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

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

Angela J. Campbell
Adrienne T. Biddings
Institute for Public Representation
Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9535
Counsel for Media Alliance and Office of Communication of the United Church of Christ, Inc.

Andrew Jay Schwartzman
Media Access Project
1625 K Street, NW, Suite 1118
Washington, DC 20006
(202) 454-5681
Counsel for Prometheus Radio Project

Corielle S. Wright
Free Press
501 Third Street NW, Suite 875
Washington, DC 20001
(202) 265-1490
Counsel for Free Press

August 16, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES:

FCC CASES

STATUTES AND REGULATIONS

OTHER

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

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

Citizen Petitioners are sympathetic to the difficult nature of the task imposed upon the Federal Communications Commission by Section 202(h) of the Telecommunications Act of 1996. As the Commission's brief shows, it has, for the most part, properly exercised its discretion in deciding to retain the local TV and radio ownership rules. However, the Commission does not seriously attempt to

dispute that the chaotic and haphazard manner in which the Commission added additional criteria for assessing waiver requests under the NBCO rule violated the fundamental requirement that it engage in reasoned decisionmaking.

In this reply brief, Citizen Petitioners respond to the Commission's efforts to rebuff their challenges to the decision. They also add a few points with respect to the reasonableness of the FCC's decision to retain the local TV ownership rule and elaborate on the Commission's arguments with respect to the constitutionality of the broadcast ownership rules and the inappropriateness of vacatur as a remedy in this case.

I. THE FCC ADEQUATELY JUSTIFIED ITS DECISION TO RE-ADOPT THE LOCAL TV LIMITS ADOPTED IN 1999, BUT FAILED TO CONSIDER THE IMPACT OF DIGITAL TELEVISION.

The FCC responded to the Court's remand of the numerical limits for local television by returning to the rule adopted in 1999. This decision was reasonable and adequately explained, except for the FCC's failure to consider whether the limits should be further tightened in light of the ability of a single broadcast station to transmit multiple program streams.

A. The FCC Decision Not to Relax the Local TV Rule is Reasonable and Supported by the Record.

While the FCC Brief clearly demonstrates that the FCC adequately justified

the readoption of the 1999 limits, Citizen Petitioners wish to elaborate on two points.

First, Sinclair's assertion that the FCC's change of position "relied only upon the conclusory statements of three special interest groups" is simply incorrect. Sinclair Br. at 15. In support of its conclusion that eliminating the Local TV rule could harm competition among broadcast stations in local markets, the FCC discusses the comments of four parties – Communications Workers of America ("CWA"), AFL-CIO, UCC and CU – that collectively represent a broad spectrum of the public.

These comments cannot be fairly characterized as "conclusory." For example, UCC's comments, which were joined by Media Alliance and three other groups, summarized numerous studies, including ones by an FCC economist and an economics professor at the Naval Academy, and another study by a Professor at the University of Michigan and the director of a communications research center at Fordham University, that showed that "competition, not concentration, has a positive correlation with informational programming" and that "competition leads not just to more news but to more accurate news." UCC 2006 Comments at 53-54, JA____. CU's comments, which were filed jointly with Free Press and Consumer Federation of America ("CFA"), summarized evidence in *Compendium Study 17*

(attached to the comments) demonstrating that the "the restrictions on duopolies and triopolies should be much more stringent because the concentration of ownership of outlets undermines diversity by reducing the ability of independent programmers to produce content." Free Press 2006 Comments at 21, JA ___; *Compendium Study 17*, JA___- ___.

The AFL-CIO explained how in practice, duopolies had led to a reduction of competition in local news: Duopolies reduced

> operating expenses through combining news operations or local station staff to produce one newscast or news product for all their properties in a market. Too often, however, this results in multiple, previously independent media outlets of a community receiving news and public affairs programming from one assignment desk, under the management of one general manager, one news or program director, and essentially, one overall editorial viewpoint.

AFL-CIO Comments at 43, JA___; *id.*, at 41-45, JA ___-___. CWA also cited specific examples in many markets based on the experiences of their members. For example, it noted that

> Los Angeles has one television triopoly and three duopolies. NABET members work at many of these stations.
>
> NBC owns three television stations in Los Angeles: KNBC and two Spanish-language stations KWHY and KVEA. NBC acquired the Spanish-language

> stations when it purchased Telemundo. Within a year of that purchase, NBC merged the stations into one facility in Burbank. They combined the technical operations, sales and marketing, and the newsroom. . . .
>
> Before NBC bought Telemundo, each of the stations had a separate news operation. They were competitors. Now the news operations are commingled. Two assignment editors -- one for English-language KNBC and the other for the Spanish-language stations -- coordinate coverage, and send one crew to shoot video for all three stations. The two Spanish-language stations often use the same reporter who carries a four-sided microphone flag. The reporter displays the KVEA letters for the KVEA stand-up, and then flips the microphone to read the same exact script for the KWHY stand-up. . . .
>
> * * *
>
> Fox owns two stations in Los Angeles: KTTV-channel 11 and KCOP-channel 13. Fox acquired this duopoly when News Corp. purchased ChrisCraft. . . . Today, there is one General Manager, one News Director, and one assignment editor overseeing both stations. . . .
>
> * * *
>
> Finally, Viacom-CBS owns both KCAL-channel 9 and KCBS-channel 2. These stations extensively commingle, sharing reporters and often airing the same news story. They even co-brand their news gathering vehicles in this market to highlight their single news operation.

CWA Comments at 13-15, JA ___-___; *id.*, JA__-__. Thus, the FCC clearly had

an ample record on which to conclude that the local television rule was needed to promote competition.

Second, it was reasonable for the Commission to retain the top-four restriction. This Court previously concluded that

> even in the smallest markets with fewer than five stations—where the top-four restriction operates to preclude any consolidation—it was not unreasonable for the Commission to conclude, as it did, that the detriment of concentrated market power—*e.g.*, reduced incentives to improve programming of mass appeal—outweighed the efficiency benefits.

Prometheus Radio Project v. FCC, 373 F.3d 372, 417 (3d Cir. 2004). In addition, this Court upheld the Commission's decision to draw the line where it did because of a substantial drop in audience share below the top-four stations. *Id.*, at 418. The record in the *2006 Quadrennial Review* shows that the top-four stations continue to dominate most markets and are usually the providers of regularly-scheduled local news. *See, e.g.*, Free Press 2007 Comments at 72, JA___(stations affiliated with the four major networks are consistently the top-rated stations, produce the highest-rated local news content, and command most of the local advertising revenue); AFL-CIO Comments at 12, JA___ (citing study showing that original local news is available from only four (or fewer) broadcasters in 70 percent of markets)." Thus, the FCC's decision not to further relax the local TV rule was

reasonable and supported by the record.

B. The FCC's Failure to Address the Impact of Digital Television on the Local TV Rule was Unreasonable.

If anything, the record supports tightening the local TV rule. Citizen Petitioners urged the Commission to return to its former rule prohibiting common ownership of stations with overlapping signals because the transition to digital had obviated the need for duopolies. In fact, Media General points out that each digital TV channel can transmit up to ten multicast signals. MG Br. at 45 n.44. The Commission claims that it could not have assessed the impact of digital television and multicasting because the transition was not completed until June 2009 and "the timing and nature of the transition were uncertain." FCC Br. at 83.

The FCC's statements are *post hoc* rationalizations. An agency's order must be upheld on the same basis articulated in the order by the agency itself. A reviewing court cannot accept appellate counsel's *post hoc* rationalizations for agency action. *See, e.g.*, *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *W.R. Grace & Co. v. EPA*, 261 F.3d 330, 338 (3d Cir. 2001). The *2008 Order* nowhere addressed the arguments made by the Citizen Petitioners about the impact of digital television ("DTV"). Furthermore, the FCC Brief is misleading to the extent that it suggests the Commission was unable to assess the impact of digital television since the

transition had not yet been completed. The Commission was well aware of the capabilities of digital television and the timing of the transition.

The FCC began planning for the transition to digital television even before the 1996 Act. *See generally Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 2 FCCRcd 5125 (1987) (initiating "a wide-ranging inquiry to consider the technical and public policy issues surrounding the use of advanced television technologies"). The 1996 Act added a new section to the Communications Act governing the transition from analog to digital. It conditioned the grant of digital licenses on the return of one of the licenses in the future. *See* 47 U.S.C. §336.

In 1997, the Commission established deadlines for the construction and operation of digital television stations. For example, affiliates of the top-four networks in the top ten markets were required to complete their digital facilities by May 1, 1999 and the top-four networks in markets 11 to 30 by November 1, 1999. *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCCRcd 12809, 12841 (1997). By May 1, 2002, all remaining commercial television stations were required to complete construction and commence DTV operations. *Second Periodic Review of the Commission's Rules and Policies Affecting Conversion to Digital Television*, 19 FCCRcd 18279,

18285 (2004).

Moreover, the FCC recognized in 1999 that DTV broadcasters would have the technical capability and regulatory flexibility "to 'multicast' by simultaneously providing multiple channels of standard digital programming and/or HDTV programming," and sought comment on what public interest obligations should apply to the multicast channels. *Public Interest Obligations of TV Broadcast Licensees*, 14 FCCRcd 21633, 21634-35 (1999). In 2004, it adopted additional children's television requirements for stations engaging in multicasting. *Children's Television Obligations of Digital Television Broadcasters*, 19 FCCRcd 22943 (2004).

In 2005, Congress established a firm cut-off date for TV stations to turn off their analog signals and broadcast solely in digital. Digital Television and Public Safety Act of 2005, Pub L. No. 109-171, 120 Stat. 4 (2006) (*codified at* 47 U.S.C. §§309(j)(14) and 337(e)). Initially, the cut-off date was in February 2009, but it was later extended to June 2009. Prior to the cut-off date, however, most television stations were broadcasting in digital and many were multicasting as well. In 2005, the FCC found that 86.4% of stations had already begun broadcasting in digital. *Carriage of Digital Television Broadcast Signals*, 20 FCCRcd 4516, 4525 n.72 (2005).

UCC's comments pointed out that as of 2006, 434 stations were already providing multicast services in 163 of the 210 television markets, and many more broadcasters were planning to roll out new streams. UCC 2006 Comments at 46, JA___. Thus, at the time the FCC adopted the *2008 Order*, most television stations were already broadcasting in digital and a cut-off date for the transition had been established. It is simply not plausible for the FCC to claim that it did not know enough about digital television to assess how it would interact with its local ownership rules.

Finally, the Court should not excuse the Commission's failure to address the impact of multicasting on the local TV rules because Citizen Petitioners are free to raise the issue again in the *2010 Quadrennial Review*. FCC Br. at 83. If the ability to raise an issue again in the future were sufficient to satisfy the agency's responsibilities under the APA, then at least in this case, where the FCC has to review the rules every four years, the FCC could use the same rationale to avoid addressing important aspects of the problem again and again.

II. THE FCC'S MODEST RELAXATION OF THE NBCO RULE WAS GENERALLY REASONABLE, BUT ITS VAGUE, UNENFORCEABLE EXCEPTIONS AND ILL-CONSIDERED WAIVERS WERE NOT.

Citizen Petitioners believe, as a general matter, that the FCC acted within its

discretion to modestly relax the NBCO rule by introducing market-based presumptions in favor or against waivers. However, the Commission has failed to rebut Citizen Petitioners' showing that the vague and unenforceable exceptions to its bright line market tests are arbitrary and capricious. Indeed, even taking into account *post hoc* rationalizations of agency counsel, the five specific waivers granted in the *2008 Order* demonstrate the standardless nature of the criteria that the Commission has employed.

A. The Local News and Four Factor Tests Are Vague and Unenforceable.

Citizen Petitioners showed in their initial brief that the Commission's Four Factor Test for assessing NBCO waivers "is so vague and full of exceptions that it undermines rather than serves the Commission's stated goals. . . ." Citizen Petitioners Br. at 30. They also maintained that the term "local news" is ambiguous. Br. at 32-33. In neither case, they argued, did the Commission provide for meaningful enforcement measures.

In its opposition brief, the Commission does not directly address Citizen Petitioners' vagueness arguments, saying only that they have "fail[ed] to identify any feature of the [Four Factor T]est that is inconsistent with the rule's purpose." FCC Br. at 55. This is beside the point, as Citizen Petitioners do not dispute the

validity of the objective, but instead challenge whether the criteria will fulfill that goal. The Commission says nothing about Citizen Petitioners' objection, Citizen Petitioners Br. at 32, that the Commission had not explained how the factors would be used together.

As to the local news test, the Commission says that it did define "local news" as "traditional newscasts as well as programming that addresses issues of local political interest or issues of public importance in the market." FCC Br. at 54 (quoting *2008 Order*, 23 FCCRcd at 2050, JA ___). But this single sentence does not provide a workable or clear definition of what counts toward the seven hours. Nor does it ensure that the programming is produced locally or addresses local issues. In recent years, a number of television stations have been providing "traditional newscasts" that were produced at a central out-of-state location.[1] Moreover, under this "definition," if drug abuse is a local problem, then presumably network or syndicated programming about the topic would count as "local news." Similarly, if a state legislature is considering immigration legislation, coverage of litigation over legislation adopted by another state 3,000

[1] *See, e.g.*, Free Press/CU Reply Comments at 35 (describing how Telemundo ended local newscasts in several highly populated Hispanic communities and replaced them with newscasts produced in a regional news bureau up to hundreds of miles away).

miles away could arguably be "local news."

The FCC brief also insists that the fact that the Commission will require annual reporting on compliance with the local news condition provides a means of enforcement, FCC Br. at 55, and that the Commission can use its license renewal process to assess whether the licensee has complied with its commitments. *Id.* at 55, *citing New Jersey Coalition for Fair Broadcasting v. FCC,* 574 F.2d 1119, 1127 (3d Cir. 1978).

1. The FCC Has Not Explained How Annual Reports Will Ensure Compliance with the "Substantial News" Condition.

The Commission's arguments about enforceability do not come to grips with the problem. Even leaving aside the definitional problem, the Commission does not explain how a baseline would be established for assessing whether local news has increased. Equally importantly, there is no mechanism, and no remedy, for determining non-compliance with either test. In particular, there is no provision in the revised NBCO rule that would enable the Commission to require divestiture, which is the appropriate way to address the failure to comply with a condition for merger.

Nor is there any reason to believe that the Commission will act when a licensee reports non-compliance. Citizen Petitioners are constrained to observe

that the Commission has been extremely passive in the face of blatant non-compliance with Commission orders in ownership matters. For example, in *Telemundo Communications Group, Inc.*, 17 FCCRcd 6958 (2002), the Commission gave NBC a 12-month waiver to allow orderly disposition of a third TV station in Los Angeles. As of the filing of this brief, NBC still holds that license, and the Commission has done nothing to obtain compliance with its order. Similarly, from 2003-2006, the Commission took no action to enforce a 24-month waiver given to Fox Television Stations, Inc. permitting it to hold two VHF TV stations and a daily newspaper in New York in 2001. *UTV of San Francisco, Inc.*, 16 FCCRcd 14975, 14988 (2001), *aff'd. sub nom. Office of Communication of United Church of Christ v. FCC*, 51 Fed. Appx. 21 (D.C. Cir. 2002). Then, in 2006, it gave Fox a *new* 24 month waiver. *K. Rupert Murdoch*, 21 FCCRcd 11496 (2006). That waiver expired in October 2008, and the Commission has thus far taken no steps to effectuate its divestiture order.

2. The FCC's Claim That Compliance Can Be Monitored by the License Renewal Process or Forfeitures Is Belied by Experience.

The Commission's discussion of available remedies for non-compliance hardly satisfies the concerns Citizen Petitioners have addressed. Even if the

license renewal process were an available option,[2] it is important to note that license terms are eight years in length, so that non-compliance could proceed unchecked for a very long time. More importantly, the standard for assessing renewals (as modified in the 1996 Communications Act) does not permit denial based on non-compliance with a Commission *order*. 47 U.S.C. §309(k)(1) (basing non-renewal only upon "serious violations" or a "pattern of abuse" of the Communications Act "or the rules and regulations of the Commission").

Once a license renewal application is filed, it is the beginning, not the end, of a very long process. There is currently a backlog of literally hundreds of TV stations whose pending license renewal applications were filed between 2004 and 2006.[3] Cases in which license renewal challenges are filed typically take several

---

[2]Revocation is, at best, a theoretical remedy. The burden of proof in such cases is so high that the Commission has only rarely sought to invoke this power except when it is essentially uncontested. It is generally employed only when stations "go dark," or when a licensee is convicted of a serious crime. *See, e.g.*, *Contemporary Media Inc. v. FCC*, 214 F.3d 187 (D.C. Cir. 2000). The Commission no longer publishes annual data, but its last such report, in 1998, listed a total of 62 radio revocations and four TV revocations in the period between 1934 and 1998, less than one per year. *Federal Communications Commission Annual Report 1998 64th* Annual Report (1999), *available* at http://www.fcc.gov/Reports/ar98.pdf).

[3]The situation is essentially unchanged from 2007, when a business newsletter reported that "[t]he FCC still has a backlog of hundreds of television license renewals, despite claims by the Media Bureau that staffers are processing applications as quickly as possible. Numerous applications have been held up due to complaints filed involving, among other things, indecency violations, the misuse

years for *initial* resolution by the FCC's Media Bureau. *See, e.g., KGAN Licensee, LLC*, 25 FCCRcd 2549 (Media Bureau 2010), application for review pending (4 years before Media Bureau decision). Then, aggrieved parties must seek review by the full Commission, a process which often takes several more years. *See, e.g, Sagittarius Broadcasting Corp.*, 18 FCCRcd 22551 (2003) (application for review pending 29 months); *Birach Broadcasting Corporation*, 16 FCCRcd 5015 (2001) (application for review pending 38 months).

Cases involving ownership issues are especially problematic with respect to enforcement because the Commission takes no steps to enforce its ownership rules during the pendency of a license renewal. For example, the Media General license renewal applications discussed below were filed as early as December 2004. The Commission did not act on the challenges to those applications until March 2008. *WJHL-TV, Johnson City, Tennessee, Application for Renewal of License*, 23 FCCRcd 4480 (Media Bureau 2008) ("*Media General Licensing Order*"). During the three years that the challenge was pending, the Commission allowed Media General to operate out of compliance with the then-current rules. This is not a

---

of video news releases, and failure to comply with children's television programming rules." *Mondaq Business Briefing Communications Law Bulletin February 2007, available at* http://tinyurl.com/329gsgx.

special case; it is absolutely typical of FCC practices.

There is more. In the event the FCC finds that there is a "substantial and material issue of fact" it must designate the application for a hearing. 47 U.S.C. §309(d)(2). There have only been a handful of cases in which citizen challenges to license renewal applications have ever been designated for hearing. In those cases, the litigation proceeded for many years thereafter. *See, e.g.*, *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998) (nine years); *Catoctin Broadcasting Corp. of New York v. FCC*, 920 F.2d 1039 (Table) (nine years).

The Commission's misplaced reliance on *New Jersey Coalition for Fair Broadcasting v. FCC* actually underscores the deficiency of the FCC's effort to rely upon the license renewal process. In that case, the FCC found that the State of New Jersey had a need for additional television service and imposed a "special New Jersey service commitment" on VHF stations broadcasting into New Jersey from neighboring states. *Id.*, 574 F.2d at 1126-1127. Such stations would have to supplement their renewal applications with a detailed statement of their New Jersey commitment, and the Commission would closely examine whether stations had met these commitments when they reviewed their license renewal applications. *Id.*, 574 F.2d at 1124. The Court rejected the Coalition's "argument that the special requirement is unenforceable, since the only check on whether stations are

fulfilling the needs of New Jersey is the triennial license renewal procedure." It found:

> The stations have made concrete commitments, in large part involving a promise to establish a particular service or to devote a specific number of hours of employee time to New Jersey. Compliance with this sort of quantifiable commitment is easily monitored by the Commission.

Id., at 1127.

What the FCC's brief fails to mention is that the entire license renewal process has changed dramatically since the *New Jersey Coalition* decision in 1978. First, license renewals occur much less frequently now – every eight years instead of every three years. Second, in 1985, the FCC eliminated the requirements that television stations maintain programming logs, air news or public affairs programming, and file detailed annual reports about the amount of news, public affairs or other community responsive programming. These reports included information on the amount of locally produced programming as well how how the licensee determined them. *TV Deregulation*, 98 FCC2d 1075 (1984). Third, the Commission ceased to require stations to make any forward-looking commitments promises about their programming and or to include any program information in their license renewal applications. *Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees*, 46 Fed.

Reg. 26236-01 (May 11, 1981), 1981 WL 102860. Finally, as noted above, the Telecommunications Act of 1996 modified the standard for assessing renewals by limiting challenges to "serious violations" or a "pattern of abuse" of the Communications Act "or the rules and regulations of the Commission." 47 U.S.C. §309(k)(1).[4]

In short, the license renewal process does not afford a basis for insuring compliance with the NBCO rule.

3. The Commission Cannot Enforce the NBCO Rule With Forfeitures.

The Commission also points to its power to exact forfeitures as a means of enforcing the NBCO rule. FCC Br. at 56. However, its carefully worded statement obscures the fact that non-compliance with conditions in an agency grant of a license is *not* a basis for monetary forfeitures. It is true that, as the Commission points out, forfeitures or non-renewal is available in the case of serious written misrepresentations to the Commission (which violate 47 C.F.R. §1.17), but this does nothing to address licensees that truthfully report the amount

[4]A citizens group, Voices for New Jersey, did file a license renewal challenge against WWOR-TV, station licensed to Secaucus, New Jersey in April, 2007, alleging that the station had not provided adequate coverage of New Jersey political races. The FCC has as yet taken no action on the group's petition to deny the license renewal.

of programming they present or otherwise report their non-compliance with the conditions of a waiver. Another flaw in the Commission's answer is that, even if the Commission had adopted rules which could be enforced, citizens have no right to initiate proceedings seeking a forfeiture, to participate in their disposition or to appeal if the Commission erroneously finds no violation.

4. The Commission Has Not Even Attempted to Rebut Citizen Petitioners' Properly Raised Objections to the Lack of Adequate Public Notice of Waiver Requests.

Citizen Petitioners demonstrated the inadequacy of the Commission's mechanisms purporting to give public notice of the filing of a new waiver request. Br. at 34-46, App. B. In response, the Commission merely repeats what the Commission stated in its order, which did not respond to the Petitioners' argument why the existing public notice requirement was inadequate. FCC Br. at 56 n.17. It also states - incorrectly - that Citizen Petitioners never properly presented their objection that the "flagging" process adopted by the Commission was insufficient to provide notice. *Id.*

The Commission could not be more wrong. Indeed, Citizen Petitioners cited to two different comments that raised specific objection to the "flagging" process. On December 11, 2007, UCC and Media Alliance said that

> 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. For example, applicants should make frequent on air announcements, publish announcements in the newspaper, and prominently post information about the proposed transfer on both the newspaper and broadcast station websites.

UCC/MA Comments on Martin Proposal at 13, JA ___. *See also* Free Press Comments on Martin Proposal at 42, JA ___ (referring to the need to "monitor the [FCC's] Daily Digest for case-by-case filings"). These comments explain precisely why merely "flagging" that an application requests a waiver in the public notice issued by the Commission does not provide meaningful notice to the listeners and viewers of the station.

B. The FCC's Convoluted and *Post Hoc* Rationalizations for Waiving the NBCO Rule in Specific Cases Demonstrate the Arbitrary Nature of its Decision.

The FCC's belabored efforts to avoid judicial review or, in the alternative, defend its grandfathering of five television-newspaper combinations that would not qualify for presumptive waivers under the criteria adopted in the same order, provide further support for Citizen Petitioners' contention that the FCC acted arbitrarily, capriciously and in violation of law when it granted four permanent waivers to Media General and one to Gannett.

First, the FCC argues that Citizen Petitioners' argument should be dismissed

under Section 405 of the Communications Act because they failed to raise it below. It is true that Citizen Petitioners did not address the merits of grandfathering these specific combinations in their comments because the FCC's notice never proposed grandfathering these or any other combinations. Indeed, the FCC admits that it gave no notice when it claims that the APA does not apply here. FCC Br. at 62. Because the FCC failed to provide notice and opportunity to comment as required by the APA, the Court should reverse this part of the FCC's decision.

If the Court does not reverse for lack of notice, Section 405 does not bar it from considering the arguments of Citizen Petitioners. In *Office of Communication of United Church of Christ v. FCC,* 465 F.2d 519 (D.C. Cir. 1972), the court rejected the FCC's claim that an argument was precluded by Section 405 because "the dissenting Commissioners . . . raise the very argument pressed here by the [Petitioners]. It would be blindly ignoring the realities of administrative decision-making to say that the majority had no opportunity to consider the objections raised by the dissenters, and to make its ruling in light of these objections." *Id.*, 465 F.2d at 523 (footnote omitted).

Here, the waivers for Media General and Gannett were inserted into the draft order the night before the vote and were strongly objected to by Commissioners Copps and Adelstein. *2008 Order*, 23 FCCRcd at 2116, JA ___; 23 FCCRcd at

2124 JA ___. Clearly, the Commission had the *opportunity* to consider the dissenting Commissioners' objections to granting the waivers. This alone should satisfy Section 405.

Alternatively, the majority's refusal to address the concerns of the dissenting Commissioners evidences the futility of seeking reconsideration here. Futility is a well-recognized exception to the requirement of exhausting administrative remedies.[5] Another indicator of futility is the fact that other parties did seek reconsideration of the *2008 Order*, arguing that the Commission should reverse its decision to grandfather these combinations.[6] That petition has been pending now for more than two years without FCC action. Moreover, the Commission told this Court that it "does not intend to issue a decision on reconsideration of the *2008 Order* until that decision can be made harmoniously with the [2010] Quadrennial Regulatory Review." FCC Letter to Court, Nov. 25, 2009. In these circumstances,

[5]Because of its nature, prudential exhaustion can be bypassed under certain circumstances, including waiver, estoppel, tolling or futility. *Wilson v. MVM, Inc.*, 475 F.3d 166, 174 (3d Cir. 2007). Moreover, the fact that an exhaustion requirement is contained within statutory language does not mandate its jurisdictional nature. *Id.*, at 175. In *Washington Ass'n for Television and Children v. FCC*, 712 F.2d 677, 682 (D.C. Cir. 1983), the D.C. Circuit "construe[d] §405 to incorporate the traditionally recognized exceptions to the exhaustion doctrine." *See also Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1170 (D.C. Cir. 1994).

[6]Petition for Reconsideration of Common Cause, *et al.* at 7-11 (filed March 24, 2008) JA ___.

it would have been futile for Citizen Petitioners to have filed a petition for reconsideration.[7]

Next, the FCC argues that even if review is not barred by Section 405, the issue should have been raised in the DC Circuit because it concerns licensing. But as Citizen Petitioners Media Alliance and UCC argued in their motion to dismiss Media General's Section 402(b) appeal in the D.C. Circuit for lack of jurisdiction, Section 402 of the Communications Act describes two *mutually exclusive* channels for the review of FCC Decisions.[8] Section 402(b) provides for appeal of FCC orders in nine enumerated situations. *Vernal Enterprises, Inc. v. FCC*, 355 F.3d 650, 655 (D.C. Cir. 2004). "On its face . . . §402(b) requires as a trigger the grant

[7]Neither case cited in the FCC's brief requires dismissal here. In *Service Elec. Cable TV, Inc. v. FCC*, 468 F.2d 674, 676-77 (3d Cir., 1972), this Court concluded that petitioner's argument that the FCC's Review Board had failed to consider all of the relevant evidence was precluded by Section 405 where the Commission never had an opportunity to pass upon the petitioner's claim. The petitioner did not claim that it failed to present the claim to the Commission because it would have been futile. Here, in contrast, the FCC had an opportunity to pass on the claim because the same claim has been pending before the FCC in a petition for reconsideration for more than two years. In *Qwest Corp. v. FCC*, 482 F.3d 471, 474, 476 (D.C. Cir. 2007), the court stated that a petitioner should first file a petition for reconsideration where it had no reason to raise an argument until the FCC issued an order that made the issue relevant, but there the Court also found that the petitioner had failed to show that any of the exceptions to the exhaustion requirement applied.

[8]Motion to Dismiss, D.C. Cir. No. 08-1082 (April 9, 2008). This case and the pending motions have been transferred to the Third Circuit.

or denial of a license application." *Waterway Communications Sys., Inc. v. FCC*, 851 F.2d 401, 403 (D.C. Cir. 1988). "[I]t is well settled that Section 402(b) is to be narrowly construed and confined to the enumerated categories." *Campos v. FCC*, 650 F.2d 890, 893 (7th Cir. 1981) (*citing FCC v. Columbia Broad. Sys.*, 311 U.S. 132 (1940)). All other final orders of the Commission must be reviewed under Section 402(a) and may be brought in any court of appeals that has venue. 28 U.S.C. §§2342-2344.

The *2008 Order* neither granted nor denied a license to Media General or Gannett. In fact, the license renewals were granted by the Media Bureau in separate orders issued after the *2008 Order*. *Media General Licensing Order*; Public Notice Rep. No. 46687, Broadcast Actions, File No. BRCT 20060531ACB at 7 (March 6, 2008). Thus, review of the *2008 Order* is available only under 402(a).

Just because a decision concerns licensing does not make it reviewable under Section 402(b). For example, in *Coalition for Noncommercial Media v. FCC*, 249 F.3d 1005, 1007-08 (D.C. Cir. 2001), the court found that a challenge to the FCC's modification of a license made in the course of a rulemaking proceeding was properly brought under Section 402(a) instead of Section 402(b). Similarly, in *Freeman Eng'g Assocs., Inc. v. FCC*, 103 F.3d 169, 177 (D.C. Cir. 1997), it found

that the grant of a pioneer's preference was not a licensing decision for Section 402(b) purposes, even though the preference effectively guaranteed the applicant would receive a license. The cases cited in the FCC brief at 61-62 are easily distinguished. *Folden v. United States*, 379 F.3d 1344 (Fed. Cir. 2004) *was* a challenge to a licensing decision that could only be brought in the D.C. Circuit. *N. Am. Catholic Educational Programming v. FCC*, 437 F.3d 1206, 1209 (D.C. Cir. 2006) involved a challenge to a waiver granted in a licensing decision, which the court found could not be bifurcated. By contrast here, Citizen Petitioners challenge waivers that were granted in a rulemaking order. There, as here, it would be inappropriate to bifurcate review of two parts of the same order, especially since here, having two different circuits reviewing the same order poses a risk of inconsistency. Thus, it was entirely appropriate, if not required, for Citizen Petitioners to challenge the FCC decision to grandfather certain cross-ownership combinations in this Court.

Because the FCC grandfathered the NBCO combinations in a rulemaking proceeding, the Court should also reject the FCC's contention that it was not required to give any notice of its proposal to grant waivers because waivers requests are party-specific adjudications. FCC Br. at 62. In fact, the FCC had five party-specific requests for waivers pending before it at the time. These waiver

requests were made in license renewal applications filed by Media General and Gannett. Citizen Petitioner Free Press filed objections to some of these license renewal applications. If the Commission's decision was in fact a party specific adjudication, then it would be reasonable to expect that it would have addressed Free Press's objections to the grant of the waivers. However, as the FCC brief concedes at 62, the *2008 Order* did not address Free Press's objections.

The FCC's brief attempts to justify this failure by explaining that "Free Press's objections were not raised in this proceeding," but were "presented in the separate proceedings before the agency concerning Media General's license renewal application." *Id.* Noting that Free Press has filed an application with the Commission to review the Bureau decision, it asserts that Free Press has not been denied its "right to be heard" because the Commission will have an opportunity to address Free Press's arguments in that proceeding. *Id*. at 62-63. This Court should not permit the FCC to play this administrative "shell game." The fact of the matter is that the FCC's grant of party-specific waivers in a rulemaking proceeding rather than in pending license renewals did deny Free Press the right to be heard. The Media Bureau did not consider Free Press's arguments in granting the renewals; it found that "[t]his issue...has been rendered moot by the Commission's [*2008*] *Ownership Order*." *Media General Licensing Order*, 23 FCCRcd at 4480.

Moreover, although Free Press filed a timely application for review on April 24, 2008 (which remains pending after more than two years), FCC rules allow it to deny the application without specifying any reasons. *See* 47 C.F.R. §1.115(g) .

Even if the Commission acts on Free Press' application for review, it is unlikely to reverse the waivers given to Media General. The application for review has already been pending for more than two years, and one of the reasons the Commission cited for granting the waivers in 2008 was that the combinations, which had been created prior to 2001, had been in existence for long period of time. FCC Br. at 64. Thus, if Free Press is to be heard at all, it must be by this Court.

On the merits, in response to Citizen Petitioners' claim that the FCC acted arbitrarily by applying neither the 1975 waiver standard nor the newly adopted standard, the FCC asserts that the *2008 Order* "applied the public interest inquiry that the Commission first elaborated on in the *1975 Order*." FCC Br. at 65. The *1975 Order* states that "if it could be shown for whatever reason that the purposes of the rule would be disserved by divestiture, if the rule, in other words, would be better served by continuation of the current ownership pattern, then waiver would be warranted." *Multiple Ownership of Standard, FM and Television Broadcast Stations*, 50 FCC 2d 1046, 1085 (1975). The purpose of the rule is to promote "the

twin goals of diversity of viewpoints and economic competition" with the recognition that competition would yield to the "even higher goals of diversity and the delivery of quality broadcasting service to the American people." *Id.* at 1074.

The *2008 Order* nowhere cites the 1975 waiver standard or considers the impact of allowing cross-ownership on viewpoint diversity and economic competition. But even assuming that the Commission applied this test, it did so in an arbitrary and capricious manner because it failed to consider arguments and evidence on both sides. Regarding Media General's cross-ownership in Columbus, GA, for example, Free Press pointed out that Media General's "*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) and WTVM/WXTX. Allowing one company to control two of three sources of local news diminishes the diversity of viewpoints available to the public." Petition to Deny at 18-19, JA ___-___. These facts were used to counter Media General's claim that it met the 1975 waiver test.

> Media General's waiver 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." Such benefits, even if they in fact exist, are irrelevant because promoting diversity, not

localism and better news, is the purpose of the rule.

Id. at 7. *See also* Informal Objection of Free Press, FCC File No. BRCT 20050401BYS at 24 (July 1, 2005). The Commission's grant of a permanent waiver to Media General, where Media General had the burden of demonstrating that the purpose of the rule were better served by a waiver, without considering arguments on the other side, is simply arbitrary.[9]

Finally, in response to Citizen Petitioners' claim that the FCC acted arbitrarily by not requiring Media General to apply for waivers under the new criteria as it did for other broadcasters, the FCC brief states that other broadcasters had multiple newspapers or broadcast stations and thus raised "heightened diversity concerns." FCC Br. at 66. But the FCC nowhere explains why a combination involving more than one station or newspaper raises more diversity concerns than combinations in small markets and/or that involve a top-four television station and the only daily newspaper.[10]

[9]The situation faced by the FCC in grandfathering combinations in 1975 was quite different from that in 2008. The combinations grandfathered in 1975 had been created at a time when there was no rule against cross-ownership. In contrast, Media General and Gannett acquired newspapers in markets where they owned broadcast stations at a time when the NBCO rule prohibited cross-ownership and required licensees to divest within one year or by their next license renewal.

[10]Moreover, allowing these waivers to stand will set a precedent that will make it difficult for the Commission to deny waivers in other cases where the applicant does not meet the test for a presumptive waiver. For example, Tribune Co. which

III. THE FCC'S RESPONSE TO THIS COURT'S REMAND REGARDING MINORITY AND FEMALE OWNERSHIP IS INSUFFICIENT.

The FCC contests Citizen Petitioners' reading of this Court's instructions on remand for the FCC to address the effect of its ownership limits on minority and female ownership. FCC Br. at 99-100. The Commission takes a narrow view of this Court's order, which it claims to have satisfied by merely re-adopting the failed station solicitation rule (FSSR) and promulgating a separate *Order and Further Notice of Proposed Rulemaking* which purportedly addressed MMTC's proposals. FCC Br. at 99.

The FCC's brief asserts that the Commission "expressly considered the effect on minority and female ownership when it reinstated the Failed Station Solicitation Rule)." FCC Br. at 100. Yet, the entire discussion of the FSSR consists of a single sentence: "To ensure that we do not negatively impact

---

currently has five requests for waivers of the NBCO rule pending before the Commission contends, that:

> The case for such a waiver here is at least as compelling as the other situations in which the agency granted permanent relief from the NBCO Rule. Most recently, in conjunction with the *2008 Order*, the Commission issued permanent waivers to Gannett . . . in Phoenix (the 12th-ranked DMA) and Media General's TV/newspaper combinations in four markets, each of which is much smaller than Chicago....

WGN Continental Broadcasting Company Debtor-in-Possession, Docket 10-104, Request for Cross-Ownership Waiver, Exhibit 16, at pp. 118-119, *available at* http://tinyurl.com/339cuvz.

minority owners, we now reinstate that requirement in the waiver standard." *2008 Order*, 23 FCCRcd at 2068.

The *2008 Order* never assessed whether the FSSR, or any other policies for that matter, was actually effective in promoting minority and female ownership. The FSSR has been in effect since 1999.[11] Commission Study No. 8 found that since 1999, the number of minority and female owned stations had decreased. Allen S. Hammond, IV, *et al*., *The Impact of the FCC's TV Duopoly Rule Relaxation on Minority & Women Owned Broadcast Stations, 1996-2002* (June 2007), at 48 JA___.[12]

This Court previously found that in

> repealing the FSSR without any discussion of the effect of its decision on minority television station ownership (and without ever acknowledging the decline in minority station ownership nothwithstanding the rule), the Commission 'entirely failed to consider an important aspect of the problem,' and this amounts to

[11]Even though the *2002 Order* repealed the FSSR, that repeal was stayed by this Court.

[12] The FCC states that it did not rely on the Hammond study because "peer review concluded that the Hammond study was 'fatally flawed.'" FCC Br. at 101 n.32. However, the peer review questioned the logic of the study, not the underlying data. Moreover, the FCC did rely on other studies that had received negative peer reviews. *See, e.g., 2008 Order*, 23 FCCRcd at 2035 n.147 (relying on Milyo study notwithstanding negative peer review); *2008 Order*, 23 FCCRcd at 2036-2037 (relying on Study 4.1 after negative peer reviews and criticism in comments). While the FCC is certainly free to reject the findings of the study it commissioned, that does not excuse the it from addressing the the effectiveness of the FSSR.

arbitrary and capricious rulemaking."

Prometheus, 373 F.3d at 421. Reinstating the FSSR without any analysis of its effectiveness similarly amounts to arbitrary and capricious rulemaking.

Citizen Petitioners recognize that this Court is in the best position to determine what was required of the Commission on remand. Nevertheless, there is nothing ambiguous about this Court's directive that the Commission consider certain proposals to advance minority and female ownership *at the same time* it responds to the remand. *Prometheus,* 373 F.3d at 421 n.59. Citizen Petitioners devoted nearly forty pages of their initial comments to discussing why and how the Commission should increase station ownership by minorities and women. UCC 2006 Comments at 2-40, JA ___-___. They proposed, among other things, that the FCC tighten up ownership limits to make it easier for minorities and women to find stations, obtain capital and compete (pages 26-27); eliminate the grandfathering for existing radio clusters, thereby freeing up approximately 96 stations (page 27); define socially and economically disadvantaged small businesses ("SDB's") to take race and gender into account (pages 33-35), and to limit the transfers of grandfathered radio station clusters to socially disadvantaged businesses (pages 35-37). The FCC ignored some of these proposals, such as eliminating grandfathering, while seeking additional comment on others, such as

the definition of SDB's. *Diversity Order/Further Notice*, 23 FCCRcd 5922, 5950 (2008) JA ___.[13] Thus, the FCC has failed to comply with the Court's direction to consider ways to increase minority and female ownership *at the same time* it decides whether to retain or modify its numerical limits.

The FCC also claims that it cannot be expected to provide evidence of the effectiveness of newly adopted policies. FCC Br. at 100. However, several of the policies have been in place long enough to make such assessments. In addition to the FSSR which was adopted in 1999, the Commission has permitted the sale of grandfathered radio station combinations that exceed of the ownership limits to small business entities since 2003. The Commission adopted this exception to its normal transfer policy because the Commission believed it would increase diversity in ownership since women and minorities often own small businesses. *Prometheus*, 372 F.3d at 420*; 2002 Biennial Review*, 18 FCCRcd 13620, 13637 (2003). UCC argued that the small business preference had not increased minority and female ownership and was actually detrimental because the majority of existing station owners qualify as small businesses. UCC 2006 Comments at 32-

[13]Nor does it meet the Court's expectation "that by the next quadrennial review the Commission will have the benefit of a stable definition of SDBs, as well as several years of implementation experience, to help it reevaluate whether an SDB-based waiver will better promote the Commission's diversity objectives." *Prometheus*, 373 F.3d at 428 n.70.

33, 36, JA____. The FCC could have, but failed, to analyze whether this policy was effective.

The FCC's reliance on *Omnipoint v. FCC,* 78 F.3d 620 (D.C. Cir 1996), as support for its claim that the small business preference "incidentally" benefits minorities and females is misplaced. FCC Br. at 101-102. The FCC makes too big a leap when it declares that a preference that will incidentally affect minority and female-owned businesses "are likely to increase broadcast ownership by women and minorities." FCC Br. at 102. Furthermore, in *Omnipoint* the court deferred to the FCC's prediction that the new small business classification would benefit minorities and women. *Omnipoint v. FCC,* 78 F.3d at 633-634. Here, the Commission has a rule that had been in effect over five years, so there is no need to make a predictive judgment to determine whether it has *actually* benefitted minority and women's ownership.

IV. THE COMMISSION'S OWNERSHIP RULES DO NOT VIOLATE THE FIRST OR FIFTH AMENDMENTS.

The Media Parties redundantly, and somewhat mechanically, go through the motions of reiterating a number of constitutional challenges without even acknowledging the fact that most have already been unanimously rejected by this Court in this case. As the FCC correctly points out, FCC Br. at 95-99, these

arguments are clearly foreclosed by established Supreme Court and Circuit precedent. *Prometheus,* 373 F.3d at 401-403 ("[I]t is the Supreme Court's prerogative to change its own precedent.")(citations omitted); *Sinclair Broadcast Group v. FCC*, 284 F.3d 148, 167 (D.C. Cir. 2002) (similar); *Fox Television Stations v. FCC*, 280 F.3d 1027, 1046 (D.C. Cir. 2002) ("*Fox I*") (similar).

The law of this case is that

- The Commission's ownership rules do not violate the Fifth Amendment for allegedly singling out particular media platforms for "special restrictions." *Prometheus,* 373 F.3d at 401.

- The Commission's ownership rules do not unconstitutionally "limit[] the speech opportunities of newspapers and broadcast station owners. . . . ." *Id.*

and

- "The expansion of media outlets since *NCCB*'s day" does not justify jettisoning the scarcity rationale. *Id.*, 373 F.3d at 401-402 (*citing Fox I*, 280 F.3d at 1046, and *Turner Broadcasting System v. FCC*, 512 U.S. 622, 638-39 (1994)).

Since those holdings dispose of most of the Media Parties constitutional arguments, only a few other points merit greater explanation

A. Spectrum Scarcity Is, If Anything, Greater Now Than in the Past.

The Media Parties are most insistent in treating spectrum scarcity as if it

were measured by the abundance of media outlets (or, in the case of Media General, MG Br. at 43-44, digital video streams). *See, e.g.*, Clear Channel Br. at 11, 34; CBS Br. at 53-55; MG Br. at 41-45. But, as this Court held, "The abundance of non-broadcast media does not render the broadcast spectrum any less scarce." *Prometheus*, 373 F.3d at 402. Indeed, recent developments demonstrate that, under the proper standard - demand versus supply - the limited and particular spectrum allocated to television is more in demand, and thus more scarce, than ever before.

In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Supreme Court explained that because there was no spectrum licensing mechanism until 1927, too many radio stations were interfering with each other "and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government." *Id.*, 395 U.S. at 375-376 (footnote omitted).[14] Scarcity is determined by the law of supply and demand: "[b]ecause of problems of interference between broadcast signals, a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public." *FCC v.*

[14] *See id.*, 395 U.S. at 376 (quoting legislative history "recogniz[ing] that...there must be a limitation upon the number of broadcasting stations. . . .").

NCCB, 436 U.S. 775, 799 (1978). While several of the Media Parties insist that advances in technology have rendered the scarcity doctrine obsolete, the *Red Lion* court rejected a similar argument, saying that "[a]dvances in technology . . . have led to more efficient utilization . . . but uses for that spectrum have also grown apace." *Red Lion*, 395 U.S. at 396-397.

Technologies have changed, but the same situation pertains today. Not only are there far more would be broadcasters than can be accommodated in most parts of the country,[15] but there are many new competing uses for spectrum. As in the day of *Red Lion*, there are today many competing demands for spectrum for "defense preparedness"[16] and public safety.[17] *Red Lion*, 395 U.S. at 397

[15]The FCC's web site warns "[p]otential applicants for radio and television services . . . that frequencies for these services are always in heavy demand. For example, the Commission received approximately 30,000 inquiries from persons seeking to start radio broadcast stations last year. When application filing window periods open for new stations, many competing applications are filed." http://tinyurl.com/2f5hmve

[16]Motivated in large part by resistence from military and other government users, the President recently issued a memorandum to heads of federal agencies, including the Department of Defense, directing them, *inter alia*, to cooperate with the Department of Commerce and the FCC in creating "a specific Plan and Timetable for identifying and making available 500 MHZ of spectrum" to be deployed for shared for broadband use. *Memorandum of June 28, 2010, Unleashing the Wireless Broadband Revolution*, 75 Fed. Reg. 38387, 38388 (June 28, 2010).

[17]After UHF channels above channel 52 were cleared a few years ago, a huge controversy developed over whether to limit use of a portion of these former analog TV channels to public safety use. *See, e.g.*, "Public Safety Group Disputes

(discussing "[c]onflicts" for spectrum). The spectrum currently reserved for use by television broadcasters is now the subject of an especially intense and high stakes debate.[18] Because of its ideal propagation qualities, the 700 MHz band, where TV stations are located, is highly prized and, in particular, is especially well-suited for new wireless broadband technologies.[19] For this reason, in its recent statutorily mandated "National Broadband Plan," the FCC proposed to reallocate a substantial

FCC's Claim On Spectrum," Tech Daily Dose, July 7, 2010, http://tinyurl.com/2dr2ght.

[18]There is also great demand for radio broadcast spectrum. *See Prometheus*, 373 F.3d at 402 (*citing Ruggiero v. FCC*, 278 F.3d 1323, 1325 (D.C. Cir. 2002), *rev'd en banc*, 317 F.3d 239 (D.C. Cir. 2003)). In March 2003, the Commission sought applications in Auction No. 83 for translators. The translator filing window attracted an "extraordinary volume" of applications. *Creation of a Low Power Service*, 20 FCCRcd 6763, 6777 (2005). The Commission received more than 13,000 applications, more than three times the number of applications as the number of translator stations authorized during the entire history of the translator service. *Id.*

[19]A portion of the spectrum vacated as a result of the recent digital television transition generated almost $20 billion when it was auctioned off for broadband use. "The 700 MHz spectrum has long been considered the last bit of beachfront wireless real estate left in the air. The spectrum, which is being vacated by the switch to digital TV in 2009, is considered valuable because of inherent properties that allow it to propagate over long distances and penetrate walls. Some experts believe the spectrum is ideal for offering robust, affordable wireless broadband services." *Assessing Success in the FCC's 700MHz Auction*, Cnet.com, March 19, 2008, http://tinyurl.com/26hau27. Assessments of the value of the remaining TV spectrum value it much more highly. *See CEA Study: Reallocating Broadcast Spectrum Could Yield $1 Trillion*, Broadcasting and Cable, October 26, 2010, http://tinyurl.com/28dsbnl.

proportion of the spectrum currently used by TV broadcasters for broadband use.[20]

> [T]he largest swath of spectrum to be used to meet this perceived need is proposed to come from television broadcasters. The Commission's plan proposes to recapture 120 MHZ of spectrum (20 UHF channels) from television broadcasters. This would be done essentially in two steps – a voluntary sale by some broadcasters of all or part of their spectrum, followed by a repacking of the spectrum to make a more efficient use of the remaining spectrum by the remaining television broadcasters.

David Oxenford, *FCC National Broadband Plan - What It Suggests for TV Broadcasters Spectrum* (March 16, 2010), http://tinyurl.com/2avf3dx.[21]

Needless to say, the FCC's proposal has been hotly contested by broadcasters. *See, e.g.*, "FCC Chairman Attacks Broadcast Lobbyists," *Broadcast Engineering*, March 1, 2010, http://tinyurl.com/299vttd. ("The NAB. . .has been

[20]"The 'lack of spectrum probably constitutes the greatest threat to a healthy broadband ecosystem in our country 10 years hence,' Blair Levin, Aspen Institute fellow and former director of the FCC's broadband initiative, said . . . .There really is no unoccupied spectrum, or 'marketing incentives for entities to allocate their spectrum,' he said. The National Broadband Plan's recommendation for spectrum incentive auctions is aimed at 'putting spectrum back in the marketplace,' he said." "Wireless," *Communications Daily*, June 23, 2010 (accessible *via* Lexis/Nexis or Westlaw)

[21]*See also* "Seybold's Take: Finding 500 MHZ of Spectrum," FierceWireless.com (August 2, 2010), http://tinyurl.com/2968pg8 ("The best hope for finding more spectrum appears to be a combination of relocating some of the TV channels, moving some license holders higher in frequency, and finding government spectrum that could be turned over for commercial broadband use.")

arguing that the broadcasters have already given up spectrum in the recent digital transition. They need their remaining spectrum, the NAB argues . . . .”). For immediate purposes, of course, what matters is not who is right and wrong, it is that wireless broadband providers, the FCC and broadcasters all agree that the spectrum is valuable, and wish to use it for different purposes. Thus, spectrum scarcity as defined in *Red Lion*, remains wholly operative.[22]

B. Tribune Incorrectly Argues That Spectrum Scarcity Does Not Govern Review of the NBCO Rule.

Tribune incorrectly argues that, unlike the local TV and radio rules, the NBCO rule “does not implicate the scarcity doctrine” and that the NBCO is therefore subject to a heightened level of scrutiny. Tribune Br. at 48. Tribune says that “courts have rejected First Amendment challenges to the newspaper rule based solely on the assumed applicability of the ‘scarcity doctrine.’” *Id.* Since the number of broadcast voices in a market is the same whether or not one of the

[22]Media General argues, at pp. 46-47, that there has been a positive response to the Supreme Court’s invitation for a “signal” that spectrum scarcity no longer pertains. *See FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984). Far from giving such notice, in the 26 years since, Congress has, among other things, mandated minimum amounts of programming for children, *see* 47 U.S.C. §303b, afforded special “must carry” rights to broadcasters, *see Turner Broadcasting System, Inc.* v. FCC, 512 U.S. at 637-638, and, as this Court is well-aware, enacted new broadcast ownership limits. The viability of all of these measures is predicated on spectrum scarcity.

stations is commonly owned with the newspaper, Tribune argues that the Commission is improperly attempting to regulate newspapers. *Id.*, at 49.

Tribune is wrong. If a newspaper and a TV station are commonly owned, there is one voice; if they are separately owned there are two voices. Counting newspaper voices under the NBCO rule is not the same as regulating newspapers; rather, it is regulating who may own a broadcasting station. Just as Congress has ruled that aliens may not hold broadcast licenses, *see* 47 U.S.C. §310(b), the FCC has said that under some circumstances, the owner of a newspaper may not hold such a license.

Tribune says that the courts have merely "assumed" that scarcity applies to the NBCO rule, but in fact, the Supreme Court did much more than that. The court evidenced a clear understanding that the NBCO rule affected not just broadcast station owners, but the *entire* marketplace of ideas:

> As we have discussed on several occasions, *see, e.g.*, *National Broadcasting Co. v. United States*, [319 U.S.190] 210-218; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375-377, 387-388 (1969), the physical scarcity of broadcast frequencies, as well as problems of interference between broadcast signals, led Congress to delegate broad authority to the Commission to allocate broadcast licenses in the 'public interest.' And '[t]he avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States.' *National Broadcasting Co. v. United*

> *States*, *supra*, 319 U.S. at 217. ***It was not inconsistent with the statutory scheme, therefore, for the Commission to conclude that the maximum benefit to the 'public interest' would follow from allocation of broadcast licenses so as to promote diversification of the mass media as a whole.***

FCC v. NCCB, 436 U.S. at 795 (emphasis added).

C. The Revised NBCO Rule is Not Content-Based.

Some of the Media Parties contend that the NBCO rule is unconstitutional because it fails to satisfy the test for strict scrutiny. *See, e.g.*, MG Br. at 49-53; Cox Br. at 39-43. These arguments are all based on the incorrect premise that the NBCO rule is content-based rather than content-neutral.

In *Turner Broadcasting System, Inc.*, 512 U.S. at 642, the Supreme Court set out the test for determining whether a regulation is content-based or content-neutral. The "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." (*citing Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). "[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Id., 512* U.S. at 643 (*citing Burson v. Freeman*, 504 U.S. 191, 197).

The Media Parties claim that the NBCO rule is content-based for three reasons. First, Media General contends that since the purpose of rule is to enhance localism and diversity, it is necessarily related to content. MG Br. at 51. This argument is foreclosed by the Supreme Court's holding in *NCCB* that the cross-ownership regulations "are not content related; moreover, their purpose and effect is to promote free speech, not to restrict it." *FCC v. NCCB*, 436 U.S. at 801. In addition, under the tests set forth in *Turner*, the goals of promoting localism and diversity are content-neutral because the government is not expressing any agreement or disagreement as to the message or favoring or disfavoring speech based on the ideas or views.

Cox claims that the NBCO rule is content-based because it favors non-newspaper owners over newspaper owners. Cox Br. at 39. Again, this argument is foreclosed by *NCCB*, where the court rejected the argument that the Commission had unfairly singled out newspaper owners for more stringent treatment. 436 U.S. at 801. Similarly in *Turner*, the court upheld that the must carry rules, which favored the speech of television stations over that of cable operators. It acknowledged that

> the must-carry provisions distinguish between speakers in the television programming market. But they do so based only upon the manner in which speakers transmit

> their messages to viewers, and not upon the messages they carry: Broadcasters, which transmit over the air-waves, are favored, while cable programmers, which do not, are disfavored. Cable operators, too, are burdened by the carriage obligations, but only because they control access to the cable conduit. So long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment.

512 U.S. at 645; *see also id.*, at 660-661 (noting that the fact that a law singles out a certain medium, or even the press as a whole, "is insufficient by itself to raise First Amendment concerns" and that "heightened scrutiny is unwarranted when the differential treatment is 'justified by some special characteristic of' the particular medium being regulated") (citation omitted).[23]

The NBCO rule as revised by the FCC does not distinguish between newspaper owners and non-newspaper owners based on the content they provide. Indeed, since both newspaper owners and non-newspaper owners have diverse viewpoints, whether or not one owns a newspaper is not correlated with any particular content or viewpoint.

Finally, some Media Parties argue that the NBCO rule is content-based because the waiver criteria of the revised NBCO rule take into account the amount

[23]Thus, the situation is completely different than in *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), where the court found it unconstitutional to restrict the amount of independent expenditures supporting political candidates, because in that case, the identity of the speaker was associated with particular viewpoint.

of local programming and the independence of the commonly-owned properties' editorial judgments. MG Br. at 49-50; Tribune Br. at 38. Citizen Petitioners argued in their initial brief that the four factor test and substantial news test are hopelessly vague and cannot be enforced. Citizen Petitioners Brief at 30-33. If the Court accepts this argument, there would be no need to reach the Media Parties' claim that the waiver criteria intrude on their First Amendment rights.

Assuming, however, that this Court finds that the NBCO waiver criteria accomplish what they set out to do, they are not unconstitutional. The fact that the FCC considers a licensee's programming in determining whether to grant a waiver is not new. Indeed, the Commission has routinely done so without engendering constitutional problems.[24]

Moreover, the fact that the waiver criteria consider the quantity of local news programming does not engender heightened scrutiny. Mere reference to

[24]*See, e.g., Estes Broadcasting, Inc.*, 2010 WL 2510748, *2 (2010)(Media Bureau) (licensee committed to expand local news and public affairs programming and initiate high school sports coverage); *Borger Broadcasting, Inc.*, 25 FCCRcd 1204, 1206 (2010) (Media Bureau) (licensee promised to initiate locally originated news and weather programming); *Golden West Broadcasters*, 10 FCCRcd 2081, 2082 (1995) (licensee promised to initiate new program format with increased public affairs programming); *Renaissance Communications Corp.*, 12 FCCRcd 11866, 11887 (1997), *aff'd sub nom. Tribune Co. v. FCC*, 133 F.2d 61 (D.C. Cir. 1998) (licensee committed, *inter alia*, to broadcast new program addressing needs of Hispanic viewers and a "30-minute news magazine for children ages 12 to 16 on 'hard' news issues").

content is by no means problematic unless the government is making judgments that are subjective or viewpoint-based which, as shown above, is not the case here. The waiver criteria do not in any way tell the licensees what they may and may not broadcast or otherwise interfere with their editorial judgments.[25]

In addition, the focus on providing local news and ensuring diversity by requiring editorial independence is wholly consistent with the basic scheme of public interest regulation. "While nothing in the Act expressly grants the Commission authority to regulate programming," the public interest standard has been "held necessarily to entail the power to license on the basis of program service." *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1414, 1428 (D.C. Cir. 1983).[26] The analysis required here (to determine

[25]The waiver criteria are unquestionably viewpoint neutral. *Ark. Educational Television Commission v. Forbes*, 523 U.S. 666, 682-83 (1998) (exclusion of candidate from debate was based on polling data, not on disagreement with his viewpoint); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983) (allowing one of two unions to have access was permissible because it was "based on the ***status*** of the respective unions rather than their views"). The Commission has no interest in the content, much less the viewpoint of local news, just its source. And it does not care about the editorial perspectives or news judgment of newspapers and TV stations, just that they are separately determined.

[26]***See, id.*** ("'[W]e are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. * * *'") (*quoting National Broadcasting Co. v. FCC*, 319 U.S. at 215 (Frankfurter, J.))

whether the presumption is in favor or against a waiver being in the public interest) is far less intrusive than other FCC measures that have withstood judicial review. *See, e.g., CBS, Inc. v. FCC,* 453 U.S. 367, 394-397 (1981) (finding constitutional a requirement that broadcasters make available the particular time and duration of airtime requested by federal candidates); *Mt. Mansfield Television, Inc. v. FCC,* 442 F.2d 470 (2d Cir. 1971)(upholding a rule limiting the amount of network programming which could be carried in prime time).

D. The Newspaper-Broadcast Cross-Ownership Rule Does Not Violate the Fifth Amendment Right to Equal Protection.

The Supreme Court unanimously upheld the constitutionality of the NBCO Rule when faced with equal protection challenges in *NCCB*, holding that the rule "treat[s] newspaper owners in essentially the same fashion as other owners of the major media of mass communications." *NCCB*, 436 U.S. at 801. This Court, accordingly, found the equal protection challenges to the NBCO rule to be "foreclosed" by the Supreme Court's ruling. *Prometheus,* 373 F.3d at 401.

Nevertheless, Cox now asks this Court to vacate the NBCO rule "because it prohibits only newspaper owners . . . from engaging in broadcast speech." Cox Br. at 46. In support of this contention Media General adds that since the *NCCB* case was decided, "the factual predicate upon which [the *NCCB* holding] rests has

evaporated" because "new and powerful major media have arisen." MG Br. at 57-58. These arguments misconstrue both fact and law.

This Court has already considered – and rejected – a virtually identical argument made by deregulatory petitioners in the original *Prometheus* case. There, this Court stated:

> We decline the Deregulatory Petitioners' invitation to disregard Supreme Court precedent because of changing times. Surely there are more media outlets today (such as cable, the Internet, and satellite broadcast) than were in 1978 when *NCCB* was decided. But it cannot be assumed that these media outlets contribute to viewpoint diversity as sources of local news and information.

Prometheus, 373 F.3d at 401. Cox and Media General present no intervening factual or legal changes in the interim between the *Prometheus* decision that oblige this Court to revisit its determination of the constitutionality of the NBCO Rule.

Media General attempts to escape the *NCCB* precedent by claiming that "newspapers are singled out as the only non-broadcast medium subject to a broadcast cross-ownership ban, [and] it is no longer true that newspapers are the only non-broadcast major medi[um] of mass communications." MG Br. at 57 (*internal citation omitted*). This argument misreads *NCCB*. The cross ownership rule is not intended to diversify all major mass media. Rather, the FCC sought to regulate broadcast cross-ownership to promote diversity of viewpoints within *local*

communities. *NCCB*, 436 U.S. at 786 (citing *1975 Order*, 50 FCC2d 1046, 1075 (1975)). When the Commission adopted the original NBCO rule in 1975, it excluded certain types of mass media, such as magazines and other periodicals, that "dealt exclusively with regional or national issues." *NCCB*, 436 U.S. at 815; *1975 Order*, 50 FCC2d at 1080. The Commission recognized that other major mass media existed, but chose to restrict common ownership of mass media outlets that provided coverage of local issues, specifically, newspapers, broadcast television, and broadcast radio. As further evidence of the Commission's intent to diversify outlets of mass media at the local level, the NBCO rule (both then and now) places limitations on common ownership only of a newspaper and broadcast station in the same market. Owners of newspapers may, and currently do, own broadcast stations in other markets.

In sum, this Court has already rejected industry requests to find the NBCO Rule unconstitutional and the relevant legal or factual evidence underpinning the legitimacy of the NBCO rule has not changed. Case doctrine compels outright rejection of Cox and Media General's equal protection claims.

E. The FCC Properly Applied the NBCO Rule to Cox and Media General.

Cox and Media General also argue that the NBCO rule is unconstitutional as

applied to each of them. Cox Br. at 35-46; MG Br. at 53-55. These arguments are procedurally flawed and based on an incorrect assumption.

Media General's alleged harm, that the NBCO rule "bar[s] Media General from selling these cross-owned properties together...," MG Br. at 54, would require a major change in FCC practice, and is an issue which was never presented to the FCC in any of its numerous comments and *ex parte* communications, or by means of a petition for reconsideration. As such, it is barred by 47 U.S.C. §405. *Petroleum Communications, Inc. v. FCC*, 22 F.3d at 1169-1170*; Coalition for Preservation of Hispanic Broadcasting v. FCC*, 931 F.2d 73, 77-78 (D.C. Cir. 1991)(*en banc*); *Green v. FCC*, 447 F.2d 323 (D.C. Cir. 1971)(constitutional issue). Similarly, Cox's argument, that "record evidence showed that a plethora of media voices serves those markets," Cox Br. at 37, was never presented to the Commission as a constitutional claim, and is also barred under 47 U.S.C. §405.

Media General's claim is unrelated to, and not "fairly traceable" to, any speech right of Media General's. A decision to sell a piece of property is not a form of speech. If any speech interest were at issue here - and there is not - it would be the speech interest of the prospective purchaser. Hence, Media General lacks standing to raise this argument.

Even if it were necessary to reach the merits of these arguments, they fall

flat, because they are based on the assumption that spectrum scarcity is defined in terms of the quantity of outlets in each particular media market, and not the demand for the available spectrum. *See, e.g.*, Cox Br. at 38 (referring to "scarcity of media voices"); MG Br. at 55 ("media outlets were anything but scarce"). As discussed above, at pp. 37-41, spectrum scarcity is based on demand as well as supply. Moreover, the Commission's spectrum allocations are based on complex engineering and propagation criteria which affect adjoining markets, and cannot be applied on a single market-by-market basis.

V. IN NO EVENT SHOULD THE LOCAL TELEVISION, LOCAL RADIO AND NBCO RULES BE VACATED RATHER THAN REMANDED.

In the event this Court finds that any of the FCC's ownership limits are arbitrary and capricious, this Court should reverse and remand to the FCC rather than vacate the rules as the Media Parties have requested. *See, e.g.*, Tribune/Fox Br. at 55-57 (seeking vacatur of NBCO rule and local TV rule), Clear Channel Br. at 38 n. 14 (seeking vacatur of local radio rule).[27]

It is the practice of the Third Circuit to remand for further proceedings when

[27]Citizen Petitioners do not seek vacatur. Instead, they have asked for reversal and remand of the NBCO rule because the Commission improperly included vague and unenforceable criteria for assessing waiver requests. Citizen Petitioners Br. at 54-55. This can be remedied on remand by eliminating those criteria.

it finds that an agency has acted arbitrarily and capriciously. *See, e.g., Pub. Citizen Health Research Grp. v. U.S. Dep't of Labor*, 557 F.3d 165, 191 (3d Cir. 2009) ("the appropriate course of action is to remand the matter to [the agency] for further consideration and explanation, without disturbing the rule itself"). Indeed, the Media Parties do not cite to a single case in this Circuit in which an agency rule has been vacated rather than remanded.

Other Circuits have on rare occasions vacated agency rules, but only after finding that (1) the agency order was so deficient that it could not be remedied upon remand *and* (2) that vacating the order would not have disruptive consequences. *See, e.g., Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 528 (D.C. Cir. 2009) (*citing Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

Citizen Petitioners believe that for the most part, the ownership rules adopted by the FCC are rational and supported by the record. Even if this Court finds that the FCC acted arbitrarily in some aspects, however, it should not vacate the ownership limits. As noted by the D.C. Circuit in rejecting a similar request by the networks to vacate the national television ownership rule, "[u]nder the APA reviewing courts generally limit themselves to remanding for further consideration an agency order wanting an explanation adequate to sustain it. . . [t]he case upon

which the networks rely involved extraordinary circumstances – extreme delay and nonresponsiveness by the Commission. . . ." *Fox I,* 280 F. 3d at 1047. *See also Am. Farm Bureau Fed'n*, 559 F.3d at 528; *Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009).

Here, the Commission responded to this Court's remand by revising the blanket ban which had been rejected on judicial review. The Commission followed a reasonable path in fashioning a rule which treats large and small market differently, but provides for waivers in each. As was the case with the national television ownership rule at issue in *Fox I,* it cannot be said with confidence that the revised NBCO rule is irredeemable, or that the probability that the FCC will be able to justify it so low, that vacatur would be warranted. *Fox I*, 280 F. 3d at 1048-49. As in *Fox I*, at most, the Commission has "been more errant than recalcitrant." *Id.*, 280 F3d at 1047.[28] Similarly, the local television and local radio rules may be adjusted on remand if found arbitrary and capricious.

Even if the Court doubts the agency's ability to remedy the defects on remand, it should "consider the disruption that might be caused if the court were

[28]In contrast, the *Fox I* court vacated the cable-broadcast cross-ownership rule because neither the Commission nor its supporters presented any "plausible reasons" why such a rule was even needed to protect competition and that the Commission's effort to justify it was a "hopeless cause." *Fox I*, 280 F.3d at 1052-53.

now to vacate the Rule and the agency were later to re-promulgate it with an adequate explanation." *Id.*, at 1049.

Here, the potential for disruption and harm to the American public is quite substantial. In *American Farm Bureau Fed'n*, the court refused to vacate air quality standards that were "contrary to law and unsupported by adequately reasoned decision-making" because not having standards would insufficiently protect the environment. *American Farm Bureau Fed'n*, 559 F.3d at 514, 528. Similarly, in *Davis County Solid Waste Management v. EPA*, 108 F.3d 1454, 1458 (D.C. Cir. 1997), the court agreed to reverse its previous decision to vacate the EPA's pollution emission standards because, if the industry went without stricter standards for even a short time, there would be significantly greater pollution emissions.

Here, not having ownership limits would harm the American public. The ownership rules are intended to protect the public interest by preserving diverse sources of local news and promoting competition. Viewers and listeners have a First Amendment interest in "the widest possible dissemination of information from diverse and antagonistic sources." *NCCB*, 436 U.S. at 785. Furthermore, as this Court noted in *Prometheus*, one inevitable detriment of concentrated media markets is the "reduced incentive to improve programming" for the public.

Prometheus, 373 F.3d at 417.

If the rules are vacated even temporarily, it would likely trigger a wave of mergers and acquisition, which would result in substantial consolidation in local markets. This is exactly what happened after the national radio rule was repealed and the local radio rule relaxed in 1996. These rule changes led to "thousands of assignment and transfer of control applications" *Definition of Radio Markets*, 16 FCCRcd 19861, 19869 (2001). From 1996-2007, the number of radio station owners declined by 39 percent, "with most of the decline occurring during the first few years after the 1996 Act." *2008 Order*, 23 FCCRcd at 2073. Similarly, after the FCC relaxed the restriction on TV duopolies in 1999, significant consolidation took place in local television markets. As of 2006, 109 duopolies had been created. Allen S. Hammond, IV *et al*., *The Impact of the FCC's TV Duopoly Rule Relaxation on Minority & Women Owned Broadcast Stations, 1996-2002*, at 28 (June 2007), JA___.

If the Court were to vacate any of the ownership limits, media companies would likely begin making acquisitions immediately. Many local television stations are already in local marketing agreements in which one station typically provides some local programming to another station and sells the advertising time. Frequently, these agreements include an option for one station to purchase the

other if the media ownership rules change.[29] If the ownership limits were vacated, many of these options would likely be exercised, thus reducing competition and diversity in local news.

In theory, if the FCC re-promulgated adequately supported ownership limits, it could require station owners to comply through divestiture. However, in practice, the FCC has been reluctant to require divestiture once new rules have been adopted. Instead, it typically "grandfathers" ownership arrangements that violate the rule. For example, in adopting the original NBCO rule, the Commission grandfathered the vast majority of newspaper broadcast combinations. It required divestiture in only the most "egregious" cases because of concerns about "disruption for the industry and hardship for individual owners." *FCC v. NCCB,* 436 U.S. at 787. The Commission also cited the disruption as one reasons for granting the five waivers in the *2008 Order*. *2008 Order*, 23 FCCRcd at 2055. Thus, if the local television, local radio and/or the NBCO rules were vacated, it would open the door to wholesale – and permanent – changes to local media markets.

[29] *See e.g., Nexstar Broadcasting Inc.*, 23 FCCRcd 3528 (Media Bureau 2008); *Chelsey Broadcasting Co. of Youngstown, LLC*, 22 FCCRcd 13905 (Media Bureau 2007)*; Piedmont Television of Springfield License, LLC*, 22 FCCRcd 13910 (Media Bureau 2007); *Malara Broadcast Group of Duluth Licensee, LLC*, 19 FCCRcd 24070 (Media Bureau 2004).

Finally, the Court should reject the argument that any disruption caused by vacatur would be insubstantial because transactions will still be evaluated under public interest standard of the Communications Act and competition will be safeguarded by applicable antitrust laws. *See e.g.*, MG Br. at 61; NAB Br. at 52; Tribune Br. at 56; Cox Br. at 51. As a practical matter, the FCC lacks the resources to conduct case-by-case reviews of every transaction. As discussed above, the FCC has been unable to handle its current case load in a timely manner. Second, case-by-case review would create the very uncertainty and inconsistency about which the Media Parties express such great fear. *See* NAA Br. at 45-46 (stating that the case-by-case approach will frustrate potential transactions while bright line rules "provide certainty to outcomes, conserves resources, reduce administrative delays, lower transaction costs, increase transparency of our process, and ensure consistency in decisions"). Finally, as this Court found previously, the antitrust laws serve a different function than the FCC's ownership rules and antitrust review is generally limited to larger transactions. *Prometheus*, 373 F.3d at 414. Thus, the situation here differs from *Comcast*, where the court found that any disruption from vacatur would be mitigated by the presence of antitrust laws. 579 F.3d at 9.

CONCLUSION

The Commission has effectively and persuasively addressed the Media Parties' arguments. However, its failure to address minority ownership and the digital television transition require remand for further examination.

The Commission's notable failure even to attempt to defend the manner in which its last minute changes to the NBCO rule waiver provisions should not go unnoticed. Those changes are indefensible on the merits as well, and should not be countenanced by this Court.

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,

/s/Andrew Jay Schwartzman

_____

Andrew Jay Schwartzman
DC Bar No. 2100096

Angela J. Campbell
Adrienne T. Biddings
Institute for Public Representation
Georgetown Law Center
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9535
Counsel for Media Alliance and Office of Communication of the United Church of Christ, Inc.

Andrew Jay Schwartzman
Media Access Project
1625 K Street, NW
Suite 1000
Washington, DC 20006
(202) 454-5681
Counsel for Prometheus Radio Project

Corielle S. Wright
501 Third Street, NW
Suite 875
Washington, DC 20001
(202) 265-1490
Counsel for Free Press

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 13,704 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 WordPerfect X3 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 Endpoint Protection version 11.0 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).

/s/Andrew Jay Schwartzman
_____

Andrew Jay Schwartzman
Media Access Project
Suite 1000
1625 K Street, NW
Washington, DC 20015
(202) 454-5681

CERTIFICATE OF SERVICE

I, Andrew Jay Schwartzman, hereby certify that on August 16, 2010, I electronically filed the foregoing Reply Brief for Citizens Petitioners, Prometheus Radio Project, Media Alliance, Office of Communication of the United Church of Christ, Inc., and Free Press with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. Participants in the case are registered CM/ECF users and will be served by the CM/ECF systemby US Mail.

I further certify that the required number of hard copies of the foregoing document was sent to the Office of the Clerk of the Court on the same day as the E-Brief was transmitted.

/s/Andrew Jay Schwartzman
_____

Andrew Jay Schwartzman
Media Access Project
Suite 1000
1625 K Street, NW
Washington, DC 20015
(202) 454-5681