BEFORE THE
ATTORNEY GENERAL OF THE UNITED STATES

In the Matter of:	)	
Application By the E.W. Scripps Company	)	
And MediaNews Group, Inc. For Approval	)	Public File No: 44-03-24-15
Of A Joint Operating Arrangement Pursuant To	)	
The Newspaper Preservation Act,	)	
15 U.S.C. §§1801-1804	)	

REPORT OF THE ASSISTANT ATTORNEY GENERAL IN CHARGE OF THE ANTITRUST DIVISION

I. INTRODUCTION

On May 12, 2000, the E.W. Scripps Company ("Scripps"), publisher of the Denver Rocky Mountain News ("News"), and MediaNews Group, Inc. ("MediaNews"), publisher of The Denver Post ("Post"), filed with the Attorney General an application for approval of a proposed joint operating arrangement ("JOA") pursuant to the Newspaper Preservation Act, 15 U.S.C. §§1801-04 ("NPA").[1] The proposed arrangement provides for shared profits and joint production and operation of the two

[1] The NPA defines a "joint newspaper operating arrangement" as "any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint 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 application; 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." 15 U.S.C. §1802(2).

newspapers while maintaining independence of their respective news and editorial departments.

The NPA provides a limited exemption from liability under the federal antitrust laws for JOAs that receive prior written approval of the Attorney General. To grant approval of a JOA between two newspapers, the Attorney General must make two findings: that not more than one of the newspapers is other than a "failing newspaper," and that approval of the JOA would effectuate the policy and purpose of the NPA. 15 U.S.C. §1803(b).

Regulations implementing the NPA require the Antitrust Division to submit a report to the Attorney General recommending that either (1) the proposed JOA be approved or disapproved without a hearing, or (2) that a hearing should be held to resolve material issues of fact.[2] The Attorney General may then approve the application, deny the application, or order a hearing to determine material issues of fact. If the Attorney General orders a hearing, an Administrative Law Judge is assigned to hear the case, in accordance with section 7 of the Administrative Procedures Act, 5 U.S.C. §556. The applicants and the Assistant Attorney General in charge of the Antitrust Division are parties at the hearing, and other persons may be permitted by the Attorney General to intervene if they have an interest which may be affected by the Attorney General's decision. See 28 C.F.R. §§48.10-48.11.

The Division expects that if established, the JOA agency may raise prices substantially for newspaper subscriptions and advertising, and it may restrict output in other ways. However, the NPA was specifically designed with the clear recognition that these types of anticompetitive effects could very well flow from the elimination of competition between certain newspapers, that otherwise would be

[2] 28 C.F.R. §48.7. See 28 C.F.R. §48.1 through 48.16.

prevented from combining by the federal antitrust laws.

For the reasons described below, the Antitrust Division recommends that the Attorney General find that the applicants in this matter have made an adequate showing that the News is in probable danger of financial failure and that the proposed Denver JOA effectuates the policy and purpose of the NPA. As a result, the Antitrust Division recommends that the Attorney General approve the application without a hearing, and immunize what appears to be an anticompetitive agreement to eliminate competition between these parties, one that would likely be found illegal under the Clayton Act (15 U.S.C. §18) were it not for the NPA.

II. THE APPLICATION

A. Procedural Summary

The proposed JOA application filed by Scripps and MediaNews describes the News as being in probable danger of financial failure and contains information regarding financial status, circulation, advertising share and quality of editorial product. On June 1, 2000, the Antitrust Division requested additional information, including detailed financial, budgetary and planning documents, from Scripps and MediaNews pursuant to 28 C.F.R. §48.7(a). On June 29, 2000, the Assistant Attorney General in charge of the Antitrust Division requested a 60-day extension of time to receive and review the parties' additional responses to information requests, complete interviews, analyze the information received, and draft the Antitrust Division's report. That request was granted, and the Antitrust Division's report therefore became due on September 8, 2000. Scripps and MediaNews subsequently completed their respective submissions of written interrogatory responses and documents on August 17, 2000. The Division received a total of 25 public comments regarding the JOA, which are discussed below.

Before making a decision on the pending application, the Attorney General must allow 30 days for any person to submit a reply to this Report. 28 C.F.R. §§48.7(d), 48.8(c). Absent any order from the Attorney General to extend the time period, reply comments therefore would be due by October 8, 2000.

B. The Proposed JOA

The proposed JOA was agreed to by the parties on May 11, 2000. The terms of the JOA expressly require the continued independence of the news and editorial departments of the two newspapers involved in the JOA and provides for the formation of The Denver Newspaper Agency, into which the News and the Post will merge their respective newspaper business operations. The agency will produce and distribute newspapers and will manage all commercial aspects of the business of the newspapers, including circulation, advertising sales, and marketing. The agency will be owned by Scripps and MediaNews in equal shares and will be governed by a four-member board, composed of two members each from Scripps and MediaNews. The board will appoint an independent chief executive officer to manage the agency.

Each of the parties will contribute assets to the agency, with Scripps paying to the Denver Post Corporation an additional cash sum of $60 million in order to equalize the initial interests of the parties.[3] The JOA contains provisions for the resolution of matters relating to the business of the agency where the parties are unable to reach an agreement. The term of the proposed JOA is fifty years.

[3] The $60 million sum was agreed to as the difference in the relative contributions of the parties. The parties claim it represents the difference in current fair market value of the existing enterprises, including the relative competitive position of each newspaper. The amount was set through negotiation, rather than a precise accounting or valuation of the businesses.

The JOA also provides that both newspapers will continue to publish separate morning newspapers Monday through Friday, the News as a tabloid and the Post as a broadsheet.[4] Joint Saturday and Sunday editions will be published with news and editorial content provided by both parties. Scripps will manage the Saturday edition and be principally responsible for its news content, and MediaNews will manage the Sunday edition and will be principally responsible its news content. The weekend editions will be published in broadsheet format and will carry joint mastheads.

C. The Parties

Scripps is a diversified media company with interests in newspapers, broadcast television stations, cable television networks and other media-related enterprises. The company operates the Scripps Howard News Service, a supplemental wire service, and each of the company's daily newspapers operates an Internet site. Many of the company's newspapers provide services such as commercial printing, total market coverage advertising products and direct mail advertising. Scripps reported $1.45 billion and $1.57 billion in revenues for fiscal years 1998 and 1999, respectively.

Scripps is the eighth largest newspaper publisher in the nation, with approximately 1.4 million daily subscribers and 1.6 million Sunday subscribers. Its largest newspapers operate in Colorado (the News in Denver and the Daily Camera in Boulder),[5] Tennessee, Texas and California.

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[4] The terms tabloid and broadsheet describe only the physical form of a newspaper, not its content. Tabloid newspapers have non-folded pages that open like a book, while broadsheet newspapers are taller and folded in the middle.

[5] Neither the business nor the assets of the Boulder Daily Camera, a daily newspaper located in the Denver metropolitan area that is *not* failing, will be included in the JOA. Nevertheless, Scripps' ownership of the Daily Camera raises an issue of first impression not addressed specifically by the NPA or in other JOA applications: whether other newspaper assets in the same metropolitan area owned by a JOA party, but not contributed to the JOA, must as a matter of law be deemed to be "involved in"

The News, founded in 1859 and acquired by Scripps in 1926, has been the fastest-growing newspaper in the U.S. since September 1998. The News is a morning tabloid newspaper, and is published seven days per week. The News has won more awards for its editorial coverage than any other paper in Colorado for the last four years. It has been first in the nation in the total number of classified advertisements for the last three years, with 6.7 million advertisements in 1998. Through the second quarter of 1999, the News was the number one newspaper in the U.S. in total advertising inches, according to Competitive Media Reporting's 1999 National Newspaper Ranking Report. The September 1999 Publisher's Statement reflected an all-time high circulation of 504,487 on Sunday and 396,114 daily.

MediaNews was formed in 1983 by William Dean Singleton and Richard B. Scudder to purchase and manage newspapers. MediaNews is the seventh largest newspaper company in the United States, with daily and Sunday circulation of approximately 1.5 million and 1.7 million as of March 1998. Newspaper companies under the management of MediaNews include Affiliated Newspapers Investments, Inc. ("Affiliated Newspapers") and Fairbanks Publishing Company.

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the JOA. If it were determined that the Daily Camera is “involved in” this JOA, then the Attorney General would have to deny the application as a matter of law--because only one of the papers involved in a JOA may not be failing, and neither the Post nor the Daily Camera is failing. 15 U.S.C. §1803(b). However, the Division does not believe that Scripps’ common ownership of the agency and the Daily Camera makes the Daily Camera “involved in” this JOA. In the first place, the ordinary meaning of the term “involved in” connotes participation in, not just ownership by an owner of, the JOA. Moreover, a legal rule that any commonly owned asset in the same metropolitan area must be deemed to be “involved in” the JOA would disserve the purpose of the NPA. Such a rule would require divestiture of all profitable papers in the area in order to gain approval of the JOA, and under some circumstances the publisher would find it in its interest to shut down the unprofitable paper rather than sell the others.

Affiliated Newspapers, with 1998 fiscal year revenues of $414.3 million, is a holding company that owns 60 percent of Denver Newspapers, Inc. Denver Newspapers owns four daily and seven weekly newspapers published in Colorado, including the Post, a morning broadsheet newspaper, published seven days per week. The Post had daily and Sunday circulation of 373,483 and 521,038, respectively, as of September 1999.

III. THE NEWSPAPER PRESERVATION ACT

A. Introduction

The NPA was a congressional reaction to the Supreme Court's decision in Citizen Publishing v. United States, 394 U.S. 131 (1969), which held that the JOA in Tucson, Arizona, was per se illegal. At the time that Citizen Publishing was decided, there were 22 JOAs in existence across the United States. The publishers of these papers argued that without shelter from antitrust prosecution, newspapers in JOAs that were about to be sued for antitrust violations under the Citizens Publishing standard would simply fail and go out of business. Congress, in turn, created the NPA, providing an antitrust exemption under specific circumstances for both pre-existing and new JOAs.[6] 15 U.S.C.§§ 1803(a), (b).

The NPA therefore provides a narrow antitrust exemption for two or more newspapers to enter into a "Joint Operating Arrangement" if the Attorney General determines that not more than one of the newspapers is other than a failing newspaper and that the arrangement will "effectuate the policy and purposes of the Act." A "failing newspaper" is defined as "a newspaper publication which, regardless

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[6] The Department of Justice promulgated regulations to implement the NPA on January 2, 1974. See 28 C.F.R. §§48.1 - 48.16.

of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. §1802(5). The policy of the NPA is stated at 15 U.S.C. §1801, as follows:

> 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.

As for the purpose of the NPA, Congress intended the exemption to be available only when a metropolitan area was faced with the actual near-closure of a newspaper, as opposed to the threatened closure due to mere losses: "[I]t is beyond question that the purpose of the NPA is to prevent the closure of the ailing newspaper." Committee for an Independent P-I v. Hearst Corp., 704 F.2d 467, 480 (9th Cir.), cert. denied, 464 U.S. 892 (1983) ("Hearst") (citing legislative record) (emphasis in original). Congress recognized that commercial competition between newspapers should be sacrificed only if "demonstrably essential to prevent a newspaper failure and to promote editorial and reportorial competition." 116 CONG. REC. 23148 (statement of Rep. McCulloch).[7]

Since the NPA became law, there have been eight applications for JOAs; seven of them were reviewed by the Attorney General, and each of them was approved (the eighth one was withdrawn).

[7] Generally, exemptions to the antitrust laws should be read narrowly, see, e.g., Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963) (implied immunity from the antitrust laws recognized only if necessary to make a statute work, and even then only to the minimum extent necessary). That general rule is particularly applicable here, where Congress expressly created a test for new JOAs that was intended to be "far more stringent" than the test for (grandfathered) JOAs that existed at the time the NPA. Grandfathered JOAs are immunized where not more than one of the papers "was likely to remain or become a financially sound publication." 15 U.S.C.§1803(a). See 116 CONG. REC. 23146 (statement of Rep. Kastenmeier); H. R. Rep. No 91-1193, at 10 (1970).

The applications for Anchorage, Chattanooga, York and Las Vegas were approved without a hearing, while applications in Cincinnati, Seattle and Detroit were resolved after a hearing before an administrative law judge. After participation in those hearings, the Antitrust Division recommended that the Cincinnati application be approved and that the Seattle and Detroit applications be rejected. The Attorney General's approval of the Seattle application was upheld by the Ninth Circuit in Hearst, and the Attorney General's decision to approve the Detroit JOA was affirmed by the D.C. Circuit, and also by the Supreme Court, without an opinion, in an evenly divided (4-4) vote. Michigan Citizens For An Independent Press v. Attorney General of the United States, 868 F.2d 1285 (D.C. Cir.), aff'd per curiam, 493 U.S. 38 (1989) ("Michigan Citizens").

B. Failing Newspaper Test

Applicants for this JOA bear the burden of proving by a preponderance of the evidence that they meet the requirements of the NPA. 28 C.F.R. §48.10(a)(4); see Michigan Citizens, 868 F.2d at 1289-90; Hearst, 704 F.2d at 479; see generally Administrative Procedure Act, 5 U.S.C. §556(d) (proponent of a rule or order has the burden of proof in an administrative proceeding); Steadman v. SEC, 450 U.S. 91 (1981) (Administrative Procedure Act generally provides for a preponderance of the evidence standard); KENNETH CULP DAVIS AND RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §10.7 (3d ed. 1994). While JOA applicants must show that one of the papers is in probable danger of financial failure, the statute provides no clear standards for making that determination.

The Ninth Circuit's review of the Seattle JOA application produced a two-part test for the probable danger of financial failure standard: 1) that the newspaper is suffering losses which, 2) more than likely cannot be reversed. Hearst, 704 F.2d at 478. The Hearst test was adopted by the

Attorney General in approving the Detroit JOA application, and the D.C. Circuit accepted the Attorney General's interpretation (i.e., the Hearst standard) as a reasonable interpretation of the statute, which it afforded deference according to the dictates of the Chevron doctrine. The Antitrust Division recommends that the Attorney General adopt the Hearst test in reviewing this application. Although not necessary for a decision on this application, we also recommend, as described below, that the Hearst test be applied differently than it was in Seattle, so as to better fulfill the congressional intent in enacting the NPA.[8]

1. Is the Newspaper Suffering Losses?

The Antitrust Division has evaluated Scripps' claimed losses using an "incremental analysis," which posits that if a subsidiary or operating unit of a corporate parent returns a *net benefit* to the overall business of the corporate parent, the corporate parent will choose to keep the subsidiary operating, even if the subsidiary appears to be losing money on a stand-alone basis. In general terms, the incremental analysis examines current and projected financial information, and excludes from the expense side all costs that would be incurred by the newspaper's owner regardless of whether the individual newspaper were to shut down. Such costs are not "incremental." Portions of overhead

[8] The Attorney General should interpret and apply the NPA in a manner that best comports with congressional intent. Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, at 842-43 (1984). The legislative history makes clear that Congress rejected the Citizen's 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. Thus, to qualify for the exemption a newspaper need not be on the brink of financial collapse, nor have entered the "downward spiral." See Michigan Citizens, 868 F.2d at 1292, Hearst, 704 F.2d at 478.

costs, such as the parent company's general counsel and chief executive officer, are examples of non-incremental costs. Unlike incremental costs such as newsprint and reporters' salaries, the parent corporation will not eliminate non-incremental costs by shutting down the allegedly failing newspaper.

The Division recognizes that the incremental analysis was rejected in connection with the Seattle JOA application because of the NPA's definition of "failing newspaper" as one "regardless of its ownership or affiliations," that "is in probable danger of business failure." 15 U.S.C. §1802(5). The Office of Legal Counsel ("OLC"), in a footnote of an opinion on another issue, advised the Attorney General that the NPA precluded an investigation into the economic contribution of an allegedly failing newspaper to its corporate parent. 6 U.S. Op. Off. Legal Counsel 243, 244 n.2 (1982). According to OLC, the legislative history of the NPA makes clear that the "ownership or affiliations" clause was intended to bar any test which would result in a subsidy from the corporate parent to the allegedly failing newspaper. OLC believed that the incremental analysis would permit just such a subsidy because it would lead to ignoring "legitimate" expenses of a parent, thus requiring the parent to absorb those expenses. Similarly, the Attorney General rejected the incremental analysis approach, stating that although financial relationships between newspaper corporations and their subsidiaries are not entirely irrelevant to the 'failing newspaper determination,' incremental analysis is "not permitted either by the express language of the Act or its legislative history." Report of the Assistant Attorney General in Charge of the Antitrust Division (Seattle) at 26-30. The Ninth Circuit agreed. Hearst, 704 F.2d at 480.

The Division, respectfully, disagrees with these conclusions. Neither the language of the statute nor the legislative history clearly rejects the incremental analysis. While we agree that the "ownership or affiliations" clause precludes a requirement that a corporate parent *subsidize* a newspaper before it is eligible for immunity, the mere use of incremental analysis to evaluate the value of a newspaper to its parent does not mean that any subsidy will be required before immunity may be granted. Thus, the incremental analysis simply provides the most accurate and practical measure of whether the News would continue to be independently operated in Denver absent approval of the JOA, and therefore satisfies the overriding congressional goal of preserving competing reporting and editorial diversity, since a rational business person would keep a competing newspaper operating if it were returning a net benefit to its corporate parent.[9] At the same time, the incremental test makes the antitrust exemption only as broad as needed to effectuate the purpose of the NPA, since the exemption would be available to preserve a paper that would otherwise exit, but is not available for papers that are returning a positive benefit to their owners, i.e., to corporate parents that are not subsidizing the subsidiary.

While we, therefore, believe that the incremental analysis is the best approach to evaluation of a claim that a newspaper which is part of a larger chain is failing, we see no reason for the Attorney General to decide this issue in order to make a decision on this application. Under either the approach employed in Seattle or an incremental analysis, as described below, the News is a failing newspaper. Given this factual setting and the foregoing reasons for preferring the incremental analysis, we urge the

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[9] The use of an incremental analysis still results in a less demanding test of business failure than the test of Citizen Publishing. The incremental analysis is analogous to one prong of the Merger Guidelines' failing division test, which requires that the proponent of the defense demonstrate that the division is experiencing negative cash flow on an operating basis. Unlike the failing division test, however, the incremental analysis does not require a showing that the assets would exit the relevant market in the near future if not sold, and a shop of the relevant assets is not required in all instances. No claim is made here that the News has satisfied the failing division test. See U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines §5.2 (1997).

Attorney General not to foreclose use of the incremental analysis in future JOA applications.[10]

2. Can the Losses Likely be Reversed?

Under the test articulated by the Ninth Circuit in its Seattle opinion, JOA applicants also bear the burden of demonstrating that losses more than likely cannot be reversed. Hearst, 704 F.2d at 478. This standard has been derived from the Bank Merger Act, which was mentioned prominently in the NPA's legislative history. See 116 CONG. REC. 23146 (1970). The NPA's "probable danger of financial failure" language is taken from the Bank Merger Act, and the Supreme Court's interpretation of it in United States v. Third National Bank, 390 U.S. 171 (1968).

In Third National Bank, the Court held that in order for merging banks to qualify for an antitrust exemption under the Bank Act, the parties were required to establish that there existed no reasonable alternatives other then the merger. Third National Bank, 390 U.S. at 190. From the opinion in Third National Bank, the Antitrust Division, ALJs, and Attorneys General all have recognized that the probable danger standard of the NPA is primarily an economic test that seeks an answer to the question of whether "reasonable alternatives . . . exist" to the JOA. Michigan Citizens, 868 F.2d at 1292; Hearst, 704 F.2d at 476. Deriving support from the bank case, the Ninth Circuit included, among other things, whether managerial improvement could reverse the newspaper's economic misfortune. Hearst, 704 F.2d at 478.

[10] An Attorney General would be well within his or her discretion to revise the prior interpretation of the NPA and, indeed, is obligated to do so where, as here, it would more faithfully fulfills congressional intent. See Chevron, 467 U.S. at 863-864; Rust v. Sullivan, 500 U.S. 173, 186-187 (1991); and Motor Vehicles Mfrs. Assn. v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 43 (1983). See also Good Samaritan Hospital v. Shalala, 508 U.S. 402, 417 (1993).

Accordingly, in Hearst, the court reviewed the Attorney General's assessment of whether reasonable alternative solutions to the JOA existed. The Hearst court agreed with the Attorney General that there was insufficient factual evidence that new management would succeed in reversing losses, and his conclusion that the newspaper's trend toward financial failure was likely irreversible under any management. Id. From these showings, the Hearst court affirmed that the newspapers had met their burden of proof.

In Detroit, the Attorney General found that a newspaper's losses also were irreversible. The D.C. Circuit affirmed the Attorney General's findings, stating that "the Free Press had met its burden of proof, because it had suffered persistent operating losses over nearly a decade and had no prospect of unilateral action to reverse those losses." Michigan Citizens, 868 F.2d at 1290. The review of the other JOA applications since Michigan Citizens have also involved factual consideration of whether unilateral action could be taken to reverse losses.

C. The Policy and Purpose of the Act

The second element of the overall statutory test is whether "approval of such arrangement would effectuate the policy and purpose of this chapter." 15 U.S.C. §1803(b). The policy and purpose of the NPA is to preserve independent newspaper editorial voices that might otherwise disappear. One method of meeting this requirement is for the parties to structure the JOA in a manner that assures both newspapers receive revenues sufficient to finance the editorial and news functions. See, e.g., Report of the Assistant Attorney General in Charge of the Antitrust Division (Las Vegas) at 41-43. This element of the statutory test has not been contested in prior applications, so there is not a body of decisional law to elaborate its meaning.

IV. APPLICANTS' ARGUMENTS

The applicants argue that years of an extremely competitive newspaper struggle between the Post and the News has caused the News to suffer serious irreversible financial losses. They argue that, even though neither paper is dominant, the financial consequences of the newspaper war in Denver has "exhausted the ability of the News to sustain itself as a commercially independent newspaper."[11] While the News has consistently suffered financial losses in the last decade, the Post appears to be profitable and likely to be able to sustain its part in the Denver newspaper war indefinitely. The News' financial losses have occurred despite various attempts to increase circulation, advertising revenues, and, ultimately, profitability. The applicants contend that due to the consistent financial losses, the News is in probable "danger of financial failure" and is therefore a "failing newspaper" as defined by the NPA.[12]

The applicants contend that in the past decade, despite the best efforts of Scripps, the News has incurred persistent substantial operating losses that total $123.4 million. See Application at Tab 3. These losses take into account intra-corporate charges assessed by Scripps to the News. These intra-corporate charges include the following: management fees, financial services fees, corporate Internet service fees, division management fees, and Washington bureau fees.[13] Even if these intra-corporate charges are deducted, the News would still have experienced substantial operating losses over the last decade, totaling $81.4 million. The applicants also contend that Scripps ownership of the News has

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[11] Application by E.W. Scripps Company and MediaNews Group, Inc. for Approval of a Joint Operating Newspaper Arrangement (May 12, 2000) ("Application") at 22.

[12] Application at 3.

[13] Application at 24.

been a financial drain on an incremental basis, although the applicants dispute that the incremental analysis method can legally be considered as part of the Department's analysis. Finally, the applicants argue that these financial losses are projected to continue and increase. Thus, the only way to preserve the News' editorial voice is through the establishment of an approved JOA.

V. ANALYSIS

A. Historical Trends

Newspaper industry participants claim that they are subject to unique economic conditions including large economies of scale resulting from "first-copy" costs.[14] Also, there is a direct correlation between the purchase of the newspaper by readers and the purchase of advertising space by advertisers such that, advertisers prefer to advertise in a newspaper that sells to many readers and readers prefer to purchase a newspaper that has a large volume of advertisements. A decrease in one leads to a decrease in the other, a situation that, if left unchecked may ultimately place a newspaper at risk of entering a downward spiral that leads to its inevitable demise.[15]

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

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[14] "First copy" costs means those costs associated with producing the first copy of the newspaper. All reporting, writing, editing, make-up and pre-production activities, and physical materials, used to make the newspaper each day. Other costs would be only those associated with printing, newsprint, and distribution.

[15] According to newspaper executives, industry observers and experts, the "downward spiral" is a phenomenon in which a newspapers' decreasing circulation may lead to decreasing advertising, which in turn may lead to further decreasing circulation and further decreasing advertising, etc., ending in the inevitable failure of the newspaper. It demonstrates the interdependence of circulation and advertising.

more than one competing daily 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. Today, of the 1,400 cities that have a local daily newspaper of general circulation, fewer than 20 have more than one.

The trend of declining numbers of cities with competing daily newspapers has affected large cities as well as small ones. In 1980, 16 of the 50 largest U.S. cities had competing daily newspapers. Today, Denver is among New York, Chicago, Boston, Washington and San Francisco, as the only six major U.S. cities remaining with independently competing daily newspapers of general circulation.

The first newspaper JOA was established in 1933 in Albuquerque, New Mexico. From 1933 to 1966, twenty-two JOAs were established, sixteen of them since the end of World War II. Currently, however, only 13 cities have JOAs, one of which, Honolulu, is currently in litigation over termination.[16]

Although it is debated what exactly has caused the phenomenon of drastically reduced competition in the markets for local daily newspapers of general circulation, the fact is that most cities do not today support more than one such newspaper. Far more cities have seen failing papers close than have seen them enter into JOAs since the NPA was enacted in 1970. This is because once the dominant newspaper concludes that its competitor is failing, it is more profitable to let it die rather than agree to a JOA.[17] Generally, there have been few attempts at entry of new newspapers into markets

[16] Cincinnati, Salt Lake City, Birmingham, El Paso, Tucson, Fort Wayne, Albuquerque, Honolulu, Seattle, Charleston (W.VA.), Las Vegas, Detroit, and York (PA). JOAs recently terminated before the expiration of their terms include San Francisco, Chattanooga, Nashville, Tulsa, Knoxville, Shreveport, Miami, Pittsburgh and St. Louis.

[17] For example, recent daily newspaper failures occurred in cities such as Little Rock, San Antonio, Dallas, and Houston. It is believed that in those cities the non-failing paper had no interest in

where there is already a paper.

B. <u>The Denver Newspapers and Newspaper Competition in Denver</u>

Both papers claim to be the leader in their respective primary markets. The <u>Post</u> has a larger primary market due to its wider area of distribution and coverage, and it claims a circulation lead across the region and state. The <u>News</u> has focused distribution primarily on the six-county Denver metropolitan area (Adams, Arapaho, Boulder, Denver, Douglas and Jefferson counties) and claims a lead there, and also a lead in total state circulation, even though the <u>Post</u> has more distribution in remote parts of Colorado. Advertisers generally confirm, however, that they are wary of both papers' claims to superior circulation and still view them largely as in a situation of relative parity. Accordingly, this has led to general overall parity in advertising rates and revenues, as described below.

Both of the newspapers have done many studies of reader preferences and advertiser perceptions. As a general matter, readers prefer the <u>News</u>' tabloid style, and most advertisers prefer the <u>Post</u>'s upscale image and larger pages. Even though many attempts have been made to alter its image, the <u>News</u> is still viewed by many readers and advertisers as a newspaper appealing to lower income "blue collar" readers. Head-to-head competition for circulation in the Denver newspaper war has resulted in the highest rate of penetration (percentage of households getting a newspaper) and readership of anywhere in the United States.

Newspaper competition in Denver has been characterized by a long and vigorous war between the <u>News</u> and the <u>Post</u> for circulation, readership, and advertising revenues. The <u>News</u> began

sharing the market once it believed the other paper had reached the downward spiral that led to its death.

publication in 1859 as a morning paper, and the Post in 1892 as an evening paper. By 1926, the News was declining rapidly and was sold to Scripps. Scripps declared war against the Post, saying it would challenge the Post's "dictatorship" of the Denver market. For the next few decades, however, the Post held on to the lead in circulation and advertising revenue. In an effort to stay alive, the News switched to a tabloid format in 1942. The News slowly recovered, and gained the daily circulation lead in 1980 and the Sunday lead in 1983. Times-Mirror bought the Post in 1980 and attempted to turn it back into the dominant force that it once was. Times-Mirror moved the Post to the morning, and felt that it had failed by 1987, and sold the Post to MediaNews. MediaNews made many changes at the Post, including cutting costs, improving the paper, and emphasizing its advantages in geographic coverage and attractiveness to newcomers and high demographic consumers in the high-growth Denver area. From 1987 to 1997, the Post has steadily gained circulation share while the News steadily lost circulation and circulation share. This competition with the Post drove Scripps throughout the 1990s to expend significant effort to reduce its costs and improve its circulation, with the hope that advertising revenues would follow.

1. The News' Efforts to Reduce Costs and Improve Circulation

In order to achieve production cost parity with the Post, Scripps made a considerable investment in capital improvements beginning in 1992, which included the building of a new production facility at a cost of roughly $150 million, which was expected to be tremendously efficient. The News subsequently implement numerous additional strategic initiatives aimed at reducing $20 million in cash expenses by December 1997, and has continued its efforts to contain costs since then.

For example, the News implemented the "Front Range Plus" strategy in the core six-county market.[18] This plan focused marketing and distribution efforts on the areas most important to advertisers with the expectation that it would achieve cost efficiencies through the elimination of unprofitable circulation.[19] Once strength in the six-county market was achieved, the News planned to eliminate distribution in all areas deemed non-essential to advertisers.[20] Scripps and the News envisioned Front Range Plus as part of a cost-effective and efficient means to reach advertisers' most likely customers. Cost savings were expected through a reduction in newsprint[21] and elimination of the high costs of distribution and transportation to outlying areas. News executives estimated achieving net savings of approximately $9.0 million in operating expenses, including $8 million in newsprint, through elimination of 32,000 daily and 50,000 Sunday newspapers in areas outside the targeted market.[22] More importantly, Front Range Plus was intended to result in increased advertising revenues as anticipated increases in core market circulation produced a greater return on investment for advertisers. In theory, the plan appeared economically feasible, considering that the majority of News subscribers

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[18] Deposition Transcript of Alan M. Horton, Senior Vice President, Newspaper Division, August 4, 2000, ("Horton Testimony") at 74-80. The six-county Denver metropolitan area consists of Adams, Arapaho, Boulder, Denver, Douglas and Jefferson counties. The "plus" areas consisted of high population centers along the I-70 corridor in Clear Creek, Gilpin, Summit and Eagle counties, plus the high population areas of Elbert, Larimer and Weld.

[19] The plan also focused new circulation and marketing efforts toward reaching customers in key zip codes in which the News trailed the Post in circulation. Horton Testimony at 76.

[20] Horton Testimony at 74-75.

[21] Newsprint prices increased 76% from December 1993 to January 1996, and projections anticipated continued increases. Front Range Plus, Employee Q & A at 1 (8 4054).

[22] News Strategic Plan, 1996-1998, at 1 (8 122).

living outside of the Front Range area do not regularly shop in Denver.[23]

Implementation of Front Range Plus achieved some significant cost savings and permitted the News to reallocate resources toward increasing its circulation lead in the core market. The News ultimately achieved the circulation lead in several of the targeted key zip codes.[24] But, the strategy did not result in increased advertising rates.[25] The Post countered Front Range Plus through marketing efforts emphasizing total circulation and, despite the News' attempts to educate advertisers on the value of Front Range Plus advertising,[26] they simply refused to accept significantly increased advertising rates.[27] The News was ultimately forced to abandon its Front Range strategy and expand back into the

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[23] 56% of all Colorado residents live in the Denver metro area. Those same residents account for over 58% of all retail sales in the state. Moreover, 70% of Colorado residents live somewhere within one of the Front Range Plus counties, and account for almost 69% of all retail sales of the state. Front Range Plus, Employee Q & A at 1 (8 4054).

[24] Horton Testimony at 76-77.

[25] Id. at 77-79.

[26] The News tried various education methods including sales staff training, mailing collateral materials to advertisers, employing market experts to give presentations to advertisers, and presenting information though television commercials. Horton Testimony at 78-79.

[27] The Division interviewed the top 30 advertisers (by annual revenue) for both newspapers. Advertiser response to Front Range Plus was generally negative, except for those advertisers whose only business was in the six-county area. Most advertisers viewed Front Range Plus as a plan which reduced the circulation of the News, thereby making advertising in the News less valuable to them. None of the advertisers interviewed by the Antitrust Division believed that they could rely solely on the News to cover the Denver market, and they were unwilling to pay higher rates in light of the still-strong presence of the Post. Generally, Front Range Plus was viewed by advertisers as ineffective because it did not entirely supplant the Post in the Denver metro area, and none of the advertisers interviewed discontinued advertising in the Post as a result of Front Range Plus.

areas from which it had withdrawn.[28]

Along with these cost reduction efforts, the News took a number of steps intended to increase immediately its circulation and thus allow it to take advertising share away from the Post, including bonus days,[29] forced conversions,[30] and subscription price discounts, such as a "penny paper" subscription package.[31] In the early 1990s, the Post initiated a bonus day battle as a means to increase its net daily paid circulation figures, offering 25 bonus days in 1991 as compared to the five bonus days offered by the News. In 1993, the News responded and increased its number of bonus days to 32, and further increased them in 1994. By 1997, the News was offering 102 bonus days per year in comparison to the Post's 98 bonus days.[32] By keeping pace with the Post's increased use of bonus

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[28] Id. at 79-81.

[29] "Bonus days" is the term used to refer to free delivery of newspapers on holidays, or any other days, to Sunday and weekend subscribers which are then counted as paid daily circulation, pursuant to Audit Bureau of Circulation ("ABC") rules. These rules permit the delivery of free newspapers to existing subscribers to be included in a newspaper's general circulation figures. As ABC circulation figures are an extremely important tool utilized by advertisers when making advertising decisions, the Denver newspapers soon increased the use of bonus days by greatly extending their use.

[30] A forced conversion adds extra days of home delivery service to existing subscription packages, thereby increasing paid circulation. Although forced conversions do not reach additional consumers, they allow for the realization of significant increases in average net paid circulation which is reflected in ABC audit reports.

[31] In general, the penny paper is a subscription package which allows a subscriber to purchase a six-day subscription, including Sunday, for $3.12 per year. The subscriber is then permitted to purchase a one-day per week subscription for an additional penny. In effect, the subscriber gets a seven day per week subscription for a penny per day. Horton Testimony, at 111. Because penny papers are paid subscriptions, they are included in ABC circulation figures and therefore arguably more valuable than free newspapers.

[32] Memorandum of Bernie Gitt to Bruce Johnson at 5 (April 27, 2000) ("Gitt Memorandum"); ABC White Audit Reports (1991-1999).

days, News management effectively countered the Post's attempts to (allegedly) artificially inflate its circulation.[33]

In March 1994, the Post converted Sunday-only subscription service to a Sunday-Monday-Holiday service, thereby realizing an additional delivery day for 16,341 customers. The News management responded to this and other forced conversion initiatives of the Post by adding more days to existing service.[34] Both newspapers have continued this practice by instituting various forced conversions, ranging from one to three days of additional service, from 1995 through the present.

In 1993, the Post initiated a subscription price discount battle that continues to this day. In May of that year the Post established a price of $26.00 for a full year of Sunday-only delivery. The Post further reduced the price of the paper by 50%, and sold the Sunday-only subscription to new subscribers at a discounted price of $13.00 per year.

News executives followed the Post's lead and, in June of 1993, established a similar Sunday-only delivery for $26.00, reduced 50% to $13.00 per year. In 1995 and 1996, the News cut some subscription prices further through a "Buy 6 Months-Get 6 Months Free" delivery rate in an effort to attract 7-day subscriptions. The Post responded by increasing the number of bonus days to their Sunday-only and weekend subscribers.[35]

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[33] In 1997, the ABC examined the bonus day issue and changed the rules. It now requires newspapers to break out the impact to daily net paid circulation if more than seven bonus days are served in a six month publisher statement period. Both Denver papers thereafter significantly reduced the number of bonus day deliveries such that, in 1999, the News offered only fifteen bonus days whereas the Post offered seven. Gitt Memorandum; ABC White Audit Reports (1991-1999).

[34] Gitt Memorandum at 2; ABC White Audit Reports (1991-1999).

[35] Gitt Memorandum at 2.

As of 1997, the Post had gained a noticeable lead over the News in circulation for both daily (343,480 vs. 311,773) and Sunday (470,782 vs. 415,363) publications, with no reversal of the downward trend in sight for the News. (See Tables 1-4.) In 1997, management at the News and at Scripps began to take bold measures to reverse the News' downward circulation trend. Scripps asserts that the News was approaching the downward spiral at that time and would have entered it if the circulation levels had become too disparate. In any event, Scripps' executives also believed that they could reverse the trend and win the Denver newspaper war in the relatively near future.

In late 1997, the News escalated the discounting battle by introducing the "penny paper." The News originally introduced the penny paper as a means to increase circulation in certain key zip codes in the core market area where the News trailed the Post. The News intended this rate structure to be limited to a small set of targeted areas. The Post, however, responded in late 1998, via direct-mail, by offering its own $3.12 yearly subscription rate, including Sunday. The Post's direct-mail offers included two and three year options which locked in subscribers for up to three years for a total price of less than $10.00.[36] See Table 1.

A Scripps executive testified that the penny paper was more successful in terms of increasing circulation than the News had anticipated, and market research revealed that readership had in fact increased.[37] In November 1998, in response to the direct-mail campaign by the Post, the News included Sunday in its $3.12 delivery rate and offered the penny rate as the paper's primary delivery offer across the Denver area. Scripps and News executives were cognizant of the fact that increased

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[36] Gitt Memorandum at 3.

[37] Horton Testimony at 114-117.

circulation expenses and decreased circulation revenues were unavoidable consequences of the penny strategy, as increased newsprint, delivery, and other production expenses far exceeded anticipated circulation revenues. See Table 2. However, management anticipated that the increased readership would eventually translate into increased advertising and revenues, in addition to creating a circulation advantage over the Post.[38]

According to Scripps, the News was never able to achieve the increased advertising rates it expected, in part, due to the competitive response by the Post. According to the Post, advertisers were told (and believed) that the News' circulation figures were misleading because the increased circulation did not translate into increased readership.[39] In fact, advertisers refused to pay higher advertising rates that would fully compensate for the additional circulation expenses.[40] Therefore, the penny subscription strategy has not produced desired results, and has in fact led to additional bottom-line operating losses.

News executives further attempted to reverse circulation losses by increasing the quality and editorial content of the newspaper. Improvements included adding various editorial sections including

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[38] Id.

[39] Interviews with Post executives, in Denver, Colorado (June 28, 2000).

[40] The most common comment from advertisers was that new circulation figures based on the penny papers were unreliable. Advertisers considered penny papers to be the equivalent of "give-aways," questioned the duplication with the Post, doubted whether the inflated numbers could be sustained (through renewals and timely payments for the subscription), and doubted that the increased circulation would lead to greater returns on advertising investments. Most advertisers believe that the increased circulation in and of itself was not significant because of the means by which it was attained. Advertisers generally said that they would require some sort of additional proof of increased value in the newspaper, such as demonstrated returns on advertising, before they would pay higher rates.

the broadsheet "Wall Street West" business section, and "Home Front," a locally produced magazine section for women. The News hired a nationally recognized sports columnist and experienced advertising executives and implemented training programs designed to develop various personnel including sales representatives, customer service representatives, managers and executives. Key executives were replaced during the 1990's, including the editor, the vice-president of advertising, the vice president of circulation, and the chief financial officer.

The effect on circulation levels was that the News regained the daily circulation lead from the Post in 1999, and significantly closed the gap in Sunday circulation during a time when the circulation of both papers dramatically increased. The most recent publishers' statements show essentially that the News' efforts to restore the dominance it had in 1987 have failed, but that the Post's efforts to obtain dominance have also failed, and that the two newspapers are now at what appears to be relative parity in circulation. See Tables 3-5.

2. Advertising Revenues and Trends

Advertising is separated into categories based on type, and the Denver newspapers' respective shares vary by category. For example, in 1999, in the largest category, classified (60% of the News' total and 58% of the Post's total advertising revenues), the Post had a lead of nearly 55% to 45%. A large part of this category is represented by recruitment (job) advertising, for which the Post has held a noticeable lead for many years. In the next major category, retail (37% of News' total and 38% of the Post's total advertising revenues), the two papers are evenly split in share.[41] See Table 6.

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[41] Retail is that part of run-of-press (ROP) advertising that is not considered "national" advertising, and consists of, e.g., local department store advertisements. The Post has a substantial

In 1994, despite slipping circulation, the News still held an overall lead of 54.5% to 45.5% in advertising. The key to Scripps' efforts to win the newspaper war through containing costs and increasing circulation was to increase this lead over the Post.

But, by late 1996, the News' slipping circulation had caused it to lose the lead in overall advertising, and Scripps' general effort to shift advertising through changes in circulation, described above, was not bearing fruit. In the spring of 1997, Scripps decided to purchase the Boulder Daily Camera, a local daily newspaper of general circulation (33,417 daily and 40,120 Sunday) primarily distributed in Boulder County.[42] The primary goal of the acquisition was "[t]o achieve a significant advertising revenue and advertising share shift from [the Post] to the [News]."[43] The acquisition of the Boulder paper was an attempt by Scripps and the News to narrow the Post's circulation lead in

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lead (65% to 35%) of revenues from national advertising (about 5% of total revenues) and the papers are split evenly on revenue share from insert advertising (about 14% of total revenues). Advertisers have enjoyed the Denver newspaper war. A larger share of total advertising dollars are spent on newspaper advertising in Denver than in any other large city in the United States.

[42] As discussed above, Scripps' ownership of the Daily Camera does not by itself make the Daily Camera "involved in" the JOA. See 15 U.S.C. §1803(b). But Scripps' common ownership of the Daily Camera and its share in the JOA could result in diminished competition between the Daily Camera and the Post. The Division has not reached a conclusion that JOA approval would raise significant competition issues, and no other interested person has alleged that or facts that would provide a basis for such a conclusion. Nevertheless, the Division is concerned that future JOA applications could raise serious competition issues because of common ownership of newspaper assets in the same metropolitan area and could thereby present difficult legal issues as to whether the application may properly be denied for that reason or whether approval of the JOA may exempt from the antitrust laws only the elimination of competition between the newspapers that are "involved in" the JOA and not any injury to competition between JOA newspapers and other business operations. Cf., 15 U.S.C. §1803(c). The Division therefore urges the Attorney General to make clear expressly that she is not in the decision on this application addressing legal issues that may arise from common ownership of non-JOA assets.

[43] Acquisition Plan for Daily Camera at 2 (April 28, 1997) (8 111531).

Boulder County and to support the strategy of increasing the News' circulation lead in the six-county Denver metro market.[44] News executives believed that operating cash flows at both the News and the Daily Camera would be improved through the joint selling and consolidation of some business and distribution functions.[45] Executives of Scripps and the News also believed that the acquisition would demonstrate the paper's commitment to the market and discredit claims made by the Post that the News would soon be going out of business.[46]

Subsequent to the acquisition in 1997, the News introduced its "Mile High Buy" marketing initiative to advertisers, an advertising package that allowed the joint purchase of space in both the News and the Daily Camera at a discounted rate. Despite market research and perceived synergies between the News and the Daily Camera, rate increases did not come to fruition as anticipated, and the acquisition has led to disappointing results.[47]

The picture that emerges from advertising trends over the last ten years is that the Post has gained a slight advantage in advertising revenues, but that neither firm has become dominant. The

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[44] Id. at 4 (8 111533). In 1997, the News had been significantly trailing the Post in circulation in Boulder county, one of the counties in the six-county core market.

[45] Id. at 21 (8 111550).

[46] Horton Testimony at 85-86.

[47] Horton Testimony at 88-103. Those advertisers who did not target the Boulder market for their business were neutral on the Mile High Buy and were unimpressed with the added overall penetration of the Scripps papers. Advertisers who did business in Boulder were already under contract with the Daily Camera and viewed the Mile High Buy as advantageous only for the administrative result of a single price negotiation. No advertiser has expressed a belief that they had received any savings or efficiencies from the Mile High Buy and therefore none was willing to pay higher rates, and none of the interviewees saw the Mile High Buy as making the News more valuable from an advertising perspective in any area.

News' business actions since 1997 have prevented the Post from continuing the trends of the early and mid-1990s, and thereby have prevented it from gaining a substantial overall lead in either circulation or advertising share, but the News has not turned the tide enough to establish itself as the dominant paper.

Advertising revenues over the many years of the Denver newspaper war had generally tracked relative circulation levels. While over the past ten years overall advertising revenues for both newspapers have increased, as has advertising lineage (the amount of space used in a newspaper for advertising), the increased circulation and lineage have caused a decrease in rates when measured by cost-per-thousand (CPM).[48] Overall share of advertising revenues has shifted substantially from the News to the Post over the last ten years. The News' overall lead of 54.5% to 45.5% in 1994 was reversed and by 1998 the overall advertising ratio was 46% to 54% in favor of the Post. See Tables 7,8.

C. Probable Danger of Financial Failure

1. Financial Losses at the Rocky Mountain News

The circulation and advertising trends described above have resulted in significant financial losses to the News, as reflected in the Schedule of Revenues and Expenses for the Denver Rocky Mountain News, provided in the Application at Tab 3. That schedule reports Operating Income (Losses) in each of the past five years. Under an incremental analysis, those reported operating losses are adjusted to reflect the *net* incremental cost or benefit to Scripps of operating the News. Scripps has submitted to the Antitrust Division the results of one approach to calculating an incremental analysis,

[48] CPM is a measure of average unit price, and consists of total revenues divided by total advertising inches, divided by the total number of thousands of newspapers circulated.

that show significant losses. Those results are set forth in Attachment A. While different results could be obtained with other approaches to incremental analysis in this matter, the bottom-line result would not vary materially regardless of which of the various reasonable approaches is used.[49] Under an incremental analysis, Scripps' has significantly subsidized the News annually for a number of years. Ironically, Scripps' efforts to reduce or avoid any subsidy, and ultimately win the dominance of the Denver market, have only worsened the News' position. The reduced circulation revenues resulting from the subscriber price war, and the substantial increased printing and distribution costs resulting from the increased circulation, have resulted in a sharp increase in Scripps' annual subsidy of the News in the last year that is projected to continue into the future if the News remains independent. Accordingly, the parties have satisfied the first prong of the failing newspaper test.[50]

2. Likelihood that the Losses Can be Reversed

The Antitrust Division concludes that the News' losses are not likely to be reversed. As described above, Scripps has implemented numerous strategic and tactical initiatives, but these efforts have failed to improve significantly the financial and competitive position of the News vis-a-vis the Post. In addition to those efforts, Scripps and News executives regularly considered other alternatives, such

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[49] The Division has included Scripps' proposed analysis merely as illustrative of an acceptable incremental analysis for this application. A different setting might require an alternative approach and show materially different results in that setting. Since the News was failing by the narrow identification of incremental costs submitted to the Division by Scripps, it necessarily would be failing in a more inclusive analysis that captured even more incremental costs, for example, one that included the costs of corporate activities and assets that are devoted to the News and that would, within an appropriate time period, be shed or devoted to other operations of the company.

[50] The parties also satisfy this prong if the incremental analysis were not performed and the News were evaluated as a stand-alone newspaper.

as switching from tabloid to broadsheet format.[51] Market research reveals that the Post is regarded as Denver's choice for well-educated, "white-collar" readers, while the News has had a long-standing reputation as a "blue-collar" newspaper, due in part to reader perception of broadsheet versus tabloid format. However, while market research also reveals that tabloid format[52] is overwhelmingly preferred by Denver readers, tabloid format generates less advertising revenue per page than broadsheet format. Also, switching format would require the purchase of all new presses, an investment ranging in the neighborhood of $80 - $100 million.[53] The risk of readership loss coupled with the overwhelming expense of new press purchases discouraged management from implementing an overall format change.[54]

The record thus does not suggest that different management would have run the News so as not to have required a substantial Scripps subsidy over the last decade, nor that new management would now implement strategies that would likely end the subsidy. Quite to the contrary, News executives in

[51] Approximately every one or two years management conducted market research designed to measure Denver newspaper readers' preferences regarding format and the likely consequences of conversion from tabloid to broadsheet. Horton Testimony at 149.

[52] Studies revealed that approximately 80% of News readers prefer tabloid format, and 20 - 40% of readers would discontinue reading the News in the event of a format change.

[53] The presses utilized by the News to print tabloid format have a 23 9/16" cut-off. The industry standard page for a unit of advertising, however, is only 21.5". Printing broadsheet format on the existing tabloid presses utilized by the News would therefore result in a portion of wasted newsprint that could not be sold to advertisers. Horton Testimony at 150-151.

[54] It is one of the dilemmas of the News that, all other things being equal, with its smaller pages it makes less money per page of advertising than the Post, but has been nevertheless unwilling to change to broadsheet and risk losing a substantial portion of its readers. See, e.g., Memo from Burdick to Strutton (Oct. 11, 1996) (8 111815-22); Alan Horton Pres. to E.W. Scripps Board of Directors at 2 (February 26, 1998) (8 3836-45).

fact implemented numerous strategic and tactical initiatives designed to narrow the gap between the competing newspapers. Many of the initiatives were unsuccessful, and in some cases resulted in widening the cost advantage of the Post. Failed initiatives, however, do not necessarily imply managerial deficiency.

Nor does the record indicate that there are strategies that the News could unilaterally employ now that would reverse the losses. Simply raising prices for either circulation or advertising is not demonstrably likely to reverse the losses given the presence of the Post as a strong alternative for readers or advertisers who would not want to pay the higher prices. Such a strategy might, indeed, increase the losses that Scripps has suffered through operation of the News, and thereby push it into a downward spiral, defeating the possibility of preserving two independent news and editorial voices in Denver. To deny the JOA application on the basis that a unilateral price increase by the News might be successful would therefore not be consistent with the intent of Congress.

Scripps has, in short, met its burden of demonstrating that the News' losses are unlikely to be reversed.[55] The facts show that News has survived through the financial backing of its corporate

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[55] The Division does not recommend that the Department require the applicants to identify prospective qualified purchasers in this matter. Although traditional methods of statutory construction and examination of case law provides no clear answer on whether the NPA precludes a "shop" as a prerequisite to newspapers seeking NPA immunity, and under what specific circumstances the Department may require one, a shop is not necessarily required in order to answer the question of whether economic alternatives to the JOA exist. See Hearst, 704 F.2d at 472, 478-9; Third National Bank, 390 U.S. at 190 (economic alternatives standard). The parties interpret the opinion in Seattle to declare that a shop can never be required. The Attorney General need not reach the question of whether the NPA places such an absolute bar to requiring a shop, because in this matter there do not appear circumstances, such as evidence that the News has been mismanaged, that might warrant a shop.

parent, Scripps, whose desire to establish the News as the sole surviving newspaper in the potentially lucrative Denver local daily newspaper market has led it to continue to subsidize the operational losses and capital improvements of the News. Despite this substantial infusion of resources, the News has failed to attain a position of dominance over the Post, or even a position of profitable co-existence.

D. The Proposed JOA and the Policy and Purpose of the NPA

The Antitrust Division also recommends that the Attorney General find that the parties have met their burden that the proposed JOA will "effectuate the policy and purpose of the Act." 15 U.S.C. §1803(b). The JOA agreement provides for the editorial and reportorial independence of the News and the Post, and will maintain two separate editorial voices in the Denver market.

The Denver Post Corporation will be responsible for gathering, preparing and laying out the news and editorial material for the Post, and the Denver Publishing Company will be responsible for gathering, preparing and laying out the news and editorial material for the News. The editorial staffs and the editorial policies of the two papers are designed to be independent of each other, and also independent of the JOA. All personnel responsible for news and editorial content of the Post will be employees of The Denver Post Corporation, and all personnel responsible for news and editorial content of the News will be employees of the Denver Publishing Company. See The Joint Operating Agreement §2.3, Application at Tab 3. Moreover, the profits of the JOA will be evenly split, which should provide both papers with equitable financial resources to maintain the current level of editorial quality. Finally, both papers will continue to publish in the morning, which will continue the strong head-to-head editorial competition that has characterized the Denver market to date, as well as avoiding the less desirable afternoon slot that has contributed to the weakening of papers in existing JOAs.[56]

VI. PUBLIC COMMENTS

The Division has received 25 letters from the public commenting on the Denver JOA application. Six letters request a hearing, while six others oppose the JOA outright on various grounds. Other comments included one that states conditions the Department should implement prior to approving the JOA in order to prevent subscription and advertising rate increases, one that asks the government to impose editorial requirements on the newspapers, and one that asks for government intervention in an alleged unrelated private dispute between the parties. Eleven letters, all from local and national labor unions, support the JOA and ask for prompt approval.[57] A separate press release in support of the JOA was forwarded from the Governor of Colorado.

Among the respondents who requested a hearing, or who were outright opposed to the JOA, were Jeffco Publishing Company, Westword, American Furniture Warehouse, and readers of both or either newspaper in Denver. As well, the Association of Alternative Newspapers, a Washington-based trade association of alternative weeklies, sent in a general resolution in opposition to all JOAs and to the NPA itself. Several commenters question the claim in the JOA application that the News was not a profitable paper (whether it is failing), while others were concerned with the impact a JOA would have on subscribers and advertisers in Denver.

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[56] The 50/50 split of profits and control also contributes to the likely long-term success of the JOA, as it avoids dominance by one firm that could be used to competitively disadvantage a junior partner and drive it out of business.

[57] These letters included support from the Denver Newspaper Guild, Teamsters, Graphic Communications International Union, Denver Newspaper Pressmen Union, and the Denver Council of Newspaper Unions.

The Division believes that public comments questioning whether the News is a failing paper under the NPA are addressed sufficiently in other parts of this report, as that question is at the center of the Division's investigation and analysis under the NPA. On the other hand, comments of concern that advertising or subscription/single copy prices will increase, such as that made by American Furniture Warehouse, are beyond the scope of appropriate inquiry in this report. Congress made the judgment that saving an editorial voice was worth the competitive harm that would result from the aggregation of market power that a JOA represents. The Antitrust Division assumes for purposes of this report that price increases are likely, and that nevertheless, if the applicants meet the standards established under the statute, the JOA immunity should be granted. The public comments requesting a hearing by Jeffco Publishing Company and Westword raise two additional substantive issues that are addressed below.

1. Jeffco Publishing Company

Jeffco Publishing Company operates four paid weekly newspapers and a free-distribution newspaper that allegedly compete with the News and the Post. Jeffco papers are distributed in Jefferson County, Colorado, a populous county located immediately west of Denver. Jeffco is concerned that a JOA will enable and facilitate "illegal predatory pricing by the applicants directed at competitors who do not enjoy the benefits of monopolization afforded by the Newspaper Preservation Act." Jeffco also claims that past predatory behavior between the Post and the News is an indication that they will turn next to predation on community newspapers like Jeffco's.

Predatory behavior engaged in by the JOA agency is not immunized under the express terms of the NPA:

> Nothing contained in this chapter shall be construed to exempt from any

> antitrust law any predatory pricing, any predatory practice, or other conduct . . . which would be unlawful under any antitrust law if engaged in by a single entity.

18 U.S.C. §1803(c).

If the JOA agency were to engage in illegal predatory conduct, it would be treated under the antitrust laws the same as any other newspaper in the United States, and similarly, the agency would be liable to a private antitrust action as well.

2. Westword

Westword is an alternative weekly newspaper published and distributed free in Denver since 1977. Westword is one of the largest alternative weeklies in the country; the large tabloid newspaper can contain anywhere from 160 to 300 pages, and it has a circulation of 104,000-110,000. Currently, the News and the Post bid competitively for the opportunity to print Westword; the News printing plant has printed Westword for the past three years pursuant to an annually renewable contract, and the Post printed it the three years prior to that. Westword is concerned that with a JOA, there will be no reasonable alternative to the News/Post combined printing plants. The lack of competition will lead to increased printing costs which will make it difficult for Westword, and other independent voices in the marketplace, to survive. Westword believes that there is no good alternatives for a paper of its size that is also close enough to Denver to allow it to remain competitive in that market.

Westword is complaining in effect that the JOA will eliminate competition in the provision of printing services by the News and the Post. But it is the purpose of the NPA to permit the parties, under specified circumstances, to eliminate commercial competition among the papers involved in a JOA in order to preserve the newspapers' independent editorial voices. The fact that this JOA may eliminate such competition thus provides no basis for the Attorney General not to approve a JOA that otherwise meets the NPA's statutory requirements.

Under a JOA, Westword will be presented with the same situation facing many other weekly newspapers across the country that exist in an area where there is only one large daily paper. It can continue to use the News/Post printing plants, or it can take its business to other printers around the Denver area. While the News and the Post may now provide the most economical plants for Westword to print its weekly, some alternatives do exist. For example, the Gannett plant in Fort Collins, Colorado, is capable of printing Westword, and it has printed Westword in the past as recently as six years ago. Although the Gannett plant, and other alternatives, are not located in the immediate Denver area, the distance to Fort Collins is small enough for the Gannett plant to be considered as an option to the News/Post presses; in fact, Gannett prints and distributes USA Today in the Denver area from that plant. In addition, there are other printing plants in and around the Denver area that could be used, such as major plants in Colorado Springs and Greeley.

Finally, the immunity that comes with approval of the JOA does not give the JOA freedom to violate the antitrust laws in the future. The conduct of the JOA will remain subject to challenge just as would the conduct on any other single firm, if for example it were to engage in predatory conduct or any one of a variety of other, similar, unlawful acts. 15 U.S.C. §1803(c)

VII. CONCLUSION

The applicants have carried their burden of demonstrating that the News is suffering losses that cannot likely be reversed. On an incremental basis, the News has been a net financial detriment to Scripps overall operations, and it appears likely it would not rationally continue its editorial voice in

Denver without the JOA. The JOA itself is structured in a manner that will likely ensure that the News continues its vigorous reportorial and editorial competition with the Post, which comports with the policy and purpose of the NPA. Moreover, there do not appear to be any outstanding material issues of fact that would require a hearing. Therefore, the Antitrust Division recommends that the Attorney General approve the application.

Respectfully submitted,

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Table 1

SUBSCRIPTION PRICES

YEAR	NEWS	POST
early 1990s	Single copy price in NDM was $.25 daily and $.75 Sunday.	Single copy price in NDM was $.25 daily and $.75 Sunday.
1993	Subscription price was $26.00 per year, discounted to $13.00 per year	Subscription price was $26.00 per year, discounted to $13.00 per year
1994		Sunday only offer with bonus days for $36.40 per year, discounted to $18.20 per year
1995-1996	Offered "Buy six months, get six months free"	
1997	Six day service for $6.24 per year, sold in select zip codes for $3.12 per year. Weekend service for $3.12 per year, sold in select zip codes for $1.56*	Six day service (including Sunday delivery) for $3.12 per year*
2000	offers the following at $4.95 per year: six days, Friday-Saturday-Sunday and Holidays, or Sunday and Holidays (started in March)	sells various year-long subscription plans for less than $5.00

*Both papers eventually extended their services to multiple years. Therefore, consumers were paying for up to three years for less than $10.

Source: Economists Incorporated Report at 43-45; Gitt Memorandum.

Table 2

CIRCULATION REVENUES ($ 000)

YEAR	NEWS	POST
1990	30,908	22,200
1991	31,760	22,821
1992	33,997	24,147
1993	33,889	27,918
1994	32,554	31,121
1995	32,709	29,669
1996	28,433	29,695
1997	25,909	28,059
1998	24,073	26,071
1999	18,480	24,183

Source: Economists Incorporated Report at 23.

Table 3

AVERAGE DAILY PAID CIRCULATION

YEAR	NEWS	POST
1995	333,446	303,345
1996	324,858	324,287
1997	311,773	343,480
1998	328,680	347,041
1999	376,342	373,483

Source: Application at 28.

Table 4

AVERAGE SUNDAY PAID CIRCULATION

YEAR	NEWS	POST
1995	442,350	453,288
1996	422,601	456,237
1997	415,363	470,782
1998	433,856	487,444
1999	483,220	521,038

Source: Application at 29.

Table 5

NEWS' CIRCULATION MARKET SHARE

YEAR	DAILY CIRCULATION	SUNDAY CIRCULATION
1995	52.3%	49.4%
1996	50.0%	48.1%
1997	47.6%	46.9%
1998	48.6%	47.1%
1999	50.25	48.1%

Source: Tables 3 and 4.

Table 6

NEWS' SHARE OF COMBINED NEWS AND POST ADVERTISING REVENUE

YEAR	RETAIL	NATIONAL	CLASSIFIED	INSERTS	ALL ADVERTISING
1991	54.7%	34.7%	52.9%	55.9%	53.2%
1992	54.2%	40.5%	53.1%	57.6%	53.6%
1993	53.7%	35.6%	55.0%	58.1%	54.0%
1994	54.6%	40.3%	54.6%	58.7%	54.5%
1995	53.5%	37.9%	51.5%	58.2%	52.6%
1996	49.5%	40.4%	48.8%	54.2%	49.4%
1997	47.7%	37.9%	46.6%	55.1%	47.5%
1998	48.0%	35.2%	43.7%	54.7%	46.0%
1999	50.0%	35.3%	45.3%	50.3%	46.9%

Source: Economists Incorporated Report at 25.

Table 7

TOTAL ADVERTISING REVENUES ($ 000)

YEAR	NEWS	POST
1995	150,518	135,693
1996	152,762	156,047
1997	164,728	178,505
1998	170,767	192,671
1999	186,286	199,289

Source: Denver Rocky Mountain News Schedule of Revenues and Expenses (Unaudited); Economists Incorporated Report at 25; Post v. Rocky 1999 Statement of Operations.

Table 8

ADVERTISING LINAGE (inches)

YEAR	NEWS	POST
1995	3,239,831	2,975,571
1996	3,176,107	3,224,679
1997	3,695,879	3,665,098
1998	3,599,485	3,823,639
1999	4,041,360	3,841,013

Source: Economists Incorporated Report at 26.

Attachment A

After Tax Incremental Gain (Loss) to Scripps from Operating the News							
(in $000)							
Line No.		1995	1996	1997	1998	1999	1-6/2000 *
1	Operating Income (Loss)	(9,711)	(6,921)	(2,864)	(12,713)	(19,780)	(19,734)
	Factors that Decrease Loss						
2	Depreciation	13,751	13,590	13,838	14,018	13,047	7,283
3	Non-incremental intercorporate charges	4,509	4,877	4,017	4,009	3,977	2,574
4	Restated Operating Income (Loss)	8,549	11,546	14,991	5,314	(2,756)	(9,877)
5	Taxes (tax credits) on restated operating income	2,992	4,041	5,247	1,860	(965)	(3,457)
6	Total of factors that decrease loss, incl. tax effects	15,268	14,426	12,608	16,167	17,989	13,314
	Factors that Increase Loss						
	Incremental investments in PP&E						
7	Mid-year 1995	(7,214)					
8	Mid-year 1996		(2,767)				
9	Mid-year 1997			(4,733)			
10	Mid-year 1998				(5,623)		
11	Mid-year 1999					(11,018)	
12	Mid-year 2000						(2,539)
13	Increase on same-year incremental PP&E @ 10% p.a.	(234)	(90)	(154)	(183)	(358)	0
14	Interest on same-year average working capital balance @ 10% p.a.	(842)	(706)	(535)	(542)	(776)	(579)
15	Interest on foregone sale of 1994 production equipment ($35.6 million) @ 10% p.a.	(2,314)	(2,314)	(2,314)	(2,314)	(2,314)	(1,157)
16	Foregone rental on buildings	(1,398)	(1,885)	(2,372)	(2,860)	(3,315)	(1,658)
17	Total of factors that increase loss	(12,002)	(7,762)	(10,108)	(11,522)	(17,781)	(5,933)
18	Incremental Gain (Loss), Without Compounding	(6,445)	(257)	(364)	(8,068)	(19,572)	(12,353)
19	Cumulative gain (loss), without compounding	(6,445)	(6,702)	(7,066)	(15,134)	(34,706)	(47,059)
	Compound interest on past cumulative gains (loss) @ 10% p.a.						
20	On gain (loss) from 1995	0	(419)	(446)	(448)	(448)	(224)
21	On gain (loss) from 1996		0	(17)	(18)	(18)	(9)
22	On gain (loss) from 1997			0	(23)	(25)	(13)
23	On gain (loss) from 1998				0	(524)	(279)
24	On gain (loss) from 1999					0	(636)
25	On gain (loss) from 2000						0
26	Total interest on past cumulative gains (loss)	0	(419)	(463)	(489)	(1,015)	(1,161)
27	Incremental gain (loss), with compounding	(6,445)	(676)	(827)	(8,557)	(20,587)	(13,514)

28	Cumulative gain (loss) with compounding	(6,445)	(7,121)	(7,948)	(16,505)	(37,092)	(50,606)
29	Cumulative Gain (Loss) With Compounding, Net of Terminal Value at Mid-2000						(29,190)

CERTIFICATE OF SERVICE

I hereby certify that on this 8 day of September, 2000, I served the foregoing Report by facsimile and first class mail, postage prepaid, on the following counsel of record:

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