

**COMMENTS OF THE NEWSPAPER ASSOCIATION OF AMERICA  
TO THE ANTITRUST MODERNIZATION COMMISSION  
ON THE NEWSPAPER PRESERVATION ACT (IMMUNITIES AND EXEMPTIONS)**

The Newspaper Association of America (“NAA”) submits the following comments to the Antitrust Modernization Commission (“AMC”) on Topic V (“Immunities and Exemptions”) with regard to the Newspaper Preservation Act, 15 U.S.C. § 1801-04 (the “NPA”), as invited by the AMC’s Federal Register notice.<sup>1</sup>

NAA is a non-profit organization representing more than 2,000 newspapers in the United States and Canada. NAA members publish nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily U.S. newspapers. A majority of NAA’s members are in small markets with a printed circulation of 25,000 or less. The Association focuses on six key strategic priorities that collectively affect the newspaper industry: marketing, public policy, diversity, industry development, newspaper operations and readership.

**I.  
Summary**

The AMC should recommend to Congress that the Newspaper Preservation Act be retained. The NPA has played a valuable role in enabling newspapers’ editorial and reportorial voices to continue to be heard when those voices would otherwise have been silenced by the business failure of the weaker newspaper. The NPA has enabled U.S. cities, both large and small, to continue to enjoy the benefits of two-newspaper competition in news and opinion even after the economic basis for commercial competition has ceased.

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<sup>1</sup> 70 Fed. Reg. 28902 (May 19, 2005). The notice states that the AMC intends to focus “for illustrative purposes” on eight identified statutory antitrust immunities and exemptions. The Newspaper Preservation Act is not included among those eight.

## **II.** **History and Purpose of the NPA**

Driven into losses and the danger of financial failure by the Depression, numerous U.S. newspapers in the same cities created a form of joint venture called a joint newspaper operating arrangement (“JOA”). By forming JOAs and combining their business operations into a single enterprise (including printing, distribution, and advertising and subscription sales), those newspapers were able to maintain their ability to publish separate and editorially independent newspapers. The first JOA in the U.S. was created in Albuquerque, New Mexico, in 1933, and still operates today.

As the nation emerged from the Depression, electronic media—radio, then television—began to place severe economic pressure on daily newspapers, particularly in cities with competing newspapers. Numerous newspapers failed and disappeared. Those competitive forces have intensified, and newspapers have continued to disappear. As the Attorney General found in 2001: “In the past 100 years, more than one thousand newspapers have closed, driven off by a range of competitive forces including the introduction of radio, then television, and now the Internet.”<sup>2</sup> These forces operated with particular severity on competitive newspaper markets, and left the great majority of U.S. cities with only a single general circulation daily newspaper.

Over the last century, the United States has experienced a drastic decrease in the number of cities with competing local daily newspapers of general circulation. In 1910, 58% of U.S. cities had more than one competing daily

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<sup>2</sup> Findings, Conclusions, and Order of the Attorney General, *In the Matter of: Application By the E.W. Scripps Company and MediaNews Group, Inc.*, Public File No: 44-03-24-15 (Jan. 5, 2001) (“Denver Opinion”) at 21.

newspaper, but by 1930 that number had decreased to 21%. By 1945 the number had declined to 8.4%, and by 1971, it was down to only two percent.<sup>3</sup>

The fragility of two-newspaper competition has been attributed to two economic conditions unique to the newspaper industry. One consists of the large economies of scale resulting from “first-copy” costs, i.e., the reporting, writing, editing, make-up, pre-production activities, and materials used to create a newspaper each day.<sup>4</sup> The incremental costs of selling additional pages of advertising or additional copies of the paper are very low, which forces newspapers to compete ferociously for each additional advertising and circulation dollar. The other economic condition unique to newspapers consists of the interdependence of circulation and advertising: advertisers prefer to advertise in a newspaper that reaches a large number of readers, and readers prefer to receive a newspaper that contains a large volume of advertisements. If either the volume of advertisements or the number of readers declines in one newspaper compared to its competitor, the weaker newspaper can enter a “downward spiral” in which its “decreasing circulation may lead to decreasing advertising, which may in turn lead to further decreasing circulation and further decreasing advertising, etc., ending in the inevitable failure of the newspaper.”<sup>5</sup> The “downward spiral” has been described as the circumstances “in which a newspaper’s declining circulation and lessening advertising revenue feed off one another, eventually forcing it to close.”<sup>6</sup>

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<sup>3</sup> Report of the Assistant Attorney General in Charge of the Antitrust Division, *In the Matter of: Application By the E.W. Scripps Company and MediaNews Group, Inc.*, File No. 44-03-24-15 (Sept. 8, 2000) (“Denver Report”) at 16-17.

<sup>4</sup> Denver Report at 16.

<sup>5</sup> *Id.*

<sup>6</sup> *Committee for an Independent P-I v. The Hearst Corp.*, 704 F.2d 467, 471 (9<sup>th</sup> Cir.), *cert. denied*, 464 U.S. 892 (1983). See also *Opinion and Order of the Attorney General in the Matter of Application by York Daily Record, Inc.*, Public File No. 44-03-13 at 9 (Feb. 21, 1990) (“In a ‘downward spiral,’ a newspaper’s circulation declines, some advertisers accordingly place their advertisements in the competing newspaper, and the circulation of the

(continue)

By 1970, despite the economic forces that operated to extinguish competing daily newspapers, two-newspaper editorial competition survived in 22 cities by virtue of JOAs.<sup>7</sup> In 1965, however, the Antitrust Division of the Justice Department sued the two newspapers in Tucson, Arizona, that had formed a JOA in 1940. The district court found the JOA illegal *per se* as unlawful price-fixing, profit pooling, and market division. On direct review, the Supreme Court affirmed in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969). Justice Douglas, writing for the Court, found that the JOA's challenged functions constituted *per se* violations of § 1 of the Sherman Act. The newspaper's "only real defense," the Court held, was the failing company defense, which required that at least one of the newspapers be in imminent danger of failure, or as the Court put it, "that the joint operating agreement was the last straw at which the Citizen grasped."<sup>8</sup> In addition, the Court held, the non-failing newspaper in the JOA had to be "the only available purchaser," and the failing paper's prospect for bankruptcy reorganization had to be "dim or nonexistent."<sup>9</sup>

The Supreme Court's decision in *Citizen Publishing* threatened other existing JOAs with similar findings of *per se* illegality, exposing them to dissolution and to crushing potential private antitrust liability. As a practical matter, the decision also would have eliminated JOAs as vehicles for preserving editorial competition in the numerous cities that would be unable to support more than one general circulation newspaper in the future.

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distressed newspaper declines still further as readers turn to the competing newspaper because they want to see the advertisements.").

<sup>7</sup> H.R. Rep. No. 91-1193, at 4-5 (1970), as reprinted in 1970 U.S.C.C.A.N. 3547, 3549.

<sup>8</sup> 394 U.S. at 137.

<sup>9</sup> *Id.* at 138.

In July 1970, as a direct response to the *Citizen Publishing* decision, Congress passed the Newspaper Preservation Act, in recognition of the “unique economic forces [that] operate in the newspaper industry, forces which caused the decline and closure of numerous newspapers since the turn of the century.”<sup>10</sup> Congress expressly found that “the economics of the newspaper industry make it more likely for newspapers to fail when faced with competition than other businesses; that when a newspaper is failing it is harder to reverse the process and it is almost impossible to find an outside buyer.”<sup>11</sup> The NPA also represented Congress’s “recogni[tion] that it had become nearly impossible for more than one newspaper to survive in any major market due to a variety of economic factors unique to the newspaper industry.”<sup>12</sup>

The Act provides that newspapers may form joint operating arrangements “with the prior written consent of the Attorney General.”<sup>13</sup> In order to approve the creation of a JOA, the Attorney General must make a determination (1) “that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper,” and (2) “that approval of such arrangement would effectuate the policy and purpose of this chapter.”<sup>14</sup>

When commercial competition is to be eliminated by a JOA, the NPA requires the perpetuation of unfettered news and editorial competition by mandating the complete reportorial and editorial independence of the JOA participants. The NPA’s definition of a qualifying JOA requires “[t]hat there is no merger, combination, or amalgamation of editorial or reportorial

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<sup>10</sup> *Committee for an Independent P-I*, 704 F.2d at 480.

<sup>11</sup> S. Rep. No. 535, 91<sup>st</sup> Cong., 1<sup>st</sup> Sess. 4 (1969).

<sup>12</sup> *Hawaii Newspaper Agency v. Bronster*, 103 F.3d 742, 748 (9<sup>th</sup> Cir. 1996).

<sup>13</sup> 15 U.S.C. § 1803(b).

<sup>14</sup> *Id.*

staffs, and that editorial policies be independently determined.”<sup>15</sup>

By passing the NPA, Congress “intended a total rejection of the failing company defense as used in *Citizen Publishing*.”<sup>16</sup> The traditional failing company defense was ill-suited to the determination of when a newspaper was sufficiently endangered to form a JOA with a stronger competitor. If the weaker newspaper’s collapse was imminent, the stronger newspaper would refuse to agree to a JOA and instead, would simply await its rival’s disappearance.

The legislative history makes clear that Congress rejected the *Citizen Publishing* standard for determining when a firm was failing, reasoning that if a newspaper’s financial condition was “virtually beyond salvage,” *see* 116 Cong. Rec. 23168 (statement of Rep. Annunzio), the dominant paper in the market would have little incentive to enter into a JOA, instead preferring to wait for its rival to actually fail and exit the market and thereby keep a monopoly for itself instead of sharing its economic benefits with a weaker competitor.<sup>17</sup>

The NPA confers Congressional approval on pre-Act JOAs, grandfathering their legality under the antitrust laws but requiring that any amendment or renewal be filed with the Department of Justice.<sup>18</sup> The NPA also provides that its antitrust exemption does not extend to “any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity,” and that except for the NPA’s express statutory antitrust exemption, “no joint newspaper operating arrangement or any party thereto shall be

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<sup>15</sup> 15 U.S.C. § 1802(2).

<sup>16</sup> *Committee for an Independent P-I*, 704 F.2d at 476.

<sup>17</sup> Denver Report at 10 n.8. *See also* Report of the Assistant Attorney General in Charge of the Antitrust Division, *In the Matter of Application by The York Daily Record, Inc.*, File No. 44-03-13 (June 9, 1989) at 15 (“Admittedly, Congress did not require that a newspaper be virtually doomed in order to qualify, for at that point its chance to find a JOA partner would be markedly diminished or perhaps non-existent.”).

<sup>18</sup> 15 U.S.C. § 1803(a).

exempt from any antitrust law.”<sup>19</sup>

The Department of Justice has adopted extensive rules for review of JOA applications.<sup>20</sup> Applicants must file detailed financial information with the Department, and publish notice of the application informing the public of the right to comment on the application or request a hearing on it.<sup>21</sup> The Assistant Attorney General in charge of the Antitrust Division must prepare a report on the application, with the power to “require submission by the applicants of any further information which may be relevant to a determination of whether approval of the proposed arrangement is warranted under the [NPA].”<sup>22</sup> The Assistant Attorney General may recommend approval or disapproval of the proposed JOA without a hearing, or that a hearing be held to resolve material issues of fact.<sup>23</sup> Any member of the public may file a reply to the Assistant Attorney General’s report.<sup>24</sup> If the Attorney General orders an adjudicative hearing, that hearing takes place before an administrative law judge, and any interested party may intervene and participate.<sup>25</sup> The Attorney General must issue a statement of findings, conclusions, and reasons for his or her decision approving or disapproving the JOA application, or adopt the administrative law judge’s findings and conclusions.<sup>26</sup> The Attorney General’s decision is subject to judicial review.

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<sup>19</sup> 15 U.S.C. § 1803(c).

<sup>20</sup> 28 C.F.R. §§ 48.1-48.19 (2004).

<sup>21</sup> *Id.* at §§ 48.4, 48.6.

<sup>22</sup> *Id.* at § 48.7.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at §§ 48.10, 48.11.

<sup>26</sup> *Id.* at § 48.14.

Justice Department JOA reviews are thorough. In considering the application for approval of a JOA in Denver in 2000, the Antitrust Division reviewed tens of thousands of pages of documents, issued interrogatories and document requests to the applicants seeking detailed financial, budgetary, and planning documents, interviewed executive and managerial personnel of both parties, and also interviewed representatives of the top 30 advertisers of both newspapers.<sup>27</sup> The Assistant Attorney General then issued a 45-page report recommending approval, which the Attorney General accepted in a 22-page opinion.

### **III. Joint Operating Arrangements Under the NPA**

Subsequent to the enactment of the NPA in 1970, the Justice Department has received eight JOA applications (a ninth was withdrawn). The Attorney General approved each of the eight applications, three after a hearing,<sup>28</sup> and five without a hearing.<sup>29</sup> Four of the Attorney General's JOA approvals (Seattle, Detroit, Denver, and York, Pa.) have been the subject of judicial review, none of which ultimately resulted in reversal of the Attorney General's decision.<sup>30</sup>

Twelve JOAs are in operation today: Albuquerque (Albuquerque Journal and Albuquerque Tribune); Birmingham (Birmingham News and Birmingham Post-Herald);

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<sup>27</sup> Denver Opinion at 5-6.

<sup>28</sup> Cincinnati (1979), Seattle (1983), and Detroit (1989).

<sup>29</sup> Anchorage (1974), Chattanooga (1980), Las Vegas (1989), York, Pa. (1991), and Denver (2001). See Denver Opinion at 10; Denver Report at 8-9.

<sup>30</sup> *Michigan Citizens for an Independent Press v. Thornburgh*, 868 F.2d 1285 (D.C.), *aff'd by an equally divided Court*, 493 U.S. 38 (1989); *Committee for an Independent P-I v. The Hearst Corp.*, 704 F.2d 467, 471 (9<sup>th</sup> Cir.), *cert. denied*, 464 U.S. 892 (1983). In Denver, a motion for a preliminary injunction to halt implementation of the JOA was denied in 2001, and the plaintiffs then voluntarily dismissed their lawsuit. Rachel Brand, "Jabs' Legal Fees \$50,000—Jabs Ends Legal Battle Against JOA," Denver Rocky Mountain News, April 14, 2001. In York, a federal district court denied a motion for a temporary restraining order against the JOA, and the case was then dismissed.

Charleston (W. Va.) (Charleston Gazette and Charleston Daily Mail); Cincinnati (Cincinnati Enquirer and Cincinnati Post); Denver (Denver Post and Rocky Mountain News); Detroit (Detroit Free Press and the Detroit News); Fort Wayne (Fort Wayne Journal Gazette and Fort Wayne News-Sentinel); Las Vegas (Las Vegas Review-Journal and Las Vegas Sun); Salt Lake City (Salt Lake City Deseret News and Salt Lake Tribune); Seattle (Seattle Post-Intelligencer and Seattle Times); Tucson (Arizona Daily Star and Tucson Citizen); and York (Pa.) (York Dispatch and York Daily Record).<sup>31</sup> Six of the eight JOAs approved by the Attorney General subsequent to the passage of the NPA continue to operate; the other six are pre-Act JOAs whose status was protected by the NPA's retroactive approval.

Even where JOAs have been terminated, the JOA structure enabled the weaker newspaper to continue publishing as an independent news and editorial voice for many years after its economic situation would otherwise have resulted in its closure. In El Paso, Texas, for example, a JOA between the El Paso Times and the El Paso Herald-Post, created in 1936, was terminated in 1997 after more than 60 years of sustaining the weaker newspaper. Similarly, in Nashville, the JOA between The Tennessean and the Nashville Banner was terminated in 1998, after operating for more than 60 years after its creation in 1937. Cincinnati in 1979 became the second new JOA approved under the NPA. The JOA will expire in 2007, but only after the failing newspaper survived for 28 years within the JOA.

#### **IV. Reasons for Retaining the NPA**

The NPA preserves and prolongs editorial and reportorial competition between newspapers after the economic basis for commercial competition has disappeared. As noted

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<sup>31</sup> NAA Factbook (2004) at 17. It has been announced that the Cincinnati JOA will not be renewed after its scheduled 2007 expiration.

above, six pre-1970 JOAs continue to operate under the antitrust protection of the NPA. The earliest of those pre-NPA JOAs—Albuquerque—is now 72 years old. Six more post-1970 JOAs also continue in operation, each one of which was formed only after the Attorney General determined that without a JOA, the weaker newspaper was in probable danger of financial failure. The NPA has thus sustained editorial and reportorial competition in such large U.S. cities as Denver, Detroit, and Seattle, as well as in smaller cities such as York, Pa. and Ft. Wayne, Ind. Without the NPA, it cannot seriously be doubted that those newspaper voices would have been silenced by business failure, or that they would be silenced in the future if the antitrust protection of the NPA were to be withdrawn.

If competing U.S. newspapers confront the probable danger of failure in the future, the NPA enables the failing newspaper to form a JOA as the means to maintain editorial and reportorial competition that would otherwise be lost. Although the number of U.S. cities with competing general circulation daily newspapers has dwindled, that competition continues in major cities such as New York, Chicago, Boston, Washington, and San Juan, as well as smaller cities such as Trenton, N.J., and Wilkes-Barre, Pa.<sup>32</sup>

The NPA exemption allows the elimination of commercial competition only when that competition, in all likelihood, is already doomed by the foreseeable failure of the weaker newspaper. The NPA does not enable a JOA to attain a stronger market position than the financially healthier newspaper would possess in any event following the probable failure of its weaker commercial competitor. That failure would remove the weaker newspaper both as a commercial competitor and as an editorial and news voice. Under those circumstances, preservation of the newspaper's voice is preferable to its complete extinction, or acquisition as a

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<sup>32</sup> Editor & Publisher International Yearbook xi (2004).

failing company by the stronger newspaper in the market.

In fact, recent research suggests that JOAs do in fact effectively maintain editorial and news diversity between the participants. The combination of commercial functions into a single JOA does not lead to the homogenization of the newspapers' perspectives and viewpoints.<sup>33</sup>

Moreover, the Justice Department has taken the position that a JOA does not entirely end commercial competition between the participating newspapers. The Department has said that renewed commercial competition between the newspaper participants in a JOA may be possible after a JOA expires or is terminated, and that "newspapers may have an incentive to improve operations and increase circulation in order to position themselves better for possible post-JOA competition."<sup>34</sup>

In addition, the markets for news, opinion, and advertising have become far more competitive today than in 1970, when the NPA was adopted. Whatever commercial competition between two newspapers may be eliminated by the formation of a JOA, commercial competition in the provision of information and advertising is unlikely to be adversely affected. Recent estimates place the number of online news users at between 80 million to 105 million Americans.<sup>35</sup> Online sources of news and information comprise not only the ubiquitous web pages of older print and electronic media, but also such web-only new media creations as blogs, wikis, and podcasting.<sup>36</sup> New media competition is equally intense for advertising expenditures,

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<sup>33</sup> Ron Rodgers, Steve Hallock, Mike Gennaria, & Fei Wei, "Two Papers in Joint Operating Agreement Publish Meaningful Editorial Diversity," 25 *Newspaper Research Jnl.* 104 (Fall 2004).

<sup>34</sup> Brief Amicus Curiae of the United States of America, *State of Hawaii v. Gannett Pacific Corp.*, No. 99-17201 (9<sup>th</sup> Cir., filed Nov. 3, 1999), p. 21.

<sup>35</sup> Project for Excellence in Journalism, "The State of the News Media 2004: An Annual Report on American Journalism," [http://stateofthenewsmedia.org/printable\\_online\\_complete.asp?media=3](http://stateofthenewsmedia.org/printable_online_complete.asp?media=3) (last visited June 27, 2005).

<sup>36</sup> "Yesterday's Papers: The Future of Journalism," *The Economist*, April 23, 2005 (U.S. ed.).

including such traditional foundations of newspaper economics as classified advertising for employment and automobiles, now competing with online providers such as Monster, Autotrader, and Vehix.com. As the Wall Street Journal recently noted: “The Internet and other electronic-media platforms are drawing ad dollars away, and daily U.S. newspaper circulation recently took its biggest tumble in nearly a decade, falling 1.9% in the six-month period ended March 31, [2005] according to the Audit Bureau of Circulations.”<sup>37</sup>

Abuse of the JOA procedure is unlikely. JOAs may be formed only with the prior approval of the Attorney General, after an investigation and report by the Antitrust Division with the use of compulsory process, and an adjudicative hearing before an administrative law judge if the Attorney General deems such a hearing to be warranted. The Justice Department’s JOA procedures afford broad opportunity for public comment, and provide for intervention by interested parties in a hearing if one is ordered. Judicial review is available of the Attorney General’s approval or disapproval of a proposed JOA. The results of judicial review indicate that the Attorney General has exercised that approval authority carefully and responsibly; no JOA decision by the Attorney General has ever been reversed by a reviewing court’s final decision.

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In summary, the AMC should recommend to Congress that the Newspaper Preservation Act be retained intact. The benefits of the NPA—survival or prolongation of news and editorial voices that would otherwise have disappeared—are manifest. The statute’s costs—loss of unsustainable commercial competition—have been modest. Creation of JOAs is subject to the approval of an expert antitrust law enforcement agency, with public participation in the process,

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<sup>37</sup> Ethan Smith, “How Old Media Can Survive in a New World,” The Wall Street Journal, May 23, 2005, at R1.

and full opportunity for judicial review. The NPA has played a significant role in contributing to the diversity of expression in the marketplace of ideas, and should be allowed to continue to play that role in the future.

Respectfully submitted,

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