Nos. 08-3078 *et al*.
(consolidating 08-4452, 08-4454, 08-4455, 08-4456, 08-4457, 08-4458, 08-4459, 08-4460, 08-4461, 08-4462, 08-4463, 08-4464, 08-4465, 08-4467, 08-4468, 08-4469, 08-4470, 08-4471, 08-4472, 08-4473, 08-4474, 08-4475, 08-4476, 08-4477, and 08-4478)

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PROMETHEUS RADIO PROJECT, *et al.*,
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION, and
THE UNITED STATES OF AMERICA,
Respondents.

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

BRIEF FOR CITIZEN PETITIONERS PROMETHEUS RADIO PROJECT, MEDIA ALLIANCE, OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, INC., and FREE PRESS

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May 17, 2010

CORPORATE DISCLOSURE STATEMENT

Pursuant to Third Circuit Local Appellate Rule 26.1 and Federal Rule of Appellate Procedure 26.1, Citizen Petitioners submit this Corporate Disclosure Statement:

Prometheus Radio Project, Media Alliance, Office of Communication for the United Church of Christ, Inc., and Free Press have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Respectfully Submitted,

_____

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May 17, 2010

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JURISDICTIONAL STATEMENT

This is a petition for review of an agency decision under the Communications Act of 1934, 47 U.S.C. § 151 *et seq*. This Court's jurisdiction is based on 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342–44. This panel retained jurisdiction over the proceedings on remand in No. 03-3388. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 435 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005). The Federal Communications Commission ("FCC" or "Commission") issued its order on remand in February 2008. *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*, Report and Order, 23 FCC Rcd 2010 (2008) (*2008 Order*). Petitions for Review of the *2008 Order* were filed in this Circuit (No 08-1586) and three other Circuit Courts of Appeal. On March 11, 2008, the Judicial Panel on Multidistrict Litigation consolidated all Petitions for Review in the Ninth Circuit Court of Appeals. By order dated November 4, 2008, the Ninth Circuit transferred the consolidated Petitions for Review to this Court.

On March 31, 2008, Office of Communication of the United Church of Christ ("UCC") and Media Alliance ("MA") moved to intervene in the Newspaper Association of America's challenge in the D.C. Circuit to the Commission's *2008 Order* and all such cases as might be consolidated with it. That matter was

transferred to the Ninth Circuit and consolidated with Media Alliance's Petition for Review of the *2008 Order*.

On March 26, 2008, Petitioners Prometheus Radio Project filed a Motion for Leave to Intervene with the Ninth Circuit in Media Alliance's challenge to the Commission's *2008 Order* and all such cases as might be consolidated with it.

By order dated November 4, 2008, the Ninth Circuit transferred all Petitions for Review of the *2008 Order* to this Court, where they were docketed under the lead case No. 08-4454. On February 21, 2008, Prometheus Radio Project filed a petition for review (No. 08-3078) of another order issued by the FCC in response to this Court's remand. *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*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008)(*Diversity Order/Further Notice).* By order dated November 14, 2008, this Court consolidated this petition with the other petitions for review under the lead case No. 08-3078.

RELATED CASES

This petition for review challenges the FCC's broadcast ownership rules, which were modified following a remand from an earlier appeal. *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004). The local television ownership rule was previously subject to review in *Sinclair Broad. Group, Inc. v.*

FCC, 284 F.3d 148 (D.C. Cir. 2002). The ownership rules are also subject to a petition for reconsideration which remains pending before the Commission. Petitioners Prometheus Radio Project, Media Alliance, Office of Communication of United Church of Christ, Inc., and Free Press (herein collectively "Citizen Petitioners") are unaware of any other related cases.

ISSUES PRESENTED

Whether the FCC acted arbitrarily, capriciously, or not in accordance with law when it:

(a) without seeking public comment, adopted a revised Newspaper Broadcast Cross Ownership (NBCO) rule with so many exceptions and ambiguities that it will allow increased consolidation in many markets contrary to the FCC's stated goal of modestly relaxing the rule only for the largest and most diverse markets;

(b) granted permanent waivers to five newspaper-broadcast combinations without considering public comment or applying any established newspaper-broadcast cross-ownership test to determine whether the waivers were in the public interest;

(c) retained its 1999 TV duopoly rule without considering that the transition to digital television eliminated the competitive benefits of consolidation; and

(d) failed to consider the effect of its ownership rules on minority and female media ownership of broadcast stations.

STATEMENT OF THE CASE

Citizen Petitioners seek review of two FCC orders arising out of proceedings conducted pursuant to this Court's remand of the 2002 Biennial Review in *Prometheus.* 373 F.3d 372 (3rd Cir. 2004): (1) *2008 Order*, 23 FCC Rcd 2010 (2008), JA___, and (2) *Diversity Order/Further Notice*, 23 FCC Rcd 5922 (2008), JA___. The Citizen Petitioners' petitions for review have been consolidated with other petitions for review of the *2008 Order*.

STATEMENT OF FACTS

Citizen Petitioners generally support the FCC's continued regulation of broadcast ownership limits. They appear here as Petitioners to seek review of the FCC's decision insofar as it relaxed application of the NBCO rule, unexpectedly granted five permanent waivers of the NBCO rule, failed to tighten the local TV ownership rule, and failed to assess the impact of its actions on minority and female ownership of broadcast properties.

Because Citizen Petitioners anticipate that Media Parties in this case will advocate outright repeal of the broadcast ownership rules, Citizen Petitioners also intend to argue as Intervenors in opposition to the Petitions for Review filed by the

various Media Parties and in favor of retaining the TV duopoly and local radio ownership rules.

Since this Court is familiar with the relevant statutory and regulatory history of the earlier stages of this proceeding, Petitioners will not discuss them extensively here. However, to understand the absence of reasoned decisionmaking that underlay the needlessly rushed, disorderly and uncollegial environment in which the FCC operated during the adoption of the *2008 Order*, it is important to set forth the more recent history of this matter in greater detail.

A. The 2006 Further Notice of Proposed Rulemaking

This Court's decision in *Prometheus*, was issued on June 24, 2004. The FCC took no action on this Court's remand for two full years. Finally, on July 24, 2006, the Commission initiated the statutorily mandated 2006 Quadrennial Review and simultaneously requested comment on how to address this Court's remand. *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*, Further Notice of Proposed Rule Making, 21 FCC Rcd 8834 (2006), JA___ ("*Further Notice*"). The Commission accepted formal comments and reply comments until January 16, 2007.

The Commission's sixteen page *Further Notice* of was a spare document, asking only the most general questions. For each of the three major rules at issue

(NBCO, local TV ownership, and local radio ownership), the Commission described the revisions that had been attempted in the earlier 2002 Biennial Review and the issues remanded by this Court. *See, e.g*, *Further Notice*, 21 FCC Rcd at 8839-42, JA___-___. On each of the remanded issues, the Commission then requested comment and posed a few additional, general questions. *See, e.g.*, *Id.* at 8842-48, JA__-__. It did not propose any specific revisions. Commissioners Copps and Adelstein dissented in part. Commissioner Adelstein stated that:

> Unfortunately, the manner in which the Commission is launching this critical proceeding is totally inadequate. It is like submitting a high-school term paper for a Ph.D. thesis. This Commission failed in 2003, and if we don't change course, we will fail again.
>
> The large media companies wanted, and today they get, a blank check to permit further media consolidation. The Notice is so open-ended that it will permit the majority of the Commission to allow giant media companies to get even bigger at the time, place and manner of their choosing. That is the reason I have refused to support launching this proceeding until now, and it is why I am dissenting from the bulk of this Notice. This Notice is thin gruel to those hoping for a meaty discussion of media ownership issues.

Id. at 8865 (Adelstein, dissenting), JA___.

B. Summer 2007: The Commission Changes Gear

After accepting the comments and reply comments, the Commission thereafter did very little with respect to advancing the matter for the next six months. However, as discussed below, in the summer of 2007, the Commission

suddenly began to move with great alacrity. Between that time and the adoption of the *2008 Order* on December 17, 2007, the Commission short-circuited established procedures in an inexplicable rush to judgment.[1]

1. Commission Studies of Media Ownership

The Commission's sudden zeal to complete its ownership proceeding led it to short-circuit the conducting of studies developed to support its action.

On July 31, 2007, the FCC's staff released ten studies conducted without regard to the requirements of the Data Quality Act ("DQA").[2] *FCC Seeks Comment on Research Studies on Media Ownership,* Public Notice, DA 07-3470, (July 31, 2007), JA___.[3] The Commission's research studies were a matter of

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[1]As Commissioners Copps and Adelstein noted in a statement issued August 1, 2007, "Now a new agenda seems to be brewing here. And whatever's being cooked up, the public is not being given sufficient time to take a close look." *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*, Second Further Notice of Proposed Rule Making, 22 FCC Rcd 14215, 14245 (2007), JA___ ("*2d Further Notice*").

[2]The DQA directs OMB to develop "rules providing policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies, and information disseminated by non-Federal entities with financial support from the Federal government." H.R. Rep. 105-592 at 49 (1998). Agencies are required to develop mechanisms to enable correction of errors in agency data. *See Implementation of Guidelines for Ensuring and Maximizing Quality, Objectivity, Utility and Integrity of Information Pursuant to Section 515 of Public Law No. 105-554,* 17 FCC Rcd 19890 (2002) (adopting FCC guidelines).

[3]At the time that the Commission announced that it would be conducting these studies, Commissioners Copps and Adelstein objected to the process:

particular concern in light of allegations that the Commission had suppressed two FCC staff studies during its 2002 Biennial Review proceeding.[4]

The Commission staff directed that comments on the new studies be filed by October 1, 2007, and reply comments were to be filed on October 16, 2007. *Id.* Comments identified as "peer review" analyses, which were required by the DQA, were not released until September 4, 2007. Data underlying the studies was released under highly restrictive conditions on September 6, 2007. *FCC's Media Bureau Adopts Procedures for Public Access to Data Sets Underlying Economic*

> Today's announcement of the Commission's new media ownership studies, unfortunately, raises more questions in the public's mind than it answers. How were the contractors selected for the outside projects? How much money is being spent on each project—and on the projects collectively? What kind of peer review process is envisioned? Why are the topics so generalized rather than being targeted to more specific questions?

Commissioner Michael J. Copps Comments on the FCC's Media Ownership Studies, MB Dkt. No. 06-121 (Nov. 22, 2006). *See also Commissioner Jonathan S. Adelstein Says Public Notice On Media Ownership Economic Studies Is "Scant" And "Undermines Public Confidence,"* MB Dkt. No. 06-121 (Nov. 22, 2006), JA___.

[4]*See* Associated Press, *Media Ownership Study Ordered Destroyed*, Sept. 14, 2006, http://www.msnbc.msn.com/id/14836500; *Second Secret Study Found*, STOP BIG MEDIA, http://www.stopbigmedia.com/blog/?p'28 (and original sources linked therein); John Eggerton, *Boxer Produces Another Unpublished FCC Report*, BROADCASTING & CABLE, Sept.18, 2006, *available at* http://www.broadcastingcable.com/article/CA6373194.html; Associated Press, *FCC Chair Orders Probe into Why Media Ownership Studies Were Destroyed*, Sept. 19, 2006, http://www.freepress.net/news/17742.

Studies for 2006 Quadrennial Regulatory Review of Commission's Media Ownership Rules, DA 07-3740 (Sept. 5, 2007), JA___.

On September 11, 2007, Free Press, along with Consumer Federation of America and Consumers Union (Free Press, *et al*.) filed a complaint alleging that the Commission violated the DQA as well as OMB and FCC guidelines issued thereunder. Complaint Under the Data Quality Act, MB Dkt. 06-121, at 9 (Sept. 11, 2007), JA___.[5] They asked that the Commission follow appropriate procedures which, *inter alia*, required the solicitation and review of comment on peer review analyses *before* comments were requested on the studies themselves. *Id.* at 19, JA___. They also asked that the Commission extend the time for comments until at least 90 days from the date that the underlying data was made available for review. *Id.*, JA___.[6]

On November 1, 2007, the same day that the comment period ended, the Commission posted on its web site several additional peer review comments. At the same time, the Commissioned posted "revised" versions of four of the studies. (A revision of another study had been posted on September 20, 2007.) In addition,

[5]Among other things, the complaint alleged that the studies were not reproducible, that the peer review process was improperly conducted subsequent to, rather than prior to, publication, and that the peer review plan was not published. *Id.* at 10, 14-17.

[6]The Commission afforded Petitioners a 21 day extension until October 22, 2007 for comments and a 15-day extension until November 1, 2007 for reply comments on the ten studies. *Media Bureau Extends Filing Deadlines for Comments on Media Ownership Studies*, DA- 4097 (Sept. 28, 2007), JA___.

the Commission posted "peer reviews" of several studies submitted by outside parties. Ignoring normal procedure for peer reviews, the authors were given no prior notice or any opportunity to respond.

In light of these developments, on November 9, 2007, Free Press filed a "Second Complaint Under the Data Quality Act and Motion for Extension of Time," JA___.[7] Noting that the newly released peer reviews "call into question the validity of several of the FCC studies," the Petitioners asked for 45 days to respond to the newly posted material. The Commission did not act on this request.

2. Addressing the Impact on Minority Ownership

Notwithstanding this Court's holding in *Prometheus,* 372 F.3d at 420-21, that the Commission should analyze the effect of revisions in its rules on "potential minority station owners," the *Further Notice* did not significantly address minority ownership issues.[8] Shortly thereafter, on August 23, 2006, a group of organizations led by the Minority Media and Telecommunications Council filed a

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[7]UCC, Media Alliance and others also raised concerns about the Commission's compliance with the DQA, stating, "The peer reviews were not announced through public notice. Instead, they merely appeared as unexplained icons on the FCC's website." UCC *et al.* Supplemental Comments, MB Dkt. 06-121 at 2 (Nov. 29, 2007), JA___. UCC also argued that the "new peer reviews demonstrate that [two FCC studies] fail to meet the . . . standard for objectivity" contemplated by the FCC's guidelines. *Id.* at 3, JA___.

[8]*See also Prometheus*, 373 F.3d at 435, n.82 (directing the FCC to "consider MMTC's proposals for enhancing ownership opportunities for women and minorities which the Commission had deferred for future consideration.")

"Motion for Withdrawal of the Further Notice of Proposed Rulemaking and for the Issuance of a Revised Further Notice" ("MMTC Motion"), JA___.

As noted above, almost a year later, on August 1, 2007, the Commission suddenly shifted into high gear. It effectively granted the MMTC Motion by soliciting additional comments, to be filed within 60 days. *2d Further Notice*, 22 FCC Rcd 14215 (2007), JA___.[9] A group of civil rights organizations and the National Association of Broadcasters each requested a five week extension for filing responses, but the Commission denied these requests. Order, 22 FCC Rcd 18119 (2007), JA___. By letter dated November 1, 2007, an even larger group of civil rights organizations unsuccessfully called on the FCC Chairman "to conduct a specific inquiry into the impact of market concentration on female and minority ownership before moving forward with issuing any new ownership rules for broadcast media." *Letter from Rainbow PUSH, et al.* (Nov. 1, 2007), JA___.

C. The Final Rush to Judgment

On November 13, 2007, FCC Chairman Martin published an op-ed in the *New York Times* detailing a proposal for a modified newspaper-broadcast cross-ownership rule. Kevin Martin, Op-Ed, *The Daily Show*, N.Y. TIMES, Nov. 13, 2007 (attached as App. A). The same day, Chairman Martin issued a press release

[9]Commissioners Copps and Adelstein dissented in part, stating that "after mulling this over for almost one year, the Commission is all of a sudden in a hurry and it is the public that gets punished." *2d Further Notice*, 22 FCC Rcd at 14245, JA___.

inviting comments on his proposal to be filed by December 11, 2007. *Chairman Kevin J. Martin Proposes Revision to the Newspaper/Broadcast Cross-Ownership Rule,* (Nov. 13, 2007), JA___ ("Martin Press Release"). Neither the substance of the proposal nor the press release itself was presented to other Commissioners, much less voted upon by them. The press release was not published in the FCC Record or the Federal Register.

Commissioners Copps and Adelstein objected in a separate press release. They said that:

> The Martin rules are clearly not ready for prime time. Under the Chairman's timetable, we count 19 working days for public comment. That is grossly insufficient. The American people should have a minimum of 90 days to comment, just as many Members of Congress have requested. More importantly, the Commission has yet to finish its Localism proceeding, teed up four years ago, or to forward comprehensive ideas to increase women and minority ownership of broadcast outlets.
>
> There is still time to do this the right way. Congress and the thousands of American citizens we have talked to want a thoughtful and deliberate rulemaking, not an alarming rush to judgment characterized by insultingly short notices for public hearings, inadequate time for public comment, flawed studies and a tainted peer review process—all designed to make sure that the Chairman can deliver a generous gift to Big Media before the holidays. For the rest of us: a lump of coal.

Joint Statement by Commissioners Copps and Adelstein on Chairman Martin's Cross-ownership Proposal, (Nov. 13, 2007), JA___.

D. Adoption of the *2008 Order*

The Commission adopted the two orders here under review at a meeting on December 18, 2007. The final process was disordered and contentious. Commissioners and their staff stayed up most of the night before the meeting trading comments and proposals. On the day of the meeting, both Commissioners Copps and Adelstein issued lengthy dissents.

As Commissioner Copps explained in his dissenting statement:

> On November 2, 2007—with just a week's notice—the FCC announced that it would hold its final media ownership hearing in Seattle. Despite the minimal warning, 1,100 citizens turned out to give intelligent and impassioned testimony on how they believed the agency should write its media ownership rules. Little did they know that the fix was already in, and that the now infamous *New York Times* op-ed was in the works announcing a highly-detailed cross-ownership proposal.
>
> Put bluntly, those Commissioners and staff who flew out to Seattle with staff, the sixteen witnesses, the Governor, the State Attorney General and all the other public officials who came, plus the 1,100 Seattle residents who had chosen to spend their Friday night waiting in line to testify were, as Rep. Jay Inslee put it, treated like "chumps." Their comments were not going to be part of the agency's formulation of a draft rule—it was just for show, to claim that the public had been given a chance to participate. The agency had treated the public like children allowed to visit the cockpit of an airliner—not actually allowed to fly the plane, of course, but permitted for a brief, false moment to imagine that they were.
>
> The *New York Times* op-ed appeared on November 13, the next business day after the Seattle hearing. That same day, a unilateral public notice was issued, providing

just 28 days for people to comment on the specific proposal, with no opportunity for replies. The agency received over 300 comments from scholars, concerned citizens, public interest advocates, and industry associations — the overwhelming majority of which condemned the Chairman's plan. But little did these commenters know that on November 28, two weeks ***before*** their comments were even due, the draft Order on newspaper-broadcast cross ownership had already been circulated. Once again, public commenters were treated as unwitting and unwilling participants in a Kabuki theater.

Then, last night at 9:44 pm—just a little more than twelve hours before the vote was scheduled to be held and long after the Sunshine period had begun—a significantly revised version of the Order was circulated. Among other changes, the item now granted all sorts of permanent new waivers and provided a significantly-altered new justification for the 20-market limit. But the revised draft mysteriously deleted the existing discussion of the "four factors" to be considered by the FCC in examining whether a proposed combination was in the public interest. In its place, the new draft simply contained the cryptic words "[Revised discussion to come]." Although my colleagues and I were not apprised of the revisions, *USA Today* fared better because it apparently got an interview that enabled it to present the Chairman's latest thinking. Maybe we really are the Federal Newspaper Commission.

At 1:57 this morning, we received a new version of the proposed test for allowing more newspaper-broadcast combinations. I can't say that I fully appreciate the test's finer points given the lateness of the hour and the fact that there was no time afforded to parse the finer points of the new rule. But this much is clear: the new version keeps the old loopholes and includes two new one path-ways to cross ownership approval. So please don't buy the line that the rule we adopt today involves fewer

> loopholes—it adds new ones. Finally, this morning at 11:12 a.m. as I was walking out my office door to come to this meeting, we received an e-mail containing additional changes. The gist of one of these seems to be that the Commission need not consider all of the "four factors" in all circumstances.
>
> This is not the way to do rational, fact-based, and public interest-minded policy making. It's actually a great illustration of why administrative agencies are required to operate under the constraints of administrative process─and the problems that occur when they ignore that duty. At the end of the day, process matters. Public comment matters. Taking the time to do things right matters. A rule reached through a slipshod process, and capped by a mad rush to the finish line, will—purely on the merits—simply not pass the red face test. Not with Congress. Not with the courts. Not with the American people.

2008 Order, 23 FCC Rcd at 2116-17 (Copps, dissenting), JA___ -___ . *See also Id.* at 2122 (Adelstein, dissenting) ("There is no time-sensitive issue that compels us to act today. In fact, we were asked by leaders in Congress, including our oversight committees, to defer today and conduct a more inclusive process."), JA___.

E. The *2008 Order*

Out of the chaos surrounding its adoption, the *2008 Order* substantially modified the NBCO rule, and adopted a significantly watered-down version of the proposal first advanced in the Chairman's November 13, 2007 press release. The

Commission majority "generally retain[ed]" the local radio and TV duopoly rule. *2008 Order* at 2011, JA___.

1. NBCO Rule

The *2008 Order* adopted a less rigorous version of the presumption put forth by Chairman Martin in favor of allowing newspaper-broadcast combinations in the largest 20 markets so long as the TV station is not among the top four ranked stations and there are at least 8 independently owned newspaper and TV station "voices." *2008 Order*, 23 FCC Rcd at 2022-23, JA___-___. For combinations that do not meet these criteria, the *2008 Order* adopted Chairman Martin's proposal that the FCC could still find that a particular transaction was in the public interest by considering "Four Factors." *Id.*

The Commission majority suddenly unveiled two *additional* criteria to reverse the presumption against approval. The presumption could now be overcome by showing either that : (1) the station or newspaper was failing ("failing media test"); or (2) the proposed combination would result in a new source of a significant amount of local news ("Local News Test"). *2008 Order*, 23 FCC Rcd at 2047-49, JA___ - ___. These additions had the effect of significantly loosening the waiver standard.

2. Treatment of Combinations Operating Under Temporary Waivers

A substantial number of newspaper-broadcast cross-ownerships have been operating under temporary waivers pending the outcome of the Commission's review. *2008 Order*, 23 FCC Rcd at 2056 n.257, JA___. As to most such combinations, the Commission majority "afford[ed] the licensee 90 days after the effective date of this order to either amend its waiver/renewal request or file a request for permanent waiver" pursuant to the newly adopted standard. *Id.*, JA___.

However, with respect to five particular newspaper-broadcast combinations, the Commission majority did something dramatically different. It said that:

> in the following cases, we have determined that the public interest warrants a waiver in light of the synergies that have already been achieved from the newspaper-broadcast station combination, the new services provided to local communities by the combination, the harms (reviewed above) associated with required divestitures, the prolonged period of uncertainty surrounding the status of the newspaper/ broadcast cross-ownership ban, and the length of time that the waiver request has been pending: Gannett's combination in Phoenix as well as Media General's combinations in Myrtle Beach-Florence, South Carolina; Columbus, Georgia; Panama City, Florida, and the Tri-Cities, Tennessee/Virginia DMA.

2008 Order at 2055-56, JA___ (footnotes omitted). The Commission made no reference to Media General's or Gannett's pending license renewal proceedings, wherein Media General and Gannett had formally requested waivers and outside

parties had petitioned to deny the license renewals based on the existing illegal newspaper-broadcast combinations. Instead, for each of the five stations, the Commission majority added a few sentences in footnotes. For example, here is what it said about the Media General combination in Columbus, GA (DMA rank 125):[10]

> In the Columbus, Georgia DMA, Media General has owned television station WRBL(TV), which is licensed to Columbus, and the *Opelika-Auburn News*, which is published in Opelika, Alabama, since 2000, and its waiver request has been pending for three years. A WRBL(TV) reporter is permanently assigned to the station's Opelika bureau, which is housed in the newspaper's building. From this facility, WRBL(TV), which does not operate a satellite truck, has the capability of transmitting live video for broadcast on WRBL(TV), which has enabled the station to broadcast improved coverage of breaking news and other events occurring in the western portion of its DMA

Id. at 2056 n.254 (citation omitted), JA___.

3. TV Duopoly Rule

In contrast to the NBCO rule, the Commission majority substantially retained the existing local TV rule. Petitioners UCC, Media Alliance and others had asked that the Commission tighten the duopoly rule. They argued, *inter alia*,

[10]"Designated market area" or "DMA" refers to a geographic area where the population receives the same or almost the same media offerings. DMAs are ranked by percentage of U.S. households.

that the transition to digital television[11] justified a stronger rule against TV duopolies:

> Changes in the media market permit television broadcasters to receive any potential efficiency benefits of duopolies without harming the public by reducing competition, diversity, and localism. * * * * With more modern technologies, broadcasters can "multicast" between twelve and nineteen video streams, and likely even more as technology evolves. Thus, broadcasters can receive all the benefits of duopolies merely by using digital technologies.
>
> Many broadcasters are already multicasting to create virtual duopolies and triopolies. At least "434 commercial stations provide 624 multicast services in 163 of the 210 television markets." * * * *
>
> * * * *
>
> These new developments undermine broadcasters' claims that they need a second (or third) station to provide additional programming to the public. Broadcasters can provide numerous channels of programming with only one license.

[11]The digital transition has been decades in the making. *See Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 2 FCC Rcd 5125 (1987). In the 1996 Telecommunications Act, Congress set the parameters for a transition to digital broadcasting. Telecommunications Act of 1996, § 201 (codified at 47 U.S.C. § 336). After years of FCC rulemakings governing how the transition would occur, in February 2006 (before the FCC began the proceedings that gave rise to this appeal), Congress established February 17, 2009 as the date of the digital transition. Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 3002. This was later extended to June 12, 2009. DTV Delay Act, Pub. L. No.111-4, 123 Stat. 112 (2009).

UCC *et al*. Comments, MB Dkt. 06-121 at 45-47 (Oct. 23, 2006) (footnotes omitted) ("UCC 2006 Comments), JA___-___.

The Commission majority devoted a single paragraph to rejecting arguments that sought a more restrictive TV duopoly rule. *2008 Order*, 23 FCC Rcd at 2064-65, JA___ - ___ (footnote omitted). It did not mention, much less justify, its refusal to take the digital television technology into account.

4. Minority Ownership

The *2008 Order* did not provide any analysis of the impact of the Commission's action on minority and female ownership.[12] Nor did it discuss any of the numerous studies submitted to the Commission, including studies that the FCC had itself commissioned,[13] which showed that increased ownership concentration has an adverse effect on minority and female ownership. Even when the Commission majority responded to this Court's remand by reinstating the so-called Failed Station Solicitation Rule ("FSSR"), it did so without analysis of its impact on minority and female ownership.

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[12]Concurrently with the adoption of the 2008 Order, the Commission issued its *Report and Order and Third Further Notice of Proposed Rulemaking*, 23 FCC Rcd 5922, JA___ ("*Diversity Order*"). The *Diversity Order* relates to a number of affirmative initiatives for promoting diversity in ownership, but it does not discuss the impact of the Commission's 2008 Order on minority and female ownership.

[13] *See* Allen S. Hammond, *The Impact of the FCC's TV Duopoly Rule Relaxation on Minority & Owned Broadcast Stations, 1996-2002* (June 2007), JA___. The Commission's only reference to the Hammond study is to note "that it does not rely on the study." *Id.* at 2086, n.467, JA___.

F. Common Cause Petition for Reconsideration

A number of organizations led by Common Cause timely filed a Petition for Reconsideration. Common Cause *et al.*, Petitition for Reconsideration, MB Dkt. 60-121 (Mar. 24, 2008), JA___. This petition substantially mirrors a number of the arguments set forth below. It asks that the revised NCBO rule be significantly tightened to eliminate obvious loopholes, *id*. at 3-4, JA__ -___, that the Commission adopt enhanced public notice requirements when waivers are requested, *id.* at 5-6, JA__ - __, that the Commission reverse its grant of permanent waivers for Media General and Gannett, *id* at 7-11, JA___- ___, and that the TV duopoly rule be tightened in light of the digital TV transition, *id.* at 11-14, JA___.

As of this time, the Commission has taken no action on the Petition for Reconsideration.

SUMMARY OF ARGUMENT

The FCC's decision to relax its NBCO rule came out of a rulemaking process that failed to meet the most minimal standards for informed and rational agency action. The Commission's procedurally inadequate Quadrennial Review resulted in rulemaking that is arbitrary, capricious, and in violation of the law.

The passage of the *2008 Order* was marred by gross procedural irregularities. Instead of voting on a proposed rule and publishing it in the Federal Register, the Chairman unilaterally released it in a *New York Times* op-ed and a

press release. A draft of the Commission's order was circulated before final comments on the proposed rule were even filed. The Commission voted days after hundreds of substantive comments were filed, and could not possibly have considered them. The final version of the rule contained changes which were circulated to the Commissioners in the early hours of the morning prior to the vote. The Commission summarily granted five permanent waivers of the NBCO with no public notice and notwithstanding pending adjudicatory challenges to similar waivers. In short, the Commission did not just act in a manner contrary to the Administrative Procedure Act; it acted contrary to basic notions of fairness and common sense, as well.

The modified NBCO rule and the waivers contained within the Commission's order were not a "logical outgrowth" of what the Commission formally proposed or even what was in the Chairman's press release. And, while it purports to be a modest change which balances competing interests and does not jeopardize diversity in the marketplace of ideas, the modified NBCO contains so many exceptions, loopholes and ambiguities that it is not rationally related to its stated purpose. Vague provisions such as demonstration of a commitment to "independent news judgment" cannot be defined, much less enforced. Not only does the FCC fail to define what it meant by its last minute addition allowing a

waiver based a promise to air seven hours of local newscasts, but the Commission has no way of ascertaining compliance with such a requirement.

The modified NBCO rule will allow the FCC to grant waivers based on an applicant's representations without hearing from members of the affected communities. The Commission has not provided a means for listeners and viewers to find out when a station in their area has requested a waiver so that they may exercise their right to object to a license transfer or renewal.

The procedurally defective and summary grant of five permanent waivers of the NBCO rule was also arbitrary and capricious because the Commission did not apply either the pre-existing waiver criteria or the newly-adopted presumptions in evaluating these applications but instead made up a unique set of result-oriented tests. Moreover, it relied upon the broadcasters' self-serving comments, ignoring that Free Press and others had filed petitions to deny the waivers.

The FCC's failure to tighten its local TV rule was also arbitrary and capricious because the Commission failed to consider the extent to which the digital transition would obviate the need for broadcasters to hold multiple licenses as a way to benefit from multi-channel efficiencies. In the wake of last year's digital transition, virtually all TV stations have the ability to broadcast multiple program feeds. Although the record is replete with discussion of the long-term

effects of digital technology, the Commission improperly failed to consider digital technology in its decision.

Finally, the Commission completely ignored this Court's instruction to consider how its modification of broadcast ownership rules might affect minority and female media ownership. The Commission's action divorcing minority and female ownership questions from its consideration of the ownership rules itself was arbitrary and capricious. Numerous studies submitted to the FCC, including an expert study commissioned by the FCC itself, established an inverse relationship between ownership concentration and minority and female ownership. Notwithstanding this voluminous record, the Commission does not analyze or even discuss minority and female ownership at any point in either the *2008 Order* or the companion *Diversity Order/Further Notice*.

ARGUMENT

I. THE FCC FAILED TO PROVIDE A REASONABLE EXPLANATION FOR ITS RELAXED NBCO RULE

In *Prometheus*, this Court held that Diversity Index relied upon by the FCC to support its relaxed NBCO rule was so fundamentally flawed that the FCC failed to provide a reasoned explanation of the rule. 373 F.3d at 402-411. It remanded to give the FCC an opportunity to "justify or modify" its approach to cross-ownership and cautioned the Commission to "provide better notice on remand." *Id*. at 435, 411.

The *Further Notice* stated that the FCC no longer intended to rely on the Diversity Index, but did not propose an alternative approach. Instead, it asked questions such as "how we should approach cross-ownership limits. Should limits vary depending upon the characteristics of local markets? If so, what characteristics should be considered, and how should they be factored into any limits?" 21 FCC Rcd at 8848, JA__. The Commission never issued another Further Notice with an actual proposal. Instead, following the highly irregular procedures discussed above, Chairman Martin alone sought public comment on his proposal, with comments due one week before the scheduled meeting at which the vote was to be taken.

The press release seeking comment described Chairman Martin's proposal as permitting "cross-ownership only in the largest markets where there exists competition and numerous voices." *Martin Press Release* at 1, JA___. Specifically, the Commission would presume that a newspaper-broadcast combination was in the public interest if four criteria were met:

> (1) the market at issue is one of the 20 largest Nielsen Designated Market Areas ("DMAs");
>
> (2) the transaction involves the combination of a major daily newspaper and one television or radio station;
>
> (3) if the transaction involves a television station, at least 8 independently owned and operating major media voices (defined to

> include major newspapers and full-power commercial TV stations) would remain in the DMA following the transaction; and
>
> (4) if the transaction involves a television station, that station is not among the top four ranked stations in the DMA.

Id. at 1-2, JA___. "All other proposed newspaper-broadcast combinations would continue to be presumed not in the public interest." *Id*. at 2, JA___. But "notwithstanding the presumption" the Commission would consider four factors to determine if the particular transaction was in the public interest:

> (1) the level of concentration in the DMA;
>
> (2) a showing that the combined entity will increase the amount of local news in the market;
>
> (3) a commitment that both the newspaper and the broadcast outlet will continue to exercise its own independent news judgment; and
>
> (4) the financial condition of the newspaper, and if the newspaper is in financial distress, the owner's commitment to invest significantly in newsroom operations.

Id., JA___. The press release stated that this approach was "notably more conservative" than the rule adopted in 2003, which would have allowed cross-ownership in the top 170 markets, because it only allowed "a subset of transactions in only the top 20 markets." *Id.*, JA___.

Citizen Petitioners raised numerous concerns about Chairman Martin's proposal and urged the Commission not to adopt it. First, they questioned Martin's premise expressed in the op-ed that relaxing the cross-ownership rule would

improve the financial health of the newspaper industry. UCC *et al*. Comments on on Martin Proposal, MB Dkt. 06-121, at 5 (Dec. 11, 2007) ("UCC/MA on Martin Proposal"), JA___. Second, pursuant to the requirements of the APA, they asked the Commission to issue a further notice that setting forth the Commission's reasoning and defining key terms. UCC/MA on Martin Proposal at 2, 11, JA___; Free Press *et al*. Further Comments on Martin Proposal, MB Dkt. 06-121, at 46-47 (Dec. 11, 2007), JA___. Third, they argued that given the open-ended nature of the four factor test, the exceptions would swallow the rule. UCC/MA on Martin Proposal at 11, JA__; Free Press on Martin Proposal at 16, 32, JA___. Finally, they argued that it was unreasonable to rely on the public to present information needed by the FCC to make a market specific determination without at least ensuring that the public had actual notice when a transfer or renewal application seeking a waiver was filed. UCC/MA on Martin Proposal at 13, JA____; Free Press on Martin Proposal at 42, JA___. Despite the shortcomings of the *Further Notice* and the Chairman's proposal, the *2008 Order* adopted it with modifications that made it even easier for applicants to obtain waivers.

A. The FCC Failed to Comply with the APA

This Court should reverse the FCC's adoption of a new NBCO rule because the FCC failed to comply with the APA. The APA requires agencies to publish in the Federal Register a notice of proposed rulemaking that contains "either the

terms or the substance of the proposed rule or description of the subjects involved." 5 U.S.C. § 553(b); *see Prometheus,* 373 F.3d at 416. Yet, as discussed above, the *Further Notice* on remand did not provide either. Indeed, in merely asking for comments on what the FCC's approach to cross-ownership should be, the *Further Notice* read more like a Notice of Inquiry than a Notice of Proposed Rulemaking.

The Notice must be "sufficient to fairly apprise interested parties of all significant subjects and issues involved." *Am. Iron and Steel Inst. v. EPA,* 568 F.2d 284, 291 (3d Cir. 1977) (quoting S. REP. NO. 79-752, at 16 (1945)). Notice is deficient when a final rule is not "a logical outgrowth of the rulemaking proposal and record." *NVE, Inc. v. Dept. of Health and Human Servs.*, 436 F.3d 182, 191 (3d Cir. 2006); *United Steelworkers of Am. v. Pendergrass*, 855 F.2d 108, 114 (3d Cir, 1988).

The NBCO rule adopted was not a "logical outgrowth" of the *Further Notice*. The *Further Notice* made *no rule proposals,* and "[s]omething [cannot be] a logical outgrowth of nothing." *Kooritzky v. Reich,* 17 F. 3d 1509, 1513 (D.C. Cir 1994); *see also Light and Power Co. v. NRC,* 673 F.2d 525, 533 (D.C. Cir 1982) ("an agency adopting final rules that differ from its proposed rules is required to renotice when changes are so major that original notice did not adequately frame the subjects for discussion"). In contrast to *United Steelworkers*

v. Pendergrass, 855 F.2d at 114, the revised NBCO rule cannot be characterized as a slight change, nor was it a logical outgrowth of the rulemaking record developed in either the 2002 Biennial or the 2006 Quadrennial reviews.

Nor can it be argued that the proposal in Chairman Martin's press release provided adequate notice under the Administrative Procedure Act (APA). First, it did not represent a proposal of the Commission, but only that of the Chairman.[14] Second, it was not published in the Federal Register as required by 5 U.S.C. § 553(b). Third, the Chairman's proposal failed to meet even the "spirit" of notice and comment rulemaking as the one week between the comment due date and the Commission's vote was far too short to allow meaningful consideration of the comments. As a result, the final order did not adequately address important aspects of the rule.

B. The FCC Failed to Articulate a Rational Connection Between the New NBCO Rule and the Goals of Diversity, Competition, and Localism

As this Court noted in its review of the FCC's *2002 Order*, the agency is required to examine the relevant data and articulate a satisfactory explanation for its action. *Prometheus,* 373 F.3d at 404, 421 (citing to *Motor Vehicle Mfrs. Ass'n*

[14] The proposal in the press release was not voted on by the full Commission. For the Commission to act legally under the Communications Act, it must have a quorum of at least three Commissioners present, 47 U.S.C. § 154(h), and a majority of those present must approve the action, *WIBC, Inc. v. FCC*, 259 F.2d 941, 943 (D.C. Cir. 1958).

of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). *See also Robert Wood Johnson Univ. Hosp. v. Thompson,* 297 F.3d 273, 280 (3d Cir. 2002).

In the *2008 Order,* the Commission concluded that:

> the record indicates that the largest markets contain a robust number of diverse media sources and that the diversity of viewpoints would not be jeopardized by certain newspaper-broadcast combinations. The record also shows that newspaper-broadcast combinations can create synergies that result in more news coverage for consumers. In addition, because the presumption we adopt today that waivers of the ban are in the public interest is generally limited to combinations of a single broadcast outlet and a daily newspaper in the largest markets, it will ensure that such synergies can be captured without impairing diversity. In short, our new rule lifts the complete ban but does so in a modest manner in order to ensure both that our goals of competition, localism, and diversity are not compromised and that we may achieve the economic benefits of allowing certain combinations.

23 FCC Rcd at 2022, JA___.

The NBCO rule as adopted contains so many exceptions, loopholes and ambiguities, however, that it is not rationally related to its stated purpose. As noted by dissenting Commissioner Adelstein, "[t]he details reveal loopholes that would permit new cross-owned combinations from the largest markets down to the smallest markets." *2008 Order* at 2124 (Adelstein, dissenting). JA___.

1. The Four Factor Test Is Vague and Unenforceable

The Four Factor Test is so vague and full of exceptions that it undermines rather than serves the Commission's stated goals of protecting diversity and

competition. For example, the first factor—whether the cross-ownership will increase the amount of local news disseminated through the affected media outlets in the combination—does not even ask the right question, *i.e.*, whether the combination would increase the total amount of news available to the public in the market. UCC/MA on Martin Proposal at 10, JA___; Free Press on Martin Proposal at 45, JA___. Citizen Petitioners also pointed out that the Chairman's proposal failed to explain how "local news" would be defined or how much would be needed to rebut the presumption. UCC/MA on Martin Proposal at 10, JA___; Free Press on Martin Proposal at 11, 32, 45-47, JA___. The *2008 Order* did not rectify these deficiencies.

Citizen Petitioners similarly pointed out that the second factor—whether the combined properties will exercise independent news judgment—does not define what is meant by "independent news judgment," or how it could be demonstrated, UCC/MA on Martin Proposal at 10, JA___; Free Press on Martin Proposal at 46, JA___. Similarly, with respect to the third and fourth factors—level of concentration and financial condition—key terms are undefined and ambiguous. UCC/MA on Martin Proposal at 10-11, JA____; Free Press on Martin Proposal at 46-47, JA__. Indeed, the *2008 Order* leaves the question of the metrics it will use for measuring concentration to "future adjudicative proceedings." 23 FCC Rcd at 2052, JA___.

All four factors suffer from the problem that the *2008 Order* fails to provide a means for the FCC to determine the recipient of the waiver in fact lives up to its commitments. And in the event that the FCC were to find out that a waiver recipient did not keep its promises, the *2008 Order* provides no enforcement mechanism or explanation of the consequences.

Finally, the Commission failed to provide any insight into how the factors would be applied together. As dissenting Commissioner Copps notes, "[t]he gist of these seems to be that the Commission need not consider all of the 'four factors' in all circumstances." *2008 Order* at 2117 (Copps, dissenting), JA___.

2. The Local News Test Is Ambiguous and Unenforceable

To make matters worse, the *2008 Order* adds an entirely new ground for reversing the presumption that a combination is contrary to the public interest. That presumption is reversed if a proposed combination would result in at least seven hours per week on a broadcast outlet that otherwise was not offering local newscasts. *2008 Order* at 2049, JA___. Although somewhat more quantifiable than the Four Factor Test, this test suffers from many of the same flaws. For example, the term "local news" is not defined. And, although the order states that the Commission will monitor combinations to see if they live up to their commitments, *id.*, JA___, it is unclear how the Commission can do this since

licensees are not required to report the amount of news programming to either the FCC or the public.[15] In his dissent, Commissioner Adelstein noted that he had "real doubts about the Commission's willingness to enforce the seven-hour weekly news requirement." *2008 Order* at 2124-25 (Adelstein, dissenting), JA___.

C. The Revised NBCO Rule Places an Undue Burden on the Public to Rebut the Waiver Presumption

The new waiver tests, as Commissioner Copps noted, have "all the firmness of a bowl of Jell-O." *2008 Order* at 2017 (Copps, dissenting), JA ___. In addition, the entire waiver scheme is fundamentally flawed because without a reasonable opportunity for public participation, the FCC will be making decisions based solely on the self-serving representations of the applicants.

In an analogous case in the D.C. Circuit, the Court found that it was arbitrary and capricious for the FCC to rely on public participation while simultaneously depriving members of the public of information they need to exercise their right under Section 309 of the Communication Act to object to the renewal of a broadcast license on the ground that it would not serve the public interest. *UCC v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983). The Court stated:

[15]In fact, since the Commission does not know what stations are presently programming, it cannot even verify representations as to the baseline from which to apply the seven-hour test.

> This proposed renewal scheme would place near-total reliance on petitions to deny as the means to identify licensees that are not fulfilling their public interest obligations. That the Commission would simultaneously seek to deprive interested parties and itself of the vital information needed to establish a prima facie case in such petitions seems almost beyond belief.

Id. at 1441-42. The Court further held that "if the Commission should alter a policy and yet fail to recognize the change or fail to provide either adequate explanation or adequate consideration of relevant factors and alternatives, we must set aside the Commission's action and remand for further proceedings." *Id.* at 1426.

Members of the public also have a right under the Communications Act to challenge broadcast licenses transfers that would not be in the public interest. 47 U.S.C. §§ 309, 310. Further, in the *2008 Order*, the FCC adopted a scheme that relies on public participation to rebut a presumption that an application meeting the presumptive waiver criteria or local news test is nonetheless not in the public interest, or to rebut the claims of applicants that they should get a waiver under the four factor test.

Citizen Petitioners expressed concern about lack of public notice of newspaper-broadcast waiver applications. UCC/MA on Martin Proposal at 13, JA___; Free Press on Martin Proposal at 42, JA__. In the Commission's one paragraph response, it noted that applicants were already subject to the public

notice requirement in §73.3580 of its rules, 47 C.F.R. § 73.3580, and that the Commission planned to "flag" such applications in its own public notice. *2008 Order* at 2057, JA___.

This curt rejection shows that the Commission failed to consider an important aspect of the problem. As UCC/MA pointed out, "To constitute sufficient public notice, the notice must at a minimum clearly state that the applicants are seeking a waiver of the cross-ownership rule and that the public has a right to object by a certain date. In addition, such notice must be provided in a manner calculated to actually reach the public." UCC/MA on Martin Proposal at13, JA___. But as the Commission is well aware, § 73.3580, which spells out the wording that applicants must use in on-air announcements alerting members of their service areas that the station has filed an application with the FCC and that the public has the right to object, does not say anything about whether the applicant is seeking a waiver of FCC rules. *See* 47 CFR § 73.3580(d)(4)(text of announcement); *id*. at § 73.3580(f)(similar).

Nor do the public notices issued by the Commission contain this information. For the convenience of the Court, Citizen Petitioners have appended an example of an FCC public notice as App. B. This example is one page of a 31 page public notice. It lists Media General's application for renewal of its Columbus, GA station. Although Media General's application included a request

for a permanent waiver of the NBCO rule, that is not noted anywhere in the FCC's public notice.

Even if the Commission "flags" applications with waiver requests, it would not give meaningful notice to the viewers and listeners served by the station.[16] Unlike the several hundred broadcast lawyers who routinely review the FCC's daily public notices, the remaining 300 million Americans cannot reasonably be expected to review these lengthy public notices every day in case a station in their community might be seeking a waiver.

Thus, the FCC failed to meet the standard set out in *Prometheus* and *Motor Vehicle Mgrs Ass'n v. State Farm Mut. Auto Ins. Co*, 463 U.S. 29, 43 (1983), to consider all relevant factors or alternatives. Moreover, it has acted unreasonably in placing the burden on the public to rebut the presumptive showings without giving adequate notice of waiver requests for the public to participate.

[16]Each day, the FCC issues a public notice typically listing well over 100 newly filed applications, many of them for trivial engineering changes. While these listings are of interest of communications lawyers and broadcast engineers, they are indecipherable to almost everyone else.

II. THE FCC ACTED ARBITRARILY, CAPRICIOUSLY, AND IN VIOLATION OF LAW WHEN IT GRANTED PERMANENT WAIVERS TO FIVE NEWSPAPER-BROADCAST COMBINATIONS

The FCC's unexpected grant of five permanent waivers of the NBCO rule to two media owners, Media General and Gannett, was both procedurally defective and arbitrary and capricious.

To understand why the Commission's action was so unexpected and arbitrary, it is necessary to provide some additional context and describe certain other FCC proceedings that were going on at the same time. When the Commission adopted the NBCO rule in 1975, it required broadcast licensees that acquired a co-located daily newspaper to divest of one or the other within one year or by the end of the license term, which ever was longer. *Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 50 FCC 2d 1046, 1076 n.25 (1975), *aff'd sub nom. FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978). The *1975 Order* also "grandfathered" some existing combinations because prior to 1975, there was no prohibition on cross-ownership, and so it would have been unfair to retroactively force divestiture. *Id.* at 1080-85.[17] Anticipating the

[17]The *1975 Order* required divestiture in only the "most egregious cases." 50 FCC 2d at 1080. A "grandfather clause" is defined as "[a] provision that creates an exemption from the law's effect for something that existed before the law's effective date; specif., a statutory or regulatory clause that exempts a class of persons or transactions because of circumstances existing before the new rule or regulation takes effect." BLACK'S LAW DICTIONARY (8th ed. 2004). Awarding of

some of the combinations that were not grandfathered might nonetheless need a waiver to continue operating, the *1975 Order* adopted a four part waiver standard. *Id.* at 1085. In the thirty-three years between 1975 and 2008, the FCC granted only four permanent waivers.[18]

In 1975, broadcast licenses came up for renewal every three years. In 1996, Congress amended the Communications Act to permit the FCC to extend license terms to eight years and to require the FCC to conduct a periodic review of its ownership rules. Telecommunications Act of 1996, §203, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 307(c)) and § 202(h). As a result, some broadcast licensees acquired daily newspapers in the same market betting that the FCC would relax the prohibition before their next license renewal.

Media General and Gannett were among those companies that created new newspaper-broadcast combinations that under the then-applicable NBCO rule would have had to be divested before the end of their license terms. Media General combined a top-four ranked network-affiliated television station and a

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permanent waivers to Media General and Gannet differs from grandfathering because before the *2008 Order*, the Media General's and Gannett's combinations were permissible under the FCC's existing NBCO rule.

[18] *Kortes Communications, Inc.*, 15 FCC Rcd 11846 (2000); *Columbia Montour Broadcasting Co., Inc.*, 13 FCC Rcd 13007 (1998); *Fox Television Stations, Inc.*, 8 FCC Rcd 5341 (1993); *aff'd sub nom. Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154 (D.C. Cir. 1995); *Field Communications Corp.*, 65 FCC 2d 959 (1977).

daily newspaper in each of four small media markets: Myrtle Beach-Florence, SC (DMA rank 109), Panama City, FL (DMA rank 158), Columbus, GA (DMA rank 125), Tri-Cities, TN/VA (DMA rank 91).[19] Gannett acquired the top-ranked broadcast station in the market and *The Arizona Republic* in Phoenix, AZ (DMA rank 12). *2008 Order*, 23 FCC Rcd at 2056 nn.252–56, JA___.

But instead of coming into compliance with the NBCO when their television station licenses came up for renewal between 2004 and 2006, Media General and Gannett requested permanent waivers of the rule. Several parties including Free Press filed petitions to deny Media General's license renewals on the ground that these combinations violated the NBCO rule and that Media General had failed meet the waiver standard. Under the only prong of the four-part standard that could possibly apply, Media General would have to show that waiving the rule would better promote diversity and competition that applying the rule. Yet, Free Press and the other parties demonstrated that these combinations had in fact decreased diversity and competition in those communities.[20]

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[19]Media General has since sold its television station in Panama City, thus rendering moot any issues surrounding that combination.

[20] Common Cause South Carolina and Free Press Pet. To Deny Renewal of Station License WBTW, Florence, South Carolina (Nov. 1, 2004); NAACP and Free Press Mot. To Dismiss or In the Alternative Pet. To Deny Renewal of Station License WMBB-TV, Panama City, Florida (Jan.3, 2005); Free Press Mot. To Dismiss or In the Alternative Pet. To Deny Renewal of Station License WRBL(TV), Columbus, Georgia (Mar. 1, 2005); Free Press Informal Objection for Renewal of Station

These petitions to deny were still pending when, without any public notice and "in the dead of night on the eve of [the] vote," the Chairman had language added to the draft granting permanent waivers to Media General and Gannett. *2008 Order* at 2122–24 (Adelstein, dissenting), JA____- ____. In its one paragraph discussion of the waivers, the Commission failed to mention any of the pending petitions to deny, nor did it address any of the objections raised in the petitions to deny the license renewals. *2008 Order* at 2055, JA___. A month later, the Media Bureau granted Gannett's license renewal without issuing an opinion. Public Notice, Media Bureau, Broadcast Applications, File No. BRCT-20060531ACB, (Mar. 6, 2008)(attached as App. D). Soon thereafter, the Bureau issued a two-page, unpublished letter granting Media General's license renewals. The letter summarily rejected all of the petitions to deny without addressing any of the facts or arguments raised therein. *WJHL-TV, Johnson City, Tennessee, Application for Renewal of License File No. BRCT-20050401BYS, et al*, DA 08-522 (Mar. 25, 2008) (attached as App. E).

A. The FCC Violated the APA By Failing to State in the *Further Notice* that It Proposed to Grant Waivers

In granting these five permanent waivers in the *2008 Order*, the FCC violated the APA requirement that agencies publish notice in the Federal Register

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License WJHL-TV, Johnson City, Tennessee (July 1, 2005). Excerpts from a representative petition to deny have been appended as App. C.

to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b), (c). The *Further Notice* did not propose granting any waivers to anyone, that depriving Citizen Petitioners and other interested parties the opportunity to present their views on whether waivers should be granted.

In granting the waivers, the *2008 Order* cited only Media General's and Gannett's comments, which self-servingly emphasized the benefits of their own combinations and did not explicitly discuss any need for permanent waivers. 23 FCC Rcd at 2055–56 nn.248–58, JA___. As a result, the Commission made an arbitrary decision on the basis of a one-sided record. In addition, the Commission violated Free Press' due process right to be heard because neither the *2008 Order* granting the waivers to Media General nor the Media Bureau decision renewing Media General's licenses, addressed their objections on the merits. *See Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 223-24 (3d Cir. 2007); *Bell Tel. Co. v. FCC*, 503 F.2d 1250, 1268 (3d Cir. 1974).

B. The FCC Decision to Grant Permanent Waivers to Media General and Gannett was Arbitrary and Capricious

In granting permanent waivers to Media General and Gannett, the Commission considered impermissible or irrelevant factors. *State Farm*, 463 U.S. at 43 (1983). The Commission did not apply the 1975 waiver standards applicable

at the time the license renewals were filed. Nor did it require Media General or Gannett to request new waivers under the newly revised NBCO, rule as it required other broadcasters with temporary waivers to do.[21]

It is obvious that Media General would not be able to meet the criteria for a presumptive waiver because among other things, none of its combinations were in top 20 markets.[22] So, instead of requiring Media General to apply under the new standard, the Commission cited four reasons for granting the waivers: (1) "the public interest warrants a waiver in light of the synergies that have already been achieved from the newspaper-broadcast station combination"; (2) "new services provided to local communities by the combination"; (3) "the harms . . .

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[21]These other applicants included companies with "existing combination[s] consisting of more than one newspaper and/or more than one broadcast station" as well as companies that "ha[d] been granted a waiver to hold such a combination pending the completion of th[e 2008] rulemaking." *2008 Order* at 2056, JA___. Specifically, this applied to Cox Enterprises (Atlanta, GA and Dayton OH DMAs), Inc., Tribune-Review Publishing Co. (Pittsburgh, PA DMA), Bonneville International Corp (Salt Lake City, UT DMA), Scranton Times Ltd. Partnership (Wilkes Barre-Scranton, PA DMA), and Morris (Amarillo, TX and Topeka, KS DMAs). *2008 Order* at nn.257–58, JA___.

[22]It bears noting that Media General had aggressively lobbied the Commission during the rulemaking. In ten months preceding the FCC's adoption of the *2008 Order*, the FCC's Electronic Comment Filing System shows that Media General representatives visited or called the Commission 37 times. Senators Jim Webb and Mark Warner from Media General's home state of Virginia wrote to Chairman Martin on Media General's behalf. *See* Media General Notice of Ex Parte Communication, MB Docket Nos. 06-121 and 02-277 (filed Nov. 20, 2007), JA__. The President and CEO of Media General, Marshall N. Morton, spoke with Chairman Martin on December 14, just four days before the adoption of the *2008 Order*.

associated with required divestitures"; and (4) "the prolonged period of uncertainty surrounding the status of the newspaper-broadcast cross-ownership ban, and the length of time that the waiver request has been pending." *2008 Order* at 2055, JA___. The Commission's reliance on these factors rather than those set forth in either the old or new waiver standard appears to be the "product of 'result-oriented' rationalization." *Continental Airlines v. CAB*, 519 F.2d 944, 957 (D.C. Cir. 1975).

III. THE FCC'S REFUSAL TO TIGHTEN THE DUOPOLY RULE IS ARBITRARY AND CAPRICIOUS BECAUSE THE FCC FAILED TO ADDRESS THE IMPACT OF THE DIGITAL TRANSITION

An agency's decision is arbitrary and capricious if the agency "entirely fail[s] to consider an important aspect of the problem." *Prometheus*, 373 F.3d at 390 (quoting *State Farm*, 463 U.S. 29, 43 (1983)). UCC and others argued that the Commission's stated rationale for permitting duopolies was undermined by the ability of television stations that broadcast digitally to "multicast." They urged the FCC to tighten its duopoly rule and return to the pre-1999 rule, which allowed only one television station per market.

In 1999, the Commission first allowed an entity to hold licensees for two television stations with overlapping contours so long as (1) there were at least eight independent broadcast television "voices" in the market and (2) both stations were

not ranked in the top four (typically NBC, ABC, CBS, and FOX affiliates) (the "1999 duopoly rule"). *Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903, 12932-33 (1999) ("*1999 Order"), remanded sub nom. Sinclair Broad Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

In the 2002 Biennial Review, the FCC relaxed the local television rule to allow common ownership of up to three stations in larger markets and two stations in most markets. *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 Order*, 18 FCC Rcd 13620, 13688 (2003). This Court found that the Commission's rationale for its numerical limits, which was based on assumptions of equal market shares, was not supported by the evidence, and the Commission had failed to offer a reasonable explanation of its decision to disregard actual market share. It also found that the modified local TV rule was inconsistent and unreasonable in allowing concentration in excess of the competition benchmarks. Thus, it remanded the numerical limits for the Commission "to support and harmonize its rationale." *Prometheus*, 373 F.3d at 420.

By the time the Commission opened its proceeding on remand in 2006, most television stations were broadcasting in both digital and analog, and full conversion to digital was anticipated. Under FCC rules, commercial stations had

been required to construct digital facilities by May 1, 2002, with earlier deadlines for stations in the largest markets. *See Advanced Television Systems and their Impact on the Existing Television Broadcast Service*, 12 FCC Rcd 12809, 12840-41 (1997). By 2005, 86.4% of stations had begun broadcasting in digital. *Carriage of Digital Television Broadcast Signals*, 20 FCC Rcd 4516, 4525 n.72 (2005).

On remand, UCC and others filed comments discussing the implications of the then-ongoing transition to digital television for establishing an appropriate ownership limit. UCC noted that 434 stations were already providing multicast services, and many more broadcasters were planning to roll out new streams.[23] This development enabled television stations to "receive all the benefits of duopolies merely by using digital technologies." UCC 2006 Comments at 45, JA___. Moreover, digital technology permitted broadcasters to "generate new revenue without the need to purchase multiple stations in any one market." Communications Workers of America, *et al.* Comments, MB Dkt. 06-121, at 53 (Oct. 23, 2006) ("CWA Comments"), JA___. Although the transition was not yet complete, the American Federation of Television and Radio Artists ("AFTRA")

[23]UCC 2006 Comments at 46, JA___. *See also* CWA Comments at 52-53, JA__-__ (describing some successful examples of broadcasters developing multicast content); AFTRA Comments at10, JA___ (indicating "every major broadcast owner in the industry is jumping on the split stream multicast bandwagon").

emphasized that "the Commission's rules must be crafted to anticipate these truly new and emergent technologies." AFTRA Comments, MB Dkt. 06-121, at 9, JA___.

UCC also pointed out that digital technology allowed the broadcast spectrum to be used more efficiently. It noted that "the Commission has a 'long-standing policy goal in favor of efficient and non-duplicative use of the spectrum.'" UCC 2006 Comments at 58, JA___ (citation omitted). UCC argued that permitting broadcasters to own multiple licenses would greatly *reduce* the economic incentive to innovate and to use the digital spectrum efficiently. *Id.* at 58-59, JA___.

Despite this extensive discussion in the record, the FCC majority summarily rejected proposals to tighten the TV ownership rule in a single paragraph:

> We decline to tighten the local television ownership rule, as requested by some commenters. We recognize that owning a second in-market station can result in substantial savings in overhead and management costs and can allow the local broadcaster to innovate by spreading its fixed costs and operating capital over a larger number of operating units and to better compete with non-broadcast content providers for advertising dollars. We find that these potential significant benefits of duopolies permitted under the parameters of the rule, in markets with a plethora of diverse voices, outweigh commenters' speculative claims that duopolies harm diversity and competition.

2008 Order, 23 FCC Rcd at 2064-65, JA___ (Citation omitted.)

Although recognizing potential benefits from duopolies, the *2008 Order* failed to consider that the same or greater benefits could be achieved from multicasting without permitting common ownership of two television stations in a market. In fact, the *2008 Order* does not contain so much as a footnote discussing the implications of the digital transition. The FCC's "failure to provide a single word of explanation for its rejection of an option that appears to serve precisely the agency's purported goals suggests a lapse of rational decisionmaking." *Office of Comm'n of United Church of Christ v. F.C.C.*, 779 F.2d 702, 714 (D.C. Cir. 1985).

IV. THE FCC'S FAILURE TO ANALYZE THE IMPACT OF THE OWNERSHIP RULES ON MINORITY AND FEMALE OWNERSHIP IS ARBITRARY AND CAPRICIOUS

In *Prometheus,* this Court found that the Commission's repeal of one aspect of the 1999 Duopoly Rule known as the failed station solicitation rule (FSSR) was arbitrary and capricious.[24] It said that "[b]y failing to mention anything about the effect this change would have on potential minority station owners, the Commission has not provided 'a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.'" 373 F.3d at 420-421 (citing *Greater Boston TV Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)).

[24]To qualify for a FSSR waiver, the applicant must show "that the in-market buyer is the only entity ready, willing, and able to operate the station" and "that the sale to an out-of-market applicant would result in an artificially depressed price." *1999 Order,* 14 FCC Rcd at 12908.

This Court also held that the Commission's failure to acknowledge the decline of minority ownership notwithstanding the prior existence of the FSSR was arbitrary and capricious because the Commission "entirely failed to consider an important aspect of the problem." *Id.* at 421. Thus, this Court remanded for correction of that omission, and instructed the Commission to "consider MMTC's proposals for enhancing ownership opportunities for women and minorities which the Commission had deferred for future consideration." *Id.* at 435, n.82. This Court also directed the Commission to consider proposals to advance minority and female ownership *at the same time* it responded to the Court's remand order. *Id.* at 421, n.59.

Notwithstanding this Court's explicit commands, the Commission failed on remand to analyze how the ownership limits would affect opportunities for minorities and females. To be sure, the *Further Notice* asked for comments on the MMTC proposals and for alternative proposals for increasing minority and female ownership that could avoid "statutory or constitutional impediments." 21 FCC Rcd at 8834, 8837, JA_. But the agency ignored many of the comments it received on these issues.

For example, UCC and others submitted a study that analyzed FCC-collected data and determined that as of 2005, women owned only 3.4%, and minorities owned only 3.6%, of the stations filing ownership data with the

Commission. Carolyn M. Byerly, *Questioning Media Access: Analysis of FCC Women & Minority Ownership Data* (Sept. 2006), JA_. Because of these low percentages, they urged the Commission to tighten or maintain existing ownership limits as the most effective, race-neutral way to increase opportunities for minority and female ownership. UCC 2006 Comments at 2, JA_. Stricter ownership limits would create more opportunities for minorities and females to obtain capital and purchase stations. *Id*. at 26, JA___. UCC also urged the Commission to reduce the limit on local radio ownership and to eliminate grandfathering of radio combinations in excess of the ownership limits, which would make available 96 stations in 54 markets. *Id.* at 25-26, JA___. The comments noted that radio represented one of the best opportunities for minorities and females because it required less capital to enter the radio market. *Id*. at 84, JA___.

Petitioner Free Press also filed comments urging, among other things that the Commission tighten or retain the existing ownership limits based on the impact on minority and female ownership. Free Press 2006 Comments at 25, JA___. The comments attached a study showing that markets with minority owners were significantly less concentrated. S. Derek Turner & Mark Cooper, *Relaxation of Media Ownership Limits Undermines Minority Ownership* (October 2006), JA_.

The FCC itself commissioned a study specifically designed to assess the impact of the relaxation of the television duopoly rule on minority and female

ownership. Study 8 found that increased concentration had a detrimental impact on minority and female ownership. Allen S. Hammond, IV *et al*., *The Impact of the FCC's TV Duopoly Rule Relaxation on Minority & Owned Broadcast Stations, 1996-2002* (June 2007), JA___. [25]

In August 2007, the Commission solicited additional comments on proposals to increase ownership opportunities for minorities and women. *2d Further Notice,* 22 FCC Rcd 14215, JA___. In response, UCC again urged the Commission to tighten and enforce media ownership limits as the most effective and race-neutral way of increasing opportunities for minorities and females. UCC 2007 Comments at 5, JA___.

Free Press also filed comments including several studies providing a comprehensive analysis of minority and female ownership of radio and television stations. Free Press's studies showed that "[w]omen and people of color are vastly underrepresented in broadcast station ownership. They are more likely to be local single-station owners, and are extremely vulnerable to the pressures of local media

[25]Specifically, Study 8 found that no minorities or women were able to create or sustain duopolies during the study's seven-year period. *Id.* at 46, JA___. During that period. levels of minority ownership fell by 27% nationwide, compared to a 39% drop in markets where a duopoly was formed subsequent to the Commission's relaxation of the rule. *Id.* at 43, JA___. By contrast, the number of minority owned stations dropped only 10% in non-duopoly markets. The impact of concentration on female ownership was similar. Female owned stations were more likely to be found in non-duopoly markets. *Id.*, JA___.

market concentration and consolidation." Free Press Comments at 3 (Oct. 1, 2007), JA__. Free Press demonstrated that "any policy changes resulting in increased market concentration will unambiguously lead to a decline in the level of female and minority ownership." *Id*., JA___.

Free Press also criticized the FCC's inadequate data collection and failure to do its own assessment of minority and female ownership. It observed that the "court in *Prometheus* clearly wished for the Commission to assess the *impact* of the of proposed rule changes before implementing them . . . But how can the Commission assess the impact of past rules and model the impact of potential future policies if it has no basic understanding of just which stations are actually owned by women and people of color?" *Id*. JA___.

Despite the substantial record developed on remand, the Commission nonetheless failed to analyze the impact of the ownership rules on minority and female ownership at the same time it modified or retained the ownership limits in the *2008 Order*. The failure is especially egregious in light of Study 8's finding that the prior relaxation of the local television rule negatively impacted minority and female ownership. The Commission's only reference to the Hammond study is to note "that it does not rely on the study." *2008 Order*, 23 FCC Rcd at 2086 n.467, JA___.

The *2008 Order* also failed to analyze the impact on minority and female owners of relaxing the NBCO rule.[26] Nor did the *2008 Order* address UCC's proposals to diversify radio ownership. UCC 2006 Comments at 25-26, JA___ . Instead, the Commission did something that no one asked it to do – adopted a separate Order and Third Further Notice of Proposed Rulemaking. *Diversity Order/Further Notice*, 23 FCC Rcd 5922, JA___.

The Commission's action divorcing minority and female ownership questions from its consideration of the ownership rules itself was arbitrary and capricious because it improperly ignored an important aspect of the problem. *State Farm*, 463 U.S. 43 (1983).[27] The Diversity Order also failed to consider the effect of the ownership rules on minority and female ownership. It did not discuss Study 8 or the UCC comments.

The *Diversity Order/Further Notice* purported to "take several steps to increase participation in the broadcasting industry by new entrants and small businesses, including minority- and women-owned businesses, which historically have not been well-represented in the broadcasting industry." *Diversity*

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[26]Petitioner Free Press submitted data showing that minority-owned stations are vastly underrepresented in the top 20 DMAs and that increased concentration led to fewer ownership opportunities for minorities and females. Free Press Comments at 43 (Oct. 1, 2007), JA_.

[27]Indeed, even its restoration of the FSSR was without any analysis of the impact of minority ownership. *2008 Order* at 2068, JA___.

Order/Further Notice at 5922, JA___. It adopted four of MMTC's fourteen proposals. Two involve preferences for "eligible entities," which the FCC defined as small businesses without regard to race, gender or social disadvantage.[28] Since a large number of existing broadcast stations owners are classified as small businesses, these measures seem unlikely to result in increased ownership diversity. UCC *et al*. Reply Comments, MB Dkt. 06-121 at 3-5 (Oct. 16, 2007), JA___. However, the *Diversity Order/Further Notice* provided *no analysis* of their effectiveness. Moreover, several important issues, such as whether a constitutionally permissible definition of "Socially Disadvantaged Business" could be applied to the rules designed to enhance ownership diversity, were deferred for additional comment and are still pending.

In conclusion, instead of complying with this Court's instruction to address the effect of the ownership limits on minority and female ownership, the Commission chose to repeat the same actions that led in part to the remand in the first instance. The Commission's continued failure to provide a reasoned analysis and to consider alternative approaches is arbitrary and capricious.

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[28]These proposals were to allow the sale of expired construction permits to eligible entities and to modify the ownership attribution rules to encourage investment in eligible entities. The other two MMTC proposals adopted by the Commission were "zero tolerance" for ownership fraud, which is nothing more than a commitment to enforce existing rules, and an "equal opportunity transaction rule," which merely requires broadcasters to certify that they did not discriminate when selling a station.

CONCLUSION

Citizen Petitioners are not unsympathetic to the burdens imposed on the Commission by the mandate of Section 202(h) of the 1996 Telecommunications Act to conduct what amounts to an almost endless review of its ownership rules. However, this does not excuse the FCC from the requirement to engage in rational decisionmaking.

This court should reverse and remand the FCC's *2008 Order* and its *Diversity Order* because, *inter alia*,

- its result-oriented revision of the NBCO was adopted using procedures that could have appeared in Alice in Wonderland;
- its indefensible gift of permanent waivers for five newspaper/broadcast combinations employed *ad hoc* standards to provide relief unobtainable under any past or current Commission policy;
- while the FCC can fairly characterize itself as one of the most tech-savvy agencies in the federal government, it inexplicably failed to apply this expertise in determining not to strengthen its TV duopoly rule; and

- the failure to heed this Court's mandate to consider the effect of its actions on minority and female ownership was arbitrary and capricious and in disregard of this Court's mandate.

WHEREFORE, Citizen Petitioners ask that this Court reverse and remand the Commission's *2008 Order* and its Diversity Order, and grant all such other relief as may be just and proper.

Respectfully submitted,

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May 17, 2010

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 13,085 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(3);
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.
3. This brief complies with the virus check requirement of 3D CIR. R. APP. P. 31.1(c) because the document has been checked with Symantec AntiVirus version 9.0.1.1000, and no viruses were found.
4. The electronic version of this brief is identical to the paper copies, as per 3D CIR. R. APP. P. 31.1(c).

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CERTIFICATE OF ADMISSION

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

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STATUTORY AND REGULATORY ADDENDUM

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Administrative Procedure Act, 5 U.S.C. § 553.

Rule making:

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

> **(1)** a military or foreign affairs function of the United States; or
> **(2)** a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

> **(1)** a statement of the time, place, and nature of public rule making proceedings;
> **(2)** reference to the legal authority under which the rule is proposed; and
> **(3)** either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

> **(A)** to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
> **(B)** when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
(2) interpretative rules and statements of policy; or
(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

*** * ***

Administrative Procedure Act, 5 U.S.C.. § 706

Scope of Review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or

those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Communications Act of 1934, 47 U.S.C. § 303

Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall--

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

* * *

Communications Act of 1934, 47 U.S.C. § 309.

Application for license

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * *

(d) Petition to deny application; time; contents; reply; findings

(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such

application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license), it shall proceed as provided in subsection (e) of this section.

(e) Hearings; intervention; evidence; burden of proof

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a

full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

* * *

Communications Act of 1934, 47 U.S.C. § 310.

License ownership restrictions

(d) Assignment and transfer of construction permit or station license

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

Communications Act of 1943, 47 U.S.C. § 402.

Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56

§ 202(h). FurtherCommission Review

The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

*** * ***

§ 203. Term of Licenses

Section 307(c) (47 U.S.C. 307(c)) is amended to read as follows:

"(c) TERMS OF LICENSES.--
"(1) INITIAL AND RENEWAL LICENSES.--Each license granted for the operation of a broadcasting station shall be for a term of not to exceed 8 years. Upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed 8 years from the date of expiration of the preceding license, if the Commission finds that public interest, convenience, and necessity would be served thereby. Consistent with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, the public interest, convenience, or necessity would be served by such action.
"(2) MATERIALS IN APPLICATION.--In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings.
"(3) CONTINUATION PENDING DECISION.--Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405, the Commission shall continue such license in effect.".

FCC Regulations

47 C.F.R. § 73.3555**.** Multiple ownership.

(a)(1) Local radio ownership rule. A person or single entity (or entities under common control) may have a cognizable interest in licenses for AM or FM radio broadcast stations in accordance with the following limits:

(i) In a radio market with 45 or more full-power, commercial and noncommercial radio stations, not more than 8 commercial radio stations in total and not more than 5 commercial stations in the same service (AM or FM);

(ii) In a radio market with between 30 and 44 (inclusive) full-power, commercial and noncommercial radio stations, not more than 7 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM);

(iii) In a radio market with between 15 and 29 (inclusive) full-power, commercial and noncommercial radio stations, not more than 6 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM); and

(iv) In a radio market with 14 or fewer full-power, commercial and noncommercial radio stations, not more than 5 commercial radio stations in total and not more than 3 commercial stations in the same service (AM or FM); provided, however, that no person or single entity (or entities under common control) may have a cognizable interest in more than 50% of the full-power, commercial and noncommercial radio stations in such market unless the combination of stations comprises not more than one AM and one FM station.

(2) Overlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service.

(b) Local television multiple ownership rule. An entity may directly or indirectly own, operate, or control two television stations licensed in the same Designated Market Area (DMA) (as determined by Nielsen Media Research or any successor entity) only under one or more of the following conditions:

(1) The Grade B contours of the stations (as determined by § 73.684) do not overlap; or

(i) At the time the application to acquire or construct the station(s) is filed, at least one of the stations is not ranked among the top four stations in the DMA, based on the most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and

(ii) At least 8 independently owned and operating, full-power commercial and noncommercial TV stations would remain post-merger in the DMA in which the communities of license of the TV stations in question are located. Count only those stations the Grade B signal contours of which overlap with the Grade B signal contour of at least one of the stations in the proposed combination. In areas where there is no Nielsen DMA, count the TV stations present in an area that would be the functional equivalent of a TV market. Count only those TV stations the Grade B signal contours of which overlap with the Grade B signal contour of at least one of the stations in the proposed combination.

(c) Radio-television cross-ownership rule.

(1) This rule is triggered when:

(i) The predicted or measured 1 mV/m contour of an existing or proposed FM station (computed in accordance with § 73.313) encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the Grade A contour(s) of the TV broadcast station(s) (computed in accordance with § 73.684) encompasses the entire community of license of the FM station; or

(ii) The predicted or measured 2 mV/m groundwave contour of an existing or proposed AM station (computed in accordance with § 73.183 or § 73.386), encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the Grade A contour(s) of the TV broadcast station(s) (computed in accordance with § 73.684) encompass(es) the entire community of license of the AM station.

(2) An entity may directly or indirectly own, operate, or control up to two commercial TV stations (if permitted by paragraph (b) of this section, the local television multiple ownership rule) and 1 commercial radio station situated as described in paragraph (c)(1) of this section. An entity may not exceed these numbers, except as follows:

(i) If at least 20 independently owned media voices would remain in the market post-merger, an entity can directly or indirectly own, operate, or control up to:

(A) Two commercial TV and six commercial radio stations (to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule); or

(B) One commercial TV and seven commercial radio stations (to the extent that an entity would be permitted to own two commercial TV and six commercial radio stations under paragraph (c)(2)(i)(A) of this section, and to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule).

(ii) If at least 10 independently owned media voices would remain in the market post-merger, an entity can directly or indirectly own, operate, or control up to two commercial TV and four commercial radio stations (to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule).

(3) To determine how many media voices would remain in the market, count the following:

(i) TV stations: independently owned and operating full-power broadcast TV stations within the DMA of the TV station's (or stations') community (or communities) of license that have Grade B signal contours that overlap with the Grade B signal contour(s) of the TV station(s) at issue;

(ii) Radio stations:

(A)*(1)* Independently owned operating primary broadcast radio stations that are in the radio metro market (as defined by Arbitron or another nationally recognized audience rating service) of:

(i) The TV station's (or stations') community (or communities) of license; or

(ii) The radio station's (or stations') community (or communities) of license; and

(2) Independently owned out-of-market broadcast radio stations with a minimum share as reported by Arbitron or another nationally recognized audience rating service.

(B) When a proposed combination involves stations in different radio markets, the voice requirement must be met in each market; the radio stations of different radio metro markets may not be counted together.

(C) In areas where there is no radio metro market, count the radio stations present in an area that would be the functional equivalent of a radio market.

(iii) Newspapers: Newspapers that are published at least four days a week within the TV station's DMA in the dominant language of the market and that have a circulation exceeding 5% of the households in the DMA; and

(iv) One cable system: if cable television is generally available to households in the DMA. Cable television counts as only one voice in the DMA, regardless of how many individual cable systems operate in the DMA.

(d) Daily newspaper cross-ownership rule.

(1) No license for an AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in:

(i) The predicted or measured 2 mV/m contour of an AM station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community in which such newspaper is published; or

(ii) The predicted 1 mV/m contour for an FM station, computed in accordance with § 73.313, encompassing the entire community in which such newspaper is published; or

(iii) The Grade A contour of a TV station, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.

(2) Paragraph (d)(1) of this section shall not apply in cases where the Commission makes a finding pursuant to Section 310(d) of the Communications Act that the public interest, convenience, and necessity would be served by permitting an entity that owns, operates or controls a daily newspaper to own, operate or control an AM, FM, or TV broadcast station whose relevant contour encompasses the entire community in which such newspaper is published as set forth in paragraph (d)(1) of this section.

(3) In making a finding under paragraph (d)(2) of this section, there shall be a presumption that it is not inconsistent with the public interest, convenience, and necessity for an entity to own, operate or control a daily newspaper in a top 20 Nielsen DMA and one commercial AM, FM or TV broadcast station whose relevant contour encompasses the entire community in which such newspaper is published as set forth in paragraph (d)(1) of this section, provided that, with respect to a combination including a commercial TV station,

(i) The station is not ranked among the top four TV stations in the DMA, based on the most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and

(ii) At least 8 independently owned and operating major media voices would remain in the DMA in which the community of license of the TV station in question is located (for purposes of this provision major media voices include full-power TV broadcast stations and major newspapers).

(4) In making a finding under paragraph (d)(2) of this section, there shall be a presumption that it is inconsistent with the public interest, convenience, and necessity for an entity to own, operate or control a daily newspaper and an AM, FM or TV broadcast station whose relevant contour encompasses the entire community in which such newspaper is published as set forth in paragraph (d)(1) of this section in a DMA other than the top 20 Nielsen DMAs or in any circumstance not covered under paragraph (d)(3) of this section.

(5) In making a finding under paragraph (d)(2) of this section, the Commission shall consider:

(i) Whether the combined entity will significantly increase the amount of local news in the market;

(ii) Whether the newspaper and the broadcast outlets each will continue to employ its own staff and each will exercise its own independent news judgment;

(iii) The level of concentration in the Nielsen Designated Market Area (DMA); and

(iv) The financial condition of the newspaper or broadcast station, and if the newspaper or broadcast station is in financial distress, the proposed owner's commitment to invest significantly in newsroom operations.

(6) In order to overcome the negative presumption set forth in paragraph (d)(4) of this section with respect to the combination of a major newspaper and a television station, the applicant must show by clear and convincing evidence that the co-owned major newspaper and station will increase the diversity of independent news outlets and increase competition among independent news sources in the market, and the factors set forth above in paragraph (d)(5) of this section will inform this decision.

(7) The negative presumption set forth in paragraph (d)(4) of this section shall be reversed under the following two circumstances:

(i) The newspaper or broadcast station is failed or failing; or

(ii) The combination is with a broadcast station that was not offering local newscasts prior to the combination, and the station will initiate at least seven hours per week of local news programming after the combination.

(e) National television multiple ownership rule.

(1) No license for a commercial television broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors having a cognizable interest in television stations which have an aggregate national audience reach exceeding thirty-nine (39) percent.

(2) For purposes of this paragraph (e):

(i) National audience reach means the total number of television households in the Nielsen Designated Market Areas (DMAs) in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license. For purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their DMA market.

(ii) No market shall be counted more than once in making this calculation.

(3) Divestiture. A person or entity that exceeds the thirty-nine (39) percent national audience reach limitation for television stations in paragraph (e)(1) of this section through grant, transfer, or assignment of an additional license for a commercial television broadcast station shall have not more than 2 years after exceeding such limitation to come into compliance with such limitation. This divestiture requirement shall not apply to persons or entities that exceed the 39 percent national audience reach limitation through population growth.

(f) The ownership limits of this section are not applicable to noncommercial educational FM and noncommercial educational TV stations. However, the attribution standards set forth in the Notes to this section will be used to determine attribution for noncommercial educational FM and TV applicants, such as in evaluating mutually exclusive applications pursuant to subpart K of part 73.

47 C.F.R. § 73.3580. Local public notice of filing of broadcast applications

(a) All applications for instruments of authorization in the broadcast service (and major amendments thereto, as indicated in §§ 73.3571, 73.3572, 73.3573, 73.3574

and 73.3578) are subject to the local public notice provisions of this section, except applications for:

(1) A minor change in the facilities of an authorized station, as indicated in §§ 73.3571, 73.3572, 73.3573 and 73.3574.

(2) Consent to an involuntary assignment or transfer or to a voluntary assignment or transfer which does not result in a change of control and which may be applied for on FCC Form 316 pursuant to the provisions of § 73.3540(b).

(3) A license under section 319(c) of the Communications Act or, pending application for or grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license.

(4) Extension of time to complete construction of authorized facilities.

(5) An authorization of facilities for remote pickup or studio links for use in the operation of a broadcast station.

(6) Authorization pursuant to section 325(c) of the Communications Act (" * * * studios of foreign stations") where the programs to be transmitted are special events not of a continuing nature.

(7) An authorization under any of the proviso clauses of section 308(a) of the Communications Act concerning applications for and conditions in licenses.

(b) Applications (as originally filed or amended) will be acted upon by the FCC no sooner than 30 days following public notice of acceptance for filing or amendment, except as otherwise permitted in § 73.3542, "Application for temporary authorization."

(c) An applicant who files an application or amendment thereto which is subject to the provisions of this section, must give notice of this filing in a newspaper. Exceptions to this requirement are applications for renewal of AM, FM, TV, Class A TV and international broadcasting stations; low power TV stations; TV and FM translator stations; TV boosters stations; FM boosters stations; and applications subject to paragraph (e) of this section. The local public notice must be completed within 30 days of the tendering of the application. In the event the FCC notifies the applicant that a major change is involved, requiring the applicant to file public

notice pursuant to §§ 73.3571, 73.3572, 73.3573 or 73.3578, this filing notice shall be given in a newspaper following this notification.

(1) Notice requirements for these applicants are as follows.

(i) In a daily newspaper of general circulation published in the community in which the station is located, or proposed to be located, at least twice a week for two consecutive weeks in a three-week period; or,

(ii) If there is no such daily newspaper, in a weekly newspaper of general circulation published in that community, once a week for 3 consecutive weeks in a 4–week period; or,

(iii) If there is no daily or weekly newspaper published in that community, in the daily newspaper from wherever published, which has the greatest general circulation in that community, twice a week for 2 consecutive weeks within a 3–week period.

(2) Notice requirements for applicants for a permit pursuant to section 325(b) of the Communications Act (" * * * Studios of Foreign Stations") are as follows. In a daily newspaper of general circulation in the largest city in the principal area to be served in the U.S.A. by the foreign broadcast station, at least twice a week for 2 consecutive weeks within a three-week period.

(3) Notice requirements for applicants for a change in station location are as follows. In the community in which the station is located and the one in which it is proposed to be located, in a newspaper with publishing requirements as in paragraphs (c)(1)(i), (ii) or (iii) of this section.

(4) The notice required in paragraphs (c)(1), (2) and (3) of this section shall contain the information described in paragraph (f) of this section.

(d) The licensee of an operating broadcast station who files an application or amendment thereto which is subject to the provisions of this section must give notice as follows:

(1) An applicant who files for renewal of a broadcast station license, other than a low power TV station license not locally originating programming as defined by § 74.701(h), an FM translator station or a TV translator station license, must give notice of this filing by broadcasting announcements on applicant's station. (Sample and schedule of announcements are below.) Newspaper publication is not required. An applicant who files for renewal of a low power TV station license not locally

originating programming as defined by § 74.701(h), an FM translator station or a TV translator station license will comply with (g) below.

(2) An applicant who files an amendment of an application for renewal of a broadcast station license will comply with paragraph (d)(1) of this section.

(3) An applicant who files for modification, assignment or transfer of a broadcast station license (except for International broadcast, low power TV, TV translator, TV booster, FM translator and FM booster stations) shall give notice of the filing in a newspaper as described in paragraph (c) of this section, and also broadcast the same notice over the station as follows:

> **(i)** At least once daily on four days in the second week immediately following either the tendering for filing of the application or immediately following notification to the applicant by the FCC that Public Notice is required pursuant to §§ 73.3571, 73.3572, 73.3573 or § 73.3578. For commercial radio stations these announcements shall be made between 7 a.m. and 9 a.m. and/or 4 p.m. and 6 p.m. For stations which neither operate between 7 a.m. and 9 a.m. nor between 4 p.m. and 6 p.m., these announcements shall be made during the first two hours of broadcast operation. For commercial TV stations, these announcements shall be made between 6 p.m. and 11 p.m. (5 p.m. and 10 p.m. Central and Mountain time).

(4) The broadcast notice requirements for those filing renewal applications and amendments thereto are as follows:

> **(i) Pre-filing announcements.** During the period and beginning on the first day of the sixth calendar month prior to the expiration of the license, and continuing to the date on which the application is filed, the following announcement shall be broadcast on the 1st and 16th day of each calendar month. Stations broadcasting primarily in a foreign language should broadcast the announcements in that language.
>
> > *On (date of last renewal grant) (Station's call letters) was granted a license by the Federal Communication Commission to serve the public interest as a public trustee until (expiration date).*
> >
> > *Our license will expire on (date). We must file an application for renewal with the FCC (date four calendar months prior to expiration date). When filed, a copy of this application will be available for public inspection during our regular business hours. It contains*

information concerning this station's performance during the last (period of time covered by the application).

Individuals who wish to advise the FCC of facts relating to our renewal application and to whether this station has operated in the public interest should file comments and petitions with the FCC by (date first day of last full calendar month prior to the month of expiration).

Further information concerning the FCC's broadcast license renewal process is available at (address of location of the station's public inspection file) or may be obtained from the FCC, Washington, DC 20554.

(A) An applicant who files for renewal of a low power TV station locally originating programming (as defined by § 74.701(h)) shall broadcast this announcement, except that statements indicating there is a public inspection file at the station containing the renewal application and other information on the license renewal process, shall be omitted.

(B) This announcement shall be made during the following time periods:

(1) For commercial TV stations--at least two of the required announcements between 6 p.m. and 11 p.m. (5 p.m. and 10 p.m. Central and Mountain Time).

(2) For commercial radio stations--at least two of the required announcements between 7 a.m. and 9 a.m. and/or 4 p.m. and 6 p.m. For stations which neither operate between 7 a.m. and 9 a.m. nor between 4 p.m. and 6 p.m., at least two of the required announcements shall be made during the first two hours of broadcast operation.

(3) For noncommercial educational stations, at the same time as commercial stations, except that such stations need not broadcast the announcement during any month during which the station does not operate.

(4) For low power TV stations locally originating programming (as defined by § 74.701(h)), at the same time as for commercial TV stations, or as close to that time as possible.

(ii) Post-filing announcements. During the period beginning on the date on which the renewal application is filed to the sixteenth day of the next to last

full calendar month prior to the expiration of the license, all applications for renewal of broadcast station licenses shall broadcast the following announcement on the 1st and 16th day of each calendar month. Stations broadcasting primarily in a foreign language should broadcast the announcements in that language.

On (date of last renewal grant) (Station's call letters) was granted a license by the Federal Communications Commission to serve the public interest as a public trustee until (expiration date).

Our license will expire on (date). We have filed an application for renewal with the FCC.

A copy of this application is available for public inspection during our regular business hours. It contains information concerning this station's performance during the last (period of time covered by application).

Individuals who wish to advise the FCC of facts relating to our renewal application and to whether this station has operated in the public interest should file comments and petitions with the FCC by (date first day of last full calendar month prior to the month of expiration).

Further information concerning the FCC's broadcast license renewal process is available at (address of location of the station's public inspection file) or may be obtained from the FCC, Washington, DC 20554.

(A) An applicant who files for renewal of a low power TV station locally originating programming (as defined by § 74.701(h)) shall broadcast this announcement, except that statements indicating there is a public inspection file at the station containing the renewal application and other information on the license renewal process, shall be omitted.

(B) This announcement shall be made during the following time periods:

(1) For commercial TV stations--at least three of the required announcements between 6 p.m. and 11 p.m. (5 p.m. and 10 p.m. Central and Mountain time), at least one announcement

between 9 a.m. and 1 p.m., at least one announcement between 1 p.m. and 5 p.m., and at least one announcement between 5 p.m. and 7 p.m.

(2) For commercial radio stations--at least three of the required announcements between 7 a.m. and 9 a.m. and/or 4 p.m. and 6 p.m., at least one announcement between 9 a.m. and noon, at least one announcement between noon and 4 p.m., and at least one announcement between 7 p.m. and midnight. For stations which do not operate between 7 a.m. and 9 a.m. or between 4 p.m. and 6 p.m., at least three of the required announcements shall be made during the first two hours of broadcast operation.

(3) For noncommercial educational stations, at the same time as commercial stations, except that such stations need not broadcast the announcement during any month during which the station does not operate. In such instances noncommercial educational stations shall meet the requirements in the exact order specified in paragraph (d)(4)(ii)(A)(1) or (2) of this section (e.g., if only four renewal notices are broadcast by an educational TV licensee, 3 must be broadcast between 6 p.m. and 11 p.m. and the fourth between 9 a.m. and 1 p.m.).

(4) For low power TV stations locally originating programming (as defined by § 74.701(h)), at the same time as for commercial TV stations, or as close to that time as possible.

(iii) TV broadcast stations (commercial and noncommercial educational), in presenting the pre- and post-filing announcements, must use visuals with the licensee's and the FCC's addresses when this information is being orally presented by the announcer.

(iv) Stations which have not received a renewal grant since the filing of their previous renewal application, shall use the following first paragraph for the pre-filing and the post-filing announcements:

> *(Station's call letters) is licensed by the Federal Communications Commission to serve the public interest as a public trustee.*

(5) An applicant who files for a Class A television license must give notice of this filing by broadcasting announcements on applicant's station. (Sample and schedule of announcements are below.) Newspaper publication is not required.

(i) The broadcast notice requirement for those filing for Class A television license applications and amendment thereto is as follows:

(A) Pre–filing announcements. Two weeks prior to the filing of the license application, the following announcement shall be broadcast on the 5th and 10th days of the two week period. The required announcements shall be made between 6 p.m. and 11 p.m. (5 p.m. and 10 p.m. Central and Mountain Time) Stations broadcasting primarily in a foreign language should broadcast the announcements in that language.

> *On (date), the Federal Communications Commission granted (Station's call letters) a certification of eligibility to apply for Class A television status. To become eligible for a Class A certificate of eligibility, a low power television licensee was required to certify that during the 90–day period ending November 28, 1999, the station: (1) Broadcast a minimum of 18 hours per day; (2) broadcast an average of at least three hours per week of programming produced within the market area served by the station or by a group of commonly-owned low power television stations; and (3) had been in compliance with the Commission's regulations applicable to the low power television service. The Commission may also issue a certificate of eligibility to a licensee unable to satisfy the foregoing criteria, if it determines that the public interest, convenience and necessity would be served thereby.*
>
> *(Station's call letters) intends to file an application (FCC Form 302–CA) for a Class A television license in the near future. When filed, a copy of this application will be available at (address of location of the station's public inspection file) for public inspection during our regular business hours. Individuals who wish to advise the FCC of facts relating to the station's eligibility for Class A status should file comments and petitions with the FCC prior to Commission action on this application.*

(B) Post–filing announcements. The following announcement shall be broadcast on the 1st and 10th days following the filing of an application for a Class A television license. The required announcements shall be made between 6 p.m. and 11 p.m. (5 p.m. and 10 p.m. Central and Mountain Time). Stations broadcasting primarily

in a foreign language should broadcast the announcements in that language.

On (date of filing license application) (Station's call letters) filed an application, FCC Form 302–CA, for a Class A television license. Such stations are required to broadcast a minimum of 18 hours per day, and to average at least 3 hours of locally produced programming each week, and to comply with certain full-service television station operating requirements.

A copy of this application is available for public inspection during our regular business hours at (address of location of the station's public inspection file). Individuals who wish to advise the FCC of facts relating to the station's eligibility for Class A status should file comments and petitions with the FCC prior to Commission action on this application.

(ii) [Reserved]

(e) When the station in question is the only operating station in its broadcast service which is located in the community involved, or if it is a noncommercial educational station, publication of the notice in a newspaper, as provided in paragraph (c) of this section is not required, and publication by broadcast over that station as provided in paragraph (d) of this section shall be deemed sufficient to meet the notice requirements of this section. Noncommercial educational broadcast stations which do not broadcast during the portion of the year in which the period of broadcast of notice falls must comply with the provisions of paragraph (c) of this section.

(f) The notice required by paragraphs (c) and (d) of this section shall contain, when applicable, the following information, except as otherwise provided in paragraphs (d)(1) and (2) and (e) of this section in regard to renewal applications:

(1) The name of the applicant, if the applicant is an individual; the names of all partners, if the applicant is a partnership; or the names of all officers and directors and of those persons holding 10% or more of the capital stock or other ownership interest if the applicant is a corporation or an unincorporated association. (In the case of applications for assignment or transfer of control, information should be included for all parties to the application.)

(2) The purpose for which the application was or will be filed (such as, construction permit, modification, assignment or transfer of control).

(3) The date when the application or amendment was tendered for filing with the FCC.

(4) The call letters, if any, of the station, and the frequency or channel on which the station is operating or proposes to operate.

(5) In the case of an application for construction permit for a new station, the facilities sought, including type and class of station, power, location of studios, transmitter site and antenna height.

(6) In the case of an application for modification of a construction permit or license, the exact nature of the modification sought.

(7) In the case of an amendment to an application, the exact nature of the amendment.

(8) In the case of applications for a permit pursuant to Section 325(b) of the Communications Act ("* * * studios of foreign stations"), the call letters and location of the foreign radio broadcast station, the frequency or channel on which it operates, and a description of the programs to be transmitted over the station.

(9) A statement that a copy of the application, amendment(s), and related material are on file for public inspection at a stated address in the community in which the station is located or is proposed to be located. See §§ 73.3526 and 73.3527.

(g) An applicant who files for authorization or major modifications, or a major amendment thereto, for a low power TV, TV translator, TV booster, FM translator, or FM booster station, must give notice of this filing in a daily, weekly or biweekly newspaper of general circulation in the community or area to be served. Likewise, an applicant for assignment, transfer or renewal, or a major amendment thereto, for a low power TV, TV translator or FM translator station, must give this same type of newspaper notice. The filing notice will be given immediately following the tendering for filing of the application or amendment, or immediately following notification to the applicant by the FCC that public notice is required pursuant to §§ 73.3572, 73.3573, or 73.3578.

(1) Notice requirements for these applicants are as follows:

(i) In a newspaper at least one time; or

(ii) If there is no newspaper published or having circulation in the community or area to be served, the applicant shall determine an appropriate means of providing the required notice to the general public, such as posting in the local post office or other public place. The notice shall state:

(A) The name of the applicant, the community or area to be served, and the transmitter site.

(B) The purpose for which the application was filed.

(C) The date when the application or amendment was filed with the FCC.

(D) The output channel or channels on which the station is operating or proposes to operate and the power used or proposed to be used.

(E) In the case of an application for changes in authorized facilities, the nature of the changes sought.

(F) In the case of a major amendment to an application, the nature of the amendment.

(G) A statement, if applicable, that the station engages in or intends to engage in rebroadcasting, and the call letters, location and channel of operation of each station whose signals it is rebroadcasting or intends to rebroadcast.

(H) A statement that invites comment from individuals who wish to advise the FCC of facts relating to the renewal application and whether the station has operated in the public interest.

(h) The applicant may certify in the appropriate application that it has or will comply with the public notice requirements contained in paragraphs (c), (d) or (g) of this section. However, an applicant for renewal of license that is required to maintain a public inspection file, shall, within 7 days of the last day of broadcast of the required publication announcements, place in its public inspection file a statement certifying compliance with § 73.3580 along with the dates and times that the pre-filing and post-filing notices were broadcast and the text thereof. This certification need not be filed with the Commission but shall be retained in the public inspection file for as long as the application to which it refers.

(i) Paragraphs (a) through (h) of this section apply to major amendments to license renewal applications. See § 73.3578(a).

APPENDIX A

The New York Times
nytimes.com

November 13, 2007

OP-ED CONTRIBUTOR

The Daily Show

By KEVIN J. MARTIN

Washington

IN many towns and cities, the newspaper is an endangered species. At least 300 daily papers have stopped publishing over the past 30 years. Those newspapers that have survived are struggling financially. Newspaper circulation has declined steadily for more than 10 years. Average daily circulation is down 2.6 percent in the last six months alone.

Newspapers have also been hurt by significant cuts in advertising revenue, which accounts for at least 75 percent of their revenue. Their share of the advertising market has fallen every year for the past decade, while online advertising has increased greatly.

At the heart of all of these facts and figures is the undeniable reality that the media marketplace has changed considerably over the last three decades. In 1975, cable television served fewer than 15 percent of television households. Satellite TV did not exist. Today, by contrast, fewer than 15 percent of homes do not subscribe to cable or satellite television. And the Internet as we know it today did not even exist in 1975. Now, nearly one-third of all Americans regularly receive news through the Internet.

If we don't act to improve the health of the newspaper industry, we will see newspapers wither and die. Without newspapers, we would be less informed about our communities and have fewer outlets for the expression of independent thinking and a diversity of viewpoints. The challenge is to restore the viability of newspapers while preserving the core values of a diversity of voices and a commitment to localism in the media marketplace.

Eighteen months ago, the Federal Communications Commission began a review, ordered by Congress and the courts, of its media ownership rules. After six public hearings, 10 economic studies and hundreds of thousands of comments, the commission should move forward. The commission should modify only one of the four rules under review — the one that bars ownership of both a newspaper and a broadcast TV or radio station in a single market. And the rule should be modified only for the largest markets.

A company that owns a newspaper in one of the 20 largest cities in the country should be permitted to purchase a broadcast TV or radio station in the same market. But a newspaper should be prohibited from buying one of the top four TV stations in its community. In addition, each part of the combined entity would need to maintain its editorial independence.

Beyond giving newspapers in large markets the chance to buy one local TV or radio station, no other

ownership rule would be altered. Other companies would not be allowed to own any more radio or television stations, either in a single market or nationally, than they already do.

This relatively minor loosening of the ban on cross-ownership of newspapers and TV stations in markets where there are many voices and sufficient competition to allow for new entrants would help strike a balance between ensuring the quality of local news while guarding against too much concentration.

The cross-ownership rule is the only media ownership rule that has never been modified since its inception in the mid-1970s. For the last decade, F.C.C. chairmen — Democrats and Republicans alike — have said this rule needs to be revised.

The ban on newspapers owning a broadcast station in their local markets may end up hurting the quality of news and the commitment of news organizations to their local communities. Newspapers in financial difficulty often have little choice but to scale back news gathering to cut costs. Allowing cross-ownership may help to forestall the erosion in local news coverage by enabling companies that own both newspapers and broadcast stations to share some costs.

Since 2003, when the courts told the commission to change its media ownership rules, the news media industry has operated in a climate of uncertainty. Many newspapers and broadcast stations are operating under waivers of the ban on cross-ownership. The F.C.C. needs to address these issues in a coherent and consistent fashion rather than considering them case by case, making policy by waiver.

I confess that in my public role, I feel that the press is not on my side. But it is for this very reason that I believe this controversial step is worth taking. In their role as watchdog and informer of the citizenry, newspapers are crucial to our democracy.

A colleague on the commission, Michael Copps, for whom I have the utmost respect, has argued that our very democracy is at stake in the decisions we make regarding media ownership. I do not disagree. But if we believe that newspaper journalism plays a unique role in the functioning of our democracy, then we cannot turn a blind eye to the financial condition in which these companies find themselves.

Kevin J. Martin is the chairman of the Federal Communications Commission.

PUBLIC NOTICE

Federal Communications Commission
445 Twelfth Street SW
Washington, D.C. 20554

News media information 202 / 418-0500 **Recorded listing of releases and texts** 202 / 418-2222

REPORT NO. 25879

Broadcast Applications

12/10/2004

STATE	FILE NUMBER	E/P	CALL LETTERS	APPLICANT AND LOCATION	NATURE OF APPLICATION
TELEVISION APPLICATIONS FOR RENEWAL ACCEPTED FOR FILING					
AL	BRCT-20041201BIL	E	WKRG-TV 73187 CHAN-5	MEDIA GENERAL BROADCASTING OF SOUTH CAROLINA HOLDINGS, INC. AL , MOBILE	Renewal of License
GA	BRCT-20041201BJY	E	WJBF 27140 CHAN-6	MEDIA GENERAL BROADCASTING OF SOUTH CAROLINA HOLDINGS, INC. GA , AUGUSTA	Renewal of License
AL	BRCT-20041201BLS	E	WPMI-TV 11906 CHAN-15	CLEAR CHANNEL BROADCASTING LICENSES, INC. AL , MOBILE	Renewal of License
GA	BRCT-20041201BMX	E	WNEG-TV 63329 CHAN-32	MEDIA GENERAL BROADCASTING OF SOUTH CAROLINA HOLDINGS, INC. GA , TOCCOA	Renewal of License
GA	BRCT-20041201BZP	E	WRBL 3359 CHAN-3	MEDIA GENERAL BROADCASTING OF SOUTH CAROLINA HOLDINGS, INC. GA , COLUMBUS	Renewal of License

APPENDIX B

APPENDIX C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Application for Renewal of Broadcast Station Licenses of	)	File No. BRCT – 20041201BZP
	)	
Media General Broadcasting of South Carolina Holdings, Inc.	)	
	)	
For Renewal of Station License WRBL(TV), Columbus, GA	)	
	)	

MOTION TO DISMISS
OR IN THE ALTERNATIVE
PETITION TO DENY

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Counsel for Free Press

March 1, 2005

SUMMARY

Petitioners request that the Commission dismiss, deny, or at minimum designate for hearing, Media General's Application for Renewal of Broadcast Station License WRBL(TV) in Columbus, Georgia. Media General's application is both procedurally and substantively defective. The *1975 Report and Order* that adopted the newspaper-broadcast cross-ownership (NBCO) rule set out procedural instructions limiting the ability of an owner of a newspaper and television station to file a license renewal application. Even the inclusion of a waiver request does not correct this fault. A waiver request must be appropriate in order to save a defective application. Media General's waiver request is not appropriate because it is not in accord with the plain language of the NBCO rule, it does not address itself to any waiver policies that might permit an NBCO exception, and it improperly asks for reconsideration of the waiver policy in an adjudicatory proceeding when the proper format is a rulemaking proceeding.

Media General acquired television station WRBL(TV) in April 2000. Four months later, it purchased the *Opelika-Auburn News*, the sole daily newspaper published in Lee County, Alabama, 30 miles away from the station. The NBCO rule prohibits the grant of any license application that would result in the common ownership of a daily newspaper and a television station that serve the same area. While Media General did not need FCC consent to initially purchase the *Opelika-Auburn News*, the NBCO rule now plainly requires that either the newspaper or the television station be divested before the license renewal deadline. Rather than attempt to divest either outlet, Media General gambled that the NBCO rule would be repealed or modified before the license renewal deadline. Now, having lost that gamble, Media General is applying for renewal of its license while in violation of the straightforward language of the NBCO rule. In the absence of such a divestment, renewal should not be granted.

Media General has not made the showing necessary to entitle it to a permanent waiver. The Commission has granted only four permanent waivers of the NBCO rule. In each of these cases, the applicants were required to make detailed financial showings to prove that, in the absence of the waiver, there was a strong likelihood that the public would lose a media voice. The Commission has never granted a waiver to allow a single company to own both a leading television station and the only daily newspaper in a community. Media General has offered no reason to do so in this instance.

Media General has failed to meet its burden to show that ownership of both the *Opelika-Auburn News* and WRBL(TV) would be consistent with the NBCO rule's purpose of increasing diversity. Because there is only one newspaper and two television stations providing independently produced local news, Media General's continued ownership of two of these three outlets disserves diversity goals. While Media General points to the existence of other media outlets, including television stations outside the DMA, none provide a genuine independent source of local news in Lee County.

Media General also claims that its common ownership of WRBL(TV) and the *Opelika-Auburn News* has provided public interest "benefits" that outweigh any loss of diversity. In fact, these "benefits" simply illustrate the loss of diversity that results from common ownership. Moreover, the types of "benefits" advanced by Media General would be present in any other cross-ownership situation. Consequently, if these "benefits" were found to support the requested waiver in this market, the Commission would effectively overrule its precedent and open the door to the grant of a waiver to virtually any applicant.

The Commission should reject Media General's plea to adopt a "new permanent waiver approach." In effect, Media General seeks to have the Commission adapt a waiver approach

based on portions of the *2002 Biennial Review Order* that were reversed and remanded by the U.S. Court of Appeals for the Third Circuit as being arbitrary and capricious. Adopting a new waiver approach during the pendency of the court's remand would itself be arbitrary and capricious, violate the stay, and inappropriately prejudge the outcome of the remand process.

Finally, the Commission should grant neither a temporary nor an interim waiver. Temporary waivers are intended to facilitate orderly divestiture of combinations in violation of the rules where operation of the rules would otherwise effectuate a hardship beyond the control of the licensee. That is not the case here. The NBCO rule contemplated the very circumstances of the present application and provided Media General notice of its duty to divest before December 1, 2004. Media General's failure to divest its cross-ownership in the four years since purchasing the properties is no reason to grant a waiver. In addition, an interim waiver contingent on the outcome of the judicial remand would violate the FCC's policy against interim waivers and would set a precedent that would undermine the rulemaking process and encourage wholesale disobedience of FCC rules and policies.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Application for Renewal of Broadcast Station Licenses of	)	File No. BRCT – 20041201BZP
	)	
	)	
Media General Broadcasting of South Carolina Holdings, Inc.	)	
	)	
	)	
For Renewal of Station License WRBL(TV), Columbus, GA	)	
	)	
	)	
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MOTION TO DISMISS
OR IN THE ALTERNATIVE
PETITION TO DENY

Free Press ("Petitioners"), by their attorneys, the Institute for Public Representation and Media Access Project, and pursuant to Section 309(d) of the Communications Act, 47 U.S.C. § 309(d), and 47 C.F.R. § 73.3584, hereby petition the Federal Communications Commission ("FCC" or "Commission") to dismiss, deny, or at minimum designate for hearing, the application for broadcast license renewal of Media General Broadcasting of South Carolina Holdings, Inc. ("Media General"), which operates WRBL(TV) Channel 3 in Columbus, GA, and serves, *inter alia*, Lee County, AL. Media General's application for renewal cannot be granted as a matter of law because the company publishes a daily newspaper in the same market as WRBL(TV) in violation of the plain procedural and substantive limitations dictated by the newspaper-broadcast cross-ownership (NBCO) rule.

BACKGROUND

Free Press is a national nonprofit nonpartisan organization working to increase informed public participation in media policy debates and to generate policies that will produce a more competitive and public interest-oriented media system. Free Press is a party in interest within Section 309(d)(1) of the Telecommunications Act.[1] As demonstrated in the attached declarations,[2] members of Free Press reside within the service area of WRBL(TV) and are directly affected by the programming diversity that the NBCO rule is designed to protect.[3] Renewal of the WRBL(TV) license would harm Petitioners by causing a permanent loss of diversity in viewpoints available to them and a permanent decrease in competition in coverage of local news. Moreover, Petitioners would be deprived of the opportunity to have an independent licensee make decisions about what programming to air and how to serve the community.

Media General is an admitted practitioner of "convergence" and its business plan relies on the purchase of multiple media outlets in the same market.[4] In pursuit of its business strategy, Media General acquired television station WRBL(TV) in April 2000. Four months later, it purchased the *Opelika-Auburn News*, the sole daily newspaper published in Lee County, Alabama, 30 miles away from the station. The NBCO rule bars the grant of any license application that would result in the common ownership of a daily newspaper and a television station that serve the same area.

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[1] *See Llerandi v. FCC*, 863 F.2d 79, 85 (D.C. Cir. 1988); *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1000-02 (D.C. Cir. 1966).

[2] *See* Attachment A.

[3] *See Rainbow/PUSH Coalition v. FCC*, 2005 WL 267951 (D.C. Cir. 2005) (explaining that "this court had little difficulty finding that a listener, who would be directly affected by the programming diversity the rule was designed to promote, had standing to challenge the Commission's alleged violation of the rule." *Id.* In that case, the court was analyzing the duopoly rule, but the same diversity principles apply to the NBCO rule.).

[4] *See Media General 2003 Annual Report* at 12, *at* http://www.mediageneral.com/reports/annual/2003/mg2003ar.pdf (last visited February 8, 2005).

Media General gambled that the NBCO rule would be repealed or modified before the WRBL(TV) license would come up for renewal.[5] Media General lost that gamble, and the time has now come for it to seek renewal of the station's license. Rather than comply with the Commission's rules, and without even attempting to take steps to come into compliance, Media General has applied for an unprecedented, and retroactively effective, permanent waiver.[6]

Media General's waiver request is not based on a claim of special hardship or of an unintended consequence arising from strict application of an agency rule to inappropriate circumstances. On the contrary, it is a central element of Media General's fundamental business model and was fully anticipated by Media General years ago. For example, the company's 2002 annual report states, "Once the FCC cross-ownership ban changes, as we believe it will, we expect to engage in strategic swaps and purchases of newspapers and broadcast stations."[7] The company has intended to purchase combinations of newspapers and television stations throughout the southeastern United States, betting on a prediction of when and how the NBCO rule would change.[8]

Media General chose to invest in the expectation that the FCC would change the rules at its own risk. Generally, even a company that consummates a Commission-approved transaction bears the cost if that transaction is later reversed by the courts.[9] If a company bears the costs of an unexpected reversal of a transaction already approved by the agency, certainly Media General

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[5] Media General Waiver Request at 1-2.
[6] *Id.* at 1.
[7] *Media General 2002 Annual Report*, p. 3, *available at* http://www.mediageneral.com/reports/annual/2002/mg2002ar.pdf (last visited February 8, 2005).
[8] *Id.*
[9] *Stockholders of CBS, Inc. and Westinghouse Electric Corp.*, 11 FCC Rcd 3733, 3744 (1995). *See also Teleprompter Corp.*, 87 FCC 2d 531, 575 (1981), *stay denied*, 50 RR2d 125 (1981), *aff'd on reconsideration*, 89 FCC2d 417 (1982); *Pacifica Foundation*, 24 FCC 2d 816, 817-18 (1970).

bears the cost of lost investment from its failure to comply with rules that were in effect at the time of the purchase and which continue to be in effect today. The company's reliance on its own prediction is irrelevant where it is fully aware that the rules may require divestiture of the station. Media General acted with full knowledge that its acquisitions would have to come into compliance with whatever rules were effect upon license renewal, but nevertheless purchased a newspaper and television station in the same market.

Central to Media General's argument is that the FCC issued an order modifying the NBCO rule by creating deregulatory Cross Media Limits in the *2002 Biennial Review Order*.[10] While that is factually correct, it is not relevant to Media General's license renewal application. Rather, what is dispositive here is that these cross-media limits were reversed because the U.S. Court of Appeals for the Third Circuit found that the FCC had failed to adequately justify them.[11] Because the court stayed the *2002 Biennial Review Order* so that the 1975 NBCO rule remains the governing regulation, the FCC is bound to apply the preexisting rule and its associated waiver standards in assessing Media General's license renewal application.[12]

I. MEDIA GENERAL'S RENEWAL APPLICATION IS DEFECTIVE ON ITS FACE AND SHOULD BE DISMISSED

Media General's application to renew the license of WRBL(TV) is both procedurally and substantively defective and should be dismissed. The *1975 Report and Order* that adopted the

[10] *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 FCC Rcd 13620, 13799 (*2002 Biennial Review*).
[11] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 382 (3d Cir. 2004).
[12] *See, e.g.*, *Letter to Kathryn R. Schmeltzer, Esq. from Media Bureau Chief W. Kenneth Ferree*, 19 FCC Rcd 3897, 3898 (Feb. 27, 2004) (declining to consider assignment application that would create combination permitted under rules adopted in *2002 Biennial Review Order* but not under prior rules, noting that "[i]mplementation of the new media ownership rules, however, was stayed by the U.S. Court of Appeals for the Third Circuit. In that decision, the Court ordered that 'the prior ownership rules remain in effect pending resolution of these proceedings.'")

NBCO rule prohibits the owner of a newspaper and television station from filing a license renewal application except in one limited circumstance not applicable here. Nor, does Media General's inclusion of a waiver request cure this problem. The grounds on which Media General requests a waiver are not permitted under the FCC's waiver policy, and an adjudicatory proceeding is not the proper forum for changing that waiver policy.

The NBCO rule states that "*No license* for a[] ... TV broadcast station *shall be granted* to *any* party (including all parties under common control) if such party directly or indirectly owns, operates, or controls… a daily newspaper and the grant of such license will result in" the Grade A contour of a TV station encompassing the entire community in which the newspaper is published."[13] Because the service area of WRBL(TV) encompasses Lee County,[14] where the *Opelika-Auburn News* is published, the plain language of the NBCO rule prohibits grant of the application.

In adopting the NBCO rule, the FCC acknowledged that it might be faced with the question of whether to accept an application from the owner of a newspaper and television combination and set forth the particular circumstances in such an application would be accepted:

> As proposed in the *Further Notice*, if a broadcast station licensee were to purchase one or more daily newspapers in the same market, it would be required to dispose of its stations there within 1 year or by the time of its next renewal date, whichever is longer. If the newspaper is purchased less than a year from the expiration of the license, the renewal application may be filed, but it will be deferred pending sale of the station.[15]

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[13] 47 CFR §73.3555(d) (2002) (emphasis added). The *1975 Report and Order* further states that "The formation of new TV-newspaper combinations in the same market is barred . . . They are considered to be in the same market if the Grade A contour of the TV station completely encompasses the community in which the newspaper is published." *1975 Report and Order*, 50 FCC 2d at 1132.

[14] BROADCASTING & CABLE YEARBOOK 2005 at B-164.

[15] *1975 Report and Order*, 50 FCC 2d at 1076 n.25 (italics in original).

Thus, the Commission determined that the only occasion upon which it would be appropriate for a cross-owner to file an application for a license renewal is if it has been less that one year since the cross-ownership was created.

Since Media General has owned WRBL(TV) and the *Opelika-Auburn News* for four years, it clearly does not fit into the exception for cross-ownerships created within the year before the television license expires. The D.C. Circuit has recently re-affirmed that the FCC is well within its discretion to dismiss a defective application that is in violation of the governing rule.[16] Because Media General's application violates the NBCO rule and does not fall into the exception contemplated by the FCC, it should be dismissed.

Media General's request for a waiver of the rule cannot save its license renewal application. The FCC rules state that "[a]pplications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an *appropriate* request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing *will be dismissed*."[17]

Media General's waiver request is not appropriate because it fails to fit within any of the recognized grounds for granting a waiver of the NBCO rules.[18] Media General claims to come within the fourth category,[19] which permits grant of the license renewal if "the purposes of the rule would be disserved by divestiture."[20] The primary purpose of the rule is to ensure "diversity

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[16] *National Science and Technology Network*, 2005 WL 38706; *See also Grid Radio v. FCC*, 278 F.3d 1314, 1320 (D.C. Cir. 2002), *Industrial Broad. Co. v. FCC*, 437 F.2d 680, 683 (D.C. Cir. 1970).
[17] 47 C.F.R. § 73.3566 (2005) (emphasis added).
[18] *See infra* part II.
[19] Media General Waiver Request at 14.
[20] *1975 Report and Order*, 50 FCC 2d at 1085.

in ownership as a means of enhancing diversity in programming services to the public."[21] Yet, Media General's wavier request does not and cannot argue that its ownership of both the newspaper and television station promotes diversity. Instead, Media General's waiver request argues that its cross-ownership promotes localism and purportedly results in "better, faster, deeper news."[22] Such benefits, even if they in fact exist, are irrelevant because promoting diversity, not localism and better news, is the purpose of the rule.

Nor can Media General's application be saved by its argument "for a new permanent waiver approach."[23] The waiver policy that Media General seeks to change was adopted in the *1975 Report and Order*[24] as a result of a notice and comment rulemaking proceeding. Thus, any changes to that waiver policy must also be done through a rulemaking proceeding. As the court explained in *Tribune Co. v. FCC*: "It is hornbook administrative law that an agency need not – indeed should not – entertain a challenge to a regulation, adopted pursuant to notice and comment, in adjudication or licensing proceeding."[25] While the *Tribune* court recognized that some FCC policies could be challenged in an adjudicatory licensing proceeding, the NBCO waiver policies could not.[26] Moreover, as the FCC itself pointed out in *Tribune*, and the court agreed, "if the FCC were to grant waivers on the grounds appellant suggests, virtually all like combinations would also be entitled to a waiver, and nothing would remain of the rule."[27] Thus,

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[21] *Id*. at 1079.
[22] Media General Waiver Request at 7.
[23] *Id*. at 15.
[24] *1975 Report and Order*, 50 FCC 2d at 1085.
[25] *Tribune Co. v. FCC,* 133 F.3d 61, 68 (D.C. Cir. 1998) (citing P. Strauss, et al., Gellhorn and Byse's Administrative Law 657 (9th ed. 1995) for the proposition that an agency is bound by its substantive rules unless validly amended or rescinded); *accord. Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982) (APA contemplates that a substantive rule would be amended or repealed by rulemaking).
[26] *Tribune*, 133 F.3d at 69.
[27] *Id*.

Media General's arguments to change the waiver policies to allow cross-ownership of WRBL(TV) and the *Opelika-Auburn News* cannot be considered in this proceeding and must be dismissed.

In sum, because Media General's application violates the NBCO rule and its waiver request is not appropriate, the application must be dismissed.[28]

II. MEDIA GENERAL HAS NOT SHOWN THAT IT IS ENTITLED TO A WAIVER OF THE CROSS-OWNERSHIP RULE

When the Commission adopted the NBCO rule, it observed that "licensing of a newspaper applicant for a new station in the same city as that in which the paper is published in not going to add to already existing choices, is not going to enhance diversity."[29] The Supreme Court agreed with this rationale, stating that "ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation."[30] The Court went on to explain that in the area of regulating broadcast licenses, the First Amendment's goal is to preserve "the widest possible dissemination of information from diverse and antagonistic sources."[31]

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[28] Even if the FCC does not dismiss Media General's application, it has the authority to deny the application without a hearing. The *1975 Report and Order* stated that:

> we wish to make it clear that we do not contemplate holding evidentiary hearings on the individual waiver requests made unless there are substantial issues of fact to be resolved. Legal, as distinguished from factual issues, can just as well if not better be resolved without the need for an evidentiary hearing. An evidentiary hearing on the other hand could only cause delay and unnecessary expense to all concerned. There is no requirement for the holding of an evidentiary hearing required by law absent the raising of substantial factual issues and we shall not take on a pointless task.

1975 Report and Order, 50 FCC 2d at 1085-86.

[29] *Id*. at 1075.

[30] *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 785 (1978) (quoting *1975 Report and Order*, 50 FCC Rcd at 1050).

[31] *Id.* at 795 (quoting *Associated Press v. United States*, 326 US 1, 20 (1945)).

The Commission also found that the creation of new newspaper-broadcast combinations was "even greater cause for concern [than permitting existing combinations to remain intact] since there would be a loss of an already existing separate voice if a separately owned station were acquired by a paper."[32] Thus, the Commission unequivocally stated that it "shall prohibit grant of a renewal to any station which acquires" a newspaper serving the same community.[33] Notably, this decision was affirmed on both statutory and constitutional grounds by the Supreme Court of the United States.[34]

A. The Columbus, GA DMA And Lee County Are Highly Concentrated And Have Few Independently Owned Sources Of Local News

The importance of the NBCO rule is clearest when applied to a market as concentrated as the one presented here. Although Media General attempts to portray Lee County and the Columbus DMA, ranked 125,[35] as diverse and competitive, in reality viewers rely on a limited number of independent local news sources.

The DMA straddles the Georgia-Alabama border, encompassing thirteen Georgia counties and four Alabama counties.[36] The DMA has a population of approximately 547,000,[37] with concentrations in Muscogee County, GA (population of 185,702), and Lee County, AL (population of 119,561).[38] The remaining counties in the DMA have populations ranging from

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[32] *1975 Report and Order*, 50 FCC 2d at 1076.
[33] *Id.*
[34] *NCCB*, 436 U.S. 775 (1978).
[35] BIA FINANCIAL NETWORK, INVESTING IN TELEVISION MARKET REPORT 2004, November 2004 Ratings (4th Ed. 2004) (BIA FINANCIAL NETWORK) at DMA Rank 125.
[36] BROADCASTING & CABLE YEARBOOK 2005 at B-164.
[37] BIA FINANCIAL NETWORK at DMA Rank 125.
[38] U.S. Census Bureau State and County Quick Facts, *at* http://quickfacts.census.gov/qfd (last visited March 1, 2005).

2,295 in Webster County, GA to 48,986 in Russell County, AL.[39] The largest cities in the DMA are Columbus, GA, in Muscogee County, with a population of 185,781[40] and Auburn, AL, in Lee County, with a population of 42,987.[41]

The DMA is home to five commercial television stations: Media General's CBS affiliate WRBL; ABC affiliate WTVM, owned by Raycom; NBC affiliate WLTZ, owned by Lewis Broadcasting; Fox affiliate WXTX, owned by Fisher; and UPN affiliate WSWS, owned by Pappas Broadcasting. There is also one noncommercial station, WJSP, which is licensed to Georgia Public Broadcasting.[42] Media General's WRBL and its nearest competitor, ABC affiliate WTVM, garner 32% and 37% of the average share in the market, respectively.[43] Fox affiliate WXTX has 17% and NBC affiliate WLTZ has 15%.[44] In addition, ABC affiliate WTVM and Fox affiliate WXTX operate pursuant to a local marketing agreement and have the same general manager.[45] As a result, WTVM owner Raycom exercises control over WXTX operations.[46] In fact, Raycom is reportedly poised to purchase WXTX upon resolution of the

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[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] BIA FINANCIAL NETWORK at DMA Rank 125. Media General seeks to include noncommercial station WGIQ(TV), licensed 75 miles away in Louisville, AL, in its analysis. Media General Waiver Request at 12. However, it is not clear that this station is necessarily within the DMA, given that Broadcasting & Cable Yearbook includes this station, Broadcasting & Cable Yearbook 2005 at B-164, but the BIA Television Market Report does not, BIA Financial Network, Investing in Television Market Report 2004, November 2004 Ratings (4th Ed. 2004) at DMA Rank 125.
[43] BIA FINANCIAL NETWORK TELEVISION YEARBOOK 2004.
[44] *Id.*
[45] *Id.*
[46] *See* Damon Cline, *New Owners Seek To Boost Profile Of Augusta, Ga., Fox-Affiliated TV Station*, The Augusta Chronicle, July 15, 2004 at A12. (reporting that WXTX and WTVM business operations are "managed through a local marketing agreement with Raycom Media, Inc.").

Commission's ownership rules.[47] WTVM and WXTX also share a website that boasts of their joint efforts, celebrating the "*WTVM/WXTX team*….[who] all do a wonderful job for you each day, *bringing you the best news*."[48]

Of these stations, only WRBL(TV), WTVM and WXTX provide local television news. Because WTVM and WXTX are jointly managed, the news market is particularly consolidated and viewers have only two independent local news sources: WRBL and WTVM/WXTX. Media General's WRBL(TV), offers about 23 hours of news per week.[49] The ABC affiliate WTVM also provides approximately 23 hours of news per week.[50] Fox affiliate WXTX also airs five hours of news programming per week,[51] but does not supply an independent voice due to common management with WTVM. Thus, WRBL(TV) and WTVMWXTX dominate local television news.

Two daily newspapers are published in the DMA: the *Opelika-Auburn News* and the *Columbus Ledger-Enquirer*.[52] The *Opelika-Auburn News*, owned by Media General, serves Lee

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[47] *See* Television Business Report, *Car 54, Where Are You Going To End Up? at* http://www.rbrepaper.com/tvepaper/pages/feb03/03-39_3m1.html (last visited February 8, 2005).
[48] *Team Appreciation,* April 30, 2004, *at* http://www.wtvm.com/Global/story.asp?S-2003016 (last visited February 8, 2005) (emphasis added). Similarly, information to reach either station's news team links to identical addresses and telephone numbers from the two stations' "contact us" link on their web page (with the exception that the Fox link provides one additional telephone number) *Contact Us*, *at* http://www.wtvm.com.
[49] *See Media General Waiver Request* at 6, Appendix B; *see also* Attachment B for Sample television schedules. WRBL has local weekday news shows at 6:00 a.m., at 12:00 p.m., at 5:00 p.m., 6:00 p.m., and at 11:00 p.m.
[50] *See* Attachment B for Sample television schedules. WTVM offers about 20 minutes more of local news per weekday, with shows at 5:30 a.m., at 6:00 a.m., at 12:00 p.m., at 5:00 p.m., at 5:30 p.m., at 6:00 p.m., and at 11:00 p.m.
[51] *See* BIA FINANCIAL NETWORK. *See also,* Attachment B; Damon Cline, *New Owners Seek To Boost Profile Of Augusta, Ga., Fox-Affiliated TV Station*, The Augusta Chronicle, July 15, 2004 at A12.
[52] 2002 EDITOR & PUBLISHER INTERNATIONAL YEARBOOK (82d Ed. 2002) at 82-I.

County, AL.[53] The *Columbus Ledger-Enquirer*, owned by Knight Ridder, serves Columbus, GA.[54] Neither publication has significant circulation in the other newspaper's market area. For example, approximately 925 *Columbus Ledger-Enquirers* are sold in both Opelika and Auburn each day.[55]

B. Media General Has Not Shown That Diversity Would Be Better Served If The Rule Is Waived.

Media General has failed to show that ownership of both the *Opelika-Auburn News* and WRBL(TV) would be consistent with the purpose of the NBCO rule to increase diversity. Because the *Opelika-Auburn News*, WRBL(TV), and WTVM/WXTX constitute the three relevant sources of independent local news in Lee County, diversity is disserved by Media General's continued ownership of two of these outlets. Moreover, dismissal or denial of the license renewal would make the license available for a new owner, and increase the diversity of viewpoints available to the public.

1. The Relevant Area For Analysis Is The Common Area Served By WRBL(TV) And The *Opelika-Auburn News*.

When analyzing whether a waiver of the cross-ownership rule is appropriate, the relevant market for diversity analysis is the common area served by the newspaper and the television station, not the entire DMA.[56] The NBCO rule prohibits the grant of a license where the Grade A contour of the TV station encompasses the community in which the newspaper is published.[57] Further, the Commission has explicitly rejected arguments that the relevant market is the entire

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[53] 2002 EDITOR & PUBLISHER INTERNATIONAL YEARBOOK at 82-I.
[54] *Id*. at I-93.
[55] *Racial diversity of its news staff and circulation area demographics for Columbus Ledger-Enquirer at* http://www.powerreporting.com/knight/ga_columbus_ledger-enquirer.html (last visited February 25, 2005).
[56] *See, e.g., Columbia Montour Broadcasting Co., Inc.*, 13 FCC Rcd at 13014-15.
[57] 47 CFR §73.3555(d)(3) (2002).

DMA.[58] In *Columbia Montour* and *Hopkins Hall,* the FCC held that the relevant market for assessing whether to waive the NBCO rule was the common area served by the newspaper and the television station, not the DMA as a whole.[59] The Commission's reasoning in those cases is equally applicable here. In *Hopkins Hall,* for example, the Commission rejected the use of the DMA or Area of Dominant Influence (ADI), finding that "many county newspapers and many broadcast stations licensed to distant communities . . . do not contribute to coverage of issues of local concern . . . issues that are at the heart of the Commission's concern with diversity."[60] Similarly, as illustrated below, it is clear that many of the newspapers and websites that Media General claims contribute to the diversity of the market in this instance in fact offer little or no news coverage of issues of local concern in Lee County.[61]

Similarly, the Commission has declined to use the entire DMA as the relevant area when analyzing similar cross-ownership situations.[62] In *Stockholder of Renaissance Communications Corp.* applicants argued that analysis of a cross-ownership waiver for WDZL-TV and the *Sun-Sentinel* should include Broward, Dade and Palm Beach counties because "these counties constitute the common areas served by WDZL (TV) 4 and the *Sun-Sentinel*."[63] The party petitioning to deny the waiver argued for an even smaller geographic market "given the very

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[58] *Hopkins Hall Broad., Inc.*, 10 FCC Rcd 9764, 9766 (1995). In this case, the newspaper owner attempted to convince the Commission that the relevant market was the entire DMA The Commission rejected this argument, stating that even though there were many media outlets in the DMA, not all of those outlets served the area in which the newspaper was published.
[59] *Columbia Montour*, 13 FCC Rcd at 13014-15; *Hopkins Hall Broadcasting, Inc.*, 10 FCC Rcd 9764, 9766 (1995).
[60] *Hopkins Hall*, 10 FCC Rcd at 9766. *See also*, *Columbia Montour*, 13 FCC Rcd at 13014-15 ("Community's waiver request assumes that Columbia County is the relevant market in this case. We will accept Community's showing because the boundaries of Columbia County approximate the common area served by the newspaper and the 2 mV/m contour of the AM station in this case.").
[61] *See supra* part II(A), (B).
[62] *See e.g., Renaissance Communications Corp.*, 12 FCC Rcd 11866.
[63] *Id.* at 11880.

limited circulation of the *Sun-Sentinel* in Dade County."[64] While the Commission decided the issue on other grounds without fully defining the applicable market, at no point did it consider the possibility that the DMA was the relevant area of analysis.[65]

Similarly, in *Metromedia*, the Commission considered News America's application for a waiver allowing the company to purchase WNEW-TV, New York and WFLD-TV, Chicago under the condition that the company sell its newspapers in those markets within two years.[66] The analysis included no mention of Nielsen markets or ADIs.[67] Instead, the Commission discussed competition in "New York, Chicago and surrounding areas," the areas served by News America's papers, *The New York Post* and *The Chicago Sun-Times*, and the television stations it sought to buy.[68] The FCC again applied similar analysis, in *UTV of San Francisco*, where News Corp., which had previously obtained a permanent waiver to own both *The New York Post* and a television station serving New York, applied to purchase a second television station serving New York City.[69] While the Commission summarized the information provided to it by News Corp. about the variety of media outlets within the New York DMA, it focused its waiver analysis on the effects of the waiver on New York City, the area of common service for WWOR-TV and *The New York Post*.[70]

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[64] *Id.* at 11884.
[65] *Id.* at 11885.
[66] *Metromedia Radio & Television*, 102 FCC2d 1334, 1337 (1985).
[67] *Id.* at 1349.
[68] *Id.*
[69] *UTV of San Francisco, Inc.*, 16 FCC Rcd 14975, 14975-76 (2001).
[70] *Id.* at 14989-90 ("25 daily papers are published in the DMA . . . Of the 5 major daily newspapers in New York ranked by circulation, the Post ranks last . . . As a result of the diverse nature of the New York market, the clearly non-dominant position of the Post in that market, as well as the Post's unique history of significant financial difficulties, we conclude that it would be in the public interest to grant FTS a temporary 24-month period within which to come into compliance with the television/newspaper cross-ownership rule in the New York market.").

Thus, it is clear that the relevant area of analysis remains the community served by both the broadcaster and the newspaper, even in television cases.

2. Media General Overstates The Diversity Of Sources.

In an attempt to argue that its ownership of both WRBL(TV) and the *Opelika-Auburn News* poses no threat to diversity, Media General lists a number of proposed sources of local news and information which allegedly assure the public of adequate exposure to issues and ideas. However, close scrutiny of these sources shows that they do not serve the same area, do not provide a comparable product, or are not independently owned.

For example, Media General's own circulation figures reflect that the *Columbus Ledger-Enquirer,* published across the state line in Columbus, Georgia, has a circulation in Lee County equal to only about four percent of its total circulation.[71] Because this paper does not compete in the same geographic areas with the *Opelika-Auburn News*, it should not be considered by the Commission in determining the concentration of the Opelika-Auburn newspaper market. In addition, because the newspapers are serve communities in different states, it is highly unlikely that the *Columbus Ledger-Enquirer* can adequately serve the needs of Alabama residents in Lee County. Furthermore, while Media General appears to suggest that the *Columbus Ledger-Enquirer*'s larger circulation numbers are indicative of market dominance over the *Opelika-Auburn News*,[72] the two papers appear to have comparable power within their respective local markets. Both newspapers appear to reach approximately a quarter of the households within

[71] Media General claims the *Columbus Ledger-Enquirer* reaches a daily circulation of about 2,400 in Lee County, Media General Waiver Request at 4; the *Columbus Ledger-Enquirer* has a total weekday circulation average of approximately 52,415, 2002 EDITOR & PUBLISHER INTERNATIONAL YEARBOOK at I-93, placing the bulk of its circulation squarely in Georgia, and making its impact in Lee County minimal.
[72] Media General Waiver Request at 4, 11.

their designated circulation areas.[73] If anything, the numbers supplied by Media General illustrate that the *Opelika-Auburn News* is clearly the dominant newspaper in Lee County.

Media General also suggests that newspapers published in nearby localities – the *Montgomery Advertiser,* the *Birmingham News,* the *Americus Times-Recorder*, and the *Valley Times-News* – provide diversity of viewpoint in local news for Lee County.[74] Yet, these papers are unlikely to contribute to Lee County's local news, as they are focused on serving their own target audiences located many miles from Lee County. For example, the *Valley Times-News* specifically designates its own circulation area as "[s]erving Lanett & Valley, Alabama and West Point, Georgia."[75] In addition, both the *Birmingham News* and the *Montgomery Advertiser* have their primary circulation in entirely different DMAs,[76] and serve communities 112 and 60 miles away, respectively. Just as the *New York Times* does not contribute to local diversity in the area, even if many residents subscribed to it, papers serving distant and distinct communities cannot substitute for diverse local news in Lee County.[77]

Media General also claims that several weekly newspapers contribute to diversity. [78] However, in adopting the NBCO rule, the FCC explained found that:

> Not all print media are equal or are generally circulated. Thus, we do not believe that weekly newspapers or specialized publications (including foreign language

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[73] The *Opelika-Auburn News* reaches 14,092 households out of a population of 60,404 (23.33%); the *Columbus Ledger-Enquirer* reaches 52,415 households out of a population of 185,291 in its market (28.29%). 2002 EDITOR & PUBLISHER INTERNATIONAL YEARBOOK at 8-I, I-93.
[74] Media General Waiver Request at 11.
[75] The Valley Times-News Online Edition *at* http://www.valleytimes-news.com/.
[76] The *Birmingham News* circulates primarily in Birmingham, AL, which has its own DMA ranked 40. 2002 EDITOR & PUBLISHER INTERNATIONAL YEARBOOK at I-3; BIA FINANCIAL NETWORK at DMA Rank 40. The *Montgomery Advertiser* circulates primarily in Montgomery, AL which also has its own DMA, ranked 113. 2002 EDITOR & PUBLISHER INTERNATIONAL YEARBOOK at 8-I; BIA FINANCIAL NETWORK at DMA Rank 113.
[77] *See Hopkins Hall*, 10 FCC Rcd at 9766. Thus, media outlets from outside market do not affect whether or not a waiver of the cross-ownership rule is appropriate.
[78] Media General Waiver Request at 11.

> dailies) need to be included in the prohibitions we are adopting. Their situation would be different, for much of the audience of a station owned by such an entity would receive that entity's views for the first time. Each such publication is a relatively unimportant fraction of the media mix in a particular area. For this reason and because of the sheer size of daily newspapers, we shall limit the rule to daily newspapers of general circulation.[79]

For the same reason that weekly newspapers were not included in the rule, they should be irrelevant to the waiver analysis. The examples supplied by Media General either target niche audiences, address a widely dispersed audience outside the locality, or both. For example, of the nine weeklies named by Media General,[80] seven target very specific audiences, many of which are college campuses or alumni associations. However, the *1975 Report and Order* specifically found that "collegiate papers, even if dailies, are not considered to be circulated generally" and therefore do not factor into operation of the NBCO rule.[81] Media General cites to college publications such as the *Phi Kappa Phi Forum,* a quarterly magazine designed for and read by its members nationwide;[82] the *Auburn Magazine,* a quarterly magazine designed for, and read by, "dues-paying members of the Auburn Alumni Association" nationwide;[83] and the *Auburn Plainsman,* the weekly Auburn University student newspaper, serving the university's student body.[84] Media General also cites three publications similarly targeted at limited audiences, the *Benning Leader,* the *Infantry,* and the *Bayonet.* These publications are not general periodicals, but rather they are targeted at the military community.[85] The *Columbus Times* is published in

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[79] *1975 Report and Order*, 50 FCC Rcd at 1075.
[80] Media General Waiver Request at 11-12.
[81] *1975 Report and Order*, 50 FCC Rcd at 1075.
[82] *The Honor Society of Phi Kappa Phi, Publication and News, at* www.phikappaphi.org/forum.shtml (last visited February 8, 2005).
[83] *Alum, at* www.alumni.auburn.edu (last visited February 8, 2005).
[84] *The Auburn Plainsman, at* www.theplainsman.com (last visited February 8, 2005).
[85] *The Benning Leader* is "distributed to personnel of Ft. Benning…[and] residents of the military community." GALE DIRECTORY OF PUBLICATIONS & BROADCAST MEDIA (135th Ed. 2001) at 457. *Infantry* and *The Bayonet* are military publications sponsored by the Army's

Columbus, GA and is specifically designed to meet the needs of the black community that go unmet by mainstream newspapers.[86] Only *The Eufaula Tribune* is a general weekly newspaper, and it is located 60 miles away from Opelika – more than twice the distance Media General complains is too far for WRBL(TV) to provide adequate news coverage.[87] Consequently, these weekly and quarterly publications do not contribute to local news diversity in Lee County.

Media General also suggests that the Grade B signals from other DMAs provide local diversity to Lee County area.[88] But again, even if these signals can be received, because these stations are licensed to communities in other DMAs, they are unlikely to provide another viewpoint in local news for Lee County residents. Media General mentions that the DMA is also served by radio stations and internet websites, but fails to identify a single station or website that provides an independent source of local news.

In sum, the other news sources Media General cites as available to Lee County's citizens do not add significantly to the diversity of viewpoint in the area. Thus, allowing Media General to continue to own both WRBL(TV) and the *Opelika-Auburn News* greatly reduces the number of viewpoints available to Lee County residents.

3. Diversity Is Disserved By Media General's Continued Ownership Of Two Of The Three Independent Sources Of News In Lee County.

The *Opelika-Auburn News* is the only daily paper that serves Lee County. Only two television stations provide independent local news – Media General's cross-owned WRBL(TV)

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infantry division. *U.S. Army Infantry Home Page, at* www.infantry.army.mil (last visited February 8, 2005).

[86] *The Columbus Times, at* http://www.columbustimes.com (last visited February 8, 2005); *see also* Media General Waiver Request at 11.

[87] *See* Media General Waiver Request at 8 (suggesting that the 30 mile difference between its cross-owned facilities is so great that coverage of news events would not otherwise be possible).

[88] Media General Waiver Request at 12.

and WTVM/WXTX.[89] Allowing one company to control two of three sources of local news diminishes the diversity of viewpoints available to the public.

As the Commission found in a portion of the *2002 Biennial Review Order* which was not reversed on appeal, "the policy of limiting common ownership of multiple media outlets is the most reliable means of promoting viewpoint diversity."[90] The Commission concluded that "outlet ownership can be presumed to affect the viewpoints expressed on that outlet."[91] The Commission also concluded that even if media outlets exhibit no apparent "slant," ownership carries the ability to affect public discourse through choice of coverage of news and public affairs and "sound public policy" required it to assume that such power was or could be exercised.[92] Moreover, the Commission explicitly rejected Media General's claim that "local ownership restrictions were unnecessary to promote diversity because financial incentives will keep local newscasts unbiased."[93] Thus, Media General's ownership of two of the three significant sources of local news in Lee County contravenes the public interest in diversity.

Here, Media General's own application demonstrates how common ownership has already diminished the diversity of news and information available to the public. For example, Media General states that the two outlets engage in "constructive collaboration."[94] Media General's business strategy of pursuing "convergence" is based on an intentional reduction of voices in order maximize the company's financial status.[95] Examples of such convergence are

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[89] As explained above, WTVM and WXTX share a general manager and local marketing agreement. *See supra* part II(A).
[90] *2002 Biennial Review*, 18 FCC Rcd at 13629.
[91] *Id*. at 13630.
[92] *Id.*
[93] *Id.*
[94] Media General Waiver Request at 7.
[95] *See Media General 2003 Annual Report*, p. 12, *at* http://www.mediageneral.com/reports/annual/2003/mg2003ar. (last visited February 8, 2005).

littered throughout Media General's waiver request. For example, Media General uses television reporters to prepare newspaper stories "on many…occasions."[96] Similarly, newspaper reporters shoot video footage for use by the television station.[97] Newspaper reporters also "provide details to the television station for on-air updates, including breaking news."[98] Rather than send its own reporters out, WRBL(TV) relies on "the newspaper's reporters… [to] provide WRBL(TV) with constant updates" of election news.[99] The examples of "benefits" provided by Media General in fact demonstrate the loss of viewpoint diversity suffered by Lee County residents.

Moreover, while Media General stresses economic advantages that result from owning the television station and the newspaper, it does not demonstrate that these advantages serve diversity. For example, Media General lauds the financial benefit it gained by sending television and newspaper reporters in a single "news truck to New York City."[100] Media General similarly points to the cost-saving advantage of using an "'FTP' site from which WRBL(TV) can download" videotaped material.[101] However, none of these advantages serve the interest of diversity – they serve only Media General's own financial interests. Benefits to Media General's bottom line do not create an appropriate or valid waiver.[102]

Media General also claims that certain programming benefits the public, but does not explain how the cross-ownership was required in order to produce and air that programming. For example, Media General claims that coverage of local angles related to the September 11

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[96] Media General Waiver Request at 8.
[97] *Id.* at 8.
[98] *Id.* at 7.
[99] *Id.* at 8-9.
[100] *Id.* at 7.
[101] *Id.* at 8.
[102] *See e.g. Astroline Communications Company Limited Partnership v. FCC*, 857 F.2d 1556, 1572 n.8 (D.C. Cir. 1998) (rejecting argument that grant of a waiver allowing common ownership would generate tax savings for the applicant and stating that "[W]e are unable to discern how such tax savings by a private corporation enhance the public interest.").

attacks in New York City could not have occurred without the newspaper and television station's combined resources.[103] However, equal or better coverage could have resulted if separately owned outlets competitively pursued this story. Thus, Media General's commonly owned outlets do not provide the "diverse and antagonistic" voices envisioned by the Supreme Court in *Associated Press*.[104]

Media General has shown no evidence to overcome the presumption that the best way to promote diversity is to have diverse owners. In other words, Media General has failed to "plead with particularity the facts and circumstances which would support deviation" from the waiver rule.[105] The small number of media outlets providing local news in Lee County make it all the more important to diversify ownership of those outlets. While Media General claims that its common ownership has provided public interest "benefits" that outweigh the loss of diversity, in fact, these "benefits" actually illustrate how common ownership reduces the amount and diversity of coverage. Finally, the types of "benefits" cited by Media General would be present in any cross-ownership situation. They are not exceptional, and if found to support the requested waiver in this market, would provide a precedent for granting virtually every waiver request, effectively gutting the NBCO rule.

C. The FCC Has Granted Permanent Waivers Only In Four Cases, Each Of Which Presented Exceptional Circumstances That Are Not Present Here

While adopting a general prohibition against newspaper-broadcast cross-ownership, the FCC also established criteria for granting waivers of the rule. Specifically, the FCC stated it would consider waivers where the applicant showed that: 1) the current owner of the broadcast

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[103] Media General Waiver Request at 7.
[104] *Associated Press v. United States*, 326 U.S. 1, 20 (1945).
[105] *Angelo State University*, 2004 WL 2913396 (FCC) (citing *Columbia Communications Corp. v. FCC,* 832 F.2d 189, 192 (D.C. Cir. 1987)).

station was unable to sell the station to anyone but a newspaper publisher, 2) the station could only be sold at a depressed price, 3) separate ownership and operation of the newspaper and broadcast station could not be supported in the locality, or 4) the purposes of the rule – increasing diversity and competition – would not be disserved by the grant of a waiver.[106] To meet this burden, a waiver applicant is obligated to "plead with particularity the facts and circumstances which would support a deviation" from the rule.[107] Moreover, the burden of justification for a permanent waiver is "considerably heavier" than for a temporary waiver.[108]

Media General purports to seek a waiver under the fourth waiver standard.[109] While acknowledging that the Commission only grants waivers "in exceptional circumstances,"[110] Media General fails to demonstrate any exceptional circumstances to justify its request.

The Commission has only granted waivers in four narrow cases, each of which presented special circumstances that are absent in Media General's situation. For example, in *Kortes Communications*, the Commission granted a waiver only after the owner of two small, financially troubled radio stations established through sworn declarations that it had unsuccessfully attempted to sell those stations for four years.[111] On this basis, the Commission concluded that there was a legitimate concern that the stations would go dark without waiver relief, and granted the application.[112] In *Columbia Montour Broadcasting*, the Commission also

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[106] *1975 Report and Order*, 50 FCC 2d at 1085.
[107] *Angelo State University*, 2004 WL 2913396 (citing *Columbia Communications Corp. v. FCC,* 832 F.2d 189, 192 (D.C. Cir. 1987).
[108] *Columbia Montour Broad. Co., Inc.*, 13 FCC Rcd at 13012.
[109] Media General Waiver Request at 14.
[110] *Id.* (citing *NCCB*, 436 U.S. at 786 n.9 (1978)).
[111] *Kortes Communications*, 15 FCC Rcd at 11850.
[112] *Id.* at 11847.

granted a waiver to allow a newspaper owner to purchase a small, financially strapped radio station that might otherwise go dark.[113]

In contrast to the small stations in *Kortes* and *Columbia Montour*, Media General's properties dominate their respective media markets: WRBL(TV) is the second largest television station in the Columbus DMA,[114] and the *Opelika-Auburn News* is the only daily newspaper serving Lee County.[115] Furthermore, Media General has provided no reason that either one of its properties would fail to generate buyer interest if it was offered for sale. Moreover, Media General has not even attempted to argue that its continued ownership is necessary to prevent either outlet from going dark.

In the 1977 decision *Field Communications*, the Commission granted a waiver to allow Field to take complete control of the properties in which it was a partner when the other partner liquidated, which included a UHF television station in the same city where Field published two newspapers.[116] The Commission granted the waiver because Field was locally based in the market, and was already a partial owner of the cross-owned station. Another factor was that in 1975, UHF television was still a marginal service and grant of the waiver promoted the FCC's policy of encouraging its growth.[117] In contrast to *Field*, Media General is not locally based,[118]

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[113] *Columbia Montour*, 13 FCC Rcd at 13008. Columbia Montour Broadcasting could only find one legitimate purchaser for its AM radio station, WCNR – a subsidiary of the company which published the local newspaper, Community Communications. *Id.* at 13008. The radio station had an audience share of only 3.9% of the area and had experienced heavy financial losses. *Id.* at 13009, 13011. Another small AM radio station in the area had recently gone dark, and the Commission granted Community a waiver to operate both its newspaper and WCNR, fearing that WNCR too might otherwise go off the air. *Id.* at 13013-14.

[114] BIA FINANCIAL NETWORK at DMA Rank 125.

[115] *Media General Waiver Request* at 8; *see also* 2002 Editor & Publisher International Yearbook at 82-I.

[116] *Field Communications Corp.*, 65 FCC 2d 959 (1977).

[117] *Id.* at 960. Field owned 22.5% of a partnership that owned a group of UHF television stations. *Id.* at 959. One of these stations was in Chicago, where Field's parent company

so a permanent waiver would not further the goal of local control over media outlets. Nor are any of the other special factors, including the desire to promote UHF television, present here.

Finally, the Commission granted Fox Television Stations a waiver to operate both a New York television station and the *New York Post* to allow Fox to rescue the *Post* from bankruptcy proceedings, fearing that the *Post* would cease to exist.[119] In contrast, Media General has not even attempted to show that its ownership of WRBL(TV) and the *Opelika-Auburn News* is necessary for either property to remain in business.[120]

III. IT WOULD BE INAPPROPRIATE TO GRANT A PERMANENT WAIVER ON THE GROUNDS THAT MEDIA GENERAL MIGHT HAVE OWNED BOTH OUTLETS UNDER THE RULES REVERSED ON APPEAL

Media General bases many of its arguments on the premise that its cross-ownership of WRBL(TV) and the *Opelika-Auburn News* would have been permitted under the *2002 Biennial Review Order*. The Third Circuit reversed and remanded the FCC's new Cross Media Limits (CMLs), which would have permitted newspaper broadcast cross ownership in any DMA with four or more television stations.[121] To grant Media General a permanent waiver on the grounds that the combination would have been allowed under a rule remanded by the court as arbitrary and capricious would itself be arbitrary and capricious. It would also have the effect of prejudging the FCC's actions on the remand. The Commission has numerous options for

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published two daily newspapers. *Id.* However, the Commission granted a permanent waiver of the cross-ownership rule to allow Field to gain complete control of the partnership's UHF stations, citing the importance of keeping the stations together as a group so they would have more power to purchase syndicated shows and attract advertisers. *Id.* at 961.

[118] *Media General Corporate Information*, *at* http://www.mediageneral.com/corpinfo/index.htm (last visited on Feb. 10, 2005).

[119] *Fox Television Stations, Inc.*, 8 FCC Rcd 5341 (1993).

[120] Also, unlike *Fox*, the FCC noted its desire to avoid interference with the operation of the Bankruptcy Court. *Id.* at 5351. That point has no relevance here.

[121] *Prometheus*, 373 F.3d at 397.

rewriting the CML on remand, and it is far from clear that the limit it ultimately adopts will allow the common ownership of WRBL(TV) and the *Opelika-Auburn News*.

For example, the Commission could devise a rule that takes actual market share into account. Because WRBL(TV) has a large audience share in the Columbus DMA,[122] Media General would probably not be allowed to own both WRBL(TV) and a newspaper in the Columbus DMA. Alternatively, the Commission could decide to limit mergers to DMAs above a certain threshold. Because the Columbus market is ranked 125th, it is not a likely candidate for allowing cross-ownership. Other options include basing the rule on the number of independent local news outlets, using a geographic unit other than the DMA, or allowing cross-ownership only where a community has multiple daily newspapers.

Because whatever new rule the Commission adopts on remand will differ significantly different from the CML, it would be contrary to the public interest for the FCC to grant Media General a permanent waiver at this time.

IV. THE COMMISSION SHOULD NOT GRANT A TEMPORARY WAIVER IN THIS CASE

Media General is not entitled to a permanent waiver, and has also failed to show that a temporary waiver would serve the purpose of the NBCO rule. The Commission grants temporary waivers[123] to permit orderly divestiture of either the station or the newspaper and prevent a "fire sale."[124] Here, in contrast, Media General has neither made an attempt to divest nor has it pledged to divest its cross-owned properties in the four years since their purchase.

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[122] BIA FINANCIAL NETWORK at DMA Rank 125.

[123] The four instances in which permanent waivers were granted are discussed in Part III(B) above.

[124] *See*, *e.g.*, *Chancellor Media/Shamrock Radio Licensees*, 15 FCC Rcd 17053, 17056 (2000); *Multimedia Inc*., 11 FCC Rcd 4883, 4891 (1995); *Stauffer Communications, Inc.*, 10 FCC Rcd 5165, 5165 (1995).

Instead, Media General asks for a "temporary" waiver for a term of eight years, until its next license renewal.[125] It contends that waivers should be tied to license renewal terms because the *1975 Report and Order* allows a station owner which acquires a newspaper to hold both until their next license renewal.[126]

Media General's argument is a nonsensical misreading of the Commission's *1975 Report and Order*. In that decision, the Commission was attempting to *eliminate* all cross-ownerships over time. Thus, while "non-egregious" cross-ownerships were grandfathered, the Commission contemplated that those combinations would be broken up over time, and did not permit them to be transferred as a unit. The Commission also provided that divestiture should occur at the first opportunity that the licensee presents itself to the Commission, *i.e.*, its next license renewal.[127] To alleviate hardship, the Commission gave licensees at least one year to divest. Thus, nothing in the structure of the *1975 Report and Order* supports Media General's claim that waivers should be tied to license terms. On the contrary, the Commission contemplated that the expiration of the current license (3 years in 1975), or one year, whichever period is longer, was sufficient for an orderly divestiture.

Similarly, an interim waiver contingent on the outcome of the judicial remand would violate the FCC's policy against interim waivers and would set a precedent that would undermine the rulemaking process and encourage wholesale disobedience of FCC rules and policies. In *Renaissance Communications*,[128] the Commission stated that "[e]ven if the biennial

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[125] Media General Waiver Request at 1.
[126] *Id.* at 16.
[127] *1975 Report and Order*, 50 FCC2d at 1076.
[128] *Renaissance Communications*, 13 FCC Rcd 4717, 4719 (1998). In that case, Tribune, which operated a Fort Lauderdale newspaper, merged with Renaissance Communications, which owned a Miami television station. The newspaper and the station were in the same market, so ownership of both would have violated the cross-ownership ban. The Commission granted

ownership review proceeding had already begun, that fact would not necessarily warrant an interim waiver. If the mere initiation of a proceeding called for an interim waiver of our broadcast cross-ownership rules, the granting of waivers would be the rule rather than the exception even though it was far from clear that a change in the rule was contemplated."[129]

Media General claims that *New City Communications* provides precedent for granting a waiver pending rulemaking.[130] However, the *New City* decision was promulgated before, and is superceded by, *Renaissance Communications*.[131] Since *Renaissance Communications*, the Commission has consistently refused to grant waivers contingent upon pending rulemakings. Most relevantly, the Commission recently rejected an argument almost identical to Media General's, holding that *Renaissance*

> was predicated on the unusual circumstance that led to extension of the waiver; in particular, the fact that the Commission had not clearly articulated its policy on interim waivers prior to that time. In a subsequent Tribune proceeding, however, we cautioned future applicants that "it should now be clear that the mere initiation of a proceeding stating that the rule would be examined, or merely the fact that such a proceeding was on the horizon, would not be sufficient to warrant an interim waiver." Consequently we will not grant . . . an "interim" waiver as requested.[132]

Tribune a waiver that lasted for twelve months, after which it would be required to divest one of the properties. Tribune appealed to the D.C. Circuit, asking that the waiver be extended until after the Commission's proposed review of the cross-ownership rule. The D.C. Circuit upheld the Commission's action, but even though it was not required to do so by the court, the Commission decided on remand to grant Tribune a waiver because it had not previously articulated its policy of not granting waivers pending rulemakings. *Id.*

[129] *Id*. at 4718.

[130] Media General Waiver Request at 16, 17.

[131] *Renaissance Communications*, 13 FCC Rcd 4717.

[132] *UTV of San Francisco, Inc.,* 16 FCC Rcd 14975, 14988, *aff'd*, 2002 WL 31496407 (2002) (footnote omitted) (quoting *Renaissance*). *See also, Chancellor Media/Shamrock Radio Licensees*, 15 FCC Rcd at 17053 (2000) ("while the temporary waiver we granted in NewCity [sic] is support for the action taken herein, the diversity finding we made there is not dispositive of the finding in the instant case").

Thus, granting Media General an interim waiver before the Commission acts on the remand in the *2002 Biennial Review* would set a dangerous precedent. If Media General were granted such a waiver, other companies would also seek and probably receive interim waivers, undermining the Commission's rulemaking process and the Third Circuit's stay.

CONCLUSION AND REQUEST FOR RELIEF

Free Press respectfully requests that the Commission dismiss, deny, or at minimum designate for hearing, Media General's application to renew the license for WRBL(TV) in Columbus, GA. Media General has filed a defective application accompanied by an inappropriate waiver request. The FCC should not consider such as application and should dismiss. Even if the FCC considers the application, Media General has offered no exceptional circumstances for which the FCC can grant a waiver request. In *U.S. v. Storer Broadcasting Co*, the Supreme Court cleared the path for the Commission's authority to apply unambiguous rules without a hearing, pointing out that the hearing clause, 47 U.S.C. § 309(e), did "not require the Commission to hold a hearing before denying a license to operate a station in ways contrary to those that the Congress has determined are in the public interest."[133] The Court further clarified its position in *NCCB*, stating that "[i]f a license applicant does not qualify under standards set forth in [FCC] regulations, and does not proffer sufficient grounds for waiver or change of those standards, the Commission may deny the application without further inquiry."[134] The FCC is authorized to deny the application without a hearing when there is no substantial issue of fact, as

[133] 351 U.S. 192, 202 (1965).
[134] 436 U.S. at 793.

is the case here. Media General's cross-ownership violates the plain language of the NBCO rule and should not be granted.

Respectfully Submitted,

___/s/_____
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REPORT NO. 46687

Broadcast Actions

3/6/2008

STATE	FILE NUMBER	E/P	CALL LETTERS	APPLICANT AND LOCATION	NATURE OF APPLICATION
Actions of: 03/03/2008					
TELEVISION APPLICATIONS FOR RENEWAL GRANTED					
AZ	BRCT-20060531ACB	E	KPNX 35486 CHAN-12	MULTIMEDIA HOLDINGS CORPORATION AZ , MESA	Renewal of License.
TV TRANSLATOR OR LPTV STATION APPLICATIONS FOR RENEWAL GRANTED					
AZ	BRTTL-20050606AAH	E	K30ES 37578 CHAN-30	GLOBE LPTV L.L.C. AZ , GLOBE	Renewal of License
AZ	BRTTL-20060531ACC	E	KPSN-LP 63396 CHAN-22	MULTIMEDIA HOLDINGS CORPORATION AZ , PAYSON	Renewal of License.
AZ	BRTTV-20060531ACD	E	K06AE 35274 CHAN-6	MULTIMEDIA HOLDINGS CORPORATION AZ , PRESCOTT	Renewal of License.

APPENDIX D

APPENDIX E

Federal Communications
Washington, D.C.

Released: March 25, 2008

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Re: WJHL-TV, Johnson City, Tennessee
Application for Renewal of License
File No. BRCT-20050401BYS, *et al.*

Dear Counsel:

This is in regard to the applications for renewal of license filed by Media General Communications Holdings, LLC ("Media General") for stations: WJHL-TV, Johnson City, Tennessee, File No. BRCT-20050401BYS; WBTW(TV), Florence, South Carolina, File No. BRCT-20040802BIK; WRBL(TV), Columbus, Georgia, File No. BRCT-20041201BZP; WMBB-TV, Panama City, Florida, File No. BRCT-20040101AQF. An informal objection, petition to deny and/or motion to dismiss was filed against each of the applications. For the reasons stated below, we dismiss the informal objection, petitions to deny and motions to dismiss and grant the renewal applications.

In each application, Media General requested a waiver of the newspaper/broadcast cross-ownership ("NBCO") rule, 47 C.F.R. § 73.3555(d)(3), to permit the continued joint ownership of the relevant television station and a local daily newspaper in the same designated market area (DMA). In each case, these waivers were opposed. This issue, however, has been rendered moot by the Commission's *2007Ownership Order.*[1] In that Order, the Commission

[1] *2006Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 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; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets, Ways to Further Section 257 Mandate and To Build on Earlier Studies; and Public Interest Obligations of TV Broadcast Licensees,* MB Dockets 06-121, *et al.*, FCC No. 07-216 (rel. February 4, 2008)("*2007 Ownership Order"*).

granted permanent waivers to Media General in each of the four DMAs at issue here to permit the joint ownership of the television station named in the application and a specified local daily newspaper.[2]

Having reviewed the renewal applications and the pleadings, we conclude that the stations have, during their license terms, served the public interest, convenience, and necessity, and have not committed any serious violations of the Communications Act or the Commission's rules, or any pattern of violations that, taken together, would constitute a pattern of abuse.

ACCORDINGLY, IT IS ORDERED, that the informal objections, petitions to deny and/or motions to dismiss of the NAACP, Free Press, and Common Cause of South Carolina filed against the applications for renewal of license of stations WJHL-TV, Johnson City, Tennessee, File No. BRCT-20050401BYS; WBTW(TV), Florence, South Carolina, File No. BRCT-20040802BIK; WRBL(TV), Columbus, Georgia, File No. BRCT-20041201BZP; WMBB-TV, Panama City, Florida, File No. BRCT-20040101AQF ARE DISMISSED, and that the applications ARE GRANTED.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau
Federal Communications Commission

[2] *Id* at ¶ 77 and fns. 253-6.