

**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 PETITIONER AND APPELLANT
MEDIA GENERAL, INC.**

George L. Mahoney
Media General, Inc.
333 East Franklin Street
Richmond, VA 23219

John R. Feore, Jr.
Michael D. Hays
M. Anne Swanson
DOW LOHNES PLLC
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036-6802
(202) 776-2000

Counsel for Media General, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Media General, Inc. (“Media General”), by and through counsel, hereby states it is an independent, publicly-owned communications company traded on the New York Stock Exchange under the ticker symbol “MEG.” Media General has no parent companies.

GAMCO Investors, Inc., a publicly-held company traded on the New York Stock Exchange under the ticker symbol “GBL,” indirectly owns more than 10 percent of Media General through its subsidiaries, GAMCO Asset Management, Inc, Gabelli Funds, LLC and Gabelli Securities, Inc.

Media General is not aware of any non-party publicly-held corporations that have a financial interest in the outcome of this proceeding.

s/ Michael D. Hays
Michael D. Hays

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
JURISDICTIONAL STATEMENT	1
RELATED CASES AND PROCEEDINGS.....	2
ISSUES PRESENTED	2
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	4
A. The FCC’s <i>1975 Order</i> Adopting the NBCO Rule.....	6
B. The Telecommunications Act of 1996.....	8
C. The <i>2003 Order</i>	9
D. The Ensuing Decline in the Newspaper Industry.....	11
E. The <i>2008 Order</i>	13
F. Licensing Decisions in the <i>2008 Order</i>	18
STANDARD OF REVIEW	19
SUMMARY OF ARGUMENT	19
ARGUMENT	21
I. The <i>2008 Order</i> Is Arbitrary and Capricious Because the FCC Provided No Reasoned Analysis for Its Departure from Its Prior Determination To Eliminate the NBCO Rule and Its Decision to Instead Impose a More Restrictive Regime That Sharply Undermines Financially Troubled Media Industries	21
II. The <i>2008 Order</i> Is Arbitrary and Capricious Because the FCC’s Decision To Impose the NBCO Rule and a More Restrictive Waiver Regime Was Not Supported Either by a Reasoned Analysis or Substantial Evidence	26

TABLE OF CONTENTS

	Page
A. The NBCO Rule Is Arbitrary and Capricious Because It Does Not Advance Any of the FCC’s Policy Goals.	27
1. Competition	27
2. Localism	28
3. Diversity	29
B. The 2008 Order Is Arbitrary and Capricious Because Its Reformulation of the NBCO Rule Dismissed Overwhelming Record Evidence That Alternative Media Outlets Contribute to Diversity.	31
C. The Presumptions Adopted in the 2008 Order Are Themselves Arbitrary and Capricious	33
1. The 2008 Order’s Adoption of a Presumption Favoring Relief from the NBCO Rule in Only the Top-20 Markets Is Arbitrary and Capricious.	34
2. The Presumption Requiring a Cross-Owned Television Station To Not Be Ranked Among the Top Four Stations in the DMA Is Arbitrary and Capricious.	38
3. The 2008 Order’s Definition of “Major Media Voices” Is Fatally Flawed.	39
III. The NBCO Rule Violates the First Amendment	40
A. NCCB Does Not Foreclose This Court’s Review of the Scarcity Doctrine.....	41
1. The Constitutionality of the Scarcity Doctrine May Be Challenged If the Facts Upon Which It Was Based Have Changed.....	41

TABLE OF CONTENTS

	Page
2. Radically Different Facts Surround the Media Marketplace Today Than When <i>Red Lion</i> Was Decided.....	42
3. Congress and the FCC Have Given Numerous “Signals” That the Scarcity Doctrine Should Be Reevaluated.....	46
4. The FCC Could Not Rationally Rely on the Scarcity Doctrine To Support Its Conclusion That the NBCO Rule Was Constitutional	48
B. Regardless of the Scarcity Doctrine, the NBCO Rule Is Subject to Heightened Scrutiny Because It Is Content-Based.	49
C. The NBCO Rule Violates the First Amendment by Restricting Speech and Speakers.	52
D. The NBCO Rule As Applied To Media General Violates Its First Amendment Rights.....	53
IV. The NBCO Rule Violates Broadcasters’ Fifth Amendment Right to Equal Protection	56
V. The NBCO Rule Should Be Vacated, Not Remanded Yet Again to the FCC.....	60
CONCLUSION	61

TABLE OF AUTHORITIES

Page

CASES

Abbott Lab. v. Celebrezze,
352 F.2d 286 (3d Cir. 1965), *overruled on other grounds*,
Abbott Labs. v. Gardner, 387 U.S. 136 (1967)1

Abie State Bank v. Weaver,
282 U.S. 765 (1931).....42

Action for Children’s Television v. FCC,
58 F.3d 664 (D.C. Cir. 1995).....47

Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n,
988 F.2d 146 (D.C. Cir. 1993).....60

Am. Mining Cong. v. EPA,
907 F.2d 1179 (D.C. Cir. 1990).....25

Bechtel v. FCC,
10 F.3d 875 (D.C. Cir. 1993).....26

Buckley v. Valeo,
424 U.S. 1 (1976).....59

Burson v. Freeman,
504 U.S. 191 (1992).....52

Busch v. Marple Newtown School Dist.,
567 F.3d 89 (3d Cir. 2009)51

Chastleton Corp. v. Sinclair,
264 U.S. 543 (1924).....42

Citizens United v. FEC,
558 U.S. ___, 130 S. Ct. 876 (2010)52, 56, 59

Comcast Corp. v. FCC,
579 F.3d 1 (D.C. Cir. 2009).....61

TABLE OF AUTHORITIES

	Page
<i>Consol. Edison Co. v. Pub. Serv. Comm’n of N.Y.</i> , 447 U.S. 530 (1980).....	51
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005).....	54
<i>Ellis v. Tribune Co.</i> , 443 F.3d 71 (1974)	9
<i>Elrod v. Burns</i> , 427 U.S. 347, 373 (1974)	42
<i>FCC v. Fox Television Stations, Inc.</i> , 556 U.S. ___, 129 S. Ct. 1800 (2009)	22, 47
<i>FCC v. League of Women Voters of Cal.</i> , 468 U.S. 364 (1984).....	46, 51
<i>FCC v. Nat’l Citizens Comm. for Broad.</i> , 436 U.S. 775 (1978).....	<i>passim</i>
<i>Fox Television Stations, Inc. v. FCC</i> , 280 F.3d 1027 (D.C. Cir. 2002), <i>modified on other grounds</i> , 293 F.3d 537 (D.C. Cir. 2002).....	27, 56, 60
<i>Jones v. Brown</i> , 461 F.3d 353 (3d Cir. 2006)	58
<i>Jupiter Energy Corp. v. FERC</i> , 482 F.3d 293 (5th Cir. 2007)	35
<i>Lutheran Church-Mo. Synod v. FCC</i> , 141 F.3d 344 (D.C. Cir. 1998).....	52
<i>Minneapolis Star and Tribune Co. v. Minn. Comm’r of Revenue</i> , 460 U.S. 575 (1983).....	52, 57, 59
<i>Motor Vehicle Mfrs. Ass’n v. State Farm</i> , 463 U.S. 29 (1983).....	25, 26, 39, 48

TABLE OF AUTHORITIES

	Page
<i>N.J. Citizen Action v. Edison Twp.</i> , 797 F.2d 1250 (3d Cir. 1986)	41
<i>Nat’l Coal. Against the Misuse of Pesticides v. Thomas</i> , 809 F.2d 875 (D.C. Cir. 1987).....	22
<i>Natural Res. Def. Council, Inc. v. EPA</i> , 790 F.2d 289 (3d Cir. 1986)	26, 31, 33, 36
<i>Pitt News v. Pappert</i> , 379 F.3d 96 (3d Cir. 2004)	54, 56
<i>Police Dep’t of Chi. v. Mosley</i> , 408 U.S. 92 (1972).....	58
<i>Prometheus Radio Project v. F.C.C.</i> , 373 F.3d 372, 451 (3d Cir. 2004)	<i>passim</i>
<i>Radio-Television News Dirs. Ass’n v. FCC</i> , 184 F.3d 872 (D.C. Cir. 1999).....	60
<i>Red Lion Broad. o. v. FCC</i> , 395 U.S. 367 (1969).....	7, 40, 43
<i>Reid v. Covert</i> , 354 U.S. 1 (1957).....	42
<i>Sable Commc’ns of Cal. v. FCC</i> , 492 U.S. 115 (1989).....	52, 53
<i>Sinclair Broad. Group, Inc. v. FCC</i> , 284 F.3d 148 (D.C. Cir. 2002).....	16, 36, 37
<i>Telecomm. Research & Action Ctr. V. FCC</i> , 801 F.2d 501 (D.C. Cir. 1986).....	47
<i>Telocator Network of Am. v. FCC</i> , 691 F.2d 525 (D.C. Cir. 1982).....	27

TABLE OF AUTHORITIES

	Page
<i>Tribune Co. v. FCC</i> , 133 F.3d 61 (D.C. Cir. 1998).....	48
<i>Turner Broad. System, Inc. v. FCC</i> , 512 U.S. 622 (1994).....	49, 56, 59
<i>United States v. Carolene Prods.</i> , 304 U.S. 144 (1938).....	41, 58
<i>United States v. Stevens</i> , 533 F.3d 218 (3d Cir. 2008), <i>aff'd</i> , 559 U.S. ___, 130 S. Ct. 1577 (2010)	49
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781 (1989).....	49, 50

STATUTES & REGULATIONS

28 U.S.C. § 2342 (2006)	1
47 U.S.C. § 151 (1996)	1
47 U.S.C. § 303, note (1997)	8
47 U.S.C. § 309 (2009)	61
47 U.S.C. § 309(j) (2009)	47
47 U.S.C. § 310 (1996)	61
47 U.S.C. § 402(a) (1996).....	1
47 U.S.C. § 402(b) (1996)	1, 2
47 C.F.R. § 73.3555(d) (2008).....	2, 18, 19, 54

TABLE OF AUTHORITIES

Page

ADMINISTRATIVE CASES & PROCEEDINGS

1998 Biennial Regulatory Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,
 15 F.C.C.R. 11,058 (2000)8

2002 Biennial Regulatory Review — Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,
 18 F.C.C.R. 13,620 (2003) 8-10, 59

2006 Quadrennial Regulatory Review — Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,
 23 F.C.C.R. 2,010 (2008) *passim*

Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service,
 12 F.C.C.R. 12,809 (1997)45

Amendment of Sections 73.34, 73.240, and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations,
 50 F.C.C.2d 1,046 (1975)6, 7, 9, 30

Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,
 19 F.C.C.R. 1,606 (2004)45

Complaint of Syracuse Peace Council,
 2 F.C.C.R. 5,043 (1987)43, 47

Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service,
 22 F.C.C.R. 10,344 (2007)45

TABLE OF AUTHORITIES

Page

*Review of the Commission’s Regulations Governing Television
Broadcasting,*
14 F.C.C.R. 12,903 (1999)35, 37, 53

Shareholders of Tribune Co.,
22 F.C.C.R. 21,666 (2007)9

JURISDICTIONAL STATEMENT

These consolidated cases relate to the *2008 Order*,¹ a hybrid agency order issued under the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, in which the Federal Communications Commission (“FCC”) made rulemaking and adjudicatory decisions.

With respect to its petition for review of the rulemaking decisions, Petitioner/Appellant Media General states that it filed a timely petition for review on March 5, 2008 (JA____), and that this Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

With respect to its appeal of the adjudicatory decisions, Media General timely filed a notice of appeal on March 4, 2008 (JA____). Such decisions are reviewable under 47 U.S.C. § 402(b). However, the United States Court of Appeals for the District of Columbia 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.*

¹ *2006 Quadrennial Regulatory Review—Review of the Commission’s Broad Ownership Rules and Other Rules Adopted Pursuant to Section 202*, 23 F.C.C.R. 2010 (2008) (“*2008 Order*”) (JA____), *appeal pending sub nom. Prometheus Radio Project v. FCC*, Nos. 08-3078, *et al.* (3d Cir. Jul. 15, 2008).

Gardner, 387 U.S. 136 (1967). Media General continues to believe that exclusive jurisdiction resides in the D.C. Circuit, but is addressing the § 402(b) issues in this brief to comply with this Court's Order.

Media General filed a timely notice of appeal challenging the licensing-related decisions in the *2008 Order* in the D.C. Circuit, but the appeal was consolidated with the petitions for review. Media General's motion to transfer its § 402(b) appeal, Case No. 08-4460, to the D.C. Circuit remains pending, (Joint Motion of the Cox Parties and Media General To Transfer Venue, Nov. 13, 2008), as does Media General's motion to deconsolidate its § 402(b) appeal from the remaining cases in this proceeding. (Joint Motion of the Cox Parties and Media General To Deconsolidate Their § 402(b) Appeals, Dec. 8, 2008.)

RELATED CASES AND PROCEEDINGS

Media General adopts the statement of related cases in the Brief of Petitioner National Association of Broadcasters.

ISSUES PRESENTED

1. Whether the decision of the FCC to retain the newspaper/broadcast cross ownership rule, 47 C.F.R. § 73.3555(d) ("NBCO Rule") and its implementation of a new set of much more restrictive presumptions prohibiting newspaper/broadcast cross-ownership in the vast majority of cases are arbitrary and capricious under the Administrative Procedure Act ("APA"); are not supported by reasoned analysis;

violate § 202(h) of the Telecommunications Act of 1996; or are otherwise contrary to law (JA____) when:

- (A) the FCC provided no reasoned analysis for its dramatic departure from its prior determination, affirmed by this Court, to eliminate the NBCO Rule, and instead inexplicably imposed a much more restrictive regime despite its recognition that traditional media industries, particularly newspapers, have been affected severely by both secular and cyclical changes;
- (B) the FCC acknowledged that it had no evidence that retention of the NBCO Rule furthered any of its policy goals; and
- (C) the waiver standards the FCC adopted are fatally flawed, run counter to the record evidence, and violate directly relevant court precedent precluding, among other things, the FCC's exclusion of non-broadcast media from the definition of "major media voices."

2. Whether the FCC's decision to retain the NBCO Rule and its implementation of a new set of much more restrictive presumptions prohibiting newspaper/broadcast cross-ownership in the vast majority of cases (JA____):

- (A) violate the First Amendment by restricting free speech and imposing unprecedented content-based waiver standards that intrude into the

core newsgathering and editorial functions of newspapers and
broadcasters; and

(B) violate the Fifth Amendment's guarantee of equal protection.

3. Whether the FCC's licensing-related and adjudicatory decisions in the *2008 Order* rejecting Media General's request for, among other things, unrestricted waivers of the NBCO Rule (JA___):

(A) are arbitrary and capricious under the APA; are unsupported by substantial evidence or reasoned analysis; and violate § 202(h); and

(B) violate Media General's First Amendment and Fifth Amendment rights.

STATEMENT OF THE CASE

Media General adopts the Statement of the Case in the Brief of Appellants Cox Enterprises, Inc., Cox Radio, Inc., Cox Broadcasting, Inc., and Miami Valley Broadcasting Corporation, and Petitioner Cox Enterprises, Inc.

STATEMENT OF FACTS

As described below, from the moment of the NBCO Rule's troubled inception, the FCC has struggled to find coherent evidence establishing that it actually furthers any of its policy goals. In sporadic moments of introspection, the FCC has itself fitfully questioned the NBCO Rule's continued usefulness, finally

culminating in the *2003 Order*'s recognition that the NBCO Rule's complete ban is not in the public interest, a determination affirmed by this Court.²

Despite the documented deleterious effects of the NBCO Rule, including the fact that it actually *undermines* the ability of newspapers and broadcasters to provide local news and commentary, the FCC has inexcusably delayed acting on this Court's remand for years. While the FCC has fiddled, traditional media companies, a vital national resource, have faced unprecedented financial distress. Newspaper companies, such as the owner of the *Philadelphia Daily News*, have declared bankruptcy, as have major diversified media companies such as the Tribune Company; 15,000 journalists have lost their jobs; and newspaper advertising revenues have declined by over 40 percent.

As detailed below, faced with this stark reality, which the FCC itself recognized, the FCC nonetheless dallied. Finally, it issued the *2008 Order*, which incomprehensively imposes a *more restrictive* regime that is riddled with errors, is contrary to established court precedent, and imposes unconstitutional content-laden waiver standards that go to the heart of media companies' newsgathering and editorial activities. Unbelievably, these standards imbue a government agency

² *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 (2003) ("*2003 Order*") (JA___).

with the power to determine whether newspapers and broadcasters are exercising “*independent news judgment.*” 2008 Order ¶ 13 (JA___) (emphasis added).

We will never know how much damage the FCC’s antiquated NBCO Rule has done up until today. Despite the FCC’s contention that this Court’s review will serve “little purpose” in light of the forthcoming 2010 Quadrennial Review,³ this Court now has the opportunity to rectify the FCC’s startling misjudgments, an opportunity that, based on the experience in this case, may not come again for another six years, during which time an unvacated NBCO Rule would continue to harm the public interest. Media General urges this Court once again to conclude that the NBCO Rule is not necessary in the public interest, but this time, to vacate it.

A. The FCC’s 1975 Order Adopting the NBCO Rule.

Prior to 1975, the FCC “allowed, and even encouraged” newspapers to own broadcast stations in their communities. *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 797 (1978) (“*NCCB*”). Even so, the FCC did an about-face in 1975,⁴ prohibiting all future newspaper/broadcast combinations within the same community. As the FCC readily admitted, it “did not find that existing co-located

³ FCC’s Response to Order to Show Cause, Jan. 7, 2010, at 2.

⁴ *Amendment of Sections 73.34, 73.240, & 73.636 of the Commission’s Rules Relating to Multiple Ownership*, 50 F.C.C.2d 1046, ¶¶ 62-65 (1975) (“*1975 Order*”), *aff’d*, *NCCB*, 436 U.S. 775.

newspaper-broadcast combinations . . . necessarily ‘spea[k] with one voice’ or are harmful to competition.” *NCCB*, 436 U.S. at 786. To the contrary, the FCC found that:

the conflicting studies submitted by the parties concerning the effects of newspaper ownership on competition and station performance were inconclusive, and no pattern of specific abuses by existing cross-owners was demonstrated.

Id. Indeed, the FCC’s own staff study concluded that, if anything, there was “an undramatic but nonetheless statistically significant *superiority* in newspaper-owned television stations in a number of program particulars” irrespective of market size. *1975 Order* ¶ 109 n.26 (emphasis added).

Rather, the FCC’s prospective ban on cross-ownership was premised purely on a predictive judgment: that “[i]ncreases in diversification of ownership would *possibly* result in enhanced diversity of viewpoints.” *NCCB*, 436 U.S. at 786 (emphasis added). The Supreme Court ultimately upheld the rule on that basis, expressly acknowledging that the FCC had not demonstrated any connection between diversity of ownership and diversity of viewpoints, but deferring to the FCC’s expertise. Applying a deferential standard based on the “scarcity rationale” of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Court held that the FCC’s prediction that these “hoped-for” diversity gains would materialize was “rational.” *NCCB*, 436 U.S. at 786-87.

B. The Telecommunications Act of 1996.

Almost 15 years ago, Congress, concluding that media ownership rules were too restrictive, passed Section 202(h) of the Telecommunications Act of 1996. That section requires the FCC, every four years, to consider whether the cross-ownership ban, like other media ownership restrictions, remains “necessary in the public interest as a result of competition.” Telecomms. Act of 1996 § 202(h).⁵ If the FCC could not conclude that the rule remained in the public interest, Congress required the FCC to repeal or modify it. *Id.*

In the years following enactment of § 202(h), the FCC repeatedly recognized that industry developments undermined the premises supporting the NBCO Rule and that fundamental re-examination of the rule was long overdue. For example, in the *1998 Biennial Review Report*, the FCC concluded that a blanket ban “may not be necessary to achieve the rule’s public interest benefits.”⁶ Despite these and similar findings, its affirmative duty under § 202(h) to review its existing regulations, and the NBCO Rule’s harmful impact on newspapers and broadcasters, the FCC took no concrete steps to revise the NBCO Rule for years.

⁵ 47 U.S.C. § 303, note. Originally, § 202(h) required biennial reviews; Congress made the requirement a quadrennial one in 2004. *See Consolidated Appropriations Act of 2004*, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004).

⁶ *1998 Biennial Regulatory Review of the Commission’s Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, 15 F.C.C.R. 11,058, ¶ 83 (2000) (“*1998 Biennial Review Report*”).

C. The 2003 Order.

In 2001, the FCC initiated the rulemaking that led to the *2003 Order*. In those proceedings, newspaper owners, including Media General, submitted voluminous comments establishing that the NBCO Rule should be repealed. Data based on the operation of newspaper/broadcast combinations either grandfathered in 1975 or subsequently permitted by temporary waiver⁷ showed that cross-ownership increases the resources devoted to news and public affairs programming, improving the quality and quantity of news information in local markets, facilitating new information outlets, and *actually increasing the presentation of diverse viewpoints*.⁸ Comments also showed that cross-ownership would allow television stations to avoid reductions in local newscasts caused by

⁷ 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 (four permanent waivers); *Shareholders of Tribune*, 22 F.C.C.R. 21,666 (2007) (fifth permanent waiver). A number of other cross-ownerships, including three of Media General's current cross-ownerships, 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 renewal. *1975 Order* ¶ 103 n.25.

⁸ See, e.g., *Comments of Tribune Co.*, MM Docket No. 01-235 (Dec. 3, 2001), at 12-33, 43-52 (2003 JA2987-3008, 2003 JA3018-27); *Comments of Media Gen., Inc.*, MM Docket No. 01-235 (Dec. 3, 2001), at 19-25 (2003 JA2666-72); *Comments of the Newspaper Ass'n of Am.*, MM Docket No. 01-235 (Dec. 3, 2001), at 16-40 (2003 JA2890-2914); *Comments of CanWest Global Commc'ns Corp.*, MM Docket No. 01-235 (Dec. 3, 2001), at App. A (no structural link between the number of owners and the degree of diversity).

growing financial pressures and increasing competition, especially in smaller markets.⁹

In light of this overwhelming evidence, the *2003 Order* concluded that the NBCO Rule was no longer in the public interest, finding that:

(1) the rule cannot be sustained on competitive grounds, (2) the rule is not necessary to promote localism (and may in fact harm localism), and (3) most media markets are diverse, obviating a blanket prophylactic ban on newspaper-broadcast combinations in all markets.

2003 Order ¶ 330 (JA____). Although the FCC “repeal[ed]” the NBCO Rule (*id.* ¶ 369 n.846 (JA____)), it did not eliminate all restrictions on newspaper/broadcast cross-ownership, instead imposing Cross Media Limits (“CMLs”), *id.* ¶¶ 391-498 (JA____), under which Media General’s cross-ownerships would have been allowed.

Numerous parties filed petitions to review the *2003 Order*, which ultimately were consolidated in this Court. In *Prometheus Radio Project v. FCC*, 373 F.3d 372, 451 (3d Cir. 2004) (“*Prometheus I*”), this Court upheld the findings in the *2003 Order*, including that repeal of the NBCO Rule was in the public interest. Among other things, this Court affirmed the FCC’s conclusion that “the newspaper/broadcast cross-ownership ban undermined localism,” based on extensive studies showing that newspaper-owned broadcast stations “produced

⁹ *Media General Ex Parte Comm’n*, MB Docket No. 02-277 *et al.* (May 6, 2003), at Attach. 1 (JA____).

local news in higher quantity with better quality” *Id.* at 398-99. But this Court concluded that the CMLs were not supported by reasoned analysis and remanded to the FCC “to justify or modify further its Cross-Media Limits.” *Id.* at 403.

D. The Ensuing Decline in the Newspaper Industry.

In the years following the *2003 Order*, the newspaper industry suffered an unparalleled financial crisis “beyond any [it] ha[s] previously experienced.” *2008 Order* ¶ 51. The increasing use of new media sources has caused a precipitous decline in newspaper circulation and revenues, a trend exacerbated in the last few years. The increased competition from new media has also siphoned audiences and advertisers from broadcast media.

In the *2008 Order*, the FCC recognized that traditional media was suffering financial distress, observing that “[t]he emergence of new forms of electronic media in recent years has come at the expense of [such] media, and of newspapers in particular.” *2008 Order* ¶ 21. “[S]tatistics 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. Indeed, at the time of the *2008 Order*, newspaper circulation was in a steep decline, with the “number of daily newspapers being published and their readership hav[ing] decreased significantly,” *id.* ¶ 27 n.89. This produced “a

cascade of negative impacts on the media industry,” *id.* ¶ 28, including a “sharp reduction in the number of professional journalists employed in the newspaper industry,” *id.*, and “flatten[ed]” advertising revenues. *Id.* ¶ 33.

Since the *2008 Order*, the situation has only worsened. Newspaper circulation has continued its downward spiral, reaching its lowest point in nearly 70 years as of October 2009.¹⁰ Advertising revenues, which traditionally make up 80 percent of overall newspaper revenues, have dropped 43 percent from 2007 through 2009.¹¹ Several newspaper publishers have sought bankruptcy protection, while others have ended their print editions.¹² Those that remain in business have closed domestic and foreign bureaus, laying off thousands of journalists.¹³ Indeed, approximately 15,000 full-time reporters and editors have lost their jobs in the past three years – a 27 percent decrease in the total number of such jobs in the

¹⁰ Frank Ahrens, *The Accelerating Decline of Newspapers*, Wash. Post, Oct. 27, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/26/AR2009102603272.html> (last visited May 14, 2010). Media General respectfully requests that the Court take judicial notice of this article and similar publicly available information below.

¹¹ Pew Project for Excellence in Journalism, *The State of the News Media* (2010) (“*2010 Pew State of Media*”), Executive Summary at 1, 8-9, available at http://www.stateofthemedial.org/2010/chapter%20pdfs/2010_execsummary.pdf (last visited May 14, 2010) (JA____).

¹² Letter Response of Petitioner Fox Television Stations Inc., *et al.*, May 5, 2009, at 4-5 (“Fox Letter”).

¹³ *2010 Pew State of Media*, Newspapers, Summary Essay at 1.

newspaper industry.¹⁴ Broadcast companies have also endured the effects of increased use of new media sources for news.¹⁵

The increased prevalence of new media sources providing local news and information (including Internet sites unaffiliated with existing media outlets in a market) has hit small and medium-sized markets especially hard.¹⁶ In the past two years, several newspapers in those markets, such as the *Albuquerque Tribune* and *Ann Arbor News*, have closed or scaled back their operations.¹⁷ As the owner of newspapers in numerous small and medium-sized markets throughout the country, Media General has directly experienced the impact of new media sources for news.

E. The 2008 Order.

Despite the declining viability of traditional media, the FCC delayed acting on this Court's remand order for two years and instead consolidated the consideration of those issues with the Quadrennial Review proceeding it was

¹⁴ *Id.*

¹⁵ 2010 *Pew State of Media*, Local TV, Summary Essay at 1, Economics at 9.

¹⁶ The majority of recent newspaper failures have occurred outside the Top-20 markets. *See Comments of Media General, Inc.*, MB Docket No. 06-121 *et al.* (Dec. 11, 2007) ("MG 12/07 Comments"), at 12-13 & App. 1 (JA____) ("roughly 60 percent" of newspapers that failed from 1988 to 2006 were in non-Top-20 markets, and "all population tiers with less than one million residents lost newspapers" from 1976 to 2006).

¹⁷ *See* Matt Mygatt, *Newspaper Bids Farewell to Albuquerque*, USA TODAY, Feb. 23, 2008, available at http://www.usatoday.com/news/nation/2008-02-23-2863108652_c.htm (last visited May 14, 2010); Katherine Yung, *Ann Arbor News Folds; Web Transition Begins*, DETROIT FREE PRESS, July 24, 2009, available at <http://m.freep.com/BETTER/news.jsp?key=496022> (last visited May 14, 2010).

required to initiate in 2006.¹⁸ Rather than the prompt remand this Court directed, the FCC engaged in another complex proceeding that developed another extensive record, including peer-reviewed studies commissioned by the FCC.

The record included at least three such studies supporting the conclusion that cross-ownership leads to more and higher quality local news. *See 2008 Order* ¶ 42 (JA____).¹⁹ Media companies also submitted extensive comments demonstrating that cross-owned media properties provide more local news in greater depth. Those comments established, among other things, that:

At least seven studies over more than three decades consistently have demonstrated that television stations jointly owned with newspapers are likely to broadcast significantly more news and informational programming than other stations in the same market.

See, e.g., Comments of Media General, Inc., MB Docket No. 06-121 (Oct. 23, 2006) (“MG 2006 Comments”), at 23 (JA____). The *2008 Order* acknowledged these and additional studies demonstrating “that newspaper/television combinations are likely to produce more news than stand-alone stations in the same market.” *See id.* ¶ 40 (JA____).

On consideration of this record, the FCC in February 2008, over three and one-half years after this Court’s remand, released the *2008 Order*. The *2008 Order* accepted much of the *2003 Order*’s analysis and reaffirmed the NBCO Rule’s

¹⁸ *2008 Order* ¶ 1 (JA____).

¹⁹ *See* Section II.A.2, *infra*.

longstanding policy goals of “competition, diversity, and localism.” *2008 Order* ¶ 9 (JA____). The FCC accepted the *2003 Order*’s basis for repealing the NBCO rule, finding that “[e]vidence in the record continues to support the Commission’s earlier decision that retention of a complete ban is not necessary in the public interest as a result of competition, diversity, or localism.” *Id.* ¶ 19 (JA____).

The *2008 Order* also detailed the newspaper industry’s dramatic decline. *See* Statement of Facts, Section D., *supra*; *2008 Order* ¶¶ 27-33 (JA____). At the same time, the *2008 Order* acknowledged that cross-ownership could ameliorate this financial distress by allowing traditional media to realize cost savings and deliver more news coverage.²⁰

²⁰ *See 2008 Order* ¶ 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.”); *id.* ¶ 39. Media General has experienced these benefits firsthand in the small and medium-sized markets where it co-owns newspapers and television stations. For instance, the *Bristol Herald Courier*, its newspaper in the Tri-Cities TN/VA DMA, where it also owns WJHL-TV, recently won a Pulitzer Prize for public service for its multi-part series on governmental mismanagement of natural gas royalties owed to Virginia landowners. *Updated: Bristol Herald Courier Wins Pulitzer Prize*, BRISTOL HERALD COURIER, Apr. 13, 2010, available at http://www2.tricity.com/tri/news/local/article/bristol_herald_courier_wins_pulitzer_prize/4443 (last visited May 16, 2010). Although the newspaper has only seven reporters covering an area the size of Connecticut, Media General’s resources and the presence of other Media General news outlets in the market provided the *Herald Courier*’s small staff with the ability to develop this award-winning series and affect policy-making in Richmond while still covering other news in the market.

Despite these conclusions, the FCC incomprehensibly retained the NBCO Rule and introduced a series of *more restrictive* presumptions. The FCC established a negative presumption that disfavored combinations in the “vast majority” of markets, *2008 Order* ¶ 52 (JA____), excepting only the top-20 markets. Even within those markets, the combination would be presumed in the public interest only if it comprises:

- (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.

2008 Order ¶ 53 (JA____). The FCC impermissibly limited the definition of “major media voices” to only “full-power commercial and noncommercial television stations and major newspapers.” *Id.* ¶¶ 57-58 (JA____). It inconsistently excluded other media, such as radio, cable, weekly newspapers, and Internet sources, several of which were included in the radio/television cross-ownership rule, the exact infirmity that the D.C. Circuit had ruled was impermissible in *Sinclair Broadcasting Group, Inc. v. FCC*, 284 F.3d 148, 165 (D.C. Cir. 2002).

At the same time, the *2008 Order* imposed much more stringent restrictions on newspaper-broadcast cross-ownership in markets outside the top-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____). This negative presumption could only be “reversed” in “two special circumstances,” *id.* ¶ 65 (JA____) – if “a newspaper or broadcast outlet [in the proposed combination] is failed or failing,” *id.* (JA____), or “when a proposed combination results in a *new* source of a significant amount of local news in a market.” *Id.* ¶ 67 (JA____) (emphasis added).

The FCC also imposed stringent requirements for “rebutting” the negative presumption:

We will require any applicant attempting to overcome a negative presumption about a major newspaper and television station combination to demonstrate by clear and convincing evidence that, post-merger, the merged entity will increase the diversity of independent news outlets (*e.g.*, separate editorial and news coverage decisions) and increase competition among independent news sources in the relevant market.

2008 Order ¶ 68 (JA____). This showing was to address four factors: (1) the extent to which cross-ownership will increase the amount of local news the combination disseminates; (2) whether each outlet in the combination will exercise its own independent news judgment; (3) the level of concentration in the market; and (4) the outlets’ financial condition, and, if either is in financial distress, the owner’s commitment to invest significantly in newsroom operations. *Id.* Thus, in these content-laden factors, the FCC assumed the unprecedented power to determine whether newspapers and broadcasters were providing enough “*local*

news” or exercising their “*own independent news judgment.*” *Id.* (emphasis added).

F. Licensing Decisions in the 2008 Order.

In addition to retaining the NBCO Rule and grafting on to it stringent waiver criteria, the hybrid *2008 Order* also made adjudicatory decisions based on the FCC’s authority to approve broadcast licenses. Those decisions denied Media General the relief it had sought by imposing conditions on Media General’s broadcast licenses that it did not request.

Between 1998 and 2000, Media General acquired television and newspaper properties in different markets, including the three combinations at issue in this case.²¹ In connection with license renewal applications for these television stations, Media General sought to own each free from any restriction imposed by the NBCO Rule, 47 C.F.R. § 73.3555(d).²² In the *2008 Order*, the FCC rejected

²¹ Media General’s license applications are described in more detail in Media General, Inc.’s Opposition to Motion to Dismiss of Intervenors United Church of Christ and Media Alliance (Mar. 29, 2009).

²² See, e.g., *Application for Renewal of Broad. Station License of WRBL(TV), Columbus, GA*, Opp’n to Mot. to Dismiss Or In The Alternative Pet. to Deny, FCC File No. BRCT-20041201BZP (Jun. 1, 2005), at 50 (JA____) (“any restriction on newspaper/broadcast cross-ownership is unconstitutional”); *Application for Renewal of Broad. Station License of WBTW(TV), Florence, SC*, Opp’n to Pet. to Deny, FCC File No. BRCT-20040802BIK (Dec. 15, 2004), at 39 (JA____) (same); *Application for Renewal of Broad. Station License of WJHL-TV Johnson City, TN*, Opp’n to Informal Objection, FCC File No. BRCT-20050401BYS (Jan. 10, 2008), at 49 (JA____) (same).

Media General's requests to own the stations free from any restriction. Although the FCC granted Media General "permanent" waivers of the NBCO Rule in the *2008 Order*, see *2008 Order* ¶ 77 (JA___), those waivers remain subject to the restrictions set forth in 47 C.F.R. § 73.3555(d), Note 4. This restriction essentially prohibits the sale of cross-owned newspapers and broadcast stations together.

STANDARD OF REVIEW

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

SUMMARY OF ARGUMENT

In the *2008 Order*, the FCC recognized that traditional media, which perform a critical role in the public discourse of this nation, are facing an unparalleled crisis and that cross-ownership could provide much-needed relief to these industries. The FCC also reaffirmed its conclusion in the *2003 Order*, upheld in *Prometheus I*, that the NBCO Rule was not in the public interest, concluding that it actually undermined localism. Despite these facts, the FCC inexplicably reinstated the NBCO Rule it had repealed in the *2003 Order* and irrationally imposed a *more restrictive* cross-ownership regime. Given the continuing damage that the NBCO Rule inflicts on media companies, the FCC's imposition of a more restrictive regime is arbitrary and capricious and violates § 202(h)'s requirement that the FCC repeal or modify regulations that are no longer in the public interest.

Moreover, the shifting waiver presumptions the *2008 Order* imposes are riddled with errors. They limit a positive presumption to the top-20 markets, although the FCC had previously concluded that a market-size restriction is unnecessary to further its policy goals. And the *2008 Order* impermissibly excludes several key media from “major media voices” used to determine whether a station is entitled to a positive waiver presumption.

The NBCO Rule also violates the First and Fifth Amendments. First, the NBCO Rule reinstated in the *2008 Order* is facially invalid as an unconstitutional restriction on newspaper owners’ speech. The NBCO Rule and the *2008 Order*’s waiver standards also are content-based and cannot withstand the scrutiny required for content-based speech restrictions.

Second, the FCC’s licensing decisions in the *2008 Order* improperly used the scarcity doctrine to justify imposing unconstitutional restrictions on Media General’s cross-owned properties. Although the FCC granted Media General waivers of the NBCO Rule with respect to its cross-owned properties in three markets, the *2008 Order* restricted Media General’s continued ownership of those properties by effectively prohibiting it from selling them together, thereby reducing Media General’s incentive to invest in the properties’ converged newsgathering capability. As a result, the NBCO Rule cannot survive strict scrutiny and is invalid “as-applied” to Media General.

Third, the NBCO Rule violates the equal protection component of the Fifth Amendment's Due Process Clause because it singles out and subjects newspaper owners to restrictions on speech that do not apply to other speakers protected by the First Amendment. Newspapers are now the *only* non-broadcast medium subject to broadcast cross-ownership restrictions, and the justifications given by the Supreme Court in *NCCB* for the NBCO Rule are no longer true today. The NBCO Rule is constitutionally invalid overall and "as applied" to Media General, in particular.

In light of these serious errors and the FCC's consistent inability to promulgate reasonable and constitutional newspaper/broadcast cross-ownership restrictions, the NBCO Rule must be vacated.

ARGUMENT

I. The 2008 Order Is Arbitrary and Capricious Because the FCC Provided No Reasoned Analysis for Its Departure from Its Prior Determination To Eliminate the NBCO Rule and Its Decision to Instead Impose a More Restrictive Regime That Sharply Undermines Financially Troubled Media Industries.

As demonstrated below, the FCC's failure in the *2008 Order* to provide justification for reversing its prior decision to eliminate the NBCO Rule and instead to impose a *much more restrictive* regime than the one the *2003 Order* contemplated is arbitrary and capricious. Indeed, the FCC's decision was *irrational* because the undisputed evidence demonstrated that traditional media,

which perform a critical role in this nation’s civic discourse, have faced increased competition, audience fragmentation, and severe financial challenges since the *2003 Order*. Although the FCC recognized that relaxing the NBCO Rule could provide sorely-needed relief to these troubled industries’ delivery of news and information, it instead inexplicably imposed a more restrictive rule. An agency’s “about-face” without adequate explanation is “arbitrary and capricious.” *Nat’l Coal. Against the Misuse of Pesticides v. Thomas*, 809 F.2d 875, 884 (D.C. Cir. 1987).²³

In the *2003 Order*, the FCC had eliminated the NBCO Rule because it found “that it failed to promote competition, localism or diversity.” *2008 Order* ¶ 15 (JA____). On review, this Court upheld those findings. *Prometheus I*, 373 F.3d at 398-400, 451. The *2008 Order* reaffirmed these findings, concluding that:

Evidence in the record continues to support the Commission’s earlier decision that retention of a complete ban [on newspaper/broadcast cross-ownership] is not necessary in the public interest as a result of competition, diversity, or localism.

2008 Order ¶ 19 (JA____).

²³ See also *FCC v. Fox Television Stations, Inc.*, 556 U.S. ____, 129 S. Ct. 1800, 1811 (2009) (when an agency undertakes a change in policy “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy”); *Prometheus I*, 373 F.3d at 390 (“an agency that departs from its ‘former views’ is ‘obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.’”).

Despite these conclusions, the FCC inexplicably reversed the *2003 Order*'s elimination of the ban and imposed more stringent restrictions, providing only for a limited presumption that would permit some cross-ownership combinations in just the top-20 markets.²⁴ The *2008 Order* prohibits newspaper/broadcast cross-ownership in the “*vast majority of cases*,” *2008 Order* ¶ 52 (JA____) (emphasis added), whereas the *2003 Order* would have permitted “transactions in the top 170 markets.” *2008 Order*, Statement of K. Martin at 2110 (JA____).

The FCC offered no evidence or justification for reversing its position, reinstating the NBCO Rule, and adopting waiver restrictions essentially perpetuating the ban in small and medium-sized markets. To the contrary, the FCC conceded it simply did not know whether the NBCO Rule was necessary to foster diversity:

We are not certain that the degree of media consolidation that the largest, more competitive markets can withstand is yet mirrored in smaller markets, and thus, we conclude that there should be a presumption against newspaper/broadcast cross-ownership in markets below the top 20.

2008 Order ¶ 63 (JA____).²⁵

Given the record evidence establishing the severe financial challenges confronting traditional media, the FCC's decision to impose a *more restrictive*

²⁴ *2008 Order* ¶ 53 (JA____).

²⁵ *See also id.* ¶ 49.

regime is simply irrational. That evidence established that: the “number of daily newspapers . . . and their readership have decreased significantly” (*Id.* ¶ 27 (JA____)); “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____)); and “technology advancements have triggered upheavals for these entities’ business models beyond any they have previously experienced.” *Id.* ¶ 51 (JA____).

As the economy has deteriorated since 2008, the hardship experienced by traditional media has worsened:

- In late 2008, Tribune Company, owner of daily newspapers and broadcast stations in multiple cities, sought bankruptcy protection, as did other major newspaper publishers in 2009, including the owners of the *Philadelphia Daily News* and *Chicago Sun-Times*. (Fox Letter at 5.)
- In the last two years, numerous broadcast companies besides Tribune, including Equity Media Holdings and Pappas Telecasting, have filed for bankruptcy. (*Id.* at 4-5.)
- In 2009, E.W. Scripps Co. closed Denver’s *Rocky Mountain News* after failing to find a buyer, and Hearst Corp. ended the *Seattle Post-Intelligencer*’s print edition. (*Id.* at 5.)

While chronicling such threats to the viability of traditional media, the *2008 Order* also acknowledged that cross-ownership presented an opportunity for financially troubled media companies by “[a]llowing a struggling newspaper or broadcast station to combine with a stronger outlet,” which could “improve its ability to

provide local news and information, thus benefiting the public interest.” *2008 Order* ¶ 74 (JA____).

The FCC, however, failed to make “a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm*, 463 U.S. 29, 43 (1983). Instead, it took the wholly illogical step of reversing itself, imposing a more restrictive regime, and prohibiting traditional media companies from realizing the cost savings that it had identified by presumptively prohibiting the vast majority of cross-owned transactions. Permitting cross-ownership would have allowed media companies to explore alternative business models in the face of financial difficulty. Instead, the FCC imposed restrictions requiring an intense regulatory review before any cross-ownership, even among struggling media properties, might be permitted to move forward. *See 2008 Order* ¶ 68 (JA____).

Accordingly, since the *2008 Order* offers no reason for abandoning the *2003 Order*’s repeal of the NBCO Rule and imposing a more restrictive regime that ran counter to the record evidence, it is arbitrary and capricious. *Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1188-90 (D.C. Cir. 1990) (when “no data” existed contradicting prior decision, policy change was “arbitrary and capricious.”). Given the severely troubled state of traditional media, a critical national resource particularly in medium and small markets, and the serious threat the NBCO Rule poses to their viability, the NBCO Rule must be vacated.

II. The 2008 Order Is Arbitrary and Capricious Because the FCC's Decision To Impose the NBCO Rule and a More Restrictive Waiver Regime Was Not Supported Either by a Reasoned Analysis or Substantial Evidence.

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). When an agency “offer[s] an explanation for its decision that runs counter to the evidence before the agency,” or is unsupported by substantial evidence, its decision is “arbitrary and capricious.” *Natural Res. Def. Council, Inc. v. EPA*, 790 F.2d 289, 305 (3d Cir. 1986).

When the agency's conclusion rests on a predictive judgment, it must nonetheless “undergird” those predictive judgments with “evidence for that judgment to survive arbitrary and capricious review.” *Prometheus I*, 373 F.3d at 409. An agency cannot simply recite a previous predictive judgment; it must evaluate continually those judgments to ensure that the evidence supports their initial conclusion. *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993) (“The Commission's necessarily wide latitude to make policy based upon predictive

judgments . . . implies a correlative duty to evaluate its policies over time to ascertain whether they work.”) (internal quotation omitted)).²⁶

As established below, the record for the *2008 Order* demonstrates that the FCC’s decision to reverse its position, retain the NBCO Rule, and institute a more restrictive regime violates these principles.

A. The NBCO Rule Is Arbitrary and Capricious Because It Does Not Advance Any of the FCC’s Policy Goals.

The FCC implemented the NBCO Rule 35 years ago based on a predictive judgment. After two extensive proceedings, numerous studies, and intensive analysis, the FCC has still produced no *evidence* that the NBCO Rule actually furthers any of its three policy goals – competition, diversity, and localism – and it conclusively undermines one of them, localism. *2008 Order* ¶ 9 (JA___). Given the continuing damage the NBCO Rule inflicts on traditional media companies, the FCC’s irrational adherence to this regulatory artifact also violates § 202(h)’s admonition to the FCC that it repeal rules that are no longer in the public interest.

1. Competition.

The *2008 Order* concluded that cross-ownership restrictions do not support the goal of competition because “newspaper/broadcast combinations cannot

²⁶ See also *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1051 (D.C. Cir. 2002) (“*Fox I*”) (same), *modified on other grounds*, 293 F.3d 537 (D.C. Cir. 2002); *Telocator Network of Am. v. FCC*, 691 F.2d 525, 550 n.191 (D.C. Cir. 1982) (same).

adversely affect competition in any relevant product market.” *2008 Order* ¶ 39 n.131 (JA____).²⁷

2. Localism.

The *2008 Order* concluded that cross-ownership restrictions actually *undermine* localism:

the weight of evidence indicates that cross-ownership can promote localism by increasing the amount of news and information transmitted by the co-owned outlets.

2008 Order ¶ 46 (JA____). The FCC pointed to an extensive record supporting the conclusion that cross-ownership promotes the production of more local news content, including three peer-reviewed studies. *See 2008 Order* ¶ 42 (JA____).

Those studies found, among other things:

- Newspaper cross-ownership is “significantly and positively associated with both local news coverage and local political news coverage,” as cross-owned stations show 7-10 percent more local news than do non-cross-owned stations. *See Jeffrey Milyo, The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News, Ownership Study 6* (rev. Sept. 2007), at abstract (JA____).
- On average, cross-owned stations broadcast about 25 percent more coverage of state and local politics. *Id.* at abstract and Tables 2-5 (JA____).
- Cross-owned television stations broadcast approximately 3 percent more local news programming. Gregory S. Crawford, *Television Station Ownership Structure and the Quantity and*

²⁷ As *Prometheus I* noted, 373 F.3d at 398, no party appealed the FCC’s determination that newspaper/broadcast combinations do not harm competition.

Quality of TV Programming, Ownership Study 3 (July 2007), at 23 (JA____).

- Examination of approximately 1700 stations' programming from 2002 and 2005 showed that cross-owned stations provided 11 percent (18 minutes) more news programming daily than other stations. Daniel Shiman, *The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming*, Ownership Study 4.1 (July 2007), at I-1 (JA____).

The FCC properly rejected other studies reaching different conclusions due to problems with their econometric techniques.²⁸ Thus, the record overwhelmingly demonstrated that cross-ownership advances localism.

3. Diversity.

The FCC's analysis included no substantial evidence that the NBCO Rule actually promotes diversity. For example, Ownership Study 6 concluded that the NBCO Rule reduces localism while providing no corresponding benefits in terms of viewpoint diversity. *See* Ownership Study 6, at 20, 28-30. Moreover, as the *2008 Order* acknowledged, there was extensive evidence that cross-owned combinations voiced diverse viewpoints on particular issues.²⁹ The FCC even *acknowledged* that it could not accurately assess the impact of cross-ownership and new media outlets on viewpoint diversity:

²⁸ *2008 Order* ¶¶ 44, 45 (JA____).

²⁹ *2008 Order* ¶ 49 n. 168 (JA____). *See also* MG 2006 Comments at 34-35 (JA____) (documenting that different news and information platforms within cross-owned properties endorsed different candidates in multiple elections).

We are not in a position to conclude that ownership can never influence viewpoint. Nor are we in a position to quantify nontraditional media outlets' contribution to diversity. . . .

2008 Order ¶ 49 (JA____).

Faced with this absence of empirical data to support the proposition that the NBCO Rule actually furthers dissemination of diverse viewpoints, the FCC retreated to a predictive judgment reminiscent of the *1975 Order*: “We continue to believe that some restrictions on cross-ownership are necessary to protect diversity.” *Id.* ¶ 47.

Thirty-five years have now passed, and the time for unsupported predictive judgments is long gone. The FCC has failed to offer any *evidence* to support its conclusion that the NBCO Rule advances the public interest. After more than three decades and Congress' directive in § 202(h) requiring an FCC determination that the rule is in the public interest, much more is required to pass arbitrary and capricious review. This Court should no longer countenance the FCC's perpetual failure to justify the NBCO Rule with evidence and vacate it. In the absence of hard, quantifiable evidence that the NBCO Rule *promotes* the FCC's diversity goal, the FCC's action must be considered arbitrary and capricious. *Prometheus I*, 373 F.3d at 409 (predictive judgments must be “undergird[ed]” with “evidence”).

B. The 2008 Order Is Arbitrary and Capricious Because Its Reformulation of the NBCO Rule Dismissed Overwhelming Record Evidence That Alternative Media Outlets Contribute to Diversity.

The *2008 Order* is arbitrary and capricious because it ignored the overwhelming record evidence establishing that the Internet and other new media sources have become outlets for diverse viewpoints in the years since the *2003 Order*. The FCC refused to acknowledge the Internet as a major media voice when retaining the NBCO Rule and excluded this and other new media outlets in defining the eight voices waiver test for the top-20 markets. *See 2008 Order* ¶ 59.

These decisions were arbitrary and capricious because they “[ran] counter” to the evidence before the FCC. *Natural Res. Def. Council*, 790 F.2d at 297-98. Although six years ago in *Prometheus I*, 373 F.3d at 406, this Court questioned the importance of the Internet as a source of local news, the record before the FCC on remand conclusively demonstrated that the Internet now makes a major contribution to new and diverse sources of information, a contribution that has only grown since that record was compiled:

- Independent Media Center websites, which this Court cited as an example of sources serving as aggregators and distillers of local information over the Internet, *see Prometheus I*, 373 F.3d at 407, had increased seven-fold to reach 62 markets as of December 2007. *See MG 12/07 Comments* at 22 n.67 (JA____).
- The Internet is becoming an increasingly important news source with 50 million adults checking the news online during a

typical day. MG 2006 Comments at 51 (JA____) (*citing* John B. Horrigan, *Online News: For Many Home Broadband Users, the Internet is a Primary News Source* (2006), at 1).³⁰

- The websites for traditional media companies include fresh local news content that is not otherwise available through those traditional outlets. *Reply Comments of the Nat'l Ass'n of Broadcasters*, MB Docket No. 06-121 (Jan. 16, 2007), at 23-24 (JA____).
- Independent websites delivering local news have proliferated. *Id.* at 25 (JA____) (“the New York market *alone* has at least 55 locally-oriented news websites, only a handful of which are affiliated with traditional media . . . [the] Charlotte market . . . has more than a dozen such locally oriented news websites.”).³¹
- Owners of cross-owned media properties have observed competing independent websites offering local news and content in smaller communities. MG 2006 Comments at 53-55 (JA____).

The FCC, however, in refusing to consider the impact of other media outlets on diversity simply cited studies indicating that consumers continue to rely on newspapers and broadcast stations as sources of local news. *2008 Order ¶ 57* (JA____). Media General does not dispute that traditional media outlets continue

³⁰ Mr. Horrigan recently authored an FCC Omnibus Broadband Initiative study, showing that by late 2009, over 75 percent of adult Internet users reported accessing community or local news online. John B. Horrigan, *Broadband Adoption and Use in America*, OBI Working Paper No. 1 (Feb. 2010) (“*FCC OBI No. 1*”), at 16, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296442A1.pdf (last visited May 13, 2010).

³¹ The FCC’s website includes a study that documents the thousands of independent local news Internet sites available around the nation. *See McLellan’s List of Best Local and Microlocal News Sites*, *available at* <http://reboot.fcc.gov/futureofmedia/blog?entryID=391366> (last visited May 13, 2010).

to be important sources of local news, but that fact does not warrant dismissing altogether the contribution new media outlets make.

In light of the overwhelming new evidence of the development of the Internet as a source of new and diverse information, the FCC's continued exclusion of it as a source of viewpoint diversity does not pass arbitrary and capricious review. *See Natural Res. Def. Council*, 790 F.2d at 297-98 (decision that is "counter to the evidence" must be vacated).

C. The Presumptions Adopted in the 2008 Order Are Themselves Arbitrary and Capricious.

While a federal agency is typically due some deference in its determination of where to draw a particular line, that discretion is not unfettered: "[W]hen an agency has engaged in line-drawing determinations . . . its decisions may not be 'patently unreasonable' or run counter to the evidence before the agency." *Prometheus I*, 373 F.3d at 390 (citation omitted). This Court will "not affirm" agency action when a line is drawn in a "seemingly inconsistent manner." *Id.* at 411.

The 2008 Order created a very limited presumption that cross-ownership was in the public interest and a negative presumption that it was not in the vast majority of markets. As demonstrated below, in doing so, it arbitrarily and capriciously drew three lines: that combinations would be presumptively permitted (1) only in the largest 20 markets; (2) when the combination is between

a newspaper and a television station, only if the television station is not ranked among the top four stations in the DMA; and (3) when the combination is between a newspaper and a television station, only if at least eight independent “major media voices” – defined in a very limited way – remain in the DMA. *2008 Order* ¶ 53 (JA____).

1. The 2008 Order’s Adoption of a Presumption Favoring Relief from the NBCO Rule in Only the Top-20 Markets Is Arbitrary and Capricious.

As established below, in creating a presumption disfavoring newspaper/broadcast cross-ownership in all but the largest 20 markets, the FCC adopted a rule that is contrary to its own precedent, unsupported by the record, and inexplicably imposes a more restrictive regime than the *2003 Order*, which would have permitted combinations in the top-170 markets. Given the FCC’s own documented conclusion that the NBCO Rule affirmatively damages its policy goal of localism, the FCC’s presumption favoring combinations in only the top-20 markets is simply irrational.

First, the *2008 Order’s* imposition of a presumption based on the size of the relevant market violates the FCC’s own precedent and is therefore arbitrary and capricious. In *1999*, in considering the radio/television cross-ownership rule, the FCC acknowledged that line drawing based on market size less accurately advanced the FCC’s own policy goals than a rule based on the number of media

outlets in a particular market.³² In removing the market size restriction as unnecessary, it stated:

[A] rule based on the number of independent voices more accurately reflects the actual level of diversity and competition in the market. As a number of commenters in this proceeding noted, *a market-size restriction is unnecessary for purposes of competition and diversity as long as there are a minimum number of independent sources of news and information available to listeners, and a minimum number of alternative outlets available to advertisers*

1999 Local Television Order ¶ 107 (emphasis added) (footnotes omitted).

Despite this finding, the *2008 Order* resurrects a market-size restriction without explaining why prior reliance on actual competition and diversity in a market was no longer sufficient in a very similar cross-ownership context. The FCC's failure to do so is arbitrary and capricious. *See Jupiter Energy Corp. v. FERC*, 482 F.3d 293, 298 (5th Cir. 2007) (failure to "articulate reasons" for change in policy rendered change arbitrary and capricious).

Second, there is no basis in the record for the FCC's proffered distinction between the 20 largest and all other markets. The studies in this record examining the impact of the NBCO Rule include no indication that the results were dependent on market size. Indeed, the evidence demonstrated that the NBCO Rule is

³² *Review of the Commission's Regulations Governing Television Broadcasting*, 14 F.C.C.R. 12,903, ¶ 107 (1999) ("*1999 Local Television Order*").

unnecessary even in small markets.³³ In the *2008 Order*, the FCC even conceded that its line drawing was arbitrary:

We admit that it is not possible to draw with mathematical precision the line that should separate those largest media markets where the positive presumption should apply from those smaller markets where it should not.

2008 Order ¶ 55 (JA____). Without *evidence* to support its line drawing based on market size, the *2008 Order* is arbitrary and capricious. *See Natural Res. Def. Council*, 966 F.2d at 1306 (“no deference” due to line-drawing where “EPA provided no data to justify” it).

Third, the FCC *admitted* that it drew a line based on a single factor, the number of commercial television stations in larger markets, a determination that impermissibly excludes radio and non-broadcast media. *See Sinclair*, 284 F.3d at 165. The FCC had created an exception to the duopoly rule, which otherwise prohibits media companies from owning multiple television stations in a local market, if after consolidation there would remain “eight independently owned, full-power and operational television stations,” concluding that combinations in such markets would not harm diversity. *Id.* at 155. In *Sinclair*, the D.C. Circuit held that this exception was fatally flawed because the FCC had failed to include the

³³ *See, e.g., Comments of Nat’l Ass’n of Broadcasters*. MB Docket No. 06-121 *et al.* (Oct. 23, 2006), at 63-64, 94-97 (JA____); MG 2006 Comments at App. 11-14 (JA____).

types of “voices” that it had found appropriate for inclusion in its simultaneous revision of the radio/television cross-ownership rule. For that rule, the FCC in 1999 adopted a “voices” test that counted, by market, four types of voices:

- independently owned and operating full-power commercial and noncommercial television stations;
- independently owned and operating commercial and noncommercial radio stations;
- independently owned daily newspapers published in the market that attain five percent or greater circulation; and
- cable systems, although the number was frozen at one.

1999 Local Television Order ¶ 111.³⁴

The D.C. Circuit found the difference in approach between the duopoly rule and the radio/television cross-ownership rule unacceptable:

Having found for purposes of cross-ownership that counting other media voices ‘more accurately reflects the actual level of diversity and competition in the market’ . . . the Commission never explains why such diversity and competition should not also be reflected in its definition of ‘voices’ for the local [television] ownership rule.

Sinclair, 284 F.3d at 164. The court reversed, holding that the FCC had “failed to demonstrate that its exclusion of non-broadcast media from the eight voices exception is ‘necessary in the public interest’ under § 202(h) of the 1996 Act.” *Id.* at 165.

³⁴ This revision liberalized the FCC’s earlier 1989 radio/television cross-ownership rule by adding newspapers and cable “because we believe that such media are an important source of news and information on issues of local concern.” *Id.* ¶ 113.

The *2008 Order* made the same error. The then-FCC Chairman candidly admitted to Congress that he drew the line at the top-20 markets based on the number of television broadcast stations in the market and without regard to the presence of any other type of media outlet:

[T]he main reason that I drew it, it was a natural breaking point if you looked at the number of commercial owners for television stations in the top DMAs.

Oversight of the Fed. Commc'ns Comm'n: Hearing of the Telecomms. and the Internet Subcommittee of the House Comm. on Energy and Commerce (Dec. 5, 2007) (LEXIS, Federal News Service), at 21. The complete omission of other all media is contrary to *Sinclair* and is arbitrary and capricious. *See Sinclair*, 284 F.3d at 165.

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

The *2008 Order* provides that, to be eligible for the presumption favoring a waiver of the NBCO Rule, a television station may not be among the top four stations in the DMA. The FCC's rationale for imposing the "top-4" restriction is arbitrary and capricious. The *2008 Order* relied on this Court's approval of a top-4 restriction in the *local television ownership rule*. *See 2008 Order* ¶ 61 (JA____) (citing *Prometheus I*, 373 F.3d at 416). But the basis for this Court's approval of that restriction was the FCC's concern about the loss of competition *among* top-4

television providers in a DMA. In light of the *2003 Order*'s and the *2008 Order*'s conclusion that newspapers and broadcast stations do not compete in any relevant market,³⁵ the FCC's rationale applied to the NBCO Rule makes no sense. Because there was no "rational connection between the facts found and the choice" the FCC made, its action was arbitrary and capricious. *State Farm*, 463 U.S. at 43 (citation omitted).

3. The 2008 Order's Definition of "Major Media Voices" Is Fatally Flawed.

In specifying when a presumptive waiver of the NBCO Rule is available, the *2008 Order* provides that at least "eight independent 'major media voices' [must] remain in the DMA . . ." *2008 Order* ¶ 53 (JA____). The *2008 Order* defined "major media voices as full-power commercial and noncommercial television stations and major newspapers." *Id.* ¶ 57 (JA____).

However, as was true in the former Chairman's justification of his top-20 line drawing, the inconsistent exclusion of certain media platforms – such as radio and cable – from this presumption while including these same platforms as "major media voices" for the purpose of other FCC rules renders the presumptive waiver formulation arbitrary and capricious. *Prometheus I*, 373 F.3d at 411 (when line is drawn in a "seemingly inconsistent manner," action is arbitrary and capricious).

³⁵ *2008 Order* ¶ 39 n.131 (JA____).

III. The NBCO Rule Violates The First Amendment.

Over forty years ago, long before the Internet, when cable was in its infancy, and the transition to digital television was decades away, the Supreme Court issued the *Red Lion* decision. In *Red Lion*, the Supreme Court sharply limited judicial review of broadcast regulation under a theory of broadcast “scarcity,” holding that restrictions on broadcast speech were subject only to rational basis review generally applicable to government regulation of non-communicative economic activity. *See* 395 U.S. at 386-90. The “scarcity” theory was based on the premise that broadcast spectrum, which at the time of *Red Lion* was one of only two means of mass communication (along with newspapers), is a “scarce resource” because “there are substantially more individuals who want to broadcast than there are frequencies to allocate.” *Id.* at 388, 391. The *Red Lion* Court acknowledged in 1969, however, that technological advances might render the scarcity doctrine obsolete, and therefore rested its holding on “the *present* state of commercially acceptable technology.” *Id.* at 388 (emphasis added).

Nine years later, the Supreme Court applied *Red Lion*’s scarcity rationale in analyzing the FCC’s 1975 adoption of the NBCO Rule. *NCCB*, 436 U.S. 775. In particular, the Court acknowledged that the evidence was “inconclusive” as to whether the ban would promote the FCC’s “hoped-for” viewpoint diversity, but accepted at face value the FCC’s prediction that “[i]ncreases in diversification of

ownership would *possibly* result in enhanced diversity of viewpoints.” *Id.* at 786, 796-97 (emphasis added).

As demonstrated below, under well-established Supreme Court and Third Circuit precedent, given the dramatically different facts now in existence and the content-based nature of the waiver provisions, *NCCB* does not foreclose this Court’s consideration of the continued vitality of the scarcity doctrine, particularly as applied to Media General. When the appropriate non-deferential standard is applied, it is apparent that the NBCO Rule must be declared unconstitutional.

A. *NCCB* Does Not Foreclose This Court’s Review of the Scarcity Doctrine.

1. The Constitutionality of the Scarcity Doctrine May Be Challenged If the Facts Upon Which It Was Based Have Changed.

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., 304 U.S. 144, 153 (1938). This Court has itself reconsidered the constitutionality of statutes and regulations based on changed factual circumstances. *See New Jersey Citizen Action v. Edison Twp.*, 797 F.2d 1250, 1260 (3d Cir. 1986) (finding ordinances regulating solicitation

unconstitutional and distinguishing an earlier case in which the ordinances had been upheld).³⁶

Here, the *NCCB* court could not have intended to exempt its decision from decades of well-established precedent that permit constitutional challenges based on changed circumstances without an explicit statement that the *Carolene Products* principle should not apply. This is particularly true in First Amendment challenges, since the Supreme Court has repeatedly held that loss of First Amendment freedoms “for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1974).

2. Radically Different Facts Surround the Media Marketplace Today Than When *Red Lion* Was Decided.

The dramatic changes in the media landscape eliminate any possible “scarcity” justification for continuing to infringe on broadcasters’ and newspaper owners’ First Amendment rights on two levels. First, today the broadcast spectrum itself is not characterized by physical scarcity, even if that characterization could have been sustained 40 years ago. Technological advances have continually increased the amount of broadcast spectrum available.³⁷

³⁶ See also *Reid v. Covert*, 354 U.S. 1, 51 (1957) (same); *Abie State Bank v. Weaver*, 282 U.S. 765, 772 (1931) (same); *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-58 (1924) (Holmes, J.) (same).

³⁷ See, e.g., John W. Berresford, *The Scarcity Rationale For Regulating Traditional Broadcasting: An Idea Whose Time Has Passed* (March 2005) (“Media

In 1969, the year *Red Lion* was decided, nationally there were 7,411 full-power television and radio stations, each delivering only one stream of programming.³⁸ In 2003, when *Prometheus I* was decided, there were 15,296 full-power television and radio stations, most still delivering only one stream of programming.³⁹ Today, as a result of the DTV transition that was completed in 2009 and the advent of digital or HD-radio, there are 16,202 stations, but with the ability to deliver up to 133,180 programming streams.⁴⁰

On the second level, it no longer makes sense to focus on the broadcasting medium in isolation. Broadcast scarcity was relevant in *Red Lion* and *NCCB* only because the limited number of frequencies then available restricted the number of voices that could be heard on what were then the only electronic media of mass communication. Broadcasters no longer are the sole or even the dominant providers of video and audio programming. A citizen in an average American city in 1975 had access to three television stations, a handful or so of commercial radio stations, and a couple of daily newspapers. There was no Internet, little cable

Bureau Paper”), at 11 (“scarcity is not an inherent barrier”); *Syracuse Peace Council*, 2 F.C.C.R. 5043, ¶¶ 62-82 (1987); Christopher S. Yoo, *The Rise & Demise of the Technology-Specific Approach to the First Amendment*, 91 Geo. L.J. 245, 279 (2003) (“Yoo”) (“[T]echnological progress has steadily expanded the range of the electromagnetic spectrum available for commercial use.”).

³⁸ *Media Bureau Paper* at 13 & n.69.

³⁹ See Chart, *infra*.

⁴⁰ *Id.*

television, no satellite television or radio, no digital television or HD radio, and no consumer broadband or wireless services. Today, consumers have access to all these sources of news and information, including literally thousands of channels of information through the Internet alone:

More new content is available on the Internet, of course – billions of web pages The Internet also makes available, at any time and any place, including schools and libraries, content such as newspapers, magazines, radio stations and TV programs that were previously available only in small areas, or to small numbers of subscribers, or at certain times. . . .

Media Bureau Paper at 16-17. Indeed, most Americans do not even receive their broadcast programming for free through reception of over-the-air signals, but instead through subscription services such as cable and satellite systems. *See Yoo, supra*, at 279-80 & nn.177-79. In addition, it is now increasingly common to watch video news or listen to the audio over the Internet. *See 2010 Pew State of Media, supra* n.11, Online, Summary Essay at 1 & Audio, Summary Essay at 1.

The following chart summarizes these changes:

Chart Summarizing Media Growth

	1970	2003	2009
Number of full-power television stations ⁴¹	875	1,733	1,782
Number of possible television channels ⁴²	875	1,733	17,820
Number of full-power radio stations ⁴³	6,751	13,563	14,420
Number of possible radio channels ⁴⁴	6,751	13,563	115,360
Estimated cable & satellite subscription rate	7.5% ⁴⁵	88% ⁴⁶	86% ⁴⁷
Estimated broadband Internet subscription rate	0%	15% ⁴⁸	67% ⁴⁹
Estimated average number of satellite television channels	0	150 ⁵⁰	367 ⁵¹
Estimated number of broadband Internet sites	0	46M ⁵²	234M ⁵³

⁴¹ FCC, Broadcast Station Totals for Jan. 1970 (rel. Feb. 10, 1970), as of Dec. 31, 2003 (rel. Feb. 24, 2004), and as of Dec. 31, 2009 (rel. Feb. 26, 2010).

⁴² A digital TV channel can transmit up to 10 multicast signals. *See, e.g., Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 F.C.C.R. 12809, ¶ 20 (1997); *Comments of NAB & MSTV*, GN Docket No. 09-51 (Dec. 22, 2009) at 10.

⁴³ *Supra*, n.42.

⁴⁴ A digital FM channel can transmit up to 8 multicast signals. *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, 22 F.C.C.R. 10344, ¶ 36 n.62 (2007).

⁴⁵ Cable only in 1970. *Television Factbook, 1970-1971 Edition/No. 40, Services Vol.* at 66-a, 84-a (Mary Appel ed., Television Digest, Inc. 1970).

⁴⁶ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 F.C.C.R. 1606 (App. B) (2004).

⁴⁷ *FCC OBI No. 1*, at 13.

⁴⁸ John B. Horrigan, *Home Broadband Adoption 2006* (2006), at 2, available at <http://www.pewinternet.org/Reports/2006/Home-Broadband-Adoption-2006.aspx> (last visited May 17, 2010).

⁴⁹ *Supra*, n.48.

⁵⁰ *Comments of Media General*, MB Docket No. 02-277 (Jan. 2, 2003) at App. 9 (JA___).

⁵¹ Dish Network, *America's Everything Pak*, <http://www.dishnetwork.com/packages/detail.aspx?pack=AEP> (452 channels) & DirecTV, *Premier Package Lineup*, <http://www.directv.com/DTVAPP/compare/printablePackageChannels.jsp?packageId=960014> (last visited May 12, 2010) (282 channels).

To talk of broadcast “scarcity” under these circumstances is simply an oxymoron. This Court should recognize that the scarcity doctrine, like the emperor in the Hans Christian Anderson tale who wears no clothes, embraces a total fiction.

3. Congress and the FCC Have Given Numerous “Signals” That the Scarcity Doctrine Should Be Reevaluated.

Separate from the invalidity of the scarcity doctrine, the Supreme Court itself has provided an independent basis to undertake review of the doctrine: it long ago suggested that the scarcity rationale could be revisited upon “some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.” *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 376 n.11 (1984). Both Congress and the FCC have provided such unmistakable “signals” that the doctrine may be revisited.

First, Congress clearly spoke when it dramatically scaled back most existing media ownership regulations and directed the FCC, every two (now four) years, to review its ownership rules (including the NBCO Rule) to determine whether they remain “necessary in the public interest as the result of competition.” Telecomms.

⁵² Netcraft, *December 2003 Web Server Survey*, http://news.netcraft.com/archives/2003/12/02/december_2003_web_server_survey.html (last visited May 12, 2010).

⁵³ Netcraft, *December 2009 Web Server Survey*, http://news.netcraft.com/archives/2009/12/24/december_2009_web_server_survey.html.

Act § 202(h). Moreover, *NCCB* had grounded the FCC’s authority to regulate viewpoint diversity in part on the FCC’s role in “choos[ing] among applicants for the same facilities.” *See NCCB*, 436 U.S. at 802. That role has now disappeared because Congress has mandated that such broadcast licenses are to be awarded by auction to the highest bidder.⁵⁴

Second, the FCC has also sent an explicit “signal” that the scarcity doctrine should be jettisoned. Over 20 years ago, the FCC surveyed the development of alternative information sources and concluded that:

[T]he scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press.

Syracuse Peace Council ¶ 65.

Finally, numerous courts have likewise recognized that the scarcity doctrine has long since outlived its usefulness. *See, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. ___, 29 S.Ct. 1800, 1820, 1822 (2009) (Thomas, J., concurring) (noting “questionable viability” of scarcity doctrine); *Telecomm. Research & Action Ctr. v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986) (“*TRAC*”) (Bork, J.) (criticizing scarcity doctrine); *Action for Children’s Television v. FCC*, 58 F.3d 654, 675 (D.C. Cir. 1995) (Edwards, C.J., dissenting) (“notion of spectrum scarcity” is indefensible).

⁵⁴ 47 U.S.C. § 309(j).

4. The FCC Could Not Rationally Rely on the Scarcity Doctrine To Support Its Conclusion That the NBCO Rule Was Constitutional.

NCCB also does not foreclose this Court's review of the FCC's reliance on the scarcity doctrine to support the constitutionality of NBCO Rule for a related, but independent reason: the FCC's reliance on that doctrine was arbitrary and capricious in light of the record before it. Even if this Court were to accept *NCCB* as binding precedent, that case does not require the FCC to retain the NBCO Rule. The FCC has an independent duty to determine that its reliance on the scarcity doctrine was reasonable. It would be "arbitrary and capricious if [the Commission] refused to reconsider [its cross-ownership rule] in light of persuasive evidence that the scarcity rationale is no longer tenable." *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998).

In the *2008 Order*, the FCC made no effort to determine whether the scarcity rationale was grounded in fact, despite acknowledging 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____). Instead, the FCC simply stated that this Court had concluded that the *2003 Order* was constitutional. *Id.* ¶ 16 n.58 (JA____). The FCC's refusal to undertake an inquiry regarding the continued viability of the scarcity doctrine in the *2008 Order* renders the *2008 Order* arbitrary and capricious. *State Farm*, 463 U.S. at 43 ("an

agency rule would be arbitrary and capricious if the agency has . . . failed to consider an important aspect of the problem”).

B. Regardless of the Scarcity Doctrine, the NBCO Rule Is Subject to Heightened Scrutiny Because It Is Content-Based.

Separate from the grounds set forth above, the NBCO Rule must be subject to heightened judicial scrutiny because it is content-based. If the objective of a statute or regulation necessarily relates to the *content* of the relevant speech, then it is not “justified without reference to the content of the regulated speech,” and is therefore content-based. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also Turner Broad. System, Inc. v. FCC*, 512 U.S. 622, 658 (1994) (“*Turner I*”) (regulation content-based if “concerned with the communicative impact of the regulated speech”).

Under settled law, government restrictions based on the content of speech—no matter how benign their motivation—are subject to heightened First Amendment scrutiny. *See, e.g., United States v. Stevens*, 533 F.3d 218, 232 (3d Cir. 2008), (“A content-based restriction on speech is ‘presumed invalid’”) (citation omitted), *aff’d*, 559 U.S. ___, 130 S.Ct. 1577 (2010). The NBCO Rule is content based under these principles for two reasons.

First, the new waiver provisions the *2008 Order* grafted onto the NBCO Rule are content-based. The *2008 Order* provides that the “negative presumption”

will be “reversed,” for instance, when “a proposed combination results in a new source of a significant amount of *local news* in a market.” *2008 Order* ¶ 67 (JA____) (emphasis added). In “rebutting” the presumption, the FCC specified that it would examine increases in local news as well as “whether each affected media outlet in the combination will exercise its own *independent news judgment*.” *Id.* ¶ 68 (JA____) (emphasis added). An assessment of what constitutes “local news” or “independent news judgment” requires the FCC to analyze the editorial and journalistic decisions of media owners. Thus, these provisions cannot be “justified without reference to the content of the regulated speech,” and are content-based. *Ward*, 491 U.S. at 791 (1989).

These provisions pose serious threats to First Amendment freedoms by intruding into the discretionary newsgathering and editorial judgments of newspapers and broadcasters. The FCC has not only allotted to itself the power to determine what constitutes “local news,” but also how much coverage of it is sufficient. Its foray into whether newspapers and broadcasters are exercising “independent news judgments” presents an even more dangerous threat to First Amendment freedoms. Which candidates for which political races warrant coverage? Which ballot initiatives should receive more or less coverage? If a newspaper or a television station endorses one or the other, is it exercising sufficiently independent news judgment? If the FCC does not like a newspaper’s

or a television station's response to these questions, it has unparalleled discretionary power to deny a waiver. Imbuing a governmental agency with such power is antithetical to the First Amendment and is simply unprecedented. *See, e.g., League of Women Voters*, 468 U.S. at 378 (invalidating statute that imposed content-based editorial restrictions on broadcasters' speech, noting "broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public duties"). *NCCB* did not address even remotely similar provisions, and it therefore it presents no bar to this Court's consideration of the content-based nature of the FCC's waiver presumptions.

Second, the FCC has specified that the whole point of the NBCO restrictions is to enhance "localism" and "diversity" in broadcasting. *See 2008 Order* ¶ 9 (JA____). Because these objectives necessarily relate to the *content* of the relevant speech, they are likewise not "justified without reference to the content of the regulated speech," and are hence content-based.⁵⁵

⁵⁵ A contrary result blurs the line between *content* and *viewpoint* neutrality. While the NBCO Rule may not be intentionally targeted at the viewpoint of speech, that does not mean it is not targeted at the content of speech and does not immunize it from heightened scrutiny. *See, e.g., Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular *viewpoints*, but" also to regulations seeking "to restrict expression because of its message, its ideas, *its subject matter, or its content.*") (emphasis added) (internal quotation omitted); *Busch v. Marple Newtown School Dist.*, 567 F.3d 89, 102 (3d Cir. 2009) (Hardiman, J., concurring in part and dissenting in part) (same).

C. The NBCO Rule Violates the First Amendment by Restricting Speech and Speakers.

The NBCO Rule singles out newspaper owners for especially onerous restrictions and suppresses their broadcast speech in favor of the speech of non-newspaper licensees. As a result, such a restriction must be evaluated under the strict scrutiny standard. *See Citizens United v. FEC*, 558 U.S. ___, 130 S. Ct. 876, 921 (2010) (Alito, J., concurring) (“restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”) (internal punctuation omitted); *Minneapolis Star and Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 583 (1983) (concluding that a regulation that singles out the press imposes a “heavier burden of justification on the State”).

That standard requires the Commission to show that its ownership restrictions are the “*least restrictive means [available of achieving] a compelling [state] interest.*” *Sable Commc’ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989) (emphasis added). “[I]t is the rare case in which . . . a law survives strict scrutiny.” *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

The NBCO Rule cannot withstand challenge under this standard. First, as *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 355 (D.C. Cir. 1998), held, “it is impossible to conclude that the government's interest [in diversity of

programming], no matter how articulated, is a compelling one.”⁵⁶ Second, a nationwide cross-ownership restriction with waivers possible as a practical matter only in the top-20 markets is obviously not the “least restrictive means” available of achieving the purported compelling state interest. *Sable Commc’ns*, 492 U.S. at 126. Indeed, as noted above, the FCC has itself rejected the notion of market size 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” *1999 Local Television Order* ¶ 107 (footnotes omitted).

D. The NBCO Rule As Applied To Media General Violates Its First Amendment Rights.

Although the FCC’s apparent reliance on the scarcity doctrine to justify retention of the NBCO Rule in the *2008 Order* and insulate it from appropriate review is invalid on its face, the FCC also improperly took advantage of the doctrine to justify applying restrictions to Media General’s cross-owned newspaper and broadcast properties. As a result, this Court should conclude that the NBCO Rule is invalid “as-applied” to Media General and therefore any restrictions on Media General’s rights should be subject to strict scrutiny.

It is well-established that a Supreme Court decision upholding a statute against a facial challenge does not constitute precedent barring later “as-applied”

⁵⁶ Indeed, the word “diversity” is not mentioned in the statutory sections in Title III of the Communications Act that govern commercial broadcasting.

challenges. *See Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005).⁵⁷ When a law imposes restrictions of any type, including operational or financial restrictions, upon a segment of the media, the government bears a “heavy burden” to justify the restriction. *Minneapolis Star*, 460 U.S. at 588, 592-93 (invalidating tax on newsprint because of the “possibility of subsequent differentially *more burdensome* treatment” on newspapers); *Pitt News v. Pappert*, 379 F.3d 96, 112 (3d Cir. 2004) (same).

The 2008 Order’s licensing-related decisions impose restrictions on Media General’s speech activity. While the FCC granted Media General “permanent” waivers of the NBCO Rule with respect to its cross-owned properties in three markets, *see 2008 Order* ¶ 77 (JA_____), the 2008 Order retained restrictions on Media General’s continued ownership of those properties. In particular, the FCC rules governing those “permanent” waivers keep them from being, in reality, “permanent,” and bar Media General from selling those cross-owned properties together. *See* 47 C.F.R. § 73.3555(d), Note 4. Media General had sought to own the broadcast licenses free from restriction.

The application of any restriction on Media General’s speech in its markets is invalid. The record before the FCC, with respect to each of the markets for

⁵⁷ The constitutional challenge in *NCCB* necessarily was “facial” because it addressed the “prospective ban,” *NCCB*, 436 U.S. at 801.

which Media General received a waiver, demonstrated overwhelmingly that independent media outlets were anything but scarce. In an extensive two-inch thick volume of the comments Media General filed in the 2006 Quadrennial Review proceeding, it catalogued – service by service, outlet by outlet – the various media serving each of the communities for which it received a waiver.⁵⁸ For instance, the introductory summary sheets showed that the residents of the Tri-Cities DMA, as of 2006, received a total of seven full-power television signals, six television “translators,” at least 42 radio stations, two low-power FM radio stations, 55 cable systems, six daily newspapers, at least 19 weekly newspapers or newspapers of varying frequency, and hundreds of Internet sites, tallies which have doubtlessly grown in the intervening years.⁵⁹ The broadcast outlets and daily newspapers alone are owned by over 40 different entities.⁶⁰ This multiplicity of outlets and owners was repeated in the data that Media General supplied for each of the other markets for which it received a “permanent” waiver.⁶¹ On these facts, the FCC could not constitutionally apply the NBCO Rule to Media General.

⁵⁸ MG 2006 Comments at Vol. 3, App. 11-13 (JA____).

⁵⁹ *Id.* at App. 11 (JA____).

⁶⁰ *Id.*

⁶¹ *Id.* at App. 12-13 (JA____).

IV. The NBCO Rule Violates Broadcasters' Fifth Amendment Right to Equal Protection.

The NBCO Rule violates the equal protection component of the Fifth Amendment's Due Process Clause because it singles out and subjects owners of newspapers to restrictions on speech that do not apply to other speakers protected by the First Amendment. Under settled law, government restrictions that "single out the press, or certain elements thereof," for differential treatment "pose a particular danger of abuse by the State" that require heightened scrutiny under the equal protection component of the Fifth Amendment. *Turner I*, 512 U.S. at 640-41; see *Pitt News*, 379 F.3d at 110-11 (same). Indeed, the Supreme Court has recently held that "constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker" should not be drawn. *Citizens United*, 130 S. Ct. at 891.

Newspapers are now the *only* non-broadcast medium subject to broadcast cross-ownership restrictions.⁶² Thus, for example, a cable company may buy a broadcast station even where a newspaper may not.⁶³ Such differential regulation

⁶² For example, cable companies can own broadcast stations and vice versa, and newspapers can own cable systems and vice versa, as Cablevision Systems Corporation demonstrated in July 2008 when it acquired approximately 97 percent of the publisher of Long Island's *Newsday*. 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).

⁶³ See *Fox I*, 280 F.3d at 1053 (vacating cable/broadcast cross-ownership rule).

is “presumptively unconstitutional” and “places a heavy burden on the [government] to justify its action.” *Minneapolis Star* 460 U.S. at 585, 592-93.

In *NCCB*, the Supreme Court upheld the FCC’s 1975 adoption of the NBCO Rule against an equal protection challenge principally because “the regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communications were already treated under the [FCC’s] multiple-ownership rules,” which then restricted cross-ownership of television and radio stations. 436 U.S. at 801. In other words, as of 1978 the only “major media of mass communication” were television, radio and newspapers, and the Court found that newspapers were not impermissibly singled out because similar prohibitions applied to owners of radio and television stations. Neither of these predicates is true today.

First, although newspapers are singled out as the only non-broadcast medium subject to a broadcast cross-ownership ban, it is no longer true that newspapers are the only non-broadcast “major medi[um] of mass communications.” *NCCB*, 436 U.S. at 801. As described in detail above (*see* Statement of Facts, Section D., *supra*), during the intervening 35 years, new and powerful major media have arisen that are indisputably “major media of mass communication” – most of which did not even exist in 1975 – including cable television systems, cable and broadcast networks, Internet sites and delivery

services, satellite programmers and system operators, and programming studios. Second, in sharp contrast to the extensive restrictions imposed upon owners of newspapers, *no* restrictions on acquisition of television or radio stations (or newspapers) apply to *any* of these other companies in *any* market.

Nothing in *NCCB* precludes this Court from performing its duty to review the established facts and apply the law to those facts. To the contrary, as noted above, under a long line of Supreme Court cases, “the 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.” *Carolene Prods.*, 304 U.S. at 153; *see Jones v. Brown*, 461 F.3d 353, 363 (3d Cir. 2006) (applying *Carolene Prods.*). Enshrining the Supreme Court’s *NCCB* holding when the factual predicate upon which it rests has evaporated no longer makes sense. It would be akin to determining that this Court was precluded from revisiting a Supreme Court determination that speech at a certain location received no First Amendment protection because it was not a public forum, when the location had subsequently been dedicated to public use. Nothing suggests that the Supreme Court intended this result.

To pass Fifth Amendment scrutiny, discrimination among classes of speakers “must be tailored to serve a substantial government interest.” *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 99 (1972). Even content neutral regulations

that single out a medium must be “narrowly tailored to” and “no greater than is essential to furtherance” of a “substantial” government interest. *Id.* at 662. The FCC cannot meet this “heavy burden.” *Minneapolis Star*, 460 U.S. at 575, 585, 592-93.

First, any governmental interest in limiting speech to increase diversity of viewpoints could not meet this burden, because the “concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others” is constitutionally unacceptable. *Citizens United*, 130 S. Ct. at 904; *Buckley*, 424 U.S. at 48-49 (same).

Second, for similar reasons, the NBCO Rule is not “narrowly tailored” to further the asserted interest in diversity of views. *See, e.g., Turner I*, 512 U.S. at 662 (restriction on First Amendment freedoms must be “no greater than is essential to the furtherance of [a substantial government] interest”). The NBCO Rule is underinclusive, because it applies only to newspapers and not to other non-broadcast media. It is also overinclusive, because it precludes a newspaper publisher from owning a station even when that would increase the diversity of views presented to viewers. Indeed, because cross-ownership “may produce tangible public benefits in smaller markets in particular,” 2003 Order ¶ 350 (JA___), the NBCO Rule is entirely misdirected because it limits cross-ownership in only those smaller markets where the public interest benefits are potentially the

greatest. *Cf. id.* ¶ 453 (JA____) (“We recognize that, in any given market, the lines we draw here may appear under- or over-inclusive.”).

V. The NBCO Rule Should Be Vacated, Not Remanded Yet Again to the FCC.

This Court should vacate the NBCO Rule. In making this determination, one factor that guides a court is the “‘seriousness of the order’s deficiencies’” *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (internal quotations and citations omitted). In *Prometheus I*, this Court affirmed the FCC’s determination to repeal the NBCO Rule and remanded to the FCC for further consideration. After almost *four years*, the FCC inexplicably reversed course, reinstated the NBCO Rule, and imposed a more restrictive regulatory regime. In retaining the NBCO Rule without explanation, the FCC plainly disregarded this Court’s conclusion in *Prometheus I* that the Rule’s repeal was appropriate. The FCC has failed for over a decade to adopt reasonable restrictions on newspaper/broadcast cross-ownership, and it is unlikely to be able to justify the current iteration of these restrictions on remand. See *Fox I*, 280 F.2d at 1053 (vacating when “probability that the Commission would be able to justify” rule “is low”).

A second factor that a court should consider is whether vacatur “would be ‘disruptive,’” *Radio-Television News Dirs. Ass’n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999) (citation omitted), something that will not occur here. Vacatur would

not create disruption because all cross-ownership transactions will continue to be evaluated under the “public interest” standard of 47 U.S.C. §§ 309 and 310 and will continue to be subject to antitrust laws. *See Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009) (vacatur would not have disruptive consequences because antitrust laws would safeguard competition).

Instead of remanding again to an agency that has opined that this Court’s review would serve “little purpose,”⁶⁴ and risking more years of delay and further impermissible FCC action, this Court should vacate the NBCO Rule.

CONCLUSION

For the foregoing reasons, Media General respectfully requests that the 2008 *Order* be reversed and the NBCO Rule vacated.

George L. Mahoney
Media General, Inc.
333 East Franklin Street
Richmond, VA 23219

s/ Michael D. Hays
John R. Feore, Jr.
Michael D. Hays
M. Anne Swanson
DOW LOHNES PLLC
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036-6802
(202) 776-2000

Counsel for Media General, Inc.

⁶⁴ FCC’s Response to Order to Show Cause, Jan. 7, 2010, at 2.

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 13,995 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.

s/ Michael D. Hays

Michael D. Hays

Dow Lohnes PLLC

1200 New Hampshire, NW

Washington, D.C. 20036

Counsel for Media General, Inc.

CERTIFICATE OF COUNSEL

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

s/ Michael D. Hays _____

Michael D. Hays

Dow Lohnes PLLC

1200 New Hampshire, NW

Washington, D.C. 20036

Counsel for Media General, Inc.

CERTIFICATE OF SERVICE

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

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

<p>Austin C. Schlick Daniel M. Armstrong, III Jacob M. Lewis Joseph R. Palmore James M. Carr C. Grey Pash, Jr. Office of General Counsel Federal Communications Commission Room 8-A741 445 12 Street, S.W. Washington, DC 20554 <i>Counsel for the Federal Communications Commission</i></p>	<p>Catherine G. O’Sullivan Nancy C. Garrison Robert B. Nicholson Robert J. Wiggers United States Department of Justice Antitrust Division, Appellate Section 950 Pennsylvania Avenue NW Room 3224 Washington, DC 20530-0001 <i>Counsel for the United States of America</i></p>
<p>Andrew Jay Schwartzman Parul Desai Media Access Project Suite 1000 1625 K Street NW Washington, DC 20006 <i>Counsel for Prometheus Radio Project</i></p>	<p>Marvin Ammori Free Press 501 Third Street NW Suite 875 Washington, DC 20001 <i>Counsel for Free Press</i></p>

<p>Angela J. Campbell Andrienne T. Biddings Institute for Public Representation Georgetown University Law Center 600 New Jersey Avenue NW Suite 312 Washington, DC 20001-2075 <i>Counsel for Prometheus Radio Project, Media Alliance and Office of Communications of the United Church of Christ</i></p>	<p>Richard E. Wiley James R.W. Bayes Helgi C. Walker Kathleen A. Kirby Eve Reed Wiley Rein LLP 1776 K Street NW Washington, D.C. 20006 <i>Counsel for Newspaper Association of America, Belo Corp., CBS Broadcasting Inc., CBS Corp., Clear Channel Communications, Inc., Gannett Co., Inc., and Morris Communications Company, LLC</i></p>
<p>Carter G. Phillips James C. Owens, Jr. Mark D. Schneider James P. Young Sidley Austin LLP 1501 K Street NW Washington, D.C. 20005 <i>Counsel for Tribune Company and Fox Television Stations, Inc.</i></p>	<p>Elaine Goldenberg Jenner & Block LLP 601 Thirteenth Street NW Suite 1200 South Washington DC 20005-3823 <i>Counsel for National Association of Broadcasters</i></p>
<p>Robert A. Long, Jr. Enrique Armijo Covington & Burling LLP 1201 Pennsylvania Avenue NW Washington, DC 20004-2401 <i>Counsel for Coalition of Smaller Market Television Stations and Raycom Media, Inc.</i></p>	<p>L. Andrew Tollin Kenneth E. Satten Craig E. Gilmore Wilkinson Barker Knauer, LLP 2300 N Street, NW, Suite 700 Washington, DC 20037-1128 <i>Counsel for Bonneville International Corp. and The Scranton Times L.P.</i></p>

<p>Clifford M. Harrington Jack McKay Pillsbury Winthrop Shaw Pittman LLP 2300 N Street, NW Washington, DC 20037 <i>Counsel for Sinclair Broadcast Group, Inc., Sinclair Acquisitions, WRGT, WVAH and WTAT Licensee</i></p>	<p>Christopher Murray Consumers Union 1101 17th St. NW Suite 500 Washington, DC 20036 <i>Counsel for Intervenors Consumers Union and Consumer Federation of America</i></p>
<p>Glenn B. Manishin Duane Morris LLP 505 9th Street NW Suite 1000 Washington, DC 20004 <i>Counsel for Intervenors Consumers Union and Consumer Federation of America</i></p>	<p>John F. Sturm Newspaper Association of America 4401 Wilson Boulevard Suite 900 Arlington, VA 22203 <i>Counsel for Newspaper Association of America</i></p>
<p>*Jane E. Mago *Jerianne Timmerman National Association of Broadcasters 1771 N Street, NW Washington, DC 20036 <i>Counsel for National Association of Broadcasters</i></p>	<p>*Bruce T. Reese Bonneville International Corporation 55 North 300 West Salt Lake City, UT 84101-3580 <i>Counsel for Bonneville International Corporation</i></p>

s/ Michael D. Hays
 Michael D. Hays