
No. 08-3078 (and consolidated cases)

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

PROMETHEUS RADIO PROJECT, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

On Petitions for Review of An Order of
the Federal Communications Commission

**BRIEF FOR INTERVENORS CONSUMER FEDERATION OF
AMERICA AND CONSUMERS UNION**

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CORPORATE DISCLOSURE STATEMENT

Prometheus Radio Project, et al. v. FCC, No. 08-3078

Pursuant to Third Circuit L.A.R. 26.1, intervenors Consumer Federation of America and Consumers Union state that they are not publicly owned corporations and that neither has any parent companies, subsidiaries or affiliates that have issued shares to the public.

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SUMMARY OF ARGUMENT

The central question in these consolidated appeals is whether the substantial revisions made by the Federal Communications Commission to its longstanding newspaper/broadcast cross-ownership rule (a/k/a the “NBCO”), on remand from this Court’s 2004 decision,¹ are consistent with the rulemaking requirements of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 553, 706.

Having been among the most vocal opponents of the FCC’s original methodology and principal petitioners in the earlier appeals, intervenors Consumer Federation of America (“CFA”) and Consumers Union (collectively the “Consumer Intervenors”) respectfully suggest that the revised NBCO regulations are within the agency’s authority and discretion and a fair exercise of its powers under the APA. The new rule is a vast improvement over the one rejected by this Court in 2004. By discarding the pseudo-science of the so-called Diversity Index, which “abandon[ed] both logic and reality,”² the Commission’s remand conclusion that media markets can and should, for purposes of diversity and competition, be divided based on market size is a reasonable inference from the record evidence. That record, some of which was supplied by intervenor CFA itself, includes ample

¹ *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005).

² *Id.* at 408; *see generally id.* at 402-11.

statistical and econometric evidence supporting the FCC's determination in its *2008 Order* that for cross-ownership purposes, the top 20 media markets should presumptively be deemed sufficiently diverse and competitive to permit a broadcaster to own a local newspaper, subject to case-by-case review and conditions that promote the public interest purposes of the Communications Act, and vice-versa.³

The Court should therefore affirm the modified NBCO rule. The objections by some media petitioners that the revisions are instead an unlawful “reinstatement” of the blanket prohibition of all local newspaper-broadcast combinations are misleading and false. While the Consumer Intervenors recognize that the Commission's presumption and waiver factors are not entirely unambiguous, we do not agree that they are so vague as to violate the APA's standards, and in any event the FCC can and likely will further interpret those criteria in case-by-case waiver proceedings.

Beyond the NBCO, Consumer Intervenors believe only one other matter merits serious consideration by the Court. The FCC's retention of a rule barring ownership of two local television stations in a single media market — the so-called “duopoly” rule — represents a permissible, and fully warranted, reversal of the

³ *2006 Quadrennial Review, Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order, 23 FCC Rcd. 2010 (2008) (“*2008 Order*”).

agency's prior 2003 Order, one in compliance with the APA's requirements for changes in agency policy as clarified by the Supreme Court in *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810 (2009). The duopoly rule should therefore be affirmed on the merits.

Conversely, a number of media petitioners again use their opposition to the FCC's regulatory revisions as an artificial vehicle with which to challenge the underlying constitutionality of *any* broadcast regulation, asserting that *Red Lion* scarcity no longer exists and therefore that the First Amendment basis for regulation has been superseded.⁴ This is not the appropriate case to address such issues, however, as a record was not assembled below on those matters and the FCC has not, as yet, had the opportunity to solicit or examine policy and jurisprudential alternatives to the *Red Lion* doctrine as a basis for broadcast regulation in today's more robust media environment. We therefore agree with the FCC that such constitutional issues are foreclosed by this Court's prior opinion and should be decided only on appellate review of an agency proceeding — for instance, one initiated by a media industry petition for rulemaking — in which all interested parties have a full and fair opportunity to develop a comprehensive record on which the Supreme Court will ultimately decide the fate of *Red Lion* in the 21st century.

⁴ *Red Lion Broadcasting Co. v. United States*, 395 U.S. 367 (1969).

ARGUMENT

I. THE FCC’S MODIFICATIONS TO THE NEWSPAPER/ BROADCAST CROSS-OWNERSHIP RULE ACCORD WITH THIS COURT’S 2004 MANDATE AND WERE NEITHER IRRATIONAL NOR ARBITRARY

The flat ban on newspaper-broadcast cross ownership, the oldest of the media ownership limits that had not been modified before 2003, was replaced in the FCC’s *2008 Order* with a case-by-case review that allocates the burden of proof according to criteria consistent with real-world marketplace developments. This result is responsive to the prior ruling of this Court — which upheld the decision by the FCC to lift the outright NBCO ban but concluded that the Commission had failed to fashion a replacement rule that rationally implemented the policy objectives of competition, localism and diversity⁵ — and is supported by substantial record evidence. It should be affirmed.⁶

A. The Media Petitioners’ Claim That the FCC Retained or Reinstated a “Blanket” NBCO Prohibition Are Grossly Misleading

Some of the media petitioners contend that the FCC reversed itself, and presumably violated this Court’s mandate, by reinstating an absolute prohibition on all

⁵ *Prometheus I*, 373 F.3d at 398-400.

⁶ While the process utilized by the FCC for its second quadrennial media concentration review was flawed in several ways as a practical matter, Citizen Petitioners’ Br. at 25-27, whether those procedures violated the notice provisions of the APA as a matter of law is not addressed in this brief. *See* FCC Br. at 36-37; 5 U.S.C. § 553(b).

newspaper-broadcast combinations in any market. *E.g.*, Tribune Br. at 21-22, 24; NAA Br. at 26-31. The Newspaper Association of America (“NAA”), for instance, claims that the agency “retained its blanket prohibition on newspaper/broadcast cross-ownership and, rather than modifying the ban itself, added sections to its regulations spelling out revised standards for seeking a waiver.” NAA Br. at 26.

This is grossly misleading if not an outright fabrication. First, the Commission’s decision does not upset, but instead expressly reiterates, its 2003 conclusion that “retention of a complete ban” on newspaper/broadcast combinations is “not . . . in the public interest” under the applicable standard of section 202(h). *2008 Order* ¶¶ 19, 24-38, 23 FCC Rcd. at 2021-22, 2024-32 (J.A. __-__, __-__). “[O]n remand and reconsideration, we will not reinstate the cross-media limits or rely on the DI [Diversity Index]. . . . [W]e **reaffirm the Commission’s decision to eliminate the blanket ban on newspaper/broadcast cross-ownership.**” *Id.* ¶¶ 17-18, 23 FCC Rcd. at 2010 (J.A. __) (emphasis supplied). That is the position upheld by this Court in 2004 and it remains unchanged. Petitioner NAB correctly recognizes that the FCC “relax[ed] the newspaper/ broadcast cross-ownership ban.” NAB Br. at 57, 59. How other media parties fairly find in the agency’s decision to reaffirm “eliminat[ion]” of a “blanket ban” on newspaper/ broadcast cross-ownership the

“retention” of a “blanket restriction” they raise as a straw man is mysterious at best.

Second, to the extent some media petitioners impliedly suggest that what they characterize as “arcane and severely circumscribed waiver standards” somehow transform a conceded presumption in larger markets (that a newspaper-broadcast transaction “will be in the public interest”) into an *absolute* prohibition of the same, *see* NAA Br. at 26, they are misguided. Using statistics on the percentage of media markets subject to the new, permissive presumption out of the total number of markets nationwide, *id.* at 27-28, cannot substitute for what the agency actually decided. More than 40 percent of the U.S. population resides in the 20 largest Designated Market Areas (“DMAs”) in which the proposed rule would not only *not* ban mergers, but would presume them to be in the public interest.⁷ This is hardly a *de minimis* change.

Yet whether the changes are substantial or *de minimis*, the fact is that the FCC did not promulgate, reinstate, re-adopt or otherwise put or keep in place the older, 1975 rule it had jettisoned during the 2002-03 ownership review. Complaining that the FCC made only “minimal changes” to its rules, NAA Br. at 27, is in fact a concession that the Commission made *some* modifications, again rejected an absolute ban, and did not improperly reverse course. Hence, this is in reality

⁷ SNL Kagan, Database, TV Households.

nothing more than a challenge to the agency's line-drawing. As Consumer Inter-venors note below — and as we conceded as petitioners in 2004 — that is a matter committed to the agency's judgment and one to which the judiciary has and should continue to defer, absent a lack of rational evidentiary support for the line(s) selected. *See* Section I(B) *infra*.

Third, since section 202(h) allows the FCC to “repeal or modify” rules that no longer serve the public interest, there is no purchase to the contention that changes which are deemed too little violate the Commission's substantive statutory obligation. NAA Br. at 29. The proper APA inquiry is whether the revisions made are rationally based on the rulemaking record before the agency. Here the FCC “modif[ied] the newspaper/broadcast cross-ownership rule, and . . . generally re-tain[ed] the other broadcast ownership restrictions currently in effect.” *2008 Order* ¶ 1, 23 FCC Rcd. at 2011 (J.A. ___). Using section 202(h) to manufacture an argu-ment that modifications which are deemed inconsequential or insufficient amount as a matter of law to reinstatement of an earlier regulation is improper. The mod-ified NBCO rule should stand or fall based on what the FCC actually did, not whether the use of waiver presumptions considered “exceedingly stringent,” NAA Br. at 31, should or may be deemed for purposes of judicial review the *sub silentio* reinstatement of a rule twice expressly rejected by the Commission.

B. The Commission’s Separation of Local Media Markets Into Two Categories, With Larger Markets Enjoying a Rebuttable Presumption That Cross-Ownership Will Not Harm Media Diversity, Is Consistent With the Record Evidence And a Valid Exercise In Administrative Line-Drawing

When it comes to the modified NBCO rule itself, there was and remains sharp disagreement among broadcast and media owners, the public interest community and the Commission itself over the relative benefits of cross-ownership, the profitability of and future economic prospects for the United States newspaper industry, and the pace at which technological developments — particularly the growth of Internet-distributed digital news content — affect the FCC’s policies of diversity, competition and localism. Here the Commission steered a middle course, rejecting some of the Consumer Intervenors’ data as well as some supplied below by the media petitioners,⁸ and sought to balance conflicting objectives in a

⁸ *E.g.*, 2008 Order ¶¶ 34 & n.114, 42, 44, 23 FCC Rcd. at 2029-30, 2034, 2037 (J.A. __-__, __, __) (rejecting CU/CFA criticism of methodology of three Media Ownership studies; finding CU/CFA conclusions regarding cross-ownership degradation of local news unreliable; criticizing CFA empirical analysis of newspaper concentration). The Consumer Intervenors have been involved in proceedings before the Commission on media ownership rules for many years, submitting detailed economic, legal and social policy analysis at every stage of the process.

period of intense, unpredictable change in media distribution, consumption and advertising.⁹ As the *Order* summarizes:

The record shows that the number of traditional media outlets has remained largely static since the Commission last considered its media ownership rules, even as online-only outlets have grown. As a result, traditional media entities have been trying to find ways to maintain revenue growth while implementing new models of distribution. With attention turned to the online and digital environment, consolidation among owners of broadcast stations appears to have slowed, while the stability of once-storied newspaper publishing companies has become open to question.

2008 Order ¶ 7, 23 FCC Rcd. at 2015-16 (J.A. ___-___) (footnotes omitted).

We respectfully think that the FCC's performance here, although somewhat superficial, got it essentially correct. The agency seriously examined the evidence before it and the differing conclusions drawn from that empirical data by a variety of adverse parties, "recogniz[ing] that there is disagreement in the studies." *2008 Order* ¶ 46, 23 FCC Rcd. at 2038 (J.A. ___). The Commission did not, as it could have, try to reinvigorate a patched-up Diversity Index ("DI"), nor did it reach arbitrary conclusions divorced from common sense and real-world experience. Unlike its 2003 decision, the presumptions adopted by the FCC are not even claimed by

⁹ "[T]he Commission's newspaper/broadcast cross-ownership ban arose in an era when daily newspapers and broadcast stations enjoyed relatively unrivaled power in their local markets to collect information and to decide what constituted 'news' worth transmitting to their audiences. . . . It is clear today that these 'gate-keeping' aspects of the traditional media's role are in turmoil." *2008 Order* ¶ 37, 23 FCC Rcd. at 2031-32 (J.A. ___-___).

petitioners to lead to absurd results akin to those which, in part, doomed the DI in this Court's earlier opinion. *Prometheus I*, 373 F.3d at 408-09, 411.

The Commission found that “[t]he record indicates that the largest markets contain a robust number of diverse media sources and that the diversity of viewpoints would not be jeopardized by certain newspaper/broadcast combinations.” *2008 Order* ¶ 19, 23 FCC Rcd. at 2022-23 (J.A. __-__). This decision to slice the baby by market size is plainly consistent with the competitive structure of media markets and subsequent developments. Although regulatory line drawing is always a difficult exercise, the top 20 markets, where the rebuttable presumption is in favor of approving mergers, are generally much richer in media variety and competition than smaller markets, where the rebuttable presumption will be against cross-ownership mergers. *See Tribune/Fox Br.* at 40-42. This market size-oriented approach is a methodology, in fact, that CFA has advocated on the record going back to the Commission's first reviews of media ownership rules.

Some of the media parties, once again, contend that the Internet and Web-centric “new media” have fundamentally changed the availability of local news and information for purposes of viewpoint diversity and localism. *E.g.*, *Media Gen. Br.* at 31-11; *CBS Br.* at 24-27, 37, 42-43. Similar overstatement of the impact of Internet-distributed news lay at the heart of this Court's actions in 2004. Here, the FCC appropriately discounted the Internet based on actual data, finding

that “only a small percentage of people use the Internet frequently for local news and information,” 2008 Order ¶¶ 57-58, 23 FCC Rcd. at 2042-45 (citing CU/CFA comments), and that “consumers continue predominantly to get their local news from daily newspapers and broadcast television.” *Id.* This accords with the record evidence of today’s media marketplace.¹⁰ Whether the development of so-called “hyperlocal” Internet content and advertising will change distribution and consumption patterns for local news in the future remains to be seen.¹¹ If it does, then the NBCO top-20 rule should and likely would be reconsidered and modified once again. But future possibilities do not justify eliminating a rule that accurately reflects current market reality and that constrains increases in the concentration of dominant media outlets in already concentrated markets today.

While we do not believe that the salvation of print journalism lies in cross-ownership between TV stations and newspapers, principally because such transac-

¹⁰ FCC Br. at 29 (record “showed that newspapers and broadcast stations remained the most significant sources of local news for American consumers” and thus “supported the Commission’s conclusion that newspaper/broadcast combinations continue to pose a serious threat to viewpoint diversity”).

¹¹ *See, e.g.*, “‘Hyperlocal’ Web Sites Deliver News Without Newspapers,” *New York Times*, April 12, 2009, available at <http://www.nytimes.com/2009/04/13/technology/start-ups/13hyperlocal.html>; “N.Y. Times Shuttles Local News Blog,” *NJ.com*, July 1, 2010, available at http://www.nj.com/business/index.ssf/2010/07/ny_times_shuttles_local_news_b.html.

tions do not address the disintermediation of legacy media resulting from vastly increased digital availability of classified advertising, it is clearly the case that large metropolitan dailies are the newspapers that have been most impacted. The review of individual proposed mergers will afford the opportunity for the Commission to weigh the private economic benefits of cross ownership to the merging parties against the harm to competition, localism and diversity that could result from specific proposed transactions. As the FCC explained, “[t]he inconclusiveness of some of the data and disagreement as to the outcome of the studies . . . supports our decision to undertake a case-by-case review of particular combinations in particular markets, rather than providing hard, across-the-board limits.” *2008 Order* ¶ 46, 23 FCC Rcd. at 2038 (J.A. ___).

The unwillingness of the FCC to adopt an alternative or modified Diversity Index is of no consequence to judicial review.¹² Such a numerical index was only a tool to aid the Commission in its evaluation of market concentration but, as the Court rightly held, the design of the tool, its use and the results it produced were illogical and divorced from reality. Market size is a criterion that is grounded in reality and one which is highly correlated with media concentration, as the record

¹² The Court’s remand to “to justify or modify further” the FCC’s cross-media limits was not, we respectfully submit, intended to prevent the agency from modifying its rules through use of tools other than the DI. *Prometheus I*, 373 F.3d at 403.

in this proceeding amply demonstrates. Whether the break point should be the top 20 markets, the top 30 markets or something else, however, represents administrative line drawing, which no party can show lacks a rational basis in the evidence, as that evidence could largely support a number of different regulatory lines.

Prometheus I, 373 F.3d at 420. That is a more than sufficient basis on which to sustain the FCC's revised NBCO rule under the settled standards of the APA.

5 U.S.C. § 706(2).

C. Although the Agency's Presumption and Waiver Criteria Are Not Entirely Unambiguous, They Meet the APA Standard for Rules and May Fairly Be Interpreted In Case-By-Case Decisions

Unlike the media petitioners, Citizen Petitioners do not attack the merits of the Commission's top-20 market presumption favoring approval of newspaper/broadcast cross-ownership. Yet it appears that nearly all of the petitioners, for different reasons, argue that the FCC's four waiver factors¹³ are unlawful, either for being too strict and constraining or, conversely, for being too loose and vague.

E.g., NAB Br. at 33-37; NAA Br. at 44-54; Citizen Petitioners' Br. at 30-33.

Although we agree that the factors are not totally clear, we cannot concur that they contain "so many exceptions, loopholes and ambiguities" as to conflict with the purposes of diversity, localism and competition. *See* Citizen Petitioners'

¹³ 47 C.F.R. § 73.3555(d)(5).

Br. at 30. The absence of formal definitions of local news or independent news judgment is not fatal because the Commission, like all regulatory agencies, is permitted to develop its policies and interpret its rules in fact-specific adjudicatory proceedings. If the FCC in such future waiver proceedings in fact does not provide consumers and interested public parties the information needed to object, that would be unlawful under section 309 of the Communication Act, but the remedy should be reversal of any resulting cross-ownership waivers. *Id.* at 33-36. In a more general sense, the Consumer Intervenors do not agree that, even though our criticisms of the four proposed waiver factors were not accepted, the FCC's adoption of those criteria lacks a rational connection to the record evidence and its applicable policy objectives.

Nor can we agree that the waiver factors are invalid on the ground that they are too "stringent"¹⁴ or that the FCC is not permitted to weigh the substantive

¹⁴ Contrary to such arguments, what the FCC in fact explained is that the top-20 market presumption will, in most instances, be virtually conclusive. "We adopt a presumption that it is not inconsistent with the public interest for an entity to own in the top 20 Designated Market Areas ('DMAs') either (a) a newspaper and a television station if (1) the television station is not ranked among the top four stations in the DMA, and (2) at least eight independent 'major media voices' remain in the DMA; or (b) a newspaper and a radio station." *2008 Order* ¶ 53, 23 FCC Rcd. at 2040 (J.A. ___) (footnotes omitted). The Commission "expect[s] that, as a result of this presumption," waivers "would be granted in such cases." *Id.*

contributions of different media to viewpoint diversity. *E.g.*, NAA Br. at 39.¹⁵ It was not the assignment of varying weights to different sources of local news and information that doomed the Diversity Index in this Court’s earlier decision, rather it was the arbitrary values used by the agency. *Prometheus I*, 373 F.3d at 404-08. It is this invalid implementation, and not “the relative importance of different [local news] outlets,” that the Court rejected in holding that the Diversity Index was not a rational administrative approach to assessing media concentration. NAA Br. at 29 & n.12.

More broadly, the waiver-specific application of these criteria, together with the existence of a regular review process for Commission media ownership regulation under section 202(h), fits the dynamic situation of the media marketplace. To the extent that the criteria articulated by the Commission for approving cross-ownership mergers need to be refined, that can be done in future quadrennial reviews. The decision by the 2002-03 FCC to conduct a mega-proceeding that sought to eliminate or radically reduce media industry oversight was driven by an

¹⁵ The constitutional arguments of the Newspaper Parties and others that use of an “independent new judgment” criterion violates the First Amendment by intruding into newsroom operations, *Tribune/Fox Br.* at 35-40; *CBS Br.* at 55-56, are meritless. Evaluating the type, significance and source of media content is vital if the FCC is to assess whether diversity in viewpoints could be curtailed by cross-ownership, but looking at the type, quality and originality of news production is a far cry from regulating it. Nothing in the FCC’s modified NBCO or waiver factors impinges on journalists’ or newspapers’ First Amendment freedoms.

exuberance for deregulation that has proven, in this and many other areas of the economy, to have been more dogmatic than accurate. The measured approach of the *2008 Order*, bolstered up by quadrennial review process, is better suited to protect consumers and the public interest as articulated in the Act.

II. THE FCC’S RETENTION OF THE LOCAL TELEVISION “DUOPOLY” RULE IS WARRANTED AND SHOULD BE AFFIRMED ON THIS RECORD

Beyond the NBCO, Consumer Intervenors believe only one other matter merits serious consideration by the Court. The FCC’s retention of a rule barring ownership of two local television stations in a single media market — the so-called “duopoly” rule¹⁶ — represents a permissible, and fully warranted, reversal of the agency’s prior 2003 Order, one in accord with the APA’s requirements for changes in agency policy as articulated by the Supreme Court in *FCC v Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810 (2009). The modified duopoly rule should therefore be affirmed on the merits.

The Commission’s decision to alter its 2003 findings is consistent with this Court’s judgment and mandate. As the FCC explained:

¹⁶ The modified local television rule “allow[s] an entity to own two television stations in the same DMA if: (1) the Grade B contours of the stations do not overlap; or (2) at least one of the stations in the combination is not ranked among the top four stations in terms of audience share, and at least eight independently owned and operating commercial or non-commercial full-power broadcast television stations would remain in the DMA after the combination.” *2008 Order* ¶ 96, 23 FCC Rcd. at 2064 (J.A. ___).

While our 2003 rule was premised on maintaining the presence of six equal-sized competitors in the marketplace, the Third Circuit in *Prometheus* pointed out that this assumption of equal-sized competitors was flawed. Indeed, the Commission itself has found that there is generally a significant gap between the top four stations in a market and the remaining stations. In light of this concentration among the top four stations in most markets, we believe that it is prudent to require the presence of at least four (rather than two) competitors not affiliated with a major network in order to ensure vibrant competition in the local television marketplace.

2008 Order ¶ 99, 23 FCC Rcd. at 2065 (J.A. ___).

The decision to continue the duopoly rule as it existed prior to the initiation of the FCC's media ownership reviews is consistent with industry market structure and economic developments. Television has been much less affected than print by the advent of digital communications technologies. Internet TV is nascent and the transition to digital TV is recent. It remains to be seen what effect these emerging factors will have on the broadcast market. Local television programming shows no positive statistical correlation to market concentration.¹⁷ Thus, the FCC's reversal

¹⁷ In its 2003 Order, the FCC had concluded that the local television duopoly rule "potentially threatens local programming" and that "the efficiencies to be gained by relaxing the rule could result in a higher quantity and quality of local news and public affairs programming." The decision under review in these appeals fairly evaluated the actual record evidence and, as a result, found instead "that the record now before us is unpersuasive regarding the effects of multiple ownership on local programming." 2008 Order ¶ 103, 23 FCC Rcd. at 2066 (footnotes omitted) (J.A. ___). This is both factually accurate and responsive to the concerns articulated by this Court in remanding the rule. See *Prometheus I*, 373 F.3d at 415-16. NAB, in contrast, incorrectly claims the FCC "nowhere attempted to explain"

of its 2003 modifications — remanded by this Court based on the Commission’s flawed economic and market share analysis (*Prometheus I*, 373 F.3d at 416-20) — was driven principally by its policy of competition, rather than diversity. *See* FCC Br. at 77-78.

Obviously, prime time market shares of broadcasters have declined with the expansion of multichannel video distribution, such as cable and satellite television services. CBS Br. at 33-35. Yet the national broadcast networks remain the overwhelmingly dominant distributors of TV news and information, as the record showed.

The Commission’s approach, which is to define the broadcast TV market as a relevant product market, is consistent with the facts, as Consumer Intervenors have argued throughout this proceeding. Recognizing broadcast television as a separate market resolves the issues raised in both this Court’s remand and the remand in *Sinclair*.¹⁸ The choice of eight “voices” was a compromise among different, longstanding thresholds utilized in market structure analysis and has no ambiguity or inconsistency where all of the voices are television voices. *Compare* NAB Br. at 25-29, 30-35 (arguing that the FCC violated *Sinclair* remand and that broad-

why common ownership does not “lead to welfare-enhancing efficiencies.” NAB Br. at 37-38.

¹⁸ *Sinclair Broadcasting v. FCC*, 282 F.3d 148 (D.C. Cir. 2002).

cast competition cannot be considered separately). How the Internet and the digital TV transition affect the broadcast television product space are proper topics of future quadrennial reviews.

III. THE COURT SHOULD NOT RE-EXAMINE THE CONSTITUTIONALITY OF BROADCAST REGULATION IN THIS APPEAL

Several of the media petitioners again use their opposition to the FCC's regulatory revisions as a vehicle with which to challenge the underlying constitutionality of any broadcast regulation, asserting that *Red Lion* scarcity no longer exists and therefore that the First Amendment basis for regulation has been superseded.¹⁹ *Red Lion Broadcasting Co. v. United States*, 395 U.S. 367 (1969). This is not the appropriate case to address such issues, however. A record was not assembled below on these matters — which unlike cross-ownership was not described in the agency's public notices as a "subject involved" in the proceedings²⁰ — and the FCC has not, as yet, had the opportunity to solicit or analyze policy and jurisprudential alternatives to the *Red Lion* doctrine as a basis for broadcast regulation in today's more robust media environment.

¹⁹ *E.g.*, CBS Br. at 53-59; Tribune/Fox Br. at 32-33; Sinclair Br. at 49-52; NAA Br. at 44.

²⁰ *See* note 6 *supra*. Nor is constitutional review required by section 202(h)'s command for periodic re-examination of whether broadcast regulations remain "necessary in the public interest" as a result of "competition."

The FCC is correct in arguing that the constitutional issues again asserted by petitioners are foreclosed, in this Court, by the law of the case and the express holdings of *Prometheus I*. FCC Br. at 31, 95-99. And as the Court observed in 2004, “scarcity” still exists because, as a factual matter, far more potential speakers would like to have television and radio broadcast licenses than can be accommodated within the available spectrum. *Prometheus I*, 373 F.3d at 402 (“The abundance of non-broadcast media does not render the broadcast spectrum any less scarce.”)

Our point is broader and more fundamental. No court, including the Supreme Court, has ever held that for First Amendment purposes the *only* permissible constitutional basis for non-content media regulation is broadcast spectrum scarcity. The licenses awarded by the FCC are valuable rights that bestow a message “reach” far in excess of what other media outlets and technologies can support. Those advantages are multiplied in an era of digital television and HD radio, where a single broadcast station now can transmit multiple channels of digital programming. There is a range of reasons why these significant, and essentially perpetual, benefits should be balanced by laws that constrain the power of a select group of broadcast licensees to dominate media, and with it political social and cultural trends, in the United States.

If and when a re-examination of *Red Lion* is commissioned, including if they desire by means of a petition for rulemaking by NAB or its members, will be the appropriate occasion for an informed and vibrant debate on such topics. On a singularly important issue as this, the Consumer Intervenors suggest that the Court should await a proper case, with a fully developed record, on which to assess the constitutional basis and impact of broadcast regulation.

CONCLUSION

For all the foregoing reasons, the Commission's 2008 *Order* in its quadrennial review of media ownership should be affirmed.

Respectfully submitted,

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Dated: August 2, 2010

CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certifies, pursuant to Third Circuit L.A.R. 46.1, that he is a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Glenn B. Manishin
Glenn B. Manishin

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) in that the brief contains 4,028 words, as calculated by the Microsoft Word 2007 software application, excluding those parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii); and

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) in that the brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

/s/ Glenn B. Manishin
Glenn B. Manishin

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2nd day of August, 2010, he caused a copy of the foregoing “Brief for Intervenors Consumer Federation of America and Consumers Union” to be served on all counsel in these consolidated appeals by filing a copy thereof via the Court’s CM/ECF system, which will provide email notice of and a link to a PDF electronic copy of the brief to all registered counsel of record. A copy of the foregoing was also served by first-class mail, postage prepaid, on:

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/s/ Glenn B. Manishin
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VIRUS DETECTION CERTIFICATE

The undersigned hereby certifies that the foregoing electronically filed “Brief for Intervenors Consumer Federation of America and Consumers Union” was scanned for viruses this 2nd day of August, 2010, using Symantec Endpoint Protection software, version 11, and is virus free.

/s/ Glenn B. Manishin
Glenn B. Manishin

CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS

The undersigned hereby certifies that the text of the foregoing electronically filed “Brief for Intervenors Consumer Federation of America and Consumers Union,” filed this 2nd day of August, 2010, is identical to the text in the printed copies of that brief.

/s/ Glenn B. Manishin
Glenn B. Manishin