

**Nos. 08-3078, 08-4454, 08-4455, 08-4456, 08-4457, 08-4458, 04-4459, 08-4460,
08-4461, 08-4462, 08-4463, 08-4464, 08-4465, 08-4466, 08-4467, 08-4468, 08-
4469, 08-4470, 08-4471, 04-4472, 08-4473, 08-4474, 08-4475, 08-4476, 08-4477,
08-4478 & 08-4652**

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

PROMETHEUS RADIO PROJECT, *et al.*,

Petitioners and Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents and Appellee.

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

**BRIEF OF APPELLANTS COX ENTERPRISES, INC., COX RADIO, INC.,
COX BROADCASTING, INC, AND MIAMI VALLEY BROADCASTING
CORPORATION AND PETITIONER
COX ENTERPRISES, INC.**

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Corporation*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and the Rules of this Court, Appellant and Petitioner Cox Enterprises, Inc. and Appellants Cox Radio, Inc., Cox Broadcasting, Inc.¹ and Miami Valley Broadcasting Corporation (collectively “Cox”) state as follows:

Cox Enterprises, Inc. is a privately held corporation and has no parent companies.

Cox Broadcasting, Inc. is a wholly-owned subsidiary of Cox Holdings, Inc., which is a wholly-owned subsidiary of Cox Enterprises, Inc.

Cox Radio, Inc. is a wholly-owned subsidiary of Cox Broadcasting, Inc.

Miami Valley Broadcasting Corporation is a wholly-owned subsidiary of Dayton Newspapers, Inc., and Dayton Newspapers, Inc. is a wholly-owned subsidiary of Cox Broadcasting, Inc.

No publicly-held company has a 10% or greater interest in any Cox party.

Cox is not aware of any publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding.

s/ Michael D. Hays

¹ As a result of a name change, Cox Broadcasting, Inc. is now known as Cox Media Group, Inc.

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JURISDICTIONAL STATEMENT

Appellants Cox Enterprises, Inc., Cox Radio, Inc., Cox Broadcasting, Inc., and Miami Valley Broadcasting Corporation and Petitioner Cox Enterprises, Inc. (collectively, “Cox”) are parties to two cases in this consolidated proceeding.

First, all of the Cox parties are Appellants in Case No. 08-4473. With respect to that case, Cox states that it timely filed a notice of appeal of the adjudicatory decisions in the FCC’s hybrid *2008 Order*² on March 4, 2008 (JA____), and jurisdiction to review such decisions exists under 47 U.S.C. § 402(b). However, the plain language of § 402(b) and the associated case law firmly establish that the D.C. Circuit has exclusive jurisdiction over § 402(b) appeals. *See, e.g., Abbott Labs. v. Celebrezze*, 352 F.2d 286, 289 (3d Cir. 1965) (“Under § 402(b) of [the Communications] Act review of other types of orders are available *only through* an appeal to the Court of Appeals of the District of Columbia.”) (emphasis added), *overruled on other grounds, Abbott Labs. v. Gardner*, 387 U.S. 136 (1967); *Folden v. United States*, 379 F.3d 1344, 1356 (Fed. Cir. 2004) (“D.C. Circuit’s jurisdiction over claims that fall within subsection

² *2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, 23 F.C.C.R. 2010 (2008) (“*2008 Order*”), *appeal pending sub nom. Prometheus Radio Project v. FCC*, Nos. 08-3078, *et al.* (3d Cir. Jul. 15, 2008).

402(b) is exclusive”), *cert. denied*, 545 U.S. 1127 (2005); *NextWave Pers. Commc’ns, Inc. v. FCC*, 254 F.3d 130, 140 (D.C. Cir. 2001) (“judicial review of all cases involving the exercise of the Commission’s radio-licensing power is limited to” the D.C. Circuit) (quoting *Cook, Inc. v. United States*, 394 F.2d 84, 86 n.4 (7th Cir. 1968)), *aff’d*, 537 U.S. 293 (2003).

Cox’s appeal was consolidated with the petitions for review. Cox’s motion to transfer its § 402(b) appeal to the D.C. Circuit remains pending, *see* Joint Motion of the Cox Parties and Media General To Transfer Venue (Nov. 13, 2008), as does Cox’s motion to deconsolidate its § 402(b) appeal from the remaining cases in this proceeding. *See* Joint Motion of the Cox Parties and Media General To Deconsolidate their § 402(b) Appeals (Dec. 8, 2008). Cox continues to believe that exclusive jurisdiction over its § 402(b) appeal resides in the D.C. Circuit, but has addressed the § 402(b) issues in this brief to comply with this Court’s March 23, 2010 order.

With respect to the second case, 08-4461, Cox Enterprises, Inc. timely filed a petition for review of the rulemaking decisions in the *2008 Order* on March 5, 2008 (JA____), and this Court has jurisdiction over that case under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

RELATED CASES AND PROCEEDINGS

Cox adopts the statement of related cases contained in the Brief of Petitioner National Association of Broadcasters.

ISSUES PRESENTED

1. Whether the licensing-related decisions of the Federal Communications Commission (“FCC”) in the *2008 Order* relating to Cox are arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*; are not supported by substantial evidence or reasoned analysis; and violate the FCC’s quadrennial review obligation under § 202(h) of the Telecommunications Act of 1996,³ when:
 - (A) Cox demonstrated that its ownership of WSRV(FM) complies with the newspaper/broadcast cross-ownership rule, 47 C.F.R. § 73.3555(d) (“NBCO Rule”), and despite this showing the FCC provided no reasoned analysis for its decision to reject Cox’s showing and to require Cox to obtain a waiver of the NBCO Rule (JA____);
 - (B) the FCC modified the conditions applicable to Cox’s WALR-FM license by revising the waiver Cox had previously obtained for that station without reasoned analysis (JA____); and

³ Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 112 (1996), *codified at* 47 U.S.C. § 303, note.

- (C) the FCC directed Cox, in all its waiver applications, to address content-laden criteria, including the degree to which its cross-owned properties exercise “independent news judgment.” (JA_____).
2. Whether the restrictions on newspaper/broadcast cross ownership in the NBCO Rule adopted by the FCC are arbitrary and capricious under the Administrative Procedure Act; are not supported by substantial evidence or reasoned analysis; violate the FCC’s quadrennial review obligation under § 202(h); or are otherwise contrary to law. (JA_____).
 3. Whether the licensing-related and rulemaking decisions the FCC made in the *2008 Order* violate Cox’s First Amendment free speech rights. (JA_____).
 4. Whether the licensing-related and rulemaking decisions the FCC made in the *2008 Order* violate Cox’s Fifth Amendment equal protection rights when:
 - (A) the NBCO Rule discriminates against newspapers, since the NBCO Rule, which prohibits the common ownership of (a) a newspaper and (b) a radio or television station in a single local market, does not limit station ownership by owners of any other major media (JA_____); and
 - (B) the FCC failed to treat Cox’s showing that its ownership of radio station WSRV(FM) complies with the NBCO Rule in the same manner that it previously treated similar showings involving newspaper/broadcast combinations (JA_____).

STATEMENT OF THE CASE

Petitioner/Appellant Cox Enterprises, Inc. is the parent company of Appellants Cox Radio, Inc., Cox Broadcasting, Inc., and Miami Valley Broadcasting Corporation (collectively “Cox”). Cox is the owner of television stations, radio stations, and daily newspapers.⁴ Cox has owned broadcast stations in the Atlanta, Georgia and Dayton, Ohio markets since 1939 and 1934, respectively. While the FCC promulgated a number of rules in the *2008 Order* dealing with ownership of media properties, this brief addresses only the NBCO Rule.

The NBCO Rule, first adopted in 1975, prohibits the ownership of (a) a newspaper and (b) a broadcast station in a single local market, but does not limit station ownership by owners of any other media. Recognizing that the media marketplace has changed substantially since 1975, the NBCO Rule has been under review at the FCC continuously since 1996.⁵ In the FCC’s 2003 proceedings that

⁴ Specifically, Cox Radio, Inc is the holder of the licenses for WSRV(FM), WALR(FM), WHKO(FM) and WHIO(AM), while its affiliate Miami Valley Broadcasting Corporation is the licensee of WHIO-TV. WSRV(FM) and WALR(FM) are located near Atlanta, Georgia, while WHKO(FM), WHIO(AM), and WHIO-TV are located near Dayton, Ohio.

⁵ In 1996 the FCC issued a *Notice of Inquiry* on whether the newspaper/radio cross-ownership rule should be retained. See *Newspaper/Radio Cross-Ownership Waiver Policy*, 11 F.C.C.R. 13,003 (1996) (“*Newspaper/Radio NOI*”). In 2001, the *Newspaper/Radio NOI* was subsumed into MB Docket No. 01-235, *Cross-Ownership of Broad. Stations and Newspapers*, 16 F.C.C.R. 17,283, n.16 (2001) (the “*Newspaper/Broadcast NPRM*”). In 2002, the Commission consolidated the

this Court reviewed in *Prometheus I*, this Court affirmed the FCC's determination that the repeal of the NBCO Rule was in the public interest, but found the FCC's justification for the new rule insufficient and remanded the *2003 Order* to the FCC. Significantly, under the standards set forth in the *2003 Order*, Cox's ownership of its newspapers and broadcast stations in Atlanta and Dayton would have been permissible.⁶

On remand, the FCC initiated an entirely new rulemaking proceeding and developed another voluminous record.⁷ Although it affirmed the conclusions of

Newspaper/Broadcast NPRM into MB Docket No. 02-277, *2002 Biennial Regulatory Review – Review of the Commission's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, 17 F.C.C.R. 18,503, ¶ 7 (2002), which resulted in the *2002 Biennial Regulatory Review – Review of the Commission's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, 18 F.C.C.R. 13,620, ¶ 48 (2003) (“*2003 Order*”). On appeal, this Court remanded the *2003 Order* to the FCC for further justification. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 398 (3d Cir. 2004) (“*Prometheus I*”), cert. denied, *Media Gen., Inc. v. FCC*, 525 U.S. 1123 (2005). In 2006, the Commission folded this Court's remand into the proceeding that culminated in the *2008 Order*.

⁶ In the *2003 Order*, the extent to which the FCC relaxed the NBCO Rule depended on the number of television stations operating in the market. In markets with more than eight television stations, like Atlanta, the FCC eliminated the NBCO Rule in its entirety. *2003 Order* ¶ 472 (JA___). In markets with between four and eight television stations, like Dayton, the FCC retained some cross-media limits. *Id.* ¶ 466. In Dayton, Cox's media properties fell within those relaxed limits. Indeed, Cox would have been permitted to acquire an additional FM station serving Dayton.

⁷ Cox submitted comments in the remand proceeding. See *Comments of Cox Enterprises, Inc.*, MB Docket No. 06-121 (Oct. 23, 2006) (JA___).

the *2003 Order*, the FCC reversed course, retained the NBCO Rule, and set forth a narrow system of presumptions that disfavors newspaper/broadcast cross-ownership in the vast majority of markets.

In the *2008 Order*, the FCC also made adjudicatory decisions that impermissibly (1) rejected Cox's prior showings that its ownership of one of its radio stations, WSRV(FM), complies with the NBCO Rule; (2) modified Cox's license for WALR-FM; and (3) directed Cox, in its waiver applications for WSRV(FM), WALR-FM, WHKO(FM), WHIO(AM), and WHIO-TV, to address content-laden criteria, such as the definition of "*local news*" and whether the affected media outlets would exercise their own "*independent news judgment*." See *2008 Order* ¶¶ 68, 78 (JA____) (emphasis added).

STATEMENT OF FACTS

A. Background of Cox's Cross-Ownership.

Cox has been a pioneer in the news industry since the company was founded by James M. Cox in 1898 with the purchase of the nearly bankrupt *Dayton Daily News*. In 1934, Cox built Dayton's first AM radio station, WHIO(AM); in 1946 it built Dayton's first FM radio station, WHKO(FM); and in 1949 it built Dayton's first television station, WHIO-TV. Similarly in Atlanta, Cox acquired the *Atlanta Journal* and WSB(AM) in 1939 and then in 1948 built the southeast's first

commercial FM radio station, WSB-FM, and the southeast's second television station, WSB-TV.

In both the Dayton and Atlanta markets, Cox has a long history of strong news properties and community involvement. Accordingly, when the FCC first adopted the NBCO Rule in 1975, Cox's then-existing newspaper/broadcast combinations in both Atlanta and Dayton were grandfathered, as the FCC found that Cox's common ownership of these media properties affirmatively served the public interest.⁸

Since 1975, Cox's ownership holdings have changed. Cox has acquired additional radio stations, including WSRV(FM) and WALR-FM in the Atlanta area, and it has acquired two small local daily newspapers, the *Hamilton JournalNews* and the *Middletown Journal*, in the Cincinnati Designated Market Area ("DMA"), which is adjacent to the Dayton DMA.

B. The 2008 Order Rejected Cox's Showing That Its Ownership of WSRV(FM) Was Not Subject to the NBCO Rule.

As described below, Cox demonstrated that its ownership of WSRV(FM) did not implicate the NBCO Rule because, under an FCC approved methodology,

⁸ *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broad. Stations*, 50 F.C.C.2d 1046, ¶¶ 97, 109 (1975) ("1975 Order"), *aff'd sub. nom., FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978) ("NCCB").

there was insufficient overlap between WSRV(FM)'s signal contour and the location of its newspaper. Despite this showing, the 2008 Order applied the NBCO Rule to Cox by requiring Cox to apply for a waiver of that rule.

Since 2000, Cox has operated WSRV(FM) (formerly WFOX(FM)) in Gainesville, Georgia, which is near Atlanta, where Cox owns the *Atlanta Journal-Constitution* ("AJC"), a daily newspaper published in Atlanta, Georgia.⁹ Over ten years ago, in November 1999, Cox applied to the FCC for authority to acquire WSRV(FM) as part of a larger, multiple station transaction (FCC File No. BALH-19991116AAT).¹⁰ In the application, Cox requested a temporary waiver of the NBCO Rule to permit the common ownership by Cox of WSRV(FM) and the AJC.¹¹

When applying the NBCO Rule to an FM station, the FCC considers whether the station's 1 mV/m signal contour¹² entirely encompasses the boundaries of the community where the newspaper is published.¹³ Accordingly, Cox

⁹ See *Application of Chancellor Media/Shamrock Radio Licenses, L.L.C. & Cox Radio, Inc.*, 15 F.C.C.R. 17,053 (2000) (JA____) ("WSRV(FM) Order").

¹⁰ See *Application for Consent to Assign WFOX(FM)*, FCC File No. BALH-19991116AAT (Nov. 16, 1999) (JA____).

¹¹ *Id.* at Ex. C (JA____).

¹² The 1 mV/m signal contour for a radio station is the geographic area the station's signal covers at the signal strength of at least one millivolt per meter.

¹³ See 47 C.F.R. § 73.3555(d)(1)(ii).

requested a waiver of the NBCO Rule based on the fact that when using the FCC's standard contour prediction methodology, the 1 mV/m contour of WSRV(FM) encompassed the entire city of Atlanta.¹⁴

After the filing of the WSRV(FM) assignment application, the FCC released its decision in *Applications of KRCA License Corp.*, 15 F.C.C.R. 1794, ¶ 1 (1999), in which it ruled that a television station would be permitted to use an alternative contour prediction methodology, called "Longley-Rice," to take into account the effect of terrain on a station's signal for purposes of determining compliance with one of the FCC's cross-ownership rules, the radio/television cross-ownership rule.¹⁵

Thereafter, Cox commissioned a Longley-Rice study of WSRV(FM)'s 1 mV/m signal over Atlanta. The study revealed that WSRV(FM)'s 1 mV/m contour does not entirely encompass Atlanta. Accordingly, on February 10, 2000, Cox submitted the study as an amendment to the WSRV(FM) assignment application to show compliance with the NBCO Rule.¹⁶ In response, the FCC staff informed Cox that the Longley-Rice study would require further review and suggested that Cox

¹⁴ See *Application for Consent to Assign WFOX(FM)*, FCC File No. BALH-19991116AAT at Ex. C (JA_____).

¹⁵ See 47 C.F.R. § 73.3555(c).

¹⁶ See *Amended Application of WFOX(FM)*, FCC File No. BALH-19991116AAT, Eng'g Ex. at 5 (Feb. 10, 2000) (JA_____).

instead reinstate its request for a temporary cross-ownership waiver.¹⁷ Cox did so, and on August 7, 2000, the FCC granted the assignment application with the condition that Cox come into compliance with the NBCO Rule within twelve months from the closing of the transaction “either by filing an application to divest itself of its interest in WFOX(FM) or taking such other action as may be necessary to bring it into compliance with 47 C.F.R. § 73.3555(d).” *WSRV(FM) Order* ¶ 14 (JA____). The transaction closed on August 25, 2000. *See Amended Application of WFOX(FM)*, FCC File No. BRH-20031205ACS, Exs. 1 at 2 (June 2, 2005) (JA____).

On October 6, 2000, Cox filed a letter with the FCC explaining that the Longley-Rice study previously submitted with the assignment application showed that Cox’s common ownership of WSRV(FM) and the *AJC* complies with the NBCO Rule. *See* Letter of E. McGeary to FCC, FCC File No. BALH-19991116AAT (Oct. 6, 2000) (“Longley-Rice letter”) (JA____). The Longley-Rice letter explained that Cox had satisfied the condition in the *WSRV(FM) Order* and asked the FCC to accept the Longley-Rice study. *See id.* (JA____).

The FCC took no action in connection with the Longley-Rice showing, and pointedly failed to reject the Longley-Rice study or to require that Cox divest

¹⁷ *See* Letter of E. McGeary to FCC, FCC File No. BALH-19991116AAT, at 2 (Oct. 6, 2000) (JA____); *Amended Application of WSRV(FM)*, FCC File No. BRH-20031205ACS, Ex. 1 at 2 (Jun. 2, 2005) (JA____).

WSRV(FM). Nevertheless, in 2005, a year and a half after Cox had filed its application, FCC staff asked Cox to amend the license renewal application to first show again that, using the Longley-Rice methodology, Cox's ownership of WSRV(FM) complies with the NBCO Rule, and second, in the alternative, to request a temporary waiver of the NBCO Rule. Cox complied with these requests in its application.¹⁸ This license renewal application remains pending before the FCC.

The *2008 Order* is completely silent on the merits of WSRV(FM)'s Longley-Rice showing. Nonetheless, as noted above, the *2008 Order* specifically compelled Cox to seek a waiver with respect to its newspaper/broadcast combination in the Atlanta market (*2008 Order* ¶ 78 n.257 (JA____)), thereby necessarily rejecting Cox's contention that it was in compliance with the NBCO Rule. If, as Cox maintains, it is in compliance with the NBCO Rule as established by the Longley-Rice methodology, a waiver is unnecessary. Thus, by requiring Cox to seek a waiver of the NBCO Rule, the *2008 Order* made an adjudicatory determination rejecting Cox's contention that no waiver was necessary because it already complied with the NBCO Rule.

¹⁸ See *Amended Application of WSRV(FM)*, FCC File No. BRH-20031205ACS, Exs. 1, 1A, 1B, 1C (June 2, 2005) (JA____).

C. The 2008 Order Modified the Terms of WALR-FM's License.

By requiring Cox to seek a waiver of the NBCO Rule with respect to its ownership of WALR-FM within 90 days of the *2008 Order*, without awaiting a final order in the NBCO proceeding, the *2008 Order* modified the terms of Cox's existing temporary waiver of the NBCO Rule to Cox's detriment. Cox has been licensed to hold WALR-FM since 1997 pursuant to a temporary waiver of the NBCO Rule. *See Applications of NewCity Commc'ns, Inc. & Cox Radio, Inc.*, 12 F.C.C.R. 3929, ¶ 57 (1997) ("*NewCity Order*") (JA____).

Cox's waiver for WALR-FM in the *NewCity Order* was to remain in effect "subject to . . . the outcome in the pending radio-newspaper cross-ownership waiver proceeding." *NewCity Order* ¶ 72 (JA____). In 2005, the FCC granted WALR-FM's license renewal application, and the temporary waiver granted by the FCC in 1997 remained effective. *License Renewal Authorization for WALR-FM*, FCC File No. BRH-20031205ADF (Jan. 10, 2005) (JA____).

Cox first began providing programming for WALR-FM in 1994.¹⁹ Prior to that arrangement, WALR-FM had not offered any original programming, but rather simulcast programming from another radio station licensed to a community

¹⁹ Cox was programming the station pursuant to a Time Brokerage Agreement with the station's then-licensee, NewCity Communications of Massachusetts, Inc. *See NewCity Order* ¶ 38 (JA____).

over one hundred miles away on the other side of Atlanta.²⁰ Cox invested in WALR-FM and created a new source of programming to better serve listeners in its local community and the greater Atlanta area.

Three years later, in 1997, Cox acquired the station as part of a larger transaction.²¹ In approving the transaction, the FCC granted Cox a temporary waiver of the NBCO Rule because without a waiver, Cox's ownership of WALR-FM and the *AJC* would have been impermissible.²² The waiver, by its terms, was to expire six months from the date of a final order in the NBCO proceeding.²³ In its decision, the FCC stated:

In light of the multiplicity of media outlets serving the Atlanta market, we see no reason to believe that the combined ownership of [WALR-FM] and the *Atlanta Journal* and the *Atlanta Constitution* will be unduly harmful to diversity or competition in the Atlanta market during this temporary period.²⁴

²⁰ See *Amended Application for Consent to Assign WYAI(FM)*, FCC File No. BALH-930625GG, Response to Letter of November 23, 1993 at 6 (Dec. 22, 1993) (JA____).

²¹ See FCC File Nos. BTC(H), (FT)-19960725GS *et seq.* (July 25, 1996) (JA____). Cox acquired WALR-FM as part of its acquisition of NewCity Communications, Inc., which owned eighteen radio stations in various markets.

²² See *NewCity Order* ¶ 56 (JA____)

²³ *Id.* ¶ 57 (JA____).

²⁴ *Id.* (JA____). In 1997, Cox owned two different daily newspapers in the Atlanta market, the *Atlanta Journal* and the *Atlanta Constitution*. In 2001, the two newspapers were combined into the *AJC* due to heavy circulation losses.

Cox has held WALR-FM since that time, and nothing in the record suggests that Cox's continued ownership of WALR-FM is not in the public interest. Nevertheless, in the *2008 Order* the FCC did not honor the waiver Cox that had held, instead requiring Cox to file a request for permanent waiver within 90 days.²⁵

D. The 2008 Order Ignored Cox's Showing That Its Cross-Ownership in Dayton Has Promoted the Public Interest, and Instead Required It to File a Waiver Request Addressing Content-Laden Criteria.

Cox has owned media properties in the Dayton, Ohio market since 1898, and Cox's subsequent acquisitions of newspapers in nearby Hamilton and Middletown, Ohio technically implicated the NBCO Rule. As discussed below, despite Cox's demonstration in its license applications that its ownership of certain Dayton broadcast stations and these newspapers was in the public interest, the *2008 Order* rejected this evidence and required Cox to seek a waiver of the NBCO Rule impermissibly addressing content-laden criteria, such as the definition of "local

²⁵ Cox and other parties have filed a motion with the FCC asking that the waiver filing deadline be extended until 90 days after the issuance of a final order on the NBCO Rule. See Motion for Extension of Time, MB Docket No. 06-121 (Sept. 30, 2008) (JA___). The FCC has yet to rule on the Motion, but on its own motion has extended the filing deadline, with the current deadline set to expire on July 6, 2010. See *2006 Quadrennial Regulatory Review – Review of the Commission's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, MB Docket No. 06-121, DA 10-463 (rel. Mar. 31, 2010) (JA___).

news” and the exercise of “independent news judgment” by the co-owned properties. *See 2008 Order ¶¶ 68, 78 n.257 (JA____)*.

Recognizing Cox’s long history of providing strong, local news and community affairs programming to the Dayton area, the FCC, when it adopted the NCBO Rule in 1975, grandfathered the combination consisting of WHIO(AM), WHKO(FM) and WHIO-TV and the *Dayton Daily News* and another Cox newspaper in the Dayton DMA, the *Springfield News-Sun*. The FCC found that Cox’s common ownership of these media properties affirmatively serves the public interest.²⁶

Continuing its long-standing commitment to serving the media needs of southern Ohio communities, Cox in 2000 purchased two small, underperforming daily newspapers: the *Hamilton JournalNews* (circulation approximately 21,000) and the *Middletown Journal* (circulation approximately 18,000).²⁷ Notably, both Hamilton and Middletown are located in the Cincinnati DMA, not the Dayton DMA, meaning that the *Hamilton JournalNews* and the *Middletown Journal* are in different media markets from WHIO-TV, WHIO(AM) and WHKO(FM).²⁸ Nonetheless, the relevant contours of the three stations “encompass” either

²⁶ *See 1975 Order ¶¶ 97, 109 (JA____)*.

²⁷ *Amended Renewal Application of WHIO-TV*, FCC File No. BRCT-20050531AWI, at Exhibit A at 5-6, (May 31, 2005) (JA____).

²⁸ *See id.* (JA____).

Hamilton or Middletown or both.²⁹ Accordingly, Cox's acquisition of the *Hamilton JournalNews* and the *Middletown Journal* technically implicates the NCBO Rule, given Cox's ownership of WHIO-TV, WHIO(AM) and WHKO(FM).

Cox amended its pending license renewal applications for WHIO(AM) and WHKO(FM) on July 28, 2004 and for WHIO-TV on June 21, 2007.³⁰ In those applications, Cox showed that its co-ownership of the stations and the *Hamilton JournalNews* and the *Middletown Journal* is in the public interest, as diversity and competition would not be harmed. For example, both Hamilton and Middletown are well served by local media sources, with media representing 63 different owners in Hamilton and 62 different owners in Middletown.³¹ In the *2008 Order*, the FCC did not, however, review the merits of Cox's requests but rather, as it did

²⁹ Specifically, the 2 mV/m contour for WHIO(AM) encompasses Middletown and the 1 mV/m contour for WHKO(FM) and the Grade A contour for WHIO-TV encompass both Hamilton and Middletown. See *Renewal Application of WHIO(AM)*, FCC File No. BR-20040601BNU, Ex. 1 (JA___); *Renewal Application of WHKO(FM)*, FCC File No. BRH-20040601BNZ, Ex. 1 (JA___); *Renewal Application of WHIO-TV*, FCC File No. BRCT-20050531AWI, Ex. 1 (JA___).

³⁰ See *Amended Renewal Application of WHIO(AM)*, FCC File No. BR-20040601BNU (July 28, 2004) (JA___); *Amended Renewal Application of WHKO(FM)*, FCC File No. BRH-20040601BNZ (July 28, 2004) (JA___); *Amended Renewal Application of WHIO-TV*, FCC File No. BRCT-20050531AWI (June 21, 2007) (JA___).

³¹ See *Amended Renewal Application of WHIO-TV*, FCC File No. BRCT-20050531AWI (June 21, 2007), Ex. 1 at 5-6 (JA___).

with Cox's other stations discussed above, required Cox to file new requests for waiver with reference to the standards set forth in the *2008 Order* within 90 days. *2008 Order* ¶ 78 n.257 (JA____). Those standards impermissibly included content-laden criteria, including the definition of "local news" and the extent to which the co-owned properties would exercise "independent news judgment. *Id.* ¶ 68 (JA____).

E. The Record Below.

Cox, along with other television, radio and newspaper owners, submitted numerous comments in the consolidated proceedings leading to the *2003 Order* that advocated the repeal of the NBCO Rule. The record evidence, including studies and data based on the operation of newspaper/broadcast combinations either grandfathered under the *1975 Order* or permitted more recently by waiver,³² showed that cross-ownership increases the resources that both newspapers and

³² Between 1975 and 2008, the FCC issued only five permanent waivers of the NBCO Rule. *Ellis v. Tribune Television Co.*, 443 F.3d 71, 79 n.9 (2d Cir. 2006) (four permanent waivers); *Shareholders of Tribune*, 22 F.C.C.R. 21,666 (2007) (fifth permanent waiver). A number of other cross-ownerships, including Cox's Dayton cross-ownerships involving the *Hamilton JournalNews* and the *Middletown Journal* have been created pursuant to footnote 25 in the *1975 Order*, which allows a broadcast station to acquire a newspaper and hold the combination until the next broadcast license renewal. *1975 Order* ¶ 103 n.25 (JA____).

broadcast stations can devote to news and public affairs programming, improving the quality and quantity of news information provided in local markets.³³

Upon review of the voluminous evidence, the FCC concluded that the NBCO Rule was no longer in the public interest. *2003 Order* ¶ 330 (JA____). Although the FCC repealed the NBCO Rule,³⁴ it did not eliminate all restrictions on newspaper/broadcast cross-ownership. Instead, it imposed “Cross Media Limits” (“CMLs”) that were informed by the FCC’s “Diversity Index” that purported to quantify diversity. *Id.* ¶¶ 391-498 (JA____). While the CMLs continued either to prohibit or restrict newspaper/broadcast cross-ownership in certain markets throughout the country, they would have allowed Cox’s cross-ownerships in Atlanta and Dayton. *Id.* ¶¶ 462-81 (JA____).

Numerous parties filed petitions to review the *2003 Order*, and those petitions ultimately were consolidated in this Court. This Court found that “[s]ubstantial evidence supports the Commission’s decision that cross-ownership

³³ See, e.g., *Comments of CanWest Global Commc’ns Corp.*, MB Docket No. 01-235 (Dec. 3, 2001), at App. A pp. 26-27 (JA____) (no structural link between the number of owners and the degree of diversity); Project for Excellence in Journalism, *Does Ownership Matter in Local Television News: A Five-Year Study of Ownership and Quality*, MB Docket No. 02-277, at 10 (Feb. 26, 2003) (JA____); *Comments of Gannett Co.*, MB Docket No. 02-277 (Jan. 2, 2003), at Ex. C (Stanley M. Besen & Daniel P. O’Brien, *An Economic Analysis of the Efficiency Benefits from Newspaper/Broadcast Station Cross-Ownership* (1998)) (JA____).

³⁴ See *2003 Order* ¶ 330 (JA____) (concluding the NBCO Rule was no longer necessary).

translates into pro-competitive public interest benefits,” and upheld the finding in the *2003 Order* that repeal of the NBCO Rule was in the public interest. *Prometheus I*, 373 F.3d at 398-400, 451. But this Court concluded that the CMLs were not supported by a reasoned analysis and remanded the matter to the FCC “to justify or modify further its Cross-Media Limits.” *Id.* at 403.

In the *2008 Order*, the FCC consolidated the consideration of those issues with the FCC’s 2006 Quadrennial Review proceeding,³⁵ which required another rulemaking proceeding that developed another extensive factual record. Newspaper publishers and broadcasters again submitted extensive comments and studies demonstrating that cross-owned media properties provide more local news in greater depth and that diverse news and information outlets abound. *See 2008 Order* ¶ 40 (JA___) (describing extensive submissions and studies). On consideration of this record, the FCC released the *2008 Order* in February 2008.

F. The 2008 Order.

1. Adjudicatory Decisions.

The *2008 Order* is a hybrid order, containing both adjudicatory licensing decisions and rulemaking decisions. With respect to the adjudicatory licensing decisions, the *2008 Order*:

³⁵ *2006 Quadrennial Regulatory Review – Review of the Commission’s Broad Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, 21 F.C.C.R. 8834 (2006) (JA___).

- without discussion, rejected WSRV(FM)'s contention that it was not subject to the NBCO Rule because under the Longley-Rice methodology the station's signal does not cover the entire city of Atlanta;
- without discussion, modified WALR-FM's license by changing the terms of its waiver; and
- without discussion, directed Cox, as part of its waiver applications for WSRV(FM), WALR-FM, WHIO-TV, WHIO(AM) and WHKO(FM), to address content-laden criteria, such as the extent to which the cross-owned properties will exercise independent news judgment.³⁶

2. Rulemaking Decisions.

The FCC reinstated the NBCO Rule and introduced a series of presumptions that disfavor cross-ownership in almost all markets. First, the FCC created a very limited presumption that cross-ownership was in the public interest, but only in the largest 20 markets. *2008 Order* ¶ 53 (JA____). In addition, the FCC specified that the favorable presumption would apply only if the combination is between “(a) a newspaper and a television station if (1) the television station is not ranked among the top four stations in the DMA, and (2) at least eight independent ‘major media voices’ remain in the DMA; or (b) a newspaper and a radio station.” *Id.* ¶ 53 (footnotes omitted) (JA____).³⁷

³⁶ See *2008 Order* ¶ 78 n.257 (JA____).

³⁷ The FCC defined “major media voices” as consisting only of “full-power commercial and noncommercial television stations and major newspapers,” excluding radio stations, local cable news networks, weekly newspapers, Internet sources, and all other media. *2008 Order* ¶¶ 57-58 (JA____).

The *2008 Order* imposed much more stringent restrictions on newspaper/broadcast cross-ownership in markets smaller than the largest 20: “In all DMAs ranked 21 and below, we adopt a presumption that it is inconsistent with the public interest for an entity to own newspaper and broadcast combinations.” *2008 Order* ¶ 63 (JA____).³⁸ The resulting ownership restrictions are much more restrictive than the repeal of the NBCO Rule that the *2003 Order* established and that this Court affirmed.³⁹ The *2008 Order* prohibits newspaper/broadcast cross-ownership in the “vast majority of cases,” *Id.* ¶ 52 (JA____), whereas the *2003 Order* would have permitted “transactions in the top 170 markets.” *Id.*, Statement of K. Martin at 2110 (JA____). Accordingly, while Cox’s cross-ownerships in Atlanta and Dayton would have been permissible under the *2003 Order*, they are presumptively impermissible under the *2008 Order* that is before this Court.

³⁸ The FCC’s negative presumption could be reversed but only in “two special circumstances....” *Id.* ¶ 65 (JA____). First, the negative presumption would be reversed if “a newspaper or broadcast outlet [in the proposed combination] is failed or failing.” *Id.* “Second, [the FCC] also will reverse the negative presumption when a proposed combination results in a new source of a significant amount of local news in a market.” *Id.* ¶ 67 (JA____).

³⁹ *See id.*, Statement of K. Martin at 2110 (JA____) (“Indeed, this rule change is notably more conservative in approach than the remanded newspaper/broadcast cross-ownership rule that the Commission adopted in 2003.”).

STANDARD OF REVIEW

Cox adopts the Standard of Review contained in the Brief of Petitioners Tribune Company and Fox Television Stations, Inc.

SUMMARY OF ARGUMENT

In addition to the rule-making decisions issued in the *2008 Order*, the FCC took the unusual step of also including adjudicative determinations affecting certain of Cox's broadcast licenses. By requiring Cox to seek waivers with respect to certain of its existing newspaper/broadcast holdings in Atlanta and Dayton, *see 2008 Order* ¶ 78 n.257 (JA___), the FCC either rejected the relief Cox sought or modified the terms under which Cox had held those properties. Despite the impact of its decision, the FCC failed to offer any explanation for its decisions. The FCC's licensing-related decisions were arbitrary and capricious for at least three reasons.

First, the FCC acted arbitrarily and capriciously in the *2008 Order* by rejecting Cox's showing that its ownership of WSRV(FM) complied with the NBCO Rule. Cox had submitted a Longley-Rice study which demonstrated that the signal contour of WSRV(FM) did not encompass the entire city of Atlanta, and therefore did not implicate the NBCO Rule. By requiring Cox to seek a waiver for WSRV(FM) in the *2008 Order*, the FCC arbitrarily and capriciously rejected Cox's Longley-Rice study.

Second, the FCC in the *2008 Order* modified the conditions applicable to Cox's license for WALR-FM without presenting any analysis or explanation. Despite the fact that Cox has been licensed to hold WALR-FM since 1997 pursuant to a temporary waiver of the NBCO Rule, the *2008 Order* required Cox to seek a different waiver for WALR-FM within 90 days, thereby modifying the conditions previously applicable to the WALR-FM license. The record contains no basis for this action.

Third, the FCC in the *2008 Order* directed Cox, in all its waiver applications, to address content-laden factors that inject the FCC into the newsgathering and editorial functions of Cox's cross-owned newspapers and broadcast stations. The FCC has given itself the power to determine what constitutes "local news" and whether Cox's cross-owned newspapers and broadcast stations are exercising sufficient "independent news judgment." This intrusion into the core newsgathering and editorial functions is arbitrary and capricious and must be invalidated.

The NBCO Rule also violates Cox's First Amendment rights. Because the NBCO Rule applies uniquely to newspapers, imposing restrictions on their broadcast speech while restricting the speech of *no* other media, the NBCO Rule is subject to strict scrutiny. *See Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987). The FCC therefore must demonstrate that the restrictions imposed

are the least restrictive means of achieving a compelling state interest. *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 754-56 (1996). The NBCO Rule cannot satisfy either element. The FCC's goal in adopting the NBCO Rule was to further diversity, but the goal of promoting programming diversity is never a compelling one. *See Lutheran Church-Mo. Synod v. FCC*, 141 F.3d 344, 355 (D.C. Cir. 1998). In addition, despite the 2008 Order's conclusion that cross-ownership can be in the public interest, the NBCO Rule applies broadly to restrict cross-ownership in all geographic markets, regardless of size.

The FCC's application of its waiver standards in the 2008 Order also warrant application of strict scrutiny. As noted above, those standards empower the FCC to determine whether the amount of "local news" produced by a media outlet is sufficient and whether the cross-owned properties would exercise "independent news judgment" when assessing waiver applications. *See 2008 Order* ¶ 68. These standards are content based and subject to strict scrutiny. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The waiver standards do not pass strict scrutiny for much the same reason the NBCO Rule fails the test – the FCC has not identified a compelling interest and has not shown that the waiver standards are the least restrictive means necessary to serve that interest.

The NBCO Rule's restrictions imposed on Cox also violate Cox's Fifth Amendment equal protection rights. The NBCO Rule treats newspapers

differently from other broadcast mediums, and fails to satisfy the heightened scrutiny required for government restrictions that single out the press. The NBCO Rule is both under-inclusive, because it applies only to newspapers and not other non-broadcast media, and is also over-inclusive, because it prohibits cross-ownership even when it would increase the diversity of views presented.

Given these serious deficiencies, the NBCO Rule must be vacated. The overwhelming evidence shows that the *2008 Order*'s NBCO Rule is a hopeless cause and should be struck down in its entirety.

ARGUMENT

I. The Licensing Decisions in the 2008 Order Relating to Cox Were Arbitrary and Capricious.

This Court will “‘hold unlawful or set aside agency action, findings, and conclusions’ that are found to be ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . . [or] unsupported by substantial evidence.’” *Prometheus I*, 373 F.3d at 389 (quoting 5 U.S.C. § 706(2)(a), (e); *N.J. Coal. for Fair Broad. v. FCC*, 574 F.2d 1119, 1125 (3d Cir. 1978)). While the scope of review is “‘narrow, and a court is not to substitute its judgment for that of the agency,’” *id.* (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)), a court nevertheless must ensure that “the agency examined the relevant data.” *Prometheus I*, 373 F.3d at 389. For agency action to survive scrutiny under the arbitrary and capricious test, “the agency must examine

the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *State Farm*, 463 U.S. at 43 (citation omitted). Therefore, “we reverse an agency’s decision when it ‘is not supported by substantial evidence, or the agency has made a clear error in judgment.’” *Prometheus I*, 373 F.3d at 390 (citation omitted). As demonstrated below, the application of these principles establishes that the FCC’s adjudicatory decisions cannot stand.

A. The FCC Acted Arbitrarily and Capriciously in Determining That Cox’s Ownership of WSRV(FM) Does Not Comply with the NBCO Rule.

Under the above principles, the FCC acted arbitrarily and capriciously in rejecting Cox’s showing that its ownership of WSRV(FM) complied with the NBCO Rule for two reasons. First, in the *2008 Order*, the FCC failed even to address the relevant data and substantial evidence regarding Cox’s showing that its ownership of WSRV(FM) complied with the NBCO Rule.

The FCC permits applicants to use Longley-Rice as a tool to demonstrate compliance with the NBCO Rule. The NBCO Rule requires an FM licensee to compute its contour “in accordance with § 73.313.”⁴⁰ When the terrain is unusually rough, as in the case of the terrain covered by WSRV(FM)’s signal,⁴¹

⁴⁰ 47 C.F.R. § 73.3555(d)(1)(ii).

⁴¹ Cox’s Longley-Rice study demonstrated that “the majority of terrain between the [WSRV(FM)] transmitter site and Atlanta, Georgia, is mountainous with

§ 73.313(e) specifically authorizes the use of a supplemental showing, such as Longley-Rice.⁴²

Longley-Rice is a commonly used propagation model employed in the broadcast industry to show station coverage areas that accounts for changes in actual terrain. First developed for television, Longley-Rice is now used for radio as well.⁴³ The FCC routinely accepts Longley-Rice studies of service contours for radio and television stations because the method is more accurate since it takes into account changes in terrain along the entire path from the transmitter to the edge of the contour.

In October of 2000, shortly after it acquired the license for WSRV(FM), and again in its May 2005 license renewal application (which is still pending), Cox

terrain variations exceeding 140 meters on some azimuths, whereas the FCC contour prediction methodology assumes a 50-meter terrain variation. Thus, the [standard] FCC contour prediction methodology does not yield accurate predictions . . . and a supplemental showing . . . using other means is warranted.” *See Amended Application of WFOX(FM)*, FCC File No. BRH-20031205ACS, Ex. 1A at 26 (June 2, 2005) (JA___). These statements are unrefuted in the record.

⁴² FCC Rule § 73.313 sets forth two methods for computing an FM radio station’s service contour. Where the terrain is regular, the § 73.313(d) standard prediction methodology applies. Section 73.313(d) takes into account the terrain between three and sixteen kilometers from the antenna site and assumes the remaining terrain is consistent with this terrain. In other cases – when the terrain “departs widely” from the average elevation between three and sixteen kilometers – § 73.313(e) permits applicants to predict contour distances using a supplemental showing, such as the Longley-Rice propagation model.

certified to the FCC that its ownership of WSRV(FM) complied with the NBCO Rule.⁴⁴ To make the certifications, Cox submitted a Longley-Rice study that demonstrated that the relevant broadcast signal of WSRV(FM) did not encompass the entire city of Atlanta and therefore the station was not subject to the NBCO Rule.⁴⁵

Nonetheless, the *2008 Order* failed to address, let alone explain, why Longley-Rice would not be suitable in this instance to calculate the actual signal contour for WSRV(FM). Instead, the *2008 Order* compelled Cox to seek a waiver with respect to its newspaper/broadcast ownership in the Atlanta market, thereby improperly rejecting Cox's showings that it was in compliance with the NBCO Rule. *2008 Order* ¶ 78 n.257 (JA____). This adjudicatory decision was arbitrary and capricious because it failed to "articulate a satisfactory explanation for its action," or indeed any justification for its action. *State Farm*, 463 U.S. at 43

⁴³ See, e.g., *CMP Houston-KC, LLC*, 23 F.C.C.R. 10,656 (2008) (using Longley-Rice to demonstrate that the principal community contour for a radio station serves the station's community of license).

⁴⁴ In May 2005, Cox amended its pending license renewal application and, at the urging of FCC staff, requested in the alternative a waiver of the NBCO Rule "until twelve months following resolution of the Commission's media ownership proceeding adopting new multiple ownership limits." *Amended Application of WFOX(FM)*, FCC File No. BRH-20031205ACS, Ex. 1 at 6 (June 2, 2005) (JA____).

⁴⁵ Letter of E. McGearly to FCC, FCC File No. *BALH-19991116AAT*, (Oct. 6, 2000) (JA____); *Amended Application of WFOX(FM)*, FCC File No. BRH-20031205ACS, Ex. 1 at 6 (June 2, 2005) (JA____).

(heart of Administrative Procedure Act’s “reasoned decisionmaking” requirement is need for agency to “examine the relevant data and articulate a satisfactory explanation for its action”).

The second reason that the *2008 Order*’s rejection of the Longley-Rice methodology is arbitrary and capricious is because the FCC made no attempt to reconcile its prior decisions permitting the use of Longley-Rice to show compliance with the NBCO Rule with the *2008 Order*’s rejection of Cox’s Longley-Rice study. “[A]n agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently.” *County of L.A. v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999) (citation omitted); see *Atchison, Topeka Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (same).

The FCC on numerous occasions has permitted the use of Longley-Rice methodology to demonstrate compliance with the NBCO Rule for television broadcasters. For example, in 2002, the FCC allowed an applicant to use a Longley-Rice analysis to demonstrate that its television station’s Grade A signal did not entirely encompass the community in which the newspaper was published so that it was in compliance with the NBCO Rule.⁴⁶ In accepting the Longley-Rice

⁴⁶ *Application of Pappas Telecasting of the Carolinas and Media Gen. Broad. of S.C. Holdings, Inc.*, 17 F.C.C.R. 842 (2002).

showing, the FCC “agree[d] that no such waiver is required in this case.”⁴⁷ Numerous other cases are to the same effect.⁴⁸ Despite this fact, the FCC impermissibly rejected without explanation Cox’s Longley-Rice study.

B. The 2008 Order Impermissibly Modified Cox’s License for WALR-FM.

The *2008 Order* modifying Cox’s previously granted FCC license for WALR-FM was arbitrary and capricious because it modified Cox’s license without presenting any reasoned analysis for this action. As this Court has stated, “an agency that departs from its ‘former views’ is ‘obligated to supply a reasoned

⁴⁷ *Id.* ¶ 10.

⁴⁸ *See, e.g., Northeast Kan. Broad. Serv., Inc.*, 20 F.C.C.R. 13675 (2005) (“we have allowed the use of the Longley-Rice methodology to demonstrate that terrain anomalies prevent actual Grade A coverage from encompassing a particular community and preclude application of the newspaper/television cross-ownership rules.”); *See* Letter of E. McGeary to FCC, FCC File No. BALH-19991116AAT, at Exhibit D (Oct. 6, 2000) (JA___) (containing letter regarding FCC’s acceptance of Longley-Rice methodology to demonstrate that television station’s Grade A contour did not encompass communities in which commonly-owned daily newspapers were published and therefore NBCO Rule was not implicated) (JA___); *Clear Channel Broad. Licenses, Inc., et al.*, 22 F.C.C.R. 21196, ¶ 6 (2007). *See also Applications of KRCA License Corp. & KSLs, Inc.*, 15 F.C.C.R. 1794, ¶ 1 n.1 (1999); *Applications of Heritage Media Servs., Inc. & William G. Evans, Tr.*, 13 F.C.C.R. 5644 ¶ 9 (1998) (affirming Video Services Division decision that waiver of local television ownership rule was unnecessary because Longley-Rice methodology showed there would be *de minimis* overlap of stations’ Grade B contours); and *Application of WMHT Educ. Telecomms. & WMHQ L.L.C.*, 14 F.C.C.R. 15250, ¶ 2 n.2 (1999) (accepting Longley-Rice study demonstrating lack of Grade B contour overlap).

analysis for the change.” *Prometheus I*, 373 F.3d at 390 (quoting *State Farm*, 463 U.S. at 41-42).

Cox has been licensed to hold WALR-FM since 1997 pursuant to a temporary waiver of the NBCO Rule, *see NewCity Order* ¶ 57 (JA___), that was to remain in effect “subject to . . . the outcome in the pending radio-newspaper cross-ownership waiver proceeding” *Id.* ¶ 72 (JA___). In 2005, the FCC granted WALR-FM’s license renewal application, and the temporary waiver granted by the FCC in 1997 remained effective. *License Renewal Authorization for WALR-FM*, FCC File No. BRH-20031205ADF (Jan. 10, 2005) (JA___).

Under the *2008 Order*, Cox must now seek a different waiver before the final outcome of the NBCO proceeding. Because the effectiveness of a waiver affects whether or not a license holder can continue to own a broadcast station, this action modifies the conditions applicable to the WALR-FM license. *See Tribune Co. v. FCC*, 133 F.3d 61, 66 (D.C. Cir. 1998).⁴⁹

This modification had no basis in the record, and the FCC provided no justification for this action in the *2008 Order*. No party had objected to Cox’s

⁴⁹ As explained in more detail in the Cox Appellants’ Opposition to Motion to Dismiss of Intervenors United Church of Christ and Media Alliance (Mar. 26, 2009), an FCC “waiver decision” is appealable under § 402(b) because the grant or denial of a waiver is a “*logically necessary prerequisite*” to the grant or denial of a broadcast license. *N. Am. Catholic Educ. Programming Found., Inc. v. FCC*, 437 F.3d 1206, 1209 (D.C. Cir. 2006) (emphasis in original).

cross-ownership of WALR-FM and the *AJC* and certainly no harm from the cross-ownership had been shown that could support a modification of Cox's license.

C. The 2008 Order Arbitrarily and Capriciously Directed Cox, in Its Waiver Applications, To Address Content-Laden Criteria.

In the *2008 Order*, the FCC directed Cox, in its waiver applications, to “address the factors considered in this order,” particularly “news and information programming.” *2008 Order* ¶ 78 (JA____). Those factors include “the extent to which cross-ownership will serve to increase the amount of *local news* disseminated through the affected media outlets in the combination” and “whether each affected media outlet in the combination will exercise its *own independent news judgment . . .*” *Id.* ¶ 68 (JA____) (emphasis added).

These criteria impermissibly interject the FCC into the newsgathering operations of both newspapers and broadcast stations to an unprecedented degree in an apparent attempt to influence the content of broadcast speech. Regulations restricting speech on the basis of its subject matter “slip from the neutrality of time, place, and circumstance into a concern about content.” *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 99 (1972) (internal quotations and citation omitted). Here, the FCC has imbued itself with the power to determine what constitutes “local news,” and whether Cox's newspapers and the broadcast stations are providing a sufficient amount to satisfy the government. Even more frightening, a government

agency, the FCC, will determine whether those newspapers and the broadcasters are exercising sufficient “independent news judgment.” The chill on First Amendment rights is apparent.

The potential for abuse in the application of these provisions is enormous. For example, these criteria empower the FCC to scrutinize and determine whether Cox newspapers and broadcast stations are providing enough coverage of local politics or even a particular campaign. The FCC even has empowered itself to determine whether reporting on specific stories is sufficiently independent. Taken to its logical conclusion, the FCC could scrutinize whether a news outlet’s decision to endorse a particular candidate or bill demonstrates sufficient “independence” from another media outlet. And the FCC has provided itself a big club if it does not like a newspaper’s or a broadcaster’s choice: it can reject a waiver application. This intrusion into the newsgathering and editorial functions of Cox newspapers and broadcast stations requires that the *2008 Order* be vacated.⁵⁰

D. Additional Administrative Law Challenges.

Cox hereby adopts and incorporates by reference the additional administrative law challenges presented by Petitioner/Appellant Media General, Inc. for purposes of its § 402(a) petition for review and its § 402(b) appeal.

⁵⁰ These restrictions also are unconstitutional. See Section II.C.1, *infra*.

II. The 2008 Order's Adjudicatory Decisions Regarding Cox's Licenses Violate Its First Amendment Rights.

A. NCCB Does Not Bar this Court's Consideration of the Constitutionality of the NBCO Rule As Applied in the Adjudicatory Decisions in the 2008 Order.

In *NCCB*, the Supreme Court, relying upon the so-called scarcity doctrine, applied rational-basis review to First Amendment challenges to the 1975 newspaper/broadcast cross-ownership ban. 436 U.S. 775 (1978). The “scarcity” doctrine, first articulated in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), is premised on the notion that the broadcast spectrum is physically scarce. *Id.* at 388, 391 (1969). However, even the *Red Lion* Court acknowledged that technological advances could render the scarcity theory obsolete, and therefore rested its holding on “the present state of commercially acceptable technology.” *Id.* at 388.

NCCB does not bar this Court's consideration of the constitutionality of the NBCO Rule as applied to Cox in the adjudicatory decisions in the *2008 Order* for two reasons. First, it is well-established that a Supreme Court decision upholding a statute against a facial challenge does not constitute precedent barring later “as-applied” challenges. *See Cutter v. Wilkinson*, 544 U.S. 709, 725-26 (2005). The constitutional challenge in *NCCB* necessarily was “facial” because it addressed the “prospective ban,” 436 U.S. at 776, and does not foreclose judicial consideration of Cox's as-applied challenge to the NBCO Rule reinstated in the *2008 Order*. *See*

47 U.S.C. § 402(b) (conveying exclusive jurisdiction to the D.C. Circuit to review decisions arising from the FCC’s authority to issue or deny broadcast licenses).

Second, the Supreme Court has long recognized the common sense proposition that when the constitutional validity of a statute is based upon the continued existence of particular facts, a change in those facts provides a basis to challenge the statute:

[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing . . . that those facts have ceased to exist

United States v. Carolene Prods. Co., 304 U.S. 144, 153 (1938).⁵¹ As described below, the present state of the media markets to which the FCC’s adjudicatory decisions relate (Atlanta and Dayton) establish there is no longer, if there ever were, any “scarcity” of broadcasters or alternative sources of diverse information. Thus, the scarcity doctrine cannot be constitutionally applied in those markets.

B. The Scarcity Doctrine Cannot Be Constitutionally Applied in the Atlanta and Dayton Markets Because There Is No Media Scarcity in Those Markets.

The *2008 Order*’s licensing-related decisions imposed restrictions on Cox’s speech activity. In the *2008 Order*, the FCC required Cox to seek a waiver of the

⁵¹ See also *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-58 (1924) (Holmes, J.) (“A law depending upon the existence of . . . [a] certain state of facts to uphold it may cease to operate if . . . the facts change even though valid when passed.”); *Abie State Bank v. Weaver*, 282 U.S. 765, 772 (1931) (“a police regulation,

NBCO Rule for its cross-owned properties in the Atlanta market and the Dayton market, thereby necessarily concluding that the NBCO Rule applied to those properties. *See 2008 Order* ¶ 78 n.257 (JA____).

The application of any restrictions on Cox's speech in the Atlanta and Dayton markets based on the scarcity doctrine is invalid because the record evidence showed that a plethora of media voices serves those markets.

Atlanta Market: In submissions to the FCC, Cox showed that the Atlanta market has an array of media voices, including:

- “at least twenty-nine [full-power] commercial and non-commercial television stations;”
- “twelve low power television stations”;
- “ninety-two radio stations”;
- “[n]umerous cable operators . . . with a large variety of cable channels”; and
- “seven daily newspapers owned by entities other than Cox and . . . thirty-nine weekly newspapers.”⁵²

Dayton Market: Similarly, in its filings with the FCC with respect to the Dayton market, Cox showed that components of the Dayton market, *i.e.*, Hamilton and Middleton, had the following media voices:

although valid when made, may become, by reason of later events, arbitrary and confiscatory in operation”).

⁵² *See Amended Application of WFOX(FM)*, FCC File No. BRH-20031205ACS (June 2, 2005), Ex. 1 at 10-11 (JA____).

Hamilton:

- “media representing approximately 63 different owners”;
- “at least 15 [full-power] commercial and non-commercial television stations”;
- “several low power television stations”;
- “more than 28 radio stations”;
- “robust” cable systems with “numerous cable channels”; and
- “numerous daily and weekly newspapers.”⁵³

Middletown:

- “[a]pproximately 62 different media owners”;
- “at least 14 [full-power] commercial and non-commercial television stations as well as numerous low power television stations”;
- “[m]ore than 29 radio stations”;
- a cable system with “numerous channels”; and
- “abundant” print media.⁵⁴

As a result, the FCC’s action burdening Cox’s speech in the Atlanta and Dayton markets cannot be reviewed under a rational basis standard because the predicate for such deferential review – “scarcity” of media voices – simply does not exist. The waiver requests Cox filed with the FCC for its properties in the Atlanta and Dayton markets showed that independent media outlets in those markets were far from scarce.

⁵³ *Renewal Application of WHIO-TV*, FCC File No. BRCT-20050531AWI (June 21, 2007), Ex. 1 at 5-6 (JA____).

⁵⁴ *Id.*, Ex. 1 at 6 (JA____).

C. The NBCO Rule Violates Cox's First Amendment Rights.

1. Under the Strict Scrutiny Standard, the NBCO Rule and the Content-Laden Waiver Factors Fail.

The NBCO Rule favors the speech of non-newspaper media owners, who are not subject to its restrictions, while suppressing the speech of newspaper owners. “[R]estricting the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” *Citizens United v. FEC*, 130 S. Ct. 876, 921 (2010) (Alito, J., concurring) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)). Thus, the FCC has a “heavy burden in attempting to defend its . . . differential” treatment. *Ark. Writers’ Project*, 481 U.S. at 231.

For the NBCO Rule to survive strict scrutiny, the FCC must demonstrate that the restrictions imposed are: (1) “the least restrictive means” of (2) “realizing a compelling [state] interest.” *Denver Area Educ.*, 518 U.S. at 754 (quoting *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)) (internal punctuation omitted). When this “form of heightened scrutiny is applied, the law may properly be regarded as presumptively invalid, and likely to be struck down.” 1 Rodney A. Smolla & Melville B. Nimmer, *Freedom of Speech* § 4:3 (1999).

The NBCO Rule fails both requirements of strict scrutiny. First, “[i]t is impossible to conclude that the government’s interest [in diversity of

programming], no matter how articulated, is a compelling one.” *Lutheran Church-Mo. Synod*, 141 F.3d at 355. Moreover, the NBCO Rule’s nationwide ban that presumes combinations in the “vast majority” of markets are not in the public interest is not the “least restrictive means” available to achieve the FCC’s purported compelling diversity interest. *See Denver Area Educ.*, 518 U.S. at 755 (quoting *Sable Commc’ns*, 492 U.S. at 126). To survive such scrutiny, the NBCO Rule would have to consider, without the “heavy burden” of a negative presumption, the particularized features of each market to determine whether cross-ownership restrictions would serve the public interest – an approach far less restrictive than that taken in the NBCO Rule.

The content-laden waiver factors fare no better under strict scrutiny than the NBCO Rule itself. “[C]ontent-based regulations are ‘presumptively invalid,’ and the Government bears the burden to rebut that presumption.” *United States v. Stevens*, 558 U.S. ___, 130 S. Ct. 1577, 1584 (2010) (quoting *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 817 (2000)). This Court applies strict scrutiny to content-based restrictions. *See Am. Civil Liberties Union v. Mukasey*, 534 F.3d 181, 190, 206-07 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009). (striking down content-based restrictions).

As noted above, in the *2008 Order*, the FCC directed Cox, in its waiver applications, to “address the factors considered in this order,” particularly the

amount of “local news” and the extent to which cross-owned properties would exercise “independent news judgment.” *2008 Order* ¶ 78. Because the application of the waiver criteria necessarily would require “reference to the content of the regulated speech,” the regulations are content-based. *Ward*, 491 U.S. at 791 (citation omitted); *see also Police Dep’t of Chi.*, 408 U.S. at 99 (stating that regulations restricting speech on the basis of its subject matter “slip(s) from the neutrality of time, place, and circumstance into a concern about content.”) (internal quotations and citation omitted)..

These waiver provisions, for much the same reason as the NBCO Rule itself, cannot withstand strict scrutiny. By relying on the promotion of its diversity goal to support these content-laden factors, *see 2008 Order* ¶ 68, the FCC has made no attempt to demonstrate a compelling government interest. *See Lutheran Church-Mo. Synod*, 141 F.3d at 355 (“government’s interest” in diversity of programming is not “a compelling one.”).

Nor are those content-laden factors permitting the FCC unbridled discretion in making these determinations “the least restrictive means to achieve that interest.” *United States v. Stevens*, 533 F.3d 218, 232 (3d Cir. 2008), *aff’d* 558 U.S. ___, 130 S. Ct. 1577 (2010); *see also Sable Commc’ns*, 492 U.S. at 126 (government regulation of the “content of constitutionally protected speech in order to promote a compelling interest” is valid only if the government “chooses

the least restrictive means to further the articulated interest.”). First, the NBCO Rule and the waiver criteria the FCC adopted are not the least restrictive means available, as the NBCO Rule restricts *all* potential cross-ownership. *See 2008 Order* ¶¶ 53, 63 (JA_____). Moreover, the positive presumption is limited to the 20 very largest markets, even though the FCC previously rejected market size restrictions as “unnecessary for purposes of competition and diversity as long as there are a minimum number of independent sources of news and information available to listeners” *Review of the Commission’s Regulations Governing Television Broad.*, 14 F.C.C.R. 12,903, ¶ 107 (1999) (footnotes omitted). Second, the presumptions also are more restrictive than necessary because the FCC has “boundless discretion” to determine whether the content-laden criteria have been satisfied. *City of Lakewood v. Plain Dealer Publ’g. Co.*, 486 U.S. 750, 764 (1988) (concluding that speech may not be conditioned “on obtaining a license or permit from a government official in that official’s boundless discretion”). The waiver standards are not limited at all, as the FCC has complete discretion to determine what is “local news” and when newsgathering activity is sufficiently “independent.”

At bottom, these content-laden restrictions cannot withstand scrutiny because, contrary to the FCC’s purported diversity goal, any attempt to enforce content-based regulations necessarily interferes with the “balanced presentation of

views” envisioned by the First Amendment. *FCC v. League of Women Voters of Ca.*, 468 U.S. 364, 378 (1984). The Supreme Court has long recognized the importance of unrestricted broadcast speech:

Unlike common carriers, broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public duties. Indeed, if the public’s interest in receiving a balanced presentation of views is to be fully served, we must *necessarily rely* in large part *upon the editorial initiative and judgment of the broadcasters* who bear the public trust.

Id. (overturning statute imposing editorial restrictions on broadcasters as violating First Amendment) (internal citations and punctuation omitted, emphasis added). Here, this principle requires that the FCC be prohibited from applying its content-laden criteria when enforcing its NBCO Rule.

2. The NBCO Rule Cannot Withstand Intermediate Scrutiny.

The NBCO Rule similarly fails constitutional muster even if this Court applies the less rigorous intermediate scrutiny standard.⁵⁵ Under intermediate scrutiny, the FCC must show that the NBCO Rule satisfies three separate requirements. The NBCO Rule fails to satisfy any of them.

First, the FCC “must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and

⁵⁵ The FCC has implicitly suggested that this standard should apply here. *See 2003 Order* ¶ 441 (JA____) (line should be drawn “as narrowly as possible in

material way.” *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 312 (2000) (Souter, J., concurring) (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) (“*Turner I*”). Here, the FCC purported to address perceived harms to diversity from newspaper/broadcast cross-ownership. See 2008 Order ¶ 47 (JA____). Instead of even attempting to satisfy this requirement, the FCC admitted that it didn’t know whether the NBCO Rule was necessary to advance its diversity goal. *Id.* ¶ 63 (JA____) (“We are not certain that the degree of media consolidation that the largest, more competitive markets can withstand is yet mirrored in smaller markets”). The FCC’s equivocation was plainly inadequate to “carry a First Amendment burden.” *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 379 (2000) (“This Court has never accepted mere conjecture as adequate to carry a First Amendment burden.”).

Second, the FCC must “show a record that validates the regulation[.]” itself. *Time Warner Entm’t Co., v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001). The record below indisputably shows that not only does the NBCO Rule fail to directly advance the FCC’s diversity goal, but it “actually works to inhibit [local news and information] programming,” and prevents the increased programming efficiencies

order to serve our public interest goals while imposing the least possible burden on the freedom of expression”).

and quality from newspaper/broadcast cross-ownership. *2003 Order* ¶ 342 (JA____). The FCC reaffirmed these findings in the *2008 Order*.⁵⁶

Third, the NBCO Rule's restrictions must be "narrowly tailored to further a substantial governmental interest." *League of Women Voters*, 468 U.S. at 380.⁵⁷ Thus, the NBCO Rule passes constitutional muster only if its restrictions "do[] not burden substantially more speech than is necessary to further" the FCC's diversity goals. *Turner I*, 512 U.S. at 624; *see also Ward*, 491 U.S. at 799 (regulation "burden[ing] substantially more speech than is necessary to further the government's legitimate interests" is not narrowly tailored); *United States v. Albertini*, 472 U.S. 675, 689 (1985).

Here, the NBCO restriction is far from "narrowly tailored." Indeed, the NBCO Rule imposes ownership restrictions in all markets, even the top 20 markets, *see 2008 Order* ¶ 53 (JA____). The courts have invalidated similar cross-

⁵⁶ *2008 Order* ¶ 39 (JA____) (noting *2003 Order* concluded 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 continuing "to find evidence that cross-ownership in the largest markets can preserve the viability of newspapers without threatening diversity by allowing them to spread their operational costs across multiple platforms"); *id.* ¶ 74 (JA____) ("Allowing a struggling newspaper or broadcast station to combine with a stronger outlet can, under certain circumstances, improve its ability to provide local news and information, thus benefiting the public interest.").

⁵⁷ *See also Time Warner*, 240 F.3d at 1143 (striking down limits on national cable ownership and carriage of vertically integrated programming); *Chesapeake & Potomac Tel. Co. of Va. v. United States*, 42 F.3d 181, 202 (4th Cir. 1994) (striking down cable/telco cross-ownership ban), *vacated as moot*, 516 U.S. 415 (1996).

ownership restrictions that applied broadly.⁵⁸ Thus, the NBCO Rule's restrictions cannot survive intermediate scrutiny in this case.

III. The 2008 Order's Adjudicatory Decisions Regarding Cox's Licenses Violate Its Fifth Amendment Rights.

By applying the NBCO Rule restrictions to Cox, the 2008 Order violates Cox's right to equal protection under the Fifth Amendment. The NBCO Rule is inapplicable to other protected speakers because it prohibits only newspaper owners, such as Cox, from engaging in broadcast speech. For instance, cable companies can own broadcast stations and vice versa, and newspapers can own cable systems and vice versa. An example of such cross-ownership is Cablevision Systems Corporation's acquisition in July 2008 of approximately 97 percent of the publisher of Long Island's *Newsday*.⁵⁹ It is well-established that government restrictions "singling out the press as a whole or targeting individual members of the press pose[] a particular danger of abuse by the State." *Ark. Writers' Project*,

⁵⁸ *US West, Inc. v. United States*, 48 F.3d 1092, 1104-06 (9th Cir. 1995) (applying intermediate scrutiny to invalidate cable/telco cross-ownership rules that constituted a "complete ban" and therefore were not narrowly tailored), *vacated as moot*, 516 U.S. 1155 (1996)); *Chesapeake & Potomac Tel. Co.*, 42 F.3d at 202.

⁵⁹ Press Release, Cablevision Systems Corp., Cablevision Completes Acquisition of 97% Stake in Newsday Media Group Through Partnership with Tribune Company (July 29, 2008), *available at* <http://www.cablevision.com/investor/index.jsp> (last visited May 17, 2010).

481 U.S. 228. Such restrictions require heightened scrutiny under the Fifth Amendment.⁶⁰

Such differential regulation is “presumptively unconstitutional” and “places a heavy burden on the [government] to justify its action.” *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585, 592-93 (1983). To pass Fifth Amendment scrutiny, discrimination among classes of speakers “must be tailored to serve a substantial governmental interest.” *Police Dep’t of Chi.*, 408 U.S. at 99.⁶¹ Even content neutral regulations that single out a medium must be “narrowly tailored to” and “no greater than is essential to the furtherance” of a “substantial” government interest. *Turner I*, 512 U.S. at 653, 662.

⁶⁰ See *Turner I*, 512 U.S. at 640-41; *Pitt News v. Pappert*, 379 F.3d 96, 110-11 (3d Cir. 2004) (because “[a] law is presumptively invalid if it ‘single[s] out the press’ or ‘a small group of speakers,’” the “presumption of unconstitutionality . . . can be overcome only by showing that the challenged law is needed to serve a compelling interest”); see also *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (prohibiting restrictions distinguishing among different speakers “based on the identity of the interests” represented, allowing speech by some but not others); cf. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (Due Process Clause of Fifth Amendment includes component analogous to Equal Protection Clause of Fourteenth Amendment).

⁶¹ See also *Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (“When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized.”). This principle applies directly to government restrictions drawn between classes of media outlets. See *Turner I*, 512 U.S. at 640-41 (“laws that single out the press, or certain elements thereof, for special treatment . . . are always subject to at least some degree of heightened First Amendment scrutiny”).

The 2008 Order's NBCO Rule does not satisfy this test. While the NBCO Rule purports to limit newspapers' speech to increase diversity of viewpoints, "government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others." *Buckley*, 424 U.S. at 48-49; *see also Citizens United*, 130 S. Ct. at 904 (same).

The NBCO Rule also is not narrowly tailored to further the FCC's purported interest in diversity of viewpoints. *See, e.g., Turner I*, 512 U.S. at 662 (the restriction on First Amendment freedoms must be "no greater than is essential to the furtherance of [a substantial government] interest.") (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). Here, the NBCO Rule is both under-inclusive because it applies only to newspapers (not other media),⁶² and over-inclusive because it also prohibits newspaper owners from owning a broadcast station even when that result would increase the diversity of views presented to viewers.

Even if the NBCO Rule's treatment of newspapers differently from other media were constitutional,⁶³ the FCC's licensing-related decisions nevertheless

⁶² *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975) (finding ordinance distinguishing among movies based on content unconstitutionally under-inclusive).

⁶³ Over thirty years ago, the NBCO Rule was held not to violate the equal protections rights of newspaper owners because the NBCO treated "newspaper owners in essentially the same fashion as other owners of the major media of mass communication" under the FCC's rules. *NCCB*, 436 U.S. at 801. The factual basis for the *NCCB* Court's conclusion is no longer true. First, there are no longer FCC restrictions prohibiting cross-ownership by other media platforms – these speech

violate Cox's equal protection rights for another reason. As previously described, although the FCC routinely accepts the Longley-Rice methodology to determine the application of the NBCO Rule to television stations, *see* Section I.A, *supra*, the FCC rejected Cox's Longley-Rice showing with respect to WSRV(FM) and determined that it must seek a waiver. *See 2008 Order* ¶ 78 n.257 (JA___).

The FCC's rejection of Cox's Longley-Rice study does not meet equal protection standards because it is not "narrowly tailored to a compelling government interest." *Turner I*, 512 U.S at 653. No substantial government interest can be shown in the FCC's practice of allowing television broadcasters to use the Longley-Rice model to show compliance with the FCC's cross-ownership restrictions, while denying Cox and other radio broadcasters the ability to use the same model. Nor can the outright rejection of Cox's use of Longley-Rice be deemed "narrowly tailored." For these reasons, the FCC's rejection of Cox's WSRV(FM) Longley-Rice application in the *2008 Order* violates Cox's Fifth Amendment equal protection rights.

restrictions are now unique to newspaper owners. Second, the time when newspapers were the only non-broadcast "major medi[um] of mass communications" has long since past. The past thirty five years have seen the proliferation of a multitude of media platforms: cable television systems, cable networks, new broadcast networks, satellite television systems, satellite radio, programming studios and the Internet. *See* Section II.B, *supra*; *2008 Order* ¶ 24 (JA___).

IV. Additional Constitutional Challenges.

Cox hereby adopts and incorporates by reference the additional constitutional challenges presented by Petitioner/Appellant Media General, Inc., including facial constitutional challenges to the NBCO Rule, for purposes of its § 402(a) Petition for Review and its § 402(b) appeal.

V. The NBCO Rule Should Be Vacated.

The FCC's arbitrary and unconstitutional decisions as to Cox in the *2008 Order* require that the NBCO Rule be vacated, not merely remanded back to the FCC. In *Prometheus I*, this Court affirmed the FCC's decision in the *2003 Order* to repeal the NBCO Rule and remanded the matter back to the FCC for further consideration of the CMLs. Although the additional proceedings yielded only further evidence supporting the NBCO Rule's repeal, in the *2008 Order* the FCC inexplicably reversed course and reinstated the Rule. In doing so, the FCC plainly disregarded this Court's conclusion in *Prometheus I* that the Rule's repeal was appropriate. Moreover, the FCC has spent the past fourteen years revising its newspaper/broadcast cross-ownership restrictions, and it has been wholly unable to adopt a reasonable rule. Given this tortured history, the FCC is unlikely to be able to devise a sound rationale for the reinstatement of the NBCO Rule in stricter form than before, particularly after the FCC itself and this Court previously found that repeal of the NBCO Rule was appropriate. These serious deficiencies justify

vacatur here. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (“The decision whether to vacate depends on the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly).”) (internal quotations and citations omitted).⁶⁴

Moreover, there is nothing to suggest that there would be “disruptive” consequences from this Court removing the unconstitutional abridgements of newspaper owners’ speech that now threaten to be reinstated. *Allied-Signal*, 988 F.2d at 150-51. Although vacatur here will eliminate the NBCO Rule, the FCC will continue to evaluate any cross-ownership of media outlets under the “public interest” standard applicable to all applications for issuance, assignment, transfer of control, or renewal of any broadcast license, *see* 47 U.S.C. §§ 309, 310, and antitrust laws will still apply. *See Comcast Corp.*, 579 F.3d at 9 (finding vacatur appropriate because newspaper owners “will remain subject to, and competition will be safeguarded by, the generally applicable antitrust laws”). “Were the Rule left in place while the FCC tries . . . to rationalize the [Rule], however, it would

⁶⁴ *See also Comcast Corp. v. FCC*, 579 F.3d 1, 8-9 (D.C. Cir. 2009) (same); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1052-53 (D.C. Cir. 2002) (“*Fox I*”) (applying *Allied-Signal* standard in vacating cable/television cross-ownership rule); *Radio-Television News Dirs. Ass’n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999) (remand is appropriate only when “‘there is at least a serious possibility that the [agency] will be able to substantiate its decision’ given an opportunity to do so, and when vacating would be ‘disruptive’” (quoting *Allied Signal*, 988 F.2d at 151)).

continue to burden speech protected by the First Amendment.” *Id.* Thus, “[b]ecause the probability that the Commission would be able to justify retaining the [NBCO] Rule is low and the disruption that vacatur will create is relatively insubstantial,” *Fox I*, 280 F.2d at 1053, vacatur is appropriate.

As the D.C. Circuit concluded in *Fox I* in vacating a similar rule, “[a]lthough the Commission presumably made its best effort, the reasons it gave . . . for retaining the [cable/broadcast cross-ownership] Rule were at best flimsy,” indicating “a hopeless cause.” 280 F.3d at 1053. So too here, the FCC’s about-face in reinstating the NBCO Rule without explanation even though it is not in the public interest is a “hopeless cause,” requiring vacatur in this case.

CONCLUSION

For the foregoing reasons, Cox respectfully requests that the *2008 Order* be reversed and the NBCO Rule reinstated therein be vacated.

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CERTIFICATE OF COMPLIANCE

I hereby certify that (1) this brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because the brief contains 12,243 words, excluding the parts of the brief exempted by Fed R. App. 32(a)(7)(B)(iii); and (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

Pursuant to Third Circuit Rule 31.1(c), I further certify that the text of the electronic brief is identical to the text in the paper copies and that a virus detection program, Symantec Endpoint Protection version 11.0.5002.333, has been run on the file and that no virus was detected.

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May, 2010, I electronically filed the forgoing Brief of Cox Enterprises, Inc.; Cox Radio, Inc.; Cox Media Group, Inc.; and Miami Valley Broadcasting Corporation using this Court’s CM/ECF system, which will send notification of such filing to the counsel of record in these matters who are registered on the CM/ECF system and appear on the service list below. Pursuant to this Court’s May 3, 2010 Order, I also caused 1 paper copy of this document to be delivered to the Clerk’s Office via overnight delivery service.

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

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