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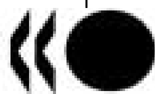

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DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
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ROUNDTABLE DISCUSSION ON MEDIA MERGERS

-- Note by the United States --

This note is submitted by the United States Delegation to the Competition Committee FOR DISCUSSION under item XI at its meeting to be held on 14-15 May 2003.

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MEDIA MERGERS ROUNDTABLE

1. Under the U.S. antitrust laws and the enforcement policy of the U.S. antitrust agencies, mergers in the media sector are, with one exception discussed below, analyzed in the same manner as other mergers. Thus, there is no special approach to preserving competition in the review of media mergers. This paper will first discuss the handling of market definition issues in recent media merger cases. It then reviews the treatment of plurality and diversity matters by the sectoral telecommunications regulator in the United States, the Federal Communications Commission. It concludes with a brief description of the Newspaper Preservation Act.

1. Market Definition

1.1 Echostar/DirecTV

2. The U.S. Department of Justice recently considered the issue of market definition in media markets during its investigation of the proposed merger of the Echostar and DirecTV direct broadcast satellite services. On October 28, 2001, General Motors Corp. agreed to sell Hughes Electronics Corporation, the owner of DirecTV, to Echostar Communications Corp. for approximately $26 billion in cash and stock. DirecTV and Echostar are essentially the only two direct broadcast satellite (ADBS@) distributors of multichannel video programming to consumers in the United States. DirecTV has more than 10.9 million subscribers and Echostar has more than 7.5 million subscribers. In this matter, the Department determined that the relevant product market was multichannel video programming distribution ("MVPD"), sometimes referred to as "pay television" service. It includes services provided by landline cable systems as well as satellite delivered services. The Department determined that the relevant geographic markets in which to examine the transaction's competitive effects were local areas.

3. In large portions of the United States accounting for millions of households, DirecTV and Echostar are the only two options for Apay television@ service. The Department determined that in these areas, this merger would have created a monopoly. For most of the rest of the United States (all but around 5% of households), DirecTV, Echostar, and the local landline cable company are the only three options for "pay television" service. In these areas, this merger would have reduced the number of market participants from 3 to 2 and would have created a "pay television" duopoly. Because the Department believed that the merger was likely to significantly reduce competition and harm consumers, it filed suit in federal court on October 31, 2002, to block the merger. The Federal Communications Commission also indicated its opposition to the merger based on its evaluation of the public interest provision of the Communications Act, which includes, among other things, promotion of competition and diversity among media voices. Faced with these objections, the parties agreed to abandon the proposed deal on December 10.

4. One key issue in this matter involved the scope of the product market. Among other things, the Department had to consider whether free, over-the-air broadcast television was in the same product market as the "pay television" service provided by the merging satellite broadcasters and cable providers. In examining this issue, the Department applied the test delineated in the Horizontal Merger Guidelines issued by the Department and Federal Trade Commission in 1992: would a hypothetical monopolist over Apay television@ (cable and satellite) be able to profitably impose at least a small but significant increase in price? In answering this question, the Department attempted to ascertain the degree of substitutability between "pay television" and "free television" by examining all the available evidence, including the characteristics of the products in question and various econometric data.

5. Whereas free over-the-air television consists of a handful of channels, typically fewer than 10, cable and satellite Apay television@ services generally provide access to at least dozens and more frequently, hundreds of channels. Moreover, standard over-the-air broadcast television does not include the variety of programming services that are available to Apay television@ subscribers: it does not provide access to popular sports, news, and entertainment services such as ESPN, CNN, and TNT; it does not permit access to premium movie services such as HBO or Showtime; and it does not provide access to advanced features such as pay-per-view events and movies or interactive channels. Accordingly, even though most U.S. consumers can receive over-the-air stations for free, most are willing to pay a significant sum--several hundred dollars a year--for Apay television@ service. Indeed, over the past several years, despite the fact that prices for Apay television@ service, particularly cable, have increased significantly, the percentage of households subscribing to such service has actually also increased. The FCC reported that as of June 2001, over 85 million U.S. households (more than 80% of total households) subscribed to a Apay television@ service.

6. Thus, the Department noted that most consumers do not consider broadcast television an acceptable substitute for cable and DBS services. Moreover, the Department's econometric estimation of demand elasticities, together with an assessment of profit margins, indicated that a hypothetical monopolist over "pay television" would indeed be able to profitably raise prices by significant amounts. The fact that free over-the-air television was unlikely to constrain anticompetitive conduct by the merging firms was a significant factor in the Department=s enforcement decision to challenge the proposed transaction.

7. With regard to geographic market, it was self-evident that consumers purchasing Apay television@ services can only select from among those companies that can offer such services directly to the consumer=s home. The geographic markets relevant for competitive analysis were thus delineated around groups of customers who face similar choices among pay television services. Although both DirecTV and Echostar are nationwide services that can reach any customer in the continental United States with an unobstructed view of the satellite, cable system operators in the United States are not nationwide and typically operate on a community-by-community basis. They generally must obtain a cable franchise from local, municipal, or state authorities in order to construct and operate a cable system in a specific area and, in fact, build wires out to the homes in that area. Consumers cannot purchase services from a cable firm operating outside their area because that firm does not have the authority to run wires to the consumer=s home and, indeed, has not run such wires. Thus, although the set of providers able to offer service to individual consumers= residences generally is the same within each local community, it differs from one local community to another. Accordingly, in DirecTV-Echostar, the Department delineated local markets by aggregating customers in a county or other jurisdiction served by the same cable system, or by no cable system, who essentially all faced the same competitive choices; the geographic markets, therefore consisted of hundreds of local markets covering the United States.

1.2 Univision/Hispanic Broadcasting Corporation

8. The Department's investigation of Univision Communications Inc.'s ("Univision") proposed acquisition of Hispanic Broadcasting Corporation ("HBC") also raised significant media market definition issues. The transaction, announced in June 2002, would have resulted in Univision, the largest Spanish-language television broadcaster in the United States (1) owning all of HBC, one of the largest Spanish-language radio broadcasters in the United States, and (2) owning a 30% equity stake and possessing significant director and shareholder control rights in Entravision Communications Corporation ("Entravision"), a Spanish-language media company that is HBC's principal Spanish-language radio competitor in numerous geographic markets.

9. On March 26, 2003, the Department filed a complaint in United States District Court alleging that, due to Univision's partial ownership and governance rights in Entravision, the proposed acquisition of

HBC would lessen competition substantially in the provision of Spanish-language radio advertising time to a significant number of advertisers in several geographic areas of the United States. On the same date, the Department filed a proposed consent decree which would require Univision to reduce its equity interest in Entravision to fifteen percent of outstanding shares within three years from the filing of the proposed decree and to ten percent within six years. The decree also would require Univision to relinquish its right to place directors on Entravision's Board, eliminate certain rights Univision has to veto important Entravision actions, and restrain certain conduct that would interfere with the governance of Entravision's radio business. The United States District Court will decide whether to enter the proposed decree as being in the public interest after the conclusion of a statutory public notice and comment period.

10. The Department's finding of likely anticompetitive effects depended on the analysis of the relevant product and geographic markets. Market definition depends on options available to customers – in this case, the advertisers who purchase advertising time. (This contrasts with the Direct TV/Echostar investigation, in which the Department focused on the end-user consumers that purchased satellite subscription TV services.)

11. In *Univision*, the Department found that Spanish-language radio stations charged different advertisers different prices, based on individual negotiations that reflected the circumstances of the negotiations and the preferences of the advertisers. Thus, the Department utilized a price discrimination analysis in defining the relevant product market. Although radio stations typically publish "rate cards" setting uniform prices for advertising time, these published rates are rarely, if ever, the final price. Rather, radio advertising rates are typically the result of individual negotiations between the radio station and the advertiser, and the resulting price for advertising time reflects these circumstances.

12. Accordingly, in the *Univision* investigation, the Department focused its inquiry on how the transaction would impact the many different advertisers that purchased time on HBC and Entravision radio stations in the numerous relevant geographic markets where the two companies competed against each other. In many of these markets, HBC and Entravision were the only significant radio stations offering Spanish-language programming.

13. The Department found a significant number of advertisers in the overlap geographic markets that consider Spanish-language radio to be particularly effective in reaching desired customers who speak Spanish and who listen predominately or exclusively to Spanish-language radio. Such advertisers view Spanish-language radio, either alone or in conjunction with other media, to be the most effective way to reach their target audience and do not consider other media, including non-Spanish-language radio, to be a reasonable substitute. These advertisers would not switch to other media, including radio that is not broadcast in Spanish, if faced with a small but significant increase in the price of advertising time on Spanish-language radio or a reduction in the value of the services provided.

14. Due to the nature of individualized negotiations between radio stations and advertisers discussed above, Spanish-language radio stations are likely able to identify advertisers that place a high value on utilizing Spanish-language radio to reach their targeted audience. Such advertisers would not find it economical to switch, or credibly threaten to switch, to other media to avoid a post-merger price increase. Thus, Spanish-language radio stations would be able to profitably impose a price increase on these advertisers. This is true even though a general increase in price to *all* advertisers might cause such significant substitution that the price increase would not be profitable. The Department found that in certain geographic markets, there are a significant number of advertisers that consider Spanish-language radio advertising to be a particularly effective medium, and the provision of advertising time on Spanish-language radio stations to these advertisers is a relevant product market for purposes of analyzing the antitrust issues raised by the transaction.

15. With regard to geographic markets, the Department concluded, as it has done in numerous radio merger investigations, that the relevant geographic markets consist of local areas traditionally referred to as "Metro Survey Areas" ("MSAs").[1] In this case, the Department examined six geographic markets[2] where Entravision and HBC each operated stations. Geographic markets in radio cases are local in nature (rather than national or regional) due to the fact that advertising placed by local and national advertisers on radio stations in each geographic market is aimed at reaching listening audiences within that geographic market, and radio stations outside that market do not provide effective access to these audiences. If there were a small but significant increase in the price of advertising time on Spanish-language radio stations within, for example, Phoenix, then advertisers who want to reach Phoenix customers would not switch enough purchases of advertising time to stations outside Phoenix and/or otherwise reduce their purchases to defeat the price increase. In other words, advertisers do not substitute Los Angeles radio stations for Phoenix stations to reach Phoenix customers.

1.3 AOL/Time Warner

16. Whether free-to-air terrestrial television, free newspapers, or free Internet access services are in the same markets as their paid-for-counterparts must be decided on a case-by-case basis. Under the antitrust laws, the appropriate questions are, first, what are the characteristics of each of the services at issue and, second, whether the "free" services exert any price-constraining influence on the "paid" services. This analysis enables the agencies to evaluate whether a merger of media services is likely to have any economically significant impact on consumers by permitting the merging parties to achieve a small but significant non-transitory increase in price. Rapid rates of innovation and increased supply-side substitution require a careful examination, or re-examination, of issues of product market definition in each new case.

17. The investigation of the proposed acquisition by America Online, Inc., ("AOL") of Time Warner Inc. raised significant media market definition issues for the Federal Trade Commission. The transaction raised competitive issues in three relevant product markets: (1) broadband Internet access; (2) residential broadband Internet transport, or last mile access; and (3) interactive television ("ITV") services. The Federal Trade Commission accepted a consent order, entered into by the parties, to remedy these alleged anticompetitive issues.

18. The first relevant product market on which the Commission focused was the market for high speed or "broadband" Internet access in individual geographic areas served by Time Warner's cable systems. These geographic areas could be as small as a community or as large as an MSA. AOL was and is the largest narrowband Internet Services Provider ("ISP") in the United States. It was positioned to become a significant broadband ISP competitor throughout the country because of its extremely large customer base. Time Warner provided broadband Internet access exclusively through its partially-owned Road Runner subsidiary. AOL and Road Runner were two of the most significant broadband ISP competitors in Time Warner cable areas. In its complaint, the Commission alleged that the market for broadband Internet access in Time Warner cable areas would have become highly concentrated post-merger, with the merged firm able to unilaterally exercise market power in Time Warner cable areas and

[1] An MSA is a geographical unit for which Arbitron, a company that surveys radio listeners, furnishes radio stations, advertisers, and advertising agencies in a particular area with data to aid in evaluating radio audience size composition.

[2] The six markets were: Dallas, Texas; El Paso, Texas; Las Vegas, Nevada; McAllen-Brownsville-Harlingen, Texas; Phoenix, Arizona; and San Jose, California. Each of these markets is a relevant geographic market for the purpose of analyzing the antitrust issues raised by the merger.

throughout the United States. The complaint also specified that new entry was unlikely to have been timely, likely, or sufficient to prevent the combined firm from exercising market power.

19. In the market for broadband Internet transport services, the Commission's complaint alleged that that cable television wires or lines and digital subscriber lines ("DSL") offered in areas nearby telephone companies' central office locations were the two principal means of providing last mile access for broadband ISPs to customers. The Commission explained that satellite and fixed wireless technologies also provided last mile access, but that consumers did not view them as viable alternatives for DSL or cable broadband access. Prior to the merger, AOL's principal means of providing broadband access to its subscribers had been through DSL, and each broadband subscriber it obtained represented a lost revenue opportunity for cable broadband providers. The Commission alleged that the merger would have reduced AOL's incentive to promote and market broadband access through DSL in Time Warner cable areas, which in turn would have adversely affected DSL rollout in those areas and nationally, thereby increasing the merged firm's ability to exercise unilateral market power.

20. Finally, at the time of the review, ITV was a nascent technology that combined television programming with Internet functionality. In its complaint, the Commission noted that cable television lines have distinct competitive advantages over DSL in providing ITV services to broadband customers and that local cable companies will play the key role in enabling the delivery of ITV services. During 2000, AOL launched AOL TV, a first generation ITV service, which was well-positioned to become the leading ITV provider. As described in the Commission's "Analysis of Proposed Consent Order to Aid Public Comment," the Commission found that the merger could have enabled AOL to exercise unilateral market power in the market for ITV services in Time Warner cable areas, which also could have affected the ability of ITV providers to compete nationally.

2. Plurality and Diversity Rules in the Telecommunications Sector

21. The Federal Communications Commission has long sought to regulate media ownership and cross-ownership without infringing on the First Amendment rights (including freedom of expression) of broadcasters and consumers. The FCC has stated three main goals that guide regulation of the media industries: the promotion of diversity, competition, and localism in media markets. The FCC's radio and television ownership rules and broadcast/newspaper and radio/television cross-ownership rules evolved over the last sixty years independent of each other. Until recently, courts have generally approved the ownership and cross-ownership rules during most of this evolutionary period.

22. The Telecommunications Act of 1996 significantly changed the media ownership landscape. The Act requires the FCC to conduct a biennial review of its broadcast ownership rules to determine the continued necessity of such rules in the public interest. Moreover, the Act repealed the prohibition on common ownership of cable and telephone systems, and overrode the regulatory limits on cable/broadcast network cross-ownership.[3] Since the passage of the Act, the DC Circuit Court of Appeals has vacated the FCC's television station/cable system cross-ownership rule. This rule prohibited common ownership of a television station and a cable system if the station's predicted Grade B signal strength overlapped the cable system's service area.

23. The changing nature of the media markets, court actions, and the changed statutory requirements have combined to prompt the FCC to re-evaluate its ownership rules. Currently, the FCC is evaluating

3 Federal Communications Commission, *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act ("2002 Biennial Regulatory Review")*, Washington, D.C., September 23, 2002, page 5.

radio/television cross-ownership and newspaper radio/television cross-ownership rules as well as other rules related to broadcast ownership.[4]

2.1 Radio/television cross-ownership rule

24. The radio/TV cross-ownership rule limits the number of commercial radio and television stations one entity may own in a given local market. The rule allows common ownership of at least one television station and one radio station in a geographic market represented as a Designated Market Area (DMA). In larger markets, a single entity may own additional radio stations depending on the number of other "voices" present in the market. More specifically, the rule allows a company to own one or two TV stations (provided it is permitted under the TV duopoly rule) and up to six radio stations in any single geographic market where at least twenty independent "voices" would remain post merger; two TV stations and up to four radio stations in a market where at least ten independent "voices" would remain post-merger; and one radio station and one TV station regardless of the number of independent "voices" in the market, post-merger. If permitted under the local radio ownership rules, where an entity may own two commercial TV stations and six commercial radio stations, it may own one commercial TV station and seven commercial radio stations. For the radio cross-ownership rule, "voices" include independently owned and operated commercial and non-commercial broadcast TV and radio stations, independently owned daily newspapers of a certain size measured in terms of circulation, and cable systems within the DMA (provided that all cable systems within the DMA are counted as a single voice).[5]

25. When the radio/television cross-ownership rule was first adopted in 1970, the FCC stated that the purpose of the rule was to promote diversity and foster competition in local media markets. Diversity, also characterized as competition in the marketplace of ideas, is the cornerstone of the FCC's media ownership policy related to local media markets. The presence of independent voices in the market, it is thought, ensures viewpoint diversity[6] so that the public has access to a wide range of diverse and competing opinions and interpretations. Unlike the competition for goods and services, competition in the marketplace of ideas does not have a set measure of output and performance. In the absence of such measures, the FCC has relied upon diversity in ownership as a proxy for, or means of achieving, diversity of viewpoints.

26. While the media ownership rules, including the radio/TV cross-ownership rules, primarily aim to preserve viewpoint diversity, the FCC also sought to foster economic competition in the relevant local product and geographic markets. There may be potential benefits from relaxing the limit on radio/TV cross-ownership, *e.g.*, in terms of fostering innovative broadcasting based on new types of programming and new broadcast-based technologies and services. The FCC is currently reviewing the extent of such benefits as well as other factors in its biennial broadcast ownership review.[7]

27. The FCC's third main goal in its broadcast ownership policy is to foster localism. In the past the FCC has promoted localism primarily by allocating licenses locally (*i.e.*, within small geographical areas) and by requiring the licensee to present local news and public affairs programming, and programming based on the particular needs and interests of the local community. In 1989, the FCC concluded that the cost savings and aggregated resources of combined radio-television operations appeared to contribute to an

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4 FCC, *2002 Biennial Regulatory Review.*

5 FCC, *2002 Biennial Regulatory Review,* Pages 33-34.

6 The FCC has considered three additional aspects of diversity including source diversity, outlet diversity, and program diversity. Briefly, source diversity ensures that the public has access to information and programming from multiple content providers; program diversity refers to a variety of programming formats; and outlet diversity is the control of media outlets by a variety of media owners. For a detailed explanation, see FCC, *2002 Biennial Regulatory Review,* pages 14-16.

7 FCC, *2002 Biennial Regulatory Review*.

increase in news and public affairs programming, and other non-entertainment programming.[8] Based partly on that finding, the FCC adopted a policy of allowing increased radio/TV ownership in the top-25 television markets, and, in certain situations, allowed the acquisition of "failed" stations.

2.2 Newspaper/broadcast cross-ownership rule

28. The newspaper/broadcast cross-ownership rule prohibits common ownership of a full-service broadcast station and a daily newspaper when the broadcast station's service contour encompasses the newspaper's city of publication. Since adopting the rule in 1975, the FCC has not only prohibited potential newspaper-broadcast mergers, it also has required existing newspaper/broadcast combinations in highly concentrated markets to divest holdings in order to come into compliance within five years.[9] The FCC, however, also grandfathered broadcast/newspaper combinations in some markets and recently has contemplated waiving the rule for existing and future combinations under certain circumstances. The FCC, as part of its biennial review, is reviewing this rule.

29. The broadcast/newspaper cross-ownership rule, like other local media ownership rules, is based on the FCC's three policy goals of promoting viewpoint diversity, economic competition, and localism. The FCC has reasoned that structural regulation, *i.e.*, a restriction on newspaper/broadcast cross-ownership, promotes diversity of ownership, which, in turn, promotes viewpoint diversity. By assuming a positive relationship between ownership diversity and viewpoint diversity, the FCC traditionally has emphasized the number of owners rather than the number of media outlets as the appropriate measure of viewpoint diversity. According to this theory, numerous media outlets controlled by a small number of owners would be detrimental to viewpoint diversity. The broadcast/newspaper cross-ownership rule, unlike the radio/television cross-ownership rule, does not have an "independent number of voices" test for ensuring viewpoint diversity.

30. The FCC historically has considered competition in the local advertising market as a measure of economic competition in local markets. The local advertising market is thought to be important because advertisers provide the financial support needed for radio and TV programming. To some extent, advertising also covers the costs of publishing a newspaper. There is considerable debate, however, on the extent to which advertising in one medium is a substitute for advertising in the other and thus on the extent to which they are in the same relevant product market.[10]

2.3 Policy options in a changing media marketplace

31. The cross-ownership rules were initially adopted in an era when media outlets were dominated by radio, television, and newspapers. In recent years, the media marketplace has changed drastically. Although there are 200 fewer daily newspapers in the country today than in 1975, the number of broadcast stations and media using non-traditional broadcast mediums such as cable, DBS, and the Internet, has grown substantially. Given these changes, the challenge before the FCC is to devise a regulatory regime that will promote diversity, competition, and localism while allowing companies to reap the benefits of economies of scale and scope associated with cross-ownership mergers.

32. A valid analysis of economic competition and competition in the marketplace of ideas requires careful evaluation of the relevant product and geographic markets, and the relative strengths of each market participant. If, for example, radio and television do not compete for audiences and are not good substitutes for each other in local advertising markets, then they probably are not in the same product

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8 FCC, *2002 Biennial Regulatory Review*, page 35.

9 Federal Communications Commission, *Cross-Ownership of Broadcast Stations and Newspapers ("Broadcast/newspaper cross-ownership NPRM"),* Washington, D.C., September 20, 2001, page 2.

10 FCC, *Broadcast/newspaper cross-ownership NPRM*, page 11.

market. Imposing structural regulation in such a situation would not be very effective in promoting either diversity of viewpoints or economic competition. Furthermore, some product markets may be interrelated, *e.g.*, advertising, program acquisition, and program production may all be interrelated. In such a case, what is the proper measure of competition? Is it advertising revenue, competition for viewers/listeners/readers, or competition for programming/editorial content, or any combination of those factors? Similarly, what is the proper measure of diversity? Should new media outlets, *e.g.*, DBS and the Internet, be included in the number-of-voices test? Should the FCC assign different weights to different voices from media outlets according to the extent they are relied upon by consumers? Should programming channels that are distributed within a community by multiple video programming distribution platforms, such as cable and DBS, count as one voice or multiple voices? The FCC is carefully examining these and other questions.

33. In addition to the above questions, the FCC sought comment in the newspaper/broadcast cross-ownership Notice of Proposed Rule Making (NPRM) on whether to redefine the geographic area in which the newspaper/broadcast cross-ownership rules operate.[11] The FCC sought comment on whether the local area in which broadcast stations and newspapers compete should be measured without regard to contour overlap. The FCC also sought comment on the appropriate measures of market concentration for broadcast stations and newspapers. Another option under consideration by the FCC includes permitting common ownership of newspapers and broadcast stations, but requiring structural separation of their news operations.[12]

3. Newspaper Preservation Act

34. As noted in the introduction to this paper, the U.S. antitrust laws and the enforcement policy of the U.S. antitrust agencies do not take a special approach to preserving competition in the review of media mergers. The one exception to this rule is the Newspaper Preservation Act, 15 U.S.C. §§1801-1804, which prescribes the failing firm requirements for the newspaper industry:

> The Newspaper Preservation Act is designed to promote the preservation of independent editorial voices in newspapers by relaxing the requirements of the failing firm doctrine. The statute provides that a newspaper "in probable danger of financial failure" is eligible to enter into a joint operating agreement [JOA] with a competing paper under which editorial functions are kept separate, but business functions – including sales of papers and advertising space – are merged. Under the act, the Attorney General makes an initial determination of whether its requirements are met, subject to judicial review."[13]

35. Note that "failure to obtain advance approval of such an arrangement merely subjects the arrangement to the ordinary antitrust tests without the benefit of any special immunity by virtue of this statute," and "[w]hile the statute permits joint arrangements, it expressly refuses to immunize exclusionary practices that 'would be unlawful under any antitrust law if engaged in by a single entity.'"[14]

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[11] FCC, *Broadcast/newspaper cross- ownership NPRM*, page 15.

[12] FCC, *Broadcast/newspaper cross- ownership NPRM*, page 20.

[13] ABA Section of Antitrust Law, Antitrust Law Developments (5th ed. 2002), at 350.

[14] IA Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 251e, at 143-44 (2d ed. 2000).