ORAL ARGUMENT NOT YET SCHEDULED

Nos. 08-3078 et al.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PROMETHEUS RADIO PROJECT, *et al.*,

Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,

Respondents.

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

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

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The Newspaper Association of America ("NAA"), Belo Corp. ("Belo"), Bonneville International Corporation ("Bonneville"), Gannett Company, Inc. ("Gannett"), Morris Communications Company, LLC ("Morris"), and The Scranton Times, L.P. ("The Scranton Times") (jointly, "Newspaper Parties") hereby submit their reply to the brief of Appellee-Respondents the Federal Communications Commission and the United States of America (the "FCC" or "Commission"). The Newspaper Parties respond specifically to the FCC's defense of the limited changes it made to the newspaper/broadcast cross-ownership rule ("NBCO Rule") in the *2008 Order*. The Newspaper Parties also respond herein to the briefs of Petitioners Prometheus Radio Project, Media Alliance, Office of Communication of the United Church of Christ, Inc., and Free Press ("Citizen Petitioners") and Intervenors Consumer Federation of America and Consumers Union ("Consumer Intervenors").

SUMMARY OF ARGUMENT

As the Newspaper Parties explained in their opening brief, the FCC made the most minimal of changes to the NBCO Rule through the addition of complex and very restrictive waiver standards in the *2008 Order*. This decision was made notwithstanding the lack of evidence supporting the retention of any cross-ownership restriction, much less keeping the ban in place in the "vast majority" of cases. The agency's decision also was made in spite of its own conclusion, which

this Court affirmed, that an absolute prohibition on cross-ownership no longer serves the public interest. The Commission now seeks to avoid close scrutiny of its legally flawed action by asserting that it is entitled to virtually unlimited discretion to make "predictive" judgments and "line-drawing" decisions. The FCC overstates its case, overlooks basic principles of administrative law and First Amendment jurisprudence, and wholly ignores the context in which the agency's review of the rule arose in the first place—the deregulatory mandate of the Telecommunications Act of 1996.

Even under the FCC's extremely lenient interpretation of the applicable standard of review, the agency is on very shaky ground with respect to its most recent evaluation of the NBCO Rule. At a minimum, the Commission was obligated to make a decision that was tied to the record. While the FCC proclaims in its brief that its decision was based on "substantial record evidence," the Commission is able to point to only the thinnest of support for its conclusion that broad NBCO limitations remain necessary to protect viewpoint diversity. In fact, the FCC refers only to indirect evidence and the observation that some commonly owned media, such as newspapers and their websites, may provide the same content. In the *2008 Order*, the FCC identified no reliable evidence that cross-ownership harms diversity, and only was able to make the much weaker assertion that the record does not definitively show that ownership "*never*" influences

viewpoint—an inconclusive statement that is grossly insufficient to maintain a highly restrictive rule.

The agency's reliance on indirect, and largely irrelevant, evidence is particularly dubious in light of the voluminous record before the Commission in the underlying rulemaking. In addition to the real-world experiences of existing cross-owners providing exemplary service, that record included an empirical study, which the FCC itself had commissioned, analyzing the impact of newspaper/broadcast cross-ownership on diversity by comparing the viewpoints of newspaper-owned television stations to other same-market stations. The study's definitive conclusion was that, from the vantage point of consumers, cross-ownership has *no appreciable impact* on the viewpoint diversity. Yet, the FCC did not even mention this study in the *2008 Order*, and its effort to sweep the study under the rug now is unavailing. In sum, the FCC jumped to the overly simplistic conclusion in the *2008 Order* that cross-ownership jeopardizes viewpoint diversity without adequate analysis or evaluation of the most relevant record evidence. Its action, therefore, was quintessentially arbitrary and capricious and insupportable under Section 202(h).

The FCC further seeks to obscure the extremely limited nature of its adjustments to the NBCO Rule by arguing that the Newspaper Parties are ignoring the substantial changes the Commission made to the rule. In an attempt to

characterize the new waiver standards as a significant overhaul of the absolute ban, the agency emphasizes that waivers rarely were granted under the pre-existing NBCO Rule. This argument is inapposite and only highlights the flaws in the revised waiver criteria. The original NBCO Rule, in fact, had an appropriately open-ended waiver standard that obligated the agency to provide relief from the rule when, "*for whatever reason*," such action would serve the public interest. Now, by contrast, the Commission has codified in advance the situations in which waivers most likely will or will not be available—an approach that undermines the agency's ability to maintain a meaningful "safety valve" and to give any and all meritorious waiver requests a "hard look." In fact, the restrictive new waiver standards expressly were designed to enable the Commission to continue its historical practice of waiving the rule only "rarely."

In addition, the FCC glosses over the incongruity between its decision to maintain a strict limitation on newspaper/radio cross-ownership and its express finding that radio stations have little to do with the FCC's diversity concerns. The Commission now claims that the restrictions on newspaper/radio combinations are considerably more lenient than those applicable to newspaper/television combinations because a proposed combination of a single radio station with a daily newspaper may qualify for a "positive presumption" without satisfying the "major media voices" or the "top four" limitations in the new waiver standards. But these

aspects of the revised provision have little, if any, relevance to the characteristics of most radio stations. Indeed, that the Commission does not even consider a radio station to be a "major media voice" demonstrates that the agency had no basis for maintaining any restrictions whatsoever on newspaper/radio cross-ownership.

Finally, the Citizen Petitioners' attack on the Commission's decision to grant Gannett a waiver of the NBCO Rule is both procedurally and substantively flawed. First, the Gannett Waiver, standing alone, is not a final order that is appealable under Section 402(a) of the Communications Act. Rather, the waiver was ancillary and preliminary to action on Gannett's television license renewal application, and thus distinct from the rulemaking actions of general applicability that were taken in the *2008 Order*. The Gannett Waiver is properly viewed as a licensing decision that may be reviewed only by the D.C. Circuit pursuant to Section 402(b) of the Act and is not subject to this Court's jurisdiction.

Further, no party—including Citizen Petitioners—timely objected to Gannett's waiver request in the context of its license renewal application. These parties are thus procedurally barred from bootstrapping new objections to Gannett's waiver onto their appeal of the Commission's modification of the NBCO Rule. Moreover, Citizen Petitioners' claim that they were given insufficient notice of the waiver grant is a hollow one. In fact, Citizen Petitioners possessed actual knowledge of Gannett's waiver application for more than a year prior to

Commission action. And, contrary to Citizen Petitioners' claim, grant of the Gannett Waiver was based on extensive evidence and firmly rooted in precedent.

ARGUMENT

I. THE FCC MISCONSTRUES AND OVERSTATES THE DEGREE OF DEFERENCE THIS COURT MUST ACCORD TO THE CONCLUSIONS REACHED IN THE *2008 ORDER*.

The FCC's defense of the extremely limited modifications it made to the waiver standards of the NBCO Rule rests largely on the claim that it has virtually unlimited discretion to make "predictive" policy judgments and "line-drawing" decisions, *see* FCC Br. 2; *id.* at 36, 39-40, 44-46; *see also id*. at 32-33 (the FCC "is entitled to *substantial* judicial deference" in this case) (emphasis added, citation omitted). However, as reflected in this Court's previous review of the NBCO Rule as well as other cases in which courts have struck down the FCC's broadcast ownership rules, this discretion has important boundaries. *See generally Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004); *see also, e.g.*, *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 169 (D.C. Cir. 2002) (remanding definition of "voices" in local television ownership rule as "arbitrary and capricious"). At a minimum, even apart from the mandate of Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, the Administrative Procedure Act ("APA") requires that the agency's ownership decisions must be reasonable and supported by substantial evidence. *See*

Prometheus, 373 F.3d at 389-90 (noting FCC's obligation to "ensure that . . . [it] examined the relevant data and articulated a satisfactory explanation for its action").

Further, the Commission must show, based on record evidence rather than merely unsupported speculation, that there is an actual regulatory problem in need of fixing. *See*, *e.g.*, *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993), *cert. denied sub nom. Galaxy Commc'ns Inc. v. FCC*, 506 U.S. 816 (1992); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 764 (6th Cir. 1995); *HBO, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977). Longstanding APA case law makes clear, moreover, that the FCC must reevaluate its rules over time to take account of changed circumstances. *See*, *e.g.*, *Am. Trucking Ass'ns, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967); *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992); *see also Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225 (1943).

The Commission also seeks cover for its exceedingly modest adjustments to the NBCO Rule from the Supreme Court's 1978 determination in *NCCB* (in which the Court upheld the original NBCO Rule adopted in 1975) that the FCC is entitled to make "predictive judgments" with respect to the "elusive concept" of diversity. *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 796 (1978) ("*NCCB*"); FCC Br. 39. However, even assuming that the Supreme Court's finding that broad deference to the agency's predictions about the NBCO Rule was appropriate at the

time the restriction was first adopted, it was not a rubber-stamp approval of any and all restrictions on newspaper/broadcast cross-ownership in perpetuity. The NBCO restriction now has been in place for 35 years without producing any concrete evidence that the "hoped for" gain in diversity that prompted the FCC to adopt the rule more than three decades ago actually has come to fruition as a result of the ban. *Multiple Ownership of Standard, FM & Television Broadcast Stations*, Second Report and Order, 50 F.C.C.2d 1046, ¶ 109 (1975) ("*1975 Order*"). Accordingly, the discretion accorded in *NCCB* now must be balanced against the FCC's duty to justify the rule based on actual circumstances in the contemporary marketplace. *See*, *e.g.*, *Bechtel*, 10 F.3d at 880 (admonishing that "[t]he Commission's necessarily wide latitude to make policy based upon predictive judgments deriving from its general expertise implies a correlative duty to evaluate its policies over time to ascertain whether they work—that is, whether they actually produce the benefits the Commission originally predicted they would"); *see also Telecomms. Act of 1996,* Pub L. No. 104-104, §202(h), 110 Stat. 56, 111-12. As shown in the Newspaper Parties' opening brief and herein, the FCC did not satisfy this obligation.

In addition, the FCC assumes that this case involves only "ordinary" APA review and disregards the fact that the proceeding below was required to be conducted under Section 202(h). *See* Reply Brief of Clear Channel

Communications, Inc. 1-6. Notwithstanding the agency's apparent view that the statute has no bearing on this Court's review, Section 202(h) undeniably changed the legal landscape and therefore must "inform" the standard of review. *Prometheus*, 373 F.3d at 391. The Commission is similarly dismissive of the First Amendment implications involved in this case. It is well-established, however, that more exacting scrutiny applies when First Amendment interests are at stake. *CBS Corp. v. FCC*, 535 F.3d 167, 174 (3d Cir. 2008), *vacated on other grounds*, 129 S. Ct. 2176 (2009) (citations omitted); *see also* Clear Channel Reply Br. 5; Reply Brief of Media General, Inc. Section IV. Given the inherent First Amendment issues that arise from restricting newspaper/broadcast cross-ownership, such heightened scrutiny unquestionably applies here. And, here again, the fact that the Supreme Court rejected First Amendment challenges to the NBCO Rule more than three decades ago is immaterial even if a lenient constitutional standard originally was applied. A "thirty year old conclusion that . . . [a] challenged rule[] survive[s] First Amendment scrutiny" cannot justify its application "in the face of modern challenges to the rule['s] consistency with the FCC's regulatory mandate." *Radio-Television News Directors Ass'n v. F*CC, 184 F.3d 872, 882 (D.C. Cir. 1999).[1]

[1] The Commission also claims that this Court should dismiss the appeals filed by NAA, Belo, and Morris pursuant to 47 U.S.C. § 402(b). FCC Br. 5. As established in opposition to the motion to dismiss those appeals, and as amplified

II. THE FCC'S DECISION TO MAINTAIN BROAD LIMITATIONS ON NEWSPAPER/BROADCAST CROSS-OWNERSHIP WAS UNREASONABLE AND WAS NOT SUPPORTED BY RECORD EVIDENCE.

As the FCC acknowledges in both the *2008 Order* and its brief, the decision to maintain broad limitations on newspaper/broadcast cross-ownership was based solely on its concern that restrictions were needed to "guard against" an "elevated risk of harm" to viewpoint diversity. *2008 Order* ¶ 49 (JA ___); FCC Br. 38. The Commission now avers that this determination was supported by "substantial record evidence." FCC Br. 38. Yet, the only observation that the FCC makes either in the *2008 Order* or its brief in support of the proposition that cross-ownership threatens diversity is that some commonly owned media such as existing newspaper websites reproduce content. *Id.*; *2008 Order* ¶ 49 (JA ___).[2]

This is an exceedingly thin reed to support *any* restriction on newspaper/broadcast cross-ownership, much less the stringent limitations retained in the *2008 Order*. *See Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1145 (D.C. Cir. 1980) ("[T]he function of judicial review is to ensure that agency decisions are 'based on a consideration of the relevant factors.'") (citation omitted); *Robbins v.*

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in the reply briefs of the Cox parties and Media General, this Court lacks jurisdiction over those appeals, which were, in any event, properly filed.

[2] The other evidence cited in passing by the FCC in the *2008 Order* consists of scattered and conclusory assertions that are unsupported by any direct evidence of a negative relationship between cross-ownership and diversity and which are greatly outweighed by the evidence on the other side. *2008 Order* ¶ 49 (JA ___).

Reagan, 780 F.2d 37, 48 (D.C. Cir. 1985) (noting that the court must "ensure that [an] agency's change of course is not based on . . . irrelevant factors"); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (finding that an agency has acted arbitrarily and capriciously when it "offer[s] an explanation for its decision that runs counter to the evidence before the agency"). Indeed, the FCC did not expressly find in the *2008 Order* that cross-ownership harms diversity, but only was able to reach the much weaker conclusion that the record does not definitively show that "ownership can *never* influence viewpoint." *2008 Order* ¶ 49 (JA___) (emphasis added).

In any case, the fact that some content may overlap between commonly owned media platforms is hardly surprising, nor does it necessarily mean that the outlets convey a monolithic viewpoint. Notwithstanding any duplication of factual material by commonly owned outlets, the record showed that different media outlets can reach different consumers and offer additional interpretations or analyses. By doing so, they enhance rather than diminish diversity in the marketplace. *See, e.g.*, Comments of Belo Corp., at 12 (Oct. 23, 2006) (explaining the ways in which the websites of its media outlets make a "significant contribution to the mix of local news and information" available to local residents).[3] Further, the FCC did not adequately account for evidence

[3] All comments cited in this reply brief were filed in MB Docket No. 06-121.

demonstrating that commonly owned outlets often differentiate both their content and their viewpoints. *See, e.g.*, Comments of the Newspaper Association of America, at 55-59 (filed Oct. 23, 2006) (explaining that "the immense capacity and unique attributes of the Internet" enable "newspaper publishers and broadcasters . . . to greatly differentiate their print, over-the-air, and online products and supplement the information they would otherwise be able to offer their audiences"); *see also id*. at 65-83 (JA__-__) (demonstrating that commonly owned newspapers and broadcasters differentiate content and viewpoint).

The FCC's cursory analysis of diversity concerns in the *2008 Order* also fails to account for the fact that newspaper/broadcast cross-ownership often enhances diversity by providing cross-owned broadcast outlets with the resources and incentives to provide local news programming that otherwise would not be available in the marketplace. The Commission previously recognized that cross-ownership enhances diversity in this respect,[4] but the agency has provided no support for its decision to abandon this view. This failure renders its decision arbitrary and capricious. *See Fox Television Stations, Inc. v. FCC*, 129 S. Ct.

[4] *See 2003 Order* ¶ 356 ("[T]he record indicates that cross-ownership of newspapers and broadcast outlets creates efficiencies and synergies that enhance the quality and viability of media outlets, thus enhancing the flow of news and information to the public."); *see also id*. ¶ 359 ("The newspaper/broadcast cross-ownership rule . . . may be preventing efficient combinations that would allow for the production of high quality news coverage and broadcast programming, including coverage of local issues, thereby harming diversity").

1800, 1811 (2009) (requiring an agency that departs from prior decisions to "provide a more detailed justification . . . when . . . its new policy rests upon factual findings that contradict those which underlay its prior policy"). The FCC even concedes in its brief that other evidence in the record "showed that diversity of ownership does *not* necessarily promote diversity of viewpoints and may even have the opposite effect." FCC Br. 71. Thus, even if there were convincing evidence that cross-owned newspapers and broadcast stations are more likely to present analogous viewpoints than other same-market daily newspapers and broadcast outlets—and there is not—the FCC's conclusion that cross-ownership somehow impairs viewpoint diversity on the whole would be overly simplistic and irrational.

The FCC's wholesale reliance on indirect, and largely irrelevant, evidence to support its diversity analysis is all the more questionable in light of the existence in the record of extensive evidence concerning the performance of existing newspaper/broadcast combinations, *see* Newspaper Parties Br. 14-16, and an empirical study, commissioned by the agency itself, analyzing the impact of cross-ownership on the viewpoints of newspaper-owned television stations, Professor Jeffrey Milyo, *The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News*, FCC Media Study 6, at Abstract (rev. Sept. 2007) ("Milyo Study") (JA___); *see Cincinnati Bell Tel. Co.*, 69 F.3d at 764 (FCC rules

must be based on "documentary support" rather than "generalized conclusions" or "broadly stated fears"). The Milyo Study, as the Newspaper Parties and other petitioners explained in their opening briefs, Newspaper Parties Br. 38-39, Tribune/Fox Br. 25-30, Media General Br. 25, demonstrates that there is no statistically significant correlation between newspaper cross-ownership and the viewpoints expressed by television stations in their local newscasts, Milyo Study at Abstract, 24-26 (JA__-__).

Despite the fact that the Commission itself commissioned this study, it failed even to mention it in the *2008 Order* and now attempts to undermine its relevance by arguing that it compares the viewpoints of cross-owned television stations to other news-producing television stations within the same market, rather than comparing the viewpoints of daily newspapers to co-owned television stations. FCC Br. 39 n.11. As an initial matter, this *post hoc* rationalization for overlooking the Milyo Study, which was not raised in the *2008 Order*, is procedurally barred. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) (explaining that "[t]he courts may not accept appellate counsel's *post hoc* rationalizations for agency action," and such action must "be upheld, if at all, on the same basis articulated in the order by the agency itself") (emphasis added).

Moreover, this argument rings hollow, given that the FCC commissioned the Milyo Study in order to "examine[] whether cross-ownership of a newspaper and

television station influences the content or slant of local television news broadcasts." Milyo Study, at 1, Introduction (JA __). The contention that the study is irrelevant to the impact of cross-ownership on diversity also is inaccurate. To the contrary, the study was carefully designed to analyze the relationship between cross-ownership and the viewpoints made available to consumers. As explained by Professor Milyo, the "in-market" comparison of cross-owned television stations to other news producing stations allows "identification of the effect of cross-ownership even in the presence of otherwise confounding unobservable market characteristics, such as the newsworthiness of current events or consumers' preference for local and political news." *Id*. (JA __).

The Milyo Study's conclusion that there is little difference between the viewpoints presented by cross-owned stations and other stations in 27 markets shows that, from the perspective of consumers, cross-ownership has little, if any, impact on the range of viewpoints presented. *Id*. at 29 (JA__) (noting that any "partisan slant" displayed on cross-owned and other same-market stations is correlated to the voting preferences of the market in question, indicating that a station's viewpoint is determined by market forces rather than ownership characteristics); *see also* Comments of the Newspaper Association of America on Media Ownership Research Studies, at 16-18 (filed Oct. 22, 2007) (JA ___-__). In the end, the Commission's reflexive and admittedly "predictive" assumption that

an NBCO Rule that seeks merely to maximize the number of individual outlet owners necessarily will result in the production of more news and information, and therefore more viewpoint diversity, *see* FCC Br. 39-40, is neither reasonable nor borne out by the record.

Finally, the FCC disregards its own determinations, which have been affirmed by this Court, that restrictions on newspaper/broadcast cross-ownership are not necessary at all to preserve competition and in fact hinder localism.[5] *See* Newspaper Parties Br. 35-38. Particularly in view of the NBCO Rule's demonstrated adverse impact on other public interest objectives, the Commission's reasoning that it may maintain a stringent rule so long as it is "not in a position to conclude that ownership can *never* influence viewpoint" is fundamentally flawed. *2008 Order* ¶ 49 (JA___) (emphasis added).

First, the agency may retain a rule only to address a definitive, rather than a theoretical, problem. *See*, *e.g.*, *Nat'l Fuel Gas Supply Corp.*, 468 F.3d at 843-44; *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1463 (D.C. Cir. 1985) (noting the Commission's failure "to determine whether the evil the rules seek to correct 'is a

[5] Although the FCC claims in its brief that the record evidence did not show that "cross-ownership would promote localism in all markets under all circumstances," FCC Br. 43 n.13, it does not suggest either in its brief or in the *2008 Order* that there is any legitimate evidence demonstrating that newspaper/broadcast combinations harm localism. Newspaper Parties Br. 37-38. Accordingly, the FCC has not shown that any restriction on cross-ownership is needed to serve its localism objective. *See Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843-44 (D.C. Cir. 2006) (rules must address "real regulatory problem[s]").

real or merely a fanciful threat'") (citing *HBO, Inc.*, 567 F.2d at 50). In addition, it must attempt to appropriately balance the relevant considerations underlying the rule and fashion a remedy that is proportionate to the problem it seeks to address. *See*, *e.g.*, *Meadville Master Antenna, Inc. v. FCC*, 535 F.2d 214, 220 (3d Cir. 1976) (citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970)) ("The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues."). By continuing to use a sledgehammer to swat a hypothetical gnat, the Commission failed to satisfy either of these obligations with respect to the NBCO Rule.

III. DESPITE ITS PRONOUNCEMENTS TO THE CONTRARY, THE FCC FAILED TO MAKE MEANINGFUL CHANGES TO THE NBCO RULE.

As shown above, in the opening briefs, and in comments submitted below, the record before the FCC did not justify the imposition of *any* restrictions on newspaper/broadcast cross-ownership—and unequivocally did not support the retention of a blanket restriction with the addition of only rigid waiver standards with little real-world applicability. *See* Newspaper Parties Br. 33-40; *see also* Tribune/Fox Br. 23-33; Media General Br. 21-33; NAB Br. 57-59; *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc.*, 371 U.S. at 168) (requiring an agency to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice

made'"). The Commission attempts to gloss over the incongruity between the record and its action by asserting in its brief that the changes to the restriction in fact were significant and that the Newspaper Parties simply have "ignore[d] the important ways in which the 2008 rule eased the 1975 rule's broad prohibition of newspaper/broadcast combinations." FCC Br. 48; *see also* Consumer Intervenors Br. 1, 5-6 (positing that the FCC made "substantial revisions" to the NBCO Rule).[6]

[6] Consumer Intervenors take issue with the Newspaper Parties' statement in their opening brief that the Commission retained the blanket restriction on newspaper/broadcast cross-ownership and merely added revised standards for seeking waiver of the ban. Consumer Intervenors Br. 4-6; *see also* FCC Br. 48; Newspaper Parties Br. 18, 26-27; Tribune/Fox Br. 21-22; Media General Br. 16-18. But the Newspaper Parties' description of the FCC's actions is entirely accurate, *see* Newspaper Parties Br. 26; the language of the rule itself clearly retains a blanket cross-ownership restriction. Specifically, the revised rule provides that:

> 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. 47 C.F.R. § 73.3555(d)(1).

The fact remains, however, that the revised waiver standards are expressly designed to continue to preclude cross-ownership in the "vast majority of cases," *2008 Order* ¶ 52 (JA___), and provide only minimal relief from the original rule, *see* Newspaper Parties Br. 26-28.[7]

The FCC supports its declaration that it has made "important" changes to the NBCO Rule only by reciting the criteria for a positive presumption and noting that waivers were difficult to attain under the pre-existing rule. FCC Br. 48; *see also* Consumer Intervenors Br. 6. As the Newspaper Parties previously have shown, however, the opportunities for waiver under the current rule are tightly circumscribed and, for that reason, fail to satisfy the agency's obligation to provide a meaningful "safety valve" from the rule. *See* Newspaper Parties Br. 30-31 (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (advising that agencies must give "serious consideration [to] meritorious applications for waiver, and a system where regulations are maintained inflexibly without any procedure for waiver poses legal difficulties")).

While the revised rule goes on to specify new waiver standards, the above language is identical to that in the 1975 rule. *See id*. at § 73.3555(d)(2)-(7).

[7] Moreover, the case-by-case approach adopted by the Commission further diminishes the already minimal changes made to the NBCO Rule because it adds an additional level of regulatory uncertainty. *See* Newspaper Parties Br. 44-50. Other than saying that it had discretion to implement case-by-case waiver standards, the FCC fails to explain why it took this approach with regard to the NBCO Rule yet retained bright line rules for all of its other broadcast ownership restrictions. *See* FCC Br. 42-44.

The Commission's argument that the positive presumption incorporated in the new waiver standards represents a significant departure from the 1975 waiver standard is equally unavailing. FCC Br. 48. Although the FCC is correct that permanent waivers rarely were granted under that standard, *id.*, that fact does not legitimize the agency's new approach. In contrast to the current rule, the 1975 waiver standard did not strictly delimit the availability of waivers to factual situations precisely described and codified in advance but, rather, appropriately directed the agency to grant waiver requests when such relief would serve the public interest "*for whatever reason*." *1975 Order* ¶ 119 (emphasis added); *see also NCCB*, 436 U.S. at 802 n.20 (noting that "[t]he reasonableness of the regulations . . . is underscored by the fact that waivers are potentially available"). In any case, the restrictive new waiver standards expressly were designed to enable the Commission to continue its historical practice of waiving the rule only "rarely." *See 2008 Order* ¶ 52 (JA___) (indicating that a presumption against cross-ownership will apply in "the vast majority of cases").

Consumer Intervenors suggest that the inclusion of a positive presumption for certain combinations in top 20 markets constitutes a substantial change to the absolute ban because "[m]ore than 40 percent of the U.S. population resides in the 20 largest [DMAs]." Consumer Intervenors Br. 6. Yet, this statistic does not change the fundamental fact that a very small number of newspaper/broadcast

combinations are presumptively permitted, and a very large number in smaller markets are presumptively precluded, under the new standards. Further, Consumer Intervenors fail to acknowledge that the revised waiver standards impose not only limitations on market size, but also restrictions on the number of broadcast stations that can be cross-owned with a newspaper as well as a prohibition on cross-ownership of a top four broadcast television station. *See* Newspaper Parties Br. 27. Thus, even in the top 20 markets, many combinations—including those involving the television stations best situated to support local news operations—are presumptively impermissible.

Section 202(h), however, does not contemplate such an incremental, "wait-and-see," approach. *Prometheus*, 373 F.3d at 406 n.33; *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1044 (D.C. Cir. 2002), *modified on other grounds on reh'g*, 293 F.3d 537 (D.C. Cir. 2002). Moreover, the fact that the absolute restriction remained unmodified for such a long period of time only highlights the FCC's duty to make meaningful changes to the rule now. This obligation was particularly strong because, during the many years that the 1975 rule remained frozen in place, the media marketplace underwent dramatic changes, all of the FCC's other media ownership rules were significantly relaxed, *see* Newspaper

Parties Br. 3-5, 33-35,[8] and the Commission and the courts repeatedly recognized that the NBCO Rule no longer serves the public interest, *see id*. at 3-18, 35-40.

In addition, the FCC's suggestion that it was required to retreat from the 2003 cross-media limits, and to take such minimal action, by the decision of this Court in *Prometheus* is inaccurate. *See* FCC Br. 49. While it is true that this Court criticized flaws in the methodology underlying the FCC's 2003 decision, it did not instruct the agency to scale back its changes to the rule and indeed expressly concluded that the Commission was required to modify the rule, which the FCC correctly had found no longer served the public interest. *See Prometheus*, 373 F.3d at 395, 398 (agreeing that "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest" and explaining that, in accordance with Section 202(h), rules "must be repealed or modified" if they are not in the public interest). The Court further approved of the Commission's efforts to "narrowly" craft any restrictions on cross-ownership in order "to avoid needlessly overregulating

[8] In upholding the NBCO Rule in 1978, the Supreme Court emphasized that owners of television and radio stations also could not acquire a cross-ownership interest in another medium of mass communications in the same market. *NCCB*, 436 U.S. at 801 (noting that the NBCO Rule "treat[s] newspaper owners in essentially the same fashion as other owners of the major media of mass communications" under the "one-property-per-owner" regulatory regime). Since then, however, the Commission has relaxed all of its other broadcast ownership rules to permit multiple and cross-ownership of broadcast stations in local markets. *See* Newspaper Parties Br. 4, 51.

markets with already ample viewpoint diversity." *Id*. at 402. Thus, the FCC cannot legitimately contend that its decision to significantly curtail the regulatory relief it previously had afforded and to impose more stringent waiver standards in the vast majority of markets was mandated by the *Prometheus* remand. *See* Newspaper Parties Br. 41-43; *see also* Tribune/Fox Br. 24-25.

As the Newspaper Parties previously explained, the record evidence supporting relaxation of the NBCO Rule in the *2006 Quadrennial Review* was even more compelling than in 2003 and, in particular, demonstrated that the considerable financial challenges faced by the newspaper industry had become substantially more pronounced in the years since the *2003 Order*. *See* Newspaper Parties Br. 33-34; *see also* Media General Br. 23-25. The FCC argues that its revised standards will address the financial difficulties of the newspaper industry through the application of a positive waiver presumption to "failed or failing" outlets and the consideration of "financial distress" with respect to proposed combinations falling under a negative presumption. FCC Br. 41-42.

However, the "failed/failing" outlet standards permit cross-ownership only in extreme circumstances. Notably, these standards are available only if a newspaper or broadcast outlet already has stopped circulating or gone dark for at least four months, is involved in involuntary bankruptcy or involuntary insolvency proceedings, or is on the brink of failure due to low all-day audience share and

poor financial condition over an extended period of time. *See 2008 Order* ¶ 65 (JA___). By providing relief in only the most egregious circumstances, this provision fails to take account of the financial difficulties most newspaper publishers were facing at the time the new waiver standards were adopted and continue to face today.

The "financial distress" factor that applies to parties seeking to overcome a presumption across cross-ownership likewise will not accord meaningful regulatory relief to struggling media outlets, given that it applies only when a newspaper has sustained "several years of losses" or when a broadcast outlet "has been struggling for an extended period of time both in terms of its audience share and in its financial performance." *Id*. ¶ 74 (JA___). Rather than according newspaper and broadcast station owners the flexibility to pursue transactions that enable them to sustain high-quality news operations while facing acute economic challenges, the current standards provide relief only when the financial circumstances of the newspaper or broadcast outlet virtually have ensured their ultimate demise. [9]

[9] Citizen Petitioners contend that the revised NBCO Rule "contains so many exceptions, loopholes and ambiguities . . . that it is not rationally related to its stated purpose." Citizens Pet. Br. 30. Beyond claiming that the new rule is too permissive, however, these parties fail to show that any restrictions on newspaper/broadcast cross-ownership whatsoever are reasonably warranted by the evidence in the record, much less that a tightening of the stringent waiver standards is in order. Moreover, Citizen Petitioners do not even attempt to grapple with the

IV. THE FCC HAS FAILED TO JUSTIFY THE APPLICATION OF A "NEGATIVE PRESUMPTION" AGAINST THE "VAST MAJORITY" OF NEWSPAPER/RADIO COMBINATIONS.

Under the NBCO standards adopted by the FCC in 2008, all combinations of a single daily newspaper and a single radio station outside of the top 20 markets are presumptively impermissible and, even within a top 20 market, only one radio station may be combined with a daily newspaper. *See 2008 Order* ¶ 63 (JA___). For all practical purposes, the revised rule thus subjects newspaper/radio combinations to the same stringent standards as newspaper/television combinations. *See* Newspaper Parties Br. 55-58. Although the *2008 Order* repeatedly emphasized the differences between radio and television, the Commission imposed restrictions on newspaper/radio combinations that are as onerous as those imposed on newspaper/television combinations, *see id*., and thus wrongly "fail[ed] to take account of circumstances that appear to warrant different treatment for different parties," *Petroleum Commc'ns, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994).[10]

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record evidence showing, among other things, the vast changes in the media marketplace and the increased financial hardships faced by the newspaper industry. *See id*. at 24-36.

[10] The FCC also erred by failing to adequately explain its disparate treatment of newspapers and "similarly situated" media outlets. *See* Newspaper Parties Br. 52 (citing *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005)). The only rationale that the FCC offers for treating newspaper/broadcast combinations more strictly than radio/television

The FCC claims in its brief that there are substantial differences between the standards applicable to radio and television combinations. FCC Br. 52-53. The technical distinctions noted by the Commission, however, do not demonstrate any meaningful difference between the two cross-ownership standards and, in fact, only serve to highlight the illogic of the FCC's decision.

First, the Commission suggests that a significantly lower threshold applies to newspaper/radio combinations because they are not subject to the restriction that the radio station cannot be ranked among the top four in audience share. *Id.* at 53. According to the FCC, however, the primary premise underlying the top four restriction in the context of the NBCO Rule is that top four television stations are among "the most influential providers of local news in their markets." *2008 Order* ¶ 61 (JA___). As the FCC itself explains in the *2008 Order*, the same simply is not

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combinations is that the FCC has always been more restrictive with respect to newspaper/broadcast cross-ownership in the past "due to the unique attributes of newspapers." FCC Br. 58 (citing *2008 Order* ¶ 63 n.206 (JA___)). The Commission's circular explanation cannot survive examination under governing administrative law standards or Section 202(h). *See Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 304 (D.C. Cir. 2009) (finding that "conclusory statements . . . cannot substitute for . . . reasoned explanation" under the APA); *see also* Newspaper Parties Br. 53. Further, although the FCC notes that it singled out newspapers for differential treatment because they hold "a particularly prominent place among news media," FCC Br. 58-59, the evidence in the record demonstrates that broadcast television stations have equal, if not more important, attributes for viewpoint diversity purposes than do newspapers, *see* Newspaper Parties Br. 53-54. Moreover, the FCC offered no reasonable justification for limiting newspaper/broadcast cross-ownership to only one broadcast station, while the radio/television cross-ownership rule allows cross-ownership of multiple broadcast stations in a market. *See id*. at 51-54.

true of any radio station, regardless of its market rank. *See id*. ¶¶ 73, 57 & n.187 (JA___). Indeed, the FCC explicitly states that "radio is generally not as influential a voice as is television" and cites to considerable evidence to support this proposition. *Id*., ¶ 73. Thus, the "top four" distinction is one without any real-world difference for radio station owners.

Second, the FCC points out that newspaper/radio combinations are not subject to the "major media voices" test. FCC Br. 53. Because radio stations are not even considered "major voices" under that test, however, its application to newspaper/radio combinations would be nonsensical. *2008 Order* ¶ 57 (JA___). As the Newspaper Parties demonstrated in their opening brief, the exclusion of radio as a "major media" voice in and of itself shows that restrictions on newspaper/radio cross-ownership logically should either have been eliminated entirely or, at the very minimum, made significantly more lenient than any retained restrictions on newspaper/television cross-ownership. *See* Newspaper Parties Br. 56-57; *see also* Tribune/Fox Br. 45.

The FCC also refers to its statement in a footnote to the *2008 Order* that "[t]he combination of a daily newspaper with one or more radio stations may have significant negative implications for the range of viewpoints available in a local market." *See* FCC Br. 53 (citing *2008 Order* ¶ 63 n.206 (JA___)). The Commission cites no evidence for this conclusion, either in the *2008 Order* or its

brief, and there was none. *See id*. The FCC cannot have it both ways by finding based on the record evidence that radio is not a "major media voice," while simultaneously concluding that it still needs to implement a rule greatly restricting newspaper/radio cross-ownership because of its supposed "significant" impact on viewpoint diversity. *State Farm*, 463 U.S. at 43 (finding that an agency acts arbitrarily or capriciously when it "offer[s] an explanation for its decision that runs counter to the evidence before the agency"). Even assuming that a newspaper/radio combination might reduce diversity in some limited instances, a proposition that is unsupported by the *2008 Order*, that possibility does not justify the application of a presumption against any and all newspaper/radio cross-ownership outside of the top 20 markets.

The application of a negative presumption to the vast majority of newspaper/radio combinations and the one-station limit even in the largest markets are particularly inappropriate in light of the countervailing evidence, ignored by the Commission in both the *2008 Order* and its brief, that cross-ownership substantially increases both the quality and the quantity of a radio station's local news programming. *See* Newspaper Parties Br. 57-58. As the Newspaper Parties explained, the Commission's "*ipse dixit* conclusion, coupled with its failure to respond to contrary arguments resting on solid data" demonstrating that newspaper/radio combinations advance the agency's localism goal, "epitomizes

arbitrary and capricious decisionmaking." *Id*. at 58 (citing *Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997)).

V. THE COURT SHOULD REJECT CITIZEN PETITIONERS' CLAIMS WITH RESPECT TO THE FCC'S GRANT OF GANNETT'S REQUEST FOR WAIVER OF THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE.

In their brief, Citizen Petitioners attempt to call into question the Commission's grant of Gannett's request for waiver of the NBCO Rule to permit common ownership of Phoenix television station KPNX(TV) and *The Arizona Republic* (the "Gannett Waiver"). Citizen Pet. Br. 37-43. However, Citizen Petitioners do not even attempt to dispute the FCC's well-substantiated conclusion that preservation of the Gannett combination would better serve the public interest. Citizen Petitioners instead challenge the agency's action as arbitrary and capricious because grant of certain long-pending waiver requests within the context of the *2008 Order* was "unexpected" and allegedly "depriv[ed] Citizen Petitioners and other interested parties the opportunity to present their views." *Id*. at 37, 41. As demonstrated in the FCC's brief and further shown below, these claims are spurious. Moreover, this Court lacks jurisdiction to consider Citizen Petitioners' contentions, which are otherwise procedurally barred, factually and legally incorrect, and patently inconsistent with Citizen Petitioners' prior positions in this review proceeding.

First, Citizen Petitioners incorrectly seek review of the Gannett Waiver under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342, *see* Citizen Pet. Br. 1, which grant jurisdiction to the Courts of Appeals to review Commission orders that do not fall within the D.C. Circuit's exclusive jurisdiction under 47 U.S.C. § 402(b) and that are "final," 28 U.S.C. § 2342(1). As shown in the FCC's brief, the Commission's action with respect to the Gannett Waiver, standing alone, is not a final order that is appealable under Section 402(a); rather, the waiver grant is ancillary to action on Gannett's license renewal application, and this Court thus has no jurisdiction to review it. *See* FCC Br. 61-62.

More specifically, action by an agency is not final for purposes of appeal unless, *inter alia*, it "mark[s] the 'consummation' of the agency's decisionmaking process" and is not "merely tentative or interlocutory." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). "As the Commission has previously ruled," however, "a licensee's waiver petition (and the FCC's decision on it) is incident to a larger licensing proceeding." *N. Am. Catholic Educ. Programming Found., Inc. v. FCC*, 437 F.3d 1206, 1209 (D.C. Cir. 2006) ("*NACEPF*") (citation omitted); *see* FCC Br. 61 n.18.

As in *NACEPF*, the Commission's decision to grant the Gannett Waiver—although ancillary to action on Gannett's license renewal application—was not

itself a final appealable decision separate from that licensing action.[11] The waiver decision was necessary to permit an unconditional grant of the KPNX license renewal application because the NBCO Rule otherwise precluded continued common operation of Gannett's Phoenix newspaper and television station. Therefore, action on Gannett's request for waiver of the NBCO Rule was a "logically necessary prerequisite" to the subsequent grant of the KPNX renewal application. *NACEPF*, 437 F.3d at 1209.

As the FCC points out, the Gannett Waiver grant was not in and of itself "one by which 'rights or obligations' [were] determined.'" *Bennett*, 520 U.S. at 178 (citation omitted). Indeed, as the Commission states, "[t]he only relevant effect of the waiver (and the only *potential* injury to the Citizen Petitioners) is that it permits the grant of related applications for license renewal, which otherwise would be barred by the cross-ownership rule." FCC Br. 61 (emphasis added); *see Mt. Wilson FM Broadcasters, Inc. v. FCC*, 884 F.2d 1462, 1466 (D.C. Cir. 1990) (finding FCC decision to allocate a channel to a community unripe because

[11] Gannett acquired *The Arizona Republic* in 2000 and held the newspaper property and same-market Phoenix television station consistent with Commission policy which, since 1975, has permitted broadcast licensees to acquire a co-located daily newspaper and hold the combination until the end of the broadcast station's license term. *See 1975 Order* at 1076 n.25. In May 2006, Gannett timely filed a license renewal application for KPNX and requested a waiver of the NBCO Rule to permit its continued common ownership of the newspaper/broadcast combination. Contrary to Citizen Petitioners' suggestion, *see* Citizen Pet. Br. 39, that request was consistent with the FCC's rules, *see* 47 C.F.R. § 1.3 (providing for waiver of any Commission rule "for good cause shown").

opponents could still challenge each of the individual license applications and thus the decision did not present any "substantial long-range significance or economic impact").[12] Standing alone, the Commission's grant of the Gannett Waiver had no immediate impact on the rights of the public or the Citizen Petitioners; instead, it merely paved the way for the grant of the pending KPNX license renewal application. Thus, the part of the *2008 Order* granting the Gannett Waiver—although ancillary to action on Gannett's license renewal application—is not itself a final order which this Court has jurisdiction to review.

Second, the D.C. Circuit—*not* this Court—would have exclusive jurisdiction under Section 402(b) to review the FCC's grant of the Gannett Waiver. Waiver of the cross-ownership ban with respect to Gannett's Phoenix combination indisputably raises a licensing issue, as the FCC correctly explains. FCC Br. 61. Any appellate review of the Commission's actions with respect to the Gannett Waiver (or the subsequent renewal of KPNX's license) thus would fall within the D.C. Circuit's exclusive jurisdiction under Section 402(b). That the Commission granted the Gannett Waiver within the *2008 Order*—which also addressed issues

[12] When it has suited their interests, certain of the Citizen Petitioners have asserted vehemently that the *2008 Order* did "not grant or deny a single license application." Motion to Dismiss of United Church of Christ and Media Alliance 8. Given their prior contention that the FCC's actions on the waiver requests could not trigger jurisdiction under 47 U.S.C. § 402(b), Citizen Petitioners' attempt to invoke this Court's jurisdiction under the statutory provisions governing appeals of *non-licensing* decisions is disingenuous to say the least.

of general applicability in the media ownership rulemaking proceedings—does not alter that fact.

Third, the FCC also is correct in stating that Citizen Petitioners' complaints regarding the Gannett Waiver are barred because they were never presented to the Commission. Section 405 of the Communications Act precludes a party from seeking judicial review of a claim upon which the FCC has been given "no opportunity to pass." 47 U.S.C. § 405(a); *see* FCC Br. 60-61. Citizen Petitioners attempt to muddy the waters by referring generally in their brief to petitions to deny "the license renewals." Citizen Pet. Br. 17-18, 40. Although certain parties objected to some of the *other* license renewals involving waivers of the NBCO Rule that the Commission resolved in the *2008 Order*, neither Citizen Petitioners nor any other party timely objected either to Gannett's KPNX renewal application or to the subsequent renewal of the station's license. FCC Br. 61 n.18.[13] Nor did Citizen Petitioners seek FCC reconsideration of the *2008 Order*. Citizen Petitioners' failure to contest the Gannett Waiver before the Commission independently forecloses them from challenging it here.

[13] The referenced "petitions to deny" concern *Media General's* license renewals. *See* FCC Br. 62; Citizens Pet. Br. 40. Further, because the license renewal decision was not a Commission-level decision but one issued by Media Bureau staff on delegated authority, an Application for Review by the full Commission would have been a prerequisite to judicial review of that decision. 47 C.F.R. § 1.115(k). Citizen Petitioners are no doubt aware of this, as they filed an Application for Review of the Media General license renewal decision. FCC Br. 61 n.18.

Fourth, even if Citizen Petitioners' claims were not jurisdictionally and procedurally barred, their challenges would fail substantively. On the merits, as the Commission notes, Citizen Petitioners "do not really dispute any of the FCC's findings supporting the waiver grants." FCC Br. 64. Instead, Citizen Petitioners claim that the Commission violated the APA in two ways.

Citizen Petitioners first argue that the FCC improperly failed to state in the rulemaking notice underlying the *2008 Order* that it might grant waivers. Citizen Pet. Br. 40-41. The APA notice requirement Citizen Petitioners cite, however, applies to rulemakings, not adjudications, and the grant of a waiver incident to a licensing action is adjudicatory. *See* FCC Br. 62 (citing 5 U.S.C. § 553(b)). Even if that part of the statute were applicable, an agency need not specify *every* action it might take before it adopts a rulemaking order to satisfy the APA. *See Crawford v. FCC*, 417 F.3d 1289, 1295 (D.C. Cir. 2005) ("The notice-and-comment requirements presume that the contours of the agency's final rule may differ from those of the rule it initially proposes in an NPRM."); *see also Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006); *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003). It is axiomatic that grandfathering or similar actions such as waivers may appropriately be used to smooth the transition to a new regulatory regime; thus, grant of Gannett's long-pending waiver request was simply a logical outgrowth of the Commission's modification of the NBCO Rule. Moreover,

contrary to the claims by Citizen Petitioners, Citizen Pet. Br. 40, the public *was* clearly advised of the filing and grant of the KPNX renewal application as required by the Commission's rules, placing interested parties—particularly diligent, interested parties such as Citizen Petitioners—on notice that they should make their concerns known. *See*, *e.g.*, *McElroy Elecs. Corp. v. FCC*, 86 F.3d 248, 257-58 (D.C. Cir. 1996).

In any case, the record before the Commission was replete with discussion of existing newspaper/broadcast combinations and the then uncertain status of some, and makes clear that at least two of the Citizen Petitioners had actual notice of the pending KPNX renewal application.[14] The future of several cross-owned combinations, including Gannett's, was inextricably linked with the outcome of the proceeding, whether in the form of repeal of the rule, grant of temporary waivers, action on pending waiver requests, or licensing decisions.[15] For Citizen

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[14] *See*, *e.g.*, Comments of Gannett Co., Inc. (filed Oct. 23, 2006) (JA__-__); Comments of Morris Communications Company, at 13-21 (filed Oct. 23, 2006) (JA__-__); Comments of Bonneville International Corporation (filed Oct. 23, 2006) (JA__-__); Comments of Shamrock Communications Inc. and Scranton Times, L.P. (filed Oct. 23, 2006) (JA__-__); Comments of Cox Enterprises, Inc. (filed Oct. 23, 2006) (JA__-__); Comments of Media General, Inc., vol. 1, at 4 (filed Oct. 23, 2006) (JA__); Comments of Belo Corp. (filed Oct. 23, 2006) (JA__-__); Comments of Tribune Company (filed Oct. 23, 2006) (JA__-__).

[15] *See*, *e.g.*, *Shareholders of Tribune Co.*, Memorandum Opinion and Order, 22 FCC Rcd 21,266 (2007); *Application For Renewal Of Broadcast Station License, KPNX-TV, Mesa, AZ*, File No. BRCT - 20060531ACB, et al. (MB May 31, 2006); *Application for Renewal of License WBTW(TV), Florence, SC*, File No. BRCT -

Petitioners, who have been intimately involved in the media ownership proceedings for years, to allege that the Commission blindsided them by granting waivers in the *2008 Order* is, again, disingenuous in the extreme. Indeed, two of the Citizen Petitioners noted Gannett's pending waiver request in comments filed before the release of the *2008 Order*, *see*, *e.g.*, Response of Prometheus Radio Project to the Chairman's Request for Submissions, at 5 (Dec. 11, 2007) (JA__); Comments of Office of Communication of United Church of Christ, Inc., et al., at 72 n.305 (Oct. 23, 2006) (JA__), and parties with which Citizen Petitioners are closely aligned challenged Media General's license renewal applications, *see* Citizen Pet. Br. 39 & n.20, 40.

Despite receiving actual notice consistent with FCC rules and unquestionably being aware of Gannett's waiver request, Citizen Petitioners *at no point* contested it before the Commission and have offered no credible reason for failing to do so. Accordingly, this Court should dismiss the claim that the Commission "depriv[ed] Citizen Petitioners and other interested parties the opportunity to present their views" on the Gannett Waiver. *Id*. at 41.

20040802BIK (MB Aug. 2, 2004); *see also* Comments of Bonneville International Corporation, at 1 n.1 (filed Oct. 23, 2006) (JA___); Comments of Cox Enterprises, Inc., at 3-4 (filed Oct. 23, 2006) (JA__-__); Comments of Morris Communications Company, LLC, at 13-21 (filed Oct. 23, 2006) (JA__-__); Comments of Shamrock Communications Inc. and The Scranton Times, L.P., at 1 n.1 (filed Oct. 23, 2006) (JA__).

Citizen Petitioners' last gasp is to argue that the FCC failed to apply the appropriate standard to the Gannett Waiver and based its decision to grant the waiver on "impermissible or irrelevant factors." *Id*. at 41-43. To the contrary, the agency's decision was grounded firmly in precedent set by the *1975 Order*, subsequent permanent waiver grants, and the exhaustive record compiled in the media ownership proceedings, which included extensive factual showings with respect to the public interest benefits that accrued from common ownership of the Phoenix properties. *2008 Order* ¶¶ 77-78 (JA__-__).

The Commission's action was wholly consistent with both the grandfathering decisions that were made in the *1975 Order* (and affirmed by the Supreme Court in *NCCB*) and the waiver standard adopted therein, *see id*., the latter of which provides that a waiver of the NBCO Rule is warranted "if it could be shown *for whatever reason* that the purposes of the rule would be disserved by divestiture," *1975 Order* ¶ 119 (emphasis added); *see* FCC Br. 65. Moreover, the Commission may reasonably waive *any* of its rules if "particular facts would make strict compliance inconsistent with the public interest." *AT&T Wireless Servs., Inc. v. FCC*, 270 F.3d 959, 965 (D.C. Cir. 2001) (internal quotations omitted); *see* Newspaper Parties Br. 30-31 (explaining that the FCC has an obligation to give a "hard look" to all meritorious requests for waiver); *see also* Media General Reply Br. Section II.A.

In the *2008 Order*, the FCC determined that it could resolve, on the record before it, NBCO waiver requests involving no more than one newspaper and no more than one broadcast station, leaving for future proceedings all other pending waiver requests. FCC Br. 65; *cf*. Citizen Pet. Br. 42 & n.21. Ultimately, the Commission concluded that the Gannett Waiver was warranted in light of the synergies that had already been achieved from the newspaper/broadcast station combination, the new services that the combination provided to local communities, the harms associated with required divestitures, the prolonged period of uncertainty surrounding the status of the newspaper/broadcast cross-ownership ban, and the length of time the waiver request had been pending. *2008 Order* ¶ 77 (JA__-__).

The Commission reasonably found, based on extensive record evidence, that the NBCO Rule's purposes would be better served by preserving the Phoenix combination, which Gannett demonstrated has allowed it to "integrate[] the operations of the two media outlets to expand the volume of local news and information communicated to Phoenix residents and to improve the quality of its offerings" in the market. *Id*., ¶ 77 & n.252 There is no question that the Commission "examine[d] the relevant data and articulate[d] a satisfactory explanation for" its grant of the Gannett Waiver, as the APA requires. *Competitive Telecomms. Ass'n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996) (citing *State Farm*, 463 U.S. at 43); *see also Cal. Metro Mobile Commc'ns, Inc. v. FCC*, 365 F.3d 38,

43 (D.C. Cir. 2004); *Atl. Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1388-89 (D.C. Cir. 1995). Further, the decision to grant waivers within the rulemaking proceeding was well within the Commission's discretion.[16] Administrative agencies commonly take steps to accommodate existing operations when making a policy change that could significantly affect regulated entities.[17] Indeed, as the

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[16] *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 588 (D.C. Cir. 2004) ("The FCC generally has broad discretion to control the disposition of its caseload, and to defer consideration of particular issues to future proceedings when it thinks that doing so would be conducive to the efficient dispatch of business and the ends of justice.") (citations omitted); *see also Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADI to the Verizon Telephone Companies*, Order, 22 FCC Rcd 10,259, 10,265 n.48 (2007) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)); *Exchange Network Facilities for Interstate Access Allnet Communications Service, Inc. v. AT&T*, 1 FCC Rcd 618, 627 (¶ 60) (1986) (same). The FCC has taken similar action on other occasions. *See*, *e.g.*, *Review of the Commission's Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Rcd 12,903, 12,965 (¶ 146) (1999) (television LMAs); *id*. at n.97 (television duopolies); *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Report and Order, 14 FCC Rcd 12,559, 12,630 (¶ 168) (1999) (cable/broadcast combinations and cable/MDS combinations); *1975 Order* ¶ 30 (newspaper/broadcast combinations).

[17] *See*, *e.g.*, *Revision of Radio Rules and Policies*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 6387, 6397 (¶ 48) (1992) (declining to restrict the transfer of station groups that were acquired in compliance with the audience share limit adopted in the FCC's Order but later grew to a level exceeding that limit, because the agency's goal had been "to promote robust competition," and "penalizing enterprises that grow into stronger competitors [was] [in]consistent with this objective"); *Revision of Radio Rules and Policies*, Second Memorandum Opinion and Order, 9 FCC Rcd 7183, 7193 (¶ 57) (1994) (permitting transfers of radio time brokerage agreements that were allowable under prior rules but impermissible under revised regulations, acknowledging that "[t]o hold otherwise, as a general matter, could severely and

Commission states in its brief, the grandfathering of existing newspaper/broadcast combinations was an integral part of the *1975 Order* that instituted the NBCO Rule. *1975 Order* ¶ 119.[18]

In sum, this Court should dismiss Citizen Petitioners' challenge to the grant of the Gannett Waiver because it is jurisdictionally and procedurally barred and substantively meritless.

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unnecessarily restrict the marketability of stations and station combinations that involve brokerage agreements and seriously undermine the utility of such agreements").

[18] Although the FCC's grandfathering of existing (and therefore permissible) combinations when it adopted the NBCO Rule in 1975 did not involve action on waiver requests in licensing applications, the Commission's action—and the Supreme Court's approval of it—represent a recognition that grandfathering decisions and similar actions to mitigate disruptions and hardships resulting from rule changes fall well within the FCC's discretion. *See* FCC Br. 63 n.20.

CONCLUSION

For the foregoing reasons, and those set forth in their opening brief, the Newspaper Parties respectfully request that the Court vacate the NBCO Rule.

Respectfully submitted,

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August 16, 2010

CERTIFICATE OF BAR MEMBERSHIP PURSUANT TO LAR 46.1

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

/s/ James R. Bayes
James R. Bayes

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND L.A.R. 31.1(c)

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and L.A.R. 31.1(c), counsel for the Newspaper Parties certifies that this reply brief complies with the applicable type-volume limitations of Fed. R. App. P. 32(a)(7)(B). The attached reply brief for Petitioners 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 it is printed using a proportionally spaced, 14-point Times New Roman typeface and contains 9,985 words, excluding the parts of the reply brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This certificate was prepared in reliance on the word count of the word-processing system (Microsoft Word) used to prepare this reply brief.

The undersigned further certifies that the text of the electronic version of the reply brief filed is identical to the text in the paper copies filed and the PDF version of this reply brief submitted via the Third Circuit's electronic filing system has been scanned for viruses using Symantec Endpoint Protection, Version 11, and that no virus has been detected.

/s/ James R. Bayes
James R. Bayes

August 16, 2010

CERTIFICATE OF SERVICE

I, James R. Bayes, hereby certify that on August 16, 2010, I electronically filed the foregoing Reply Brief for the Newspaper Parties 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 who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that the required number of hard copies of the foregoing document were sent to the Office of the Clerk of the Court by overnight UPS on the same day as the brief was transmitted.

/s/ James R. Bayes
James R. Bayes