IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 03-3388, 03-3577, 03-3578, 03-3579, 03-3580, 03-3581, 03-3582, 03-3651, 03-3665, 03-3675, 03-3708, 03-3894, 03-3950, 03-3951 & 03-4073

PROMETHEUS RADIO PROJECT, *ET AL.*,

PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,

RESPONDENTS

PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUE PRESENTED

Whether the Federal Communications Commission's revision of its broadcast ownership rules, *see* Report and Order, *2002 Biennial Regulatory Review*, 18 FCC Rcd 13620 (2003) (JA0037-433) (Order) was a lawful exercise of the agency's authority to regulate broadcasting in the public interest.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the Order pursuant to 47 U.S.C. §402(a), 28 U.S.C. §2342(1), and the order of the Judicial Panel on Multidistrict Litigation consolidating the petitions for review in this Court. *See* 28 U.S.C.

§2112(a). The Order was published in the Federal Register on August 5, 2003, *see* 68 Fed. Reg. 46286 (2003), and each of the petitions for review was filed within 60 days of that date, as required by 28 U.S.C. §2344. As explained below, however, this Court lacks jurisdiction to entertain the arguments put forth by Capitol Broadcasting Co. and the Minority Media and Telecommunications Council (MMTC) because those arguments are the subject of petitions for reconsideration filed by those parties that are currently pending before the Commission. *See* pp. 41-44, 100-01, *infra*.

STATUTES AND REGULATIONS

Pertinent provisions of the Communications Act of 1934, the Telecommunications Act of 1996, and the Commission's revised media ownership rules are reprinted as an addendum to this brief.

STATEMENT OF RELATED CASES

This case has not previously been before this Court. Prior versions of the FCC's national television station ownership rule and its local television station ownership rule were before the District of Columbia Circuit in *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, *modified on rehearing*, 293 F.3d 537 (D.C. Cir. 2002) and *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

Petitions for reconsideration of the Order are presently pending before the FCC.

COUNTERSTATEMENT

I. Statement of the Case.

On July 2, 2003, after an extensive administrative proceeding pursuant to the biennial review provisions of the Telecommunications Act of 1996, the FCC released a *Report and Order* revising its rules governing ownership of radio and television stations to provide a "new, comprehensive framework for broadcast ownership regulation." Order ¶3 (JA0040). Petitions for review of the FCC's revised rules were filed in various courts of appeals by several organizations, some contending that the Commission had gone too far in revising its rules and some contending that the Commission had not gone far enough. The Judicial Panel on Multidistrict Litigation, acting pursuant to the random selection procedures of 28 U.S.C. §2112(a), ordered the petitions consolidated in this Court. After granting a stay of the rules pending judicial review, this Court set the cases for briefing and argument.

II. Statutory and Regulatory Background.

1. *The 1934 Act and the FCC's Broadcast Ownership Rules*. In order to "regulat[e] interstate and foreign communications by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges," 47 U.S.C. § 151, the Communications Act of 1934 centralizes federal broadcast regulation in the FCC. The 1934 Act "expresses a desire on the part of Congress to maintain, through approp-

riate administrative control, a grip on the dynamic aspects of radio transmission." *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940).

The 1934 Act empowers the FCC to grant broadcast licenses in accordance with its determination of the "public interest, convenience and necessity." 47 U.S.C. §309(a). *See also* 47 U.S.C. §§307(a), 310(d). In carrying out its responsibilities, the Commission is authorized to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions," 47 U.S.C. §154(i), and "from time to time, as public convenience, interest, or necessity requires," to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act," 47 U.S.C. §303(r).

"In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978) (*NCCB*). In 1938, the Commission adopted a presumption against granting a second license in the same community to any existing licensee, *Genesee Radio Corp*., 5 FCC 183, 186-87 (1938)—a presumption that was shortly thereafter codified in the Commission's rules. *See Rules Governing Standard and High Frequency Broadcast Stations*, 5 Fed. Reg. 2382, 2384 (1940) (FM radio); *Rules Governing Standard and High Frequency Broadcast Stations*, 6 Fed. Reg. 2282, 2284-85 (1941) (TV); *Rules Governing*

Standard and High Frequency Broadcast Stations, 8 Fed. Reg. 16065 (1943) (AM radio). The Commission also imposed limits on network ownership of broadcast stations. In its Chain Broadcasting Regulations, which the Supreme Court upheld in *National Broad. Co. v. United States*, 319 U.S. 190, 206-08 (1943) (*NBC*), the Commission (among other things) prohibited broadcast networks from owning more than one station in a given community.

Subsequently, the Commission promulgated rules—again upheld by the Supreme Court, in *United States v. Storer Broad. Co.*, 351 U.S. 192, 203-06 (1956)—limiting the total number of radio and TV stations a single person could own nationwide. *See Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations relating to Multiple Ownership of AM, FM, and Television Broadcast Stations*, 9 *Radio Reg. (P&F)* 1563, 1567-69 (¶¶9-11) (1953). The Commission also issued "one-to-a-market" radio-television cross-ownership rules, which proscribed common ownership of more than one full-time broadcast station (radio or TV) in the same market. *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, 22 FCC 2d 306, 307-08 ¶¶5-8 (1970). And in 1975, the Commission adopted a ban on common ownership of a daily newspaper and a broadcast station in the same local market. *Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 50 FCC 2d 1046 (1975), *amended on reconsideration*, 53 FCC 2d 589 (1975). The Supreme Court upheld the Commission's newspaper/broadcast cross-ownership prohibition in

NCCB as a "reasonable means of promoting the public interest in diversified mass communications." *See* 436 U.S. at 796-802.

The Supreme Court has recognized that the problems before the Commission often can "not be solved at once and for all time by rigid rules-of-thumb." *NBC*, 391 U.S. at 225. As a result, it has long been assumed that the agency would adjust its regulations "[i]f time and changing circumstances reveal that the 'public interest' is not served by [their] application." *Id*. The Commission has accordingly adjusted its broadcast ownership rules in recent years to take account of developments in the media marketplace, including the significant increase in the number of broadcast outlets and the advent of competing video programming providers. Thus, the Commission in 1984 raised the national ownership limits to generally permit common ownership of 12 stations in each broadcast service (although it prohibited common ownership of broadcast television stations that could reach more than 25% of the national audience). *Amendment of Section 73.3555 (formerly 73.35, 73.240, and 73.636) of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations,* 100 FCC 2d 74, 84 ¶22, 90 ¶38 (1984). And in 1989, the Commission relaxed its "one-to-a-market" rule by implementing a lenient waiver policy for applications involving radio and television combinations in the top 25 markets. *Second Ownership Order*, 4 FCC Rcd 1741 ¶1 (1989).

2. *The 1996 Act*. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), made a number of changes in the FCC's media ownership rules.

The 1996 Act modified the Commission's national ownership restrictions by removing the limits on the number of radio or television stations that a single entity could own nationwide, §202(a), 202(c)(1)(A), 110 Stat. 110-11, and by raising the national audience reach limitation for television stations to 35 percent, §202(c)(1)(B), 110 Stat. 111. The 1996 Act also revised the Commission's local radio ownership restrictions, §202(b), 110 Stat. 110-11, and directed the Commission to conduct a rulemaking to determine whether to "retain, modify, or eliminate" its local television ownership limitations, §202(c)(2), 110 Stat. 111.[1]

Finally, Section 202(h) of the 1996 Act instituted a "biennial review" requirement, which obligates the Commission to (1) "review its rules adopted pursuant to this section and all of its ownership rules biennially," (2) "determine whether any of such rules are necessary in the public interest as the result of competition," and (3) "repeal or modify any regulation it determines to be no longer in the public interest." 110 Stat. 111-12.

3. *The* Fox *and* Sinclair *decisions.* In line with its continuing examination of its broadcast ownership rules, and guided by the statutory directives of the 1996 Act, the Commission in 1999 adopted an order revising its local television ownership rules and its radio-television cross-ownership rules. *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903 (1999),

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[1] The 1996 Act also directed the Commission to relax its "one-to-a-market" rules by extending its waiver policy to the "top 50 markets," §202(d), 110 Stat. 111, and to revise the "dual network" rule to permit common ownership of two or more broadcast television networks, other than the six (now four) largest. §202(e), 110 Stat. 111; *see* 47 C.F.R. §73.658(g).

on reconsideration, 16 FCC Rcd 1067 (2001). The revised local television rule continued to permit common ownership of two television stations whose signals did not overlap, 14 FCC Rcd 12926 ¶47, and enabled common ownership of two television stations with overlapping signals if "at least eight independently owned and operating full power commercial and noncommercial TV stations would remain post-merger, and the two merging stations are not both among the four top-ranked stations in the market, as measured by audience share." 14 FCC Rcd at 12932-33 ¶64.

The Commission also relaxed the radio-television cross-ownership rule to permit common ownership of up to two TV stations and six radio stations (or one TV station and seven radio stations) in any market where at least 20 "independently owned media voices" would remain in the market post-merger, up to two TV stations and four radio stations in any market where at least 10 independently owned media voices would remain post-merger, and up to two TV stations and one radio station notwithstanding the number of media voices post-merger. 14 FCC Rcd at 12947 ¶100. The Commission explained that its new television ownership rules "reflect a recognition of the growth in the number and variety of media outlets in local markets, as well as the significant efficiencies and public interest benefits that can be obtained from joint ownership," while at the same time they advance the Commission's "continuing goals of ensuring diversity and localism and guarding against undue concentration of economic power." 14 FCC Rcd at 12904 ¶1.

In its 1998 Biennial Review, the Commission voted to retain the congressionally established 35% national television audience reach limit. *1998 Biennial Review Report*, 15 FCC Rcd 11058, 11072 ¶25 (2000). The Commission explained that, before altering the national ownership cap, it wanted to assess the effects of its recent changes in the local television ownership rules and to observe the effect of the large number of station acquisitions that had occurred following the revisions to the audience reach cap effectuated by the 1996 Act. *Id*. at 11072 ¶25.

The decision to retain the 35% national television audience reach cap was reviewed by the D.C. Circuit in *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, *modified on rehearing*, 293 F.3d 537 (D.C. Cir. 2002). The appeals court rejected the networks' constitutional challenge to the Commission's ownership rules, 280 F.3d at 1045-47, but found that the Commission's decision to retain the 35% cap "was arbitrary and capricious in violation of the APA." *Id*. at 1043-44.

In the court's view, the Commission had identified "no valid reason" to think that the 35% ownership cap was "necessary to safeguard competition." 280 F.3d at 1042. The court agreed that, "[i]n the context of the regulation of broadcasting, 'the public interest' has historically embraced diversity (as well as localism)," *id*., but it found that the Commission had "not provide[d] an adequate basis for believing the Rule would in fact further" those interests, *id*. at 1044.

The Commission's 1999 revision of its local television ownership rule was reviewed by the D.C. Circuit in *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), which also remanded that rule to the Commission for further consideration. The court emphasized that "[w]here issues involve 'elusive' and 'not easily defined' areas such as programming diversity in broadcasting," it was obligated to "accord[] broad leeway to the Commission's line-drawing determinations." 284 F.3d at 159 (citation omitted). It also rejected a First Amendment challenge to the rule as "foreclosed by" Supreme Court and circuit precedent, *id*. at 167-69, and found that the Commission had "adequately explained how the local ownership rule furthers diversity at the local level and is necessary in the 'public interest' under §202(h) of the 1996 Act." *Id*. at 160. But because the court found that the Commission had "not provided any justification for counting fewer types of 'voices' in the local [television] ownership rules than it counted in its rule on cross-ownership of radio and television stations," *id*. at 162, it remanded the rule for further consideration. *Id*. at 169.

III. The Commission's Report and Order.

In the wake of the *Fox* and *Sinclair* decisions, and in accordance with its biennial review obligations, the Commission initiated a "comprehensive review" of its broadcast ownership rules. *2002 Biennial Regulatory Review*, Notice of Proposed Rulemaking, 17 FCC Rcd 18503, 18504 ¶1 (2002) (*2002 Biennial NPRM)* (JA3451). The *2002 Biennial NPRM* announced the Commission's review of four rules: the 35% national audience reach limit remanded in *Fox*, the local television ownership rule remanded in *Sinclair*, the radio-television cross-ownership rule, and the dual network rule. *Id*. ¶6 (JA3452-53). In addition, the Commission incorporated into the rulemaking previously instituted proceedings to review its local radio ownership rule and the newspaper/broadcast cross-ownership prohibition. *Id*. ¶7 (JA3453).[2]

On the basis of "extensive information gathering efforts" as well as "the voluminous record assembled in th[e] rulemaking docket," the Commission on July 2, 2003 released a 256-page Order revising its ownership rules to "provide a new, comprehensive framework for broadcast ownership regulation" that both serves the goals of "competition, diversity and localism in highly targeted ways" and "is responsive to today's media environment." Order ¶¶3, 5, 7, 9 (2003) (JA0040-41).

The Order "determin[es] the appropriate regulatory framework for broadcast ownership in a world characterized not by information scarcity, but by media abundance." Order ¶89 (JA0030). The Commission found that "Americans today have more media choices, more sources of news and information, and more varied entertainment programming available to them than ever before. . . . Today, hundreds of channels of video programming are available in every market in the country, and, via the Internet, Americans can access virtually any information, anywhere, on any topic." *Id.* ¶3 (JA0040). *See generally id.* ¶¶86-128 (JA0065-85).

[2] *See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861 (2001) (JA2487-536); *Definition of Radio Markets*, 15 FCC Rcd 25077 (2000) (JA2410-32); *Cross-Ownership of Broadcast Stations and Newspapers*, 16 FCC Rcd 17283 (2001) (JA2458-86) (*Newspaper/Broadcast NPRM*).

The Order affirms the Commission's "longstanding commitment to promoting competition by ensuring pro-competitive market structures," recognizing that "[c]onsumers receive more choice, lower prices, and more innovative services in competitive markets than they do in markets where one or more firms exercise market power." Order ¶57 (JA0056). In addition, the Order adheres to the Commission's "longstanding determination that the policy of limiting common ownership of multiple media outlets is the most reliable means of promoting viewpoint diversity." *Id.* ¶27 (JA0047). And the Order makes clear that the Commission remains "firmly committed to the policy of promoting localism among broadcast outlets" by promoting "market structures that take advantage of media companies' incentive to serve local communities." *Id.* ¶77 (JA0061).

In light of the marketplace developments identified by the Commission, and to further its public policy goals of promoting competition, diversity and localism in broadcasting, the Order: (1) revises its rules for local radio and local television ownership, Order ¶¶132-326 (JA0086-166), (2) replaces the newspaper/broadcast and radio-television cross-ownership restrictions with a specific set of "cross-media limits," *id*. ¶¶327-481 (JA0166-226), and (3) adjusts the national television audience reach cap from 35% to 45%, *id*. ¶¶499-591 (JA0233-66).[3] We briefly review each change below.

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[3] In a portion of the Order not challenged in this case, the Commission retained the dual network rule, which prohibits a merger between the top four television networks, Order ¶592 (JA0266-67), explaining that such mergers "would harm localism by providing the top-four networks with increased economic leverage over their affiliates, thereby diminishing the ability of the affiliates to serve their communities," *id*. ¶611 (JA0274).

1. *Local Television Ownership*. The modified local television ownership rules permit common ownership of no more than two television stations in markets with 17 or fewer full-power commercial or noncommercial television stations, and no more than three stations in markets with 18 or more television stations. Order App. H (JA0342) (adding 47 C.F.R. §73.3555(b)(ii)). The revised rules continue to prohibit combinations between any two of the top four television stations, *id.* (JA0341) (adding 47 C.F.R. §73.3555(b)(i)), which effectively forecloses same-market television station combinations in markets with fewer than five television stations, *id.* ¶186 (JA0110).

In revising the local television ownership rule, the Commission "recognize[d] that common ownership of stations may result in consumer welfare enhancing efficiencies," which can both "enhance the ability of broadcast television to compete with cable and DBS [direct broadcast satellite] in more [markets]," Order ¶147 (JA0092-93), and "better enable local television stations to acquire content desired by their local audiences," *id*. ¶156 (JA0096-97). The Commission also found that "media other than television broadcast stations contribute to viewpoint diversity in local markets," and that "the majority of markets have an abundance of viewpoint diversity." *Id*. ¶171 (JA0104). By revising the rules "to reflect the contribution of other media to competition and viewpoint diversity," *id*. ¶184 (JA0109), the Commission sought to "achieve necessary protection for diversity purposes without unduly limiting speech," *id*. ¶180 (JA0107).

2. *Local Radio Ownership.* The Commission retained the numerical limits in the local radio ownership rules that had been established by the 1996 Act, but

replaced its contour-overlap methodology for defining radio markets with a definition based on Arbitron Metro Survey Areas. Order ¶239 (JA0131).[4] For areas of the country not covered by Arbitron Metros, the Commission adopted an interim contour-overlap methodology, *id*. ¶¶284-86 (JA0148-49), and initiated a new rulemaking seeking comment on how to define radio markets in non-Metro areas of the country, *see id*. ¶¶657-70 (JA0289-92). In addition, the Commission revised its rules to count noncommercial radio stations in determining the size of local radio markets. *Id*. ¶295 (JA0153).

The Commission explained that its contour-overlap methodology for defining radio markets was "flawed," Order ¶256 (JA0137-38), because it created a "perverse incentive" to encourage consolidation of powerful radio stations, *id*. ¶257 (JA0138), "often does not reflect the area of true competition," *id*. ¶258 (JA0138), and "makes it difficult to measure concentration in local radio markets accurately." *Id*. ¶259 (JA0139). By contrast, "[t]he record shows that Arbitron's market definitions are an industry standard and represent a reasonable geographic market delineation within which radio services compete." *Id*. ¶276 (JA0144).

3. *Cross-Media Limits*. The Commission recognized that its local television and local radio ownership limits serve to promote diversity as well as competition, since "ensuring that several competitors remain within each of the radio and tele-

[4] "Arbitron, as the principal radio rating service in the country, has defined radio markets for most of the more populated urban areas of the country. These radio markets—Arbitron Metros—are Arbitron's primary survey area." Order ¶275 (JA0143-44).

vision services . . . also ensure[s] that a number of independent outlets for viewpoint will remain in every local market." Order ¶6 (JA0040). But the Commission understood that its local television and radio ownership rules "cannot protect against losses in diversity that might result from combinations of different types of media within a local market." *Id*. It therefore adopted a supplemental safeguard in the form of "cross-media limits" restricting cross-ownership among newspapers, broadcast television stations, and radio stations. *Id*.; *see generally id*. ¶¶432-81 (JA0209-26).

The Commission's cross-media limits prohibit the combination of a daily newspaper and a broadcast station, or a radio station and a television station, in any market with three or fewer full-power commercial and noncommercial television stations. Order App. H (JA0342) (adding 47 C.F.R. §73.3555(c)). In markets with from four to eight television stations, the rule permits common ownership of a daily newspaper and (1) a single commercial television station and up to 50% of the number of radio stations permitted to be owned under the local radio ownership limit for that market, or (2) if no television station is owned, up to 100% of the local radio limit. *Id*. (adding 47 C.F.R. §73.3555(c)(2)). In markets with nine or more television stations, "which tend to have robust media cultures characterized by a large number of outlets and a wide variety of owners," the cross-media limits do not apply. *Id*. ¶473 (JA0223).

The cross-media limits replace the Commission's newspaper/broadcast cross-ownership prohibition and its radio-television cross-ownership restrictions. The Commission concluded that "a blanket prohibition on the common ownership of broadcast stations and daily newspapers in all communities and all circumstances can no longer be justified as necessary to achieve and protect diversity" in light of the "growth in the number, breadth and scope of informational and entertainment media available and the benefits that may accrue from common ownership." Order ¶355 (JA0179). The Commission likewise agreed that a cross-ownership rule applicable only to radio and television is "inequitable and outdated," *id.* ¶388 (JA0193), and that more the "targeted cross-media limits" adopted by the Commission was better designed to promote diversity, *id*. ¶390 (JA0194).

In structuring its cross-media limits the Commission drew upon its "Diversity Index," a quantitative method the agency developed for "analyzing and measuring the availability of outlets that contribute to viewpoint diversity in local markets." Order ¶391 (JA0194). The Commission recognized that "that diversity is inherently subjective and cannot be reduced to scientific formula," and it emphasized that the cross-media limits "ultimately rest on our independent judgments about the kinds of markets that are most at-risk for viewpoint concentration, and the kinds of transactions that pose the greatest threat to diversity." *Id*. ¶435 (JA0209-10).

4. *The National Television Audience Reach Cap*. The Commission also revised its national television ownership rules to permit common ownership of stations reaching up to 45% (rather than 35%) of households across the country. Order App. H (JA0342-43) (amending 47 C.F.R. §73.3555(d)). The Commission found that such a national television ownership limit was necessary to "promote localism by preserving the bargaining power of affiliates and ensuring their ability

to select programming responsive to tastes and needs of their local communities." *Id*. ¶507 (JA0237).

"[M]indful of the predictive nature" of this "line-drawing exercise," Order ¶582 (JA0262-63), the Commission found that its "modest relaxation of the cap will help networks compete more effectively with cable and DBS operators," and would allow some of the largest group owners to "serv[e] additional communities with local news and public affairs programming that is of greater quantity and at least equal, if not superior, quality than that of affiliates," *id*. ¶501 (JA0234). In calculating the audience reach cap, the Commission retained its preexisting 50% discount for UHF stations, concluding that the "discount continues to be necessary to promote entry and competition among broadcast networks," *id*. ¶586 (JA0264), particularly in light of the diminished signal coverage and higher operating costs associated with UHF broadcasting, *id*. ¶¶587-88 (JA0264-65).

IV. Subsequent Developments.

On November 25, 2003, House and Senate conferees included language in the conference report for the omnibus appropriations bill that would amend the 1996 Act to reset the national television ownership cap at 39%. Consolidated Appropriations Act, 2004, H.R. 2673, §629. Such legislation, if enacted, would presumably supersede the 45% limit contained in the Commission's revised national television ownership rule and likely moot petitioners' challenges to that rule. As of the filing of this brief, however, the omnibus bill has not been enacted into law.

SUMMARY OF ARGUMENT

The FCC's revised broadcast ownership rules are a responsible exercise of the agency's expansive authority to regulate television and radio broadcasting in the public interest. The revised rules advance three well-established goals: (1) promoting competition among broadcasters, (2) preserving a diversity of views in the media marketplace, and (3) ensuring that broadcast stations are responsive to the needs and interests of their local communities.

1. The Commission has long recognized its duty to ensure that its broadcast ownership rules continue to meet the needs of the modern media marketplace. Congress has also acted to ensure that the Commission's ownership rules continue to serve the public interest. In the 1996 Act, Congress updated a number of the Commission's ownership rules. In addition, section 202(h) of the 1996 Act instructed the Commission to review all of its ownership rules every two years to determine whether they are "necessary in the public interest," and to "repeal or modify" any rule the Commission determines "to be no longer in the public interest." After the Commission's first biennial ownership proceeding, the Commission's national and local television ownership rules were reviewed by the D.C. Circuit in the *Fox* and *Sinclair* cases. Both rules were remanded to the Commission for further consideration.

2. In the wake of *Fox* and *Sinclair*, and as part of the 2002 biennial ownership review, the Commission engaged in a lengthy and comprehensive reexamination of its broadcast ownership rules. At the end of that process, and on the basis of a voluminous record, the Commission issued a 256-page *Report and Order*

revising its broadcast ownership rules to create a modern framework that better serves the agency's competition, diversity, and localism goals in light of the abundance of voices in today's media marketplace.

The Commission's order accordingly amends its local television and radio ownership rules, replaces its cross-ownership rules with new "cross-media limits," and raises the national television ownership cap. The revised local television ownership limits permit a single entity to own two television stations in markets with more than 12 television stations, and three stations in markets with more than 18 television stations, thereby enabling station owners to take advantage of efficiencies that can permit stations to better serve the public. The revised local radio ownership rules amend the definition of local radio markets to rely on Arbitron Metro survey areas, thereby eliminating the fundamental anomalies that had beset the Commission's prior contour-overlap methodology.

In addition, the Commission replaced its ban on newspaper/broadcast cross-ownership with limits tailored to markets of varying sizes, thereby retaining a supplemental safeguard for diversity in those small and medium-size local markets in which it is needed. Lastly, the Commission raised its national television ownership audience reach limit by 10 percentage points, permitting common ownership of television stations reaching 45% of households nationwide, thereby balancing the benefits of allowing group owners to serve more communities against the need to maintain the balance of power between the networks and their affiliates to preserve localism.

3. The Commission's revised rules are a measured response to the substantial changes in the broadcast industry and the media marketplace in recent years. The rules both advance the Commission's traditional goals of promoting competition, diversity, and localism, and they fulfill the Commission's obligation to periodically review its rules to ensure that they continue to remain necessary in the public interest.

The Commission's revised rules do not, by any stretch of the imagination, "eviscerate" the system of media ownership regulation, as Prometheus contends. Prometheus Br. 18. While in some cases the Commission relaxed existing rules (for example, the local television ownership limits and the national audience reach cap), in others the Commission's changes have the effect of tightening existing rules (as with the Commission's choice of Arbitron radio market definitions). In every instance, however, the revised rules leave in place a comprehensive set of ownership limitations that continue to restrain multiple ownership of broadcast stations in local markets, regulate cross-media ownership, and cap the national reach of television station groups.

By the same token, the record did not compel the Commission to "relax" its ownership rules "further," or to "repeal them outright," as the industry petitioners contend. Fox Br. 15. As the Commission recognized, the abundance of media voices in today's information society has not yet eliminated the need for protections against undue domination of the media marketplace.

The particular limits contained in the revised ownership rules are the product of the Commission's expert judgment, founded on a voluminous record, and explained in detail in its Order. The Supreme Court has emphasized time and again that the Commission's power to adopt and revise broadcast ownership rules in the public interest is both wide-ranging and flexible. *See, e.g.*, *NCCB*, 436 U.S. at 794-95; *United States v. Storer Broad. Co.*, 351 U.S. at 203-05; *NBC*, 319 U.S. at 219-20. Moreover, in responding "to changed circumstances in the broadcasting industry," *NCCB*, 436 U.S. at 797, the Commission has considerable discretion to make predictive judgments, *id*. at 813-14, and to draw necessary lines, *id*. at 814. While the 1996 Act requires the Commission to review its rules biennially to ensure that they remain necessary in the "public interest," §202(h), it does not purport to change the nature of the public interest inquiry. In the end, because the Commission's order "was made upon findings supported by evidence, and pursuant to authority granted by Congress," *NBC*, 319 U.S. at 224, the petitions for review should be denied.

<u>STANDARD OF REVIEW</u>

FCC rules adopted or modified through the informal rulemaking procedures of the Administrative Procedure Act may be overturned only if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A); *New Jersey Coalition for Fair Broad. v. FCC*, 574 F.2d 1119, 1125 (3d Cir. 1978). The scope of review is "narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). "[A] reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute," *id.* at 41, and the agency's decision will be affirmed so long as it has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action," *id*. at 42. Moreover, where the agency's decision is "bound up with a record-based factual conclusion," it must be affirmed if it is supported by "substantial evidence." *Dickinson v. Zurko*, 527 U.S. 150, 164 (1999).

The 1934 Act grants "broad" and "expansive" powers to the Commission to allocate broadcast licenses in the "public interest, convenience and necessity." *FCC v. WNCN Listeners' Guild*, 450 U.S. 582, 594 (1981); *NCCB*, 436 U.S. at 795; *NBC*, 319 U.S. at 219. *See* 47 U.S.C. §§307(a), 309(a), 310(d). The 1934 Act's public interest standard is "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *WNCN*, 450 U.S. at 593 (1981) (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. at 138). The standard "leaves wide discretion and calls for imaginative interpretation." *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953). The Commission's broad authority means that "the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference," and "is not to be set aside" as long as its implementation of the public interest standard is "based on a rational weighing of competing policies." *WNCN*, 450 U.S. at 596.

Finally, where Commission decisions are "primarily of a judgmental or predictive nature," "complete factual support in the record . . . 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.'" *NCCB*, 436 U.S. at 813-14 (citation omitted). And "where issues involve 'elusive' and 'not easily defined' areas such as programming diversity in broadcasting," judicial review "is considerably more deferential, according broad leeway to the Commission's line-drawing determinations." *Sinclair*, 284 F.3d at 159.

ARGUMENT

I. THE FCC HAS AMPLE AUTHORITY TO ADJUST ITS OWNERSHIP RULES TO CHANGES IN THE MEDIA MARKETPLACE.

Section 202(h) of the 1996 Act requires the Commission to (1) review its ownership rules "biennially," (2) "determine whether any of such rules are necessary in the public interest as the result of competition," and (3) repeal or modify any regulation it determines to be no longer in the public interest." 110 Stat. 111-12.

By its terms, therefore, Section 202(h) requires the Commission to determine every two years whether its ownership rules are "necessary in the public interest," but to "repeal or modify" such a rule only if it determines that the rule is "no longer in the public interest."

Contrary to the television networks' contentions, Fox Br. 18, as well as those of Clear Channel, Clear Channel Br. 20-28, Section 202(h) does not impose a standard for retaining or modifying an ownership rule that is any higher than the standard for adopting such a rule in the first place. The word "necessary" appears regularly in delegations of Commission rulemaking power—s*ee, e.g.*, 47 U.S.C. §201(b) (Commission "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act"); 154(i) ("necessary in the execution of its functions"); 303(r) ("necessary to carry out the provisions of this Act")—yet it has never been thought that the Commission may adopt rules only if they are absolutely required, or otherwise indispensable, to its statutory mission. *See NCCB*, 436 U.S. at 796 (Commission's ownership regulations "fall within its statutory authority" so long as they "are not an unreasonable means for seeking to achieve . . . permissible public interest goals"). *See Cellular Telcomm. & Internet Ass'n v. FCC*, 330 F.3d 502, 509-12 (D.C. Cir. 2003) ("necessary" in § 10(a) of the 1934 Act does not mean "absolutely required"). *See also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414-15 (1819) (as used in the Necessary and Proper Clause, "necessary" means "convenient, or useful"); BLACK'S LAW DICT. 1052 (7th ed. 1999) ("necessary" often means "appropriate and well adapted to fulfilling an objective").

In addition, section 202(h) requires the agency to repeal or modify those rules that are "no longer in the public interest." The "no longer" phrase, followed by a repetition of the Communications Act's well-settled standard for promulgating rules, compels reference to that standard as traditionally understood. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (when Congress borrows language from an earlier enactment on the same subject, it presumably intends the same meaning).

The Commission's interpretation of section 11 of the 1934 Act, which contains a similar biennial review requirement, is instructive.[5] The Commission has made clear that Section 11's biennial review requirement obligates it "to reevaluate rules in light of current competitive market conditions to see that the conclusion . . . reached in adopting the rule—that it was needed to further the public interest—remains valid." *2002 Biennial Regulatory Review*, 18 FCC Rcd 4726, 4735 ¶21 (2003), *petition for review filed sub nom*. *Verizon Tel. Cos. v. FCC*, No. 03-1080 (D.C. Cir.) (argument scheduled Dec. 15, 2003). But the Commission has flatly rejected contentions "that the standard in Section 11 is more stringent than the 'plain public interest' standard found in other parts of the Communications Act," and "the notion that to retain a rule, [it] must conclude that [the rule] is 'essential' or 'indispensable.'" *Id.* at 4735 ¶21, 22. *See also id*. at 4730 ¶13. In discussing the Commission's obligations under Section 202(h), the *Report and Order* specifically cross-refers to the Commission's prior interpretation of Section 11. Order ¶11 n.15 (JA0042).

As the Commission has recognized, it makes little sense to conclude that Congress sought to impose a higher standard for retaining a rule than for adopting the rule in the first place. Such a scheme would permit the adoption of an owner-

[5] Section 11 requires the Commission to review every two years all regulations "that apply to the operation or activities of any provider of telecommunications service," determine "whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service," and "repeal or modify any regulation it determines to be no longer necessary in the public interest." 47 U.S.C. §161.

ship rule designed to foster competition, diversity, or localism, but would then force the Commission to modify or repeal the rule in the following biennial review unless the agency could show that the rule was indispensable to those goals. (At which point the Commission would presumably be empowered to re-adopt the same rule, only to be compelled to repeal it at the next biennial, and so on.) There is no reason to think "that Congress intended either to modify fundamentally the statutory public interest standard (without any legislative history to that effect) or to create [such] a dysfunctional scheme." *2002 Biennial Review*, 18 FCC Rcd at 4731 ¶14 n.21. It is well settled that when a statute is ambiguous, the courts "must defer to a reasonable construction by the agency charged with its implementation." *Barnhart v. Thomas*, 124 S. Ct. 376, 380 (2003); *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

Although the D.C. Circuit in *Fox* initially stated that Section 202(h) provides that "a regulation should be retained only insofar as it is necessary in, not merely, consonant with, the public interest," 280 F.3d at 1050, the court deleted that language on rehearing "in order to leave this question open." 293 F.3d at 540. The *Fox* court also stated that Section 202(h) "carries with it a presumption in favor of repealing or modifying the ownership rules," 280 F.3d at 1048, but that is true, if at all, only insofar as the provision "appears to upend the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule." Order ¶11 (JA0041-42).

In sum, Section 202 (h) embodies Congress' judgment that the passage of time in a highly dynamic industry such as broadcasting may cause ownership rules to become outdated. Section 202(h) therefore establishes a structure for periodic review to ensure that the Commission's ownership rules continue to match market realities.[6]

Nor does the First Amendment require heightened scrutiny of the Commission's media ownership rules, as the television networks contend (Fox Br. 20-21).[7] To be sure, "First Amendment interests are implicated by any regulation of media outlets, including broadcast media"; accordingly, the Commission sought in its order "to be sensitive to those interests and to minimize the impact of [its] rules on the right of speakers to disseminate a message." Order ¶16 (JA0043-44).

But it has long been settled that the "right of free speech does not include . . . the right to use the facilities of radio without a license," and that a denial of a station license under the public interest standard "is not a denial of free speech." *NBC*, 319 U.S. at 227. Because of interference and because the finite

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[6] The networks contend that because the Order results from the Commission's review of two rules that were remanded in *Fox* and *Sinclair*, those decisions are now "law of the case." Fox Br. 19. Though there is nothing in the Commission's order that is inconsistent with *Sinclair* or *Fox* (as modified on rehearing), those decisions are not the law of <u>this</u> case, which involves petitions for review of the Commission's comprehensive re-examination of a much larger set of its broadcast ownership rules, in which a different set of parties participated, a different record was compiled, and a different result reached. *See, e.g.*, *Hamilton v. Leavy*, 322 F.3d 776, 787 (3d Cir. 2003) (law of the case doctrine applies only to the "same litigation").

[7] Despite their contention that the *Fox* decision is law of the case, the networks dismiss the significance of the *Fox* court's First Amendment holding, which (the networks concede) flatly "reject[ed]" this argument. Fox Br. 21 n.23. *See Fox*, 280 F.3d at 1045-46.

number of radio frequencies "is far exceeded by the number of persons wishing to broadcast to the public . . . [g]overnment allocation and regulation of broadcast frequencies are essential." *NCCB*, 436 U.S. at 799. Thus, so long as the Commission's "regulations are a reasonable means of promoting the public interest" under the 1934 Act, "they do not violate the First Amendment rights of those who will be denied broadcast licenses pursuant to them." *Id*. at 802. [8]

In other words, the courts apply a "rational basis standard of review" under the First Amendment to the Commission's ownership rules. *Sinclair*, 284 F.3d at 167-68. *Accord Fox*, 280 F.3d at 1045-46. Under that standard, "the only question" is whether the Commission's rules are "rationally connected" to the public interest goals that it has identified under the 1934 Act. *Sinclair*, 284 F.3d at 168. Thus, as far as the Commission's broadcast ownership rules are concerned, the First Amendment does not mandate a standard of review any stricter than the traditional—and highly deferential—standard applied under the APA.

II. THE COMMISSION REASONABLY REVISED ITS LOCAL TELEVISION OWNERSHIP LIMITS TO TAKE ACCOUNT OF THE EFFICIENCIES OF COMMON OWNERSHIP.

A. *Background.* Adopted in 1964, the Commission's "duopoly" rule prohibited ownership or control of television stations with overlapping Grade B

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[8] *FCC v. League of Women Voters,* 468 U.S. 364 (1984), which invalidated a prohibition upon editorializing by government-funded noncommercial broadcasters, is not to the contrary. As the *Fox* court explained, the ban at issue in *League of Women Voters* was a "content-based regulation" of speech, while the FCC's ownership rules are "regulation[s] of industry structure" which the Supreme Court has concluded are content-neutral. 280 F.3d at 1046 (citing *NCCB* and *NBC*).

signal contours. 47 C.F.R. §73.3555(b) (1998). Section 202(c)(2) of the 1996 Act directed the Commission to conduct a rulemaking "to retain, modify, or eliminate" its local television ownership limitations. 110 Stat. 111. Pursuant to that legislative instruction, the Commission adopted rules permitting common ownership of two television stations even if their Grade B signal contours overlapped, so long as (1) one of the two stations is not ranked among the top four, and (2) at least eight independently owned full-power commercial and noncommercial stations remain in the market after the merger. 47 C.F.R. §73.3555(b) (2002). As noted, the Commission's local television ownership rules were reviewed in *Sinclair*, 284 F.3d 148, which found that the Commission had "adequately explained" how its local television rule "furthers diversity at the local level and is necessary in the 'public interest' under section 202(h)," *id.* at 160. However, the court held that the Commission had "failed to demonstrate" why it was necessary to exclude non-broadcast media from the ownership rule's eight-voices test, *id*. at 165, and therefore remanded the rule to the Commission for further consideration, *id*. at 169.

B. *The Report and Order*. In the *Report and Order*, the Commission modified the local television ownership rule. The modified rule permits common ownership of up to two commercial television stations in markets that have "17 or fewer" full-power commercial and noncommercial television stations," and up to three commercial stations in markets that have "18 or more" stations." Order ¶186 (JA0110). In addition, the Commission retained the top four ranked limitation; the rule thus continues to prohibit ownership of more than one television station in any market with fewer than five television stations. *Id*.

In relaxing its local television rule, the Commission found that common ownership of television stations in local markets can "result in consumer welfare enhancing efficiencies." Order ¶147 (JA0092-93). The Commission explained that "common ownership of broadcast stations in a local market can facilitate . . . cost savings . . . by eliminat[ing] redundant studio and office space, equipment and personnel, and increase[ing] opportunities for cross-promotion and counter-programming." *Id*. Not only can these efficiencies "enhance the ability of broadcast television to compete with cable and DBS in more markets," *id*., but they may also "spur the transition to digital television," *id*. ¶148 (JA0093).[9]

The Commission also found that common ownership does not "adversely affect the types or characteristics of the programming offered by the merged entities to the detriment of viewers." *Id.* ¶150 (JA0093-94). On the contrary, "[a]udience share data . . . reveals that common ownership of two broadcast television stations has generally improved audience ratings," which "suggests that more viewers prefer the post-merger programming." *Id*. *See also id*. ¶194 (JA0112-13).

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[9] Recognizing that digital broadcasting promises both "dramatically enhanced sound and picture quality" and "more efficient use of the scarce electronic spectrum," Congress has set a target date of December 31, 2006 for broadcast stations to convert to digital programming. *See Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 293-94 (D.C. Cir. 2003); 47 U.S.C. §309(j)(14). The Commission noted that there was evidence that "stations that are commonly owned and stations involved in joint operating arrangements are further along in the DTV transition." Order ¶149 (JA0093).

Equally important, the Commission found that same-market television combinations promote the production of local news and programming. After examining empirical studies, *id.* ¶159 (JA0098), as well as "persuasive anecdotal evidence," *id*. ¶160 (JA0098-99), the Commission concluded that "owners/operators of same-market combinations have the ability and incentive to offer more programming responsive to the needs and interests of their communities and that, in many cases, that is what they do." *Id*. ¶164 (JA0101). *See id*. ¶159 (JA0098) (describing a study submitted by Fox that found that "stations that are part of a commonly owned local station group or [local marketing agreement] are significantly more likely to carry local news than other stations, even controlling for other factors").

The Commission found that these benefits could be obtained without unduly undermining its competition or diversity goals.[10] The Commission emphasized that its modified ownership rules "will ensure that there are least six firms" in "all markets with 12 or more television stations." *Id*. ¶207 (JA0119). And while the rules would allow for fewer firms in smaller markets, the Commission explained that it would "permit this additional concentration because the economics of local broadcast stations justify graduated increases in market concentration as markets

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[10] While the Commission observed that television stations compete in at least three different markets—the delivered video programming (DVP), advertising, and program production markets—the Commission focused on competition for viewers in the DVP market. Order ¶141 (JA0090). The Commission observed that antitrust review of broadcast mergers conducted by the Department of Justice and the Federal Trade Commission focuses on and provides an avenue for relief for anticompetitive effects in the advertising market. *Id.* ¶339 (JA0171).

get smaller." *Id*. ¶201 (JA0116-17) (noting evidence that "owners of television stations in small and mid-sized markets are experiencing greater competitive difficulty than stations in larger markets").[11]

The Commission also agreed that "television broadcast stations are not the only media outlets contributing to viewpoint diversity in local markets," and that there are "countless other sources of news and information available to the public" in the "delivered video market alone." Order ¶178 (JA0107). *See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Ninth Annual Report, 17 FCC Rcd 26901, 26909-52 ¶¶15-111 (2002) (cable, satellite, home video, Internet broadband). Because the local markets "for viewpoint and the expression of ideas" are thus "much broader than the economic markets . . . in which broadcast stations compete," ownership limits "designed to protect competition in local delivered video markets necessarily also protect diversity; indeed they are more protective of competition in the broader marketplace of ideas given the difference in market definition." Order ¶178 (JA0107). By setting its local television ownership limits "only so high as necessary to protect competition in the delivered video market," the Commission

[11] Under the DOJ/FTC Merger Guidelines, a Herfindahl-Hirschman Index (HHI) level of between 1000 and 1800 is considered "moderate concentration" and "[t]he 1800 threshold corresponds to having six equal-sized competitors in a given market." Order ¶192 (JA0112). *See* 57 Fed. Reg. 41552 (1992). The Commission chose this threshold rather than the lower limit of 1000 in order to account for the competitive pressures exerted on broadcast television stations by the cable networks. Order ¶192 (JA0112).

explained that they would "achieve necessary protection for diversity purposes without unduly limiting speech." *Id.* ¶180 (JA0107).

The Commission determined, however, that its prohibition on a merger among the top four-ranked stations in a market remained a necessary aspect of its local television ownership rules. Order ¶186 (JA0110). As the Commission explained, "in local markets, there is a general separation between the audience shares of the top four-ranked stations and the audience shares of other stations in the market." *Id*. ¶195 (JA0113-14).[12] Mergers between any of the top four stations thus "would . . . often result in a single firm with a significantly larger market share than the others," *id*. ¶196 (JA0114), and "also would generally lead to large increases in the HHI," *id*. ¶197 (JA0114-15).

Conversely, the Commission determined, "combinations involving top four-ranked stations are less likely to yield public interest benefits such as new or expanded local news programming," since "such stations are already originating local news." Order ¶198 (JA0115) (citing evidence that 85% of the top four-ranked stations offer local news, while only 19% of stations outside the top four do). The Commission also found that combinations among top four-ranked

[12] The Commission reviewed "the audience shares of stations in every market with five or more commercial television stations" and found that "in two-thirds of the markets, the fourth-ranked station was at least two percentage points ahead of the fifth-ranked station." Order ¶195 (JA0113-14). As the Commission found, "network programming . . . explains a significant portion of continued market leadership of the top four local stations in virtually all local markets." *Id*. ¶196 (JA0114). "[T]he continued need for the Dual Network rule to protect competition at the network level" likewise supported its "decision to separate ownership of local stations carrying the programming of the Big Four networks." *Id*.

stations "are less likely to provide public interest benefits in the form of new DTV service," since "the financial position of top four-ranked stations makes the transition to DTV more affordable"; as a result, "[t]op four-ranked stations also are more likely to have made the transition to DTV than other stations." *Id*. ¶199 (JA0115-16).[13]

C. *The Petitions for Review*. Prometheus argues that the Commission's findings that same-market television combinations can promote localism and result in efficiencies lack substantial record support. Prometheus Br. 51, 55-56. But Prometheus acknowledges that "industry commenters" submitted evidence "that allowing local consolidation will give stations greater resources to provide more or better quality news." Prometheus Br. 51. *See* Order ¶¶159-61 (JA0098-99). Indeed, the Commission specifically found on the basis of such evidence that in many cases same-market combinations "offer more programming responsive to the needs and interests of their communities." *Id*. ¶164 (JA0101). In addition, Prometheus ignores the record evidence that cost savings can result from common ownership, *see id*. ¶147 (JA0092-93); *see also id*. ¶194 (JA0112-13), and that same-market combinations have "a welfare-enhancing effect for consumers," as demonstrated by post-merger increases in viewership, *id*. ¶194 (JA0112-13); *see*

[13] In addition, the Commission explained, "[p]ermitting combinations among the top four would reduce incentives to improve programming that appeals to mass audiences," since "top four-ranked stations typically offer programming designed to attract mass audiences," but "[w]hen formerly strong rivals merge, they have incentives to coordinate their programming to minimize competition between the merged stations." Order ¶200 (JA0116).

also id. ¶150 (JA0093-94). The evidence supporting the Commission's conclusion that relaxing the local television ownership rule would promote localism and result in efficiencies thus was by any measure substantial.

Prometheus also contends that, while "agency line-drawing deserves some deference," Prometheus Br. 53, the Commission's numerical limits for television ownership allow for excessive market concentration. Prometheus Br. 52-55. But the ownership rules ensure that in markets with 12 or more stations, there will be "at least six" competing firms, Order ¶207 (JA0119), and that "six equal-sized competitors" in a market corresponds to an HHI of 1800, which the DOJ/FTC Merger Guidelines consider only "moderately concentrated," even putting aside "the competitive pressures exerted by the cable networks," *id*. ¶192 (JA0112). Prometheus argues that the Commission's assumption of "equal-share TV stations . . . ignor[es] reality," because "[t]elevision market shares vary widely." Prometheus Br. 52-53. But as the Commission explained, in the market for delivered video programming, "a firm's market share is more fluid and subject to change than in other industries." Order ¶193 (JA0112). Over the life of a firm's investment in a station and the duration of its license, the market share of all stations in the market can shift substantially. Thus, in constructing its rules, the Commission focused on "a firm's 'capacity' to deliver programming"—*i.e.*, "the number of licenses that a firm controls in a market." *Id.*. In light of the particular characteristics of the video programming market, the Commission's reliance on the number of competitors permitted by its ownership rules, rather than their day-to-day market share, was entirely justified.[14]

Finally, this Court should dismiss out of hand Prometheus' contention that the Commission failed to give adequate notice regarding (1) its decision to permit ownership of three television stations in the largest markets, and (2) its modification of the standard for waiver of the television ownership rule. *See* Prometheus Br. 56-58. The APA simply requires agencies to publish a notice of proposed rulemaking that contains "either the terms or substance of the proposed rule or *a description of the subjects and issues involved*." 5 U.S.C. §553(b) (emphasis added). *See James v. Quinlan*, 866 F.2d 627, 631 (3d Cir.), *cert. denied*, 493 U.S. 870 (1989). The *2002 Biennial NPRM* emphasized that the Commission was "initiat[ing] a comprehensive review" of its media ownership rules, ¶1 (JA3451), and that the Commission was embarking on an overall "reassessment" of its "broadcast ownership regulatory framework," ¶5 (JA3452). Moreover, the *NPRM* specifically apprised parties that any reevaluation of the local television ownership rule would take account of the D.C. Circuit's remand order in *Sinclair*, which left it to the Commission to reexamine not only its voice test, "but also the numerical

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[14] Prometheus erroneously maintains that the Commission's use of bright-line rules "prohibits citizens . . . from challenging a transaction that contravenes the public interest." Prometheus Br. 63. But 47 U.S.C. §309(d) provides that "any party in interest" may file a "petition to deny" an application to obtain, renew or modify a broadcast station license on the ground that grant of the application would be inconsistent with the public interest. The Order acknowledges the Commission's "discretion to review particular cases" as well as its specific obligation to entertain "petitions to deny." Order ¶85 (JA0064).

limit, given that there is a relationship between the definition of voices and the choice of a numerical limit." *Id*. (citing *Sinclair*, 284 F.3d at 162). Indeed, the Commission specifically asked for comment on any "different economic incentives" relating to diversity in newscasting that might exist "among stand-alone stations, duopolies, or "<u>triopolies</u>." *Id*. ¶80 (JA3476-77) (emphasis added). There is thus no basis for Prometheus' contention that "[t]he public did not and could not fairly have anticipated that the FCC would allow triopolies." Prometheus Br. 57. The *2002 Biennial NPRM* also asked for comment on the advantages or disadvantages of a "case-by-case approach," ¶106 (JA3485), an approach to which waiver standards are obviously relevant.

In contrast to Prometheus, the network petitioners recognize that the Commission made only "a few small changes" to its local television ownership rules. Fox. Br. 46. But they contend that the Commission failed to demonstrate that local television ownership limits are necessary at all. *Id*. at 46-52. The networks' arguments fly in the face of the Commission's long-settled authority to impose local television ownership rules in order to "assure fair opportunity for open competition in the use of broadcasting facilities." *Storer Broad. Co.*, 351 U.S. at 203.

The networks contend that the local ownership rules are unjustified because they simply "duplicate[]" the antitrust enforcement efforts of the Department of Justice and the Federal Trade Commission. Fox Br. 47. But "while the Commission does not have power to enforce the antitrust laws as such, it is permitted to take antitrust policies into account in making licensing decisions pursuant to the

[1934 Act's] public interest standard." *NCCB*, 436 U.S. at 795. *See United States v. Radio Corp. of Am.*, 358 U.S. 334, 351 (1959); *NBC*, 319 U.S. at 222-24. The 1996 Act does nothing to remove "considerations of competition" from "the proper purview of the Commission." *Sinclair*, 284 F.3d at 161. *See generally* Order ¶¶53-57 (JA0054-56).[15] In any event, the networks ignore the fact that the Commission's revised local television ownership rules not only promote competition, but diversity as well, since "ensuring that several competitors remain within each of the radio and television services" guarantees that "a number of independent outlets for viewpoint will remain in every local market." *Id*. ¶129 (JA0085-86).

The networks contend that license caps are "an irrational solution to any putative market power problem," because licenses are not a logical measure of a broadcast firm's market power and market concentration depends on overall market structure. Fox Br. 50-51. But, as we have explained, because broadcast audience ratings depend on the popularity of programming subject to "constant product innovation," market shares in broadcasting are "more fluid" than in other industries. Order ¶193 (JA0112). Given that television ratings change over time, the Commission reasonably decided to focus on the capacity to deliver programming—*i.e.*, the number of station licenses—in evaluating competitive conditions in

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[15] It is well-established that the Commission's regulation of broadcast license ownership confers no antitrust immunity. *RCA*, 358 U.S. at 346. *See also* 1996 Act, §601(b) (the 1996 Act does not "modify, impair, or supersede the applicability of any of the antitrust laws"); Order ¶¶208, 339 (JA0019, 0171-72). The Department of Justice reviews broadcast mergers under the antitrust laws. The standards of the antitrust laws are distinct from those of the Communications Act, and their application may lead to different conclusions.

local television markets. *Id*. Moreover, the local television ownership limits also serve the Commission's diversity goals, *Id*. ¶178 (JA0107), and license caps are particularly suited to ensuring that a "number of independent outlets for viewpoint will remain in every local market." *Id*. ¶129 (JA0085-86).[16]

The networks' alternative challenge to the specific numerical limits contained in the Commission's local television ownership rule, Fox. Br. 56-58, fails to overcome the "broad leeway" afforded to the Commission's "line-drawing determinations" in this area. *See Sinclair*, 284 F.3d at 159. The networks contend that the local television ownership limits "inexplicably diverge" from the local radio ownership limits. Fox Br. 57. But both the television and radio rules generally require at least five or six participants in most markets. And there is no reason for the Commission's local television ownership limits to mirror precisely its local radio ownership limits, particularly given that there are substantially more radio stations than television stations in any given community.

Finally, NAB contends that the Commission's decision to retain the top-four ownership limitation was arbitrary and capricious because to the extent the limitation applies, it prevents viewers "from realizing the benefits of consolidation."

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[16] The networks also contend that the Commission erred in focusing on market concentration, since "concentration without more" may not result in market power. Fox Br. 51. But in crafting its rules to promote competition in broadcasting, it is entirely appropriate to focus on market concentration in the first instance because "a merger is unlikely to create or enhance market power or to facilitate its exercise unless it significantly increases market concentration or results in a concentrated market." DOJ/FTC Merger Guidelines, §1.0. *See* http://www.usdoj.gov/atr/public/guidelines/horiz_book/10.html (December 8, 2003).

NAB Br. 44. But the Commission explained that "combinations involving top four-ranked stations are less likely to yield public interest benefits" (since, for example, "such stations generally are already originating local news," Order ¶198 (JA0115)), and "are more likely to have made the transition to DTV than other stations," *id*. ¶199 (JA0115-16). Equally important, because of the generally dominant market position of the top four stations, *see id*. ¶¶195-96 (JA0113-14), as well as the fact that "[t]he strongest rival to a top four-ranked station is another top four-ranked station," *id*. ¶200 (JA0116), the Commission found that mergers among top four-ranked stations "are likely to create or enhance market power or to facilitate its exercise," *id*. ¶197 (JA0114-15). NAB's criticisms of the evidence underlying these conclusions (NAB Br. 46-50) do not come close to showing that they are without substantial support in the record.[17]

In any event, as NAB acknowledges (NAB Br. 51), the Commission took account of those instances in which application of the top four restriction would

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[17] NAB contends that the top four restrictions fails to account for the presence of cable television networks as broadcast station competitors. NAB Br. 55. On the contrary, the Commission "recognize[d] the importance of competition from cable networks in the market for [delivered video programming]." Order ¶191 (JA0111-12). But the Commission explained that cable networks offer "almost exclusively . . . national or broadly defined regional programming," and thus "the profit-maximizing decision of a national cable programmer reflect conditions in the national market," and are unlikely to be affected by "a change in concentration in any single local market." *Id*. *Accord id.* ¶145 (JA0092). Nevertheless, in evaluating competition in the market for purposes of identifying the appropriate numerical ownership limits, the Commission chose an HHI of 1800—the upper level of moderate concentration—because of "the competitive pressures exerted by the cable networks." *Id*. ¶192 (JA0112).

prevent "marginal . . . stations from effectively serving the needs of their communities" by agreeing to consider waiving the top four restriction "in markets with 11 or fewer television stations." Order ¶227 (JA0127).[18] NAB contends that the Commission "failed to explain" its choice of 11 as the "appropriate cut-off." NAB Br. 53. But the Commission specifically stated that its decision to draw the line at "markets with 11 or fewer television stations" was based on its determination that it was in those markets that "the economics of broadcast television justify relatively greater levels of station consolidation." Order ¶227 (JA0127-28). *See id*. ¶201 (JA0116-17) ("small market stations are competing for disproportionately smaller revenues").

Intervenor Minority Media and Telecommunications Council *et al.* (MMTC) challenges the Commission's decision to modify its standards for waiving the local television ownership rules in the case of proposed combinations involving stations that are "failed, failing or unbuilt" by removing the requirement that the waiver applicant show that it has tried and failed to obtain an out-of-market buyer for its station. MMTC Br. at 34-38. In addition, MMTC contends that the Commission

[18] Contrary to NAB's contention, the fact that the Commission did not extend its expanded top four waiver policy to larger markets does not mean that the Commission has "announced a blanket refusal to consider waivers" in those markets, NAB Br. 53. The Commission has expressly acknowledged its duty to give a "hard look . . . to waiver requests," Order ¶85 (JA0064), *see* 47 C.F.R. §1.3 (authorizing waiver of Commission rules "for good cause shown"), and has made clear that, among other situations, it will entertain waivers of its local television ownership rules "where a proposed combination involves at least one station that is failed, failing, or unbuilt." Order ¶221 (JA0125).

failed meaningfully to address proposals aimed at preserving broadcast ownership by disadvantaged and minority businesses. *Id*. at 38-48.

As a threshold matter, the Court lacks jurisdiction to consider MMTC's arguments, because the same parties have petitioned the Commission for reconsideration of the Order on the same grounds. *West Penn Power Co. v. EPA*, 860 F.2d 581, 587 (3d Cir. 1989); *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1040 (D.C. Cir. 1997). *See* Petition for Reconsideration, FCC Docket 02-277, et al., filed by Diversity and Competition Supporters (Sept. 4, 2003).[19] Moreover, MMTC seeks improperly to expand the issues in these cases beyond the issues presented by the petitioners. While Prometheus briefly complains of the Commission's revised waiver policy, Prometheus Br. 57-58, no petitioner has addressed the Commission's actions with respect to MMTC's proposals regarding minority ownership of broadcast stations. "It is a general rule that an intervenor may argue only the issues raised by the principal parties and may not enlarge those issues." *Southwestern Penn. Growth Alliance v. Browner*, 121 F.3d 106, 121 (3d Cir. 1997). There are no special circumstances here that would warrant the Court considering the issues raised only by MMTC.

Moreover, there is no basis for MMTC's contention (MMTC Br. 34) that the Commission failed to provide adequate notice of its decision to revise the failing station waiver policy. MMTC concedes (*id*. at 34-35) that the Commission was simply required by the APA to fairly apprise parties of the "subjects and issues

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[19] Diversity and Competition Supporters comprise the same parties as are listed as intervenors filing the MMTC brief. *See* Pet. Recon. at Annex 1.

involved" in its rulemaking. *See* 5 U.S.C. § 553(b). The *2002 Biennial NPRM* invited comment on the local television ownership rule, raised the option of "case-by-case determinations of multiple ownership" and emphasized the possibility that the Commission might "revis[e]" (*2002 Biennial NPRM* ¶ 75 (JA3475)) or "modify" (*id.* ¶ 97 (JA3482)), the local television rule. The *NPRM* was fully adequate to provide parties notice that all parts of the rule, including the standard for waiving the rule with respect to failing stations, were subject to reexamination.[20]

On the merits, the Commission's decision to revise the failing station waiver policy to eliminate a showing that the waiver applicant had tried and failed to secure an out-of-market buyer was not arbitrary and capricious. As the Commission explained, there is little point to requiring such a showing, because "the efficiencies associated with operation of two same-market stations" will almost always "result in the buyer being the owner of another station in that market." Order ¶225 (JA0127). Because a "failed, failing, or unbuilt station" cannot contribute to localism, competition, or diversity, the Commission reasonably determined that granting a waiver in such circumstances would serve its public interest goals by preventing the licensee's assets from "exit[ing] the market." *Id.* ¶226 (JA0127).

Finally, there is no basis for MMTC's contention that the Commission failed meaningfully to address its proposals for initiatives to advance minority ownership

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[20] In addition, the fact that a number of parties submitted comments on the failing station waiver policy is ample illustration that notice here was adequate. *See* Order ¶¶222-23 nn.478-88 (JA0126-27).

of broadcast stations. The Commission specifically acknowledged that MMTC's comments contained "many creative proposals to advance minority and female ownership," but that "a more thorough exploration of these issues" was warranted. Order ¶50 (JA0053-54). The Commission therefore announced its intention to issue a Notice of Proposed Rulemaking to address these issues, and stated that it would incorporate the comments already received into that proceeding. *Id*. ¶51 (JA0054). *See also id*. ¶52 (JA0054) (referring proposal for "equal transactional opportunity" rule to Advisory Committee on Diversity).[21]

III. THE COMMISSION REASONABLY REVISED THE LOCAL RADIO OWNERSHIP RULES.

A. *Background.* For many years the Commission limited local radio ownership to no more than one AM and FM station with overlapping signal contours. *See, e.g.*, *Amendment of Section 73.3555 of the Commission's Rules*, 4 FCC Rcd 1723 ¶¶5-6 (1989). In "view of the increasingly fragmented nature of the local radio marketplace, the economic strain experienced by many . . . radio broadcasters, and the sizeable savings that can stem from joint operation of same market radio facilities," the Commission in 1992 relaxed its rules to permit common ownership of radio stations in line with the size of various local market "tiers." *Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2776 ¶40 (1992), *on reconsideration*, 7 FCC Rcd 6387 (1992).

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[21] Finally, in response to MMTC's suggestion, the Commission adopted a limited exception to allow the sale of grandfathered station combinations to eligible small entities. *Id.* ¶51 (JA0054). That provision is challenged by Clear Channel. *See* Pt. III.C.2. *infra*.

The Commission originally considered using the Arbitron rating service (where available) to define radio markets and the number of stations in the market. *Id*. at 2778 ¶45. Upon reconsideration, however, the agency decided to define radio markets and the number of stations in the market based on signal contour overlap. *Revision of Radio Rules and Policies*, 7 FCC Rcd 6387, 6395 ¶39 (1992).

The 1996 Act directed the Commission to revise its local radio ownership rules by adjusting both the market tiers and the numerical limits. Specifically, section 202(b)(1) of the 1996 Act required the Commission to provide that:

> (A) in a radio market with 45 or more commercial radio stations, a party may own, operate or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);
>
> (B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);
>
> (C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and
>
> (D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate or control more than 50 percent of the stations in such market.

Nothing in the 1996 Act addressed the methodology for defining radio markets or identifying the number of radio stations in a market for purposes of the rules.

The Commission duly implemented the congressional directive. *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996*

(Broadcast Radio Ownership), 11 FCC Rcd 12368, 12369 ¶3 (1996). In doing so, it continued to define radio markets and identify the number of stations in the market by reference to the signal contour overlap of full-power commercial stations. *Id*. at 12370 ¶4.

Although the Commission decided against making any changes to its local radio ownership rule in the 1998 Biennial Review, *see* 15 FCC Rcd at 11091 ¶60, it expressed concern that its method of defining markets and identifying stations in the market had led to "unrealistic results," and was both "illogical" and "contrary to Congress' intent." *Id*. at 11093 ¶65, 11094 ¶67. The Commission therefore instituted a proceeding seeking comment on whether and how it should modify the way in which it "determine[s] the dimensions of radio markets and counts the number of stations in them." *Definition of Radio Markets*, 15 FCC Rcd 25077 ¶1 (2001) (JA2410). This was followed by a second notice instituting a broader examination of possible changes to the Commission's radio ownership rules "to reflect the current radio marketplace." *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861 ¶1 (2001) (JA2487). These two proceedings were incorporated in the 2002 Biennial Review. Order ¶1 (JA0039).

B. *The Report and Order*. In the *Report* and *Order*, the Commission concluded that the numerical limits in the local radio ownership rule should be retained, but that it should revise the "contour-overlap methodology" it used to define radio markets and to identify stations in the market, because that methodology was "flawed as a means to protect competition." Order ¶239 (JA0131).

To more accurately measure competition in the local radio marketplace, the Commission modified its local radio ownership rule to replace its contour-overlap methodology with the market definition employed by the Arbitron radio rating service for metropolitan markets ("Arbitron Metros"). *Id*. ¶239 (JA0131). In addition, the Commission revised its rule to count noncommercial stations as part of the local radio market in order to account for the fact that, while such stations are not part of the radio advertising market, they exert competitive pressures in the listening and program production market. *Id*.

The Commission revised its approach to radio market definition after examining in detail the inadequacies of its contour-overlap methodology. As the Commission explained, under that methodology, the Commission first considered "whether an area of overlap exists among the principal community contours of all of the stations proposed to be commonly owned." Order ¶250 (JA0136). If there was no such overlap, the stations involved would be "presumed to be in separate radio markets." *Id*. If there was an overlap, however, the ownership rule would apply and the Commission would be required to determine whether the proposed radio station combination complied with the applicable limit. *Id*.

In performing that inquiry, the Commission determined "how many stations a party would own in the relevant radio market." Order ¶251 (JA0136). It did so by identifying those stations whose principal community contours "mutually overlap," and deeming those stations to be in the same market, and to be the only stations commonly owned in that market. *Id*. The Commission next determined the size of the market by adding to the mutually overlapping stations "every other commercial radio station[] whose principal community contour overlaps the principal community contour of at least one" of the mutually overlapping stations. *Id*. ¶252 (JA0136).

As the Commission explained, the contour-overlap methodology had a significant flaw, known as the "Pine Bluff problem," or the "'numerator-denominator' inconsistency." Order ¶253 (JA0136-37). *See Application of Pine Bluff Radio, Inc.*, 14 FCC Rcd 6594 (1999). That anomaly arises from the fact that the contour-overlap rules deem the common owner to own only those stations that have mutually overlapping contours, but calculates the size of the relevant market by including any station whose contour overlaps <u>at least one</u> of the mutually overlapping stations (even if that station is also owned by the same party). Order ¶253 (JA0136-37). The rules thus treat some commonly owned stations as being in the market for purposes of calculating the size of the market, but not for purposes of determining how many stations the common owner owns in the market. *Id*. *See* Order App. F (JA0326)

As the Commission explained, this anomaly permits parties to "circumvent" the local radio ownership limits because it allows a party to own radio stations in the relevant radio market "without having those stations count against the party's ownership limit in that market." Order ¶254 (JA0137). Indeed, the Commission noted, under the rule, a party might in certain circumstances "be able to use its own radio stations to increase the size of the radio market and thereby 'bump' itself into a higher ownership tier." *Id*. The contour-overlap methodology also "encourages consolidation of powerful radio stations," since "stations with larger signal contours are more likely to create larger radio markets," making it "more likely that a party would be able to acquire additional radio stations in that market." *Id*. ¶257 (JA0138).

The Commission also found that by counting in the market radio stations simply because their signals overlap with one of the signals of the stations that are proposed to be combined, the contour-overlap methodology "often does not reflect the area of true competition among radio stations." Order ¶258 (JA0138). In addition, because the methodology does not accurately "take ownership into account," it makes it difficult to measure levels of market concentration. *Id*. ¶259 (JA0139). Finally, "[c]onsistency suffers" because "every combination operates in a radio market that is unique to that combination." *Id*. ¶260 (JA0139).

The Commission determined that it could not fix its contour-overlap methodology "merely by excluding commonly owned stations from the denominator" (the size of the market) "or including those stations in the numerator" (the number of stations that are commonly owned). Order ¶255 (JA0137). Excluding commonly owned stations from the denominator would mean that the Commission's calculation of the size of the market would depend upon station ownership, "a distinction that would be both unprincipled and unprecedented in the history of competition analysis." *Id*. On the other hand, including in the numerator commonly owned stations represented in the denominator might "overly inflate[]" ownership levels by including "outlying stations" that are "far from the area of concentration." *Id*.

The flaws in the contour-overlap methodology led the Commission to revise its local radio market definition. Order ¶256 (JA0137). Concluding that "a local radio market that is objectively determined, *i.e.*, that is independent of the radio stations involved in a particular acquisition, presents the most rational basis for defining radio markets," *id*. ¶273 (JA0143), the Commission decided "to rely on the Arbitron Metro Survey (Arbitron Metro) as the presumptive market." *Id*. ¶274 (JA0143). The Commission emphasized that "Arbitron's market definitions" are an "established industry standard" that "represent a reasonable geographic market delineation within which radio stations compete." *Id*. ¶276 (JA0144).

As the Commission recognized, "Arbitron Metros do not cover the entire country." Order ¶282 (JA0148).[22] Accordingly, the Commission initiated a new rulemaking proceeding to "develop radio market definitions for non-Metro areas." *Id*. ¶283 (JA0148). *See id.* ¶¶657-70 (JA0289-92). The Commission determined that it should process applications proposing radio station combinations in non-

[22] There are "287 Arbitron Metros," which "cover approximately 60% of the commercial radio stations, 30% of the counties, and 78% of the population above the age of 12 in the United States, including Puerto Rico." Order ¶282 (JA0148).

Metro areas in the interim using the contour-overlap market definition, adjusted "to minimize the more problematic aspects of that system." *Id.* ¶285 (JA0148).[23]

Having settled on a revised local radio market definition, the Commission reaffirmed the ownership tiers established by Congress in the 1996 Act. The Commission emphasized that "[n]umerical limits on radio station ownership help to keep the available capacity from becoming 'locked-up' in the hands of one or a few owners, and thus help prevent the formation of market power" in competing for listeners. Order ¶288 (JA0149-50). The Commission also observed that "[t]he current tiers ensure that, in markets with between 27 and 51 radio stations, there will be approximately five or six radio firms of roughly equal size," and that "many of" the top 100 Metro markets "fall within that range." *Id*. ¶289 (JA0150). Finding "that the concentration levels permitted by the current rule represent a reasonable and necessary balance for radio broadcasting that comports with general competition theory," the Commission "decline[d] to relax the rule to permit greater consolidation in local radio markets." *Id*. ¶290 (JA0150-51).

The Commission also decided against making the numerical limits "more restrictive." Order ¶292 (JA0152). As the Commission noted, "[i]n the smallest

[23] The interim contour-overlap policy does not count commonly owned stations in determining the size of the local market (thereby "prevent[ing] a party from 'piggy-backing' on its own stations to bump into a higher ownership tier"), and excludes any station whose transmitter site is more than 52 miles from the perimeter of the mutual overlap area, thereby "alleviat[ing] some of the gross distortions in market size that can occur when a large signal contour that is part of a proposed combination overlaps the contours of distant radio signals and thereby brings them into the market." Order ¶285 (JA0148-49).

radio markets, the current rule provides that one entity may own up to half of the commercial radio stations in a market." *Id*. *See* 1996 Act, §202(b)(1)(D) (in markets with 14 or fewer radio stations, a party may own "up to five commercial radio stations, except that a party may not own, operate or control more than 50 percent of the stations in such market"). The Commission recognized, however, "that greater levels of concentration may be needed to ensure the potential for viability of radio stations in smaller markets." Order ¶292 (JA0152). Given that recognition, the Commission found it reasonable "to allow greater levels of concentration in smaller radio markets, but to require more independent radio station owners as the size of the market increases and viability concerns become less acute." *Id*.

Finally, the Commission decided that it should no longer exclude noncommercial stations in determining the size of local radio markets. As the Commission explained, "[a]lthough noncommercial stations do not compete in the radio advertising market, they compete with other radio stations in the radio listening and program production markets," and their presence "exerts competitive pressure on all other radio stations . . . seeking to attract the attention of the same body of potential listeners." Order ¶295 (JA0153).

C. *The Petitions for Review*.

1. *The Ownership Rules*. Prometheus contends that the current radio ownership limits—set by Congress in the 1996 Act—are too permissive, asserting that "in most markets, the top two stations dominate and . . . there may be very few other radio station owners of measurable size." Prometheus Br. 59. But as with

broadcast television, Order ¶193 (JA0112), radio audience shares can change over time, and an appropriate evaluation of radio market structure must take account of the fact that licenses provide radio stations with the capacity to provide more popular programming. *See id*. ¶288 (JA0149).[24] In any event, the Commission explained that its radio ownership rules ensure that there will be roughly five or six owners in markets with between 27 and 51 radio stations, which should allow competitive market performance. *Id*. ¶289 (JA0150). The Commission acknowledged that the limits permit greater concentration in smaller markets, *id*. ¶292 (JA0152), but determined that, as with television, the viability of stations in smaller markets may require greater levels of concentration to take advantage of the efficiencies that can result from common ownership, *id*. ¶293 (JA0152).

In evaluating the local radio ownership limits, the Commission sought "both to ensure a healthy, competitive radio market by enabling radio owners to achieve significant efficiencies through consolidation of broadcast facilities," while at the same time "ensur[ing] that such consolidation does not . . . stifl[e] competitive incentives." Order ¶293 (JA0152). While Prometheus might have struck the balance at a different point, the line was for the Commission to draw. *NCCB*, 436 U.S. at 814-15; *Sinclair*, 284 F.3d at 162.

[24] As with broadcast television stations, the Commission recognized that over the life of a firm's investment in a radio station, the market share of all stations in the market can shift substantially; accordingly, the Commission chose to take an approach that counts all stations in the market as having similar capacity to compete for listeners. Order ¶288 (JA0149).

Prometheus also challenges the Commission's decision to count noncommercial stations in determining the size of radio markets. Prometheus Br. 60-61. However, it does not contest the Commission's determination that the presence of noncommercial stations "exerts competitive pressure on all other radio stations in the market seeking to attract the attention of the same body of listeners." Order ¶295 (JA0153). It was plainly reasonable for the Commission to take account of noncommercial stations on that basis, and Prometheus's failure to dispute the factual premise of the Commission's analysis is fatal to its claim.[25]

Prometheus also contends that the Commission's rulemaking notice did not adequately apprise participants that it might include noncommercial stations in its local radio ownership rules. Prometheus Br. 61. But the Commission's notice of proposed rulemaking stated that it would engage in "a comprehensive review" of its media ownership rules, *see 2002 Biennial NPRM* ¶1 (JA3450), and the Commission specifically sought comment on whether its competition analysis should focus on "competition for viewers/listeners" and "competition for programming" as well as "competition for advertising revenue." *Id*. ¶57 (JA3470). *See also Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861, 19878-79 ¶40 (2001) (JA2504-05) (asking whether

[25] Although the 1996 Act originally established the numerical limits by reference to "commercial radio stations," §202(b), it made clear that the Commission retained the authority to "repeal or modify" those limits if the agency determined that they were "no longer in the public interest." *Id*., §202(h). Thus, Section 202(b) did not "lock[] into place the particular market definition that existed in 1996." Clear Channel Br. 30.

in analyzing marketplace conditions, the Commission should be interested in "competition for listeners, competition for advertisers, or a combination of the two").[26] These areas of inquiry fairly apprise interested parties of "the subjects and issues involved" in the rulemaking proceeding, including the fact that the Commission might find noncommercial radio station to participate in the local radio market. 5 U.S.C. §553(b); *James*, 866 F.2d at 631.

Unlike Prometheus, Viacom (the only one of the network petitioners that challenges the radio rules, Fox Br. 58 n.74), contends that protecting competition in local radio markets by means of numerical caps "makes no sense." Fox Br. 59. But as the Commission explained, numerical limits on radio station ownership help to keep the limited number of radio station licenses available in any one market "from becoming 'locked-up' in the hands of one or a few owners, and thus help prevent the formation of market power in local radio markets." Order ¶288 (JA0149-50).

In the alternative, Viacom contends that the Commission's decision to retain the existing numerical tiers was unjustified. Fox Br. 59-63. Viacom does not dispute that the tiers ensure that in many markets (those with between 27 and 51 radio stations), there will be approximately five or six radio station firms of equal size; it asserts that markets "can be" competitive even "when there is one large

[26] The Commission found, and Prometheus does not dispute, that "although non-commercial stations do not compete in the radio advertising market, they compete with other stations in the radio listening and program production markets." Order ¶295 (JA0153).

firm and many small ones." *Id*. at 61-62. That some markets can be competitive even though dominated by one firm does not mean, however, that it was unreasonable for the Commission to refuse to encourage such a market structure, particularly given that market concentration provides a basis for the formation of market power, and there was evidence that the increase in concentration in local radio markets in recent years "ha[d] resulted in an appreciable, albeit small, increase in advertising rates," Order ¶290 (JA0151).[27]

As a fallback position, Viacom (joined at greater length by Clear Channel) contends that the Commission should have permitted local radio ownership tiers in excess of eight stations. Viacom Br. 63; Clear Channel Br. 28-40. But the benefits of consolidation in the radio industry have much to do with operating efficiencies, *see* Order ¶293 (JA0152), and the Commission found "no evidence in the record that indicates that the efficiencies of consolidating radio stations increase appreciably for combinations involving more than eight radio stations," *id*. ¶291 (JA0151)—a point that neither Viacom nor Clear Channel disputes. Conversely, the Commission explained, "extremely large radio markets tend to cover a large area geographically and also tend to be more 'crowded' in terms of radio signals,"

[27] Viacom also claims that the FCC "arbitrarily ignored" the competitive pressures from satellite and Internet radio in constructing its ownership limits. Fox Br. 59. But the Commission explained that, with only 600,000 subscribers at the time of the Order, "satellite radio is not yet a good substitute for broadcast radio for most listeners." Order ¶245 (JA0134). Similarly, the Commission found that while Internet audio streaming "may be a substitute for broadcast radio while working on a computer or in a small office environment . . . a significant portion of audio listening . . . occurs while driving or otherwise outside of the office or home," and "most people do not access Internet audio from a mobile location." *Id*.

resulting in "a greater number of extremely small radio stations, as well as radio stations that are a significant distance from each other." *Id*. Thus, as the Commission observed, markets with a large number of radio stations "appear more competitive" than they actually are. *Id*. (describing the structure of the second largest radio market, Los Angeles, where the top, top-two, and top-four radio station firms receive 31.2%, 60.2%, and 76.1%, respectively, of total local market revenues). With obvious costs to competition, and no evidence of countervailing benefits, the Commission reasonably refused to permit more than eight stations to be commonly owned even in the largest markets.[28]

NAB (joined by Nassau) contends that the Commission's decision to replace its contour-overlap methodology with market definitions based on Arbitron Metros violates section 202 of the 1996 Act. NAB Br. 13-20. Nassau Br. 4-6. But section 202(h) specifically provides that the Commission is to review its ownership

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[28] Viacom's contention that the Commission failed to justify its reaffirmation of the specific AM and FM ownership limits (Fox Br. 63-64) is unfounded. The Commission originally adopted specific AM and FM ownership limits in order to "prevent one entity from putting together a powerful combination of stations in a single service that may enjoy an advantage over stations in a different service." *Revision of Radio Rules and Policies*, 7 FCC Rcd at 2778 ¶44. As the Commission found in the present proceeding, "significant technical and marketplace differences between AM and FM stations" persist. Order ¶294 (JA0152-53) (AM stations have less bandwidth than FM stations, an inferior audio signal, and signal propagation characteristics that vary with time of day). These technical differences are reflected in radio listening patterns and formats. *Id.* (FM stations currently capture 82% of the radio audience, AM only 18%; AM stations often have news/talk/sports or ethnic formats, while FM stations concentrate on music formats). It was thus entirely reasonable for the local ownership limits to continue to treat the two services differently.

rules—including the local radio ownership rules adopted under section 202(b)—and "repeal or modify any regulation it determines to be no longer in the public interest." 1992 Act, §202(h) (emphasis added).

NAB contends that "[t]he contour-based approach is . . . presumptively embedded in" the numerical limits Congress established in the 1996 Act. NAB Br. 19. But the 1996 Act does not define local radio markets, much less adopt the contour-overlap methodology. And even if it had, section 202(h) empowers the Commission to revisit that conclusion as part of its congressionally mandated biennial review. Under Section 202(h), Congress's establishment of the local ownership tiers "determined only the starting point from which the Commission was to assess the need for further change." *Fox*, 280 F.3d at 1043. Thus, as the Commission explained, "even if Congress believed in 1996 that Section 202(b) set the appropriate radio station ownership levels, *Fox* holds that we retain the authority—indeed the obligation—to determine ourselves whether a change in the rules would serve the public interest." Order ¶267 (JA0141).[29]

In the alternative, NAB contends that the Commission's replacement of contour-overlap with Arbitron markets was arbitrary and capricious. NAB Br. 20-28. *See also* Nassau Br. 6-12. But the Commission set forth in detail its reasons

[29] NAB's contention that section 202(h) "entitles the Commission only to repeal, loosen, or maintain" section 202(b)'s local radio ownership caps, "not to tighten them," NAB Br. 15, is entirely unsupported by the statute's language. On the contrary, section 202(h) empowers the Commission to repeal or "modify" (a term that is used without qualification) those ownership rules that the Commission determines are not in the public interest. 1996 Act, §202(h), 110 Stat. 110-111.

for deciding to employ "an industry standard," Order ¶276 (JA0144), in preference to a contour-overlap methodology that had proved "ineffective as a means to measure competition in local radio markets," *id*. ¶263 (JA0140). *See id*. ¶¶250-61 (JA0136-39).[30]

NAB complains that the Commission failed to find that there was "harm to competition or to the public interest resulting from combinations that were permitted under the contour-based market definition." NAB Br. 21-22. The Commission noted that there was evidence of potential competitive harm, including a study (MOWG Study No. 4) that suggests that station consolidation under the contour-overlap regime has resulted in an increase in radio advertising prices. Order ¶261 n.548 (JA0139); ¶290 (JA0150-51). Moreover, the Commission observed that the contour-overlap methodology created a perverse incentive encouraging consolidation of powerful radio stations, thereby undermining the protections afforded by the local radio ownership limits against undue market concentration. *Id.* ¶257 (JA0138). In any event, the Commission is not required to wait for a conclusive demonstration of actual harm to competition before it reforms a "distorted methodology for defining radio markets and counting radio stations." *Id.* ¶261 (JA0139).

NAB contends that "contours rather than geography" is "the only sensible basis for determining which stations actually compete with each other," NAB Br.

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[30] The Commission recognized that its decision differed from that it reached in 1992 when it first adopted the current contour-overlap methodology. Order ¶262 (JA0139-40). But as the Commission explained, the problems with that system were "less evident because of the far more restrictive ownership limits" in effect at that time. *Id*.

22, because "[r]adio is a signal-based enterprise," *id*. at 22. But the Commission explained that "radio stations serve people, not land," and "people in the United States tend to be clustered around specific population centers." Order ¶273 (JA0143).[31] Not only does the Department of Justice generally treat Arbitron Metros as the relevant market for antitrust purposes,[32] but NAB's own study stated that Arbitron's ratings service "is the primary currency through which buyers and sellers of radio airtime negotiate prices for radio advertising in most local markets." *Id*. ¶276 (JA0144) (quoting David Gunzerath, *An Analysis of the Proposed Use of Arbitron Data to Define Radio Markets* (Feb. 26, 2001) (JA2441)). In light of the difficulties identified by the Commission with the contour-overlap metho-

[31] NAB contends that radio stations compete against each other if their signals overlap, NAB Br. 27, but that is not invariably true—radio signals that "overlap over uninhabited land or water" may not have any real world competitive impact. *See* Order ¶273 (JA0143). Conversely, although NAB contends that two radio stations in the same Arbitron Metro do not compete when they do not have overlapping signals, NAB Br. 27, because people listen to radio while commuting and otherwise traveling through their community, *see id*. ¶245 (JA0134), two stations in the same Arbitron market may very well exert competitive pressures on each other even when their signals do not overlap.

[32] *See, e.g.*, *United States v. CBS Corp. and Am. Radio Sys. Corp*., Proposed Final Judgment and Competitive Impact Statement, 63 Fed. Reg. 18036, 18044-45 (Apr. 13, 1998).

dology, the use of the radio industry's standard geographic market definition was entirely reasonable.[33]

NAB contends that there are "flaws in the Arbitron methodology," including that its market definitions are "subject to manipulation." NAB Br. 28. *See also* Nassau Br. 9-12. But the Commission established specific safeguards "to deter parties from attempting to manipulate Arbitron market definitions for purposes of circumventing the local radio ownership rule." Order ¶278 (JA0145). Chief among these are that the Commission "will not allow a party to receive the benefit of a change in Arbitron Metro boundaries unless that change has been in place for at least two years." *Id*. The Commission also stated that it will not allow a party to include a radio station as "home" to a Metro "unless such station's community of license is included within the Metro or such stations has been considered home to that Metro for at least two years." *Id*.[34] And in any event, the Commission emphasized, "[t]o the extent that . . . despite these safeguards, an Arbitron Metro boun-

[33] NAB claims that the Commission "fixed" the contour-overlap methodology "in the course of implementing an interim policy for market definition in the areas of the country not rated by Arbitron." NAB Br. 25. But the Commission's adjustments to the contour-overlap methodology only "minimize," but do not eliminate, "the more problematic aspects of that system." *See* Order ¶285 (JA0148-49). In particular, the Commission could do nothing to solve the fundamental anomaly of the contour-overlap methodology—that it "uses the outlets of one party – commonly owned stations with mutually overlapping principal community contours – to define the local radio market and identify other market participants." *Id*. ¶256 (JA0137-38).

[34] Radio stations designated as "home" to an Arbitron Metro "usually are either licensed to a community within the Arbitron Metro or are determined by Arbitron to compete with the radio stations located in the Metro." Order ¶279 (JA0145-46).

dary has been altered to circumvent the local radio ownership rule," it "will consider that fact in evaluating whether a radio station combination complies with the rule's numerical limits." *Id*. ¶278 n.584 (JA0145).[35]

2. *Restrictions on Transferability*. In applying its local ownership rules, the Commission decided to grandfather existing radio, television, and radio-television combinations, and did "not require entities to divest their current interests in stations in order to come into compliance with the new ownership rules." Order ¶484 (JA0228-29). But the Commission refused to permit the transfer of grandfathered combinations that violate its local ownership limits except to certain "eligible entities" that qualify as small businesses. *Id*. ¶¶487-88 (JA0228-29).

NAB and Clear Channel contend that while the Commission's decision to grandfather existing radio station combinations was "appropriate[]," NAB Br. 30, it was unlawful for the Commission to limit the sale or transfer of grandfathered radio stations. NAB Br. 30-33; Clear Channel Br. 42-52. But the Commission properly concluded that permitting the transfer of grandfathered station

[35] Nassau contends in a footnote that the Commission's use of Arbitron markets "arguably" delegates governmental power to a private entity. Nassau Br. 6 n.2. But Nassau identifies no governmental power that Arbitron will purportedly exercise. The Commission continues to be the sole arbiter (subject to judicial review) of whether a proposed radio station combination serves the public interest. And while the Commission will rely on Arbitron's market definitions in making that determination, that is because the Commission considers those market definitions to be reasonably accurate descriptions of local radio markets. Parties remain free to challenge that view in particular cases by presenting evidence that another market definition more accurately reflects competitive realities. *See, e.g.*, Order ¶85 (JA0064).

combinations without regard to whether they comply with the ownership rules would "hinder" its "efforts to promote and ensure competitive markets." Order ¶487 (JA0028-29). Not only do grandfathered combinations by definition "exceed the numerical limits" that the Commission has found to promote the public interest, "in the case of radio ownership, these combinations were created pursuant to a market definition" that the Commission has concluded "fails to adequately reflect competitive conditions." *Id*. ¶487 (JA0228-29).

The Commission found that the "threat to competition" posed by free transferability of grandfathered combinations was "not outweighed" by the "countervailing considerations" that led it to grandfather such combinations in the first place. Order ¶487 (JA0228-29). As the Commission explained, with the adoption of its rules "[b]uyers will be on notice that ownership combinations must comply" with the Commission's ownership limits at the time of any acquisition. *Id*. The Commission also noted that any station spin-offs that would be required in connection with a sale of a grandfather group "could afford new entrants the opportunity to enter the media marketplace," and could "give smaller stations owners already in the market the opportunity to acquire more stations and take advantage of the benefits of combined operations." *Id*.[36]

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[36] Clear Channel complains that the restrictions on transferability "will depress station prices," thereby depriving radio station sellers of some of the benefits of their investments. Clear Channel Br. 44. In doing so, Clear Channel ignores the fact that the Commission was not required to grandfather non-compliant station combinations in the first place, *see NCCB*, 436 U.S. at 814-15, and that owners of grandfathered combinations are not required to divest their stations at any time. Order ¶484 (JA0228-29).

The Commission's decision to refuse to permit the sale or transfer of grandfathered radio station combinations "in perpetuity" and without qualification was firmly grounded on the very considerations that led the Commission to revise its ownership restrictions, and was for the same reasons entirely sensible. *See NCCB*, 436 U.S. at 785, 796-802 (upholding Commission's rule that grandfathered newspaper/broadcast combinations but prohibited "transfers of existing combinations to new owners").

Clear Channel—but not NAB—contends that the Commission's restriction on the transferability of grandfathered station groups "raises serious constitutional concerns under the Takings and Due Process Clauses of the Constitution." Clear Channel Br. 49-52. Its assertion that the rules affect a property right (Br. 49), however, is unsupported by citation of authority, and dubious at best. 47 U.S.C. §301 (broadcast licenses to provide for "the use . . . but not the ownership" of channels of radio communication). Moreover, even a total ban on sales of physical property is not a "taking" merely because it reduces the property's value. *Andrus v. Allard*, 444 U.S. 51, 65-67 (1979). Given Clear Channel's acceptance of its licenses subject to the statutory reservation of the government's power to regulate their transfer pursuant to "the public interest, convenience, and necessity," 47 U.S.C. §310(d), and, indeed, to the Commission's settled power to order divestiture in appropriate cases, *NCCB*, 436 U.S. at 814-15, the limited restrictions on transferability at issue here are simply part of the package of rights and duties that go with the licenses, and not in derogation of them. *See also Sinclair*, 284 F.3d at 167.

3. *Joint Sales Agreement Attribution*. Finally, Clear Channel (again on its own) also challenges the Commission's decision to take account of certain Joint Sales Agreements (JSAs) in applying its local radio ownership rules.

JSAs typically authorize a broker to sell advertising time for the brokered station in return for a fee to that station, and they generally give the broker authority to "hire a sales force for the brokered station, set advertising prices, and make other decisions regarding the sale of advertising time." Order ¶316 (JA0161-62). The Commission determined that where a radio station licensee acts under a JSA to broker more than 15 percent of the advertising time (per week) of another station in the same local market, it should count the brokered station towards the brokering station's ownership limits in that market. *Id*. ¶317 (JA0162).[37] The Commission found that, "because the broker controls the advertising revenue of the brokered station," JSAs have the "potential . . . to convey sufficient influence over core operations of a station to raise significant competition concerns warranting attribution." Order ¶320 (JA0163). Moreover, because the brokered station "typically receive[s] a monthly fee regardless of the advertising sales or audience share of the station," it has "less incentive to maintain or attain significant competitive standing in the market." *Id*. ¶320 (JA0163). The Commission therefore

[37] The Commission had previously determined that it should attribute local marketing agreements (LMAs) in much the same way. *1999 Attribution Order*, 14 FCC Rcd at 12612 ¶122. LMAs typically provide that the broker may sell advertising time and retain the advertising revenue for "programming it provides to the brokered station." Order ¶319 n.693 (JA0163). In *Sinclair*, the D. C. Circuit upheld the Commission's decision to attribute LMAs under the local television ownership rules and to grandfather them only for a limited time. 284 F.3d at 165-69.

found that it should modify its rules "to reflect accurately [the] competitive conditions of today's local radio markets." *Id*. So as not to "unnecessarily adversely affect current business arrangements between licensees and brokers," the Commission gave parties to JSAs "2 years" to end their agreements or otherwise come into compliance with the Commission's local ownership rules. *Id*. ¶325 (JA0165).

Clear Channel contends that the Commission "provided no explanation" of its decision to change its policy with regard to attribution of JSAs. Clear Channel Br. 54. On the contrary, the Commission set forth "several reasons" for its change in policy, including the fact that JSAs have the potential for sufficient influence over a station's operations to warrant attribution, and that JSAs dampen the financial incentives for brokered stations to compete in the marketplace. Order ¶320 (JA0163). Clear Channel contests the Commission's decision to limit its grandfathering of JSAs to a two-year period, but sets forth no basis for concluding that the line the Commission drew fell outside the agency's broad discretion in such matters. *See Sinclair*, 284 F.2d at 166.

Clear Channel contends that the Commission's decision to limit its grandfathering of JSAs also raises "serious constitutional questions" under the Takings and Due Process Clauses, because it deprives parties to JSAs "the benefits of their contractual agreements," and "changed the consequences of transactions that are now closed." Clear Channel Br. 58-59. But the Commission has not invalidated any JSAs; it has simply recognized that a party that controls most of the advertising revenue of a station has sufficient influence over that station to have it count against that party's ownership limits in a market. Clear Channel, moreover, has no vested right in the continuance of any particular regulatory scheme, especially in a field as heavily regulated as broadcasting. *See*, *e.g*., *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 222-27 (1986); *see also Folden v. United States*, 56 Fed. Cl. 43, 61 (2003) (parties "in a highly regulated field such as FCC licensing can have no distinct investment-backed expectations that include a reliance upon a legislative and regulatory status quo"). In any event, there is nothing in the Constitution that permits radio station licensees to immunize themselves, through private contract, from the Commission's extensive powers to regulate broadcasting in the public interest. *See Borough of Columbia v. Surface Transp. Bd*., 342 F.3d 222, 235 (3d Cir. 2003).

IV. THE COMMISSION REASONABLY REVISED THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP BAN AND ADOPTED A NEW CROSS-MEDIA LIMITS RULE.

As discussed above, for many years the Commission maintained rules governing cross-ownership of media in local markets. The newspaper/broadcast cross-ownership rule imposed a ban on common ownership of a full-service radio or television broadcast station and a daily newspaper where the broadcast station's service contour encompassed the newspaper's city of publication. *See* 47 C.F.R. §73.3555(d) (2002). The rule did not otherwise limit newspaper/broadcast cross-ownership where there was no overlap of a broadcast station's service area and a newspaper's city of publication. The radio-television cross-ownership rule limited the number of commercial radio and television stations an entity could own in combination in a single local market. *See* 47 C.F.R. §73.3555(c)(2002). These cross-ownership limits were in addition to the separate limits of the local television and local radio ownership rules (discussed above in Parts II and III).

In the Order on review, the Commission concluded that neither of the existing rules was necessary in the public interest and that the goals of protecting viewpoint diversity in local markets "can be achieved with more precision and with greater deference to First Amendment interests by modifying the rules into a single set of cross-media limits . . . ." Order ¶327 (JA0166). The Commission thus adopted a revised rule, referred to as the cross-media limits, or "CML" rule, that adopted new limits for both types of cross ownership in "at-risk" and small to medium-size markets:

- In "at-risk" markets, with three or fewer television stations, new cross-ownerships among television stations, radio stations and newspapers are not permitted.[38]
- In small to medium-size markets, with between four and eight television stations, varying types of cross ownership are permitted. For example, cross ownership between a daily newspaper, one television station and up to half the number of radio stations permitted by the local radio ownership rule for the market in question is permitted.
- In large markets with nine or more television stations, there are no cross-ownership limitations under the new CML rule.

See id. at ¶¶452-81 (JA0216-25; 0342).

[38] No party challenges the new limits on radio-television cross ownership.

A. The Commission Reasonably Concluded That The Existing Newspaper/Broadcast Cross-Ownership Ban Is No Longer Necessary In The Public Interest.

The agency first concluded that the existing newspaper/broadcast cross-ownership rule was no longer necessary in the public interest, finding that "(1) the rule cannot be sustained on competitive grounds, (2) the rule is not necessary to promote localism (and may in fact harm localism), and (3) most media markets are diverse, obviating a blanket prophylactic ban on newspaper/broadcast combinations in all markets." Order ¶330 (JA0167).

In reaching this conclusion, the Commission surveyed the extensive record developed in this proceeding and looked to its own experience and that of the Department of Justice to assess whether the newspaper/broadcast cross-ownership rule continued to be necessary to protect competition. It concluded that "the local newspaper market [for advertising] is distinct from the local broadcast market" and that a "newspaper/broadcast combination . . . cannot adversely affect competition in any relevant product market." Order ¶332, ¶341 (JA0168, 0172).

Indeed, the Commission found that "the synergies and cost reductions of joint-ownership may translate into increased, rather than decreased competition within each service." Order ¶337 (JA0171). The Commission pointed to evidence in the record suggesting that newspaper and broadcast TV partnerships could lead to increased services and reduced costs. "By precluding the efficiencies inherent in combinations," the Commission said, "the rule likely harms consumers by limiting the development of new, innovative media services that would flow from a more efficient, combined entity." *Id.*

The Commission also found that the prior rule's newspaper/broadcast cross-ownership prohibition is no longer necessary to promote the provision of local news and information programming on broadcast stations and that the former rule's blanket prohibition on common ownership of broadcast stations and daily newspapers in the same community in all circumstances is unnecessary to protect diversity. *See* Order ¶¶342-69 (JA0172-86).

Specifically, the Commission pointed to evidence in the record that supported its conclusion that the prior newspaper/broadcast cross-ownership rule "actually works to inhibit" local news and information programming. Order ¶342 (JA0172). Citing one of the agency's staff studies, the Commission found that newspaper-owned stations not only "provide more news and public affairs programming, they also appear to provide higher quality programming." *Id.* ¶344 (JA0174), citing MOWG Study 7, at 4 (JA3573).

The conclusions of the Commission's staff study were supported by a study done by the Columbia University Graduate School of Journalism's Project for Excellence in Journalism (PEJ) that analyzed five years of data on ownership and news quality and concluded that "stations with cross-ownership—in which the parent company also owns a newspaper in the same market—tended to produce higher quality newscasts." JA5114; *see* Order ¶345 (JA0174). The Commission acknowledged the statistical shortcomings of this study, but found that it provided useful anecdotal evidence of the benefits of newspaper/broadcast cross-ownership.

See id. ¶345 n.766, ¶¶572-73 (JA0174, 0259-60). The Commission cited substantial additional evidence in the record illustrating "how efficiencies resulting from cross-ownership translate into better local service." *Id.* ¶348 (JA0175); *see also id.* ¶¶346-47 (JA0174-75).

Prometheus criticizes reliance on MOWG Study No. 7 (Br. 37) because it looked at television stations owned by newspaper companies whether or not they were located in the same market, when it could have compared stations where the ownership was in the same market. Prometheus does not explain why this makes the information the Commission did use unreliable. Moreover, as Prometheus acknowledges in a footnote (Br. 37. n.16), the record did contain information on same-market cross-owned television-newspaper combinations, indicating in those circumstances that the newspaper-owned stations' quantity of news and public affairs programming exceeded that of non-newspaper owned stations by an even greater margin. *See* Order ¶344 (JA0174), citing Comments of Newspaper Association of America at 14-15 (JA4648-49).

Prometheus also criticizes the Commission's reliance on the PEJ study (Br. 37 n.16), but it does not dispute the accuracy of the information, and it fails to show why it was unreasonable for the agency to rely on this data as evidence of the potential public interest benefits that could arise if the complete prohibition on newspaper/broadcast cross-ownership were relaxed. The deference owed to the Commission's predictive judgments is at least as applicable where the agency's judgment leads it to conclude that a regulation is no longer necessary, and may indeed be harmful, as when it imposes regulation.

There is, further, no basis for Prometheus' contention that the Commission gave undue weight to evidence favoring repeal of the rule while ignoring evidence to the contrary. The claim, for example, that the Commission relied on "examples from industry comments purporting to show 'how efficiencies from cross-ownership translate into better service,' JA0174-76, while rejecting without explanation comparable evidence from public interest groups that common ownership has *reduced* local news and other local programming" (Br. 38) is groundless. The Commission provided a clear and rational explanation of why it "disagree[d] with those who argue that the relaxation or elimination of the newspaper/broadcast cross-ownership rule will create additional pressures on local news editors and directors to curtail coverage of public interest news." Order ¶351 (JA0176).

There was ample basis in the record for the Commission's finding that newspaper/broadcast cross-ownership "can promote the public interest by producing more and better overall local news coverage." The Commission's conclusion that "the current rule is not necessary to promote our localism goal and that it, in fact, is likely to hinder its attainment" was a reasonable conclusion based on the record evidence. Order ¶354 (JA0178).

Finally, the Commission concluded that the existing rule prohibiting "common ownership of broadcast stations in all communities and in all circumstances can no longer be justified as necessary to achieve and protect diversity." Order ¶355 (JA0179). The Commission found "ample evidence that competing media outlets abound in markets of all sizes—each providing a platform for civil discourse. *Id.* ¶365 (JA0184); *see also id.* ¶¶120-28 (JA0080-85) (surveying the current media landscape). Prometheus contends that this is "plainly not the case" (Br. 35), but with rare exception, Prometheus offers no specific arguments to dispute the Commission's conclusion, backed by detailed citation to the extensive record, that "there will be a plethora of voices in most or all markets absent the rule." Order ¶367 (JA0185).

And in those few circumstances where Prometheus does specifically dispute the Commission's findings, its claims are mistaken. For example, its claim (Br. 35 n.11) that cable television "does not contribute to viewpoint diversity on local issues" is inconsistent with the record. *See* Order ¶365 & n.830 (JA0184). Although the Commission did not include cable among the media used in developing its Diversity Index as Prometheus points out, the Commission nevertheless recognized even in that context that "cable systems do provide local news and current affairs information through [public, educational and government] channels and, in some markets, local news channels." *Id.* ¶408 (JA0201); *see also id.* ¶123 (JA0083) ("In 2002 the Commission also identified at least 86 regional non-broadcast networks, including 31 sports channels and 32 regional and local news networks.").

Prometheus also criticizes the Commission's reliance on the Internet as a contributor to local diversity because, according to Prometheus the Internet "is not a significant source of local news." Br. 35 n.11. This claim also is inconsistent with the record evidence. The Commission noted the explosive growth of the Internet, with more than 30 million web sites at the end of 2000, none of which existed when the newspaper/broadcast rule was first adopted. "[T]he Web provides an unrestrained forum for the dissemination and consumption of ideas." Order ¶119 (JA0080). The Commission found that the Internet "is becoming a commonly-used source for news, commentary, community affairs and national/ international affairs." *Id*. ¶365 (JA0184); *see also id*. ¶427 (JA0207) (rejecting arguments that the Internet is not an independent source of local information). The Internet is not simply "an alternative means to access *national* news *already* provided by major media companies" (Prometheus Br. 41). The record contained evidence of scores of local web sites that could be expected to provide a wide range of local news and information. *See* Comments of Media General, Inc., App. 9 (JA4250-55), App. 12 (JA 4297-302); *see also* Reply Comments of Media General, Inc. at 15-18 (JA4921-24).[39]

The Commission found that there were benefits from common ownership of newspaper and broadcast stations in creating "efficiencies and synergies that enhance the quality and viability of media outlets, thus enhancing the flow of news and information to the public," and that continued application of the rule's complete prohibition "may be preventing efficient combinations" that would have a

[39] Prometheus (Br. 42) cites the observation in a FCC-sponsored study in the record that the Internet is a "nonlocal" medium to support its claim that the Commission should not have considered the Internet in constructing the DI. However, the study was simply distinguishing the Internet, in which the content is available to anyone with Internet access regardless of the person's location, from radio, television and newspapers, which are not readily available outside of specific local areas. *See* MOWG Study No. 3, at 19 (JA3565). The study did not claim to find that the Internet is not a source of local news and information.

"positive impact" on the ability of both newspapers and broadcast stations to provide local news and public affairs programming. Order ¶¶356-60 (JA0179-80).

The Commission found little evidence that common ownership of newspapers and broadcast stations would lead to expression of a single common viewpoint by both. Order ¶¶361-64 (JA0180-82). The Commission pointed both to one of its staff studies as well as other evidence in the record suggesting that "common ownership 'does not result in a predictable pattern of news coverage and commentary about important political events in . . . commonly owned outlets.'" *Id.* ¶361 (JA0181), quoting MOWG Study No. 2 (JA3543).

The Order is not "internally inconsistent," as Prometheus claims, because it concludes that the previous newspaper/broadcast cross-ownership rule is no longer necessary in the public interest but, in another part of the order, that "local radio limits remain necessary to protect viewpoint diversity." Br. 38.

Prometheus has misread the Commission's order. What the agency said was that the local radio ownership limits "are 'necessary in the public interest' to protect competition in local radio markets. . . . Although we primarily rely on competition to justify the rule, we recognize and localism and diversity are fostered when there are multiple, independently owned radio stations competing in the same market. . . ." Order ¶239 (JA0131). The Commission thus found that fostering diversity was an ancillary benefit of a rule primarily designed to protect competition. There is no inconsistency in the Commission's explanation for retaining the local radio limits while concluding that the complete ban on newspaper/broadcast cross-ownership was no longer necessary.

B. The New Cross-Media Limit On Newspaper/Broadcast Cross-Ownership Is Reasonable.

The Commission's conclusion that the prior rule's blanket prohibition on newspaper/broadcast cross-ownership in local markets was no longer necessary did not, however, answer the question whether some different, more narrowly focused limits were needed. The record in this proceeding led the Commission to conclude that such new limits were needed in certain specific situations to guard against "an elevated risk of harm to the range and breadth of viewpoints that may be available to the public." Order ¶442 (JA0212).

The Commission explained that it regarded "fostering viewpoint diversity [to be] one of the principal goals" of its media ownership rules and "at the core of our public interest responsibility." Order ¶¶393, 394 (JA0195). The conclusion that the prior rule's complete ban on newspaper/broadcast cross-ownership was no longer necessary to further any of the original goals, including diversity, did not resolve the question of whether some more focused limitation was necessary to protect viewpoint diversity.

Having examined the record evidence, the Commission reasonably concluded that such a new limit was necessary "specifically to check the acquisition by any single entity of a dominant position in local media markets—not in economic terms, but in the sense of being able to dominate public debate—through combinations of cross-media properties." Order ¶432 (JA0209). The Commission recognized that its local ownership rules limiting the number of television or radio stations one owner may hold in a market "also will protect against undue concentration of speech outlets for diversity purposes." *Id.* ¶437 (JA0211). However, cross-media combinations, the Commission found, "that may impact the range and diversity of voices in local markets will not be captured by our television and radio caps," and the cross-media limits rule was adopted to target "the types of transactions that would give us the most concern and which are not already prohibited by our intra-service caps." *Id.* ¶440 (JA0211).

Based on a detailed analysis of the record, informed by its Diversity Index, the Commission identified markets with three or fewer television stations to be "at-risk markets" for purposes of diversity concentration. In those markets, the CML rules prohibit the combination of a daily newspaper and a broadcast television station, or a daily newspaper and a radio station. *See* Order ¶¶452-61 (JA0216-20). In small to medium-size markets, which the Commission defined as those with four to eight television stations, the rule will prohibit a single entity from owning a newspaper and more than one television station or a newspaper, a television station and radio stations that exceed 50% of the applicable local radio limit for the market in question. *Id.* ¶¶462-71 (JA0220-23). In large markets, *i.e.* those with nine or more television stations, the Commission imposed no cross-media limitations. For example, in analyzing one typical example of a nine-station market, the Commission concluded that it could not "justify a restriction in a market where the worst case scenario . . . will result in a market with at least seven different owners of the major sources of local news and information." *Id.* ¶475 (JA0224).

Both the Tribune and Prometheus briefs focus their criticism on the Diversity Index, or "DI." As the Commission explained, the DI is an analytical tool "for analyzing and measuring the availability of outlets that contribute to viewpoint diversity in local markets." Order ¶391 (JA0194). The DI was developed to provide the Commission's "media ownership framework with an empirical footing" and "to inform [its] judgments about the need for ownership limits." *Id.*

However, the Commission did not adopt the DI as a rule. Instead, while the DI obviously played a role in the development of the new CML rule, the Commission made clear that it played only a supporting role. The "cross-media limits are based on a set of assumptions drawn directly from the record evidence in this proceeding [and] ultimately rest[] on our independent judgments about the kinds of markets that are most at-risk for viewpoint concentration, and the kinds of transactions that pose the greatest threat to diversity." Order ¶435 (JA0210).

The Commission concluded that "the vast majority of local media markets are healthy, well-functioning, and diverse" and that its local radio and television ownership rules "will also be protective of diversity interests . . . ensur[ing] a significant number of independent voices in larger markets" in the case of cross-media combinations. Order ¶¶434, 435 (JA0209). However, the Commission found that in small markets cross-media combinations "might result in problematical levels of concentration for diversity purposes," and it determined that new, narrowly focused cross-media limits were needed to "supplement" the local ownership rules "to reach those combinations that are not already prohibited by our television or radio caps, but which would give rise to serious diversity concerns." *Id.* ¶435 (JA0210).[40]

The Diversity Index is simply an analytical tool designed to reflect the degree of concentration in viewpoint diversity in local markets. The DI does not assess diversity by looking to the specific views expressed over a media outlet, but measures the availability of outlets of various types and assigns a weight to each class of outlet (radio, television, newspaper, Internet) based on its relative value to consumers. The selection and weighting was based on a nationwide survey of 3,136 consumers who were asked what sources they used for local news and current affairs information.[41] The DI was "inspired by" the Herfindahl-Hirschmann Index (HHI), which is used in antitrust analysis to measure the degree of concentration in an economic market. *See* Order ¶394, 395 (JA0195-96). But the DI analysis was only analogized to the HHI as a general means of analysis and, contrary to the claims of opposing parties, was not intended to import the specifics of antitrust use of the HHI or, conversely, to suggest that the media included in the DI comprise a single relevant market for antitrust analysis.

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[40] Tribune correctly notes (Br. 34, 36) the Commission's observation that "newspaper/broadcast combinations may produce tangible public benefits in smaller markets in particular." Order ¶350 (JA0176). The Commission took into account situations where this concern for localism may override the adverse impact on diversity from combinations in small markets by explicitly providing for waiver of the CML rule where there is a demonstration by an applicant "that an otherwise prohibited combination would, in fact, enhance the quality and quantity of broadcast news available in the market." *Id.* ¶481 (JA0225).

[41] *See* Nielsen Media Research, "Consumer Survey on Media Usage," MOWG Study No. 8 (JA3591).

The end result is that the Diversity Index provided the Commission with a rough assessment of the degree of media diversity concentration in markets and how changes as a result of cross-media combinations could affect the level of diversity. The DI's "methodological foundation" assisted the Commission's "analysis of the record" and gave it "confidence that our rules will prevent the transactions that would seriously impair the availability of diverse viewpoints in any local market while permitting efficiency enhancing combinations." Order ¶¶453 (JA0216).[42]

The Supreme Court recognized in *NCCB* that "'[d]iversity and its effects are . . . elusive concepts, not easily defined let along measured without making qualitative judgments on both policy and First Amendment grounds.'" 436 U.S. at 796-97. The Court held there that even though the rulemaking record was "inconclusive," the Commission "acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints." *Id.* at 796. The Commission's development and use of the Diversity Index reflects an effort to provide both a more detailed factual foundation for its analysis as well as a specific factual framework to explain its approach to establishing the CML rule.

Prometheus contends that the DI is irrational because it overstates the amount of diversity in a market. *See* Br. 41-43. Tribune claims it is irrational

[42] Prometheus criticizes (Br. 47) the Commission in its use of the DI for failing precisely to follow the case-by-case approach of antitrust analysis and its use of the HHI. This simply ignores the very different role for which the DI was developed.

because it understates the amount of diversity in a market. *See* Br. 57-59. Both petitioners ignore the Commission's finding that daily newspapers, along with television and radio stations, "are the three media platforms that Americans turn to most often for local news and information." Order ¶452 (JA0216), citing MOWG Study No. 8, at Table 97 (JA3613). In constructing the Diversity Index, the Commission considered those three media, plus the Internet, based on a survey of consumer media usage. The Commission explained in detail the basis for the choice of media that it included in the DI and its weighting of those media in making the DI calculations. *Id*. ¶¶401-27 (JA0197-207).

While it is true, as Tribune argues (Br. 57-59), that there are other sources of local news and information, the survey on which the Commission relied showed that few respondents relied on any media other than television, newspapers, radio, Internet and magazines as a source of such information. *See* Order ¶405 (JA0198). Moreover, the Commission explained its determination not to include magazines and other sources such as cable television, low power radio and low power television, which Tribune claims (Br. 57-59) that it improperly ignored.[43] *See* Order ¶407-08 (JA0201). In addition, the Commission committed to re-examine the

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[43] Tribune also relies (Br. 57 n.38) on a critique of the Nielsen survey on which the selection of media to be included in the DI was based. The critique was prepared for and submitted by Media General to the Commission late in the proceeding. The Commission addressed these criticisms directly and acknowledged that the survey was not perfect. Nevertheless, it noted that the critique provided no evidence that the survey results were biased and concluded that the survey provided useful and reliable information. Order ¶404 (JA0198).

question of what media to include in the DI analysis in the next biennial review and to gather additional survey data at that time. *See id.* ¶414 (JA0203).

The Diversity Index was based on "conservative assumptions" about how "people actually use" media, rather than on the mere "availability of news sources irrespective of their particular usage rates by consumers." Order ¶399 (JA0197). Tribune clearly favored reliance on the mere availability of other media, but it was reasonable for the Commission to adopt more conservative assumptions when making a significant change in a rule that had not been comprehensively re-examined since its adoption in 1975.

Although Prometheus also criticizes the DI, the conservative assumptions employed by the Commission in fact protect its diversity concerns because they served to focus the CML rule on those markets in which there was a basis for concern that removing all cross-media limits would have a substantial adverse impact on diversity. The Commission acknowledged, for example, that the 'results of our diversity index analysis can fairly be said to understate the true level of viewpoint diversity in any given market." Order ¶400 (JA0197).

Prometheus claims (Br. 44), nevertheless, that the DI is irrational because it assumed "*equal market shares* for all media outlets in the market" in its analysis, which, accordingly to Prometheus, is inconsistent with antitrust analysis. Prometheus' claim is misleading in that it focuses on only part of the issue. As the Commission explained, it did weight different media, based on the survey of consumer usage, both in deciding which media to include in the DI and in assigning respective weights in the DI analysis to types of media because it recognized that all media are not of equal importance. *See* Order ¶¶409-19 (JA0201-04).

However, when it came to weighting outlets within the same medium, the Commission decided to focus on availability, assuming that all outlets within a medium have equal shares of readers, viewers or listeners. The Commission recognized that while not a perfect approach, the "underlying assumption is that "all outlets have at least similar technical coverage characteristics" (Order ¶421 (JA0205)), *i.e.*, that they are equally available throughout the market and have a similar potential impact on the "marketplace of ideas." *Id.* ¶422 (JA0206).

While the Commission's decisions about the technical details of the Diversity Index can be the subject of debate—indeed the agency recognized that the DI is a "blunt tool" that is neither "perfect nor absolutely precise" (Order ¶¶392, 398 (JA0194-95, 0197)—the Commission explained fully the purpose of the DI and the manner in which it was used as one element in the agency's process of assessing the need for and specifics of regulation to replace the prior newspaper/broadcast cross-ownership rule. That explanation is reasonable.

Tribune or Prometheus would have chosen a different course, which apparently would have led to different results that, coincidentally, would support their very different policy preferences. However, parties' disagreement with the Commission's conclusions on matters like this does not undermine those conclusions. The Commission is entitled to "implement its view of the public interest standard of the Act 'so long as that view is based on consideration of permissible factors and is otherwise reasonable.'" *WNCN Listeners' Guild*, 450 U.S. at 594, quoting *NCCB*, 436 U.S. at 793.

Petitioners' unwarranted focus on the process – a part of which included the Diversity Index – overlooks the end result – the CML rule. That rule is a rational approach, based on substantial evidence in the extensive record, that permits cross-media combinations in many markets while protecting those small and medium-size markets that the Commission identified as being most at risk of viewpoint concentration from cross-media combinations. This was the first change in cross-media limits with respect to newspaper/broadcast cross ownership in nearly thirty years. It was reasonable for the agency, both in designing the DI analysis and in its final CML rule, to rely on a conservative approach that will, as a result of Section 202(h), be subject to periodic re-examination to determine if the CML continues to be necessary in the public interest.

Tribune's contention (Br. 47-52) that the Commission's conclusions that led it to repeal of the prior rule do not permit adoption of the CML ignores the context of the Commission's discussions and relies on an erroneous interpretation of Section 202(h). Tribune argues that the Commission "expressly found that 'the record does not support [the] conclusion" that "cross-owned properties [are] likely to demonstrate uniform bias" and thus, in Tribune's view, there was no foundation for the Commission's decision to impose any limits on newspaper/broadcast cross-ownership. Br. 47. However, the Commission's complete statement is:

> Suffice to say, although there is evidence to suggest that ownership influences viewpoint, the degree to which it does so cannot be established with any certitude. <u>In order to sustain a blanket prohibition on</u>

> cross-ownership, we would need, among other things, a high degree of confidence that cross-owned properties were likely to demonstrate uniform bias. The record does not support such a conclusion.

Order ¶364 (JA0183) (emphasis added).

The fact that the record did not support sustaining a blanket prohibition, however, does not compel the conclusion that the record precluded any limits on cross-ownership in local markets. The Commission could reasonably conclude, as it did, that even if there were not clear evidence that cross-owned properties are likely to demonstrate uniform bias, the risk to diversity by reducing the number of media voices in small markets was sufficient to justify the limited restrictions imposed by the new CML rule. *See NCCB*, 436 U.S. at 796-97 (rejecting argument that newspaper/broadcast cross-ownership rule was unreasonable because record did not conclusively establish that rule would enhance diversity).

Prometheus, by contrast, offers as an example of the adverse consequences of the CML rule that the *Philadelphia Inquirer* would be permitted by the rule to "own the first-, fifth- and sixth-ranked TV stations, along with eight radio stations." Prom. Br. 34. Even if there were reason to believe that Prometheus' hypothetical might occur, the Philadelphia market would still have twelve commercial and five noncommercial television stations, thirty-five radio stations, a competing daily newspaper and a wide variety of additional local and national media. *See* NAA Br. 50. It was reasonable and well within the FCC's discretion to conclude that given the existing intra-service limits in a large market like Philadelphia, the wide range of available media did not warrant retaining additional restrictions on cross-ownership to protect diversity.[44]

C. The New CML Limiting Newspaper/ Broadcast Cross-Ownership Does Not Violate The Constitution.

1. *The Fifth Amendment Claims.* Tribune's claim (Br. 20-26) that the CML rule violates the equal protection component of the Fifth Amendment is unfounded. As Tribune acknowledges, the Supreme Court rejected a virtually identical argument in *NCCB*, holding that "the regulations treat newspaper owners in essentially the same fashion as other owners of major media of mass communication were already treated under the Commission's multiple-ownership rules." *See* 436 U.S. at 801. That same analysis remains valid today, and the Court's ruling controls here. The Commission found in the Order that daily newspapers, along with television and radio stations, "are the three media platforms that Americans turn to most often for local news and information." Order ¶452 (JA0216), citing MOWG Study No. 8, at Table 97 (JA3613). As was the case when the

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[44] Tribune's claim (Br. 61) that the Court should vacate the CML rule rather than remand if it were to find the Commission's action arbitrary and capricious is baseless. Vacating a rule is not required in such circumstances. *See United States Telecom Ass'n v. FBI*, 276 F.3d 620, 627 (D.C. Cir. 2002); *Illinois Public Telecomm. Ass'n v. FCC*, 123 F.3d 693 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1046 (1998). In *Fox* the D.C. Circuit vacated one media ownership rule only after finding that the rule was a "hopeless cause." 280 F.3d at 1053. However, it declined to vacate another rule even though it found that the disruptive consequences of vacating the rules would not be great, because the court could not "say it is unlikely that the Commission will be able to justify a future decision to retain the Rule." *Id.* at 1049. *See Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150-51 (D.C. Cir. 1993).

Supreme Court upheld the newspaper/broadcast cross-ownership rule in 1978, these three major media of mass communications continue to be treated in a similar fashion. It is no doubt true that in the 25 years since *NCCB* there have been changes in the number and types of communications media, but Tribune's claim (Br. 22) that "new and powerful major media have arisen that are indisputably 'major media of mass communication'" is unsupported by any reference to the record and is inconsistent with the Commission's record-supported finding that newspapers, radio, and television stations continue to be the major sources for local news and information.

2. *The First Amendment Claims.* The Commission correctly rejected claims below that its ownership rules, and particularly rules affecting newspapers, should be subjected to heightened First Amendment scrutiny. The Commission observed that the "*NCCB* Court explained that the rational basis test is the appropriate standard to govern our broadcast ownership regulations because spectrum scarcity requires 'Government allocation and regulations of broadcast frequencies,' and because these regulations are not content related." Order ¶14 (JA0043), quoting *NCCB*, 436 U.S. at 799, 801.

In fact, the Court in *NCCB* specifically rejected the claim, revived by Tribune here, that the newspaper/broadcast cross-ownership rule violated the First Amendment by "'restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others.'" Br. 24, quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). Noting its prior holdings, the Court found that "'the broad-cast media pose unique and special problems not present in the traditional free speech case.'" *NCCB*, 436 U.S. at 799, quoting *CBS v. DNC*, 412 U.S. 94, 101 (1973); *see also Buckley*, 424 U.S. at 50 n.55. The Court thus held that

> efforts to "'enhanc[e] the volume and quality of coverage' of public issues" through regulation of broadcasting may be permissible where similar efforts to regulate the print media would not be. . . . Requiring those who wish to obtain a broadcast license to demonstrate that such would serve the "public interest" does not restrict the speech of those who are denied licenses; rather, it preserves the interests of the "people as a whole . . . in free speech."

NCCB, 436 U.S. at 800. The Court expressly rejected an essentially identical argument by petitioners there relying on the same language from the then two-year old decision in *Buckley*. Tribune offers no explanation why that same reasoning is not equally applicable today.

Indeed, as recently as two years ago, the D.C. Circuit held, in response to virtually the same argument in *Sinclair*, 284 F.3d at 161, 62, that "there is no unabridgeable First Amendment right to hold a broadcast license; would-be broadcasters must satisfy the public interest by meeting the Commission criteria for licensing, including compliance with any applicable ownership limitations." Order ¶13 (JA 42-43).

In the 1996 Telecommunications Act, Congress mandated a number of changes in the FCC's broadcast ownership rules, but it did not modify the newspaper/broadcast cross-ownership rule. *See also Policies and Rules Concerning Children's Television Programming*, 11 FCC Rcd 10660, 10728-32 ¶¶146-56 (1996), citing S. Rep. No. 101-227, at 16 (1989) (finding Children's Television Act to be consistent with First Amendment and rejecting position that the scarcity rationale was no longer good law). In the Order, the Commission similarly rejected calls from a number of parties that heightened First Amendment scrutiny should apply to review of its ownership rules because spectrum scarcity is no longer a valid rationale for media ownership limits, noting that "the courts have considered and consistently rejected the arguments for a stricter standard of First Amendment scrutiny on broadcast regulation made by commenters here." Order ¶15 (JA0043).

Moreover, it does not follow, as the opposing parties would have it, that elimination of the scarcity doctrine automatically would lead to a conclusion that the newspaper/broadcast cross-ownership rule is an unconstitutional abridgement of free speech. The Supreme Court, for example, has upheld a requirement that cable television systems devote a portion of their channels to carriage of broadcast stations despite the fact that the Court also found that the scarcity doctrine – and therefore the more lenient First Amendment standards applicable to broadcasting – did not apply to cable television. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636-41 (1994). Thus the newspaper/broadcast cross-ownership rule cannot be assumed, as the opposing parties contend, automatically to be impermissible if the scarcity doctrine were to be eliminated.

D. The Commission Provided Adequate Notice And Opportunity To Comment With Respect To The Cross-Ownership Rule Changes.

Prometheus contends (Br. 39) that the Commission did not provide adequate notice and opportunity to comment, in violation of the APA, before adoption of the new cross-media limits rule. The argument has no foundation. The Commission provided ample notice and opportunity to comment on the newspaper/broadcast cross-ownership rule in two separate notices of proposed rule making.[45] *See* 47 U.S.C. §553(b)(3).

In a Notice of Proposed Rule Making issued in 2001, for example, the Commission undertook a proceeding to "seek comment on whether and to what extent we should revise our cross-ownership rule that bars common ownership of a broadcast station and a daily newspaper in the same market." *Newspaper/Broadcast NPRM* ¶1 (JA2458).

The Commission, in that notice, discussed at length questions regarding diversity and competition in relation to the newspaper/broadcast cross-ownership rule, posing questions for public comment such as: "Is it possible that the effect on diversity will be different depending on the size of the markets involved, or the predominance of newspapers and broadcast stations in a particular local market." *Id.* ¶18 (JA2467). The new CML rule, of course, concludes that the impact of differing ownership patterns will differ depending on the size of the markets involved and the number of television stations and takes those factors into account in adopting certain ownership limits in certain types of markets.

Much of the criticism in Prometheus' opposing brief relating to the issue of notice is directed at the Commission's development and use of the Diversity Index in creating the new cross-media limits rule. *See, e.g.,* Br. 41-48. As we have discussed above, the DI is simply an analytical tool the Commission employed to implement a policy approach that it had repeatedly discussed in the relevant

[45] *See Newspaper/Broadcast NPRM*, 16 FCC Rcd 17283 (2001) (JA2548); *2002 Biennial NPRM*, 17 FCC Rcd 18503 (2002) (JA3450).

notices—to adopt revised cross ownership restrictions based on the "size of the markets involved, or the predominance of newspapers and broadcast stations in a particular local market." *Newspaper/Broadcast NPRM* ¶18 (JA2467).

More specifically, in the *2002 Biennial NPRM*, the Commission sought comments on "(1) how to reformulate our mechanism for measuring diversity and competition in a market; (2) how to accord different weights to different media types to the extent that they are relied on by consumers differently; and (3) how to account for diversity and competition via MVPDs [Multi-channel Video Program Distributors] and the Internet in a revised voice test." ¶112 (JA3486). As the Commission explained, "[w]e use the DI as a tool to inform our judgments about the need for ownership limits." Order ¶391 (JA0193). The DI is modeled after the long-established Herfindahl-Hirschmann Index, and the Commission noted that the HHI "is already widely used in the diversity literature for measuring content diversity." *Id*. ¶397 (JA0195).

In addition, courts have held that agencies are not required to seek additional public comment prior to using data such as that employed in the DI. "Rulemaking proceedings would never end if an agency's response to comments must always be made the subject of additional comments. The response may, moreover, take the form of new scientific studies without entailing the procedural consequence appellants would impose, unless prejudice is shown." *Community Nutrition Inst. v. Block*, 749 F.2d 50, 58 (D.C. Cir. 1984); *see also Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991) ("[C]onsistent with the APA, an agency may use 'supplementary' data, unavailable during the notice and comment period, that 'expand[s] on and confirm[s]' information contained in the proposed rulemaking and addresses 'alleged deficiencies' in the pre-existing data, so long as no prejudice is shown."). Prometheus has failed to show any prejudice arising from the fact that it did not have an opportunity to comment directly on the Diversity Index.

V. THE 45% NATIONAL TELEVISION OWNERSHIP LIMIT IS A REASONABLE MEANS OF PROMOTING LOCALISM BY PRESERVING THE NETWORK-AFFILIATE BALANCE OF POWER.

The 1996 Act required the Commission to modify its rules to increase the national audience reach limitation for television stations from 25 percent to 35 percent. 1996 Act, §202(c)(1)(b), 110 Stat. 111. In the *Report and Order*, the Commission revised the limitation to increase the cap by an additional 10 points, to 45 percent. *See* 18 FCC Rcd at 13923 (to be codified at 47 C.F.R. §73.3555(d)).[46]

The Commission found that such a limit continued to remain necessary to promote localism by preserving a "balance of power" between the television networks and their affiliates in order to "ensur[e] that affiliates can play a meaningful role in selecting programming suitable for their communities." Order ¶501 (JA0234).

The Commission first examined the effect on the programming and national advertising markets if the national limit were removed. Order ¶¶518-28 (JA0240-44). Even with "worst case," "highly unrealistic" assumptions, however, the

[46] As we have noted, p.17, *supra*, legislation to reset the national cap to 39% is being considered by Congress but has not yet been enacted.

Commission found that the television programming market would be "moderately concentrated." *Id*. ¶523 (JA0241-42).[47] This worst-case result provided it with no basis for concluding that a national cap is needed to protect competition in that market. *Id*. ¶523 (JA0241-42). The Commission also found that there has been "no diminution in the national spot advertising market"[48] that could be "reliably associated with an increase in network station ownership." *Id*. ¶527 (JA0243).

The Commission likewise concluded that a national television ownership rule was not necessary to promote viewpoint diversity, "because people gather news and information from sources available in their local market," Order ¶534 (JA0245), and a national cap "has no meaningful impact on viewpoint diversity within local markets," *id*. ¶535 (JA0246). "[E]ven if the national market were the relevant area to consider," the Commission concluded, "the proliferation of media outlets nationwide renders the current rule unnecessary." *Id.*

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[47] The Commission observed that only 4.6% of the television markets in the United States have fewer than four television stations, and only 19.7% of the markets in the United States have fewer than six television stations. Order ¶522 (JA0241). It therefore assumed that, without a national limit, the four top broadcast networks would acquire stations to reach 100% coverage of U.S. television households, while an additional two companies would be able to acquire stations in 80% of television markets. *Id*.

[48] "National spot advertising time is sold by stations to national advertisers, which aggregate national or regional coverage by purchasing advertising spots from stations in multiple markets." Order ¶525 n.1098 (JA0242). Local television stations "rely in part on the national spot advertising market for a portion of their advertising revenue." *Id*. ¶526 (JA0242-43).

The Commission found, however, that a national television ownership cap remained necessary to promote localism because it acted to "preserve a body of independently-owned affiliates." Order ¶546 (JA0251-52). The Commission explained that "network affiliates have economic incentives more oriented towards localism than do network-owned stations," and "affiliates act on those incentives in ways that result in networks delivering programming more responsive to their local communities (in the judgment of the affiliate) than they otherwise would." *Id*. ¶546 (JA0251-52). In this regard, affiliates promote localism both "by collective negotiation to influence the programming that the networks provide" and by preempting network programming to provide programming that is "better suited" to their communities. *Id*. ¶546 (JA0251-52). *See id*. ¶543 (JA0248-50) (describing, among other things, NBC's decision to drop "strip stunts" from its program *Dog Eat Dog*, and CBS's decision to move its *Victoria's Secret Fashion Show* to a later evening time slot); *id*. ¶548 (JA0252) (showing that in the year 2001, affiliates preempted on average "9.5 hours of prime time programming," while network-owned stations preempted on average only "6.8 hours").[49]

The Commission found that it was not necessary to maintain the ownership cap at 35%, however. Relying "principally on the evidence showing that the largest network station owners possess no greater bargaining power—as measured

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[49] The Commission also concluded that a national television ownership cap "facilitate[s] a rapid and efficient transition to digital television" because "the broadcast industry is more likely to address the technical and marketplace issues associated with digital television if there are a variety of group owners exploring ways to use the spectrum." Order ¶532 (JA0244-45).

by prime time preemptions—than the smallest network station owner," Order ¶558 (JA0255), the Commission concluded that "the cap may safely be raised without disturbing either [the network-affiliate] balance or affiliates' ability to preempt network programming." *Id*. ¶562 (JA0256). The Commission also relied on evidence showing that "network-owned stations air, on average, more local news and public affairs programming than affiliates overall," *id*. ¶575 (JA0260-61), and that "local news on network-owned stations appears to be of higher quality than news on affiliate stations," *id.* ¶576 (JA0261) (discussing statistics regarding awards received), to conclude that the ownership cap may be "restraining the most effective purveyors of local news from using their resources in local markets." *Id*. ¶575 (JA0260-61).

The Commission "balance[d] the benefits of a television ownership cap against the factors favoring an incremental increase," *id*. ¶580 (JA0262), and concluded that it should raise the national cap by 10 percentage points. The Commission explained that it was "interested in finding a point at which the balance of power between networks and affiliates is roughly equal." *Id*. ¶581 (JA0262). At the same time, it was "mindful of the predictive nature of [its] line-drawing exercise" and "concern[ed] about allowing significant new aggregation of network power absent more compelling evidence regarding the possible effects of that aggregation above current limits." *Id*. ¶582 (JA0262-63). By increasing the limit by 10 percentage points, the Commission took an "incremental approach" that not only mirrored the increase that had been legislated by the 1996 Act, but allows "some, but not unconstrained growth, for each of the top four network owners."

Id. ¶¶582-83 (JA0262-63).[50] In the Commission's judgment, "the economies of scale and scope made possible by network expansion of station ownership" should "contribute to the preservation of over-the-air television by deterring the migration of expensive programming, such as sports programming, to cable networks." *Id.* ¶583 (JA0263).

The affiliates contend that the Commission should have retained the 35% limit, relying on evidence submitted by them that affiliate preemptions of network programming had decreased, and at an accelerated rate, since Congress increased the national ownership cap from 25% to 35% in 1996. NASA Br. 23. But as the affiliates acknowledge (*id*. at 24-25), the networks submitted preemption data for 2001 that showed that affiliates of the largest network-owners preempt "to an equal or greater extent" than do "affiliates of the network (ABC) with the smallest number of owned stations." Order ¶555 (JA0253-54). But "[i]f higher levels of network station ownership actually increased networks' leverage over their affiliates," one "would expect affiliates of the largest network station owners to preempt less (because of their diminished bargaining power) than affiliates of a network that had significantly less station ownership." *Id*.

Moreover, the affiliates themselves identified "other factors occurring in the same timeframe as the national cap increase" (including the Commission's repeal

[50] As a result of waivers obtained during the *Fox* litigation, CBS owns 39 stations reaching 39% of the national audience and Fox owns 37 stations reaching 37.8% of the national audience. In addition, ABC currently owns ten stations reaching 23.6% of the national audience, and NBC owns 29 stations reaching 33.6% of the national audience. Order ¶583 n.1204 (JA0263).

of the financial interest and syndication rules) that could have eroded their bargaining power. Order ¶559 (JA0255). This undermined their argument "that it was specifically the 1996 increase in the national cap that caused affiliates to reduce their preemption of network programming." *Id*. The affiliates complain that the networks' preemption data (which dealt with a single year) was so selective that it would have been reasonable for the Commission to draw adverse inferences against the networks on the preemption issue. NASA Br. 31. The Commission acknowledged that "[a] more accurate assessment of the impact of the 1996 national cap increase on network-affiliate bargaining leverage could be made if affiliate preemption rates from 1991 to 2001 could be compared to the preemption rates of network-owned stations during that same period." Order ¶560 (JA0255-56). But it refused to disregard the evidence that was before it, choosing instead to give it "the appropriate weight in light of all circumstances." *Id*. ¶555 n.1156 (JA0254).

The affiliates also criticize the basis for the Commission's conclusion that network-owned stations produce local news and public affairs programming in greater quantity, and of higher quality, than affiliates. NASA Br. 36-41. NASA does not dispute that there was record evidence, in the form of MOWG Study No. 7, to show that network-owned stations produce more local news and public affairs programming than affiliates, but argues that the difference between the two disappears "if Fox stations are excluded from this analysis." NASA Br. 40. But the Commission reasonably determined that that there was "no valid reason" to exclude Fox-owned stations from the analysis. Order ¶575 (JA0260-61). The affiliates also emphasize that there "is no significant difference in the quantity of local news programming" between network-owned stations and affiliates "in the top 25 markets." NASA Br. 41. But it was plainly reasonable for the Commission to decide not to focus on a particular subset of television markets in crafting a national television ownership rule.

The affiliates also contend that they produce higher quality news and public affairs programming than network-owned stations. NASA Br. 37-40. But again, the Commission had evidence before it to the contrary. MOWG Study No. 7, for example, determined that network-owned stations received more awards for local news programming than affiliates, *see* Order ¶569 (JA0258). The affiliates criticize the significance of those results on the ground that they were not adjusted for market size, NASA Br. 38, but a second study examined awards received in the top ten and top 50 markets, and concluded that there was no "discernible difference" between network-owned stations and affiliates on this score. Order ¶570 (JA0258-59). In sum, while the affiliates may disagree with the Commission's conclusion that the national cap could be raised without disturbing the network-affiliate balance of power, that conclusion was clearly supported by substantial evidence in the record.

At the other extreme, the network petitioners contend that there is no need for a national ownership cap at all, because network-owned stations are just as able as affiliates to respond to the tastes and needs of local communities. Fox Br. 23-34. But as the Commission found, "network-owned stations and affiliates have different economic incentives regarding the programming aired by local stations."

Order ¶547 (JA0252). The record showed that "the networks have a strong financial incentive to promote the widest distribution across the nation of network programming irrespective of the tastes of one or more particular local cities." *Id.* ¶541 (JA0248). This is because "[t]he widest possible distribution of programming . . . increases viewership of network programming," thereby "maximiz[ing] network advertising revenues," and "improves the likelihood that the program owner[s]"—increasingly the networks themselves—"will realize additional revenues in the program syndication market." *Id*. By contrast, "affiliates have an economic incentive to target their local audience . . . by offering programming that local viewers will prefer to watch, even if the programming replaces the network's nationally scheduled programming." *Id*. ¶547 (JA0252).

The networks concede that the record shows that "the average affiliate preempts 9.5 hours of prime-time programming per year versus 6.8 hours for the average [network-owned station]," Fox Br. 26, but attempt to dismiss the significance of that data because some local affiliates preempted network programming for "infomercials, telethons, entertainment, and paid religious shows," *id.* at 27. The Commission quite rightly "exclude[d] consideration of the content" of substituted programming in its preemption analysis, however, concluding that "[t]he judgment of when to preempt and what to substitute are uniquely within the judgment— and responsibility—of the station." Order ¶561 (JA0256).

The networks also do not dispute the examples in the record of affiliates collectively influencing network programming decisions to account for local tastes. Fox Br. 28. *See* Order ¶543 (JA0248-49), ¶551 (JA0252-53). And while the networks contend that network-owned stations "have far greater ability than do affiliates to influence network programming," Fox Br. 29, there is no evidence in the record that they do so to advance localism, and ample evidence that the economic incentives of the networks—by whom the owned stations are controlled—are to maximize national distribution of their programming without regard to the desires of any particular local community. Order ¶541 (JA0248).

Lastly, intervenor Capitol Broadcasting Co. (Capitol) challenges the Commission's decision to retain a discount of 50% for UHF television stations in calculating the national television ownership cap. Capitol Br. 10-38. This Court lacks jurisdiction over Capitol's arguments, which are in any event unavailing.

Capitol has filed a petition for FCC reconsideration of the *Report and Order* on review in this case that raises the same issues it has raised in its brief to this Court. *See* Petition for Reconsideration by Capitol Broadcasting (FCC No. 02-277 Sept. 4, 2003). As we have explained with regard to the arguments of MMTC, the Court lacks jurisdiction over arguments raised by a party that has sought reconsideration by the agency. *West Penn Power Co. v. EPA*, 860 F.2d at 587; *Graceba Total Communications, Inc. v. FCC*, 115 F.3d at 1040. In addition, Capitol's arguments against the Commission's decision to retain a UHF discount are barred because no petitioner has raised that contention.[51] *See Southwestern Penn. Growth Alliance v. Browner*, 121 F.3d at 121.

In any event, the Commission's decision to retain the UHF discount was neither arbitrary nor capricious. As the Commission explained, the UHF discount recognizes that UHF stations are at a competitive disadvantage with VHF stations because the UHF signal covers a smaller area, Order ¶586 (JA0264), and UHF stations require "more expensive transmitters" and "between 1.5 and 3 times greater electricity costs to operate." *Id*. ¶588 (JA0265). In addition, the Commission found, the UHF discount "promotes entry by new broadcast networks," citing the experience of Paxson and Univision, both of which created networks through ownership of UHF stations. *Id*. ¶589 (JA0265-66).

Capitol contends that there is no basis in the agency's past policies or in the record to support this justification for the UHF discount. Capitol Br. 17-23. But the Commission has long taken steps to encourage the creation of additional networks to promote competition in broadcasting, *see NBC*, 319 U.S. at 207-08, 224-27 (upholding Chain Broadcasting Rules), and the evidence that the UHF discount has contributed to those policies is undeniable. Order ¶589 (JA0265-66). *See also* Univision Br. 22-23.

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[51] Prometheus makes passing references to the UHF discount in its factual statement, *see* Prometheus Br. 7, 16, but nowhere in its argument. The affiliates also mention the UHF discount in their brief, *see* NASA Br. 25 n.20, 43 n.31, but nowhere challenge the discount's lawfulness. The networks' brief addresses the UHF discount, but argues that the agency erred in announcing its intention to partially eliminate the UHF discount at some future point. *See* Fox Br. 43.

Capitol also contends that UHF signal limitations "are largely irrelevant" because "86% of households receive their television signals through cable or satellite." Capitol Br. 17. But the Commission pointed out that "roughly 30% of television sets" are still not connected to cable or satellite and "receive exclusively over-the-air broadcast stations." Order ¶587 (JA0264-65) (citing *2001 Video Competition Report*, 17 FCC Rcd 1244, 1282 ¶79 (2002)). Moreover, weaker UHF signals make it more difficult for a UHF station to qualify for cable and DBS carriage, and non-carriage on those systems "will, as a practical matter, make the UHF station unavailable" to homes connected to those services. *Id.* ¶587 (JA0264-65). [52]

Even if it had authority to retain some national television ownership limit, the networks maintain, the Commission should have set the limit at more than 45%. Fox. Br. 36-39. But the courts have recognized that "[w]hen an agency is required to make policy judgments where no factual certainties exist," the courts require only "that the agency so state and go on to identify the considerations it found persuasive." *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003) (citing *AT&T v. FCC*, 832 F.2d 1285, 1291 (D.C. Cir. 1987)).

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[52] The networks contend (Fox Br. 43-45) that the Commission acted arbitrarily in announcing its intention to "sunset" the application of the UHF discount for the top four networks "as the digital transition is completed on a market by market basis." Order ¶591 (JA0266). But the Commission made clear that it would not sunset the discount if it determined "that the public interest would be served by continuation of the discount beyond the digital transition." *Id.* The networks thus will have ample opportunity before any "sunset" to make their case that the discount should be retained beyond the digital transition.

In this case, the Commission candidly acknowledged that "[t]he record does not . . . help [to] identify with any precision the point at which a network audience reach would be so large that affiliate bargaining power would be substantially undermined," Order ¶581 (JA0262), and where precisely to draw the line was ultimately a "matter of judgment" informed by the Commission's experience and expertise. *Id*. ¶580 (JA0262). The Commission identified and discussed—at length and in detail—the confluence of considerations that led it to decide, in light of all of the available information, that a 45% limit would best promote its localism policies by preserving a balance of power between the networks and their affiliates. Because that judgment was a reasonable exercise of the Commission's authority under the 1934 Act, it should be upheld.

CONCLUSION

For the foregoing reasons, the Commission's order revising its media ownership rules should be upheld and the petitions for review denied.

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December 8, 2003

IN THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

PROMETHEUS RADIO PROJECT, *ET AL.*, PETITIONERS V. FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS	)))))))))	NOS. 03-3388, 03-3577, 03-3578, 03-3579, 03-3580, 03-3581, 03-3582, 03-3651, 03-3665, 03-3675, 03-3708, 03-3894, 03-3950, 03-3951 & 03-4073

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS IN RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's order of November 24, 2003 because this brief contains 27268 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in Times New Roman 14.

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December 8, 2003

STATUTORY AND REGULATORY APPENDIX

1. 47 U.S.C. §154(i) Federal Communications Commission.

Duties and powers. The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

2. 47 U.S.C. § 201(b) Service and charges.

. . . The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

3. 47 U.S.C. § 301 License for radio communication or transmission of energy.

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. . . .

4. 47 U.S.C. § 303(r) Powers and duties of Commission.

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

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

5. 47 U.S.C. § 307(a) Licenses.

Grant. The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

6. 47 U.S.C. § 309(a) Application for license.

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

7. 47 U.S.C. § 309(d)(1) Application for license.

Petition to deny application; time; contents; reply; findings. (1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which

statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license), it shall proceed as provided in subsection (e) of this section.

8. 47 U.S.C. § 310(d) License ownership restrictions.

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

9. 1996 Act, § 202 Broadcast Ownership.

(a) NATIONAL RADIO STATION OWNERSHIP RULE CHANGES REQUIRED.—The Commission shall modify section 73.3555 of its regulations (47 C.F.R. 73.3555) by eliminating any provisions limiting the number of AM or FM broadcast stations which may be owned or controlled by one entity nationally.

(b) LOCAL RADIO DIVERSITY.—

(1) APPLICABLE CAPS.—The Commission shall revise section 73.3555(a) of its regulations (47 C.F.R. 73.3555) to provide that—

(A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);

(B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);

(C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and

(D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.

(2) EXCEPTION.—Notwithstanding any limitation authorized by this subsection, the Commission may permit a person or entity to own, operate, or control, or have a cognizable interest in, radio broadcast stations if the Commission determines that such ownership, operation, control, or interest will result in an increase in the number of radio broadcast stations in operation.

(c) TELEVISION OWNERSHIP LIMITATIONS.—

(1) NATIONAL OWNERSHIP LIMITATIONS.—The Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations (47 C.F.R. 73.3555)—

(A) by eliminating the restrictions on the number of television stations that a person or entity may directly or indirectly own, operate, or control, or have a cognizable interest in, nationwide; and

(B) by increasing the national audience reach limitation for television stations to 35 percent.

(2) LOCAL OWNERSHIP LIMITATIONS.—The Commission shall conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market.

(d) RELAXATION OF ONE-TO-A-MARKET.—With respect to its enforcement of its one-to-a-market ownership rules under section 73.3555 of its regulations, the Commission shall extend its waiver policy to any of the top 50 markets, consistent with the public interest, convenience, and necessity.

(e) DUAL NETWORK CHANGES.—The Commission shall revise section 73.658(g) of its regulations (47 C.F.R. 658(g)) to permit a television broadcast station to affiliate with a person or entity that maintains 2 or more networks of television broadcast stations unless such dual or multiple networks are composed of—

(1) two or more persons or entities that, on the date of enactment of the Telecommunications Act of 1996, are ‘‘networks’’ as defined in section 73.3613(a)(1) of the Commission's regulations (47 C.F.R. 73.3613(a)(1)); or

(2) any network described in paragraph (1) and an English language program distribution service that, on such date, provides 4 or more hours of programming per week on a national basis pursuant to network affiliation arrangements with local television broadcast stations in markets reaching more than 75 percent of television homes (as measured by a national ratings service).

(f) CABLE CROSS OWNERSHIP.—

(1) ELIMINATION OF RESTRICTIONS.—The Commission shall revise section 76.501 of its regulations (47 C.F.R. 76.501) to permit a person or entity to own or control a network of broadcast stations and a cable system.

(2) SAFEGUARDS AGAINST DISCRIMINATION.—The Commission shall revise such regulations if necessary to ensure carriage, channel positioning, and nondiscriminatory treatment of nonaffiliated broadcast stations by a cable system described in paragraph (1).

(g) LOCAL MARKETING AGREEMENTS.—Nothing in this section shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is in compliance with the regulations of the Commission.

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

(i) ELIMINATION OF STATUTORY RESTRICTION.—Section 613(a) (47 U.S.C. 533(a)) is amended— (1) by striking paragraph (1);

(2) by redesignating paragraph (2) as subsection (a);

(3) by redesignating subparagraphs (A) and (B) as paragraphs (1) and (2), respectively;

(4) by striking ‘‘and’’ at the end of paragraph (1) (as so redesignated);

(5) by striking the period at the end of paragraph (2) (as so redesignated) and inserting ‘‘; and’’; and

(6) by adding at the end the following new paragraph: ‘‘(3) shall not apply the requirements of this subsection to any cable operator in any franchise area in which a cable operator is subject to effective competition as determined under section 623(l).’’.

9. 47 C.F.R. § 73.3555 Multiple ownership.

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

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

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

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

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

(b) Local television multiple ownership rule.

(1) For purposes of this section, a television station's market shall be defined as the Designated Market Area (DMA) to which it is assigned by Nielsen Media Research or any successor entity at the time the application to acquire or construct the station(s) is filed. Puerto Rico, Guam, and the U.S. Virgin Islands each will be considered a single market.

(2) An entity may have a cognizable interest in more than one full-power commercial television broadcast station in the same DMA in accordance with the following conditions and limits:

(i) at the time the application to acquire or construct the station(s) is filed, no more than one of the stations that will be attributed to such entity is ranked among the top four stations in the DMA, based on the most recent all-day (9:00 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and

(ii) (A) Subject to (2)(i) above, in a DMA with 17 or fewer full-power commercial and noncommercial television broadcast stations, an entity may have a cognizable interest in no more than 2 commercial television broadcast stations; or

(B) Subject to (2)(i) above, in a DMA with 18 or more full-power commercial and noncommercial television broadcast stations, an entity may have a cognizable interest in no more than 3 commercial television broadcast stations.

(c) Cross-Media Limits. Cross-ownership of a daily newspaper and commercial broadcast stations, or of commercial broadcast radio and television stations, is permitted without limitation except as follows:

(1) In Nielsen Designated Market Areas (DMAs) to which three or fewer full-power commercial and noncommercial educational television stations are assigned, no newspaper/broadcast or radio-television cross-ownership is permitted.

(2) In DMAs to which at least four but not more than eight full-power commercial and noncommercial educational television stations are assigned, an entity that directly or indirectly owns, operates or controls a daily newspaper may have a cognizable interest in either:

(i) one, but not more than one, commercial television station in combination with radio stations up to 50% of the applicable local radio limit for the market; or

(ii) radio stations up to 100% of the applicable local radio limit if it does not have a cognizable interest in a television station in the market.

(3) The foregoing limits on newspaper/broadcast cross-ownership do not apply to any new daily newspaper inaugurated by a broadcaster.

(d) National television multiple ownership rule.

(1) No license for a commercial television broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors having a cognizable interest in television stations which have an aggregate national audience reach exceeding forty-five (45) percent.

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

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

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

CERTIFICATE OF SERVICE

I, C. Grey Pash, Jr., hereby certify that the foregoing "Brief for Respondents" was served December 9, 2003 by sending copies by hand delivery or by overnight delivery service to the following persons at the addresses shown below:

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