Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 06-121
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	
Ways to Further Section 257 Mandate to Build on Earlier Studies	)	MB Docket No. 04-228
	)	
Public Interest Obligations of TV Broadcast Licensees	)	MM Docket No. 99-360

OPPOSITION TO PETITION FOR RECONSIDERATION

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SUMMARY

Objectors have filed an untimely request for Commission reconsideration of the permanent waivers that the FCC issued, grandfathering four Media General cross-ownerships as part of the FCC's decision in the 2006 Quadrennial Regulatory Review and *Prometheus* remand ("*2008 Decision*"). The waivers were clearly "non-rulemaking" actions even though they were issued in the context of a rulemaking proceeding. As explained herein, the FCC rules make unmistakably clear that, in exactly this situation, reconsideration petitions were due within 30 days of the February 4, 2008 release date of the *2008 Decision*. Objectors submitted their reconsideration request 19 days beyond that deadline, instead filing it 30 days after notice of the *2008 Decision* appeared in the Federal Register. While such submission was timely for the rulemaking portion of the *2008 Decision*, it was fatally late for the non-rulemaking aspects, like the waivers grandfathering Media General's cross-ownerships. The FCC cannot overlook this error since the 30-day deadline is statutory, and the Objectors' failure cannot be traced to any mistake on the FCC's part in giving notice.

In any event, Objectors' attack on the permanent waivers grandfathering the Media General cross-ownerships fails to demonstrate flaws in the FCC's analytic approach or the FCC's application of that analysis to the facts. Media General's cross-ownerships were legally established pursuant to footnote 25 of the 1975 decision adopting the original newspaper/broadcast cross-ownership rule. In deciding in this case to grandfather Media General's legitimate cross-ownerships, the FCC applied the same public interest calculus it used in grandfathering combinations in 1975, an analysis the Supreme Court affirmed. As the Court recognized, in potential divestiture situations, as opposed to the application of a prospective prohibition, "a mere hoped-for gain in diversity is not enough." Instead, as the Court said was appropriate in 1975, the FCC in this case rightly factored concerns like program service,

stability, and continuity of ownership into account. The FCC then noted examples of extensive public service delivered by the four cross-ownerships, examples supported by literally volumes of facts in the record. Objectors attack the FCC for providing inadequate evidence of any harm that would result from divestiture, wholly ignoring the extensive evidence in the record of the financial challenges faced by today's media, particularly newspapers. In any event, as the Supreme Court affirmed in just this context, such factual determinations or predictive judgments regarding harm are based on the expert knowledge of the agency and "complete factual support . . . is not possible or required."

Objectors contend that the FCC's grandfathering analysis strayed impermissibly from the waiver approach set forth in the *2008 Decision* or the one utilized by the FCC in the four permanent waivers of the newspaper/broadcast cross-ownership rule issued prior to the 2006 Quadrennial Review. The first claim ignores that the new rules are not yet effective and that other public interest challengers have argued the *2008 Decision* is stayed by the Third Circuit's 2003 *Prometheus* decision. Second, the Objectors' challenge overlooks that the four previous permanent waivers turned on an open-ended public interest analysis, which, in the end, cannot be legally differentiated from the public interest approach the FCC applied here.

The Objectors' additional criticisms of the details of the waiver standards as a whole must give way to the unmistakable conclusion that the newspaper/broadcast cross-ownership rule should have never been retained in the first place. The *2008 Decision* fails adequately to explain why the FCC retreated from the changes it adopted in 2003, changes that were mandated by Section 202(h) of the 1996 Act. Most seriously, retention of the rule continues to work a deprivation of the constitutional rights of Media General and other newspaper owners that hold or would like to own broadcast licenses. Objectors' carping at details cannot obscure that fundamental violation, which Media General expects the courts to rectify in the future.

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OPPOSITION TO PETITION FOR RECONSIDERATION

Media General, Inc. ("Media General"), by its attorneys, hereby opposes the Petition for Reconsideration filed by seven parties on March 24, 2008,[1] asking the FCC to review and modify its *Report and Order and Order on Reconsideration*, released on February 4, 2008.[2]

As shown below, under the Communications Act and procedural rule changes adopted in 2000, the *Petition* is untimely insofar as it asks the FCC to reconsider its grant in the *2008 Decision* of permanent waivers that grandfathered cross-ownerships in four of Media General's markets. That infirmity aside, Objectors' attack on the merits ignores that the issuance of the grandfathering waivers applied the same public interest calculus that the FCC has followed in the past, and the Supreme Court has affirmed, in similarly grandfathering cross-ownerships. The FCC's application of those public interest factors to Media General's cross-ownerships was fully supported by the facts in the record. Finally, contrary to Objectors' claims, the FCC, in its *2008 Decision*, should have repealed the newspaper/broadcast cross-ownership rule in its entirety. Merely tinkering with its waiver standards, as Objectors ask, is beyond the point.

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[1] Petition for Reconsideration in MB Docket Nos. 06-121 *et. al.* (March 24, 2008) ("*Petition*"). The petitioners include Common Cause, Benton Foundation, Consumers Action, Massachusetts Consumers' Coalition, NYC Wireless, James J. Elekes, and National Hispanic Media Coalition ("Objectors").

[2] *2006 Quadrennial Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act*, Report and Order and Order on Reconsideration, FCC 07-216 (rel. Feb 4, 2008) ("*2008 Decision*").

I. THE RECONSIDERATION PETITION IS UNTIMELY AND MUST BE DISMISSED AS IT PERTAINS TO THE PERMANENT WAIVERS THAT GRANDFATHERED MEDIA GENERAL'S CROSS OWNERSHIPS

Section 405(a) of the Communications Act requires that reconsideration petitions be submitted within 30 days of the issuance of a decision.[3] Since 2000, the Commission's rules have made unmistakably clear that, for adjudicatory decisions, including individual licensing and waiver decisions like grandfathering, the 30 days is to be measured from the date on which the Commission's decision is *released,* even when those decisions are included in a document produced as part of a rulemaking proceeding.

In this case, the *2008 Decision* was released on February 4, 2008. It included, among other determinations, grandfathering of Media General's four cross-ownerships, an adjudicatory decision clearly premised on permanent waivers of the cross-ownership rule.[4] Under the Act, the FCC's rules, and unambiguous precedent, petitions for reconsideration of such adjudicatory decisions were due on March 5, 2008, 30 days after the February 4 release. The *Petition* was not filed, however, until March 24, 2008, or 19 days after expiration of the applicable 30-day time period. As explained in this section, this tardiness leaves the Commission no choice but to dismiss the challenge to the permanent waivers that grandfathered Media General's cross-ownerships since the 30-day deadline is a statutory one.

The FCC's rules include two different provisions implementing Section 405(a)'s 30-day deadline: Section 1.106, which relates generally to reconsideration of adjudicatory matters, and Section 1.429, which pertains to reconsideration of rulemaking proceedings.[5] Both sections include virtually identical language elaborating on the filing specifics that implement

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[3] 47 U.S.C. § 405(a).

[4] *2008 Decision* at ¶ 77.

[5] 47 C.F.R. §§ 1.106 and 1.429, respectively.

Section 405(a). Both sections direct litigants to Section 1.4(b) of the FCC's rules for the mechanics of computing time deadlines.[6]

Section 1.4(b), however, differentiates between rulemaking and non-rulemaking decisions and includes a note that makes clear that petitioners in this case have submitted an untimely request. Section 1.4(b)(1) first provides that, for decisions in notice and comment rulemaking proceedings, "public notice" is defined as the date of the document's publication in the Federal Register; Section 1.4(b)(2) provides that for all non-rulemaking determinations, "public notice" means the release date of the document.[7] The note to Section 1.4(b)(1) states that "[l]icensing and other adjudicatory decisions with respect to specific parties that may be associated with or contained in rulemaking documents are governed by the provisions of § 1.4(b)(2)," which operates to require submission of reconsideration requests within 30 days of release of a decision.[8]

The administrative history of Section 1.4(b) further makes clear that requests for reconsideration of the grandfathering waivers that Media General received are procedurally governed by Section 1.4(b)(2) of the FCC's rules and that subsection's earlier deadline. In adopting the current rule in 2000, the FCC specifically stated that:

> [a]djudicatory matters, *e.g.,* individual licensing decisions *and waivers as to specific parties*, do not come within the scope of Section 1.4(b)(1), even if the decisions happen to be related to, or issued in, an on-going rulemaking docket.[9]

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[6] 47 C.F.R. § 1.4(b). The relevant language in Section 1.106 provides that "[t]he petition for reconsideration and any supplements thereto shall be filed within 30 days from the date of *public notice of the final Commission action, as that date is defined in § 1.4(b) of these rules*, ..." 47 C.F.R. § 1.106(f) (emphasis supplied). Section 1.429's language is identical except that it specifies the deadline as "30 days from the date of public notice of *such* action," before referring parties to Section 1.4(b). 47 C.F.R. §§ 1.429(d) (emphasis supplied).

[7] 47 C.F.R. §§ 1.4(b)(1) & (2).

[8] 47 C.F.R. § 1.4(b)(1), Note.

[9] *Amendment of Section 1.4 of the Commission's Rules relating to Computation of Time*, Memorandum Opinion and Order, 15 FCC Rcd 9583, 9584 (2000) (emphasis supplied).

In reaching this result, the Commission explained that it was clarifying its rules to remove confusion and correct a problem that had been highlighted by the United States Court of Appeals for the District of Columbia Circuit in *Adams Telcom, Inc. v. FCC.*[10] In that decision, the court had held that, while it was reasonable for the Commission to apply different approaches to triggering time periods for seeking review of adjudicatory and non-adjudicatory orders, the FCC's rules needed to clearly specify the distinction.[11] Since 2000, Section 1.4 of the Commission's rules has made this distinction unambiguously clear so that requests for reconsideration of waivers and other non-rulemaking determinations, such as those issued to Media General, are now due 30 days after the release date of a document even if that document was issued as part of a rulemaking proceeding.

Since its 2000 clarification, the Commission has applied the new approach to dismiss several petitions for reconsideration of adjudicatory decisions made in the context of rulemaking when those petitions were not filed within 30 days of the *release date* of the rulemaking decision. In 2003, the Commission rejected portions of a petition for reconsideration related to adjudicatory matters filed by an applicant whose license applications had been dismissed as part of a broader Commission rulemaking order.[12] The Commission in that decision partially dismissed the petition for reconsideration that had been submitted within 30 days of Federal Register publication but was filed more than 30 days after the order's earlier release date, "to the extent that the petition relates to [a] particular application."[13] Later the same year, the

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[10] 997 F2d 955 (D.C. Cir. 1993).

[11] *Id.* at 957.

[12] *Amendment of the Commission's Rules Concerning Maritime Communications*, Third Memorandum Opinion and Order, 18 FCC Rcd 24391, 24397 (2003).

[13] *Id.* In that case, the Commission distinguished the petition it partially rejected from another acceptable one that separately sought reconsideration of the adjudicatory order because the latter had been filed within 30 days of the order's release date. *Id.* at 24396. The Commission also

Commission dismissed as untimely two parties' petitions for reconsideration of the adjudicatory denial of waiver requests included in a rulemaking order because again the parties filed their requests within 30 days of Federal Register publication of the rulemaking but more than 30 days after the Commission's release of the decision itself.[14]

In this case, the reconsideration petition was likewise filed within 30 days of publication of the *2008 Decision* in the Federal Register but not within 30 days of the release of the *2008 Decision*. It was filed 49 days after that release. As a result, the Commission's rules clearly require dismissal of the *Petition* to the extent that it requests reconsideration of the adjudicatory decision grandfathering Media General's cross-ownerships. The Commission does not have discretion to waive the 30-day filing requirement set forth in Section 405(a) of the Act unless "a procedural violation by the Commission" has made it "impossible reasonably for the party to comply with the filing statute."[15] The only occasions when the Commission has waived Section 405(a)'s timing requirements have been when the Commission itself failed to provide adequate notice of its decision, thereby preventing the party seeking reconsideration from receiving actual notice of the decision in a timely manner.[16]

In a proceeding as highly publicized as this, it is inconceivable that Objectors did not receive actual notice of release of the *2008 Decision* in time to submit a timely petition. Objectors have not even attempted to plead exceptional circumstances, nor is it likely that they

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dismissed a curiously styled "Erratum Petition" of its adjudicatory decisions that was filed more than 30 days after release of the order. *Id.* at 24397.

[14] *ACR Electronics, Inc. and McMurdo Limited*, Order on Reconsideration, 18 FCC Rcd 11000, 11001 (2003).

[15] *Gardner v.* FCC, 530 F2d 1086, 1091-1092 n.24 (D.C. Cir. 1976).

[16] *Id.* at 1091-1092. *Winbeam, Inc.*, 20 FCC Rcd 8741, 8745 (2005); *Gary E. Stoffer*, 13 FCC Rcd 14056, 14058-59 (1998). *See also Virgin Islands Telephone Corp. v FCC*, 989 F2d 1231 (D.C. Cir. 1993); *Reuters, Ltd. v. FCC*, 781 F2d 946, 951-952 (D.C. Cir. 1986).

could. Accordingly, the Commission must dismiss the *Petition* as it relates to the permanent waivers grandfathering Media General's four cross-ownerships.

II. THE FCC'S DECISION TO GRANDFATHER FOUR MEDIA GENERAL CROSS-OWNERSHIPS, SIMILAR TO THE AGENCY'S 1975 DETERMINATIONS FOR OTHER COMBINATIONS, WAS BOTH IN THE PUBLIC INTEREST AND WITHIN ITS ADMINISTRATIVE DISCRETION

In the *Petition*, Objectors challenge the FCC's decision to grandfather four Media General cross-ownerships, granting them permanent waivers of the cross-ownership rule and doing so, as the FCC said, "in the same manner as the Commission did in 1975."[17] They contend that the FCC applied the wrong legal test and instead should have discussed the "four-factor" test it has followed in permanently waiving the cross-ownership rule for proposed cross-ownerships or the waiver tests announced as part of the *2008 Decision.* Objectors also argue that the FCC provided inadequate factual justification for its result.[18]

Objectors' contention that the grandfathering was improper seems to be based, in part, on their insinuations that these combinations were improperly formed and lacked a *bona fide* basis for their existence. Their arguments ignore that, at root, the touchstone for whether cross-ownerships should continue is whether they serve the "public interest," something that the FCC here analyzed in a manner entirely consistent with its own and court precedent. Contrary to Objectors' arguments, the FCC applied the correct analysis, as shown in this section. Further, its application of that analysis was fully supported by record facts, as discussed in the next section.

In 1975, the FCC not only adopted the cross-ownership ban, but the agency had to address how to apply that rule change to legally established combinations. The prospective rule had been adopted despite the fact that no claim had been made that "newspaper-television station owners [had] committed any specific non-competitive acts" and that the FCC's own review of

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[17] *2008 Decision* at ¶ 77.

[18] *Petition* at 7-11.

the effect of newspaper ownership on television advertising rates "fail[ed] to show an effect on rates attributable to newspaper ownership."[19] The agency also noted that it could not ascertain any "basis in fact or law for finding newspaper owners unqualified as a group for future broadcast ownership."[20] Rather, it adopted the cross-ownership rule solely because "[w]e think that any new licensing should be expected to add to local diversity."[21] The United States Supreme Court, in affirming the FCC's ban, commented on the "inconclusiveness of the rulemaking record,"[22] noting that the FCC "did not find that existing co-located newspaper-broadcast combinations had not served the public interest, or that such combinations necessarily 'speak with one voice' or are harmful to competition."[23] The Supreme Court, nonetheless, found that the FCC's decision to give controlling weight to the "goal" of diversification in shaping the *prospective* rules was a "reasonable administrative response" and that diversification was a justifiable public interest goal on which to ground the new prospective rules.[24]

When it came time to analyze the grandfathering of existing combinations, however, the FCC, as affirmed by the Supreme Court, utilized a different and broader public interest calculus, one in which "a mere hoped-for gain in diversity is not enough."[25] In its adjudicatory

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[19] *Amendment of Section 73.34 [sic], 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Second Report and Order, 50 FCC 2d 1046, 1072-73 ("*1975 R&O*"), *recon.* 53 FCC 2d 589 (1975), *modified by Nat'l Citizens Committee for Broad. v. FCC,* 555 F.2d 938 (D.C. Cir. 1977), *aff'd in part and rev'd in part, FCC v. Nat'l Citizens Committee for Broad.*, 436 U.S. 775 (1978) ("*NCCB*").

[20] *1975 R&O* at 1075.

[21] *Id.*

[22] *NCCB,* 436 U.S. at 796.

[23] *Id.* at 786. In the intermediate appeal, even the D.C. Circuit, which thought the FCC had not gone far enough in applying the restriction to existing combinations, acknowledged that the FCC had adopted the ban "without compiling a substantial record of tangible harm" and that the record included "little reliable 'hard' information." *NCCB v. FCC,* 555 F.2d at 944,956.

[24] *NCCB,* 436 U.S. at 795-97.

[25] *1975 R&O,* 50 FCC 2d at 1078.

grandfathering decisions, the FCC said it would examine additional considerations "relevant under our broad public interest mandate"[26] and explained that "[i]n our view, stability and continuity of ownership do serve important public purposes. Traditions of service were established and have been continued . . . . Particularly in connection with a number of entities, there is a long record of service to the public."[27] In this review, the FCC noted that "[a]scertaining and endeavoring to serve local needs was the key point, and some standard had to be developed to indicate where this was a reasonable expectation and where it was not."[28]

The Supreme Court affirmed the FCC's approach, which did not simply give controlling weight to diversity:

> the weighing of policies under the "public interest" standard is a test that Congress has delegated to the Commission in the first instance, and we are unable to find anything in the Communications Act, the First Amendment, or the Commission's past or present practices that would require the Commission to "presume" that its diversification policy should be given controlling weight in all circumstances.[29]

The Court indicated that such an analysis, focused only on diversification, would be inconsistent with other policies emphasizing local service. It approvingly noted that the FCC, in the renewal context, had made clear that "diversification . . . [is] a factor of less significance when deciding whether to allow an existing licensee to continue in operation than when evaluating applicants seeking initial licensing."[30] Rejecting the Court of Appeals' call for total divestiture, the Supreme Court stated that the FCC had rightly factored concerns like stability and continuity of ownership into its public interest analysis of grandfathering and that the FCC had not "acted irrationally in concluding that these public interest harms outweighed the potential gains that

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[26] *Id.* at 1080.

[27] *Id.* at 1078.

[28] *Id.* at 1081.

[29] *NCCB,* 436 U.S. at 810.

[30] *Id.*

would follow from increasing diversification."[31] Based on this approach, the FCC grandfathered all but "egregious" combinations, which included the television stations owned by the local newspapers which were the only electronic outlets of their kind in the community.

In granting permanent waivers grandfathering the Media General cross-ownerships, the FCC used the same calculus, analyzing a number of public interest concerns. The FCC first noted that these combinations consisted of but a single broadcast station and newspaper.[32] In addition, not allowing these combinations to continue would have created the same type of disruption that had concerned the FCC and the Supreme Court in the 1970s.[33] The FCC found that this adjudicatory decision was premised on five public interest concerns that echoed the Supreme Court's affirmance of the FCC's 1975 grandfathering determinations:

> Specifically, in the following cases, we have determined that the public interest warrants a waiver in light of the synergies that have already been achieved from the newspaper/broadcast station combination, the new services provided to local communities by the combination, the harms . . . associated with required divestitures, the prolonged period of uncertainty surrounding the status of the newspaper/broadcast cross-ownership ban, and the length of time that the waiver request has been pending . . . .[34]

This emphasis on proven service to local communities and the FCC's public interest in maintaining it was wholly consistent with the approach affirmed by the Supreme Court when it reviewed the *1975 R&O.*

Objectors attempt to establish that the Media General situation is somehow inapposite from what was before the Commission in 1975, arguing that then there were many more combinations and attempting to imply that Media General formed the cross-ownerships with "unclean hands" -- "they held broadcast licenses in full knowledge that the FCC's rules prohibited such combinations and that they would be required to divest before license

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[31] *Id.* at 804-05.

[32] *2008 Decision* at ¶ 77.

[33] *Id.*

[34] *Id.* (footnote omitted).

renewal."[35] This suggestion that Media General's combinations were illegally formed is wholly mistaken. Each combination was created when a television licensee acquired a newspaper, a practice permitted under footnote 25 of the *1975 R&O* itself and allowed to continue for "1 year or . . . [until] the time of the next renewal date, whichever is longer."[36] Objectors have consistently opposed any cross-ownership, calling in the comment period for no liberalization to the rule.[37] They also have made clear their dislike of footnote 25, calling now on reconsideration for a change in the legitimate process that the FCC established decades ago to address acquisitions of newspapers over which it lacks jurisdiction.[38] Objectors' predilections, however, cannot de-legitimize Media General's reliance on established FCC procedures or diminish the propriety of Media General's legally established combinations.[39] The FCC's decision now, in the context of the larger rulemaking, to issue permanent waivers that grandfathered Media General's four legitimately formed combinations was fully consistent with the FCC's earlier public interest calculus and well within its discretion.

Objectors' attempt to demonstrate that the FCC incorrectly ignored the "four-factor" test that had been utilized in four earlier permanent waiver cases mistakenly overlooks that this test, if even Objectors succeed in showing it should apply, incorporates many of the same public interest indicia that the FCC applied in the adjudicatory relief that it provided to Media General.

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[35] *Petition* at 9 n.29.

[36] *1975 R&O* at 1076 n.25.

[37] *E.g.,* Comments of Office of Communication of United Church of Christ, Inc., National Organization for Women, Media Alliance, Common Cause and Benton Foundation in MB Docket Nos. 06-121, *et. al.* (Oct. 23, 2006) at 60-73.

[38] *Petition* at 6-7.

[39] "[W]hen it established the cross-ownership rules, the Commission expressly contemplated waivers of newly created combinations brought about through a television licensee purchasing a daily newspaper. *Second Report and Order*, 50 FCC Rcd 1046, 1076 n.25 (1975), *aff'd sub nom., FCC v. NCCB,* 436 U.S. 775 . . . ." *Health & Medicine Policy Research Group v. FCC*, 807 F.2d 1038, 1041 n.4 (D.C. Cir. 1987).

This "four-factor" test provides for alternative circumstances in which waivers may be warranted:

> (1) where a licensee is unable to sell a station; (2) where the only sale possible would be at an artificially depressed price; (3) where separate ownership and operation of the newspaper and the broadcast station could not be supported in the locality; or (4) *where, for whatever reason, the purposes of the rule would be disserved by its application.*[40]

While the test includes three very specific criteria focused on financial difficulty, the fourth alternative is much broader and specifically calls for a public interest review. Prior to this 2006 Quadrennial Review, the FCC had granted four permanent waivers of the cross-ownership rule; all of them under the fourth "public interest" criterion.[41] In making evaluations under this fourth "public interest" criterion, the FCC will consider any "special circumstances" advanced by a party as having a bearing on the appropriateness of granting a waiver.[42]

This emphasis in the fourth alternative on the "public interest" with respect to determining "where, for whatever reason, the purposes of the rule would be disserved by its application" is exactly what the FCC did in this case when it followed the 1975 grandfathering approach. As the United States Court of Appeals for the Third Circuit recognized almost four years ago in addressing the policy goals related to the rule, newspaper/broadcast combinations can promote localism, and a blanket prohibition on newspaper/broadcast combinations is not necessary to protect diversity.[43] On remand, in grandfathering Media General's cross-

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[40] *Kortes Communications, Inc.*, 15 FCC Rcd 11846, 11851 (2000) (emphasis supplied).

[41] *Id. Columbia Montour Broadcasting Co., Inc.*, 13 FCC Rcd 13007, 13012-13 (1998); *Fox Television Stations, Inc.*, 8 FCC Rcd 5341, 5349-50 (1993), *aff'd sub nom Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154 (D.C. Cir. 1995); *Field Communications Corp.*, 65 FCC 2d 959, 960-61 (1977).

[42] *Kortes*, 15 FCC Rcd at 11851.

[43] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 398-400 (3d Cir. 2004) ("*Prometheus*"), *cert. denied*, *Media General, Inc. v. FCC*, 545 U.S. 1123 (2005). Although this decade began with the FCC citing "competition" as one of the goals to be served by the newspaper/broadcast cross-ownership rule, the *Prometheus* court noted that the FCC, in modifying the cross-ownership rule in 2003, had determined that the ban was no longer necessary to promote

ownerships, the FCC took these localism and diversity conclusions into account. The FCC noted that it based its determination that grandfathering was warranted on synergies and new services the Media General cross-owned properties had brought to their local markets. The FCC highlighted these conclusions with illustrative facts from the record, examples amply backed up by literally volumes of factual support that Media General had submitted in the rulemaking record.[44] The FCC's cited examples recounted the localism benefits of the combinations; they also showed why prohibiting the Media General cross-ownerships was not necessary to protect diversity because they documented how the flow of information to the licensee communities had increased vastly through cross-ownership and marketplace changes. Then -- certainly in keeping with the "for whatever reason" language from the terms of the fourth criterion -- the FCC added that grandfathering these four combinations on a permanent basis was warranted by "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 that the waiver request has been pending," also harkening back to the 1975 analytic approach.[45]

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competition in local markets. The FCC had found most advertisers do not view newspapers and television stations as close substitutes and that no party challenged this finding on appeal. *Id.* at 398. In the *2008 Decision*, the FCC stated that it no longer believes that the rule is needed to ensure competition in *any* relevant product market. *2008 Decision* at 23 n.131 (emphasis supplied).

[44] *2008 Decision* at ¶ 77. *See* Section III *infra.*

[45] *2008 Decision* at ¶ 77. Objectors briefly contend, *Petition* at 8, that the FCC failed to apply the *2008 Decision*'s new waiver criteria in grandfathering the combinations. First, this contention overlooks that the new standards are not yet effective. *See, e.g., Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested*, 73 Fed. Reg. 15156 (2008) (seeking OMB consent on forms necessary to implement newspaper/broadcast cross-ownership changes); *2008 Decision* at ¶ 155. Second, the argument is totally inconsistent with other public interest parties' contentions in a separately filed collateral attack on this same action that effectiveness of the *2008 Decision* has been stayed by the Third Circuit in *Prometheus*. *See Application for Renewal of License of WJHL-TV, Johnson City, Tennessee, BRCT-20050401BYS, et. seq.*, Application for Review of Free Press and NAACP (Apr. 24, 2008) at 17. It cannot be stayed there and operative here. If the new criteria were operative, Media General would be required to defeat the negative presumption that would apply because of market size by demonstrating satisfactory levels of concentration,

Thus, the FCC's rationale to support its permanent waivers grandfathering Media General's four cross-ownerships was, contrary to Objectors' contentions, clearly consistent with past precedent -- whether it be the *1975 R&O* or the "public interest" criterion utilized in the four subsequent instances in which the FCC has granted permanent waivers. The FCC has "wide" discretion both in how it analytically makes decisions, like waivers that grandfather and affect licensing, and in the predictive judgments supporting its waiver decisions.[46] The logic with which it approached Media General's situation was grounded in both precedent and rationality. Objectors' dislike of the outcome is not accompanied by any proffered reason to change it.

III. THE FACTS IN THE RULEMAKING RECORD FULLY SUPPORT THE ADJUDICATORY DECISION TO GRANDFATHER MEDIA GENERAL'S FOUR CROSS-OWNERSHIPS

In explaining the grandfathering which Objectors oppose, the FCC cited to increased public interest benefits Media General's cross-ownerships have rendered in each of their four markets. While providing the highlights, the *2008 Decision* in no way did justice to the extensive recitation of benefits Media General has supplied during the last six and one-half years this proceeding and its predecessors have been open before the FCC.

First and foremost, three of the four combinations at issue deliver appreciably more local news and public affairs programming than they were offering prior to cross-ownership. WJHL-TV in Johnson City, Tennessee, has increased its local news and public affairs by seven and one-half hours per week; WRBL(TV) in Columbus, Georgia, offers an additional five hours; and

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increased local news, continued independent news judgment at the outlets, and need for financial relief. The same synergies and increased local news offerings, combined with the evidence Media General supplied in comments on the lack of any competitive harm, its outlets' independence in decisionmaking, and the adverse financial conditions facing media outlets would be sufficient to warrant a waiver under even the new standards which other public interest parties claim in another pleading are not yet in effect.

[46] *NCCB*, 436 U.S. at 813-814; *Ellis v. Tribune Television Co.*, 443 F3d 71, 73 (2nd Cir. 2006).

WMBB(TV) in Panama City, Florida, increased its total by 30 minutes a week.[47] In the one exception, WBTW(TV) in Florence, South Carolina, the station was already delivering the most local news of all the new cross-owned stations at the time Media General acquired it; there, the news total has simply remained the same, although the station has added an additional half-hour of public affairs programming each week.[48] Thus, WBTW(TV)'s overall total of local news and public affairs programming has increased since convergence began. All four stations increased their news and public affairs programming since Media General acquired them.

While the FCC cited several additional specifics on each of the Media General stations, the record is replete with examples of how, working together, the co-owned newspaper and television station in each market have been able to cover more breaking news stories, report on more diverse ideas from different sources, investigate governmental and institutional abuse, and deliver more emergency weather coverage than they could each have done acting alone. While Objectors call the examples "self-serving," *Petition* at 10, the volumes of facts belie the claim.

WJHL-TV, in particular, has been able to increase its political coverage and electoral reporting in the Tri-Cities, TN-VA DMA since it became a cross-owned outlet. Examples in the record have included:

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[47] As noted in Media General's comments, the news totals are as follows:

Station	Prior to Convergence	Fall 2006	Increase
WJHL-TV (Tri-Cities)	18 hrs, 47½ mins	26 hrs, 17½ mins	7 hrs, 30 mins
WRBL(TV) (Columbus)	16 hrs, 45 mins	21 hrs, 45 mins	5 hrs
WMBB(TV) (Panama City)	20 hrs, 15 mins	20 hrs, 45 mins	30 mins

Comments of Media General in MB Docket No. 06-121 (Oct. 23, 2006) ("*Comments*"), Vol. 2, Statement of Adam Clayton Powell, III ("*Powell*"), at Exhibit C, p. 4 and Tab 1 (WJHL-TV); Exhibit E, p. 4 and Tab 1 (WRBL(TV)); Exhibit F, p. 4 and Tab 1 (WMBB(TV)).

[48] The news totals for the station are as follows:

Station	Prior to Convergence	Fall 2006
WBTW(TV)	20 hrs, 30 mins	20 hrs, 30 mins

Powell at Exhibit D, p. 4 and Tab 1.

-- Three-day series of live reports on opening of Tennessee legislature with reporting and analysis from WJHL-TV and reporters from the co-owned *Bristol Herald Courier*. (*Powell*, Exhibit C at 6)

-- Coverage of Virginia Governor Tim Kaine's 2006 inauguration; the station and paper shared reporting; print reporters appeared in on-air segments. (*Powell*, Exhibit C at 6-7)

-- Questionnaires sent by *Herald Courier* to candidates before elections; answers reported in print, on-air, and on-line. (*Powell*, Exhibit C at 7)

-- Station's pre-election profiles of candidates -- in 2006 TN state primary and local general elections, WJHL-TV broadcast profiles of all candidates in 9 races -- included interviews with *Herald Courier* reporters with specialized knowledge and long-time contacts. (*Powell*, Exhibit C at 7-8)

-- Similar pre-election profiles for November 2005 Virginia general elections. (*Powell*, Exhibit C at 8)

-- WJHL-TV's special reports on candidates, issues, and voting process in the 2004 primary elections included much deeper coverage of Virginia subjects because of station's access to *Herald Courier* reporters. (*Powell*, Exhibit C at 9)

-- Expanded election night coverage -- access to *Herald Courier* and WJHL-TV reporters allowed station to provide results and deeper analysis much more quickly. (*Powell*, Exhibit C at 7-10)

In the *2008 Decision*, the FCC referred to the fact that the reporting of WBTW(TV) in Florence, South Carolina has benefited from relying on its co-owned newspaper's archives and support in preparing special and investigative pieces. Examples in the record have included:

-- Station's 2004 special report on fifty-year anniversary of *Brown v. Board of Education*, using extensive archival information from the *Morning News*. (*Powell*, Exhibit D at 8)

-- WBTW(TV) report on hurricane dangers in locally produced "Storms of the Century" relied on *Morning News* archives. (*Powell*, Exhibit D at 7)

-- Hurricane coverage -- WBTW(TV) and the *Morning News* work together each year to produce a hurricane guide, which is distributed in print copies of the newspaper and available at the station and on-line. (*Powell*, Exhibit D at 5-6)

-- Extended coverage of the planning and construction of Interstate 73, proposed route from Michigan to SC coast -- In 2004 reporters traveled to Washington together to report on lobbying efforts to increase funding. Presence of reporters from both outlets allowed increased sourcing. (*Powell*, Exhibit D at 8) WBTW(TV), *Morning News*, and local public TV station in 2004 and 2005 held three "town hall" meetings

on the proposed highway; WBTW(TV) provided on-air coverage. (*Powell*, Exhibit D at 8)

-- Combined efforts by reporters for both outlets led to eventual release of a videotape of incident in which Dillon, SC police officers were accused of using racially offensive language. (*Powell*, Exhibit D at 9)

For WRBL(TV) in Columbus, Georgia, the *2008 Decision* noted that, through convergence, the station is better able to cover the western half of its DMA due to the broadcast bureau it has established and staffed in the newspaper's building approximately 30 miles to the west. As the comments repeatedly showed, the station's collaboration with newspaper reporters to the west has, at the same time, freed up some of the station's own reporters to provide expanded coverage of the eastern DMA. Examples in the record include:

-- Breaking news coverage greatly improved through tips -- March 2005 WRBL(TV) tipped off by newspaper reporter to explosion at a factory in Lanett. WRBL(TV) was first in DMA to report this on-air; *Opelika-Auburn News* followed up with independently produced story next day. (*Powell*, Exhibit E at 5-6)

-- February 2005, *Opelika-Auburn News* reporter broke story of a lawsuit alleging abuse of students at local military academy -- WRBL(TV) reporter followed up with additional reporting and interviews. Reporters from both outlets collaborated on continuing coverage as the story developed. (*Powell*, Exhibit E at 6)

-- February 2005 coverage of story that dismissal of Auburn University athletics personnel was racially motivated -- *Opelika-Auburn News* reporter was the only person able to obtain an interview with the person making the allegations and shared this information with WRBL(TV). (*Powell*, Exhibit E at 6-7)

-- 2006 story of legitimacy of grades given to Auburn University football players -- WRBL(TV) reporters conducted interviews and provided information to newspaper reporters, who used it to supplement their own reporting. (*Powell*, Exhibit E at 7)

-- Coverage of federal environmental trial in eastern Alabama -- WRBL(TV) reporter attended morning sessions and reported in evening news; newspaper reporter attended in afternoon. The reporters shared their notes and research. (*Comments* at 19)

-- "State of Secrecy" series -- in consultation with Alabama Council for Open Government, the two outlets investigated and reported on openness and accountability of government records in many of DMA's small towns and municipalities. Newspaper reporters investigated the Alabama counties, and WRBL(TV)'s reporters investigated those in Georgia. Together, they provided a comprehensive regional review and comparison. WRBL(TV) broadcast two days of on-air; newspaper had five-day series of reports. (*Powell*, Exhibit E at 10)

Finally, as the *2008 Decision* noted, WMBB(TV) in Panama City, Florida, a station in Media General's smallest cross-owned market (DMA # 154), through convergence, has been able to increase its hurricane coverage, political forums, and investigative reporting. Examples in the record include:

- -- Hurricane coverage -- WMBB is located on the coast, while the co-owned *Floridan* is located more to the north and inland. During Hurricane Denis in 2005, WMBB stationed a reporter in the *Floridan*'s newsroom and broadcast live reports as part of its wall-to-wall coverage, including interviews with emergency management officials. With this second base in the northern part of the DMA, the station could provide much more information on evacuation routes and particular dangers, such as tornadoes, faced by residents in that part of the DMA. Similar efforts occurred in 2004 for Ivan and other serious hurricanes. (*Powell*, Exhibit F at 5-9)
- -- Election night coverage -- access to both outlets' reporters allows each to cover more races in greater depth, particularly in this market where television station and newspaper serve different parts of the DMA. (*Powell*, Exhibit F at 12-13)
- -- In 2004, the outlets teamed up on investigation of a group that had purchased highly critical print and TV advertisements related to a candidate for state's attorney. WMBB(TV) obtained documents, and *Floridan* reporter with expertise in fundraising records analyzed them. (*Powell*, Exhibit F at 13-15)
- -- Outlets worked together to overcome governmental officials' resistance to investigate and report on story regarding allegations of sexual misconduct involving a young girl that was levied against a Jackson County sheriff's deputy. (*Powell*, Exhibit F at 15)
- -- 2002 -- WMBB(TV) received "tip" that local officials were investigating a local school for troubled boys and shared it with *Floridan*, which was able to use extensive contacts to determine investigation's status. (*Powell*, Exhibit F at 16)
- -- 2002 -- WMBB(TV) worked with *Floridan* and papers in Dothan, AL DMA to research and present special reports on controversial proposal for Interstate connector. (*Powell*, Exhibit F at 16)

Objectors also criticized the *2008 Decision* for failing to provide any specific harms that would be caused by forced divestiture, harms that would undoubtedly be exacerbated by the prolonged nature of this proceeding and the length of cross-ownership, concerns which the FCC cites and Objectors say are irrelevant. In the late 1970s, the FCC's 1975 grandfathering decision came under similar attack. The Supreme Court, however, in affirming the FCC's analytical approach to divestiture and its factual evaluations, found that such specificity was not required:

> The Court of Appeals' final basis for concluding that the Commission acted arbitrarily in not giving controlling weight to its divestiture policy was that the Court's finding that the rulemaking record did not adequately "disclose the extent to which divestiture would actually threaten" the competing policies relied upon by the Commission . . . . However, to the extent that factual determinations were involved in the Commission's decision to "grandfather" most existing combinations, they were primarily of a judgmental or predictive nature . . . . In such circumstances, complete factual support in the record for the Commission's judgment or prediction is not possible or required: "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency."[49]

In this instance, the FCC's factual determinations or predictions regarding potential harms are entitled to the same deference and clearly should not be disturbed on reconsideration.

IV. THE FCC MISTAKENLY MADE ONLY THE MOST MODEST OF CHANGES TO ITS NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE AND SHOULD HAVE ELIMINATED IT ENTIRELY

While Objectors make suggestions as to how the *2008 Decision* can be made more regulatory in certain specifics,[50] Media General submits that the FCC erred, as a matter of statutory and constitutional law, in not completely eliminating the newspaper/broadcast cross-ownership rule in all markets. The waiver procedures that the FCC merely grafted onto the former rule, which it retained in its entirety, are not only impermissibly narrow in scope and specifics but the criteria set forth for waiving future combinations are based on legally discredited FCC models. Rather than make minor modifications to the changes that the FCC did adopt in the *2008 Decision*, the agency should repeal the newspaper/broadcast cross-ownership rule and the recent standards it has added to it for at least four reasons, which were more fully developed in the record.[51]

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[49] *NCCB*, 436 U.S. at 813-14.

[50] *Petition* at 2-7.

[51] *See, e.g.*, Comments of Media General in MB Docket Nos. 06-121, *et al.* (Dec. 11, 2007) at 1-24 ("*MG Dec. 11, 2007 Comments*"); *Comments* at 66-98; Comments of Media General in MB Docket Nos. 02-277, *et al.* (Jan. 2, 2003) at 25-75; Comments of Media General in MM Docket Nos. 01-235 and 96-197 (Dec. 3, 2001) at 18-86.

First, the FCC already found in 2003, and the United States Court of Appeals for the Third Circuit agreed in 2004, that the former rule was not necessary to fulfill the FCC's interest in promoting competition, localism, or diversity, and that it counterproductively harmed localism. The FCC found repeal mandated by Section 202(h) of the 1996 Telecommunications Act, and the court agreed.[52]

The *Prometheus* court "sum[med] up" the standard of review that it would apply in any future evaluation of the FCC's actions: "In a periodic review under § 202(h), the Commission is required to determine whether its then-extant rules remain useful in the public interest; if no longer useful, they must be repealed or modified."[53] The *2008 Decision* does an inadequate job of addressing the lack on remand of any credible evidence showing that the former rule remains "useful" or that any need remains under Section 202(h) to substitute somewhat lessened regulation, such as adopted in the *2008 Decision*, for the previous rule. The FCC and the court already found the earlier rule was unnecessary to advance competition or localism, and the ever-growing abundance of sources of news and information, particularly local, should have mooted any further FCC concern over "diversity." Given that review has now become quadrennial, the FCC's statutory burden to ensure that its rules keep pace with marketplace realities is that much stronger. The *2008 Decision* did not establish, nor could it, that any trends suggest a future decrease in abundance that somehow warrants four more years of regulation.

Long-established administrative law precedents equally compelled total repeal. The FCC itself acknowledged in 1975 that there was no evidence of a competitive harm mandating the former rule; the speculative "hoped-for" gain in diversity upon which it has premised has never

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[52] *Prometheus*, 373 F.3d at 398-400, *citing 2002 Biennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd at 13749, 13754, 13764-66 (2003).

[53] *Prometheus*, 373 F.3d at 395.

materialized. This time around, the FCC thus had no legal choice but to repeal the former rule. A regulation reasonable in the face of a problem becomes highly capricious when the problem is shown no longer to exist.[54]

In fact, the FCC's abrupt change of course in 2008, which, as the Chairman acknowledged, decreased cross-ownership regulation much less and in fewer markets than had been done with the cross-media limits in 2003, similarly violated administrative law precedent. Such a change in course requires clear and compelling evidentiary support and a detailed and persuasive explanation for reversing direction.[55] The *2008 Decision* does an inadequate job of explaining why the record warranted a more conservative approach than it had a half decade earlier.

Second, the decision to limit "presumptive relief" to only the Top 20 television markets is highly arbitrary, ignoring that FCC precedent decries such DMA line-drawing. Moreover, missing from all of the studies in the record -- the FCC's latest set of peer reviewed studies, the earlier 2002 studies, and the empirical reviews filed by parties -- was any indication that the results were dependent on market size.

In modifying the radio/television cross-ownership rule in 1999, the FCC itself acknowledged that line-drawing based on DMAs is "unnecessary" to advance competition or diversity when a particular rule otherwise calls for an examination of "voices."[56] The FCC's

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[54] *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977). *See Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992), *cert. denied,* 506 U.S. 816 (1992). *See also Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993). Even a statute, the validity of which depends on a premise supported at the time of enactment, becomes invalid subsequently if the predicate disappears. *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979).

[55] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 1007 (1971), 403 U.S. 923 (1971), 406 U.S. 950 (1972).

[56] *Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules*, Report and Order, 14 FCC Rcd 12903, 12949 (1999) ("*1999 Local Television Order*"), *recon.* 16 FCC Rcd 1067 (2000), *aff'd in part and*

initial liberalization of that rule had permitted, on a presumptive basis, mergers involving one TV, one AM, and one FM station in the Top 25 television markets, if post-merger at least 30 independently owned broadcast "voices" remained.[57] In 1999, the FCC removed the reference to market size, expressing concerns about its accuracy in accounting for levels of diversity and ability to reflect change.[58] Thus, even when local ownership regulation is warranted, line-drawing based on DMA rank is not.[59]

Further, data in the record on newspaper failures compelled relief outside the Top 20 markets. Prior to adoption of the *2008 Decision*, the Chairman had noted that at least 300 daily newspapers had ceased publication in the last 30 years.[60] More detailed data submitted in the

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remanded in part sub. nom., *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) ("*Sinclair*").

[57] *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, Second Report and Order, 4 FCC Rcd 1741 (1989). In 1996, Congress extended the presumption to the Top 50 markets. Pub. L. No. 104-104, § 202(d), 110 Stat. 56, 112 (1996), as amended by Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004).

[58] The FCC explained its decision as follows:

> [A] rule based on the number of independent voices more accurately reflects the actual level of diversity and competition in the market . . . . [A] market-size restriction is unnecessary for purposes of competition and diversity as long as there are a minimum number of independent sources of news and information available to listeners, and a minimum number of alternative outlets available to advertisers . . . . In addition, unlike a rule based on market rank, our revised rule will account for changes in the number of voices in a market resulting from consolidation, the addition of new voices, or the loss of any outlets.

1999 Local Television Order, 14 FCC Rcd at 12949 (footnotes omitted).

[59] For different reasons, the FCC in 1982 repealed its "Top 50" policy, which had required an evidentiary hearing for those seeking to acquire additional VHF stations in the largest markets unless the applicant made a compelling public interest showing. The decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit. *NAACP v. FCC*, 682 F.2d 993 (D.C. Cir. 1982). With repeal of the Top 50 policy and removal of DMA rank from the radio/television cross-ownership rule, the FCC's ownership rules, prior to the *2008 Decision*, had no longer been based on arbitrary references to DMA rank.

[60] FCC News Release, "Chairman Kevin J. Martin Proposes Revision to the Newspaper/Broadcast Cross-Ownership Rule," DOC-278113A1 (rel. Nov. 13, 2007) at 1.

record showed, however, that the majority of recent newspaper failures have occurred outside the Top 20 markets. For the period 1988 to 2006, of the 88 newspapers that completely ceased publication, 52 or roughly 60 percent were outside the Top 20 markets.[61] Additional data similarly demonstrated that, from 1976 to 2006, the overwhelming number of newspaper failures had occurred in very small population centers. In small towns of less than 25,000 residents, 179 papers went out of existence during those three decades, whereas population centers with over one million residents actually gained four papers; the record also showed all population tiers with less than one million residents lost newspapers during the period.[62] In light of this evidence, restricting presumptive relief to just the Top 20 DMAs was highly arbitrary.[63]

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[61] Data derived from the following: *Editor & Publisher International Yearbook 1989* at I-367; *Editor & Publisher International Yearbook 1990* at I-370; *Editor & Publisher International Yearbook 1991* at I-380; *Editor & Publisher International Yearbook 1992* at I-382; *Editor & Publisher International Yearbook 1993* at I-423; *Editor & Publisher International Yearbook 1994* at I-449; *Editor & Publisher International Yearbook 1995* at I-451; *Editor & Publisher International Yearbook 1996* at xxiv; *Editor & Publisher International Yearbook 1997* at xxiv; *Editor & Publisher International Yearbook 1998* at xxiv; *Editor & Publisher International Yearbook 1999* at xxiv; *Editor & Publisher International Yearbook 2000* at xxiv; *Editor & Publisher International Yearbook 2001* at xx; *Editor & Publisher International Yearbook 2002* at xx; *Editor & Publisher International Yearbook 2003* at xx; *Editor & Publisher International Yearbook 2004* at I-493; *Editor & Publisher International Yearbook 2005* at 490-I; *Editor & Publisher International Yearbook 2006* at I-455; *Editor & Publisher International Yearbook 2007* at I-445; *Broadcasting & Cable Yearbook 2007* at B-132 to B-215. This figure on newspaper failures did not include newspapers that cut back by converting from daily to weekly publication, merged with another newspaper, or became a "zoned edition" of another nearby newspaper; there is no reason to think that those curtailments would be any less prevalent in smaller markets.

[62] *MG Dec. 11, 2007 Comments* at Appendix I.

[63] Presumably ignoring this evidence in the record and in the *2008 Decision*, *see, e.g.*, at ¶¶ 27-33, that newspapers are facing adverse financial conditions, Objectors ask the FCC to make an even more regulatory change to the cross-ownership regime. In the *Petition*, at 6-7, they propose that television owners that purchase a local newspaper be required to submit a waiver request within one month of the acquisition and that the FCC act on the filing expeditiously. If the applicant cannot show that the acquisition serves the public interest, Objectors contend that the FCC should order the applicant to comply with the cross-ownership rule within one year. Objectors have provided no legal or credible factual support for this proposal, only anecdotal incidents that again play to their predilections. If, indeed, the FCC thinks such a significant change is needed to regulate newspaper acquisitions -- an area in which its jurisdiction is most, most tenuous -- it should put the proposal out for comment.

Third, use of the "eight-voices" limit in the presumptive waiver test is reminiscent of a formulation of the FCC's duopoly rule roundly discredited by the United States Court of Appeals for the District of Columbia in 2002 as arbitrary and capricious and remanded for corrections that the FCC has never made effective.[64] The *2008 Decision*'s approach to presumptive waivers does not correct these problems; it, in fact, compounds them.

The *2008 Decision* first borrows a Top 4 criterion from the duopoly rule, requiring that the television station that is to be cross-owned with a newspaper not be among the Top 4 ranked stations in its market. In the duopoly context, adoption of this Top 4 prong was based on promoting competition; the FCC reasoned that allowing merger of two of the Top 4 stations with their larger advertising bases might be anti-competitive.[65] As noted above, however, both the FCC and Third Circuit have recognized that newspapers and broadcast stations operate in separate product markets for antitrust analysis, and competitive concerns are no longer at issue in the newspaper/broadcast cross-ownership rule.

The *2008 Decision* also borrows the duopoly rule's requirement that eight independently owned and operating "major media voices" remain post-merger, limiting the count to television stations and newspapers. As the D.C. Circuit found in *Sinclair*, however, this approach arbitrarily and capriciously excludes other "voices." In that case, the court ruled that the duopoly rule was fatally flawed because of the FCC's unjustified failure to include the types of "voices" that it had found appropriate for inclusion in its simultaneous revision of the radio/television cross-ownership rule -- full-power commercial and noncommercial television, commercial and noncommercial radio, daily newspapers, and cable. The court found the difference in approach between the duopoly rule and the radio/television cross-ownership rule unacceptable: "Having found for purposes of cross-ownership that counting other media voices 'more accurately reflects

[64] *Sinclair*, 284 F.3d at 152, 169.

[65] *1999 Local Television Order*, 14 FCC Rcd at 12933-34.

the actual level of diversity and competition in the market' . . . the Commission never explains why such diversity and competition should not also be reflected in its definition of 'voices' for the local [television] ownership rule."[66] The court held that the FCC had "failed to demonstrate that its exclusion of non-broadcast media from the eight voices exception is 'necessary in the public interest' under § 202(h) of the 1996 Act."[67] In this instance, the failure is even more pronounced. The newspaper/television cross-ownership directly deals with cross-ownership as did the radio/television cross-ownership rule that the *Sinclair* court used as a guide. The comparison and need for uniformity is even more direct than it was in the duopoly context.

Fourth, retention of any restriction on newspaper/broadcast cross-ownership is simply unconstitutional. The sole justification for deferential First Amendment review of the cross-ownership rule in 1978 -- the "scarcity doctrine" -- has been rendered obsolete by regulatory and technical changes.[68] In addition, since 1978 Congress has acted to limit the Commission's role in awarding new spectrum to broadcast licensees, further eliminating any principled basis for the "scarcity doctrine." Not eligible for deferential review, any newspaper/broadcast cross-ownership restriction cannot survive heightened constitutional scrutiny. In addition, any such restriction can no longer survive equal protection scrutiny because newspapers are the *only* non-broadcast media that remain subject to discriminatory cross-ownership restrictions.

V. CONCLUSION

Insofar as the *Petition* pertains to the permanent waivers that grandfathered the Media General cross-ownerships, it should be dismissed as untimely. The FCC does not have authority to entertain it. If the FCC somehow finds a reason to overlook this fatal deficiency, it should

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[66] *Sinclair*, 284 F.3d at 164.

[67] *Id.* at 165.

[68] *See, e.g.*, John W. Berresford, *The Scarcity Rationale For Regulating Traditional Broadcasting: An Idea Whose Time Has Passed*, Media Bureau Staff Research Paper (March 2005).

deny the *Petition* because the FCC's analytic approach to the adjudicatory grandfathering decision was consistent with its own and court precedent. The result was also supported by ample factual evidence in the record. In addition, the FCC should reject Objectors' attacks on other aspects of the *2008 Decision* dealing with the newspaper/broadcast cross-ownership rule, a restriction that the FCC should have eliminated entirely since retaining it violates statutory standards and constitutional principles.

Respectfully submitted,

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