

**Nos. 08-3078, 08-4454, 08-4455, 08-4456, 08-4457, 08-4458, 04-4459, 08-4460,
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08-4478 & 08-4652**

**In the
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

PROMETHEUS RADIO PROJECT, *et al.*,

Petitioners and Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents and Appellee.

On Petition for Review and Appeal of an
Order of the Federal Communications Commission

**REPLY BRIEF OF PETITIONER AND APPELLANT
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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
INTRODUCTION	1
ARGUMENT	3
I. This Court Does Not Have Jurisdiction To Consider Citizen Petitioners’ Challenge to Media General’s Permanent Waivers.....	3
II. The Waivers Awarded in the <i>2008 Order</i> Were Within the FCC’s Authority and Consistent with the Public Interest	5
A. The FCC Has Broad Discretion To Issue Waivers of Its Rules	5
B. The FCC’s Decision To Award Media General Permanent Waivers under <i>NCCB</i> ’s “Grandfathering” Standard Was in the Public Interest and Well Within Its Discretion	6
1. <i>NCCB</i> Approved the Grandfathering of Existing Cross-Ownerships Based on Application of Broad Public Interest Criteria.....	6
2. In Granting Media General Permanent Waivers, the FCC Applied the Same Public Interest Calculus That the Supreme Court Approved in <i>NCCB</i>	9
C. The FCC Also Properly Applied the Waiver Standard Under the <i>1975 Order</i> in Granting Media General Permanent Waivers	12
1. The FCC Had Authority To Grant Waivers Under the <i>1975 Order</i> ’s Public Interest Standard	12

TABLE OF CONTENTS

	Page
2. The Record Overwhelmingly Established That the FCC Properly Applied the <i>1975 Order's</i> Public Interest Standard in Granting Media General Permanent Waivers.....	13
a. Localism	14
b. Competition.....	15
c. Diversity	16
d. Media General's Permanent Waivers Were Otherwise Consistent with the Public Interest.....	16
D. Contrary to Citizen Petitioners' Contentions, Media General's Waivers Were Proper and Consistent with the Administrative Procedure Act	17
1. Media General Has Complied with the NBCO Rule at All Times.....	17
2. Notice of the Permanent Waivers Was More than Adequate	18
3. Citizen Petitioners' Contention that the Waiver Standards in the <i>2008 Order</i> Were Not Satisfied Is Meritless	20
III. The Rulemaking Decisions in the <i>2008 Order</i> Violated the APA	20
A. The FCC Still Has Offered No Reasoned Analysis for Its Departure from Its Prior Determination To Eliminate the NBCO Rule and Imposition Instead of a More Restrictive Regime	20
B. The FCC's Imposition of a More Restrictive Regime on a Struggling Industry Was Arbitrary and Capricious.....	23

TABLE OF CONTENTS

	Page
C. The FCC Did Not Demonstrate That the NBCO Rule Advanced Any of Its Policy Goals	24
D. The FCC Improperly Dismissed Overwhelming Evidence That Alternative Media Outlets Contribute to Diversity	26
E. The FCC’s Waiver Presumptions Were Invalid Under the APA.....	28
1. The Limitation of the Positive Presumption to Only the Top-20 Markets Is Arbitrary and Capricious	28
2. The Presumption Requiring a Cross-Owned Television Station Not To Be Ranked Among the Top-4 Stations in the DMA Is Arbitrary and Capricious	33
3. The 2008 Order’s Definition of “Major Media Voices” Is Arbitrary and Capricious	33
IV. The NBCO Rule and Its Waiver Criteria Facially Violate the First Amendment.....	35
A. The Scarcity Doctrine Is No Longer Valid, Subjecting the NBCO Rule To Strict Scrutiny	35
B. The NBCO Rule and Its Waiver Factors Are Content-Based and Are Therefore Subject to Heightened Scrutiny.....	37
C. The NBCO Rule and Its Waiver Factors Cannot Withstand Either Strict or Intermediate Constitutional Scrutiny	38
V. The NBCO Rule As-Applied Violates Media General’s First Amendment Rights	39
VI. The NBCO Rule Violates Broadcasters’ Fifth Amendment Equal Protection Rights.....	41

TABLE OF CONTENTS

	Page
VII. The NBCO Rule Should Be Vacated	42
CONCLUSION	43

TABLE OF AUTHORITIES

Page

CASES

Abbott Lab. v. Celebrezze,
352 F.2d 286 (3d Cir. 1965), *overruled on other grounds*,
Abbott Labs. v. Gardner, 387 U.S. 136 (1967)4

Am. Mining Cong. v. EPA,
907 F.2d 1179 (D.C. Cir. 1990).....22

BDPCS, Inc. v. FCC,
351 F.3d 1177 (D.C. Cir. 2003).....5

Bechtel v. FCC,
10 F.3d 875 (D.C. Cir. 1993).....25

Buckley v. Valeo,
424 U.S. 1 (1976).....42

CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008),
vacated and remanded on other grounds, 129 S. Ct. 2176 (2009)21

Citizens United v. FEC,
558 U.S. ___, 130 S. Ct. 876 (2010)38, 42

Comcast Corp. v. FCC,
579 F.3d 1 (D.C. Cir. 2009).....43

Covad Commc’ns Co. v. FCC,
450 F.3d 528 (D.C. Cir. 2006).....19

Cutter v. Wilkinson,
544 U.S. 709 (2005).....40

Doe v. United States,
372 F.3d 1347 (Fed. Cir. 2004)32

Ellis v. Tribune Co.,
443 F.3d 71 (2d Cir. 1974)5, 6

TABLE OF AUTHORITIES

	Page
<i>FCC v. League of Women Voters of Cal.</i> , 468 U.S. 364 (1984).....	37, 38
<i>FCC v. Nat’l Citizens Comm. for Broad.</i> , 436 U.S. 775 (1978).....	<i>passim</i>
<i>Fox Television Stations, Inc. v. FCC</i> , Nos. 06-1760-AG <i>et al.</i> , 2010 WL 2736937 (2d Cir. July 13, 2010)	36
<i>Health & Med. Pol. Research Group v. FCC</i> , 807 F.2d 1038 (D.C. Cir. 1987).....	18
<i>Hubbard Broad., Inc. v. FCC</i> , 684 F.2d 594 (8th Cir. 1982)	4
<i>Jones v. Brown</i> , 461 F.3d 353 (3d Cir. 2006)	41
<i>Keller Commc’ns v. FCC</i> , 130 F.3d 1073 (D.C. Cir. 1997).....	5, 13
<i>KiSKA Constr. Corp.-U.S.A. v. Wash. Metro. Area Transit Auth.</i> , 167 F.3d 608 (D.C. Cir. 1999).....	32
<i>MacLean v. Dep’t of Homeland Sec.</i> , 543 F.3d 1145 (9th Cir. 2008)	19
<i>Metro. Council of NAACP Branches v. FCC</i> , 46 F.3d 1154 (D.C. Cir. 1995).....	12
<i>Morris Commc’ns, Inc. v. FCC</i> , 566 F.3d 184 (D.C. Cir. 2009).....	5
<i>Motion Picture Ass’n of Am. v. FCC</i> , 309 F.3d 796 (D.C. Cir. 2003).....	39
<i>Motor Vehicle Mfrs. Ass’n v. State Farm</i> , 463 U.S. 29 (1983).....	22

TABLE OF AUTHORITIES

	Page
<i>N.J. Citizen Action v. Edison Twp.</i> , 797 F.2d 1250 (3d Cir. 1986)	35
<i>Nat’l Ass’n of Indep. Television Producers & Distribs. v. FCC</i> , 516 F.2d 526 (2d Cir. 1975)	39
<i>Nat’l Citizens Comm. for Broad. v. FCC</i> , 555 F.2d 938 (D.C. Cir. 1977).....	6
<i>Nat’l Coal. Against the Misuse of Pesticides v. Thomas</i> , 809 F.2d 875 (D.C. Cir. 1987).....	20, 21
<i>NextWave Pers. Commc’ns, Inc. v. FCC</i> , 254 F.3d 130 (D.C. Cir. 2001), <i>aff’d</i> , 537 U.S. 293 (2003).....	4
<i>N. Am. Catholic Educ. Programming Found., Inc. v. FCC</i> , 437 F.3d 1206 (D.C. Cir. 2006).....	4
<i>Omnipoint Corp. v. FCC</i> , 78 F.3d 620 (D.C. Cir. 1996).....	5
<i>PLMRS Narrowband Corp. v. FCC</i> , 182 F.3d 995 (D.C. Cir. 1999).....	32
<i>Prometheus Radio Project v. F.C.C.</i> , 373 F.3d 372, 451 (3d Cir. 2004)	<i>passim</i>
<i>Sable Commc’ns of Cal. v. FCC</i> , 492 U.S. 115 (1989).....	41
<i>Sinclair Broad. Group, Inc. v. FCC</i> , 284 F.3d 148 (D.C. Cir. 2002).....	33
<i>Tribune Co. v. FCC</i> , 133 F.3d 61, 66 (D.C. Cir. 1998).....	40
<i>United States v. Carolene Prods.</i> ,	

TABLE OF AUTHORITIES

	Page
304 U.S. 144 (1938).....	35, 41
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781 (1989).....	37
<i>Wis. Right to Life v. FEC</i> , 546 U.S. 410 (2006).....	39

STATUTES & REGULATIONS

5 U.S.C. § 553(b) (1966)	19
47 U.S.C. § 307(c)(3) (2006)	18
47 U.S.C. § 309 (2009)	43
47 U.S.C. § 310 (1996)	43
47 U.S.C. § 402(b) (1996)	1, 3, 4
47 C.F.R. § 1.3 (2008)	5, 20
47 C.F.R. § 73.3555(d) (2008).....	40

ADMINISTRATIVE CASES & PROCEEDINGS

<i>2006 Quadrennial Regulatory Review — Review of the Commission’s Broadcast Ownership Rules</i> , 21 FCC Rcd 8834 (2008)	<i>passim</i>
<i>Amendment of Sections 73.34, 73.240, and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations</i> , 50 F.C.C.2d 1,046 (1975)	6, 7, 13, 18
<i>Review of the Commission’s Regulations Governing Television Broadcasting</i> , 14 FCC Rcd 12,903 (1999)	29

INTRODUCTION

Citizen Petitioners Licensing-Related Waiver Challenge. In their opening brief, Citizen Petitioners claim the FCC abused its discretion in awarding waivers to certain existing Media General cross-owned combinations in the *2008 Order*. This Court lacks jurisdiction over this licensing-related challenge since exclusive jurisdiction over such challenges is vested in the D.C. Circuit pursuant to 47 U.S.C. § 402(b). Citizen Petitioners failed to file a § 402(b) appeal. Thus, their challenge must be dismissed.

If this Court nonetheless elects to address the waivers, the FCC's decision to grant permanent waivers of the NBCO Rule is reviewable under the deferential abuse of discretion standard. The record demonstrates that the FCC acted well within that discretion. The FCC, applying the same "grandfathering" standard *NCCB* approved, as well as the *1975 Order's* public interest waiver standard, concluded that waivers were in "the public interest" given the "synergies that have already been achieved from the newspaper/broadcast station combination, the new services provided to local communities by the combination, the harms associated with required divestitures, the prolonged period of uncertainty surrounding the status of the newspaper/broadcast cross-ownership ban, and the length of time that the waiver requests had been pending." *2008 Order* ¶ 77 (JA___). Citizen Petitioners do not present a remotely credible challenge to the FCC's exercise of its

broad discretion to issue waivers. Incredibly, these “public interest” parties seek instead to deprive small and mid-sized communities of demonstrated increases in local news and information.

Media General’s Rulemaking Challenges. In its opening brief, Media General demonstrated that the FCC issued the *2008 Order* after years of delay and then incomprehensibly imposed a *more restrictive* regime that is riddled with errors, is contrary to established court precedent, and imposes unconstitutional content-laden waiver criteria that go to the heart of media companies’ newsgathering and editorial activities. The FCC’s brief does nothing to dispel any of these problems, wholly failing to provide any rational explanation for imposing a more restrictive regulatory regime on an industry that faces enormous financial challenges but still is endeavoring to provide communities of all sizes with critical local news and information. Section 202(h) requires more.

Moreover, the FCC’s brief inexplicably devotes only a single page to defending the constitutionality of the NBCO Rule, merely repeating the mantra that *NCCB* precludes this Court’s review. As Media General demonstrates, however, *NCCB*’s endorsement of the scarcity doctrine can no longer justify deferential review given the explosion of new media outlets. Moreover, *NCCB* never reviewed waiver criteria even remotely similar to those adopted here. It thus cannot preclude judicial review. As demonstrated below, those waiver criteria

improperly imbue a government agency with the power to regulate based on the content of speech. For these and other reasons, the *2008 Order* cannot stand and must be vacated.

ARGUMENT

I. This Court Does Not Have Jurisdiction To Consider Citizen Petitioners' Challenge to Media General's Permanent Waivers.

As a threshold matter, this Court does not have jurisdiction to consider Citizen Petitioners' challenge to Media General's permanent waivers. As established below, those decisions are reviewable only by appeal under 47 U.S.C. § 402(b). Citizen Petitioners failed to timely file such an appeal. Thus, their challenge must be dismissed.

As the FCC acknowledges, the *2008 Order* is a hybrid. Not only did the *2008 Order* address the FCC's 2006 Quadrennial Review rulemaking proceeding, but the FCC made "adjudicatory decisions involving waiver requests relating to particular broadcasting licenses." FCC Br. 4. Among those decisions, the FCC awarded Media General permanent waivers in four markets, recognizing that allowing those combinations promotes the public interest.¹

¹ Like many broadcasters in the current environment, Media General since has sold a number of its television stations, including its station in Panama City, Florida. Thus, only three waivers remain at issue.

As the FCC has also conceded, Section 402(b) of the Communications Act vests the D.C. Circuit with exclusive jurisdiction to review such FCC licensing determinations. *See* FCC Br. 4.² The D.C. Circuit’s exclusive jurisdiction extends not only to the specific licensing decisions enumerated in § 402(b), but decisions that are “ancillary” thereto, such as “waiver” decisions. *N. Am. Catholic Educ. Programming Found., Inc. v. FCC*, 437 F.3d 1206, 1209 (D.C. Cir. 2006).³ Accordingly, those claims must be dismissed because Citizen Petitioners failed to file a timely § 402(b) appeal.⁴

² *See also NextWave Pers. Commc’ns, Inc. v. FCC*, 254 F.3d 130, 140 (D.C. Cir. 2001) (“judicial review of all cases involving the exercise of the Commission’s radio-licensing power is limited to” the D.C. Circuit), *aff’d*, 537 U.S. 293 (2003); *Abbott Lab. v. Celebrezze*, 352 F.2d 286, 289 (3d Cir. 1965) (same), *overruled on other grounds*, *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967).

³ *See Hubbard Broad., Inc. v. FCC*, 684 F.2d 594, 597 (8th Cir. 1982) (finding that appeals must “be taken under section 402(b) when the Commission’s action bears a ‘close functional similarity’ to the types of cases enumerated under that section, or is ‘ancillary’ to, or ‘in aid of,’ or ‘intimately associated with’ the FCC licensing authority”).

⁴ In addition, as the FCC argued in its brief, Section 405(a) of the Communications Act bars Citizen Petitioners’ claims because the FCC had been given “no opportunity to pass” on them. *See* FCC Br. 60-61.

II. The Waivers Awarded in the 2008 Order Were Within the FCC’s Authority and Consistent with the Public Interest.

A. The FCC Has Broad Discretion To Issue Waivers of Its Rules.

Should this Court nonetheless elect to address the grant of Media General’s waivers, that grant was wholly proper and well within the FCC’s broad discretion. The FCC’s authority includes the power to issue waivers of any of its rules “on its own motion or on petition if good cause therefore is shown.” 47 C.F.R. § 1.3.⁵ A court’s review of an FCC waiver decision is conducted under the deferential abuse of discretion standard. *See Morris Commc’ns, Inc. v. FCC*, 566 F.3d 184, 188 (D.C. Cir. 2009) (reviewing FCC decision on waivers under an “abuse of discretion” standard); *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1181 (D.C. Cir. 2003) (same).

The FCC’s general waiver authority unquestionably extends to the NBCO Rule. *See Ellis v. Tribune Television Co.*, 443 F.3d 71, 85-86 (2d Cir. 2006) (“[W]hether [a party] should receive an extension of the waiver of the cross-ownership rule is particularly within the agency’s discretion.”). When the FCC

⁵ *See Keller Commc’ns v. FCC*, 130 F.3d 1073, 1076 (D.C. Cir. 1997) (“an agency’s discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve” exemption procedure); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996) (finding that “agency’s interpretation of its own regulation” when deciding whether to waive its own rules “must be given controlling weight”).

initially adopted the NBCO Rule in 1975,⁶ the FCC provided “for waiver of the prospective ban” (*NCCB*, 436 U.S. at 786 n.9), and “the FCC’s ability to grant waivers [of the NBCO Rule] is a fundamental component of its licensing discretion.” *Ellis*, 443 F.3d at 86-87.

B. The FCC’s Decision To Award Media General Permanent Waivers Under *NCCB*’s “Grandfathering” Standard Was in the Public Interest and Well Within Its Discretion.

1. *NCCB* Approved the Grandfathering of Existing Cross-Ownerships Based on Application of Broad Public Interest Criteria.

In adopting the NBCO Rule in 1975, the FCC addressed how that rule change should be applied to previously established combinations. The FCC determined that cross-ownership did not impair competition and held there was no “basis in fact or law for finding newspaper owners unqualified as a group for future broadcast ownership.”⁷ Nevertheless, it adopted the NBCO Rule solely because “[w]e think that any new licensing should be expected to add to local diversity.”⁸ The Supreme Court, in affirming the FCC’s ban, noted that the FCC

⁶ *Amendment of Section 73.34 [sic], 73.240, and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order*, 50 FCC 2d 1046, 1072-73, 1075 (“1975 Order”), *recon.* 53 FCC 2d 589 (1975), *modified by Nat’l Citizens Comm. for Broad. v. FCC*, 555 F.2d 938 (D.C. Cir. 1977), *aff’d in part and rev’d in part, FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775 (1978) (“*NCCB*”).

⁷ *1975 Order*, 50 FCC 2d at 1072-73, 1075.

⁸ *Id.*

“did not find that existing co-located newspaper-broadcast combinations had not served the public interest, or that such combinations necessarily ‘spea[k] with one voice’ or are harmful to competition.” *NCCB*, 436 U.S. at 786. The Supreme Court nonetheless found that the FCC’s decision to give controlling weight to the “goal” of diversification in shaping the *prospective* rules was a “reasonable administrative response” and that diversification was a justifiable public interest goal on which to ground the new rules. *Id.* at 795-97.

In analyzing the grandfathering of *existing* combinations, the FCC utilized a broader public interest calculus, one in which “a mere hoped-for gain in diversity is not enough.” *Id.* at 786. Importantly, regarding existing combinations, the FCC said it would examine additional considerations “relevant under our broad public interest mandate.”⁹ It further explained:

In our view, stability and continuity of ownership do serve important public purposes. Traditions of service were established and have been continued Particularly in connection with a number of entities, there is a long record of service to the public.

Id. at 1078. The FCC noted that “[a]scertaining and endeavoring to serve local needs was the key point.”¹⁰

Rather than focus on diversity, the Supreme Court affirmed a broad public interest calculus:

⁹ *1975 Order* at 1080.

¹⁰ *Id.* at 1081.

[T]he weighing of policies under the “public interest” standard is a task that Congress has delegated to the Commission in the first instance, and we are unable to find anything in the Communications Act, the First Amendment, or the Commission’s past or present practices that would require the Commission to “presume” that its diversification policy should be given controlling weight in all circumstances.

NCCB, 436 U.S. at 810.

The Supreme Court indicated that an approach focused only on diversification would be inconsistent with other policies emphasizing local service. *See id.* It approvingly noted that the FCC, in the renewal context, had made clear that “diversification . . . [is] a factor of less significance when deciding whether to allow an existing licensee to continue in operation than when evaluating applicants seeking initial licensing.”¹¹ Rejecting the Court of Appeals’ call for divestiture of all then-existing cross-ownership combinations, the Supreme Court noted that the FCC had rightly factored concerns like stability and continuity of ownership into its public interest analysis of grandfathering and stated that the FCC had not “acted irrationally in concluding that these public-interest harms outweighed the potential gains that would follow from increasing diversification.”¹² Moreover, the Supreme Court recognized that when the FCC previously had “changed its multiple-

¹¹ *Id.*

¹² *Id.* at 804-05.

ownership rules[,] it has almost invariably tailored the changes so as to operate wholly or primarily on a prospective basis.”¹³

2. In Granting Media General Permanent Waivers, the FCC Applied the Same Public Interest Calculus That the Supreme Court Approved in *NCCB*.

In its adjudicatory waiver decisions included in the *2008 Order*, the FCC considered four of Media General’s pending requests for waiver of the NBCO Rule submitted in connection with broadcast license renewal applications in markets where it owned a newspaper. The FCC explicitly found that:

[T]he public interest would be served by such waivers[, and w]e thus grandfather these combinations in the same manner as the Commission did in 1975.¹⁴

The FCC’s public interest determination in the *2008 Order* was premised on concerns that echoed the Supreme Court’s affirmance of the FCC’s grandfathering determinations in the *1975 Order*:

Specifically, in the following cases, we have determined that the public interest warrants a waiver in light of the synergies that have already been achieved from the newspaper/broadcast station combination, the new services provided to local communities by the combination, the harms (reviewed [in paragraph 76]) associated with required divestitures, the prolonged period of uncertainty surrounding the status of the newspaper/broadcast cross-ownership ban, and the length of time that the waiver request has been pending¹⁵

¹³ *Id.* at 811-12.

¹⁴ *2008 Order* ¶ 77 (JA____).

¹⁵ *Id.* (footnote omitted).

This emphasis in the *2008 Order* on proven service to local communities and the FCC's public interest in maintaining it was wholly consistent with the approach that *NCCB* had affirmed. *See NCCB*, 436 U.S. at 810 (finding a presumption that the FCC's diversification policy should dictate grandfathering decisions would "be inconsistent with the Commission's longstanding and judicially approved practice of giving controlling weight in some circumstances to its more general goal of achieving the best practicable service to the public.") (quotations omitted).

The *2008 Order* and the underlying record fully supported the FCC's decision. First, the FCC specifically found that cross-ownership in the Media General markets generated synergies that "expand[ed] the volume of local news and information communicated to local residents and ... improve[d] the quality of their offerings." *2008 Order* ¶ 77 n.251 (JA____) (citing Media General, Inc. Comments, MB Docket No. 06-121 (Oct. 23, 2006), Vol. 1, at 13-22 & Vol. 2, App. 4A, Ex. B-F (JA____) ("MG 2006 Comments"); *see id.* Vol. 2, App 4A; *see id.* e.g. at Ex. C at 5 ("WJHL-TV airs dozens of news stories a month that are made possible in the first instance or made more detailed because of WJHL-TV's collaboration with the *Herald-Courier.*")).

The evidence fully supported the FCC's conclusion that cross-ownership can promote the goal of more local content. *See 2008 Order* ¶ 42 (JA____). Media General provided ample support for this conclusion with expert studies of each of

Media General's converged markets by Professor Adam Clayton Powell III, who found:

[I]t is clear that in each of the [] converged markets, the communities served benefit by increased news coverage, expanded public affairs service, and greater community service from the [] licensed television broadcasters than would have been the case absent convergence.

MG 2006 Comments, Vol. 2, App. 4A at 2-3 (JA____) ("Powell").

Second, failing to award permanent waivers to Media General would have placed all these public interest benefits at risk, as divestiture would have been required. In 1975 when it grandfathered existing newspaper/broadcast combinations, the FCC recognized "that divestiture would cause 'disruption for the industry' and 'hardship for individual owners,' both of which would result in harm to the public interest." *NCCB*, 436 U.S. at 804 (quoting *1975 Order* at 1078). Similarly, the *2008 Order* recognized that compelling divestiture "would be harmful and that certain combinations remained appropriate and consistent with its localism, diversity, and competition goals" and granted waivers to Media General's existing combinations. See *2008 Order* ¶¶ 76-77 (JA____). In the underlying licensing proceedings, Media General had demonstrated that its combinations were in the public interest.¹⁶

¹⁶ See, e.g., *Application for Renewal of Broad. Station License of WJHL-TV Johnson City, TN*, Waiver Request, FCC File No. BRCT-20050401BYS (Apr. 1, 2005) (JA____) & *Opp'n to Informal Objection* (Jan. 10, 2008) (JA____); *Application for Renewal of Broad. Station License of WRBL(TV), Columbus, GA*,

Finally, because Media General's waiver applications had been pending since 2004 and 2005,¹⁷ the FCC had an opportunity to observe Media General's firm commitment to the communities it serves prior to granting permanent waivers. *See NCCB*, 436 U.S. at 810 (concluding that FCC goal of achieving "the best practicable service to the public" warranted grandfathering of combinations); *see also Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1163 (D.C. Cir. 1995) (recognizing that FCC has granted permanent waivers "to preserve existing ownership patterns").

C. The FCC Also Properly Applied the Waiver Standard Under the 1975 Order in Granting Media General Permanent Waivers.

1. The FCC Had Authority To Grant Waivers Under the 1975 Order's Public Interest Standard.

The FCC also had ample authority to grant Media General permanent waivers under the operative standards of the *1975 Order*. "In announcing the cross-ownership rule, the [FCC] specifically contemplated the possibility of permanent waivers." *Metro. Council of NAACP Branches*, 46 F.3d at 1163. Since this Court's stay of the *2003 Order* was in effect at the time the FCC granted

Waiver Request, File No. BRCT-20041201BZP (Dec. 1, 2004) (JA____) & Opp'n to Mot. to Dismiss Or In The Alternative Pet. to Deny (June 1, 2005) (JA____); *Application for Renewal of Broad. Station License of WBTW(TV), Florence, SC*, Waiver Request, File No. BRCT-20010802BIK (Aug. 2, 2004) (JA____) & Opp'n to Pet. to Deny (Dec. 15, 2004) (JA____).

¹⁷ *See 2008 Order* ¶ 77 nn.253-56 (JA____).

Media General permanent waivers and the *2008 Order*'s standards were not yet effective, the previously existing waiver standards in the *1975 Order* were the operative standards. See *Prometheus Radio Project v. FCC*, 373 F.3d 371, 435 (3d Cir. 2004) ("*Prometheus I*").

The *1975 Order* established four circumstances warranting the grant of a waiver. While the first three circumstances apply when a station is experiencing financial difficulty, the fourth – where “for whatever reason [] the purposes of the rule would be disserved by divestiture” (*1975 Order*, 50 FCC 2d at 1085) – reflects the FCC’s discretion to “waive its rules if ‘particular facts would make strict compliance inconsistent with the public interest.’” *Keller Commc’ns*, 130 F.3d at 1076.

2. The Record Overwhelmingly Established That the FCC Properly Applied the 1975 Order’s Public Interest Standard in Granting Media General Permanent Waivers.

As demonstrated below, in addition to properly approving Media General’s permanent waivers under *NCCB*’s grandfathering standards, there was overwhelming evidence before the FCC demonstrating that granting Media General permanent waivers was, as the FCC specifically found, in “the public interest.” *2008 Order* ¶ 77 (JA____). Therefore, the FCC also properly granted Media General waivers under the *1975 Order*’s public interest standard.

a. Localism.

The evidence before the FCC conclusively demonstrated that Media General's combinations serve the FCC's localism goal. In the 2006 Quadrennial Review, Media General submitted the analysis of Professor Powell who examined each of Media General's converged markets. He observed the facilities and staffing of the newsgathering operations; studied the political coverage; and examined the amount and quality of the local news, sports and weather. *See generally* Powell (JA____).

Professor Powell found that, under Media General's ownership, two of the three relevant combinations delivered appreciably more news and public affairs programming than they offered prior to cross-ownership. *See* Powell, Ex. C at 4-5 & Tab 1 (WJHL-TV) (JA____); Ex. E at 4-5 & Tab 1 (WRBL(TV)) (JA____). The other station (WBTW(TV) in Florence, South Carolina) was already delivering the most local news of all the new cross-owned stations when Media General acquired it, and the news total had remained the same and the public affairs programming had *increased*. *See* Media General, Inc. Reply Comments, MB Docket No. 06-121 (Jan. 16, 2007) ("MG Reply Comments"), at 48 (JA ____). Professor Powell noted that while the editorial staffs of the different properties remained separate, the news teams collaborated when appropriate to deliver news reports that might not otherwise have been available, citing numerous specific examples of breaking

news and political and investigative coverage that cross-ownership facilitated. *See* Powell, Ex. C at 5-15 (JA____); Ex. D at 5-20 (JA____); Ex. E at 4-18 (JA____).

This comprehensive analysis led him to conclude:

The depth of journalism and public service enabled by convergence is without question documented in these markets, and the geographically broader and editorially more intensive and responsive public service is demonstrated in each of the six markets.

Powell at 3 (JA____). Given this overwhelming record, it was well within the FCC's discretion to conclude that allowing Media General's cross-ownership to continue would serve its localism goal.

b. Competition.

Ample evidence before the FCC established that Media General's continued ownership of its cross-owned properties was not inconsistent with the FCC's policy of fostering advertising competition. First, the FCC has found, and this Court has affirmed, that newspaper/broadcast cross-ownership does not pose any threat to advertising competition because newspapers and broadcast stations compete in different markets. *See Prometheus I*, 373 F.3d at 398-400. The 2008 *Order* reaffirmed this conclusion. 2008 *Order* ¶ 39 n.131 (JA____).

Second, in the 2006 Quadrennial Review, Media General submitted the report of Michael Bauman of Economists, Inc. on the effect of cross-ownership on advertising rates in small and mid-sized markets. This study, which updated earlier empirical reviews from 1998 and 2002, found "no reason to believe that

cross-ownership is likely to lead to higher newspaper advertising prices.” *See* MG Reply Comments, App. 3 at 1-8 (JA____). These results demonstrate that competition continues to thrive in combination markets, no matter what their size.

c. Diversity.

The record before the FCC demonstrated that Media General’s combinations are consistent with the FCC’s diversity goal. Indeed, the FCC cited Media General’s combinations as an “example[] of commonly owned outlets exercising independent editorial control,” thereby enhancing viewpoint diversity. *2008 Order* ¶ 49, n.168 (citing MG 2006 Comments, Vol. 1, at 34-35 (JA____)) (JA____). For example, Media General’s properties frequently voiced different opinions and even endorsed different candidates in the same election. *See* MG 2006 Comments, Vol. 1, at 34-39 & App. 6 (JA____). With this record, it was well within the FCC’s discretion to conclude that awarding permanent waivers to Media General was consistent with its diversity goal.

d. Media General’s Permanent Waivers Were Otherwise Consistent with the Public Interest.

All the additional public interest considerations discussed previously in connection with the “grandfathering” standard likewise support the grant of the Media General waivers under the *1975 Order*’s public interest standard. As documented in Professor Powell’s market-by-market review, Media General’s combinations have provided “synergies that have already been achieved from the

newspaper/broadcast station combination” and new services to local communities furthering the public interest. *2008 Order* ¶ 77 (JA____) (footnote omitted). Moreover, waivers avoided the harm that would have resulted if the FCC required divestiture. *Id.*

D. Contrary to Citizen Petitioners’ Contentions, Media General’s Waivers Were Proper and Consistent with the Administrative Procedure Act.

In their opening brief, Citizen Petitioners make three arguments that the FCC improperly granted permanent waivers to Media General. As demonstrated below, each of these arguments is meritless.

1. Media General Has Complied with the NBCO Rule at All Times.

Citizen Petitioners contend that Media General improperly failed to come “into compliance” with the NBCO Rule before the waiver grant. *See* Citizen Pet. Br. 39. However, they fail to establish that, even if their contention were true (which it is not), that alleged failure somehow renders the FCC’s subsequent grant of the waivers impermissible.

In any event, the predicate of their argument is false because Media General has at all times complied with applicable FCC regulations. The Media General combinations receiving permanent waivers in the *2008 Order* were properly formed pursuant to “footnote 25” of the NBCO Rule, which permits a television licensee to acquire a newspaper and to hold both properties for “1 year or . . .

[until] the time of its next renewal date, whichever is longer.”¹⁸ Consistent with FCC requirements, Media General requested waivers when it applied to renew the relevant broadcast licenses. In doing so, Media General relied on established FCC procedures that resulted in legally proper combinations, permitting it to hold both the broadcast license and the newspaper while its license application and waiver request were pending.¹⁹

2. Notice of the Permanent Waivers Was More than Adequate.

Citizen Petitioners also disingenuously argue that the FCC failed to provide proper notice of the grant of permanent waivers in the *Further Notice*.²⁰ Citizen Petitioners had actual notice that Media General had requested permanent waivers, and Free Press itself filed oppositions to all Media General’s applications on

¹⁸ *1975 Order*, 50 FCC 2d at 1076 n.25. Citizen Petitioners inconsistently argue that applying the *NCCB* “grandfathering” standard was inappropriate because Media General’s combinations were permissible under the existing NBCO Rule. Citizen Pet. Br. 37-38 n.17. This distinction is meritless because, as the FCC has pointed out, those combinations could not be maintained “unless the FCC’s cross-ownership rule was waived or modified.” FCC Br. 63 n.20.

¹⁹ See *Health & Med. Pol. Research Group v. FCC*, 807 F.2d 1038, 1041 n.4 (D.C. Cir. 1987) (“[W]hen it established the cross-ownership rules, the Commission expressly contemplated waiver for newly created combinations brought about through a television licensee purchasing a daily newspaper.” (citing *1975 Order* at 1076 n.25)); 47 U.S.C. § 307(c)(3) (continuing licenses in effect during pendency of renewal applications).

²⁰ 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules, 21 FCC Rcd 8834 (2006) (“*Further Notice*”) (JA____).

various grounds, including “that Media General had failed [to] meet the waiver standard.” Citizen Pet. Br. 39.

Second, as previously noted, the rulemaking record included extensive evidence describing Media General’s operations and the public interest benefits derived therefrom. Citizen Petitioners had the same procedural rights to respond to this material as anyone else.²¹

Third, the FCC was not required to state explicitly in the *Further Notice* that it would consider granting permanent waivers of the NBCO Rule. *See* Citizen Pet. Br. 47-48. As the FCC’s Brief establishes, the decision to issue permanent waivers was an adjudicatory decision not subject to the notice requirements of 5 U.S.C. § 553(b). FCC Br. 62 (citing *MacLean v. Dep’t of Homeland Sec.*, 543 F.3d 1145, 1151 (9th Cir. 2008)).²²

²¹ Citizen Petitioners’ assertion that their due process rights were violated because neither the *2008 Order* nor the subsequent grant of Media General’s renewal applications addressed their objections to the waiver requests is meritless. Citizen Pet. Br. 40. The *2008 Order* provided at least five reasons why the grandfathering of Media General’s combinations was in the public interest. Moreover, if Citizen Petitioners wanted to raise this argument they were required to appeal the FCC’s licensing adjudication under § 402(b), which they failed to do.

²² Finally, even if notice had been required, which it was not, it is well established that an agency’s determination “need only be a ‘logical outgrowth’ of its notice.” *Covad Commc’ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006). The FCC’s conclusion that the “public interest warrants a waiver” (*2008 Order* ¶ 77 (JA____)) was a “logical outgrowth” of the proceedings. The *Further Notice* sought “comment on the newspaper/broadcast cross-ownership rule” (*Further Notice*, 21 FCC Rcd at 8848 (JA __)), and Media General’s comments established that application of the NBCO Rule to its cross-owned properties would not serve the

3. Citizen Petitioners' Contention that the Waiver Standards in the 2008 Order Were Not Satisfied Is Meritless.

Citizen Petitioners' contention that the award of permanent waivers to Media General was improper because the waiver standards in the *2008 Order* were not satisfied is meritless. *See* Citizen Pet. Br. 42. As noted above, the waiver standards in the *2008 Order* were indisputably *not* in effect when the FCC granted the waivers in that same decision, as this Court had stayed the FCC's media ownership rules, leaving the 1975 version of the rule in effect. *See Prometheus I*, 373 F.3d at 435. Moreover, as also discussed above, the FCC properly determined that allowing Media General's cross-ownership to continue was consistent with existing "grandfathering" waiver standards and the *1975 Order's* public interest waiver standard. *See* Part II.C, *supra*.

III. The Rulemaking Decisions in the 2008 Order Violated the APA.

A. The FCC Still Has Offered No Reasoned Analysis for Its Departure from Its Prior Determination To Eliminate the NBCO Rule and Imposition Instead of a More Restrictive Regime.

The FCC does not dispute that an agency's "about-face" without adequate explanation is "arbitrary and capricious." *Nat'l Coal. Against the Misuse of*

public interest. Moreover, Citizen Petitioners were on notice that the FCC could *sua sponte* approve combinations that served the public interest, just as it had done in 1975. *See NCCB*, 436 U.S. at 806-09; 47 C.F.R. § 1.3.

Pesticides v. Thomas, 809 F.2d 875, 884 (D.C. Cir. 1987). Nor does it dispute that when it “departs from its ‘former views’ [it] is ‘obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.’” *Prometheus I*, 373 F.3d at 390; *CBS Corp. v. FCC*, 535 F.3d 167, 182 (3d Cir. 2008), *vacated and remanded on other grounds*, 129 S. Ct. 2176 (2009). Finally, Section 202(h) requires the FCC to justify its “decision to retain its existing regulations” with the same “reasoned analysis” that is required to uphold its adoption of new regulations. *See Prometheus I*, 373 F.3d at 395. Yet, despite the FCC’s recognition of these sound principles, it has utterly and indisputably failed to satisfy them.

The FCC has provided *no* justification for imposing a *more restrictive rule* that prohibits newspaper/broadcast cross-ownership in the “*vast majority of cases*,” *2008 Order* ¶ 52 (JA____) (emphasis added), when the *2003 Order* would have permitted “transactions in the top 170 markets.” *2008 Order*, Statement of K. Martin at 2110 (JA____). The FCC apparently has no rational explanation of why it imposed a much more restrictive regime or presumably it would have offered it.

Indeed, far from concluding that the dangers associated with cross-ownership had increased, thereby justifying a more restrictive regime, the *2008 Order* stated that “the Commission was ‘not in a position to conclude that ownership can never influence viewpoint.’” FCC Br. 38. This insurmountable and

improper test is far from a demonstration *that cross-ownership in fact influences viewpoint*, the sole basis for imposing the cross-ownership ban in the first place. As demonstrated below (*see* Section III.C.), the FCC cannot support the affirmative imposition of any NBCO Rule. But for present purposes, the FCC has not even remotely satisfied its obligation to justify its *more restrictive regime* with evidence demonstrating a heightened risk associated with cross-ownership.

Instead of offering an explanation that even attempts to justify its incongruous “about-face,” the FCC deflects attention by arguing that it has simply adopted a “case-by-case analysis,” which allegedly would provide “a much more accurate assessment of the impact of particular transactions in particular markets.” FCC Br. 44. Yet, this statement, regardless of whether a case-by-case application allows a more accurate assessment, simply ignores the FCC’s own conclusion that the revised rule would preclude combinations in the “*vast majority of cases.*” *2008 Order* ¶ 52 (JA____) (emphasis added). It does nothing to explain why the FCC’s about-face imposing a less predictive and more onerous rule is appropriate. Accordingly, since “no data” existed contradicting the FCC’s prior decision, the *2008 Order*’s policy change was “arbitrary and capricious” and must be vacated. *Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1188-90 (D.C. Cir. 1990).

B. The FCC's Imposition of a More Restrictive Regime on a Struggling Industry Was Arbitrary and Capricious.

The FCC also has failed to address in any meaningful fashion Media General's argument that the FCC "failed to make a 'rational connection between the facts found and the choice made'" when it imposed its more restrictive cross-ownership. MG Br. 25 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983)). Instead, the FCC stated that it would consider the financial condition of a news property during its waiver analysis. FCC Br. 42 (citing *2008 Order* ¶¶ 65, 74 (JA_____)). But this argument again fails to address the fact that the *2008 Order's* regime, even with the possibility of waivers, was much more restrictive than the one envisioned in the *2003 Order*. See MG Br. 25. The FCC failed to explain why, especially in light of the *2008 Order's* recognition that cross-ownership can result in efficiencies that benefit the public interest,²³ it decided to impose still higher regulatory burdens.

Indeed, the FCC's unexplained decision is simply irrational given the undisputed evidence before it demonstrating that traditional media, a critical national resource, had faced increasingly severe financial challenges since the *2003 Order*:

²³ The *2008 Order* found that cross-ownership could "benefit[] the public interest" by "[a]llowing a struggling newspaper or broadcast station to combine with a stronger outlet" to "improve its ability to provide local news and information" *2008 Order* ¶ 74 (JA_____).

- The *2008 Order* found that newspaper circulation was in a steep decline, with the “number of daily newspapers being published and their readership hav[ing] decreased significantly.” *2008 Order* ¶ 27 n.89 (JA____).
- This reduction in circulation produced “a cascade of negative impacts on the media industry,” *id.* ¶ 28 (JA____), including a “sharp reduction in the number of professional journalists employed in the newspaper industry.” *Id.* Indeed, approximately 15,000 full-time reporters and editors have lost their jobs in the past three years – a 27 percent decrease in the total number of such jobs in the newspaper industry. *Id.*
- Broadcast companies have also endured the effects of increased use of new media as sources for news.²⁴

Accordingly, the *2008 Order* is arbitrary and capricious and violates § 202(h), and it must be vacated.

C. The FCC Did Not Demonstrate That the NBCO Rule Advanced Any of Its Policy Goals.

In its opening brief, Media General established that after three extensive proceedings, numerous studies, and intensive analysis, the FCC has still produced no *evidence* that the NBCO Rule actually furthers any of its three policy goals – competition, diversity, and localism – and it conclusively undermines one of them, localism. *2008 Order* ¶ 9 (JA____). In response, the FCC does not contend that its NBCO Rule advances competition or localism, but argues that its “determination

²⁴ Pew Project for Excellence in Journalism, *The State of the News Media* (2010), Local TV, Summary Essay at 1, Economics at 9, available at http://www.stateofthemediamedia.org/2010/chapter%20pdfs/2010_execsummary.pdf.

that cross-ownership limits remained necessary to ensure diversity was not ‘unsupported.’” FCC Br. 39. This contention is meritless.

First, the 2008 Order itself belies the FCC’s claim. As noted above, the FCC’s double negative factual determination that it is “not in a position to conclude that ownership can never influence viewpoint” (2008 Order ¶ 49 (JA____)) is not the equivalent of a determination that the NBCO Rule furthers diversity, and thus provides no basis for reimposing the sweeping NBCO Rule that bars cross-ownership in the “vast majority of cases.” *Id.* ¶ 52 (JA____).

Second, left with no basis in the record to support its conclusions, the FCC again retreats to its “predictive judgment” affirmed 32 years ago in *NCCB*. But the FCC does not dispute that when an agency’s conclusion rests on a predictive judgment, it must nonetheless “undergird” those predictive judgments with “evidence for that judgment to survive arbitrary and capricious review.” *Prometheus I*, 373 F.3d at 409. Here, there is no such evidence. Rather, the FCC simply “recite[s] a previous predictive judgment,” impermissibly failing its “correlative duty to evaluate its policies over time to ascertain whether they work.” *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993) (internal quotation omitted). After more than three decades, more is required to satisfy arbitrary and capricious review and Section 202(h) than the FCC’s rote recitation of *NCCB*. In the absence

of hard, quantifiable evidence that the NBCO Rule *promotes* the FCC's diversity goal, the FCC's action is arbitrary and capricious.

D. The FCC Improperly Dismissed Overwhelming Evidence That Alternative Media Outlets Contribute to Diversity.

In its opening brief, Media General established that the FCC did not adequately consider the contribution of alternative media outlets to diversity in retaining the NBCO Rule. *See* MG Br. 31-33. The FCC defends its conclusion that alternative media are not “major” sources of local news by arguing that “consumers continue *predominantly* to get their local news from daily newspapers and broadcast television.” FCC Br. 40-41 (quoting *2008 Order* ¶ 57 (JA____)) (emphasis added).

This contention does not, of course, dispose of the point that even if not the “predominant” source of local news, alternative non-traditional media outlets are nonetheless “major” sources of local news that the FCC should have considered in fashioning its rule. Indeed, the same studies the FCC relies upon to argue that daily newspapers and television stations are the “predominant” sources of local news also establish that:

- While “54 percent of the respondents most often use daily newspaper and television for local news, and 53 percent consider daily newspapers and television to be the most important source of local news,” an additional “33 percent answered that they most often use weekly newspapers and radio for local news, while 31 percent

consider weekly newspapers and radio to be the most important source of local news.”²⁵

- The Pew Study reported that “59 percent of respondents got news “yesterday” from local television, 38 percent from a local paper” and “23 percent from the Internet.”²⁶

For the FCC simply to ignore media sources that even the studies it relies upon found provided “33 percent” (weekly newspapers and radio) or “23 percent” (Internet) of consumers’ news is arbitrary and capricious, particularly when it has failed to specify what criteria it applied to determine whether a media outlet qualifies as “major.”

Finally, the FCC failed to reconcile its conclusion with its observation that due to the impact of the Internet “the diminishment of mainstream media power over information flow is real.” *2008 Order* ¶ 36 (JA____). Indeed, the FCC itself recognized that the Internet has become such a transformative force that “[i]t is clear today that the[] ‘gatekeeping’ aspects of the traditional media’s role are in turmoil.” *Id.* ¶ 37 (JA____). The FCC cannot have it both ways. For this reason

²⁵ *2008 Order* ¶ 57 n.187 (JA____).

²⁶ *2008 Order* ¶ 57 n.188 (JA____). Indeed, a recent study released by the University of Southern California’s Annenberg School for Communication & Journalism found that newspapers now rank *below* the Internet or television as sources of information. See Press Release, USC Annenberg School for Communication & Journalism, Digital Future Study (July 23, 2010), at 3, *available at* http://www.digitalcenter.org/pdf/2010_digital_future_final_release.pdf. Media General respectfully requests that this Court take judicial notice of this information, which is much more current than the data gathered almost five years ago for the *2006 Quadrennial Review*.

as well, its adoption of a more restrictive cross-ownership regime was arbitrary and capricious.²⁷

E. The FCC's Waiver Presumptions Were Invalid Under the APA.

As this Court recognized in *Prometheus I*, an agency “engaged in line-drawing determinations” may not make determinations that are “‘patently unreasonable’ or run counter to the evidence before the agency.” *Prometheus I*, 373 F.3d at 390 (citation omitted). As Media General’s opening brief demonstrated, the 2008 Order failed to meet this standard in connection with its waiver criteria. The FCC’s attempt to justify these waiver criteria in its brief is fatally flawed.

1. The Limitation of the Positive Presumption to Only the Top-20 Markets Is Arbitrary and Capricious.

In its opening brief, Media General established that the FCC’s presumption disfavoring newspaper/broadcast cross-ownership in all but the Top-20 markets

²⁷ The FCC takes issue with Media General’s argument that Ownership Study 6 (Milyo) concluded the NBCO Rule harms localism without providing corresponding benefits in terms of diversity, claiming that the study made no attempt to assess the viewpoints of newspapers and their cross-owned broadcast stations. See FCC Br. 39 n.11. The FCC has missed Media General’s point. The study found that a ban on cross-ownership could harm one of the FCC’s policy goals, localism, without furthering the diversity goal. Ownership Study 6 at 28-30 (JA____). Indeed, the study suggested that the political slant of local news broadcasts is likely explained by “market forces,” rather than ownership. See *id.* at 29 (JA____).

violated its own precedent, was unsupported by the record, and inexplicably imposed a more restrictive regime than the *2003 Order*. The FCC's response is facially inadequate and misguided.

First, the FCC's response to Media General's demonstration that the *2008 Order* is arbitrary and capricious because it violates the FCC's own precedent is meritless. In the *1999 Local Television Order*,²⁸ the FCC had concluded that "a market-size restriction is unnecessary for purposes of competition and diversity as long as there are a minimum number of independent sources of news and information available to listeners." *1999 Local Television Order* ¶ 107. The *2008 Order* reversed this policy and established presumptions based on market-size.

In response, the FCC makes a wholly unconvincing attempt to explain this inconsistency by arguing that the *2008 Order* established a "case-by-case review process" rather than a "bright-line rule" like the *1999 Local Television Order*. FCC Br. 47 n.16. The FCC's mandatory presumptions (which will "generally" result in "a waiver of the newspaper/broadcast cross-ownership ban" in the Top-20 markets, but preclude it in all others) are a lot closer to the "bright-line test" in the *1999 Local Television Order* than a true "case-by-case" review.

²⁸ *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12,903, ¶ 107 (1999) ("*1999 Local Television Order*").

In any event, the FCC's explanation is facially invalid. The FCC's proffered justification in the *2008 Order* for the retrenchment from the *1999 Local Television Order* was the need to provide for "adequate predictability for the industry" by relying on "clearly defined and readily ascertainable statistics." FCC Br. 47 n.16. But this argument contradicts the FCC's stated purpose for the *2008 Order*'s so-called "case-by-case" review, which was supposedly to advance "the benefits of precision that case-by-case review [provides] of every transaction." *2008 Order* ¶ 54 (JA___). The FCC's inconsistent justifications for its line-drawing establishes the arbitrariness of the *2008 Order*.

Second, in response to Media General's contention that its line-drawing was wholly arbitrary, the FCC recites voodoo statistics reminiscent of its *2003 Order*. A moment's reflection reveals the intellectual vacuity of those statistics. For example, the FCC recites that:

the top 20 markets, on average, have 15.5 major voices (independently owned television stations and major newspapers), 87.8 total voices (all independently owned television stations, radio stations, and major newspapers), and approximately 3.3 million television households.

2008 Order ¶ 56 (JA___). The FCC then attempts to justify its arbitrary line-drawing by noting that:

Markets 21 through 30, by comparison, have, on average, 9.5 major voices, 65.0 total voices, and fewer than 1.1 million television households, representing drops of 38.5 percent, 25.9 percent, and 56.3 percent from the top 20 markets, respectively.

Id.

But these statistics prove absolutely nothing. As a matter of simple mathematics, a comparison of larger markets with smaller markets will always yield discrepancies in such averages.

Third, the FCC's argument fails to address Media General's core contention, that the studies showing the benefits of cross-ownership do not depend on market size. Instead, those studies and the record show that the gains in local content, without a loss of diversity, are identifiable even in mid-size and smaller markets.²⁹ In simply concluding that combinations *only* in larger markets should be entitled to positive presumptions based on the number of media outlets, without scrutinizing more particularized evidence, the FCC's action was arbitrary and capricious.

Finally, the FCC attempts to dismiss Media General's argument that the FCC's line-drawing was based on a single impermissible factor – the number of television stations in the market – by arguing that the contemporaneous statements of the former FCC Chairman to Congress about the proposed rule should be ignored. *See* FCC Br. 46 n.15. The FCC's position is misguided, as it is well established that Congressional testimony can inform questions of statutory and rule

²⁹ *See* Media General, Inc. Comments on Research Studies on Media Ownership, MB Docket No. 06-121 *et al.* (Oct. 22, 2007), at 13 (JA___); MG 2006 Comments, Vol. 1, at 94-97 (JA___); Comments of Nat'l Ass'n of Broadcasters. MB Docket No. 06-121 *et al.* (Oct. 23, 2006), at 63-68 (JA___).

interpretation. *See Doe v. United States*, 372 F.3d 1347, 1361 (Fed. Cir. 2004) (relying on Commissioner of Civil Service Commission's testimony during hearings before House committee as evidence of meaning of Federal Employees Pay Act); *KiSKA Constr. Corp.-U.S.A. v. Wash. Metro. Area Transit Auth.*, 167 F.3d 608, 611-12 (D.C. Cir. 1999) (same).

The case upon which the FCC relies, *PLMRS Narrowband Corp. v. FCC*, is wholly distinguishable. There, the D.C. Circuit refused to consider statements made during agency deliberations “a year and one-half” prior to the FCC's order as evidence of the agency's motivation in making a decision. *PLMRS*, 182 F.3d 995, 1001 (D.C. Cir. 1999). But the statement relied upon by Media General carries far more weight. Chairman Martin's statement was made to Congress within a week of the adoption of the *2008 Order* while addressing the precise question posed in this appeal: why he instituted a waiver presumption in only the Top-20 markets. *See* MG Br. 38. Statements made to Congress in close temporal proximity to the release of the *2008 Order* shed light on the FCC's motivations in ways “any slip of the tongue during an agency's decision-making process” do not. *PLMRS*, 182 F.3d at 1001.

2. The Presumption Requiring a Cross-Owned Television Station Not To Be Ranked Among the Top-4 Stations in the DMA Is Arbitrary and Capricious.

In response to Media General's argument that the "Top-4" prohibition was irrationally based on competition grounds, the FCC argues that it justified the restriction on diversity grounds. *See* FCC Br. 50. Even if the Top-4 prohibition were based on a diversity rationale, a dubious proposition,³⁰ that provision is still arbitrary and capricious because the FCC failed to provide evidence that the combinations between a Top-4 station and a newspaper pose a greater threat to diversity. *See* FCC Br. 50 (citing *2008 Order* ¶ 61 (JA____)).

3. The 2008 Order's Definition of "Major Media Voices" Is Arbitrary and Capricious.

In response to Media General's argument that the inconsistent definition of "major media voices" in the NBCO Rule waiver standards and the radio/television cross-ownership rule runs afoul of the D.C. Circuit's decision in *Sinclair Broadcasting Group, Inc. v. FCC*, 284 F.3d 148, 165 (D.C. Cir. 2002), the FCC argues that the inconsistent definitions are rational. With respect to the definition of "major media voices" in the NBCO Rule, the FCC attempts to justify the

³⁰ *See 2008 Order* ¶ 61 (JA____) (relying on this Court's approval of a similar Top-4 prohibition in the Local Television Ownership Rule based on a perceived threat to competition). Such reliance is irrational given the FCC's conclusion that newspapers and broadcast stations do not compete in any relevant market. *Id.* ¶ 39 n.131 (JA____).

inclusion of only full-power television stations and major newspapers by asserting that consumers rely on those outlets most for local news. *See* FCC Br. 51 (citing *2008 Order* ¶ 57 (JA____)). With respect to the radio/television cross-ownership rule, the FCC also included radio stations and cable systems in its definition of media “voices,” and attempts to distinguish these additional inclusions by asserting that, since the regulated combinations included radio stations, it made sense to include them as voices. *See* FCC Br. 51 (citing *2008 Order* ¶ 80 n.259 (JA____)).

Despite the FCC’s attempted rationalization, its embrace of simultaneous inconsistent definitions is arbitrary and capricious under *Sinclair*. The FCC’s proffered excuse fails at the outset because it does not even attempt to explain why it included cable systems, in addition to radio, in the definition of “voices” for the purposes of the radio/television cross-ownership rule, but not the NBCO Rule. Moreover, the FCC failed to explain why other sources of news and information (such as radio stations and cable systems) are sources of diversity in one circumstance but not another.³¹ It defies credulity for the FCC to assert that cable television systems increase diversity when considering combinations of television

³¹ The FCC’s Brief heightens the confusion. In justifying the application of the NBCO Rule to “non-major” newspapers, the FCC argued that it “recognized that even less-read daily newspapers rank among ‘the most influential providers of local news in their markets.’” FCC Br. 52 (quoting *2008 Order* ¶ 61 (JA ____)). Yet, the FCC’s formulation of the NBCO Rule waiver standards and the radio/television cross-ownership rule both omitted such publications from the definition of “voices.”

and radio, but not when the combination is between a newspaper and television station. This Court will “not affirm” agency action when a line is drawn in a “seemingly inconsistent manner.” *Prometheus I*, 373 F.3d at 411.

IV. The NBCO Rule and Its Waiver Criteria Facially Violate the First Amendment.

A. The Scarcity Doctrine Is No Longer Valid, Subjecting the NBCO Rule To Strict Scrutiny.

As Media General demonstrated in its opening brief, under well-established precedent, this Court must consider the continued validity of the scarcity doctrine given the dramatically different facts that exist today. *See* MG Br. 41-49. Perhaps recognizing that it cannot refute this overwhelming evidence, the FCC cavalierly devotes a single page of its 103-page brief to defending the scarcity doctrine, wholly failing even to address the data Media General presented. *See* FCC Br. 95-96; MG Br. 42-46. Instead, the FCC simply claims that *NCCB* resolved this issue. This argument is misguided.

First, the FCC did not refute Media General’s showing that longstanding Supreme Court (and Third Circuit) precedent permits a challenge based on changed factual circumstances. *See United States v. Carolene Prods.*, 304 U.S. 144, 153 (1938); *N.J. Citizen Action v. Edison Twp.*, 797 F.2d 1250, 1260 (3d Cir. 1986).

Second, the FCC did not question Media General's showing that underlying facts supporting the scarcity doctrine's validity have changed dramatically, thereby warranting reconsideration of the doctrine itself. *See* MG Br. 42-46. In contrast to 1975, when the NBCO Rule was adopted, consumers today have access to many new sources of programming, as the Second Circuit recently observed:

Indeed, we face a media landscape that would have been almost unrecognizable in 1978. Cable television was still in its infancy. The Internet was a project run out of the Department of Defense with several hundred users. Not only did Youtube, Facebook, and Twitter not exist, but their founders were either still in diapers or not yet conceived. In this environment, broadcast television undoubtedly possessed a "uniquely pervasive presence in the lives of all Americans." The same cannot be said today.

Fox Television Stations, Inc. v. FCC, Nos. 06-1760-AG *et al.*, 2010 WL 2736937, at *7 (2d Cir. July 13, 2010) (internal citations omitted).

The FCC also claims that this Court should follow its previous decision in *Prometheus* not to reconsider the constitutionality of the scarcity doctrine. However, the media landscape has also dramatically changed since this Court decided *Prometheus* and reluctantly embraced the scarcity doctrine on the basis of "physical scarcity" of the spectrum. *Prometheus I*, 373 F.3d at 402. The spectrum is no longer "physically scarce." As a result of the DTV transition completed in 2009 and the advent of digital and HD-radio over the past few years, the spectrum available for broadcasting has exploded, giving consumers over 100,000 more possible radio channels and over 16,000 more possible television channels than

existed when this Court was evaluating the *Prometheus* record in 2003. *See* MG Br. 43-45. Thus, the scarcity doctrine can no longer justify the NBCO Rule. *2008 Order* ¶¶ 18-20, 24 (JA____).³²

B. The NBCO Rule and Its Waiver Factors Are Content-Based and Are Therefore Subject to Heightened Scrutiny.

As Media General demonstrated in its opening brief, regardless of whether the scarcity doctrine remains valid,³³ the NBCO Rule and its waiver factors are content-based for two reasons, and therefore subject to heightened judicial scrutiny. MG Br. 49-51. The FCC disputes neither reason.

First, under the NBCO Rule's new waiver factors, the FCC will evaluate a media outlet's amount of "local news" and whether it will exercise "independent news judgment," assessments that require the FCC to analyze content and the editorial and journalistic decisions of media owners, rendering them content-based. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Notably, *NCCB* did not address anything even remotely similar to the new waiver factors here and,

³² Intervenors' claim that "the FCC has not, as yet, had the opportunity to solicit or examine policy alternatives to the *Red Lion* doctrine in today's "more robust media environment" is wholly misguided. *See* Intervenors Br. 3. This entire multi-year proceeding concerned the appropriate role of broadcast regulation in today's media landscape.

³³ *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378 (1984) (applying heightened scrutiny and striking down content-based editorial restrictions on broadcasters' speech).

therefore, does not preclude this Court's consideration of the content-based nature of the waiver factors.

Second, the NBCO Rule is content-based because the FCC's purpose for the Rule is to enhance diversity in broadcasting, which necessarily relates to the content of the relevant speech. *See* MG Br. 51; FCC Br. 96 (acknowledging "protecting viewpoint diversity" as "the primary objective" of the NBCO Rule). The FCC's cross-ownership restrictions in support of this goal are therefore subject to heightened scrutiny. MG Br. 51.

C. The NBCO Rule and Its Waiver Factors Cannot Withstand Either Strict or Intermediate Constitutional Scrutiny.

As established in Media General's opening brief, the NBCO Rule and its waiver factors are subject to strict scrutiny because they single out newspaper owners for especially onerous restrictions and suppress their broadcast speech in favor of the speech of non-newspaper licensees. *See Citizens United v. FEC*, 558 U.S. ___, 130 S. Ct. 876, 921 (2010). Media General further demonstrated in its opening brief that the new NBCO Rule and its waiver factors cannot withstand strict or intermediate scrutiny.³⁴ MG Br. 52-53.

³⁴ The FCC cannot show that they further "a substantial government interest" or are "narrowly tailored." *League of Women Voters*, 468 U.S. at 380. Indeed, they restrict newspaper/broadcast cross-ownership in *all* markets, regardless of size. *See 2008 Order* ¶ 53 (JA___).

The FCC wholly failed to respond to these contentions. Rather, it merely claims it may do so because it holds “general power ‘to interest itself in the kinds of programs broadcast by licensees,’” which it asserts has been upheld against constitutional challenges in the past. FCC Br. 97 (quoting *Nat’l Ass’n of Indep. Television Producers & Distribs. v. FCC*, 516 F.2d 526, 536 (2d Cir. 1975)). This assertion (based on decades old authority) is misguided. This statutorily granted so-called “general power” cannot trump constitutional rights. Moreover, this “general power” is dependent upon a specific grant of “authority to promulgate the regulations at issue.” *Motion Picture Ass’n of Am. v. FCC*, 309 F.3d 796, 805-06 (D.C. Cir. 2003). Here, there is no such specific grant of authority to regulate content.³⁵

V. The NBCO Rule As-Applied Violates Media General’s First Amendment Rights.

The FCC also failed to address Media General’s as-applied challenge to the NBCO Rule. *NCCB* does not foreclose this challenge, as it is well-established that a Supreme Court decision upholding a statute against a facial challenge does not bar a later “as-applied” challenge. *See Wis. Right to Life v. FEC*, 546 U.S. 410,

³⁵ Intervenors’ claim that “looking at the type, quality and originality of news production is a far cry from regulating it” is meritless. *See* Intervenors Br. 15, n.15. The FCC’s only purpose for considering such information is to determine whether to regulate it (either through rulemaking or adjudications). Thus, any FCC action taken after “looking at” such information is assuredly content-based.

411-12 (2006) (clarifying that prior rejection of facial challenge to statute did not bar subsequent as-applied challenge); *Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005) (same).

As explained in Media General's opening brief, although the FCC granted Media General waivers in the *2008 Order's* licensing-related decisions, it still imposed restrictions on Media General's speech activity by barring it from selling its cross-owned properties together. MG Br. 53-55.³⁶ The application of any restriction on Media General's speech in its markets is invalid because the record established that there is a plethora of independent media outlets in each of the markets for which Media General received a waiver. *Id.* 53-55. Media General also provided overwhelming evidence of the public benefits from its cross-ownership combinations in its markets. *See generally* Powell (JA____).

³⁶ The FCC's assertion that Media General's Section 402(b) claims are improper because Media General was not aggrieved by the *2008 Order* as required in § 402(b) is meritless. *See* FCC Br. 5. "[W]hen the Commission grants an application subject to some condition which the applicant did not request, the application has been denied for purposes of § 402(b)." *Tribune Co. v. FCC*, 133 F.3d 61, 66 (D.C. Cir. 1998). Here, Media General argued the NBCO Rule was constitutionally invalid and thus sought to be free from any restrictions, while the permanent waivers prevent the transfer of the combinations together (*see* 47 C.F.R. § 73.3555(d), Note 4). Accordingly, the waivers are subject to a condition to which Media General objected. This argument is more fully developed in Media General's Opposition to Motion to Dismiss of Intervenors, No. 4460 (3d Cir. Mar. 26, 2009).

Given the diversity in Media General's markets, the application of the NBCO Rule and its waiver factors in those markets is constitutionally permissible only if it satisfies strict scrutiny. *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989). But as explained above, it cannot meet this test.

VI. The NBCO Rule Violates Broadcasters' Fifth Amendment Equal Protection Rights.

As Media General explained in its opening brief, the NBCO Rule violates newspaper owners' equal protection rights because it singles out and subjects newspaper owners to restrictions on speech that do not apply to other protected speakers. MG Br. 56. The FCC makes two responses to this argument, each of which is misguided.

First, the FCC claims that *NCCB* precludes this Court from considering Media General's equal protection challenge. FCC Br. 97-98. But in evaluating an equal protection challenge to the NBCO Rule, this Court must consider the facts as they exist today, not thirty-two or even six years ago. *See, e.g., Carolene Prods.*, 304 U.S. at 153; *Jones v. Brown*, 461 F.3d 353, 363 (3d Cir. 2006) (applying *Carolene Prods.*). Unlike when *NCCB* was decided thirty-two years ago, newspapers are now the *only* non-broadcast medium subject to cross-ownership restrictions. *See* MG Br. 57-58.

Second, the FCC asserts that it is entitled to single out newspaper owners for special restrictions because newspapers are the most prominent sources of local

news. However, *NCCB* does not support the FCC's distinction between newspaper owners and the other non-broadcast "major media" that have emerged since 1975 based on the extent to which they serve as "sources of local news and information." *NCCB*'s equal protection test permits differential treatment *between* (a) such "major media" and (b) other non-major media. *NCCB*, 436 U.S. at 801. It does not condone differential treatment *among* "major media."

Because the NBCO Rule treats newspaper owners differently than owners of other major non-broadcast media, heightened judicial scrutiny is required. MG Br. 57-58. The NBCO Rule fails to satisfy such scrutiny, as any governmental interest in limiting speech of newspaper owners supposedly to increase viewpoint diversity is constitutionally unacceptable. *See id.* 58-60 (citing *Citizens United v. FEC*, 130 S.Ct. at 904; *Buckley v. Valeo*, 424 U.S. at 48-49).

VII. The NBCO Rule Should Be Vacated.

The FCC argues, without apparent embarrassment, that even if this Court determines to remand, it should not order vacatur, which it asserts would be disruptive "because restrictions on media ownership have been in effect for decades." FCC Br. 103 n.33. This argument fails. The length of time that the NBCO Rule has existed is not the test for determining whether vacatur would be disruptive. No disruption would occur here because all cross-ownership transactions will continue to be evaluated under the FCC's "public interest" test, 47

CERTIFICATE OF COUNSEL

Pursuant to Third Circuit Rules 28.3(d) and 46.1(e), I certify that I am a member of the bar of this court.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 2010, I electronically filed the forgoing Reply Brief of Media General, Inc. using this Court’s CM/ECF system, which will send notification of such filing to the counsel of record in these matters who are registered on the CM/ECF system and appear on the service list below. Pursuant to this Court’s May 3, 2010 Order, I also caused one paper copy of this document to be delivered to the Clerk’s Office via overnight delivery service.

I further certify that some of the parties in this case are not CM/ECF users, and I have mailed the foregoing document by First-Class Mail, postage prepaid, to the non-CM/ECF users, each of whom are denoted with an asterisk below.

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