff found that after controlling for variables such as market size, network affiliation, and group ownership, the average "co-located newspaper-owned" television broadcaster produced 12 percent more local programming than did other television broadcasters in 1973.<sup>66</sup>

### More and Better Local Planning

The same conclusion, that cross-owned outlets offer more and better local programming, has been reached time and time again.<sup>67</sup> The Third Circuit agreed with the Commission's assessment that

"the newspaper/broadcast cross-ownership ban undermined localism."<sup>68</sup> Nevertheless, virtually every commentator in the 2006 Quadrennial Review devoted significant energy to explain how newspaper-broadcast cross-ownership promotes or inhibits the Commission's goal of localism. Inasmuch as the Commission uses local news programming as a localism yardstick, the existing combinations' experience strongly supports the deregulatory position.<sup>69</sup>

In Fredericksburg, Virginia, the combined resources of the *Free Lance-Star* and its three radio stations create efficiencies permitting reporters more easily to cover stories in distant communities. This combination also permits important local breaking news to be disseminated quickly and accurately.<sup>70</sup> The quality of local coverage has not suffered because of the newspaper and radio stations' integrated operations. Both the stations and the *Free Lance-Star* have received dozens of awards for the quality of their journalism.<sup>71</sup> Similarly, as the result of the efficiencies created by the joint ownership of the *News-Gazette*, WDWS (AM), and WHMS-FM in Champaign, Illinois, WDWS (AM) replaced a syndicated news show with a locally produced three-hour daily talk show.<sup>72</sup> Anecdotal evidence suggests that WHMS-FM is the only music station in its market that employs a full-time news staff.<sup>73</sup> As a result, WHMS-FM broadcasts forty hours of local news programming each week.<sup>74</sup>

### Studies and More Studies

Media General has provided for the Commission a detailed assessment of the locally oriented value each of its six newspaper-broadcast combinations adds to its respective market.<sup>75</sup> In a comprehensive study of each combination, Professor Adam Clayton Powell III of the University of Southern California concluded that all six communities received more and better local news and public affairs programming than they would absent the convergence benefits of the combinations.<sup>76</sup> Areas in which benefits can be seen include breaking news, expanded news content, investigative and enterprise pieces, greater understanding of the community,<sup>77</sup> and production of specials and investigative reports that could not have been done on a stand-alone basis.<sup>78</sup> The tangible results are evident in everything from the outlets' joint investigation of the

hurricane-preparedness plans of Tampa-area governments,<sup>79</sup> to an in-depth series on the experiences of parents who have lost children to cancer, to coordination on town hall meetings held for local candidates.<sup>80</sup> Such extensive community-oriented efforts simply would be out of reach for most stand-alone outlets.

Belo Corporation has stated that the existence of its Dallas combination has served as a “direct catalyst” for an overall increase in the quantity and quality of local news available in the market.<sup>81</sup> In particular, Belo explained that the sharing of resources not only has enhanced the news coverage of its co-owned TV station and daily newspaper but also has helped make possible the launch of several additional local and regional outlets, including a regional cable news channel, a Spanish-language daily newspaper, and a free daily specifically targeted to younger readers.<sup>82</sup>

Similarly, in Phoenix, a Gannett-owned combination brings heightened local content to the market. Gannett’s KPNX-TV has the highest-rated local newscast,<sup>83</sup> while the *Arizona Republic* has taken advantage of the efficiencies inherent in cross-ownership to increase its in-depth and investigative reporting.<sup>84</sup>

Cox Enterprises also claims localism benefits from its newspaper-broadcast combinations in Atlanta and Dayton.<sup>85</sup> In both of these cross-ownership markets, the broadcast stations have the resources to offer exceptional locally oriented programming. For example, the Atlanta station airs the only weekly half-hour public affairs program in the market, and the Dayton station produces a similar weekly half-hour public affairs program.

Tribune Company currently holds newspaper-broadcast combinations in several markets, including Chicago, New York, Los Angeles, Hartford, and South Florida, some of which are grandfathered and some of which Tribune holds under temporary waivers or pursuant to the FCC’s Footnote 25 policy.<sup>86</sup>

The Tribune combination in Chicago, which is grandfathered, is the nation’s third-largest market and provides, perhaps, the best case study. According to Tribune’s comments filed with the FCC, the newspaper-broadcast combination has allowed each entity to streamline operations and provide more extensive informational coverage by taking advantage of both local efficien-

cies and companywide resources. The radio station and its sister outlets jointly plan for coverage of special events, such as local and national elections. Likewise, the *Chicago Tribune* works with WGN-TV to co-sponsor public opinion polls before major local, state, and national elections. WGN-TV’s chief meteorologist and his staff of professional weather forecasters provide a “weather page” for each daily edition of the *Chicago Tribune*. Moreover, all three media outlets contribute to www.chicagotribune.com, enabling that website to offer far more content than otherwise would be possible.

At Tribune and elsewhere, the websites offered do far more than “merely republish” the content developed by their sister newspaper, radio, or television station.<sup>87</sup> Because of the immense capacity and unique attributes of the Internet, newspaper publishers and broadcasters via the Web greatly differentiate, supplement, and constantly update the information they disseminate to their audiences. These websites host chat rooms about top stories and forums on issues such as elections, public safety, immigration, schools, and even the neighborhood weather. Multiple blogs contain reporting, commentary, and observations on everything from local politics and sports to pop culture. Opinion pages offer venues for readers to state their views.

### **Economic Survival**

Incredibly, certain commentators contend that there is no evidence that the seismic shift in the media landscape has had any competitive impact on newspaper publishers or broadcasters.<sup>88</sup> The record unambiguously demonstrates, however, that traditional broadcasters and newspaper publishers are facing formidable challenges in today’s highly fragmented media marketplace.<sup>89</sup> In particular, the flexibility of new and alternative media to react quickly as the paradigm has shifted from “one size fits all” to individualized media “on-demand” is well documented.<sup>90</sup>

As new technology has multiplied the number of media outlets, the traditional print and broadcast media face increased competition for audiences and revenues. The average newspaper’s circulation has declined by at least 1 percent per year since 1975, and, over the

past several years, the rate of decline has increased noticeably. The value of publicly traded newspaper companies decreased by 20 percent in 2005 and by another 14 percent in 2006.<sup>91</sup> The forced sale of Knight Ridder and Tribune Company’s recent public struggle to reach an agreement with a buyer only underscore the diminishing economic power of newspaper publishers.<sup>92</sup> Even the *New York Times* has not been immune to these trends. Its share price has fallen by nearly 40 percent in recent years.<sup>93</sup> The combination of decreased circulation and advertising revenues has forced publishers to cut costs, even to the extent of reducing newsroom staff. It is expected that from 2000 to 2007, newspapers, in aggregate, will employ 7 percent fewer reporters.<sup>94</sup>

### **Audience Erosion**

Television broadcasters are facing a similar problem: audience erosion began with the increased number of offerings by multichannel video providers and has accelerated with the advent of streaming Internet video. For example, in the large markets of New York, Los Angeles, and Chicago, virtually every television broadcast station’s share of the total local television viewing audience decreased from 2001 to 2006.<sup>95</sup>

With declining audiences and advertising revenues, newspaper publishers and broadcasters must change their business models in order to remain profitable and to survive in the information age. As the Third Circuit noted in *Prometheus*, newspaper-broadcast cross-ownership can create economic efficiencies without sacrificing journalistic integrity.<sup>96</sup> The record on remand supports the court’s observations. For example, Fredericksburg, Virginia’s local paper, the *Free Lance-Star*, owns four local radio stations. Through colocation and the merger of some of the five properties’ operational, human resources, and administrative staffs, the *Free Lance-Star* recognizes an annual savings of \$500,000 while increasing local programming on the radio stations.<sup>97</sup> The publisher of the *News-Gazette* in Champaign, Illinois, has recognized similar economies of scale from cross-ownership. The integration of the *News Gazette*, WDWS (AM), and WHMS-FM results in an annual savings of \$100,000 and increased investment

in the stations' news operations.<sup>98</sup>

Media General's experience in Tampa offers yet another example of how cross-ownership of local newspaper and television properties can "reverse the [economic] downturn and profitably provide communities with more and better local news."<sup>99</sup> Before Media General consolidated its news-gathering operations, circulation of the *Tampa Tribune* was declining in key demographics. With the efficiencies created by cross-ownership and operation with WFLA-TV, Media General saw a "level[ing] off [of] circulation declines."<sup>100</sup> But Media General was not the only one to see benefits from the economic buttressing of the *Tampa Tribune*. The cross-ownership efficiencies have allowed WFLA-TV to add an additional thirty minutes of local programming each day. Obviously, economic efficiencies are not anathema to the public interest.<sup>101</sup>

Although it is true that common ownership of a local daily newspaper and a local broadcast station does not maximize diversity of ownership, common ownership is sometimes necessary to maintain the status quo, especially given the state of the industry.<sup>102</sup> One owner of two outlets will always be a better servant of the public interest than two outlets silenced.

### Taming *Red Lion*

Finally, it is, of course, worth noting that the *Prometheus* court rejected a constitutional challenge to the Newspaper Rule, finding that the Commission violated neither publishers' nor broadcasters' First Amendment rights through the reformation of the Newspaper Rule.<sup>103</sup> The Third Circuit's constitutional ruling rests primarily on the belief that precedent constrained the court from finding a First Amendment violation in the revised Newspaper Rule. The court's interpretation of precedent, however, confuses its inability to overturn binding precedent with its ability to distinguish a case on the facts. From this perspective, post-*Prometheus* broadcast technologies undermine the Third Circuit's findings.

Shortly after the start of the 1968 inquiry into media ownership, the Supreme Court granted the Commission a regulatory boon in *Red Lion Broadcasting v. FCC*.<sup>104</sup> In upholding the fairness doctrine

against a First Amendment challenge, the Court held that the "scarcity of radio frequencies" in the "unique" media of broadcast services was sufficient to allow some governmental regulation of speech. After all, it was "the right of the viewers and listeners, not the right of the broadcasters, which [was] paramount."<sup>105</sup> Significantly, the *Red Lion* Court framed its analysis in terms of the scarcity inherent in the (then) "present state of commercially acceptable technology."<sup>106</sup>

The 1975 Report and Order provided the Supreme Court with an opportunity to revisit the scarcity doctrine in *FCC v. National Citizens Committee for Broadcasting*.<sup>107</sup> Once again, the Court rejected a First Amendment challenge to the Commission's regulations, finding that "[i]n light of this physical scarcity, Government . . . regulation of broadcast frequencies [is] essential."<sup>108</sup> The Newspaper Rule stood because of the Court's deferential review.

At its heart, though, the scarcity doctrine of *Red Lion* and its progeny depends on finding some measure of scarcity in the broadcast media, and courts invoking *Red Lion* often cite the Commission's pronouncements on the crowding of radio and television spectra.<sup>109</sup> But such determinations are factual, not legal, in nature, and they address the continuing applicability of the scarcity doctrine, not its continued validity as a legal theory. Viewing *Red Lion* in this light could enable a court to account for technological advances without upsetting its status as legal precedent.<sup>110</sup> Such an approach is attractive because it would preserve the scarcity doctrine for future courts without shackling the industry to outdated facts.

The broadcast media are far different today than they were in June 2004. In March 2007, the Commission announced the long-awaited approval of rules governing HD Radio. The in-channel on-band (IBOC) technology that drives HD Radio allows FM broadcasters to slice their allotted spectrum into multiple audio and data streams. Even though IBOC has not changed the amount of bandwidth available for broadcasters, it has trebled the number of FM outlets available in a given market through a more efficient use of available spectra. Broadcasters, in turn, are permitted to lease excess capacity to third parties, thereby increasing the di-

versity of voices and viewpoints within a given market.

A similar transformation is occurring in the television industry. Analog television broadcasts are scheduled to cease on February 17, 2009, and every broadcast station will have the capacity to deliver combinations of high-definition programming or multiple streams of programming on its allotted channels. Already, some broadcasters are taking advantage of this newfound capacity to offer different streams of programming. For example, a local public television station in Washington, D.C., WETA-TV, currently broadcasts five unique digital streams on Channel 26.

New and emerging technologies do not merely allow for a more efficient slicing of the spectral pie. Technology can expand the pie as well. For example, noted an article in *Nature* magazine, researchers at the University of Utah recently announced that they have created a filter that may enable the currently unusable terahertz region of the spectrum to be used for wireless communications.<sup>111</sup> When terahertz communications technology emerges, certain types of wireless communications services could be shifted from congested regions of the spectrum, allowing for the expansion of broadcast bands.

The Third Circuit did not address HD Radio multicasting or terahertz technologies in *Prometheus*. But how could it have? The Commission did not authorize HD Radio multicasting until March 8, 2005, nearly a year after the Third Circuit decided *Prometheus*, and *Nature* published the terahertz article in March 2007. *Prometheus* therefore stands as an example of how an otherwise valid legal construct can be undermined by the use of old facts.

### Conclusion

Simply put, newspaper-broadcast cross-ownership regulation is an anachronism. Today's media bear little resemblance to those of 1975; and to the extent that diversity has increased since 1975, the Commission's "hoped for gain in diversity" has been realized because of advancing technologies, not because of the Newspaper Rule. With the benefit of hindsight, it has become apparent that the speculative fears voiced by the Commission in 1975 were misplaced. Had the commissioners known of the

looming information age, perhaps they would have been less inclined to focus on the potential for commonly owned newspaper and broadcast outlets to diminish diversity of viewpoints and would have accorded more weight to existing studies that made clear even then how such combinations benefited localism.

Although the Commission has remained mired in a regulatory morass, the technological developments impacting the media industry have been far from stuck. The Commission is statutorily obligated to make sure that its ownership rules reflect the situation “as it is, not as it was.”<sup>112</sup> The belief that these structural ownership rules are necessary to preserve a diversity of voices ignores the overwhelming evidence that the marketplace of ideas has never been more robust, and the need for regulatory relief never more immediate.

The means through which to ensure a vibrant media marketplace—one where consumers continue to have access to the valuable services and quality journalism provided by newspapers and free, over-the-air broadcast stations—is to level the playing field through regulatory relief. Over-the-air television broadcasters and daily newspapers are facing unprecedented competitive and financial challenges. Without relaxation of the local ownership restrictions, it will be increasingly difficult for broadcasters and newspapers to fund the local news operations that have long been their hallmark and that so clearly serve the public interest. 

## Endnotes

1. See 1975, WIKIPEDIA, <http://en.wikipedia.org/wiki/1975> (last visited Apr. 5, 2007).

2. See [www.poynter.org/content/content\\_view.asp?id=99440](http://www.poynter.org/content/content_view.asp?id=99440) (last visited Apr. 5, 2007).

3. See Top 40, WIKIPEDIA, [http://en.wikipedia.org/wiki/Top\\_40\\_\(radio\\_format\)](http://en.wikipedia.org/wiki/Top_40_(radio_format)) (last visited Apr. 5, 2007).

4. See [www.museum.tv/archives/etv/U/htmlU/unitedstatesc/unitedstatesc.htm](http://www.museum.tv/archives/etv/U/htmlU/unitedstatesc/unitedstatesc.htm) (last visited Apr. 5, 2007).

5. See [www.cedmagic.com/history/betamax-lv-1901.html](http://www.cedmagic.com/history/betamax-lv-1901.html) (last visited Apr. 5, 2007).

6. John Eggerton, *Who Cares About Ownership Rules?*, BROADCASTING & CABLE 3 (Mar. 12, 2007).

7. Prometheus Radio Project v. FCC, 373 F.3d 372, 398 (3d Cir. 2004), cert. denied,

545 U.S. 1123 (2005).

8. Despite the prohibition, numerous same-market newspaper-broadcast combinations exist today. When it adopted the rule in 1975, the Commission grandfathered combinations in many markets (as long as the ownership of the combination remained the same). In other instances, the FCC has granted permanent or temporary waivers of the newspaper-broadcast cross-ownership rule. Finally, certain newspaper-broadcast combinations exist under a policy that permits a broadcast station owner to acquire a newspaper in the same market and operate it until the end of the station's license renewal term, or for one year, whichever period is longer. 1975 Multiple Ownership Report, 50 FCC 2d at 1076 n.25 [hereinafter Footnote 25 policy].

9. *Id.*; 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report & Order & Notice of Proposed Rulemaking, 18 FCC Rcd 13,620, 13,747, ¶ 327 (2003) [hereinafter 2003 Report and Order].

10. Amendment of Sections 73.34, 73.240 & 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, & Television Broadcast Stations, Second Report & Order, 50 FCC 2d 1046, 1075, ¶ 102 (1975) [hereinafter 1975 Multiple Ownership Report].

11. *Id.* at 1075, ¶ 101.

12. *Id.* at 1046, 1074, 1078–81.

13. *Id.* at 1078, ¶ 109.

14. The FCC's rules required that absent a waiver, the grandfathered newspaper-broadcast combinations held by ABC in Fort Worth and Detroit be split upon the merger with Disney. Disney requested a permanent waiver of the newspaper-broadcast rule, but the FCC found that the newspaper-radio combinations had not been justified under existing criteria for such waivers and that this restricted, adjudicatory proceeding was not the appropriate forum in which to amend its waiver policies. Accordingly, the FCC granted Disney temporary twelve-month waivers of the newspaper-broadcast rule in Detroit and Fort Worth. Application of Capital Cities/ABC, Inc., Memorandum Op. & Order, 11 FCC Rcd 5841, 5888 (1996).

15. *Id.*

16. *Id.* at 5906 (separate statement of Chairman Hundt). See also *id.* at 5915–16 (separate statement of Commissioner Barrett) (“The fact that this rule is over twenty (20) years old provides an even more compelling justification for the Commission's initiation of a rulemaking proceeding to determine the

future applicability of this rule.”).

17. See Newspaper/Radio Cross-Ownership Waiver Policy Notice of Inquiry, 11 FCC Rcd 13,003.

18. 1998 Biennial Regulatory Review, Notice of Inquiry, 13 FCC Rcd 11,276 (1998).

19. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111–12 (1996).

20. 1998 Biennial Review, 13 FCC Rcd at 11,280, ¶ 10.

21. 1998 Biennial Regulatory Review, Biennial Review Report, 15 FCC Rcd 11,058 (2000), vacated on other grounds by Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1048, reh'g granted in part, 293 F.3d 537 (D.C. Cir. 2002).

22. *Id.* at 11,102, ¶ 83.

23. Cross-Ownership of Broadcast Stations & Newspapers, Order & Notice of Proposed Rulemaking, 16 FCC Rcd 17,283 (2001). In the interim, the FCC had concluded, in the space of just seven months, its 2000 Biennial Regulatory Review. The Commission's 2000 Biennial Regulatory Review, Report, 16 FCC Rcd 1207 (2001), however, was devoted largely to a recitation of the conclusions reached in the 1998 Biennial Review and a concurrent proceeding on television ownership matters and did not alter the conclusions reached in those proceedings. See *id.* at 1217, 1225–26.

24. 2003 Report and Order, *supra* note 9, at 14,013 (app. A) (listing commentators in response to 2001 Newspaper/Broadcast Cross-Ownership NPRM).

25. 2002 Biennial Regulatory Review, Notice of Proposed Rulemaking, 17 FCC Rcd 18,503 (2002).

26. Fox Television Stations, 280 F.3d at 1048 (remanding the FCC's national television station ownership rule and vacating its television-cable cross-ownership restriction); Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148, 159 (D.C. Cir. 2002) (remanding the local television ownership rule to the Commission for further consideration).

27. News Release, Fed. Communications Comm'n, FCC Sets Limits on Media Concentration; Unprecedented Public Record Results in Enforceable and Balanced Broadcast Ownership Rules, MB Docket Nos. 02-277, 01-235, 01-317, 00-244, 2003 FCC LEXIS 3121, at \*1 (2003) (FCC decision “represents the most comprehensive review of media ownership regulation in the agency's history”).

28. Prometheus Radio Project v. FCC, 373 F.3d 372, 386 (3d Cir. 2004), cert. denied, 545 U.S. 1123 (2005).

29. See, e.g., Thomas C. Spavins, Loretta

Denison, Scott Roberts, & Jane Frenette, *The Measurement of Local Television News and Public Affairs Programs*, MB Docket No. 02-277 (Sept. 2002), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-226838A12.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A12.pdf) (last visited Apr. 5, 2007) [hereinafter MOWG Spavins Study]; David Pritchard, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Election Campaign*, MB Docket No. 02-277 (Sept. 2002), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-226838A7.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A7.pdf).

30. 2003 Report and Order, *supra* note 9, at 13,747, ¶ 327.

31. *Id.* at 13,748, ¶ 330.

32. 47 C.F.R. § 73.3555(c).

33. *Prometheus*, 373 F.3d at 394.

34. *Id.* at 399–400. The court’s criticism focused on flaws in the Diversity Index (DI) used by the agency as support for the Cross-Media Limits (CMLs). The DI, which was loosely based on the Herfindahl-Hirschmann Index (HHI) used by the Department of Justice and Federal Trade Commission to measure competition, attempted to assess the diversity of viewpoints offered by local news and informational outlets. The FCC applied the DI to a range of sample markets in order to assess current levels of diversity and determine what types of combinations would pose an unacceptable diversity risk. The court stated that the FCC had not identified any consideration other than the DI as having influenced the formulation of the CMLs. Although the court noted that it did not object “in principle” to the FCC’s use of the DI “as a starting point” for assessing local diversity, it found that the DI employed “several irrational assumptions and inconsistencies.” Specifically, in the court’s opinion, the FCC gave too much weight to the Internet as a media outlet, irrationally assigned outlets of the same media type equal market shares, and inconsistently derived the CMLs from the DI results.

35. See Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111–12 (1996); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99–100 (2004) (amending Sections 202(c) and 202(h) of the Telecommunications Act of 1996).

36. See [www.fcc.gov/ownership/hearings.html](http://www.fcc.gov/ownership/hearings.html).

37. John Eggerton, *Martin Promises Localism Study Before Ownership Moves*, BROADCASTING & CABLE, Jan. 8, 2007.

38. See [www.fcc.gov/ownership/studies.html](http://www.fcc.gov/ownership/studies.html).

39. 2003 Report and Order, *supra* note 9, at 13,748, ¶ 330.

40. For example, a search for the phrase *technological revolution* in the Google news archive yielded 2,420 stories published between the release of *Prometheus* (June 24, 2004) and December 31, 2006. [http://news.google.com/archivesearch?q=%22technological+revolution%22&num=20&as\\_ldate=06/24/2004&as\\_hdate=12/31/2006&lr=lang\\_en&sa=N&lnav=m](http://news.google.com/archivesearch?q=%22technological+revolution%22&num=20&as_ldate=06/24/2004&as_hdate=12/31/2006&lr=lang_en&sa=N&lnav=m) (last visited Apr. 5, 2007).

41. 2003 Report and Order, *supra* note 9, at 13,623, ¶ 3.

42. *Id.*

43. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 415 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005).

44. See generally Howard Kurtz, *Tightened Belts Could Put Press in a Pinch*, WASH. POST, Oct. 23, 2006, at C1.

45. See Pew Internet & Am. Life Project, *Online News: For Many Broadband Users, the Internet Is a Primary News Source* (Mar. 22, 2006), available at [www.pewinternet.org/pdfs/PIP\\_News.and.Broadband.pdf](http://www.pewinternet.org/pdfs/PIP_News.and.Broadband.pdf).

46. 2003 Report and Order, *supra* note 9, at 13,665–67.

47. See Pew Internet & Am. Life Project, *TEENS AND TECHNOLOGY* 1, 4 (July 27, 2005), available at [www.pewinternet.org/pdfs/PIP\\_Teens\\_Tech\\_July2005web.pdf](http://www.pewinternet.org/pdfs/PIP_Teens_Tech_July2005web.pdf); see also Pew Internet & Am. Life Project, *Generations Online 3* (Dec. 2005), available at [www.pewinternet.org/pdfs/PIP\\_Generations\\_Memo.pdf](http://www.pewinternet.org/pdfs/PIP_Generations_Memo.pdf).

48. *Jorn Barger*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Jorn\\_Barger](http://en.wikipedia.org/wiki/Jorn_Barger) (last visited Apr. 5, 2007).

49. See *Blog*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Blog> (last visited Apr. 5, 2007).

50. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 469 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005) (Scirica, J., dissenting in part, concurring in part).

51. [www.pewinternet.org/trends/UsageOverTime.xls](http://www.pewinternet.org/trends/UsageOverTime.xls) (last visited Apr. 5, 2007).

52. Reply Comments of AFL-CIO, MB Docket Nos. 06-121, et al. 14 (Jan. 16, 2007).

53. Andy Sullivan, *Bloggers Gain Access to “Scooter” Libby Trial*, REUTERS, Jan. 12, 2007, [http://in.today.reuters.com/news/newsArticle.aspx?type=technologyNews&storyID=2007-01-12T090216Z\\_01\\_NOOTR\\_RTRJONC\\_0\\_India-283211-2.xml&archived=False](http://in.today.reuters.com/news/newsArticle.aspx?type=technologyNews&storyID=2007-01-12T090216Z_01_NOOTR_RTRJONC_0_India-283211-2.xml&archived=False); Liz Halloran, *Media Takes: A Dogged Blogger at the Libby Trial*, U.S. NEWS & WORLD REP., Feb. 13, 2007, available at [www.usnews.com/usnews/news/articles/070213/libby.htm](http://www.usnews.com/usnews/news/articles/070213/libby.htm); Joe Garofoli,

*Analysts Say Information Now Could Be Harder to Get*, S.F. CHRON., Mar. 7, 2007, at A10.

54. *Meet Your New Representative*, D.C. (updated), DCIST, [www.dcist.com/archives/2007/03/23/meet\\_your\\_new\\_r.php](http://www.dcist.com/archives/2007/03/23/meet_your_new_r.php) (last visited Apr. 5, 2007).

55. See <http://flickr.com/search/?q=news&m=tags> (last visited Apr. 5, 2007).

56. See [http://youtube.com/categories\\_portal?c=25&e=1](http://youtube.com/categories_portal?c=25&e=1) (last visited Apr. 5, 2007).

57. Lev Grossman, *Time Person of the Year: You*, TIME, Dec. 25, 2006, at 40.

58. 1975 Multiple Ownership Report, *supra* note 10, at 1078, ¶ 109.

59. *Id.* at 1078, ¶ 108.

60. This policy permits a broadcaster acquiring a local daily newspaper to own both properties until the station’s next renewal, or for one year, whichever period is longer. *Id.* at 1076 n.25 (statement of Commissioner Robinson, concurring in part, dissenting in part).

61. See, e.g., Comments of Media General, MB Docket Nos. 06-121, et al. 23–29 (Oct. 23, 2006) [hereinafter Media General Comments].

62. 1975 Multiple Ownership Report, *supra* note 10, at 1074, ¶ 99.

63. See, e.g. MOWG Spavins Study, *supra* note 29, at 1; Statement of Professor Jerry A. Hausman, Comments of Clear Channel Communications, Inc., MB Docket Nos. 06-121, et al., exhibit 2 (Oct. 23, 2006).

64. The Commission looks at two factors when judging localism: “the selection of programming responsive to local needs and interests, and local news quantity and quality.” 2003 Report and Order, *supra* note 9, at 13,644, ¶ 78.

65. 1975 Multiple Ownership Report, *supra* note 10, at app. C.

66. *Id.*

67. Media General Comments, *supra* note 61, at 23–29.

68. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 399 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005).

69. See, e.g., 2003 Report and Order, *supra* note 9, at 13,644–45, ¶¶ 77–78.

70. Comments of Newspaper Ass’n of Am., MB Docket Nos. 06-121 et al. 67–68 (Oct. 23, 2006) [hereinafter NAA Comments].

71. See, e.g., WFLS, [www.wfls.com/news](http://www.wfls.com/news) (last visited Apr. 1, 2007).

72. NAA Comments, *supra* note 70, at 68–69.

73. *Id.*

74. *Id.* at 69.

75. See Media General Comments, *supra* note 61, at 7–22; see also *id.* app. 4.

76. See *id.* app. 4A at 2–3. Professor Powell

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77. *See id.* at 9, app. 4A at 2; *see also id.* app. 4A, exhibits A–F.

78. *See id.* at 10.

79. *Id.*

80. *Id.*

81. Comments of Belo Corp., MB Docket Nos. 06-121, et al. 13 (Oct. 23, 2006) [hereinafter Belo Comments].

82. *Id.* at 13–15.

83. *See* Comments of Gannett Co., MB Docket Nos. 06-121 et al. 27 (Oct. 23, 2006) [hereinafter Gannett Comments].

84. *See id.* at 28.

85. Comments of Cox Enters., Inc., MB Docket Nos. 06-121 et al. 13–16 (Oct. 23, 2006) [hereinafter Cox Comments].

86. In March 2007, Tribune Company agreed to a sale to real estate magnate Sam Zell, who will pay \$34 per share for some 126 million shares and take the multimedia company private. Because none of the FCC "rights" to hold these combinations conveys to a new owner, the sale undoubtedly will create a new front in the battle over cross-ownership and face significant hurdles before regulatory approval. For information on the Footnote 25 policy, *see supra* note 8.

87. *See, e.g.,* [azcentral.com](http://azcentral.com), ARIZONA'S HOME PAGE, [www.azcentral.com/](http://www.azcentral.com/) (last visited Apr. 5, 2007); [coloradoan.com](http://coloradoan.com), BRINGING FORT COLLINS HOME, [www.coloradoan.com/apps/pbcs.dll/frontpage](http://www.coloradoan.com/apps/pbcs.dll/frontpage) (last visited Apr. 5, 2007); [HONOLULU ADVERTISER ONLINE](http://honoluluadvertiser.com), [www.honoluluadvertiser.com/apps/pbcs.dll/frontpage](http://www.honoluluadvertiser.com/apps/pbcs.dll/frontpage) (last visited Apr. 5, 2007); [STATESMAN J. ONLINE](http://statesmanjournal.com), [www.statesmanjournal.com/apps/pbcs.dll/frontpage](http://www.statesmanjournal.com/apps/pbcs.dll/frontpage) (last visited Apr. 5, 2007); [newsleader.com](http://newsleader.com), SERVING THE CTR. SHENENDOAH VALLEY, [www.newsleader.com/apps/pbcs.dll/frontpage](http://www.newsleader.com/apps/pbcs.dll/frontpage) (last visited Apr. 5, 2007); [SPRINGFIELD NEWS-LEADER ONLINE](http://springfieldnews-leader.com), [www.news-leader.com/apps/pbcs.dll/frontpage](http://www.news-leader.com/apps/pbcs.dll/frontpage) (last visited Apr. 5, 2007). For additional links to Gannett newspaper websites offering unique local content, community forums, user commentary, and other hyper-local features, *see* Gannett Newspapers on the Web, [www.gannett.com/web/newspapers.htm](http://www.gannett.com/web/newspapers.htm) (last visited Apr. 5, 2007).

88. *See* Comments of the Communications Workers of Am., et al., MB Docket Nos. 06-121, et al. 38–46 (Oct. 23, 2006); Comments of Consumers Union, et al., MB Docket Nos. 06-121 et al. 17 (Oct. 23, 2006).

89. *See* Belo Comments, *supra* note 81, at 18; Block Communications, Inc., Comments, MB Docket Nos. 06-121, et al. 2–4, 7–8 (Oct. 23, 2006); Cascade Broadcasting Group, L.L.C., Comments, MB Docket Nos. 06-121, et al. 1–4 (Oct. 23, 2006); CBS Comments, MB Docket Nos. 06-121, et al. 11 (Oct. 23, 2006); Cox Comments, *supra* note 85, at 10–12; Fox Comments, MB Docket Nos. 06-121, et al. 12–13 (Oct. 23, 2006) [hereinafter Fox Comments]; Freedom of Expression Comments, MB Docket Nos. 06-121, et al. 10, 22 (Oct. 23, 2006); Gannett Comments, *supra* note 83, at 21–25; Media General Comments, *supra* note 61, at 45, 63; Granite Broadcasting Corp. Comments, MB Docket Nos. 06-121, et al. 3–6 (Oct. 23, 2006); Gray Comments, MB Docket Nos. 06-121, et al. 10–15 (Oct. 23, 2006) [hereinafter Gray Comments]; Hoak Media LLC Comments, MB Docket Nos. 06-121, et al. 4–6 (Oct. 23, 2006); KMVD Licensee Co., LLC, Comments, MB Docket Nos. 06-121, et al. 6 (Oct. 23, 2006); Morris Comments, MB Docket Nos. 06-121, et al. 10–11 (Oct. 23, 2006) [hereinafter Morris Comments]; NAB Comments, MB Docket Nos. 06-121, et al. 23–34, 94–98 (Oct. 23, 2006) [hereinafter NAB Comments]; NBC Comments, MB Docket Nos. 06-121, et al. 7–12 (Oct. 23, 2006); Nexstar Comments, MB Docket Nos. 06-121, et al. 6–10 (Oct. 23, 2006); Shamrock Comments, MB Docket Nos. 06-121, et al. 6–7 (Oct. 23, 2006); Smaller Market Television Stations Comments, MB Docket Nos. 06-121, et al. 6–10 (Oct. 23, 2006); Tribune Comments, MB Docket Nos. 06-121 et al. 33–42, 46–52, 55–61, 64–69, 72–77 (Oct. 23, 2006) [hereinafter Tribune Comments].

90. *See* Fox Comments, *supra* note 89, at 5–6; Gray Comments, *supra* note 89, at 8–9; Hearst-Argyle Comments at 7–8; Morris Comments, *supra* note 89, at 12; NAB Comments, *supra* note 89, at 49–54; Progress and Freedom Foundation Comments at 36–40.

91. Rick Edmonds, Project for Excellence in Journalism & Poynter Inst., *Newspapers, in THE STATE OF THE NEWS MEDIA: AN ANNUAL REPORT ON AMERICAN JOURNALISM (2007)*, available at [www.stateofthenewsmedia.com/2007/printable\\_newspapers\\_chapter.asp?media=1&cat=1](http://www.stateofthenewsmedia.com/2007/printable_newspapers_chapter.asp?media=1&cat=1).

92. Michelle Greppi, *Zell Buys Tribune, Plans to Sell Cubs*, [TVWEEK.COM](http://TVWEEK.COM), Apr. 2, 2007, [www.tvweek.com/news.cms?newsId=11813](http://www.tvweek.com/news.cms?newsId=11813).

93. *Compare* N.Y. Times Co., 2002 Annual Report F-51 (2003) (reporting

fourth-quarter 2002 share price of \$50.11), *with* N.Y. Times Co., 2005 Annual Report F-61 (2006) (reporting fourth-quarter 2005 share price of \$30.17).

94. Edmonds, *supra* note 91.

95. Tribune Comments, *supra* note 89, at 36–56 (citing Nielsen Station Indexes). In the three cities, the only television broadcast stations to experience share growth were the Spanish-language stations located in New York and Los Angeles, but the growth was insufficient to account for the other stations' decreased audience.

96. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 415 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005).

97. NAA Comments, *supra* note 70, at 67.

98. *Id.* at 68.

99. Media General Comments, *supra* note 61, at 46.

100. *Id.* at 47.

101. *Id.*

102. Indeed, recent statements by Commissioner McDowell seem to suggest that he feels the benefits of existing newspaper-broadcast combinations "favor the status quo," pending the Commission's next attempt to modify or repeal the Newspaper Rule. *See* Corey Boles, *Tribune Sale Barriers Could Be Resolved*, *FCC Official Says*, [MARKETWATCH.COM](http://MARKETWATCH.COM), Apr. 5, 2007, [www.marketwatch.com/news/story/tribune-sale-barriers-could-resolved/story.aspx?guid=%7B601530EE-393F-4C8B-B831-D900172E95A2%7D](http://www.marketwatch.com/news/story/tribune-sale-barriers-could-resolved/story.aspx?guid=%7B601530EE-393F-4C8B-B831-D900172E95A2%7D).

103. *Prometheus*, 373 F.3d at 401–02.

104. 395 U.S. 367 (1969).

105. *Id.* at 390.

106. *Id.* at 388.

107. 436 U.S. 775 (1978).

108. *Id.* at 799.

109. *See, e.g.,* *Ruggiero v. FCC*, 278 F.3d 1323, 1325 (D.C. Cir. 2002) ("very little spectrum remains available for new full-powered stations"), *rev'd en banc*, 317 F.3d 239 (D.C. Cir. 2003).

110. *See* *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 376 n.11 (1984) (reserving its right to reconsider the continued validity of the scarcity doctrine in light of future factual findings by the Commission).

111. Duncan Graham-Rowe, *Terahertz Filter Could Harness Unused Spectrum*, [NEWSSCIENTIST.COM](http://NEWSSCIENTIST.COM), Mar. 29, 2007, [www.newsscientist.com/article/dn11492-terahertz-filter-could-harness-unused-spectrum-.html](http://www.newsscientist.com/article/dn11492-terahertz-filter-could-harness-unused-spectrum-.html).

112. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 391 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005); *see also* Gannett Comments, *supra* note 83, at 14–15.