

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
2014 Quadrennial Regulatory Review -- Review)	MB Docket No. 14-50
of the Commission’s Broadcast Ownership Rules)	
and Other Rules Adopted Pursuant to Section 202)	
of the Telecommunications Act of 1996)	
)	
2010 Quadrennial Regulatory Review -- Review of)	MB Docket No. 09-182
the Commission’s Broadcast Ownership Rules and)	
Other Rules Adopted Pursuant to Section 202 of)	
the Telecommunications Act of 1996)	
)	
Promoting Diversification of Ownership)	MB Docket No. 07-294
In the Broadcasting Services)	
)	
Rules and Policies Concerning Attribution of Joint)	MB Docket No. 04-256
Sales Agreements in Local Television Markets)	

**COMMENTS OF THE NEWS MEDIA ALLIANCE
IN SUPPORT OF NAB PETITION FOR RECONSIDERATION**

The News Media Alliance (“NMA”) supports the National Association of Broadcaster’s Petition for Reconsideration of the Federal Communications Commission’s 2016 Order resolving the 2010 and 2014 quadrennial reviews of the broadcast ownership rules (“2016 Ownership Order”).¹ In particular, NMA urges the Commission to reconsider its decision to maintain the Newspaper/Broadcast Cross-Ownership Rule (“NBCO rule” or “cross-ownership ban”).

¹ Petition for Reconsideration of National Association of Broadcasters, MB Docket Nos. 14-50, 09-182, 07-294, 04-256 (Dec. 1, 2016).

The FCC promulgated the cross-ownership ban more than 40 years ago, in 1975. Back then, local newspapers and a few VHF over-the-air broadcasters were consumers' only choice for local news and information. Cable, satellite and the Internet did not exist.

Times have, to state the obvious, changed. Today's media markets are literally flooded with information from digital platforms, multichannel video programming distributors ("MVPDs") and hundreds of MVPD channels, digital publishers, and more broadcasters than existed in 1975. Newspapers face stiff competition for readers' attention and advertisers' funding from every side -- they must compete with cable television networks and online-only news sites to produce the best content, and must compete with social media companies and search engines for advertising dollars. In the remarkable seven years it took the FCC to conduct its 2014 quadrennial review, the Commission compiled a record clearly demonstrating that the cross-ownership ban is a musty anachronism that undermines the very values for which it was promulgated. Yet, inexplicably, the Commission concluded its review in August 2016 by deciding to retain the rule in essentially the same form in which it was adopted in 1975.² This action, in the face of such overwhelming evidence to the contrary, is the very definition of an arbitrary and capricious act that is invalid under the Administrative Procedure Act. Given the blatant restrictions the cross-ownership ban places on free expression, this decision violates the First Amendment as well.

The NMA urges the Commission to reconsider the 2016 Ownership Order and eliminate this analog-era rule once and for all. Eliminating the cross-ownership ban will strengthen the

² *2014 Quadrennial Regulatory Review*, Second Report & Order, 31 FCC Rcd 9864 (2016) ("2016 Ownership Order").

local journalism upon which the media ecosystem relies, creating better content for all Americans.

I. The Commission’s Decision to Retain the Newspaper/Broadcast Cross-Ownership Rule Is Arbitrary and Capricious.

Continuing the cross-ownership ban is arbitrary and capricious under the Administrative Procedure Act. An agency’s regulations are arbitrary and capricious if the agency “offered an explanation for its decision that runs counter to the evidence before the agency[.]”³ Section 202(h) of the Telecommunications Act of 1996 requires the Commission to reevaluate its media ownership rules every four years and to repeal or modify those no longer necessary to the public interest.⁴ Understanding how quickly the media landscape could change, Congress set up a system to force the Commission to continually re-examine these regulations. Yet the 2016 Ownership Order does not show this necessary re-examination; instead, it shows the Commission skating over important record evidence in order to maintain a status quo that does not serve the public interest.

The courts have found the Commission’s failure to searchingly evaluate its media ownership rules arbitrary and capricious before. In *Fox Television Stations, Inc. v. FCC*, the court held the FCC’s decision to retain both the Cable/Broadcast Cross-Ownership rule (“CBCO rule”) and the National Television Station Ownership rule arbitrary and capricious.⁵ The court’s decision regarding the CBCO rule, which the Commission had originally justified on localism, diversity, and competition grounds as it had once justified the NBCO rule, is particularly relevant here. Holding that the FCC’s decision to retain the CBCO rule was arbitrary and capricious, the

³ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

⁴ Section 202(h) of the Telecommunications Act of 1996, 110 Stat. 111-112.

⁵ 280 F.3d 1027, 1033 (D.C. Cir. 2002).

court reasoned that “[a] decision is arbitrary and capricious if the agency fails to consider an important aspect of the problem.”⁶ The court held that the FCC’s competition concerns were unjustified, finding “[t]he Commission [did] not show[] a substantial enough probability of discrimination to deem reasonable a prophylactic rule as broad as the cross-ownership ban, especially in light of the already extant conduct rules.”⁷ The FCC failed to justify the rule as necessary to safeguard competition, because it failed to consider competition from DBS, justify its change from its previous position that the rule should be repealed, and put forward any adequate reason for believing the rule remains necessary in the public interest. The court also held that the FCC’s argument that the rule furthered diversity was “woefully inadequate,” because it failed to consider the increased number of broadcast stations now in operation, and failed to reconcile the decision with its previous, contrary position.⁸

The Commission has committed many of the same errors in maintaining the NBCO rule. The NBCO rule was conceived of to serve the goals of competition, diversity, and localism in media services. However, the Commission already determined that the rule does not serve two of these three goals in its 2002 biennial review. Of competition, the Commission stated, “[a] newspaper-broadcast combination . . . cannot adversely affect competition in any market. Accordingly, we cannot conclude that the current newspaper-broadcast cross-ownership rule is necessary to promote competition.”⁹ Of localism, the Commission went even further, finding that “[i]n light of the overwhelming evidence that combinations can promote the public interest by producing more and better overall local news coverage, we conclude that the current rule is

⁶ *Id.* at 1051.

⁷ *Id.*

⁸ *Id.* at 1052.

⁹ 2002 *Biennial Review Order*, 18 FCC Rcd 13620, 13752 (2003).

not necessary to promote our localism goal and that it, in fact, is likely to hinder its attainment.”¹⁰ It is important to note that these determinations were made over a decade ago; since then, the NBCO rule has been standing on one leg: viewpoint diversity. With only viewpoint diversity left to rely on, the 2016 Ownership Order is also “woefully inadequate.” Not only does the Commission not sufficiently justify maintaining a rule that it acknowledges does not serve two of its original goals, but also its finding that the cross-ownership ban promotes viewpoint diversity ignores the realities of the modern media marketplace.

II. Cross-Ownership Leads to Substantial Public Benefits

At a time when the reliability and accuracy of the media is more important than ever, the Commission should focus on proven ways to support the independent news media and to make sure that Americans receive the type of targeted, informative content that they need to participate in society. To do this, the Commission should support policies that enhance localism, such as removing the cross-ownership ban that undermines it.

Localism, as discussed above, is one of the cornerstone values underlying the public-interest standard that guides the Commission’s regulatory efforts.¹¹ It refers to the value of encouraging broadcasters to air programming that responds to the interests of their communities of license. Newspapers play a key role in producing this critical content. Although there are a growing number of aggregators, blogs, and other websites that summarize content, newspapers remain the primary *original* sources of local news. Yet local newspapers -- the ones paying to produce original content -- have to work with constrained budgets and diminished staff but cannot draw upon local investments to support this journalism.

¹⁰ *Id.* at 13759-60.

¹¹ The Commission has multiple rules and policies intended to foster localism, *see, e.g.*, *Broadcast Localism*, MB Docket No. 04-233, FCC 07-218 (Jan. 24, 2008).

Newspapers need investment to produce the credible content their communities deserve. And yet newspapers are the only media industry barred by federal law from receiving certain types of investment. The government should not prohibit a company from investing in newspapers just because they also have broadcast interests -- especially when companies may share the same core journalistic values as newspapers.¹² Lifting the cross-ownership ban would permit newspapers to engage in the full scope of investment possibilities and would lead to more and better content for all Americans.

III. In the Face of These Benefits, The Commission Has Not Adequately Justified Continuing the Cross-Ownership Ban

The Commission's only reason for retaining the cross-ownership rule is "viewpoint diversity." This reasoning, while well-intentioned, is misplaced because it assumes that cross-ownership results in a single viewpoint. As the record clearly illustrates, this is simply not true. Not only does the Commission's reasoning misunderstand the organization of commonly-owned newspapers and broadcast stations,¹³ but it shows a failure to consider the broad array of viewpoint diversity demonstrated by cable and online media.

The Commission's conclusion that only print newspapers and broadcast stations drive viewpoint diversity, as opposed to the vast array of digital voices in today's media marketplace, inappropriately assumes that the only way a viewpoint can be expressed is in the original reporting of a story. This assumption requires a logical backbend. In the 2016 Ownership Order

¹² Indeed, such investments have shown to improve local journalism. *See* Comments of Newspaper Association of America, MB Docket Nos. 14-50, 09-182, 07-294 (Aug. 6, 2014) at 2-10 (demonstrating how cross-ownership has led to stronger local journalism across the country, from Atlanta to South Bend to Spokane).

¹³ *See id.* at 15 ("Although commonly-owned newspapers and broadcast stations share administrative and newsgathering resources, they each have independent editors and news directors who control the tone and direction of news content.").

the Commission acknowledges the vast proliferation of online sources, but finds that “newspapers and broadcasters [are] the primary producers of original reporting centered on local news.”¹⁴ NMA heartily agrees! As discussed above, newspapers play a key role in serving local communities. However, the Commission assumes that because of the key role newspapers and broadcasters play in creating content, no other media source that then uses that content expresses a diverse view. This is so far from reality that one wonders whether the drafters of the order have ever accessed the Internet. While local newspapers produce content the rest of the media ecosystem relies upon, they do not prevent other sources -- blogs, cable news networks, prominent individuals on social media -- from taking that content and imposing their own viewpoint upon it. In fact, entire digital platforms exist for precisely that purpose. It is typical to see online news or cable news sources of different ideological persuasions interpret the same story -- originally based on a local report -- in distinctly different ways. According to the Commission, the fact that “independent online sources currently do not provide a substitute for the original reporting by professional journalists associated with traditional local media” means that these online sources express no viewpoint at all. However, it is the very fact that they do so that drives consumers to them: according to the Pew Research Center, 38 percent of Americans got their news from digital media platforms in 2016, and the majority get news from social media.¹⁵

Following the Commission’s logic, viewpoint diversity will only exist when different types of media perform the exact same local reporting function as local newspapers and broadcasters to the exact same extent. But this will not happen because, as discussed above, this

¹⁴ 2016 Ownership Order at 9921.

¹⁵ Krisine Lu and Jesse Holcomb, *Digital News Audience: Fact Sheet*, Pew Research Center (June 15, 2016), <http://www.journalism.org/2016/06/15/digital-news-audience-fact-sheet/>.

is not how the media ecosystem works. Newspapers and broadcasters continue to be the most trusted players in local news. Cable and digital news continues to flourish because it can rely on those local reports and use them to shape their own, viewpoint-diverse content. But if newspapers continue to be hampered from freely accepting investments, they may not be able to continue playing this key localism role. The Commission must realize that the viewpoint diversity it seeks to protect rests upon the backbone of newspapers, and it must eliminate the cross-ownership ban to ensure that backbone is not compromised.

IV. Conclusion

For the foregoing reasons, the Commission should grant the National Association of Broadcaster's petition for reconsideration.

Respectfully submitted,



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