

ORAL ARGUMENT NOT YET SCHEDULED

Nos. 08-3078 et al.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

PROMETHEUS RADIO PROJECT, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,

Respondents.

**ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION**

**BRIEF FOR PETITIONERS NEWSPAPER ASSOCIATION OF AMERICA,
BELO CORP., BONNEVILLE INTERNATIONAL CORPORATION,
GANNETT COMPANY, INC., MORRIS COMMUNICATIONS COMPANY,
LLC, AND THE SCRANTON TIMES, L.P.**

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May 17, 2010

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1.1 of the Third Circuit Local Appellate Rules, the Newspaper Association of America (“NAA”), Belo Corp. (“Belo”), Bonneville International Corporation (“Bonneville”), Gannett Company, Inc. (“Gannett”), Morris Communications Company, LLC (“Morris”), and The Scranton Times, L.P. (“The Scranton Times”) hereby submit a joint Corporate Disclosure Statement.

NAA is a non-profit organization representing the newspaper industry and nearly 2,000 newspapers in the United States and Canada. NAA has no parent company. No publicly owned company owns 10% or more of NAA’s stock, and no publicly owned corporation has a financial interest in NAA.

Belo and its subsidiaries own and operate a diversified group of broadcasting, cable, and interactive media assets. Belo owns 20 television stations reaching 14% of U.S. television households, owns two regional cable news channels reaching more than three million households, owns or operates four local cable news channels, and operates more than 30 websites associated with its broadcast and cable media holdings. Belo has no parent company, and no publicly owned company owns more than 10% of Belo’s stock. Certain principals of Belo are also principals of A. H. Belo Corporation, a publicly held corporation that publishes several daily newspapers.

Gannett is an international news and information company operating on multiple platforms including the Internet, mobile, newspapers, magazines and television stations. Gannett Broadcasting Division's 23 television stations reach 21 million households and cover 18.2% of the U.S. population. Gannett also publishes 82 daily newspapers, including *USA Today*; owns more than 600 magazines and other non-daily publications; and is a digital leader with hundreds of newspaper and TV websites; CareerBuilder.com, the nation's top employment site; USATODAY.com; and more than 80 local MomsLikeMe.com sites. In addition, Gannett owns Newsquest plc, the second largest regional newspaper publisher in the United Kingdom, with 17 daily paid-for titles, more than 200 weekly newspapers, magazines and trade publications, and a network of web sites. Gannett has no parent company. According to filings made pursuant to Section 13(g) of the Securities and Exchange Act of 1934, JPMorgan Chase & Co., a banking and investment firm, holds 10.2% of Gannett's common stock as of May 11, 2010.

Morris is a privately held media company with diversified holdings, including radio broadcasting. Morris is wholly owned by its sole member, Morris Communications Holding Company, LLC ("Morris Holding"), which, in turn, is wholly owned by Pesto, Inc. ("Pesto"), which in turn is wholly owned by Questo, Inc. ("Questo"). Neither Morris, Morris Holding, Pesto, nor Questo is publicly

owned. No publicly owned company owns more than 10% of the stock of Morris, Morris Holding, Pesto, Inc., or Questo.

Bonneville is a privately held Utah corporation whose sole shareholder is Deseret Management Corporation (“DMC”) which, in turn, is privately held.¹ No publicly held company has a 10% or greater ownership interest in Bonneville or DMC.

The Scranton Times is a Pennsylvania limited partnership and is controlled by its sole general partner, The Times Partner, LLC, whose membership interests are held by four individuals. There are also various limited and preferred partnership interests in The Scranton Times held by individuals and various estate planning trusts. Other than The Times Partner, LLC, The Scranton Times does not have any parent companies. No publicly held company has a 10% or greater interest in The Scranton Times.

Dated: May 17, 2010

/s/ James R. Bayes

James R. Bayes

¹ Bonneville is ultimately controlled by The First Presidency of The Church of Jesus Christ of Latter-day Saints.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES.....	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	3
STATEMENT OF RELATED CASES AND PROCEEDINGS.....	21
STANDARD OF REVIEW	21
SUMMARY OF ARGUMENT	21
ARGUMENT.....	26
I. THE FCC’S MINIMAL ADJUSTMENTS TO THE STANDARDS FOR WAIVER OF THE ANTIQUATED NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE FAIL TO SATISFY ITS LEGAL OBLIGATION TO REPEAL OR MODIFY THE BAN	26
A. The FCC’s Decision To Retain an Absolute NBCO Ban, and To Superimpose Only Arcane and Severely Circumscribed Waiver Standards on the Blanket Restriction, Falls Short of the Agency’s Duties Under Section 202(h) and the APA.....	26
B. The FCC’s Failure To Repeal or, at a Minimum, Substantially Relax the Blanket NBCO Ban Was Wholly at Odds with the Record in the Underlying Rulemaking and the FCC’s Own Stated Policy Objectives	33
C. The FCC Failed To Follow This Court’s Directives on Remand and Offered No Reasonable Basis for Its Decision To Sharply Retreat from Its Previous Changes to the NBCO Ban	41
D. The Presumptive NBCO Waiver Standards Violate the First and Fifth Amendments	44
II. THE NBCO WAIVER STANDARDS ARE IMPERMISSIBLY INCONSISTENT WITH THE FCC’S OWN PRECEDENT AND ITS OTHER MEDIA OWNERSHIP RULES	44

TABLE OF CONTENTS
(continued)

	Page
A. The FCC Failed To Provide Any Satisfactory Rationale for Making All Forms of Newspaper/Broadcast Cross-Ownership Subject to Limiting and Subjective “Presumptions.”	44
B. The 2008 Order Irrationally Maintains More Restrictive Limitations on Newspaper Cross-Ownership Than It Does With Respect to Other Local Media Combinations.....	51
III. THE 2008 ORDER PROVIDES NO SATISFACTORY JUSTIFICATION FOR MAINTAINING EQUALLY BURDENSOME RESTRICTIONS ON NEWSPAPER/RADIO AND NEWSPAPER/TELEVISION COMBINATIONS	55
IV. VACATUR OF THE NBCO RULE IS THE APPROPRIATE REMEDY	58
CONCLUSION	60

TABLE OF AUTHORITIES

Page

FEDERAL CASES

<i>ACLU v. FCC</i> , 823 F.2d 1554 (D.C. Cir. 1987)	39, 45
<i>ALLTEL Corp. v. FCC</i> , 838 F.2d 551 (D.C. Cir. 1988)	30, 38, 49
<i>American Radio Relay League, Inc. v. FCC</i> , 524 F.3d 227 (D.C. Cir. 2008)	40
<i>American Trucking Ass’ns, Inc. v. Atchison</i> , 387 U.S. 397 (1967).....	29
<i>Bechtel v. FCC</i> , 957 F.2d 873 (D.C. Cir. 1992)	30
<i>Bechtel v. FCC</i> , 10 F.3d 875 (D.C. Cir. 1993)	30
<i>Bellsouth Telecommunications, Inc. v. FCC</i> , 469 F.3d 1052 (D.C. Cir. 2006)	33
<i>Brookings Municipal Telegraph Co. v. FCC</i> , 822 F.2d 1153 (D.C. Cir. 1987)	39
<i>Burlington Northern & Santa Fe Railway Co. v. Surface Transportation Board</i> , 403 F.3d 771 (D.C. Cir. 2005)	50, 52
<i>Burlington Truck Lines, Inc. v. United States</i> , 371 U.S. 156 (1962).....	33
<i>Comcast Corp. v. FCC</i> , 579 F.3d 1 (D.C. Cir. 2009)	29, 58
<i>FCC v. Fox Television Stations, Inc.</i> , 129 S. Ct. 1800 (2009).....	43, 47

<i>FCC v. NCCB</i> , 436 U.S. 775 (1978).....	3, 44
<i>Fox Television Stations v. FCC</i> , 280 F.3d 1027 (D.C. Cir. 2002)	53, 59
<i>HBO, Inc. v. FCC</i> , 567 F.2d 9 (D.C. Cir. 1977)	38, 40
<i>Illinois Citizens Committee for Broadcasting v. FCC</i> , 467 F.2d 1397 (7th Cir. 1972).....	50
<i>Illinois Public Telecommunications Ass’n v. FCC</i> , 117 F.3d 555 (D.C. Cir. 1997)	58
<i>KCST-TV, Inc. v. FCC</i> , 699 F.2d 1185 (D.C. Cir. 1983)	31
<i>Marshall v. Lansing</i> , 839 F.2d 933 (3d Cir. 1988).....	59
<i>Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.</i> , 463 U.S. 29 (1983).....	33
<i>NBC v. United States</i> , 319 U.S. 190 (1943).....	29, 32
<i>National Fuel Gas Supply Corp. v. FERC</i> , 468 F.3d 831 (D.C. Cir. 2006)	38, 40, 49
<i>P&R Temmer v. FCC</i> , 743 F.2d 918 (D.C. Cir. 1984)	31, 32
<i>Petroleum Communications, Inc. v. FCC</i> , 22 F.3d 1164 (D.C. Cir. 1994)	55, 57
<i>Prometheus Radio Project v. FCC</i> , 373 F.3d 372 (3d Cir. 2004).....	<i>passim</i>
<i>Quincy Cable TV, Inc. v. FCC</i> , 768 F.2d 1434 (D.C. Cir. 1985)	40

Radio-Television News Directors Ass’n v. FCC,
184 F.3d 872 (D.C. Cir. 1999)30

Scenic Hudson Preservation Conference v. FPC,
453 F.2d 463 (2d Cir. 1971).....36

United States v. Storer Broadcasting Co.,
351 U.S. 192 (1956).....32

Verizon Telephone Cos. v. FCC,
570 F.3d 294 (D.C. Cir. 2009)53, 57

WAIT Radio v. FCC,
418 F.2d 1153 (D.C. Cir. 1969)31

Wyeth v. Levine,
129 S. Ct. 1187 (2009).....43

FEDERAL STATUTES

Administrative Procedure Act (“*APA*”),
5 U.S.C. § 706*passim*

Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629,
118 Stat. 3, 99 (2004).....5

Telecommunications Act of 1996, Pub. L. No. 104-104,
110 Stat. 56, § 202(h).....*passim*

ADMINISTRATIVE DECISIONS

2000 Biennial Regulatory Review, Report,
16 F.C.C.R. 1207 (2001).....5

1998 Biennial Regulatory Review, Biennial Review Report,
15 F.C.C.R. 11058 (2000).....5

Capital Cities/ABC, Inc., Memorandum Opinion and Order,
11 F.C.C.R. 5841 (1996).....4

Cross-Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Policy, Order and Notice of Proposed Rulemaking, 16 F.C.C.R. 17283 (2001).....5

Multiple Ownership of Standard, RM & Television Broadcast Stations, Second Report and Order, 50 F.C.C.2d 1046 (1975) (“1975 Order”).....3

Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission’s Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission’s Cross-Interest Policy, 14 F.C.C.R. 12559 (1999).....46

Telecommunications Act of 1996, Notice of Proposed Rulemaking, 21 F.C.C.R. 8834 (2006).....11

Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, 18 F.C.C.R. 13620 (2003).....6

JURISDICTIONAL STATEMENT

The Newspaper Association of America (“NAA”) timely filed both a petition for review and a notice of appeal on February 29, 2008 in the D.C. Circuit. Bonneville International Corporation (“Bonneville”) and The Scranton Times, L.P. (“The Scranton Times”) timely filed petitions for review on March 4, 2008 in the D.C. Circuit. Belo Corp. (“Belo”) and Morris Communications Company, LLC (“Morris”) timely filed petitions for review and notices of appeal on March 5, 2008 in the D.C. Circuit. Gannett Company, Inc. (“Gannett”) timely filed a petition for review in the D.C. Circuit on March 5, 2008. Accordingly, the D.C. Circuit had jurisdiction under 28 U.S.C. §§ 2342(1) and 2344 and 47 U.S.C. § 402(a), or alternatively, under 47 U.S.C. §§ 402(b) and (c). This Court exercises jurisdiction over the petitions for review under 28 U.S.C. §§ 2342(1) and 2344 and 47 U.S.C. § 402(a). Although the notices of appeal are currently pending in this Court, the D.C. Circuit has exclusive jurisdiction to resolve them under 47 U.S.C. § 402(b). *See* Joint Motion of NAA, Belo, and Morris To Deconsolidate and To Transfer Venue to the District of Columbia Circuit (filed Nov. 21, 2008). In addition to the foregoing, NAA, Belo, Bonneville, Gannett, Morris, and The Scranton Times (jointly, “Newspaper Parties”) adopt the information concerning the proceedings below in the Jurisdictional Statement in the Brief of the National Association of Broadcasters (“NAB Brief”).

STATEMENT OF ISSUES

1. Whether the Federal Communications Commission (“Commission” or “FCC”) violated Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(h) (the “1996 Act”), acted arbitrarily and capriciously under Section 706 of the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, and/or violated the First and Fifth Amendments to the U.S. Constitution by retaining an absolute ban on newspaper/broadcast cross-ownership (the “NBCO Rule”) and modifying the blanket restriction with only exceedingly limited waiver standards;²
2. Whether the FCC violated Section 202(h) and/or acted arbitrarily and capriciously under the APA by making all requests for waivers from the NBCO Rule subject to “case-by-case” determinations, rather than bright-line standards, and/or by retaining far more restrictive limits on newspaper/broadcast cross-ownership than on other types of media combinations;³ and

² See, e.g., Comments of Newspaper Association of America, MB Docket No. 06-121, at I-3, 7-14 (Dec. 11, 2007) (“NAA 12/11/2007 Comments”) (JA ___ - ___, ___ - ___); 2006 *Quadrennial Regulatory Review – Review of the Comm’ns Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, Report and Order and Order on Reconsideration, 23 F.C.C.R. 2010, 2018-57 (¶¶ 13-79) (2008) (“2008 Order”) (JA ___ - ___).

³ See, e.g., NAA 12/11/2007 Comments, at 9-13 (JA ___ - ___); 2008 Order ¶¶ 52-54, 63 n.206 (JA ___ - ___, ___).

3. Whether the FCC violated Section 202(h) and/or acted arbitrarily and capriciously under the APA by imposing the same waiver restrictions on newspaper/radio and newspaper/television combinations.⁴

STATEMENT OF THE CASE

The Newspaper Parties adopt the Statement of the Case from the NAB Brief.

STATEMENT OF FACTS

The NBCO Rule, which prohibits common ownership of a daily newspaper and a broadcast station serving the same community, was adopted by the Commission 35 years ago. *Multiple Ownership of Standard, FM & Television Broad. Stations*, Second Report and Order, 50 F.C.C.2d 1046 (1975) (“1975 Order”), *aff’d FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775 (1978) (“NCCB”). As the FCC later reflected, the rule arose “in an era when two mature industries—daily newspapers and broadcasting—constituted the only ‘mass media’ providing local news and information to most American communities.” *2008 Order* ¶ 21 (JA___). When it adopted the ban, the Commission recognized the “pioneering spirit” that newspapers brought to broadcasting and observed that broadcast stations affiliated with newspapers tend to produce greater amounts of local news and public affairs programming than other stations. *See 1975 Order* ¶ 100 and App. C. Nevertheless, the agency justified the cross-ownership

⁴ *See, e.g.*, NAA 12/11/2007 Comments, at 2-3, 11 (JA___ - __, ___); *2008 Order* ¶¶ 53-75 (JA___ - ___).

prohibition based on what it acknowledged was a “mere hoped for gain in diversity.” *Id.* ¶ 109.

Well over a decade ago, the Commission began calling for revisions to the NBCO Rule, recognizing that significant changes in the media landscape since 1975 had undermined any previous rationale for the rule. As early as 1996, the agency stated its intention to commence a proceeding to obtain a “fully informed record” on the rule and “to complete that proceeding expeditiously.” *Capital Cities/ABC, Inc.*, Memorandum Opinion and Order, 11 F.C.C.R. 5841, 5888 (¶ 87) (1996). The FCC’s Chairman at the time expressed concern that “there is reason to believe that . . . the newspaper-broadcast cross-ownership rule . . . is right now impairing the future prospects of an important national source of education and information: the newspaper industry.” *Id.* at 5906.

That same year, Congress, in passing the 1996 Act, relaxed some of the FCC’s broadcast ownership rules and created a process for further deregulation. *See* 1996 Act §§ 202(b)(1), (c)(2). In particular, Section 202(h) of the statute requires the FCC periodically to evaluate whether its broadcast ownership restrictions remain “necessary in the public interest as the result of competition”

and to “repeal or modify any regulation it determines to be no longer in the public interest.” *Id.* § 202(h); *see also* 47 U.S.C. § 161.⁵

In the years after the passage of the 1996 Act, the Commission repeatedly acknowledged that the NBCO Rule was in need of reform. During this period, the agency went through a series of false starts in which it committed to initiate, and in some cases commenced, but then failed to complete, rulemaking proceedings intended to recalibrate the rule. *See, e.g., 1998 Biennial Regulatory Review, Biennial Review Report*, 15 F.C.C.R. 11,058, 11,102 (¶ 83) (2000) (“[W]e believe that there may be certain circumstances in which the [NBCO] rule may not be necessary to achieve the rule’s public interest benefits. We, therefore, will initiate a rulemaking proceeding to consider tailoring the rule accordingly.”); *2000 Biennial Regulatory Review, Report*, 16 F.C.C.R. 1207, 1218 (¶ 32) (2001) (committing to “issue a notice of proposed rulemaking . . . on whether [the FCC] need[s] to modify the daily newspaper/broadcast cross-ownership rule in order to address contemporary market conditions”); *Cross-Ownership of Broad. Stations and Newspapers; Newspaper/Radio Cross-Ownership Policy, Order and Notice of Proposed Rulemaking*, 16 F.C.C.R. 17,283 (2001).

⁵ In 2004, Congress amended the Act to make the Commission’s obligation to review its rules quadrennial rather than biennial. *See Consolidated Appropriations Act, 2004*, Pub. L. No. 108-199, 118 Stat. 3, 99, § 629 (2004).

1. **2003 Order.**

Finally, in June 2003, the FCC adopted an Order (the “2003 Order”) revising several of its media ownership rules, including the NBCO Rule. *2002 Biennial Regulatory Review – Review of the Comm’ns Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 F.C.C.R. 13,620 (2003), *aff’d in part, remanded in part, Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005).

The proceeding leading up to the *2003 Order* comprised the “most extensive” review the FCC ever had conducted with regard to its broadcast ownership rules and included the commissioning of twelve empirical studies as well as analysis of thousands of public comments. *See id.* ¶¶ 1, 7. After completing this in-depth review, the FCC concluded that an absolute NBCO prohibition was no longer necessary to serve any of the three public interest objectives the FCC historically has relied on to justify broadcast ownership regulation: competition, localism, and diversity. *See id.* ¶¶ 327, 330, 368-69.

With regard to competition, the Commission found “that most advertisers do not view newspapers, television stations, and radio stations as close substitutes,” and “newspaper-broadcast combination[s], therefore, cannot adversely affect competition in any relevant product market.” *Id.* ¶¶ 332, 341. The Commission

further observed that “the synergies and cost reductions of joint-ownership may translate into increased, rather than decreased competition within each service,” and that “[b]y precluding the efficiencies inherent in combinations, the rule likely harms consumers by limiting the development of new, innovative media services that would flow from a more efficient, combined entity.” *Id.* ¶ 337.

As to localism, the Commission cited “overwhelming evidence,” including several empirical studies and illustrative experiences provided by grandfathered and other existing newspaper/broadcast combinations, showing that such “combinations can promote the public interest by producing more and better overall local news coverage.” *Id.* ¶ 354. Noting that “television stations that are co-owned with daily newspapers tend to produce more, and arguably better, local news and public affairs programming than stations that have no newspaper affiliation,” the FCC recognized “that substantial public interest benefits may flow from broadcast/newspaper combinations.” *Id.* ¶ 465. Thus, the agency concluded that “the current rule is not necessary to promote our localism goal and . . . , and in fact, is likely to hinder its attainment.” *Id.* ¶ 354.

Finally, the Commission concluded that “[a]gainst the backdrop of the last 27 years’ growth in the number, breadth, and scope of informational and entertainment media available and the benefits that may accrue from common ownership,” a blanket NBCO prohibition “can no longer be justified as necessary

to achieve and protect diversity.” *Id.* ¶ 355. The FCC noted the lack of record evidence showing that newspaper/broadcast cross-ownership “poses a widespread threat to diversity of viewpoint or programming.” *Id.* ¶ 368. To the contrary, the Commission found “that the synergies and efficiencies that can be achieved by commonly located newspaper/broadcast combinations can and do lead to the production of more and qualitatively better news programming and the presentation of diverse viewpoints.” *Id.* ¶ 358.

To address the monumental changes that had occurred in the marketplace since the NBCO Rule was adopted in 1975, the FCC adopted a series of cross-media limits that would have permitted cross-ownership in large markets, significantly relaxed cross-ownership limits in medium-sized markets, and continued to preclude cross-ownership in small markets. *Id.* ¶¶ 432-81. The limits were “precisely targeted at specific types of markets in which particular combinations are most likely to harm [viewpoint] diversity.” *Id.* ¶ 369.

Specifically, the cross-media limits would have (i) permitted any newspaper/broadcast combinations that comply with the separate local television and radio ownership rules in markets with nine or more television stations, *id.* ¶ 472; (ii) permitted newspaper/broadcast combinations in markets with between four and eight television stations, subject to certain restrictions (*i.e.*, newspaper publishers could own either (a) one television station and up to 50% of the radio

stations permitted under the local radio ownership rule, or (b) up to 100% of the radio stations permitted under the local radio ownership rule, but no television stations), *id.* ¶ 466; and (iii) continued to prohibit newspaper/broadcast combinations in markets with three or fewer television stations, *id.* ¶ 454.

2. Third Circuit Review and Remand.

A number of parties challenged the *2003 Order*, and their appeals were consolidated in this Court. Upon review, this Court expressly affirmed the FCC's decision to repeal the blanket ban on newspaper/broadcast cross-ownership, explaining that "reasoned analysis supports the Commission's determination that [it] was no longer in the public interest." *Prometheus Radio Project v. FCC*, 373 F.3d 372, 398 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005). As this Court definitively stated, "[t]he Commission's decision not to retain a ban on newspaper/broadcast cross-ownership is justified under § 202(h) and is supported by record evidence." *Id.*

In reaching this determination, the Court confirmed the FCC's conclusion that newspaper/broadcast cross-ownership does not implicate competition concerns. *Id.* at 399-400. The Court further recognized that "[n]ewspaper/broadcast combinations can promote localism" and that arguments to the contrary failed to "unsettle the Commission's conclusion that the newspaper/broadcast cross-ownership ban undermined localism." *Id.* at 398-99.

In addition, this Court agreed that “[a] blanket prohibition on newspaper/broadcast combinations is not necessary to protect diversity.” *Id.* at 399. In this regard, the Court found that “the Commission reasonably concluded that it did not have enough confidence in the proposition that commonly owned outlets have a uniform bias to warrant sustaining the cross-ownership ban.” *Id.* at 399-400.

This Court thus upheld the Commission’s conclusion that the NBCO Rule is no longer in the public interest, but remanded the *2003 Order* to the FCC for further justification of the specific cross-media limits that had been adopted. *Id.* at 402-03. In so doing, the Court identified three discrete flaws in the cross-media limits, which it directed the FCC to address on remand. Specifically, the Court concluded that, in crafting the revised rule, the FCC had (i) given too much weight to the Internet as a media outlet; (ii) irrationally assigned outlets of the same media type equal market shares; and (iii) inconsistently derived the cross-media limits from its “Diversity Index,” a methodological tool the Commission had developed to provide a measure of viewpoint diversity in local markets. *Id.*; *see also id.* at 388 (citing *2003 Order* ¶¶ 391, 442).

3. 2008 Order.

In July 2006, more than two years after this Court issued its remand order, the Commission released a Notice of Proposed Rulemaking (“*NPRM*”) in its subsequent periodic review proceeding. *2006 Quadrennial Regulatory Review* –

Review of the Comm'ns Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, Notice of Proposed Rulemaking, 21 F.C.C.R. 8834 (2006). The *NPRM* was intended to serve the dual purposes of fulfilling the agency's Section 202(h) mandate and responding to the issues raised in the Third Circuit's remand decision. After the passage of yet another two years, the FCC released an Order in February 2008 concluding, once again, that "retention of a complete [newspaper/broadcast cross-ownership] ban is not necessary in the public interest as a result of competition, diversity, or localism." *2008 Order* ¶ 19 (JA____).

In addition to the factors that had been considered in its *2003 Order*, the FCC emphasized the "adverse financial conditions" facing the newspaper industry and explained in detail that the industry had experienced severe financial stresses in recent years. *Id.* ¶¶ 27-34 (JA____-____). In particular, the Commission found "that the statistics over the past decade show an industry containing fewer newspapers, facing declining circulation, bringing in stagnant revenues, suffering from increased costs, and employing fewer journalists." *Id.* ¶ 34 (JA____).⁶ "In light of the important role and current state of the newspaper industry," the agency

⁶ The record similarly showed that broadcasters are experiencing very challenging economic circumstances. *See, e.g.*, Comments of Smaller Market Television Stations, MB Docket No. 06-121, at 5-9 (filed Oct. 23, 2006) (JA____-____); Comments of National Association of Broadcasters, MB Docket No. 06-121, at 89-94 (filed Oct. 23, 2006) (JA____-____).

recognized that it is “critical that our rules do not unduly stifle efficient combinations that are likely to preserve or increase the amount and quality of local news available to consumers via newspaper and broadcast outlets.” *2008 Order* ¶ 35 (JA___). As the FCC repeatedly has acknowledged, these adverse trends have continued, and in some cases have intensified considerably, since issuance of the *2008 Order*. See, e.g., FCC, Public Notice, *FCC Launches Examination of the Future of Media and Information Needs of Communities in a Digital Age*, GN Docket No. 10-25 (rel. Jan. 21, 2010) (noting that “the layoffs of thousands of journalists have prompted concern from a wide variety of independent analysts and groups that we may end up with fewer ‘informed communities’” and that “these trends could have dire consequences for our democracy and the health of communities, hindering citizens’ ability to hold their leaders and institutions accountable”).

The *2008 Order* also recounts in considerable detail the exponential and continuous growth in the media environment since the FCC originally adopted the NBCO Rule. *2008 Order* ¶¶ 21-25 (JA___ - ___). In this vein, the FCC observed that the “media marketplace today is profoundly different” than it was in 1975. *Id.* ¶ 24 (JA___). The FCC further noted that “[m]any of the media outlets now vigorously competing for audiences simply did not exist” when the NBCO Rule was adopted and that “the increase in media voices” had engendered “a marked

fragmentation of audience share as viewers, listeners and readers gravitate toward new sources of information and entertainment.” *Id.* Observing that “[t]he emergence of new forms of electronic media in recent years has come at the expense of traditional media, and of newspapers in particular,” *id.* ¶ 21 (JA___), the agency declared that “[a]ll of these post-1975 marketplace developments obviate the need for an across-the-board ban on newspaper/broadcast combinations,” *id.* ¶ 24 (JA___).

As further justification for the elimination of the blanket cross-ownership ban, the *2008 Order* discusses the profound effect that the Internet has had on the local marketplace for news and information. *Id.* ¶¶ 36-38 (JA___ - ___). The Commission explained that increased Internet usage has affected traditional news media operations by fracturing their advertising-based business models and changing how they gather information, disseminate news, and compete for consumers. *Id.* ¶ 36 (JA___ - ___). More specifically, the agency found that:

the new and broader array of inputs from online sources available to the American public not only affects mainstream journalists’ decisions on what to report and how to report it, but websites also act as competing outlets—even, at times, as work-around channels of information in cases where the mainstream media has been slow or reluctant to react. *Id.* ¶ 37 (JA___ - ___) (citations omitted).

Perhaps most importantly, the FCC concluded that the growth of the Internet has “ero[ded] . . . newspapers’ traditional gatekeeping power.” *Id.* ¶ 38 (JA___). These

findings “convince[d]” the agency that “newspaper combinations no longer pose the same threat to diversity that they once did.” *Id.*

In addition, the FCC again found that the NBCO Rule is not necessary, and in fact is inimical, to its three traditional public interest objectives. *First*, with respect to competition, the FCC reaffirmed its prior determination that newspapers and broadcast outlets do not compete for advertising revenue and, thus, that the ban no longer is necessary to serve its goal of fostering competition among local media outlets. *Id.* ¶ 39 n.131 (JA___).

Second, the Commission confirmed its prior determination that the 1975 ban is not necessary to preserve localism. *See id.* ¶ 39 (JA___ - ___). Reiterating its 2003 conclusion “that efficiencies from the common ownership of two media outlets may increase the amount of diverse, competitive news and local information available to the public,” the agency “continue[d] to find evidence” that permitting some cross-ownership “can preserve the viability of newspapers without threatening diversity” and “can improve or increase the news offered by the broadcaster and the newspaper.” *Id.* In this vein, the FCC found that record evidence “shows that newspaper/broadcast combinations can create synergies that result in more news coverage for consumers.” *Id.* ¶ 19 (JA___).

To support this finding, the agency noted that numerous commenters provided “examples of cost savings and shared resources leading to more local

coverage and better quality news coverage.” *Id.* ¶ 40 (JA ___ - ___); *see also id.* (“Numerous parties cite to examples of the introduction of new or additional newscasts due to cross-owned combinations in markets.”). For example, Gannett described how its critically acclaimed Phoenix newspaper/broadcast combination provides more high-quality local news coverage, including lengthy investigative reports, while retaining separate editorial viewpoints. *Id.* Similarly, Media General noted that, in markets as small as Panama City, Florida (which, at the time, was the 157th largest television market (or Designated Market Area (“DMA”)) and Columbus, Georgia (then DMA 127), its same-market newspapers and broadcast stations provide between 20.5 and 32 hours of local news per week. *Id.*; *see also* Comments of Media General, Inc., MB Docket No. 06-121, at 2 (filed Oct. 23, 2006) (“Media General 10/23/2006 Comments”) (JA ___); Reply Comments of Media General, Inc., MB Docket No. 06-121, at 48 n.172 (filed Jan. 16, 2007) (JA ___). In addition to the examples singled out in the *2008 Order*, the record before the FCC was replete with other examples, in markets of all sizes, of existing newspaper/broadcast combinations that consistently serve their local markets with more and higher quality local news and information than stand-alone stations. *See, e.g.*, Comments of the Newspaper Association of America, MB Docket No. 06-121, at iv-v, 66-79 (filed Oct. 23, 2006) (“NAA 10/23/2006 Comments”) (JA ___ - ___, ___ - ___); Comments of Morris Communications

Company, LLC, MB Docket No. 06-121 (filed Oct. 23, 2006) (JA___); Comments of Cox Enterprises, Inc., MB Docket No. 06-121, at 12-18 (filed Oct. 23, 2006) (JA___ - ___).

The *Order* also cited the “considerable amount” of empirical evidence in the record demonstrating “that cross-ownership can promote localism by increasing the amount of news and information transmitted by the co-owned outlets.” 2008 *Order* ¶¶ 42-46 (JA___ - ___). Three FCC-commissioned media ownership studies analyzing the effects of newspaper/television combinations on broadcast news coverage and local content. These studies concluded that (i) local television newscasts for cross-owned stations contain on average more overall news coverage, more local news coverage, and more state and local political news coverage than the average for non-cross-owned stations; (ii) cross-owned television stations broadcast more local news programming between 2003 and 2006; and (iii) cross-owned stations provided more news programming per day than other stations. *Id.* ¶ 42 (JA___ - ___); *see also* Professor Jeffrey Milyo, *Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News*, FCC Media Study 6, at abstract (Sept. 2007) (“Milyo Study”) (JA___); Gregory S. Crawford, *Television Station Ownership Structure and the Quantity and Quality of TV Programming*, FCC Media Study 3, at 4 (July 2007) (JA___);

Daniel Shiman, *The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming*, FCC Media Study 4.1, at I-21-22 (Sept. 2007).⁷

Third, the Commission found that the absolute ban no longer is necessary to promote its diversity objectives. *See 2008 Order* ¶ 39 (JA ___ - ___). The FCC recognized that some markets “contain a robust number of diverse media sources and that the diversity of viewpoints would not be jeopardized by certain newspaper/broadcast combinations” in these markets. *Id.* ¶ 19 (JA ___).⁸ Nevertheless, the FCC further concluded that “some cross-ownership limits are necessary” to protect viewpoint diversity in markets with fewer media voices. *2008 Order* ¶¶ 47-50 (JA ___ - ___). The FCC provided little explanation for this conclusion, instead observing that it was not “in a position to conclude that

⁷ Two other research studies commissioned by the agency found that newspaper/radio cross-ownership enhances the quality and quantity of local radio news programming, although the Commission did not rely upon these findings as evidence supporting repeal of the NBCO Rule. *See* Craig Stroup, *Factors that Affect a Radio Station's Propensity to Adopt a News Format*, FCC Media Study 4.3, at III-14-III-15 (Sept. 2007) (“Stroup Study”) (JA ___); Tasneem Chipty, *Station Ownership and Programming in Radio*, FCC Media Study 5, at 43 (June 2007) (“Chipty Study”) (JA ___).

In addition, although two studies conducted by Consumers Union and Michael Yan, respectively, attempted to make contrary showings, the FCC questioned the reliability of the conclusions reached in these studies and found that, on balance, the evidence demonstrated that newspaper/broadcast cross-ownership can enhance the quality and quantity of local news. *See 2008 Order* ¶¶ 43-46 (JA ___ - ___).

⁸ The agency's conclusion that the ban is not needed to preserve viewpoint diversity was soundly confirmed by one of the empirical studies it had commissioned. The study found that there was no statistically significant difference in the viewpoints expressed by broadcast stations that were cross-owned with a same-market daily newspaper and other major network-affiliated stations, although these findings were not discussed in the *2008 Order*. *See* Milyo Study, at 23-34 (JA ___).

ownership can never influence viewpoint” and that it could not precisely “quantify nontraditional media outlets’ contribution to diversity.” *Id.* ¶ 49 (JA___).

Based solely on its stated but unquantified concern that some restrictions remained necessary to preserve viewpoint diversity, the FCC took what it described as “a modest step in loosening the complete ban on cross-ownership.” *Id.* ¶ 13 (JA___). Rather than modifying the 1975 rule itself, however, the Commission retained its original ban on newspaper/broadcast cross-ownership and established tightly circumscribed standards for consideration of waiver requests on a case-by-case basis. *Id.* Under those standards, the FCC presumes that a very limited array of combinations will serve the public interest. Specifically, only combinations of a daily newspaper and a single broadcast station in the top 20 television markets presumptively are in the public interest. Further, if the broadcast station is a television station, to qualify for a positive presumption (i) the station must not be ranked among the top four stations in the DMA, and (ii) at least eight independent “major media voices” must remain in the DMA. *Id.* ¶ 53 (JA___).

The FCC also will apply a positive presumption if either the newspaper or broadcast station qualifies as “failed” or “failing” under specified criteria, or if a new owner commits to initiating at least seven hours per week of local news programming on a broadcast station that does not offer any local newscasts. *Id.* ¶¶

65-67 (JA___ - __). Although the FCC noted its expectation that waivers “generally” would be granted in cases qualifying for a “positive presumption,” it expressly stated that the permissibility of cross-ownership will be determined on a “case-by-case” basis and that the positive presumption is subject to rebuttal. *Id.* ¶¶ 54, 64 (JA___, ___).

In all other television markets, the FCC presumes that it is inconsistent with the public interest for an entity to own a newspaper/broadcast combination. *Id.* ¶ 63 (JA___ - __). Although the Commission indicated that this “negative presumption” is intended to apply in “the vast majority of cases,” *id.* ¶ 52 (JA___), it also stated that waivers will be available to applicants able to “demonstrate by clear and convincing evidence that, post-merger, the merged entity will increase the diversity of independent news outlets . . . and increase competition among independent news sources in the relevant market,” *id.* ¶ 68 (JA___). This determination will be “inform[ed]” by four factors which involve highly fact-specific inquiries into the content-related and editorial functions of both newspapers and broadcasters: (i) whether cross-ownership will increase the amount of local news disseminated through the affected media outlets; (ii) whether each outlet will exercise its own independent news judgment; (iii) the level of concentration in the DMA; and (iv) the financial condition of the newspaper or station, and if either outlet is in financial distress, the owner’s commitment to

invest significantly in newsroom operations. *Id.* ¶¶ 68-75 (JA___-___). The Commission stated that it expects cases rebutting the negative presumption to be rare. *Id.* ¶ 64 (JA___).

The *2008 Order* was challenged by numerous parties, including the Newspaper Parties, in several Courts of Appeals. The Judicial Panel on Multidistrict Litigation determined by random selection that the consolidated cases would be heard in the Ninth Circuit. *In re: Federal Communications Commission, In the Matter of 2006 Quadrennial Regulatory Review*, RTC No. 95 (J.D.P.M.L. Mar. 11, 2008). The Ninth Circuit subsequently transferred the appeals to this Court. *Media Alliance v. FCC*, Nos. 08-70830, *et al.* (9th Cir. Nov. 4, 2008).

In April 2009, this Court granted a motion jointly filed by various advocacy groups to hold these appeals in abeyance pending FCC action on a petition for reconsideration. *See Order* (Apr. 14, 2009). Shortly thereafter, the Court ordered that a stay issued in connection with its review of the *2003 Order* remain in effect. *See Order* (June 12, 2009). This Court subsequently requested filings addressing whether the case should continue to be held in abeyance and whether the stay should be lifted. *See Order* (Nov. 4, 2009); *Order* (Dec. 17, 2009). In response, the Commission indicated that it planned to address the petition for reconsideration within the context of its forthcoming 2010 Quadrennial Review and opined that “[j]udicial review of the *2008 Order* would serve little purpose when that order has

been stayed and will soon be superseded by the 2010” proceeding. *See* FCC, Response to the Court’s Order of November 4, 2009 (filed Nov. 25, 2009). In March 2010, however, this Court issued an order lifting the stay and establishing a briefing schedule in these consolidated appeals. *See* Order (Mar. 23, 2010).

STATEMENT OF RELATED CASES AND PROCEEDINGS

The Newspaper Parties adopt the Statement of Related Cases and Proceedings from the NAB Brief.

STANDARD OF REVIEW

The Newspaper Parties adopt the Standard of Review from the Brief of Clear Channel Communications, Inc.

SUMMARY OF ARGUMENT

In the *2008 Order*, the FCC decided to retain its blanket restriction on newspaper/broadcast cross-ownership and to overlay the prohibition with new standards for obtaining a waiver. These arcane and stringent waiver standards provide scant opportunities for cross-ownership and, in reality, change the outlook for potential newspaper/broadcast combinations only minimally. As the FCC itself explained in the *2008 Order*, the revised waiver standards are intended to preclude cross-ownership “in the vast majority” of cases.

Given the FCC’s repeated, and judicially affirmed, conclusions that the 1975 NBCO Rule “no longer serves the public interest,” this *de minimis* alteration of the

original ban does not satisfy the Commission's obligation "to repeal or modify" outdated rules under Section 202(h) or its longstanding duty under the APA to ensure that its rules keep pace with changing marketplace conditions. As this Court has stated, the FCC "cannot save an irrational rule by tacking on a waiver procedure." In fact, the agency's exacting new waiver standards conflict with its duty to provide a meaningful "safety valve" from its rules through the full and fair consideration of *all* meritorious requests for waiver.

The FCC's failure to significantly modify the NBCO Rule also cannot be squared with its own policy objectives. By emphasizing the "significant turmoil" that recently has erupted in the newspaper publishing industry, the Commission made clear in the *2008 Order* that the case for relief from the NBCO Rule only had become stronger since its last periodic review proceeding. Further, the Commission reiterated in the *2008 Order* its well-settled and amply supported conclusions, both of which were affirmed by this Court in 2004, that newspaper/broadcast cross-ownership does not implicate "competition" concerns and that restrictions on cross-ownership in fact can "hinder" the agency's "localism" objectives.

Having dispensed with these considerations, the agency hinged its decision to maintain the NBCO Rule solely on the tepid assertion that it cannot be sure that cross-ownership "never" influences the subject properties' diversity of viewpoints.

In doing so, the FCC flatly ignored empirical evidence demonstrating that, in reality, no appreciable relationship exists between viewpoint diversity and newspaper/broadcast cross-ownership. In any case, that the agency cannot “prove the negative” in this regard hardly suffices as the demonstration of a concrete problem that must form the foundation of an agency regulation. The record before the Commission thus called for repeal of the long-outdated NBCO Rule, not the grudging waiver adjustments the agency instead adopted.

The FCC’s disorderly retreat in the *2008 Order* from the cross-media limits the Commission sought to put in place in 2003 can be harmonized neither with the record that was before the agency nor with this Court’s remand directives. The three discrete flaws in the cross-media limits that this Court expressly instructed the Commission to address in 2004 were hardly broached in the *2008 Order*, and the decision failed to provide any explanation whatsoever for the about-face the agency took with respect to reformulating the NBCO Rule. Furthermore, as explained in more detail in the Brief of Tribune Company and Fox Television Stations, Inc. (“Tribune/Fox Brief”), the current waiver standards cannot pass constitutional muster under any standard.

Apart from the FCC’s failure to satisfy its statutory obligations to modify the 1975 NBCO Rule in a meaningful way, the revised waiver standards constitute unexplained departures from the agency’s own precedent and—notwithstanding

this Court's prior admonishment that the Commission must reconcile its various ownership restrictions—are fatally inconsistent with other broadcast ownership restrictions addressed in the very same decision. First, disregarding its well-reasoned preference in other contexts to provide parties with the benefit of bright-line ownership standards, the FCC has crafted an intricate, uncertain, and necessarily subjective rubric of “positive” and “negative” presumptions under which no NBCO combinations are definitively permissible. The new “case-by-case” standards are inexplicably disparate from all of the FCC's other ownership rules and represent a clear reversal of the Commission's prior determination that bright-line standards “provide certainty to outcomes,” “ensure consistency in decisions,” and “conserve resources.”

Second, the new waiver standards are far more restrictive than the FCC's other media ownership restrictions, particularly the radio/television cross-ownership rule, even though both rules are based on seemingly identical viewpoint diversity concerns. The FCC dismisses this glaring inconsistency in a footnote of the *2008 Order* by averring that it “traditionally” has been “more cautious” with respect to newspaper/broadcast than radio/television cross-ownership. But a mere statement that “that's the way it's always been” does not pass muster as “reasoned analysis” under the APA and certainly is not what Congress had in mind in enacting Section 202(h).

In addition, the *2008 Order* applies exactly the same stringent waiver standards to both newspaper/*television* and newspaper/*radio* combinations, notwithstanding its repeated findings that radio combinations raise far less concern under its own stated public interest objectives. Such disparity between the “facts found” and the “choice made” is intolerable under elementary principles of administrative law.

Finally, in light of the FCC’s long sequence of failed efforts to reform the NBCO Rule in a reasonable manner, the Newspaper Parties respectfully submit that the rule should be vacated rather than remanded. At this point in the rule’s tortured history, the likelihood that the FCC will be able to cure the rule’s deficiencies on remand is exceedingly slim. Moreover, given the consistent evidence that newspaper/broadcast cross-ownership does not harm, and in fact promotes, the FCC’s stated public interest goals, vacatur would not significantly disrupt the agency’s regulatory agenda.

ARGUMENT

I. THE FCC’S MINIMAL ADJUSTMENTS TO THE STANDARDS FOR WAIVER OF THE ANTIQUATED NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE FAIL TO SATISFY ITS LEGAL OBLIGATION TO REPEAL OR MODIFY THE BAN.

A. The FCC’s Decision To Retain an Absolute NBCO Ban, and To Superimpose Only Arcane and Severely Circumscribed Waiver Standards on the Blanket Restriction, Falls Short of the Agency’s Duties Under Section 202(h) and the APA.

In the *2008 Order*, the FCC retained its blanket restriction on newspaper/broadcast cross-ownership and, rather than modifying the ban itself, added subsections to its regulations spelling out revised standards for seeking a waiver.⁹ As the FCC explained throughout the *Order*, it opted to establish new criteria for “the limited circumstances” in which “a waiver of the ban should be granted” and the agency will “presume a newspaper/broadcast transaction will be in the public interest.” *2008 Order* ¶ 52 (JA ___ - ___); *see also id.* ¶ 20 (JA ___). The *2008 Order* repeatedly describes the waiver revisions as a “modest” adjustment to the across-the-board ban, *see, e.g., id.* ¶¶ 5, 13, 19, 36 (JA ___, ___, ___, ___), and states that they are intended to preclude cross-ownership in “the vast majority of cases,” *id.* ¶ 52 (JA ___). Although the Newspaper Parties support the *2008 Order* to the extent that it was intended by the FCC to provide some

⁹ Prior to the effective date of the *2008 Order*, the standard for waiver of the NBCO Rule included a broad category for consideration of permanent waiver requests when “*for whatever reason*, the purposes of the rule would be disserved by divestiture,” and those purposes “would be better served by continuation of the current ownership pattern.” *1975 Order* ¶ 119 (emphasis added).

measure of relief from the 1975 NBCO Rule, the minimal changes to the rule's waiver standards are arbitrary and capricious and patently insufficient to satisfy the clear mandate of Section 202(h) of the 1996 Act.

The revised NBCO waiver standards codify a series of stringent criteria that “presumptively” permit very limited cross-ownership in only 20—or fewer than ten percent—of the nation’s 210 Nielsen DMAs. The Nielsen Company, Local Television Market Universe Estimates (2009), *available at* <http://blog.nielsen.com/nielsenwire/wp-content/uploads/2009/08/2009-2010-dma-ranks.pdf> (last visited May 13, 2010). Even in these mega-markets, combinations may include one daily newspaper and, at most, either one radio station or one television station, unless the parties are able to meet the exacting specifications for “rebutting [a] presumption” against cross-ownership. *2008 Order* ¶ 68 (JA___). Only an exceedingly small universe of transactions conceivably could satisfy the criteria for a positive presumption, and even those will be relegated to “case-by-case” review. *Id.* ¶ 20 (JA___). All other waiver applicants will be subject to a “negative presumption.” *Id.* ¶ 65 (JA___). As NAA and other parties to the underlying rulemaking proceeding explained to the FCC, the revised waiver criteria thus represent a *de minimis* change to the NBCO Rule adopted in 1975, provide only a modicum of regulatory relief from the original ban, and fail to take into account the acute need for such relief in smaller markets where many

newspaper publishers and broadcasters are struggling to maintain their traditional news operations. *See, e.g.*, NAA 12/11/2007 Comments, at 7-13 (JA ___ - ___); Comments of Belo Corp., MB Docket No. 06-121, at 2-6 (filed Dec. 11, 2007) (“Belo 12/11/2007 Comments”) (JA ___ - ___); Comments of Morris Communications Company, LLC, MB Docket No. 06-121, at 4-10 (filed Dec. 11, 2007) (“Morris 12/11/2007 Comments”) (JA ___ - ___); Comments of Gannett Co., Inc., MB Docket No. 06-121, at 1-8 (filed Dec. 11, 2007) (“Gannett 12/11/2007 Comments”) (JA ___ - ___); Comments of Bonneville International Corporation, MB Docket No. 06-121, at 4-9 (filed Dec. 11, 2007) (“Bonneville 12/11/2007 Comments”) (JA ___ - ___).

The FCC’s decision to retain the NBCO Rule in this manner falls woefully short of its obligation under Section 202(h) “to repeal or modify rules that no longer serve the public interest.” 1996 Act § 202(h). After correctly establishing on two separate occasions that retention of the original NBCO Rule “is not necessary in the public interest as a result of competition, diversity, or localism,” *2008 Order* ¶ 19 (JA ___), the FCC failed to fulfill its statutory duty to “repeal or modify” the rule in any meaningful sense. This failure is unequivocally clear under the heightened burden to eliminate outdated rules that the Newspaper Parties consistently have maintained applies to the FCC under Section 202(h). *See, e.g.*, NAA 10/23/2006 Comments, at 18-20 (JA ___ - ___); *see also* Bonneville 12/11/2007

Comments, at 4-5 (JA ___ - ___). The Newspaper Parties acknowledge that circuit precedent establishes that Section 202(h) requires reexamination of its broadcast ownership rules under guidelines analogous to a conventional “public interest” standard. *See Prometheus*, 373 F.3d at 389-95. Under this Court’s reading of the statute, the Commission still has a clear obligation to “repeal or modify” a rule once it has determined that the rule no longer “remain[s] useful in the public interest.” *Id.* at 395; *see also id.* (Section 202(h) is “deregulatory” because it “requires the Commission periodically to justify its existing regulations, an obligation it would not otherwise have”; thus, “[a] regulation deemed useful when promulgated must remain so” and “[i]f not, it must be vacated or modified.”). Here, the FCC has not sufficiently followed through with that obligation to eliminate or change outmoded restrictions.

Likewise, the FCC’s inconsequential changes to the NBCO waiver standards do not satisfy its duty under the APA to modify its rules to keep pace with changing marketplace conditions. *See Am. Trucking Ass’ns, Inc. v. Atchison*, 387 U.S. 397, 416 (1967) (“Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation’s needs in a volatile, changing economy.”); *NBC v. United States*, 319 U.S. 190, 225 (1943); *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (holding that the 30% cable

television horizontal ownership cap was arbitrary and capricious because the FCC failed to adequately take into account marketplace changes); *Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872, 887 (D.C. Cir. 1999); *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992), *rev'd and remanded*, 10 F.3d 875 (D.C. Cir. 1993) (stating that the FCC must “evaluate its policies over time to ascertain whether they work—that is, whether they actually produce the benefits the Commission originally predicted they would”). This duty has special force in the case of the NBCO Rule, which the FCC admitted at the time of its creation was based only on supposition, not evidence. *See Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993) (admonishing that “[t]he Commission’s necessarily wide latitude to make policy based upon predictive judgments deriving from its general expertise implies a correlative duty to evaluate its policies over time to ascertain whether they work—that is, whether they actually produce the benefits the Commission originally predicted they would”); *see also 1975 Order* ¶ 109 (adopting NBCO Rule based on a “mere hoped for gain in diversity”).

What is more, as this Court expressly recognized in its 2004 decision, “[t]he FCC cannot save an irrational rule by tacking on a waiver procedure.” *Prometheus*, 373 F.3d at 417 (quoting *ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988)). Indeed, the availability of waiver relief in appropriate circumstances must be part and parcel of any rational regulatory scheme. Agencies

must give “serious consideration [to] meritorious applications for waiver, and a system where regulations are maintained inflexibly without any procedure for waiver poses legal difficulties.” *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969); *see also KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1191 (D.C. Cir. 1983). Given that the FCC already has a well-established obligation to give *all* meritorious requests for waiver serious consideration, the agency’s purported modification of the standards for waiver of the NBCO Rule through codification of a limited range of permissible grounds for relief cannot logically be considered an adequate change to the underlying rule.

Further, the FCC’s specification of exceedingly stringent waiver criteria and its stated intention of precluding the “vast majority” of waiver requests through the establishment of negative presumptions are in direct tension with its duty to provide a meaningful “safety valve” from its restrictions. *WAIT Radio*, 418 F.2d at 1157 (stating that “an application for waiver has an appropriate place in the discharge by an administrative agency of its assigned responsibilities” and “[t]he agency’s discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances”); *see also P&R Temmer*

v. *FCC*, 743 F.2d 918, 929 (D.C. Cir. 1984) (quoting *WAIT Radio*, 418 F.2d at 1157).¹⁰

The inclusion of a negative presumption in the proposed waiver standard inevitably will chill legitimate requests for relief and is flatly inconsistent with the individualized inquiry the Commission is obligated to undertake in evaluating waiver requests. As the D.C. Circuit has explained, “[w]here any administrative rule, although considered generally to be in the public interest, is not in the public interest as applied to particular facts, an agency should waive application of the rule.” *P&R Temmer*, 743 F.2d at 929 (citing *United States v. Storer Broad. Co.*, 351 U.S. 192, 205 (1956) and *NBC v. United States*, 319 U.S. 190, 225 (1943)). By establishing specific and very exacting criteria that limit the range of permitted showings and give rise to a presumption against “the vast majority of” waiver requests, the Commission effectively has “rigged the game” against potential combinations that may well be in the public interest. The FCC’s decision therefore is arbitrary and capricious and should be set aside.

¹⁰ These shortcomings are even more troubling in light of the highly intrusive nature of the four factors the agency selected to “inform” its judgment as to whether a particular NBCO waiver should be deemed to overcome a negative presumption. *See 2008 Order* ¶ 68 (JA ____). As explained in more detail in the *Tribune/Fox Brief*, these factors impermissibly scrutinize the content-related and editorial functions of both daily newspapers and broadcasters. *See Tribune/Fox Brief*, Section I.B.

B. The FCC’s Failure To Repeal or, at a Minimum, Substantially Relax the Blanket NBCO Ban Was Wholly at Odds with the Record in the Underlying Rulemaking and the FCC’s Own Stated Policy Objectives.

The record before the FCC, as well as the Commission’s own conclusions concerning that record, should have led the agency inexorably to a decision to repeal the NBCO Rule in its entirety or, at a minimum, to relax it substantially. Because the *2008 Order* did not provide any legitimate basis for retaining significant restrictions on newspaper/broadcast cross-ownership under any of the three policy objectives that undergird the FCC’s broadcast ownership rules, the Commission’s decision to keep the ban in place and to adjust solely—and then only minimally—the associated waiver standards does not satisfy either the strictures of Section 202(h) or the agency’s fundamental obligation to provide a “rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *see also Prometheus*, 373 F.3d at 389-90; *Bellsouth Telecomms., Inc. v. FCC*, 469 F.3d 1052, 1056 (D.C. Cir. 2006).

In important respects, the record before the FCC in the 2006 Quadrennial Review proceeding demonstrated that the factors weighing in favor of regulatory relief from the NBCO Rule were even more compelling than in 2003, and the agency repeatedly acknowledged as much throughout the *2008 Order*. In

particular, the FCC discussed at length the considerable financial challenges the newspaper publishing industry has faced in recent years. *See 2008 Order* ¶¶ 27-33 (JA ___ - ___); *see also id.* ¶ 74 (JA ___) (“With regard to the newspaper industry, we are cognizant of the significant turmoil that has erupted since we last embarked on a media ownership review.”). For example, the agency explained that “the number of daily newspapers being published and their readership have decreased significantly,” *id.* ¶ 27 (JA ___), a trend that had “triggered a cascade of negative impacts on the media industry,” *id.* ¶ 28 (JA ___), including, among “other problems,” *id.* ¶ 32 (JA ___), a “recent and sharp reduction in the number of professional journalists employed in the newspaper industry,” *id.* ¶ 28 (JA ___), and circulation declines that have “affected the advertising dollars that keep newspapers alive,” *id.* ¶ 30 (JA ___). Notably, the disruptive economic trends in the newspaper industry have become more pronounced in the years since the FCC’s *2003 Order*, in which far more substantial changes to the NBCO Rule were adopted by the Commission. *See 2003 Order* ¶¶ 359-60.

The *2008 Order* also emphasized the exponential growth that has occurred in the media marketplace since the NBCO Rule was adopted, noting that “[t]he media marketplace today is profoundly different” than it was in 1975 and that “dramatic changes have occurred over several decades with respect to the number and types of media ‘voices’ competing for the public’s attention.” *2008 Order* ¶

24 (JA___). In the same vein, the FCC explained that the growth of the Internet and other new competitors had greatly expanded the media landscape and caused an “erosion of newspapers’ traditional gatekeeping power.” *Id.* ¶ 38 (JA___). Based on these highly evident marketplace trends, the Commission expressly acknowledged its duty to rework the NBCO Rule to “adequately reflect the situation as it is, not was.” *Id.* ¶ 21 (JA___) (citing *1975 Order* ¶ 100).

Even more importantly, the FCC once again concluded that the blanket NBCO ban does not serve any of its traditional public interest objectives. As the agency confirmed in the *2008 Order*, “[t]he media ownership rules are designed to foster the Commission’s longstanding policies of competition, diversity, and localism.” *Id.* ¶ 9 (JA___); see *Prometheus*, 373 F.3d at 386. Neither the evidence in the record nor the FCC’s own analysis in the *2008 Order* provide a valid basis for retaining restrictions on newspaper/broadcast cross-ownership under *any* of these three objectives.

Competition: First, the FCC confirmed its prior conclusion, which was upheld by this Court in 2004, that newspaper/broadcast cross-ownership does not implicate competition concerns. See *Prometheus*, 373 F.3d at 398, 400-01. As succinctly stated in the *2008 Order*, “the Commission found [in the *2003 Order*] that newspaper/broadcast combinations cannot adversely affect competition in any

relevant product market. We continue to support this conclusion.” *2008 Order* ¶ 39 n.131 (JA___).¹¹

Localism: The FCC also reiterated its prior finding that the absolute NBCO Rule is not necessary to preserve, and in fact can hinder, localism. Noting that it had determined in the *2003 Order* that “efficiencies from the common ownership of two media outlets may increase the amount of diverse, competitive news and local information available to the public” and that this Court had agreed with this conclusion in its 2004 opinion, *2008 Order* ¶ 39 (JA___); *see also id.* ¶ 16 (JA___) (citing *Prometheus*, 373 F.3d at 398-99), the FCC similarly concluded in the *2008 Order* that newspaper/broadcast cross-ownership “can improve or increase the news offered by the broadcaster and the newspaper,” *id.* ¶ 39 (JA___). Nothing in the FCC’s decision suggested that such benefits are unique to large market

¹¹ The FCC’s finding in this regard related to both advertising and consumer markets. *Id.* ¶ 39 n.131 (JA___). The Commission expressly rejected the argument that newspapers and broadcast outlets should be viewed as competitors for the “provision of local news” based on its determination, which it also had made in the *2003 Order*, that “consumers experience print and electronic media in very different ways.” *Id.* Yet, in another part of the very same decision, the FCC states that the revised waiver standards are being adopted “as a measure to protect competition” and are intended to analyze “the extent to which media outlets in a particular market compete in the provision of local news and information to consumers.” *Id.* ¶¶ 63, 72 (JA___, ___ - ___). Such contradictory statements are facially arbitrary and capricious and should be reversed. *Prometheus*, 373 F.3d at 411 (explaining that the “failure to provide any explanation for [a] glaring inconsistency is without doubt arbitrary and capricious”); *see also, e.g., Scenic Hudson Pres. Conference v. FPC*, 453 F.2d 463, 484 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972) (Oakes, J., dissenting) (“[I]f . . . agency findings are internally inconsistent, the court is not bound to accept them.”) (citations omitted).

combinations, and the record established otherwise. *See, e.g.*, Media General 10/23/2006 Comments, at 7-22 (JA___ - ___).

Although the FCC also asserted that there was “a considerable amount of empirical evidence in the record on both sides concerning the relationship between newspaper/broadcast combinations and localism,” 2008 Order ¶ 42 (JA___), the agency validated the results, and rejected the criticisms, of the three studies it had commissioned that demonstrated a positive correlation between cross-ownership and local news output, *see id.* ¶ 42 nn.147, 149, 150, 151 (JA___ - ___). In addition, the FCC expressly found that it could “not rely” on the conclusions of the one analysis, submitted by an advocacy group, that purported to show that cross-ownership actually may decrease the quantity of local news. *See id.* ¶¶ 43-44 (JA___) (noting submission by Consumers Union of an analysis stating that “while in some cases there may be an increase in news output at [an] individual cross-owned station there is a decline in the amount of local news for the market as a whole” and concluding that “[d]ue to numerous difficulties with CU’s analysis, we find that we cannot rely on its conclusions”).

Despite its repudiation of this single countervailing study, the FCC stated that “[t]he inconclusiveness of some of the data and disagreement as to the outcome of the studies . . . supports our decision to undertake a case-by-case review of particular combinations in particular markets, rather than providing hard,

across-the-board limits.” *Id.* ¶ 46 (JA___). Because the FCC rejected the only record evidence suggesting that cross-ownership may harm localism, however, this conclusion lacks any concrete basis in the record and is contrary to the agency’s duty to impose regulatory restrictions only to address “real regulatory problem[s].” *E.g., Nat’l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843-44 (D.C. Cir. 2006); *see also ALLTEL Corp.*, 838 F.2d at 561 (noting that “‘a ‘regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.’””) (citing *HBO, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (quoting *City of Chicago v. FPC*, 458 F.2d 731, 742 (D.C. Cir. 1971))).

Diversity: Finally, the Commission concluded, as it had in 2003, that the absolute restriction no longer is necessary to preserve viewpoint diversity. *2008 Order* ¶ 38 (JA___). While the agency further asserted that some restrictions on cross-ownership were merited to preserve viewpoint diversity, *id.* ¶ 47 (JA___), this finding was based on the agency’s perfunctory assertions that it was “not in a position to conclude that ownership can *never* influence viewpoint” and that it was unable to “quantify nontraditional media outlets’ contribution to diversity,” *id.* ¶ 49 (JA___) (emphasis added). In fact, the agency’s conclusion that cross-ownership restrictions are needed to preserve viewpoint diversity is directly *contrary* to the record evidence, including a peer-reviewed study commissioned by the FCC,

which found that there is no statistically significant correlation between cross-ownership and the viewpoints expressed by daily newspapers and broadcast stations. *See* Milyo Study, at 23-34 (JA ____). Despite the obvious relevance of this study to the FCC's examination of viewpoint diversity considerations, its conclusions are not even mentioned in the *2008 Order*.

Moreover, the FCC ignored arguments that attempting to “quantify” the relative contribution of specific media outlets is wholly irrelevant with respect to viewpoint diversity. As NAA explained in its comments, viewpoint diversity should be examined according to the availability of alternative sources of news and information, rather than the relative importance of various outlets.¹² *See ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987) (stating that an order is arbitrary and capricious if the agency fails to respond to “all significant comments”); *Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987) (noting “well settled” duty of an agency to “consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives” and that “the

¹² Specifically, NAA explained that, “[c]onsistent with the core purpose of the FCC’s diversity objectives, the Commission should focus on the availability in the contemporary marketplace of an abundant and ever-expanding array of local news and information alternatives to today’s local consumers.” *See* NAA 10/23/2006 Comments, at 85 (JA ____). NAA further explained that “the FCC c[ould] greatly simplify its analysis in this proceeding by focusing on whether consumers in individual media markets have a sufficient number of local news and informational outlets available to them to ensure that they will be well-informed and exposed to a variety of viewpoints. So long as local audiences have an adequate variety of local news and informational choices at their disposal, the relative audience reach, market share, or popularity of one outlet versus another should be irrelevant.” *Id.* at 89 (JA ____).

failure of an agency to consider obvious alternatives has led uniformly to reversal”) (citation omitted); *see also Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008).

In any case, that the agency could not conclusively “prove the negative” with respect to the impact of cross-ownership on viewpoint diversity is hardly a sufficient basis to maintain restrictions on newspaper/broadcast cross-ownership, much less the highly stringent restrictions imposed in the *2008 Order*. *See, e.g., Nat’l Fuel Gas Supply Corp.*, 468 F.3d at 843-44; *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1463 (D.C. Cir. 1985) (“[T]he Commission has failed entirely to determine whether the evil the rules seek to correct ‘is a real or merely a fanciful threat.’”) (citing *HBO, Inc.*, 567 F.2d at 50).

Moreover, the FCC expressly recognized that “the largest markets contain a robust number of diverse media sources and that the diversity of viewpoints would not be jeopardized by certain newspaper/broadcast combinations.” *2008 Order* ¶ 19 (JA___). Given this clear statement and the lack of any other basis for retaining cross-ownership restrictions, the Commission was required, at the very least, to afford regulatory certainty to combinations in all markets in which a sufficiently “robust number of diverse media sources” exist, rather than establishing a rebuttable presumption that will be available only for a very narrow and arbitrarily limited universe of potential transactions.

C. The FCC Failed To Follow This Court’s Directives on Remand and Offered No Reasonable Basis for Its Decision To Sharply Retreat from Its Previous Changes to the NBCO Ban.

Apart from the more general infirmities in the FCC’s decision-making process discussed above, the *2008 Order* must be reversed because it inexplicably disregards this Court’s specific remand directives and offers no justification for the retreat it made from its well-founded conclusion in 2003 that a far more substantial relaxation of the NBCO Rule was necessary. At the outset of the FCC’s 2006 Quadrennial Review, it already had been established that the 1975 NBCO Rule no longer serves the public interest. In affirming the Commission’s 2003 conclusion that the NBCO Rule “must be repealed or modified,” *Prometheus*, 373 F.3d at 395, this Court agreed with the agency that the existing ban was not necessary to serve the agency’s competition, localism, or diversity goals, *id.* at 398-400. The Court also upheld the agency’s efforts to “craft new limits ‘as narrowly as possible’” and “to avoid needlessly overregulating markets with already ample viewpoint diversity.” *Id.* at 402. In remanding the *2003 Order*, the Court cited three discrete flaws in the cross-media limits and, notably, did not fault the agency either for completely eliminating the rule in large markets or, more generally, for significantly relaxing the then nearly 30 year-old ban.

Instead of using the 2003 cross-media limits as a baseline and focusing on the specific issues that had been remanded by this Court, however, the FCC

radically reversed course by keeping the absolute cross-ownership ban in place. The arcane and narrow waiver standards adopted in the *2008 Order* are far more restrictive, and provide far less regulatory certainty, than the erstwhile cross-media limits. Under the limits adopted by the FCC in 2003, newspaper/broadcast combinations that complied with the agency's separate local television and local radio ownership limits would have been fully permissible in any market with at least nine commercial and noncommercial full-power television stations. *2003 Order* ¶ 472; *2008 Order* ¶ 15 n.55 (JA___). In mid-sized markets with at least four full-power television stations, the 2003 version of the rule would have allowed an entity to own a daily newspaper and a minimum of several broadcast stations. In stark contrast, the 2008 waiver standards possibly, but not definitively, permit the common ownership of one daily newspaper and, at the very most, one television or radio station, and such limited cross-ownership is “presumptively” allowed only in the 20 largest markets. As the FCC admitted in the *2008 Order*, combinations qualifying for a presumptive waiver almost invariably will be in markets with at least 10 independently owned television stations—more than twice the four TV stations that would have sufficed to permit some cross-ownership under the 2003 version of the rule. *2008 Order* ¶ 56 (JA___).

In effectuating this significant retrenchment from the *2003 Order*, the FCC did not indicate that there was any basis for scaling back the regulatory relief it

previously had afforded and, as shown above, the record evidence supporting deregulation in fact had grown stronger since the agency's prior proceeding. *See* Section I.B. and Statement of Facts, *supra*. Moreover, the FCC did not even consider, much less effectively address, the discrete issues that had been remanded by this Court and, indeed, hardly even broached the 2003 cross-media limits.

Accordingly, the FCC's decision to reverse course from the 2003 cross-media limits was inconsistent with the deference due to this Court, the mandate of Section 202(h), applicable standards of reasoned decision making, and the agency's duty to adequately explain any decision to jettison its prior regulatory approach. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (holding that the "requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position" and that "[a]n agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."); *see also id.* at 1824 (Kennedy, J., concurring) ("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past."); *Wyeth v. Levine*, 129 S. Ct. 1187, 1203-04 (2009) (concluding that an agency statement that "represent[ed] a dramatic change in position" "does not merit deference" and "is entitled to no weight").

D. The Presumptive NBCO Waiver Standards Violate the First and Fifth Amendments.

The Newspaper Parties agree with the argument set forth in the Tribune/Fox Brief that the revised NBCO waiver standards constitute an unlawful intrusion into the newsroom operations of both daily newspapers and broadcasters. Further, for the reasons set forth in the Tribune/Fox and Clear Channel Briefs, the Newspaper Parties agree that the scarcity rationale should be overturned and, in any event, cannot logically be applied to regulation affecting daily newspapers. The Newspaper Parties further concur with Tribune/Fox that the current NBCO waiver standards are unconstitutional even under the First Amendment test applied in *NCCB* because they are not “rationally related to a substantial government interest.” *See Prometheus*, 373 F.3d at 402 (citing *NCCB*, 436 U.S. at 796, 799-800). Accordingly, the Newspaper Parties adopt each of these arguments herein. *See* Tribune/Fox Brief at I.A., I.B., III; Clear Channel Brief at IV.

II. THE NBCO WAIVER STANDARDS ARE IMPERMISSIBLY INCONSISTENT WITH THE FCC’S OWN PRECEDENT AND ITS OTHER MEDIA OWNERSHIP RULES.

A. The FCC Failed To Provide Any Satisfactory Rationale for Making All Forms of Newspaper/Broadcast Cross-Ownership Subject to Limiting and Subjective “Presumptions.”

The FCC’s decision in the *2008 Order* to subject all requests for waivers of the NBCO Rule to ambiguous “case-by-case” review represents an inadequately explained and discriminatory departure from the agency’s prior precedent and the

approach taken by the Commission in all of its other broadcast ownership restrictions. *See 2008 Order* ¶ 20 (JA ___ - ___).

Under the intricate and uncertain rubric of “positive” and “negative” presumptions adopted by the agency in the *2008 Order*, no newspaper/broadcast combinations are definitively permissible, even those in the nation’s very largest markets, those that undeniably advance the FCC’s localism objectives, or those that would have no more than a *de minimis* impact on the FCC’s stated viewpoint diversity concerns. This framework makes it unnecessarily and unreasonably risky for parties to enter into combinations that ultimately may founder in the FCC application process. The Commission, however, fails to acknowledge the difficulties inherent in this *ad hoc* waiver approach and casually dismisses the concerns raised by the Newspaper Parties and other commenters that the absence of clear-cut standards for permissible cross-ownership will frustrate potential transactions that otherwise would produce tangible public interest benefits. *ACLU v. FCC*, 823 F.2d at 1581; *see, e.g.*, NAA 12/11/2007 Comments, at 13 (JA ___); Belo 12/11/2007 Comments, at 4 (JA ___); Morris 12/11/2007 Comments, at 8 (JA ___); Gannett 12/11/2007 Comments, at 5 (JA ___). Accordingly, the standards satisfy neither the APA nor Section 202(h).

The Commission’s adoption of these arcane and unpredictable waiver standards also constitutes an arbitrary and capricious departure from its own

precedent and longstanding regulatory approach. As the FCC acknowledged in the *2008 Order*, the agency established a clear preference for bright-line media ownership rules in prior proceedings. *2008 Order* ¶ 54 (JA ____). Specifically, the FCC explained in its *2003 Order* that it prefers a “bright line rule approach” because such rules “provide certainty to outcomes, conserve resources, reduce administrative delays, lower transaction costs, increase transparency of our process, and ensure consistency in decisions.” *2003 Order* ¶ 82; *cf. Review of the Comm’ns Regulations Governing Attribution of Broad. and Cable/MDS Interests; Review of the Comm’ns Regulations and Policies Affecting Investment in the Broad. Indus.; Reexamination of the Comm’ns Cross-Interest Policy*, Report and Order, 14 F.C.C.R. 12,559, 12,581-82 (¶¶ 43-44) (1999), *on recon.*, 16 F.C.C.R. 1097 (2001) (noting that the existing “bright-line [equity-debt-plus] test is superior to a case-by-case approach” because it “will provide more regulatory certainty than a case-by-case approach that requires review of contract language” and “will permit planning of financial transactions, would also ease application processing, and would minimize regulatory costs”).

Indeed, all of the FCC’s other local broadcast ownership restrictions consist of explicit rules that definitively permit specified types of combinations. Under the Commission’s local television and local radio caps, *2008 Order* ¶¶ 87, 110 (JA ____, ____), as well as the radio/television cross-ownership rule, *id.* ¶ 80 (JA ____ - ____),

combinations are permissible so long as parties are able to demonstrate compliance with the relevant “voices” tests and other straightforward criteria. Because it offered wholly inadequate bases for abandoning this well-reasoned bright-line approach, the Commission failed to meet its obligation to “show that there are good reasons for the new policy” or to proffer “a reasoned explanation” for its “disregard[]” of the “facts and circumstances that underlay or were engendered by the prior policy.” *FCC v. Fox Television Stations*, 129 S. Ct. at 1811.

The FCC asserted that “the built-in presumptions and the public interest test provide adequate predictability for the industry, particularly when coupled with the older ‘bright-line’ rules that we are retaining.” *2008 Order* ¶ 54 (JA___). Given the FCC’s clearly stated intention to “look at every transaction on a case-by-case basis,” *id.* ¶ 20 (JA___), however, this reasoning offers cold comfort to prospective applicants. Moreover, that bright-line rules exist with respect to the FCC’s local radio and television multiple ownership rules has no apparent bearing on the predictability of outcomes where the NBCO Rule is implicated and, in fact, serves only to highlight the agency’s discriminatory treatment of newspaper publishers. What is more, in an analogous context, the Commission reached precisely the opposite conclusion. The FCC explained in the *2003 Order* that its prior “experience with the [then] current case-by-case analysis used for radio transactions” made clear that a case-by-case approach to ownership rules “hinders

business planning and industry investment.” *2003 Order* ¶ 84; *see also id.* ¶ 83 (“Any benefit to precision of a case-by-case review is outweighed, in our view, by the harm caused by a lack of regulatory certainty to the affected firms and to the capital markets that fund the growth and innovation in the media industry. . . . Clear structural rules permit planning of financial transactions, ease application processing, and minimize regulatory costs.”).¹³ Nothing in the *2008 Order* suggests that these facts have changed or justifies a contrary conclusion.¹⁴

The Commission also claimed that “in comparison to the number of applications triggering the local radio, local television, and radio/television ownership rules,” it does “not anticipate that there will be as many newspaper/broadcast applications filed; thus, the more case-specific nature of the review . . . will not be unduly burdensome for the industry or the Commission.” *Id.* ¶ 54 (JA___). The FCC offered no basis for this prediction, however. In any

¹³ The FCC decided in the *2003 Order* to eliminate a policy that “any radio transaction that proposes a radio station combination that would provide one station group with a 50% share of the advertising revenue in the local radio market, or the two station groups with a 70% advertising revenue, undergoes additional public interest analysis.” *Id.* ¶ 84. The Commission noted that, for each such transaction, the FCC staff was required to “conduct[] an individual competitive analysis.” *Id.* The FCC determined that “[t]he administrative time and resources required for such an undertaking are considerable” and that “such an approach hinders business planning and industry investment for all radio firms falling within the ambit of our case-by-case review.” *Id.*

¹⁴ The FCC’s suggestion that its “case-by-case approach should partially alleviate the concerns of the newspaper industry commenters who believe the revised rule is too modest in scope” similarly is illogical. *2008 Order* ¶ 52 (JA___). The lack of certainty inherent in case-by-case review is one of several reasons discussed herein why the revised waiver standards are “too modest” in the first place.

case, the Commission’s suggestion that this approach will not be burdensome—based solely on the predicted number of applications—only highlights the extremely limited nature of the relief afforded under the *2008 Order* and the likely chilling effect of the new standards. Moreover, even assuming the Commission’s prediction about the number of applications were correct, a would-be cross-owner “inevitably will incur substantial legal fees” and must make a “significant showing” even for a combination “that clearly poses no public threat.” NAA 12/11/2007 Comments, at 13 (JA___).

The FCC also referred to “[t]he inconclusiveness of some of the data and disagreement as to the outcome of the studies” to support its newly minted case-by-case approach. *2008 Order* ¶ 46 (JA___). As explained above, the Newspaper Parties disagree with the FCC’s assessment that any such “inconclusiveness” exists or serves as a basis for maintaining *any* restrictions on newspaper/broadcast cross-ownership, much less as an adequate justification for a restriction that continues to deny any real measure of regulatory certainty. *See* Section I.B., *supra*; *e.g.*, *Nat’l Fuel Gas Supply Corp.*, 468 F.3d at 841; *ALLTEL Corp.*, 838 F.2d at 561 (“[A] ‘regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.’”) (citation omitted).

In a further attempt to support its radical change in approach, the FCC stated that “bright-line rules can be over-inclusive or under-inclusive” and that “[a]n

inflexible ‘one-size-fits-all’ rule . . . fails to recognize the diversity of media markets across the country as well as the diversity of media transactions.” *2008 Order* ¶¶ 50, 54 (JA ___, ___). To the extent that these concerns have validity, however, they should apply equally to all of the agency’s rules, not just to restrictions on newspaper/broadcast cross-ownership.

This Court found such internal inconsistencies among the Commission’s broadcast ownership limits intolerable in its prior review. *See Prometheus*, 373 F.3d at 419 (noting “inconsistent” aspects of local television ownership rule and that the FCC offered “no evidence” to support such inconsistencies). Further, “[a]n agency must provide an adequate explanation to justify treating similarly situated parties differently.” *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 776-77 (D.C. Cir. 2005). Here, the FCC utterly failed to provide any rational explanation for its discriminatory treatment of potential cross-owners and of newspaper publishers in particular, which notably are not even otherwise subject to the FCC’s jurisdiction. *See Ill. Citizens Comm. for Broad. v. FCC*, 467 F.2d 1397, 1400 (7th Cir. 1972) (finding that the FCC does not have authority to leverage its oversight of wire and radio communications to directly regulate services that do not involve such communications).

B. The 2008 Order Irrationally Maintains More Restrictive Limitations on Newspaper Cross-Ownership Than It Does With Respect to Other Local Media Combinations.

In addition to lacking the benefit of bright-line standards, the current version of the NBCO Rule is considerably more restrictive than any of the FCC's other local broadcast ownership rules. In particular, the revised NBCO waiver standards are far more prohibitive than the agency's radio/television cross-ownership rule, which is the Commission's only other cross-media restriction. In the *2008 Order*, the Commission itself acknowledged that "[i]n contrast to the newspaper/broadcast cross-ownership ban, [the radio/television cross-ownership] rule has been substantially relaxed over the years." *2008 Order* ¶ 80 (JA ___ - ___).

The current radio/television cross-ownership rule permits a single entity to own: (i) up to two full-power, commercial television stations and up to six radio stations (or, alternatively, one television station and seven radio stations), so long as 20 independently owned media "voices" would remain in the market; (ii) up to two television stations and up to four radio stations, so long as 10 independently owned media "voices" would remain in the market; and (iii) up to two television stations and one radio station, *regardless* of the number of "voices" remaining in the market. 47 C.F.R. § 73.3555(c); *2008 Order* ¶ 80 n.259 (JA ___).¹⁵ Thus, even in mid-sized and smaller markets, cross-ownership of up to two television stations

¹⁵ In all cases, cross-ownership also must comply with the local television and local radio ownership rules. *See* 47 C.F.R. § 73.3555(c).

and as many as four (or six) radio stations is definitively permitted if there are at least 10 (or 20) remaining independent “voices.” And, cross-ownership of up to two television stations and one radio station is allowed in *any* market.¹⁶

Further, whereas the NBCO Rule counts only full-power television stations and major newspapers as “major media voices” for purposes of determining whether a newspaper/television combination is entitled to a positive presumption, the radio/television cross-ownership rule provides more flexibility by permitting prospective owners to include a wider variety of media—including television stations, radio stations, cable television, and daily newspapers—in the required voice counts. *See 2008 Order* ¶¶ 57-60, 80 n.259 (JA ___ - __, ___).

The *2008 Order* provides scant explanation for the disproportionately negative treatment of newspaper cross-ownership under any of its stated policy objectives. *Burlington N. & Santa Fe Ry. Co.*, 403 F.3d at 777 (agencies have an obligation to explain disparate treatment of “similarly situated” parties). In fact, as the FCC made clear in the *2008 Order*, both the NBCO Rule and the radio/television cross-ownership rule are based on the agency’s seemingly identical viewpoint diversity concerns. *See 2008 Order* ¶¶ 49, 82 (JA ___ - __, ___ - ___).

¹⁶ To provide just one example of the marked differences between the NBCO and the radio/television rules, cross-ownership of a daily newspaper and a single broadcast station is presumptively prohibited under the standards adopted in the *2008 Order* in the Pittsburgh, Pennsylvania DMA, which is ranked 23rd among the nation’s DMAs, whereas cross-ownership of two television stations and six radio stations would be permissible in this same market. *See BROADCASTING & CABLE YEARBOOK 2010*, at B-86, B-210, D-471-72, D-817 (2009).

The FCC summarily dismissed arguments that the “numerical limit of one newspaper and one broadcast station is inconsistent with the radio/television cross-ownership rule’s higher numerical limits,” noting only that it “traditionally has been more cautious in allowing newspaper/broadcast combinations than in allowing broadcast-only combinations due to the unique attributes of newspapers.” *Id.* ¶ 63 n.206 (JA___). This vague statement, buried in a footnote in the middle of the *Order*, does not offer any acceptable rationale for maintaining this dichotomy. *See Fox Television Stations v. FCC*, 280 F.3d 1027, 1052 (D.C. Cir. 2002), *modified on reh’g*, 293 F.3d 537 (D.C. Cir. 2002) (vacating the agency’s former cable/broadcast cross-ownership rule for its failure to harmonize the rule with its local television ownership rule); *see also Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 304 (noting that “conclusory statements . . . cannot substitute for . . . reasoned explanation”) (citation omitted). A mere assertion that “that’s the way it’s always been” does not pass muster as “reasoned analysis” under the APA and certainly is not what Congress had in mind in enacting Section 202(h).

The unexplained disparity between the FCC’s broadcast cross-ownership rules is especially troubling because the record does not indicate that newspapers have more important attributes for viewpoint diversity purposes than television stations. To the contrary, some of the data relied on by the agency suggests that television stations are more popular sources of local news than daily newspapers.

2008 Order ¶ 57 (JA___ - __) (citing Nielsen Media Research, Inc., *How People Get News and Information*, FCC Media Study 1 (September 2007)) (survey results indicating “that 38.2 percent of all respondents consider broadcast television stations and 30.1 percent consider local newspapers ‘the most important source of local news or local current affairs’”); *see also id.* ¶ 57 n.188 (JA___) (citing Pew Internet & American Life Project, *Online News: For Many Home Broadband Users, the Internet is a Primary News Source* (Mar. 22, 2006)) (survey reaching “substantially the same results: 59 percent of respondents got news ‘yesterday’ from local television, 38 percent from a local paper”).

Wholly apart from its treatment of other types of broadcast combinations, the FCC places no restrictions at all on the local cross-ownership of broadcast outlets with cable operators, satellite television operators, Internet-based services, or any other local media. Thus, at the same time that daily newspapers remain extremely restricted in their ability to join resources with local broadcasters, competing media outlets have absolute freedom to do so. Because the FCC’s failure to address these inconsistencies in any meaningful fashion is arbitrary and capricious and invalid under Section 202(h), the NBCO Rule should be set aside.

III. THE 2008 ORDER PROVIDES NO SATISFACTORY JUSTIFICATION FOR MAINTAINING EQUALLY BURDENSOME RESTRICTIONS ON NEWSPAPER/RADIO AND NEWSPAPER/TELEVISION COMBINATIONS.

Assuming *arguendo* that the FCC could justify the retention of any limits on newspaper/broadcast cross-ownership, the *2008 Order* is also arbitrary and capricious as well as inconsistent with Section 202(h) because it subjects newspaper/radio combinations to the very same restrictions as newspaper/television combinations, despite recognizing that newspaper/radio combinations are “less likely to raise concentration concerns.” *2008 Order* ¶ 73 (JA___). While there is no question that an “agency must provide adequate explanation when it treats similarly situated parties differently,” the “converse is also true” and “[a]n agency must justify its failure to take account of circumstances that appear to warrant different treatment for different parties.” *Petroleum Commc’ns, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (citations omitted). The *2008 Order* provides virtually no justification for maintaining any prohibition on newspaper/radio cross-ownership whatsoever, much less for adopting restrictions that are as onerous as the stringent limits imposed on newspaper/television combinations.

In the *2008 Order*, the FCC repeatedly pointed to the circumstances that it believes warrant different treatment of newspaper combinations with radio and television, stating that “radio is not as influential a voice as television.” *2008*

Order ¶ 73 (JA___). In reaching this conclusion, the FCC noted extensive record evidence demonstrating that television is a considerably more popular source of local news and information than radio. *See id.* ¶ 57 and n.187 (JA___ - ___). Indeed, record evidence suggests that radio is no more popular a source of local news than weekly newspapers, *see id.*, which are entirely exempt from cross-ownership restrictions.

Similarly, the Commission limited its definition of “major media voices” to “full-power commercial and noncommercial television stations and major newspapers” for purposes of determining the applicability of a positive or negative presumption under the revised waiver standards. *Id.* ¶ 57 (JA___ - ___). In excluding radio from this definition, the FCC explained that daily newspapers and television stations “are generally the most important and relevant outlets for news and information in local markets today” and that “there is relatively unanimous support for the position that consumers continue predominantly to get their local news from daily newspapers and broadcast television.” *Id.* To recognize these significant differences and then “fail[] to take account of circumstances that appear to warrant different treatment” of radio vis-à-vis television constitutes arbitrary and

capricious agency action that cannot be sustained. *Petroleum Commc'ns, Inc.*, 22 F.3d at 1172.¹⁷

Although it subjects radio stations to exactly the same waiver standards as television stations, the FCC vaguely suggested that it may be “less difficult” for newspaper/radio combinations to “overcome the negative presumption” than it will be for newspaper/television combinations and that they “will not face as high a hurdle.” *2008 Order* ¶ 73 (JA___); *id.* ¶ 68 n.220 (JA___). Apart from these vaporous statements, however, the FCC fails to offer any guidance as to how the standards may differ for prospective radio and television combinations. This non-committal and obscure approach is patently arbitrary and does not satisfy Section 202(h). *See NetworkIP, LLC v. FCC*, 548 F.3d 116, 127-28 (D.C. Cir. 2008) (holding waiver decision arbitrary and capricious in light of an opaque waiver policy that could be discriminatory).

Finally, the FCC utterly ignored the extensive record evidence that newspaper/radio combinations advance its localism objectives. The Commission

¹⁷ Indeed, the FCC’s proffered justification for retaining any restrictions on newspaper/radio cross-ownership is cursory at best. The *2008 Order* notes in passing, and only in a footnote, that “[d]espite the fact that radio stations generally have less of an impact on local diversity than television stations, we disagree with commenters who argue that the retention of any limits on newspaper/radio cross-ownership is not justified.” *2008 Order* ¶ 63 n.206 (JA___). The agency loosely asserted that “the combination of a daily newspaper with one or more radio stations may have significant negative implications for the range of viewpoints available in a local market.” *Id.* Such “conclusory statements . . . cannot substitute for the reasoned explanation that is wanting in this decision.” *Verizon Tel. Cos.*, 570 F.3d at 304 (quoting *AT&T Corp. v. FCC*, 236 F.3d 729 (D.C. Cir. 2001)).

did not even acknowledge the findings in two of the empirical studies it commissioned demonstrating convincingly that cross-owned radio stations are four to five times more likely to have a news-based format and that cross-ownership is positively correlated with the quality of radio programming. *See, e.g.*, Comments of Newspaper Association of America, MB Docket No. 06-121 (Oct. 22, 2007) (JA___); Stroup Study, at III-14-III-15 (JA___); Chipty Study, at 43 (JA___). Because the Commission failed to respond to the relevant data in the record, its “ipse dixit conclusion, coupled with its failure to respond to contrary arguments resting on solid data, epitomizes arbitrary and capricious decisionmaking.” *Ill. Pub. Telecomms. Ass’n v. FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997).

IV. VACATUR OF THE NBCO RULE IS THE APPROPRIATE REMEDY.

Vacatur of the NBCO Rule is appropriate here because the agency already has tried, and failed, to reformulate the rule in a reasonable manner based upon guidance from this Court. Indeed, over the past 14 years, the Commission has been through a long succession of unsuccessful efforts to recalibrate the rule. In light of this tortured history, it is safe to assume that the probability that the agency will be able to craft a justifiable restriction on yet another remand is extremely low. *See Comcast v. FCC*, 579 F.3d at 19 (finding “no trouble concluding” that vacatur of FCC’s cable horizontal ownership rule was appropriate given agency’s failure, on remand from prior judicial decision holding rule to be arbitrary and capricious,

to provide an adequate explanation for the rule); *Fox Television Stations*, 280 F.3d at 1033 (vacating the FCC's cable/broadcast cross-ownership rule because it is "unlikely the Commission will be able on remand to justify retaining it"); *id.* at 1053 ("Because the probability that the Commission would be able to justify retaining the CBCO Rule is low and the disruption that vacatur will create is relatively insubstantial, we shall vacate the CBCO Rule."); *Marshall v. Lansing*, 839 F.2d 933, 945 (3d Cir. 1988) ("When a court has already remanded a case to an administrative agency for failure to explain adequately its decision, and the agency, on remand, again fails to provide a reasoned basis for its conclusions, a reviewing court can set aside the agency's decision so that it comports with a more readily apparent conclusion."). Further, given the consistent evidence that newspaper/broadcast cross-ownership does not harm, and in fact promotes, the FCC's stated public interest goals, *see* Section I.B., *supra*, vacatur would not significantly disrupt the agency's regulatory agenda. In contrast, yet another remand only would perpetuate the cycle of judicial directives and FCC rulemakings that already has subsumed the NBCO Rule, and unnecessarily handicapped regulated entities such as the Newspaper Parties, for the better part of a decade.

CERTIFICATE OF BAR MEMBERSHIP PURSUANT TO LAR 46.1

I, James R. Bayes, hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

/s/ James R. Bayes

James R. Bayes

CERTIFICATE OF SERVICE

I, James R. Bayes, hereby certify that on May 17, 2010, the foregoing Brief for the Newspaper Parties was filed electronically using the Third Circuit's electronic filing system. I further certify that I caused a true and accurate copy of the foregoing document to be served on the following persons electronically via the Notice of Activity generated by this Court's Case Management / Electronic Case Filing system or by electronic mail upon consent, as appropriate:

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