

Market Definition, Merger Review, and Media Monopolization: Congressional Approval of the Corporate Voice Through the Newspaper Preservation Act

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I. INTRODUCTION

Wilkes-Barre is not your average American town of 43,123 residents.¹ The northern Pennsylvania burg, located 113 miles from Philadelphia, boasts two competing daily newspapers. The Wilkes-Barre *Times Leader*, once a Knight Ridder newspaper, was sold by McClatchy to an independent investment group for \$65 million in late July 2006.² The *Citizens' Voice*, Wilkes-Barre's second daily newspaper, was founded in 1978 by workers on strike from the *Times Leader*. Now owned by Times-Shamrock Communications, the newspaper has become a worthy competitor, boasting more than 32,000 daily readers.³ Unlike competing dailies in twelve other cities, the *Times Leader* and *Citizens' Voice* are not run under a federally approved joint-operating agreement ("JOA"). Instead the two newspapers are produced and printed by separate staffs in separate facilities.

With the growth of new media, including the rise of the 24-hour cable news channel and the increasing reliance on the Internet for news, such a phenomenon is rare at best.⁴ As Americans turned to radio, television, and the Internet for their news, the newspaper industry began to wane.⁵ At one point, the nation boasted more than 94 competing dailies.⁶ However, as advertising dollars decreased and readers began to turn away, newspapers began to look at cost-saving measures to keep from closing their doors.⁷ In

1. This figure is according to the 2000 U.S. Census. Wilkes-Barre QuickFacts, 2000 U.S. Census, <http://quickfacts.census.gov/qfd/states/42/4285152.html>.

2. See *McClatchy Completes Sale of Wilkes-Barre Times Leader*, SACRAMENTO BUS. J., July 28, 2006, available at <http://sacramento.bizjournals.com/sacramento/stories/2006/07/24/daily48.html>.

3. For an enjoyable summary of the newspaper's history, see *About The Citizens' Voice*, <http://www.timeshamrockcommunications.com/cvcspages/about.htm> (last visited Feb. 11, 2007).

4. Although Baltimore recently joined the ranks of cities with competing daily newspapers with its April 2006 addition of the *Examiner* to rival the *Baltimore Sun*, competing dailies have become quite rare, but continue to exist in several U.S. communities. For example, the *Chicago Tribune* and *Chicago Sun-Times*, and the *Minneapolis Star-Tribune* and the *St. Paul Pioneer-Press* are two larger examples of separately owned competing daily newspapers. See CLARENCE JONES, WINNING WITH THE NEWS MEDIA 349 (2001). See also Annys Shin, *Examiner Plans Baltimore Edition*, WASH. POST, Oct. 18, 2005, at D4.

5. Weekly readership of daily papers dropped 22.5 percent from 1964 to 1997, according to statistics from the Newspaper Association of America's Web site. See Newspaper Association of America, *Daily Newspaper Readership Trends* (2001), <http://www.naa.org/marketscope/databank/tdnpr1299.htm>.

6. JONES, *supra* note 4, at 349. As of 2000, twelve cities had completely separate, competing newspapers while another thirteen had two newspapers running under joint-operating agreements. *Id.*

7. The number of daily newspapers decreased from 1,772 in 1950 to 1,457 in 2002, according to statistics from the Newspaper Association of America's Web site. Newspaper

an effort to keep struggling newspapers afloat, Congress, at the urging of newspaper publishers, passed the Newspaper Preservation Act (“NPA”).⁸ The NPA exempted newspapers from federal antitrust laws,⁹ essentially allowing competing dailies to merge their business entities while maintaining separate editorial staffs.¹⁰ Unlike traditional companies seeking to unite their business ventures, newspapers can petition the Attorney General under the NPA to request authorization for a JOA.¹¹

This Article examines the effect of the NPA on competition in the daily newspaper market by analyzing legislative history, subsequent court interpretations, and Justice Department implementation of the NPA. Part II of the Article discusses the legislative history of the NPA and the subsequent case law that has interpreted it. In addition, this Part addresses the effects of the NPA on the Justice Department’s merger review process. Part III summarizes current criticisms of the NPA and its impact on media competition. Part IV posits that the NPA is harmful to competition among the media because it removes certain aspects of anti-competitive action from strict merger review. Part V concludes with a call for more regulation of media mergers and a redefinition of market as it pertains to media merger analysis.

II. HISTORICAL AND LEGAL BACKGROUND

A historical examination of JOAs must begin with a discussion of newspaper industry practices that began shortly after the Great Depression.¹² During the 1930s, several local newspapers had already

Association of America, *Number of U.S. Daily Newspapers* (2003), http://www.naa.org/info/facts03/12_facts2003.html.

8. See 15 U.S.C. § 1801 (2000):

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.

9. See *id.* § 1803 (referencing the Clayton Act, one of the two major components of federal antitrust law).

10. See *id.* § 1802(2):

... [J]oint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: *Provided*, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined.

11. *Id.* § 1803.

12. See JOHN C. BUSTERNA & ROBERT G. PICARD, JOINT OPERATING AGREEMENTS: THE

united their operations and penned agreements to merge their businesses.¹³ In doing so, they employed the traditional anti-competitive practices scrutinized today under federal antitrust laws.¹⁴ These included price-fixing, profit-sharing, and other cost-cutting measures.¹⁵ Two newspapers in Tucson, Arizona—the *Star* and the *Citizen*—were among those who entered into these unification agreements.¹⁶ This agreement formed the basis of the *United States v. Citizen Publishing Co.* case, in which the Department of Justice sought to enforce federal antitrust laws against the *Star* and the *Citizen*.

A. *The Citizen Publishing Case*

The Justice Department's victory in *United States v. Citizen Publishing*¹⁷ played a key role in the eventual enactment of the NPA.¹⁸ In *Citizen II*, the U.S. Supreme Court held that a JOA between two daily newspapers in Tucson, Arizona, violated the Sherman Act¹⁹ by fixing advertising rates and pooling profits between competitors.²⁰ In doing so, the Court acknowledged that the newspapers, formerly competitors in business, had instead turned into a cartel that had substantial market power to set prices and control competition.²¹

The newspapers, operating separately, had circulations that were approximately equivalent, but the *Star* had significantly larger advertising revenues than its competitor.²² When the JOA went into effect, the *Citizen* was not up for sale or in danger of ceasing operation.²³ The agreement stipulated that the papers would retain segregated news and editorial

NEWSPAPER PRESERVATION ACT AND ITS APPLICATION 25 (1993).

13. *Id.*

14. *Id.*

15. *Id.*

16. Similar agreements were also in place in El Paso, Texas, and Albuquerque, New Mexico. See *United States v. Citizen Publ'g Co. (Citizen I)*, 280 F. Supp. 978, 981 (D. Ariz. 1968).

17. *Citizen Publ'g Co. v. United States (Citizen II)*, 394 U.S. 131, 135 (1969) (holding that a joint-operating agreement between the only two competing newspapers in a county that created a joint corporation to manage all departments, except news and editorial departments, fixed rates and prices, pooled and distributed profits according to a specified ratio and included an agreement not to compete was in violation of the Sherman Act).

18. *Id.*

19. See 15 U.S.C. § 1 (2000).

20. *Citizen II*, 394 U.S. at 134–35. “The joint operating agreement exposed the restraints so clearly and unambiguously as to justify the rather rare use of a summary judgment in the antitrust field.” *Id.* at 136.

21. *Id.*

22. *Id.* at 133.

23. *Id.*

functions as well as maintain independent corporate identities.²⁴ All assets of the newspapers' other operations would be merged, and a parent company, Tucson Newspapers, Inc., would be formed.²⁵ The agreement mandated three controls to end competition between the newspapers. First, it fixed advertising and subscription rates, which were set by Tucson Newspapers, Inc.'s advertising and circulation departments.²⁶ Second, it provided for the pooling of profits, which allowed the proceeds to be distributed to the individual newspapers at a fixed ratio.²⁷ Finally, the agreement sought to control the market by prohibiting those affiliated with Tucson Newspapers, Inc. from engaging in any business contrary to the interests of the corporation.²⁸

Tucson's two dailies, the *Star* and the *Citizen*, were not the only newspapers engaged in joint operations during the 1960s.²⁹ Because the *Citizen II* decision worried newspaper owners around the country, many in the industry—including those involved in the *Citizen II* case—petitioned Congress for a special legislative exemption from federal antitrust regulations.³⁰ In doing so, they relied on a small piece of dicta from the *Citizen II* opinion—a sentence that described the “failing company” defense.³¹

This potential antitrust exemption for newspapers first emerged in the U.S. Senate in 1967. Senate Bill 1312, known as the Failing Newspaper Act, was introduced shortly after the federal district court's ruling in *Citizen I*.³² Not surprisingly, the bill garnered support from several legislators whose states had newspapers with arrangements similar to the one in Tucson.³³ After a round of hearings, the NPA, delineated in Senate Bill 1520, replaced the Failing Newspaper Act.³⁴

24. *Id.*

25. *Citizen II*, 394 U.S. at 133.

26. *Id.* at 134.

27. *Id.*

28. *Id.*

29. See BUSTERNA & PICARD, *supra* note 12, at 25–26.

30. *Id.*

31. According to *Citizen II*:

The only real defense of appellants was the ‘failing company’ defense—a judicially created doctrine . . . The burden of proving that the conditions of the failing company doctrine have been satisfied is on those who seek refuge under it. That burden has not been satisfied in this case.

(citations omitted). *Citizen II*, 394 U.S. at 136, 138–39. See *infra* Part III for a discussion of the definition of “failing firm.”

32. See *Citizen II*, 394 U.S. at 138, n.4.

33. Carl Hayden (R-Ariz.) was the driving force behind the Failing Newspaper Act, which was subsequently replaced by Senate Bill 1520. *Id.*

34. BUSTERNA & PICARD, *supra* note 12, at 36.

Newspaper owners, particularly William Small of Small Newspaper Group who was involved in *Citizen I*, supported the legislation.³⁵ Many believed that allowing the cost-saving measures, such as combined printing and delivery systems, was the only way the newspapers would survive.³⁶ Small pointed out that the *Citizen* could not support separate advertising and business staffs, which were two major components of its joint operations with the *Star*.³⁷

The Justice Department, on the other hand, ardently opposed the NPA.³⁸ At the very least, attorneys for the federal government sought to get the NPA postponed until after the *Citizen II* case had been remanded and reheard by the U.S. District Court in Arizona.³⁹ Doing so, they argued, would allow legislators to examine the modified agreement the district court had been instructed to create.⁴⁰

Congress passed the NPA on July 24, 1970, just two years before the U.S. District Court in Arizona ruled on the Tucson modified JOA.⁴¹ The outcome of the Tucson JOA under the court's modified decree was quite similar to what the outcome under the NPA would have been. Under the joint-operating agreement, the two newspapers would produce one Sunday edition, from which they shared cost and profit.⁴² Sunday advertising rates and subscription prices were also decided in concert.⁴³ Throughout the rest of the week, the newspapers could sell advertisements in combination so long as the rates were independently determined.⁴⁴ Merged advertising, business, printing, and circulation staffs were also allowed under the court-mandated modified decree.⁴⁵

Essentially, the court's modified decree provided the Tucson newspapers with almost all of the NPA safeguards.⁴⁶ The only protections the court's decree did not grant to the Tucson papers were the relaxation of

35. *The Newspaper Preservation Act: Hearing on H.R. 19123 Before the Antitrust Subcomm. on the H. Comm. on the Judiciary*, 90th Cong. 55-56 (1968) (testimony of John Donahue on behalf of William Small, Jr., Publisher, Tucson Daily Citizen).

36. *Id.*

37. *Id.*

38. Stephen R. Barnett, *Freedom of the Press: The Most Serious Threat is the JOA Scam*, COLUM. JOURNALISM REV., Nov./Dec. 1991, available at <http://archives.cjr.org/year/91/6/joa.asp>.

39. *Id.*

40. *Id.*

41. *United States v. Citizen Publ'g*, 1972 Trade Cases, para. 74,137 (D. Ariz. 1972) [hereinafter 1972 Trade Cases].

42. *Citizen II*, 394 U.S. 131, 133-34.

43. 1972 Trade Cases, para. 74,137.

44. *Id.*

45. *Id.*

46. *Id.*

price-fixing and profit-pooling restrictions.⁴⁷ Under the court's decree, the newspapers could not share revenue or agree on prices for the weekday editions.⁴⁸ Thus, advertising and circulation rates for the Monday through Saturday editions of the newspapers had to be independently set, and the profits had to remain with the individual newspapers.⁴⁹

B. *The Newspaper Preservation Act*

Under the NPA, two newspapers are allowed to petition the federal government to form a joint-operating agreement.⁵⁰ A JOA is a formal arrangement between two companies that combines certain functions, allowing both companies to utilize the same resources to perform that function. Essentially, in the newspaper industry, these agreements allow two newspapers to unify all aspects of their operations except the editorial functions, which are required to remain separate.⁵¹ Because Congress asserted the NPA was designed to sustain newspaper competition in markets that were not supporting two newspapers, the law requires that news-editorial content in the newspapers be gathered distinctly and produced separately.⁵²

The NPA stipulates that newspapers seeking JOAs comply with two requirements in order to be exempt from federal antitrust laws.⁵³ First, the newspapers must seek the U.S. Attorney General's written approval prior to entering the JOA.⁵⁴ Second, one of the two newspapers must qualify as a

47. The NPA exempts newspapers from antitrust enforcement of price-fixing and profit-pooling restrictions so long as they do not engage in predatory pricing practices. 15 U.S.C. § 1803(c) (2000). According to the statute:

Nothing contained in the chapter shall be construed to exempt from any antitrust law 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.

Id.

48. 1972 Trade Cases, para. 74,137.

49. *Id.*

50. 15 U.S.C. § 1803(b). "It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States." *Id.*

51. *Id.* § 1802(2).

52. *Id.* § 1801. That statute reads:

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.

Id.

53. *See id.* § 1803(b).

54. *See* 15 U.S.C. § 1803(b).

failing newspaper, which stems from the failing company dicta in *Citizen II*.⁵⁵ Once these requirements are met, approval of the JOA will exempt the newspapers from an array of federal antitrust laws, including the Federal Trade Commission Act,⁵⁶ the Sherman Act,⁵⁷ and the Clayton Act.⁵⁸

C. *The Federal Antitrust Laws*

Passed in 1890 to combat the actions of the burgeoning steel cartels, the Sherman Act prohibits contracts or conspiracies that seek to limit competition in the marketplace.⁵⁹ The Sherman Act provides both criminal and civil causes of action, allowing enforcement by the Justice Department,⁶⁰ state attorneys general,⁶¹ and the general public.⁶² The law

55. *See id.*

56. *See id.* § 4. Section 4 reads:

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Id.

57. *See id.* §§ 1–7.

58. *See id.* §§ 12–27.

59. 15 U.S.C. § 1. Section 1 reads:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id.

60. *See id.* § 4.

61. *See id.* § 15c(a)(1):

Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity.

62. *See id.* § 15(a):

covers a wide variety of anti-competitive conduct. Section 1 addresses contracts, combinations, or conspiracies that restrain trade.⁶³ Section 1 has primarily been used to combat price fixing, territorial restraints, boycotts and refusals to deal, tying arrangements, and exclusive-dealing arrangements.⁶⁴ Section 2 of the Sherman Act addresses the creation of actual monopolies and the attempt to monopolize an industry.⁶⁵

The Clayton Act was passed in 1914 to address price discrimination and other anti-competitive practices.⁶⁶ Section 2 of the Clayton Act, known as the Robinson-Patman Act, prohibits price discrimination.⁶⁷ Section 3 of

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

63. *Id.* § 1.

64. 15 U.S.C. § 1.

65. *Id.* § 2. Section 2 reads:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id.

66. *Id.* §§ 12–27.

67. *Id.* § 13(a). The Section reads:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona

the Clayton Act regulates tying arrangements and exclusive dealing.⁶⁸ Mergers and acquisitions are addressed in Section 7 of the Clayton Act.⁶⁹ Like the Sherman Act, the Clayton Act—if applied to the newspaper industry—would have a substantial effect on media companies' ability to gain market power and participate in anti-competitive practices.

D. The Courts, the NPA, and the Justice Department

Since the enactment of the NPA, numerous newspapers have petitioned for approval of JOAs.⁷⁰ The most recent pair of newspapers

vide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Id.

68. 15 U.S.C. § 14. Section 14 reads:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Id.

69. *Id.* § 18:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

70. BUSTERNA & PICARD, *supra* note 12, at 22. Between 1974 and 1989, eight newspaper pairs filed for joint-operating agreements. The newspaper markets ranged in size from Detroit and Seattle to Manteca, California, and York, Pennsylvania. Of these eight

approved for joint-operating status was MediaNews Group's *Denver Post* and the Scripps Company's *Rocky Mountain News*.⁷¹ In 2001, Attorney General Janet Reno approved the newspapers' petition. The Denver JOA, like most agreements, received much criticism both before and after it was signed, with citizens and businesses complaining of higher prices and lower quality.⁷² A 1983 JOA between Seattle's two newspapers, the *Times* and *Post-Intelligencer*, was the subject of protracted litigation that continues in the courts today as Committee for a Two Newspaper Town struggles to prevent The Times Co. from ending its joint-agreement with Hearst and forcing closure of the *Post-Intelligencer*.⁷³

Although subscribers and advertisers are often quite unhappy about the establishment of JOAs, citizen suits rarely succeed in court.⁷⁴ In *Michigan Citizens for an Independent Press v. Thornburgh*, readers and advertisers challenged in court the U.S. Attorney General's decision to approve a JOA between the *Detroit News* and the *Detroit Free-Press*.⁷⁵ The history of the Detroit newspapers' quest for a JOA was a long one. When the papers initially petitioned the Justice Department, an assistant attorney general recommended a hearing before an administrative law judge to determine if one of the newspapers was truly failing.⁷⁶ The administrative law judge concluded that neither paper was in jeopardy of failing and that if a JOA were denied, the newspapers would raise prices back to precompetition levels.⁷⁷ However, Attorney General Edwin Meese disagreed with this conclusion and approved the petition for a JOA.⁷⁸ In light of the approval, the newspapers signed the JOA, and a subsequent lawsuit was filed by readers and advertisers.⁷⁹ On appeal from the U.S.

applications, seven were approved. The eighth, between the *Manteca Bulletin and News* was withdrawn in 1991. *Id.*

71. Anne Colden, *Papers Launch New Era: Post, News Combine Business Operations*, DENV. POST, Jan. 23, 2001, at 1A.

72. *Id.*

73. Eric Pryne, *Citizens Committee at Crossroads; Court Victory, Empty Pockets for Group Trying to Preserve Two Newspapers*, SEATTLE TIMES, May 14, 2006, at E1.

74. *See News Weekly Sys., Inc. v. Chattanooga News-Free Press*, 986 F.2d 1422, 1993 WL 47197, at *1 (6th Cir. Feb. 23, 1993) (affirming summary judgment against a competing weekly newspaper that claimed that the portions of a joint-operating agreement between Chattanooga's two daily newspapers that had not been approved by the Attorney General violated the Sherman Act).

75. *Michigan Citizens for an Indep. Press v. Thornburgh (Michigan Citizens I)*, 868 F.2d 1285 (D.C. Cir. 1989).

76. *Id.* at 1289.

77. *Id.* at 1290.

78. *Id.*

79. *See Michigan Citizens for an Indep. Press v. Att'y Gen. of United States*, 695 F. Supp. 1216 (D. D.C. 1988) (granting summary judgment in favor of the attorney general against a claim by readers and advertisers that his decision to allow a joint-operating

District Court's decision, the Sixth Circuit Court of Appeals held that the Attorney General's interpretation of the NPA was proper, and he did not abuse his discretion by allowing the JOA to be approved.⁸⁰ The primary issue from the case, how to define a failing newspaper, continues to spark debate and remains one of the primary criticisms of the legislation.

III. CURRENT CRITICISMS OF THE NEWSPAPER PRESERVATION ACT

The stated purpose of the NPA is to safeguard independent voices in markets that are no longer capable of supporting dueling daily newspapers.⁸¹ To achieve this end, it allows the combination of business functions while retaining separate editorial staffs.⁸² As described above, the consolidation of advertising, printing, and circulation services can provide substantial cost savings, thereby allowing both newspapers to remain viable.

However, one of the main criticisms of the NPA is its definition and subsequent application of the "failing firm requirement." Although the NPA explicitly defines a failing newspaper,⁸³ this definition is open to a variety of interpretations. Some courts have read the definition to mean that one of the individual newspapers does not have the resources, by itself, to maintain production. Others have interpreted the legislation to require that there be no means available to save the newspaper. Such a reading would seem to imply that if a newspaper's chain affiliation, holding company, or parent organization were able to subsidize its existence off of other proceeds, the newspaper could not be deemed a "failing newspaper."

This definitional issue pits large media corporations directly against small, independent news organizations. If such a reading were accepted, then the interests of corporate media and the independent press would likely be diametrically opposed. Even without such a reading, issues relating to market power and ownership have arisen in litigation under the NPA. Smaller newspapers, such as those who challenged JOAs between two newspaper giants in Detroit and Seattle, assert that the market power associated with the formation of a JOA limits the ability of others to compete in the market. Thus, by allowing joint operators to set advertising prices and circulation rates, the NPA provides the newspapers with the

agreement violated federal law).

80. *Michigan Citizens I*, 868 F.2d at 1296–97.

81. 15 U.S.C. § 1801 (2000).

82. *See id.*

83. *Id.* § 1802(5). The NPA defines a failing newspaper as "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." *Id.*

ability to control the market by asserting their joint status to demand higher prices. By virtue, smaller, independent newspapers are unable to compete with the economies of scale created under the JOA. Combined with an inability to command market share, they are unlikely to compete adequately with the newly formed joint-operators.

The market power equation gets even more complicated in light of the Federal Communication Commission's relaxation of the cross-ownership rules in June 2003. The cross-ownership rules now allow companies such as Gannett and E.W. Scripps to own a variety of media combinations in markets with four to eight television stations.⁸⁴ In large markets, with nine or more television stations, the FCC abolished the cross-ownership restrictions.⁸⁵ Thus, the only markets in which cross-ownership is proscribed are those with fewer than four television stations.⁸⁶

With corporations like Gannett and E.W. Scripps branching across all forms of media ownership, the potential impact of JOAs on market power is also burgeoning. For example, in Cincinnati, Ohio, the two companies control both daily newspapers—the *Post* and the *Enquirer*—and WCPO-TV, the local ABC affiliate that has produced the market's top-rated television newscast for the past twenty-two years. In addition, the Gannett and Scripps media outlets, along with Cinweekly, are a part of Cincinnati.com, a unified Web site containing news, sports, weather, and entertainment content.

IV. THE NPA, MEDIA COMPETITION, AND MERGER REVIEW

Traditional horizontal merger review by the Department of Justice Antitrust Division looks at a number of factors to determine the anti-competitive effects of a proposed course of action.⁸⁷ The guidelines first seek to define the relevant market and examine the competitiveness of the market prior to the proposed merger.⁸⁸ This includes an examination of product market, geographic market, market participants, and the concentration of the market. The second step in merger review is to analyze

84. In these markets, a company has the following ownership options: a daily newspaper, one television station, and up to half of the radio station limit for the market; a daily newspaper and the maximum number of radio stations for the market so long as no television station is owned; or two television stations and up to the maximum number of radio stations for the market so long as no daily newspaper is owned. *See* 47 C.F.R. § 73.3555(c)(2) (2005).

85. *See id.*

86. In these markets, cross-ownership may be allowed if the company can show that the television station serves an area not already served by a cross-owned property. *See id.* § (c)(1).

87. *See* U.S. Dep't of Justice & Fed. Trade Comm'n Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH), § 2 (1997) [hereinafter Horizontal Merger Guidelines].

88. *See id.* §§ 1.0–1.5.

the negative externalities that the proposed merger might cause.⁸⁹ The primary focus here is on coordinated interaction and unilateral effects. The third step includes an evaluation of potential for entry into the market.⁹⁰ Timeliness, likelihood, and sufficiency of entry are the chief concerns at this point in the examination. The fourth step is the evaluation of any efficiencies the merger may produce.⁹¹ Finally, the Antitrust Division addresses potential merger defenses, including the failing firm defense.⁹² Under this type of thorough examination, mergers between two competing daily newspapers would often fail.

Congress, in enacting the NPA, made it the public policy of our nation to protect viewpoint diversity in the form of multiple voices.⁹³ Because of this, it can be argued that mergers between newspapers should be subject to a stricter review than that proposed by the Horizontal Merger Guidelines. JOAs need not be per se violations of antitrust laws, even under a stricter merger review. Under such a heightened scrutiny, the Justice Department's guidelines serve as a basic framework that need only be expanded to address First Amendment goals. By strengthening merger review and applying federal antitrust laws to media corporations, the federal government can help ensure competition in the marketplace of ideas. Stricter merger review and application of antitrust regulations should make it more difficult for large media companies to dominate the news market and engage in anti-competitive activity. One way to ensure this is to consider First Amendment values when applying the Horizontal Merger Guidelines.

A. *Market Definition*

One of the most important aspects of such a merger review would be the definition of the proper market. Convergence among the media, along with an ever-shrinking worldview, have made both geographic and product market definitions essential to a thorough review.⁹⁴ Under current guidelines, market definition is essential to determining the presence of market power.⁹⁵ The analysis therefore focuses on the responses of

89. *See id.* § 2.

90. *See id.* §§ 3.0–3.4.

91. *See id.* § 4.

92. *See id.* § 5.

93. 15 U.S.C. § 1801 (2000) establishes that the public policy of the United States favors this view.

94. *See generally* GILLIAN DOYLE, UNDERSTANDING MEDIA ECONOMICS 141 (2002) (explaining the fundamental concepts relevant to the study of media economics; considering the key industrial questions facing the media industries today; and relating economic theory to business practice).

95. Horizontal Merger Guidelines, *supra* note 87, at § 1.0. Section 1 reads:

consumers to a hypothetical price increase in the market.⁹⁶ In the newspaper industry this price increase could take either of two forms: an increase in advertising rates or an increase in subscription/rack prices. After the Tucson JOA went into effect, the two newspapers were able to raise both advertising rates and subscription rates because of their combined market power.

In order to obtain the product market, the guidelines look at the substitutability of products for the merging firms' products.⁹⁷ If in response to a small price increase, the consumer would substitute another product, then that product is added to the product market because it is viewed as a competing product.⁹⁸ This process is performed repeatedly until the products are no longer acceptable substitutes for the merging firms' products. In the newspaper industry, this test has several potential

A merger is unlikely to create or enhance market power or to facilitate its exercise unless it significantly increases concentration and results in a concentrated market, properly defined and measured. Mergers that either do not significantly increase concentration or do not result in a concentrated market ordinarily require no further analysis.

Id.

96. *Id.* Section 1 continues:

A market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and nontransitory' increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test.

Id.

97. *Id.* at § 1.11. The test suggested in the guidelines asks:

[A]ssuming that buyers likely would respond to an increase in price for a tentatively identified product group only by shifting to other products, what would happen? If the alternatives were, in the aggregate, sufficiently attractive at their existing terms of sale, an attempt to raise prices would result in a reduction of sales large enough that the price increase would not prove profitable, and the tentatively identified product group would prove to be too narrow.

Id.

98. Horizontal Merger Guidelines, *supra* note 87, at § 1.11. The Section continues:

In considering the likely reaction of buyers to a price increase, the Agency will take into account all relevant evidence, including, but not limited to, the following:

- (1) evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables;
- (2) evidence that sellers base business decisions on the prospect of buyer substitution between products in response to relative changes in price or other competitive variables;
- (3) the influence of downstream competition faced by buyers in their output markets; and
- (4) the timing and costs of switching products.

Id.

applications. One might ask, if the daily newspaper increased ad rates, would advertisers turn instead to a weekly newspaper? A local magazine? A radio station? A television station? A Web site? If any of these products are seen as acceptable substitutes, then they should be included in the product market. As an example of a product that would likely fall outside the product market, one might imagine a local restaurant that advertises lunch specials in one of the two daily newspapers. The advertiser might find that the other daily newspaper, the local radio station, and weekly newspaper would all be adequate substitutes if one of the daily newspapers increased its prices. Therefore, all of these would be included in the relevant product market. The *New York Times*, however, would not be a part of the relevant product market because it is not a suitable substitute.

Research has shown that consumers consider some media sources as suitable substitutes for one another.⁹⁹ This would support the notion that the definition of market, in the context of media mergers, must be expanded to include products that are viewed by consumers and advertisers to be adequate substitutes for one another. For example, since the increase in availability of Internet access, consumers with computers have reported more reliance on the Web for news and less on broadcast television.¹⁰⁰ Additionally, consumers often see cable television and daily newspapers as interchangeable means for acquiring information.¹⁰¹ Similarly, broadcast television and daily newspapers also had high substitution.¹⁰² Studies have indicated that some media, however, are not equivalent.¹⁰³ Consumers, for example, will not turn to a weekly newspaper to replace television news or a daily newspaper.¹⁰⁴ Radio was also reported to be a medium that would not serve as an acceptable substitute for the Internet or cable television.¹⁰⁵

Once the markets have been properly defined, the concentration of the market is calculated.¹⁰⁶ This calculation takes into consideration the

99. See Joel Waldfogel, *Consumer Substitution among Media* (2002), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A8.pdf.

100. *Id.* at 17.

101. *Id.* at 17, 32–39.

102. *Id.*

103. *Id.*

104. Waldfogel, *supra* note 99.

105. *Id.*

106. Horizontal Merger Guidelines, *supra* note 87, at § 1.0. Section 1 reads:

Once defined, a relevant market must be measured in terms of its participants and concentration. Participants include firms currently producing or selling the market's products in the market's geographic area. In addition, participants may include other firms depending on their likely supply responses to a 'small but significant and nontransitory' price increase. A firm is viewed as a participant if, in response to a 'small but significant and nontransitory' price increase, it likely would enter rapidly into production or sale of a market product in the market's area, without incurring significant sunk costs of entry and exit. Firms likely to

number of firms that are in the product and geographic markets.¹⁰⁷ It also considers the potential for firms who, in response to a small price increase, would seek to enter the market.¹⁰⁸ Because the actual calculation of concentration does not materially impact this Article's suggested changes to the review of newspaper mergers, it will not be addressed in great depth.

B. Adverse Effects of Mergers

A significant portion of the DOJ's merger review is its analysis of the negative impact that a merger might have on a market. This review looks at the potential for tacit or explicit collusion among firms in the same market.¹⁰⁹ Coordinated interaction looks at the ability of firms to set prices, control output, or otherwise lessen competition by working together at the detriment of the consumer. Along with having the conditions required to coordinate actions, this type of collusion also requires that firms have the ability to punish those who deviate from the agreed-upon coordination. Often, coordinated interaction occurs when firms set prices. As the number of firms in a market decreases, this theory posits that it becomes easier for the firms to either openly or unconsciously control prices. The DOJ considers numerous factors including the amount of price information available and the similarity of products.¹¹⁰ In the newspaper industry, this would include access to published advertising ratecards, ability to reach similar audiences, and the possible cross-ownership of multiple product outlets.

In addition to coordinated interaction, the merger guidelines also address the unilateral effects of mergers.¹¹¹ This aspect of merger review is concerned with how merging firms will change their behavior in light of

make any of these supply responses are considered to be 'uncommitted' entrants because their supply response would create new production or sale in the relevant market and because that production or sale could be quickly terminated without significant loss.

Id. (citation omitted).

107. *Id.* at §§ 1.12–1.22.

108. *Id.* at §§ 1.32–1.41.

109. *Id.* at § 2.0.

110. Horizontal Merger Guidelines, *supra* note 87, at § 2.1. Section 2.1 reads:

Certain market conditions that are conducive to reaching terms of coordination also may be conducive to detecting or punishing deviations from those terms. For example, the extent of information available to firms in the market, or the extent of homogeneity, may be relevant to both the ability to reach terms of coordination and to detect or punish deviations from those terms. The extent to which any specific market condition will be relevant to one or more of the conditions necessary to coordinated interaction will depend on the circumstances of the particular case.

Id.

111. *Id.* at § 2.2.

the merger. Typical behavioral changes could include increased prices or the suppression of supply.¹¹² Unilateral effects are not likely to be seen in markets where the products are sufficiently distinct or where other suppliers could compensate for a decrease in supply.¹¹³

C. Market Entry

When new competitors can begin producing a product and competing in a market with little effort, mergers are not seen as harmful to competition.¹¹⁴ To determine if other producers could easily enter a market, and thus increase competition even after a merger, the guidelines rely on three factors: timeliness, likeliness, and sufficiency of entry.¹¹⁵ In order for another firm to be considered a likely competitor, they must have the ability to enter the market with relative expedience.¹¹⁶ Timeliness then considers not only how quickly a firm can enter, but also how quickly the firm can be a viable alternative.¹¹⁷ Likeliness relies on whether a firm would actually consider entering the market.¹¹⁸ Factors in this determination include whether it would be profitable and feasible to enter

112. *Id.* at § 2.21–2.22.

113. *Id.* at §§ 2.211–2.212.

114. See Horizontal Merger Guidelines, *supra* note 87, at § 3.0. Section 3 reads:

A merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels. Such entry likely will deter an anticompetitive merger in its incipiency, or deter or counteract the competitive effects of concern.

Id.

115. *Id.*

116. *Id.*

117. *Id.* at § 3.2. This Section states:

In order to deter or counteract the competitive effects of concern, entrants quickly must achieve a significant impact on price in the relevant market. The Agency generally will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact. Where the relevant product is a durable good, consumers, in response to a significant commitment to entry, may defer purchases by making additional investments to extend the useful life of previously purchased goods and in this way deter or counteract for a time the competitive effects of concern. In these circumstances, if entry only can occur outside of the two year period, the Agency will consider entry to be timely so long as it would deter or counteract the competitive effects of concern within the two-year period and subsequently.

Id. (citation omitted).

118. Horizontal Merger Guidelines, *supra* note 87, at § 3.3. In Section 3.3:

An entry alternative is likely if it would be profitable at premerger prices, and if such prices could be secured by the entrant. The committed entrant will be unable to secure prices at premerger levels if its output is too large for the market to absorb without depressing prices further. Thus, entry is unlikely if the minimum viable scale is larger than the likely sales opportunity available to entrants.

Id. (citation omitted).

the market. Even if market entry could be timely and likely, if it will not serve to increase competition and lower prices, then it is not a sufficient entry.¹¹⁹ Thus, the final factor seeks to ensure that a market entry will have the desired outcome of returning premerger market conditions.

Entry into the newspaper business rarely meets any of these criteria in an era of corporately-controlled media. First, in order to be a viable competitor, the newspaper must have access to manpower, facilities, and a large amount of financing. These requirements inhibit the timely entry into the market. In addition, the production of a newspaper includes many specialized positions that require training, which would make it more difficult for someone producing a similar product to decide to expand into the newspaper business. For example, while a print shop might have the knowledge to run a press operation, it is unlikely that the print shop employees have journalistic training. Because entry into the newspaper business requires a large commitment of capital, it could be a rather risky venture, which may decrease the likelihood of its occurrence. Additionally, it is unlikely that a start-up newspaper could sell the subscriptions and advertisements to turn a profit quickly. Perhaps the largest barrier to entry would be the ability of a new entrant to sufficiently compete with the existing firms. Reputation and incumbency would tend to provide the dominant firm with an advantage over a new entrant, making it tough for a new competitor to lower the prices in the market back to premerger levels.

D. Efficiencies

One of the justifications behind the NPA was its ability to create market efficiencies that allow jointly operated newspapers to continue production. By allowing the newspapers to share certain facilities, the JOA seeks to cut costs that would otherwise make production of both products

119. *Id.* at § 3.4. Section 3.4 reads:

Inasmuch as multiple entry generally is possible and individual entrants may flexibly choose their scale, committed entry generally will be sufficient to deter or counteract the competitive effects of concern whenever entry is likely under the analysis of Section 3.3. However, entry, although likely, will not be sufficient if, as a result of incumbent control, the tangible and intangible assets required for entry are not adequately available for entrants to respond fully to their sales opportunities. In addition, where the competitive effect of concern is not uniform across the relevant market, in order for entry to be sufficient, the character and scope of entrants' products must be responsive to the localized sales opportunities that include the output reduction associated with the competitive effect of concern. For example, where the concern is unilateral price elevation as a result of a merger between producers of differentiated products, entry, in order to be sufficient, must involve a product so close to the products of the merging firms that the merged firm will be unable to internalize enough of the sales loss due to the price rise, rendering the price increase unprofitable.

Id.

cost-prohibitive. The Horizontal Merger Guidelines also seek to address the creation of market efficiencies, recognizing that some mergers create benefits to the consuming public.¹²⁰

The guidelines only recognize efficiencies that are likely to result if the merger occurs.¹²¹ In addition, because it is difficult to substantiate possible efficiencies, the DOJ places the onus on the merging firms to provide evidence of the possible efficiencies.¹²² Vague or speculative claims of efficiencies will not save a merger under the guidelines. Instead the efficiencies must be cognizable.¹²³ Only then will efficiencies have the potential to act as a defense to an otherwise unlawful merger. In such a case, the DOJ will not challenge a merger if it has determined that the efficiencies are so great that no anticompetitive effects will result in any market.¹²⁴

Efficiencies are at the heart of the NPA's attempts to maintain competing voices in the newspaper industry. By allowing two newspapers to share the printing function, a JOA splits the cost of one of the largest capital outlays in the industry: the press. In addition, allowing advertising representatives to sell ads for both products reduces the duplicative nature of their jobs—allowing them to sell space in both newspapers during one trip. However, the Horizontal Merger Guidelines take the analysis one step further by requiring that no anti-competitive effects result in any market.

120. *Id.* at § 4.0. In Section 4.0:

Competition usually spurs firms to achieve efficiencies internally. Nevertheless, mergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction. Indeed, the primary benefit of mergers to the economy is their potential to generate such efficiencies.

Id.

121. Horizontal Merger Guidelines, *supra* note 87, at § 4.0. Section 4.0 continues:

The Agency will consider only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed *merger-specific efficiencies*. Only alternatives that are practical in the business situation faced by the merging firms will be considered in making this determination; the Agency will not insist upon a less restrictive alternative that is merely theoretical.

Id. (citation omitted).

122. *Id.*

123. *Id.* “Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service. Cognizable efficiencies are assessed net of costs produced by the merger or incurred in achieving those efficiencies.” *Id.*

124. Horizontal Merger Guidelines, *supra* note 87, at § 4.0. “In the Agency’s experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great. Efficiencies almost never justify a merger to monopoly or near-monopoly.” *Id.*

While the virtues of a JOA should allow the newspapers to publish in a more cost-efficient manner, the practice of JOAs often allows them the market power to raise advertising and circulation prices.

E. Failing Firms

The essential idea behind the failing firm defense is that competition will decrease if a firm has to leave a market.¹²⁵ Thus, a merger between two firms should inhibit competition no more than one firm's exit from production. The definition of failure has drawn quite a bit of discussion both in the context of the Horizontal Merger Guidelines and the NPA's failing newspaper requirement. To qualify under the merger guidelines, a firm must be unable to fulfill its impending financial liabilities, must be unable to qualify for reorganization under Chapter II bankruptcy, must have made reasonable efforts to secure acquisition of its assets by another firm, and must be at a point where it is about to end production in the relevant market.¹²⁶ This would seem to require a firm to have explored all options to remain a viable competitor. In this context, it would appear that a newspaper whose parent company had substantial corporate resources would have a difficult time proving failure in the market.

Under the NPA, however, the definition of failure is a bit more ambiguous. Instead of providing the specific criteria outlined in the guidelines, the NPA standard requires that "... regardless of its ownership or affiliations, [the newspaper] is in probable danger of financial failure."¹²⁷ Under this level of scrutiny, it is difficult to determine if a JOA is the last resort, or instead a calculated business decision designed to increase market power. This raises many questions about its application and obviously provides for a standard that is more lenient than that of the Justice Department. In addition, the statutory language provides a lower standard than the one suggested by the Supreme Court in *Citizen II*.

In *Citizen II*, the Court delineated its own interpretation of "failing newspaper."¹²⁸ In order to qualify under the Court's definition, a newspaper had to meet a three-prong test. First, the owners of the

125. *Id.* at § 5.0. Section 5.0 reads:

[A] merger is not likely to create or enhance market power or to facilitate its exercise, if imminent failure, as defined below, of one of the merging firms would cause the assets of that firm to exit the relevant market. In such circumstances, post-merger performance in the relevant market may be no worse than market performance had the merger been blocked and the assets left the market.

Id.

126. *Id.* at § 5.1.

127. 15 U.S.C. § 1802(5) (2000).

128. *See Citizen II*, 394 U.S. at 137.

newspaper must be contemplating a liquidation of the newspaper.¹²⁹ Essentially, the Court believed that a JOA should be the last resort for the newspaper. Second, the failing newspaper bears the burden of proving that the acquiring newspaper is its only potential suitor.¹³⁰ If other available purchasers exist who might be interested in the newspaper, then the Court would not classify the newspaper as failing. Finally, reorganization under bankruptcy laws must not be a viable option to continue the newspaper's existence.¹³¹ However, Congress statutorily changed this test by enacting the NPA in response to the *Citizen I* decision. Thus, the current standard, established by statute, requires only that a newspaper be in probable danger of financial failure.

V. CONCLUSION

Given the changing media landscape, the NPA is no longer the best way to ensure “. . . a newspaper press editorially and reportorially independent and competitive in all parts of the United States”¹³² Instead, federal antitrust laws should be applied to curtail anti-competitive practices among media corporations, and newspaper mergers should be analyzed under the Department of Justice Antitrust Division's Horizontal Merger Guidelines. Further, in conducting this review, careful attention should be paid to the determination of proper geographic and product markets.

In order to promote competition among the media, ensure an independent editorial voice, and maintain a free press, merger review of competing newspapers must include an examination of corporate holdings in the relevant markets. While JOAs may provide one alternative to maintaining competing voices in markets that can no longer support competing daily newspapers, their effect on competition must be carefully scrutinized to ensure that the ability of other voices to compete is not impaired by compounding market power in the hands of a few.

129. *Id.*

130. *Id.* at 138–39.

131. *Id.*

132. 15 U.S.C. § 1801.