

ORAL ARGUMENT NOT YET SCHEDULED

Nos. 08-3078 et al.

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

PROMETHEUS RADIO PROJECT, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,

Respondents.

**ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION**

**BRIEF FOR PETITIONER
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and L.A.R. 26.1, undersigned counsel respectfully submits this corporate disclosure statement for Petitioner Clear Channel Communications, Inc. (“Clear Channel”):

Clear Channel Communications, Inc. is a wholly owned subsidiary of Clear Channel Capital I, LLC which, in turn, is a wholly owned subsidiary of Clear Channel Capital II, LLC which, in turn is a wholly owned subsidiary of CC Media Holdings, Inc. Clear Channel Capital IV, LLC, which is owned through intermediate subsidiaries by Bain Capital Investors, LLC and Thomas H. Lee Partners, L.P., holds approximately 71.6% of the voting stock of CC Media Holdings, Inc. The remaining approximately 28.4% of the voting stock of CC Media Holdings, Inc. is publicly held.

Clear Channel Capital IV, LLC is equally owned by Bain Capital (CC) IX, L.P. and Thomas H. Lee Equity Fund VI, L.P. The sole general partner of Bain Capital (CC) IX, L.P. is Bain Capital Partners (CC) IX, L.P., whose sole general partner is Bain Capital Investors, LLC. The sole general partner of Thomas H. Lee Equity Fund VI, L.P. is THL Equity Advisors VI, LLC, whose sole member is Thomas H. Lee Partners, L.P.

/s/ Helgi C. Walker

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JURISDICTIONAL STATEMENT

Clear Channel adopts the Jurisdictional Statement from the Brief of the National Association of Broadcasters (“NAB Brief”). In addition, Clear Channel states that it timely filed its petition for review on March 5, 2008, in the D.C. Circuit, which had jurisdiction under 28 U.S.C. §§ 2342(1) and 2344 and 47 U.S.C. § 402(a).

STATEMENT OF ISSUES

1. Whether the Federal Communications Commission (“Commission” or “FCC”) violated Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(h) (the “1996 Act”) and acted arbitrarily and capriciously under Section 706 of the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, by failing to repeal, or modify in a deregulatory manner, the local radio ownership rule;¹

¹ See Comments of Clear Channel Communications, Inc., MB Docket No. 06-121, et al. at 7-41 (Oct. 23, 2006) (“*CCC Opening Comments*”) (JA____-__); Reply Comments of Clear Channel Communications, Inc., MB Docket No. 06-121, et al. at 2-42 (Jan. 16, 2007) (“*CCC Reply Comments*”) (JA____-__); Comments of Clear Channel Communications, Inc. On Proposed Revision To The Newspaper/Broadcast Rule, MB Docket No. 06-121, et al. at 2-4 (Dec. 11, 2007) (“*CCC 12/11/2007 Comments*”) (JA____-__); *2006 Quadrennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules*, Report and Order and Order on Reconsideration, 23 F.C.C.R. 2010 (¶¶ 110-135) (2008) (“*2008 Order*”) (JA____-__).

2. Whether the FCC violated Section 202(h) of the 1996 Act and acted arbitrarily and capriciously under the APA by failing to adopt the “Super Tier Proposal”—which would allow a single entity to own at least ten stations in the nine markets with between sixty and seventy-four stations, and at least twelve stations in the eight markets with seventy-five or more stations—or otherwise relax the numerical limits of local radio ownership rule;²
3. Whether the FCC violated Section 202(h) of the 1996 Act and acted arbitrarily and capriciously under the APA by failing to eliminate the separate caps on the ownership of AM and FM properties (the “AM/FM subcaps”) that are contained in the local radio ownership rule;³ and
4. Whether the local radio ownership rule violates the First Amendment.⁴

STATEMENT OF THE CASE

Clear Channel adopts the Statement of the Case from the NAB Brief.

² See *CCC Opening Comments* at 50-59 (JA____ - __); *CCC Reply Comments* at 42-47 (JA____ - __); *CCC 12/11/2007 Comments* at 9-12 (JA____ - __); *2008 Order* ¶¶ 117-19 & n.382 (JA____ - __, ____).

³ See *CCC Opening Comments* at 66-73 (JA____ - __); *CCC Reply Comments* at 49-52 (JA____ - __); *CCC 12/11/2007 Comments* at 4-9 (JA____ - __); *2008 Order* ¶¶ 130-135 (JA____ - __).

⁴ See *Reply Comments of the National Association of Broadcasters, MB Docket Nos. 06-121, et al. at 50 (Jan. 16, 2007) (“NAB Reply Comments”)* (JA____).

STATEMENT OF FACTS

In addition to adopting the portion of the Statement of Facts regarding the local radio ownership rule in the NAB Brief, Clear Channel states as follows:

The Super Tier Proposal. In the 2002 media ownership review, the FCC decided to retain the local radio ownership rule and its particular numerical limits. *2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules*, Report and Order and Notice of Proposed Rulemaking, 18 F.C.C.R. 13620, 13733 (¶ 293) (2003) (“*2002 Biennial Review Order*”). This Court held that the “decision to retain the numerical limits was arbitrary and capricious” and remanded the issue “for the Commission’s further consideration.” *Prometheus Radio Project v. FCC*, 373 F.3d 372, 421 (3d Cir. 2004); *see also id.* at 431 (remanding for “additional justification” due to lack of “reasoned analysis” regarding specific numerical limits); *id.* at 434 (remanding “for the Commission to develop numerical limits that are supported by a rational analysis”).

During the subsequent 2006 Quadrennial Review, *2006 Quadrennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules*, Further Notice of Proposed Rulemaking, 21 F.C.C.R. 8834 (2006) (“*2006 Quadrennial Review FNPRM*”) (JA____ - __), Clear Channel, CBS Corporation, and others argued that the Commission should relax the local radio ownership caps in the largest markets by creating two new ownership tiers, *CCC Opening*

Comments at 50-59 (JA____-__); *CCC Reply Comments* at 42-47 (JA____-__); *CCC 12/11/2007 Comments* at 9-12 (JA____-__); Reply Comments of CBS Corporation, MB Docket Nos. 06-121, et al., at 11-13 (“*CBS Reply Comments*”) (JA____-__).⁵ In particular, Clear Channel argued that the Commission should increase from eight to at least ten the number of stations a single entity can own in markets with between sixty and seventy-four stations, and increase from eight to at least twelve the number of stations that a single entity can own in markets with seventy-five or more stations. *CCC Opening Comments* at 50 (JA____); *CCC Reply Comments* at 42-47 (JA____-__); *CCC 12/11/2007 Comments* at 10 (JA____).

This “Super Tier Proposal” was necessary “to take into account the competitive developments that have occurred since Congress set the current limits in 1996,” *CCC Opening Comments* at 50 (JA____), and, in particular, abundant record evidence that free radio now faces competition from multiple new unregulated platforms within local radio markets, *CCC Opening Comments* at 10-17, 50-51 (JA____-__, JA____-__); *CCC Reply Comments* at 4-6 (JA____-__); *CCC 12/11/07 Comments* at 10-11 (JA____-__). Record evidence submitted by

⁵ See also *NAB Reply Comments* at 50 (JA____) (arguing generally for relaxation of the local radio ownership rule); Comments of the National Association of Broadcasters, MB Docket No. 06-121 at 24-27 (Dec. 11, 2007) (“*NAB 12/11/2007 Comments*”) (JA____-__) (same).

Clear Channel and others also demonstrated that radio owners are facing sharp financial pressures due to such changes in the media marketplace, characterized by a steep decline in radio advertising revenues and in stock prices. *CCC Opening Comments* at 50-52 (JA____-__); *CCC Reply Comments* at 8-9 (JA____-__); *CCC 12/11/07 Comments* at 10-11 (JA____-__); *see also* Comments of the National Association of Broadcasters, MB Docket No. 06-121 et al., at 32-35 (Oct. 23, 2006) (“*NAB Comments*”) (JA____-__). Clear Channel and others also provided real-world and empirical evidence regarding the public interest benefits that flow from common ownership, *see, e.g., CCC Opening Comments* at 17-43 (JA__-__); *id.* at Exhibit 2 (JA__-__); *CCC Reply Comments* at 13-35 (JA__-__), demonstrating the correctness of the Commission’s own prior conclusions, *see CCC Opening Comments* at 19-20 (JA____-__). Drawing from such evidence, Clear Channel further argued that the Super Tier Proposal would help large-market terrestrial radio stations meet particularly significant financial struggles due to the increased efficiencies and economies that flow from group ownership in larger markets. *CCC Opening Comments* at 57 (JA____). Clear Channel demonstrated, moreover, that adoption of the Super Tier Proposal would not adversely impact competition. *See id.* at 43-50 (JA____-__).

Without explanation, and with only passing acknowledgment of the Super Tier Proposal, the Commission rejected Clear Channel’s argument—in a single

sentence buried in a single footnote of the order on review. *2008 Order* ¶¶ 118 n.382 (JA____). (“Thus, we decline to relax our rule as recommended by some commenters.” (citations omitted)). Refusing to modify the existing numerical limits at all, and abandoning its prior “five equal-sized competitor rationale,” *Prometheus*, 373 F.3d at 431, the Commission purported to rely upon its “public interest objectives of ensuring that the benefits of competition and diversity are realized in local radio markets,” *2008 Order* ¶ 117 (JA____). In the ensuing discussion, the Commission wholly failed to support its cursory assertion that the existing numerical limits enhance diversity, providing not a scintilla of record evidence that this is actually so. *Id.* ¶¶ 117-123 (JA____ - ____). Indeed, later in that same *2008 Order*, the Commission conceded that it “cannot conclude that the local radio ownership rule is necessary to protect format diversity” and that it is “not persuaded that common ownership allowable under” existing numerical limits “is associated with reductions in format or programming diversity.” *Id.* ¶ 128 (JA____).

AM/FM Subcaps. In the *2002 Biennial Review Order*, the Commission also decided to retain limits (or “subcaps”) on the number of stations that may be owned in each of the two radio services (AM and FM). *2002 Biennial Review Order*, 18 F.C.C.R. 13620 (¶ 294). On review, this Court concluded that the Commission had failed adequately to support its decision to retain the subcaps and,

moreover, had completely failed to explain “why it is necessary to impose an AM subcap at all.” *Prometheus*, 373 F.3d at 434-35; *see also id.* at 435 (directing Commission either to respond to criticism of decision to retain AM/FM subcaps “or modify its approach, on remand”).

The Commission then sought comment in the proceeding below on whether to retain the AM/FM subcaps. *2006 Quadrennial Review FNPRM*, 21 F.C.C.R. at 8843 (¶ 22). In response, Clear Channel, along with others, urged the Commission to abolish separate AM and FM subcaps because no rational basis in fact or in law exists to retain them. *CCC Opening Comments* at 66-73 (JA____ - __); *CCC Reply Comments* at 49-52 (JA____ - __); *CCC 12/11/2007 Comments* at 4-9 (JA____ - __).⁶ In particular, Clear Channel argued that the record contained no “actual facts to support the subcaps’ underlying rationale that the ‘technical and marketplace differences’ between the two services warrant separate limits on the number of AM and FM stations that a party may own.” *CCC Reply Comments* at 49-50 (JA____ - __). Clear Channel also argued that, at any rate, the transition to a digital radio broadcasting environment would obviate technical differences between stations in the AM and FM services. *CCC Opening Comments* at 70-72 (JA____ - __); *CCC*

⁶ *See also CBS Reply Comments* at 13-15 (JA____ - __); *Comments of Multicultural Radio Broadcasting, Inc., MB Docket Nos. 06-121 et al., at 2-4 (Oct. 23, 2006) (JA____ - __)*.

Reply Comments at 51 (JA____-__). Clear Channel further argued below that eliminating the AM/FM subcaps would foster increased radio ownership by small businesses and minorities, as lifting the subcaps likely would spur substantial market activity and increase “opportunities for affordable purchases.” *CCC Opening Comments* at 72 (JA____); *see also CCC Reply Comments* at 52 (JA____); *CCC 12/11/2007 Comments* at 7-8 (JA____-__).

Out of over 166,000 comments filed, only *two* commenters argued in favor of retaining subcaps. *2008 Order* ¶ 132 (JA ____). Nevertheless, the Commission retained the AM/FM subcaps, and justified its decision by continued reliance on what it found to be the technical and marketplace differences between AM and FM stations, and by simply accepting at face value the arguments of the two commenters urging retention of the subcap. *2008 Order* ¶¶ 133-34 (JA____-__). And, although the Commission further relied on an interest in promoting ownership diversity to support the AM/FM subcaps, accepting a lone commenter’s argument that the subcaps promote market entry, nowhere did the Commission address Clear Channel’s argument that lifting the subcaps would be likely to promote market activity in which more affordable properties—be they AM or FM—would be put up for sale.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Clear Channel adopts the Statement of Related Cases and Proceedings from

the NAB Brief.

STANDARD OF REVIEW

Clear Channel adopts the Standard of Review from the NAB Brief and, in addition, states as follows:

Congress expected Section 202(h) of the 1996 Act to drive systematic deregulation over time, as the plain language of the Act, the design and context of Section 202(h), and its legislative history and stated purpose make plain. *See CCC Opening Comments* at 5-6 (JA____-__); *see also* Comments of the Newspaper Association of America, MB Docket No. 06-121, et al., at 18-20 (Oct. 23, 2006) (“*NAA Comments*”) (JA____-__). Accordingly, Section 202(h) of the 1996 Act, properly understood, establishes a deregulatory presumption “in favor of repealing or modifying the ownership rules.” *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002) (“*Fox I*”), *modified on reh’g* 293 F.3d 537 (D.C. Cir. 2002); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002). Under this reading, the Commission may retain ownership rules only if it “reasonably determines that the rule is ‘necessary in the public interest.’” *Fox I*, 280 F.3d at 1048; *Sinclair*, 284 F.3d at 159. In addition, the statute authorizes the Commission to repeal or relax rules on review, but not to tighten them.

Alternatively, Section 202(h) at the very least imposes on the Commission an express “obligation it would not otherwise have” to periodically justify its

ownership regulations, *Prometheus*, 373 F.3d at 395, and requires the Commission to reevaluate its rules in light of current competitive market conditions. *Cellco P'ship v. FCC*, 357 F.3d 88, 98 (D.C. Cir. 2004). This duty “extends beyond [the agency’s] normal monitoring responsibilities.” *Id.* at 99. At a minimum, then, Section 202(h) imposes on the Commission a heightened affirmative obligation to demonstrate that the rule “remain[s] useful in the public interest” and to “support its decision with a reasoned analysis.” *Prometheus*, 373 F.3d at 395.⁷

Under the First Amendment, strict scrutiny applies to the local radio ownership rule because, insofar as it is partially justified on the basis of content-specific considerations, *see, e.g., 2008 Order* ¶¶ 127-29 (JA____), it is a content-based restriction. To survive such scrutiny, the Commission must demonstrate that the rule is “narrowly tailored to promote a compelling Government interest,” and that no “less restrictive alternative would serve the Government’s purpose.” *U.S. v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000). This standard applies in the context of broadcast speech, notwithstanding the scarcity doctrine set forth in

⁷ A reading of Section 202(h) that requires nothing more of the agency than a showing that a rule is “useful” or “appropriate” adds nothing to the agency’s already extant duties under the APA. Accordingly, Section 202(h) must be read to impose *some* deregulatory obligation, lest the provision be rendered meaningless. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” (internal quotation marks omitted)).

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). In any event, the scarcity doctrine is outdated and *Red Lion*, as many courts, commentators, and even the Supreme Court has suggested, should be overruled. See *FCC v. League of Women Voters*, 468 U.S. 364, 376-77 n.11 (1984) (stating that “technological developments have advanced so far that some revision of the system of broadcast regulation may be required”); *Telecomms. Research & Action Ctr. v. FCC*, 801 F.2d 501, 508, 509 n.5 (D.C. Cir. 1986) (explaining that “[i]t is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media” and that *League of Women Voters* “suggested that the advent of cable and satellite technologies may soon render the scarcity doctrine obsolete”); see also *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1820 (2009) (Thomas, J., concurring) (“*Red Lion* and [its progeny] *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity.”).

Alternatively, at a minimum, the local radio ownership rule must survive intermediate scrutiny, which applies to all regulations that “interfer[e] with” an entity’s “speech rights by restricting the number of viewers to whom [it] can speak.” *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1129 (D.C. Cir. 2001). To survive intermediate scrutiny, the Commission must “demonstrate that the

recited harms are real, not merely conjectural, and that the regulation will, in fact, alleviate these harms in a direct and material way.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664, 666 (1994) (internal quotation marks omitted) (plurality).

SUMMARY OF THE ARGUMENT

In the *2008 Order*, in which the Commission undertook to review the media ownership rules pursuant to Section 202(h) of the 1996 Act and to respond to this Court’s remand, the agency bore a heightened burden to reevaluate its local radio ownership rule in light of current competitive market conditions. The Commission was obligated under Section 202(h) to demonstrate that the rule, if retained, “remain[s] useful in the public interest” and to “support its decision with a reasoned analysis.” *Prometheus*, 373 F.3d at 395. Nonetheless, the Commission refused to repeal or to otherwise relax the local radio ownership rule. *2008 Order* ¶¶ 110-135 (JA ____ - __). The *2008 Order* runs contrary to Section 202(h), is arbitrary and capricious in various key respects, and cannot be squared with the First Amendment. It also fails to respond to this Court’s specific instructions that the Commission provide a meaningful analysis for the rule’s numerical limits and AM/FM subcaps.

First, the Commission, abandoning the “five equal-sized competitors rationale” that this Court found wanting in *Prometheus*, sought to justify its decision to retain the local radio ownership rule in its current form by falling back

upon a generalized theory that ownership caps remain necessary to protect competition. In support of this new theory, the Commission offered the explanation that concentration results in increased advertising rates. This explanation is not only unsupported by any record evidence but runs *counter to* that evidence, including the Commission's own study. In further support, the Commission relied on a factor that the agency itself concedes is wholly irrelevant to local ownership issues—*i.e.*, evidence of national consolidation. The FCC's alternate rationale—that the public interest in diversity partially justifies retention of the rule—is rife with internal inconsistencies. Had the Commission rationally considered the evidence, it would no doubt have concluded that repeal or relaxation of the rule was appropriate, as the evidence showed that common ownership enhances diversity and localism. Instead, the Commission arbitrarily ignored this evidence and irrationally retained the rule.

Second, despite this Court's admonition in *Prometheus* to provide a reasoned analysis to support the existing numerical limits, the Commission failed even to consider the Super Tier Proposal (or any other arguments that the limits should be relaxed in the largest markets). In effectively ignoring this proposal—a reasonable, and less restrictive, alternative to the extant limits—the FCC irrationally failed to give effect to abundant evidence that competition from new media fully warranted relaxation in the largest markets and to provide any

explanation, much less an adequate one, for its refusal to permit such relaxation. The Commission relied on this very same evidence to justify its decision to relax (albeit only marginally) the newspaper/broadcast cross-ownership ban in large markets, and its failure to consistently and rationally give it similar effect in the radio ownership context is wholly arbitrary. What is more, the Commission erred in failing adequately to explain its reasons for rejecting this reasonable alternative and, further, in the rationale it did provide, relied on cursory assertions and internally inconsistent argumentation.

Third, in attempting to justify retention of AM/FM subcaps, the Commission again fell short of the mark of reasoned decision-making. The FCC relied as before on a vague assertion of purported technical and marketplace differences between AM and FM services—the *very same* rationale that this Court previously found legally deficient. There was no evidence of such differences in the record but, rather, only evidence that *undermined* the asserted justification, which the Commission arbitrarily ignored. The Commission’s insufficient analysis failed to take into account meaningful comments urging elimination of the subcaps. And, having initially embraced—at least implicitly—the rationale that AM stations are inferior to FM stations, the Commission attempts to “have it both ways” by later arguing that AM subcaps nevertheless remain necessary by citing the high ratings of AM stations in some markets.

Finally, the limits on local radio ownership cannot be squared with the First Amendment, which guarantees all speakers the right to communicate with the willing listeners of their choice. Specifically, the limits amount to an impermissible asymmetrical regulation of speech, discriminating among media and singling out broadcasters for burdensome regulatory treatment. The radio ownership rule further burdens broadcasters' protected First Amendment rights to determine the content of their programming and to communicate with their desired audience. If the government limited the number of books that a person could publish, such action would doubtless be found to violate the First Amendment; the ban on ownership of radio stations is no different in principle. The Commission failed to offer any compelling justification for these substantial burdens on broadcasters' speech and, indeed, ignored the comments raising this concern.

In sum, despite Congress's clear direction to reevaluate the media ownership rules in light of changes in the marketplace and the important free speech interests at stake, the Commission has steadfastly refused, in the course of four periodic media ownership reviews, to make even the slightest deregulatory change to the numerical limits of the local radio ownership rule or the AM/FM subcaps, retaining the rule in exactly the same form since 1996. Given the myriad inconsistencies and failures of explanation in the Commission's analysis here, and in light of this Court's previous finding that the retention of the numerical limits and subcaps was

arbitrary and capricious, this Court should now set aside the local radio ownership rule.

ARGUMENT

I. THE COMMISSION’S REFUSAL TO REPEAL OR RELAX THE LOCAL RADIO OWNERSHIP RULE WAS UNLAWFUL.

The Commission’s decision to retain the local radio ownership rule runs afoul of Section 202(h) of the 1996 Act and is arbitrary and capricious within the meaning of the APA. Properly understood, Section 202(h) “carries with it a presumption in favor of repealing or modifying the ownership rules.” *Fox I*, 280 F.3d at 1048. The Commission failed to meet the proper legal standard under Section 202(h), as it failed to demonstrate, under the presumption, that the local radio ownership rule remains “necessary in the public interest.” In any event, the Commission failed to meet its heightened affirmative obligation under circuit precedent to show that the rule “remain[s] useful in the public interest” and also failed to “support its decision with a reasoned analysis.” *Prometheus*, 373 F.3d at 395. The local radio ownership rule is arbitrary and capricious in violation of the APA for the same reasons.

A. The Commission Arbitrarily Ignored Record Evidence And Relied On Irrelevant Considerations.

In the *2008 Order*, the Commission concluded that “the current local radio ownership rule . . . remains ‘necessary in the public interest’ to protect competition in local radio markets.” *2008 Order* ¶ 110 (JA ____). This conclusion is wholly unsupported by the reasoned analysis required under Section 202(h) and the APA

inasmuch as the Commission arbitrarily ignored record evidence to reach it and, further, relied upon factors it elsewhere deemed irrelevant.

First, the Commission “offered an explanation for its” conclusion that competition justifies the local radio ownership rule that is not only unsupported by any record evidence but actually “runs counter to the evidence before the agency.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); accord *Natural Res. Def. Council, Inc. v. EPA*, 790 F.2d 289, 305 (3d Cir. 1986). The Commission’s explanation relied in part on “evidence in the record . . . that the increase in concentration in commercial radio markets has resulted in appreciable, albeit small, increases in advertising rates.” *2008 Order* ¶ 118 (JA ____). This explanation, however, wholly ignores substantial record evidence, including the Commission’s own studies to the contrary.

In particular, record evidence submitted by Clear Channel and others below plainly demonstrates that post-1996 Act consolidation had no effect on radio advertising rates. See *CCC Opening Comments* at 43-46 (JA ____ - ____); *id.*, Ex. 2, Statement of Jerry A. Hausman, at 6-7 (citations omitted) (JA ____ - ____); *CCC Reply Comments* at 35-38 (JA ____ - ____); *NAB Comments* at 73-78 (JA ____ - ____). The Commission’s own study confirmed that “consolidation in local radio markets has no statistically significant effect on advertising prices.” Tasneem Chipty, *Station Ownership and Programming in Radio* (June 24, 2007), available at

http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A6.pdf (released in MB Docket Nos. 06-121, *et al.* as Study 5) (“Media Ownership Study 5”), at 3, 45 (JA____, JA____). Yet, the Commission entirely ignored this record evidence, which drains its rationale for retention of the rule of any force. Where, as here, “the record belies the agency’s conclusion, [this Court] must undo its action.” *Petroleum Commc’ns, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (citation omitted); *accord State Farm*, 463 U.S. at 43.

Second, the Commission arbitrarily relied on factors that it elsewhere in the *2008 Order* deemed irrelevant. In particular, evidence of increases in radio consolidation at the *national* level since the 1996 Act informed the Commission’s decision to retain the radio ownership rule. *2008 Order* ¶ 118 (JA____). Such evidence is wholly irrelevant to the question whether *local* radio ownership caps remain justifiable, *CCC Reply Comments* at 3 n.12 (JA____); *see also id.* at 39-40 (JA____ - ____), as the Commission itself acknowledged only paragraphs later. *2008 Order* ¶ 126 (JA____) (concerns about overall national size of radio station group owner “do not address whether consolidation of radio stations in a local market harms localism”) (citing *2002 Biennial Review Order*, 18 F.C.C.R. at 13738 (¶ 304)). Because the Commission relied on national concentration levels, a factor that the *2008 Order* found to lack any rational relation to the question of local concentration, its decision “falls below the standard of reasoned decisionmaking.”

Gen. Chem. Corp. v. United States, 817 F.2d 844, 850 (D.C. Cir. 1987); accord *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1145 (D.C. Cir. 1980) (“[T]he function of judicial review is to ensure that agency decisions are ‘based on a consideration of the relevant factors.’”).

B. The Commission’s Discussion Of The Diversity Interest Is Internally Inconsistent.

The Commission also partially relied on diversity as a justification for retaining the local radio ownership rule, *2008 Order* ¶ 129 (JA____), but its decision to do so is riddled with internal inconsistencies. The Commission began its diversity analysis by asserting that local radio ownership limits indirectly “promote diversity by ensuring a sufficient number of independent radio voices and by preserving a market structure that facilitates and encourages new entry into the local media market.” *2008 Order* ¶ 127 (JA____). But in the next paragraph, the Commission turned heel, conceding that consolidation does not harm format diversity. *Id.* ¶ 128 (JA____). Indeed, the Commission even acknowledged evidence that common ownership actually *increases* format diversity. *Id.* ¶ 128 n.404 (JA____) (citing Media Ownership Study 5 at 3). This “internally inconsistent and inadequately explained” analysis fails rationally to justify the Commission’s partial reliance on diversity to retain its local radio ownership rule. *Gen. Chem.*, 817 F.2d at 846; accord *Sinclair*, 284 F.3d at 164-65.

C. The Commission Arbitrarily Ignored Record Evidence That It Should Repeal Or Relax The Local Radio Ownership Rule.

Finally, the Commission retained the radio ownership rule without regard for record evidence that common ownership *enhances* diversity and localism. By ignoring this evidence, the Commission impermissibly failed to consider and give effect to factors traditionally considered relevant to the public interest analysis in radio broadcasting, *2008 Order* ¶ 113 (JA____), which, here, counseled in favor of at least some deregulation.

The record was replete with real-world and empirical evidence that common ownership enhances diversity. In particular, studies submitted by Clear Channel and NAB empirically demonstrated the positive effect that common ownership has on format diversity. *CCC Opening Comments*, Ex. 2 at 4 & Table 1 (JA____ & ____); *NAB Comments*, Att. G (JA____ - ____).⁸ The Commission's own evidence supported this proposition as well. *Media Ownership Study 5* at 3, 29-30, 44 (JA____, JA____ - __, JA____). And the record contained *no* evidence that allowing ownership of multiple radio stations adversely impacts viewpoint diversity. The agency, in fact, acknowledged the existence of record evidence that

⁸ See also *CCC Opening Comments* at 17-32 (JA____ - ____); *CCC Reply Comments* at 14-15 (JA____ - ____); *NAB Comments* at 79-84 (JA____ - ____); see also Comments of The Media Institute, MB Docket Nos. 06-121, et al., Att. (filed Oct. 23, 2006)).

concentration can enhance diversity. *2008 Order* ¶ 128 n.403 (JA____); *id.* n.404 (JA____).

The Commission similarly acknowledged evidence that consolidation enhances localism. *2008 Order* ¶ 125 (JA____). In fact, the record evidence demonstrates that substantial local benefits, such as increased local news, locally-focused and locally-tailored programming, and other local initiatives, flow from common ownership. *CCC Opening Comments* at 32-41 (JA____-__); *CCC Reply Comments* 26-30 & n.105 (JA____-__ & JA____); Comments of Clear Channel Communications, Inc. on FCC Media Ownership Research Studies, MB Docket No. 06-121, et al. at 8 (Oct. 22, 2007) (JA____); *see also NAB Comments* at 60-61 (JA____-__); *NAA Comments* at 65 (JA____). This evidence bolstered “forceful[]” commentary “that consolidation has benefited localism.” *2008 Order* ¶ 125 (JA____). In disregard of this evidence, the Commission retained the status quo, and irrationally failed to repeal or, at a minimum, relax the ownership rule. The Commission’s failure to do so—especially where, as here, factors central to its public interest analysis were at stake—is the very embodiment of irrational decision-making. *Gen. Chem.*, 817 F.2d at 850; *see also Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (agency must “give[] reasoned consideration to all the material facts and issues”).

* * *

For the above reasons, the Commission's failure to repeal or relax the local radio ownership rule is contrary to Section 202(h) of the 1996 Act and is arbitrary and capricious under the APA.

II. THE COMMISSION'S FAILURE TO ADOPT THE SUPER TIER PROPOSAL OR OTHERWISE RELAX THE LOCAL RADIO OWNERSHIP RULE IN THE LARGEST MARKETS WAS UNLAWFUL.

The Commission fell short of meeting its burden under Section 202(h) of the Act because it failed to demonstrate that the existing numerical limits remain "necessary in the public interest" or, alternatively, "useful in the public interest." *See supra* p. 17. It also wholly failed to support its decision to retain those limits—and, more specifically, to reject the Super Tier Proposal—with the sort of reasoned analysis necessary to withstand review under Section 202(h) and the APA and which this Court specifically instructed the Commission to provide. *Prometheus*, 373 F.3d at 421, 431, 432.

A. The Commission Ignored Record Evidence That Relaxation Was Warranted In The Largest Markets.

In the *2008 Order*, the Commission relaxed the newspaper/broadcast cross-ownership rule in the largest markets, concluding that record evidence of competition from new media and of threats to the ability of traditional media to remain viable more than amply justified its decision to do so. *2008 Order* ¶¶ 13, 21-38 (JA____, JA____-____). The *same facts* regarding competition from new

media rationally support relaxation of the radio ownership rule as well. In rejecting the Super Tier Proposal and other calls for relaxation of the rule in the largest markets the Commission irrationally and unlawfully failed to give the same effect to that evidence that it did in the context of the newspaper/broadcast cross-ownership rule. *Sinclair*, 284 F.3d at 164-65 (reversing decision to retain the local television ownership rule because the FCC arbitrarily ignored implications of its cross-ownership findings on diversity and competition in the local ownership context).

When Congress adopted the existing numerical limits in 1996, the nature of the media marketplace was dramatically different. The media marketplace “is exploding and changing almost daily.” *See Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 768 (6th Cir. 1995). Abundant evidence below demonstrated that free radio now faces competition from multiple new unregulated platforms within local radio markets.⁹ *CCC Opening Comments* at 10-17, 50-51 (JA____-__, JA____-__); *CCC Reply Comments* at 4-6 (JA____-__); *CCC 12/11/07 Comments* at 10-11 (JA____-__). The record further established that radio owners are facing sharp financial pressures due to such changes in the media marketplace, characterized by

⁹ These new media platforms include: satellite radio; MP3 players; Internet radio stations; subscription-based music services offered via cable, DBS, and “IPTV” networks; and Wi-Max. *See CCC Opening Comments* at 10-17 (JA____-__).

a steep decline in radio advertising revenues and stock prices. *CCC Opening Comments* at 50-52 (JA____-__); *CCC Reply Comments* at 8-9 (JA____-__); *CCC 12/11/07 Comments* at 10-11 (JA____-__); *see also NAB Comments* at 32-35 (JA____-__). On the record, then, relaxation in the largest markets was warranted “to take into account the competitive developments that have occurred since Congress set the current limits in 1996,” *CCC Opening Comments* at 50 (JA____), and to insure that the terrestrial radio industry can overcome financial challenges and continue to compete with its unregulated counterparts, *CCC 12/11/2007 Comments* at 11 (JA____).

Without explanation, and with only passing acknowledgment of the Super Tier Proposal itself, the Commission rejected it—in a single sentence buried in a single footnote of its *2008 Order*. *2008 Order* ¶ 118 n.382 (JA____) (“Thus, we decline to relax our rule as recommended by some commenters.” (citations omitted)). In so doing, the Commission arbitrarily declined to consider record evidence that rationally required the Commission to relax the radio ownership rules in markets with 60 or more stations. Such inconsistent and illogical application of the same facts to justify two distinctly different “choices made” is the essence of arbitrary and capricious decision-making. *Sinclair*, 284 F.3d at 164-65; *see also Cincinnati Bell*, 69 F.3d at 767 (“where the factual assumptions which support an agency rule are no longer valid, agencies ordinarily must reexamine their

approach”) (citation omitted). This is so especially because the extent of regulatory relief under the Super Tier Proposal would have been even more modest than the relief the Commission granted in the context of newspaper/broadcast cross-ownership, as it would affect only the seventeen largest markets in the country.¹⁰ At any rate, conclusory statements such as the Commission’s single sentence rejection of the Super Tier Proposal do not suffice to address meaningful comments, which the agency must treat with a fuller explanation to survive review. *Am. Mining Congress v. EPA*, 907 F.2d 1179, 1189 (D.C. Cir. 1990); *accord Natural Res. Def. Council*, 790 F.2d at 309-10.

B. The Commission Failed To Explain Its Reasons For Rejecting Reasonable Alternatives Such As The Super Tier Proposal.

Reasonable and less restrictive alternatives to simply retaining previously existing numerical limits existed, and were given impermissibly short shrift in the

¹⁰ In contrast, the newspaper/broadcast cross-ownership rule was relaxed in the top 20 Designated Market Areas (“DMAs”), *2008 Order* ¶ 55 (JA ____), which cover a much larger area of the country than the top 17 Arbitron metro markets. See Nielsen, *Local Television Market Universe Estimates*, <http://blog.nielsen.com/nielsenwire/wp-content/uploads/2009/08/2009-2010-dma-ranks.pdf> (last visited May 7, 2010) (listing Nielsen DMAs); Arbitron, *Arbitron Radio Market Rankings: Spring 2010*, http://www.arbitron.com/radio_stations/reference_metroinfo.htm (last visited May 7, 2010) (listing Arbitron Metro Markets); Arbitron, *2010 Arbitron Metro Radio Map*, http://www.arbitron.com/downloads/Arb_US_Metro_Map_10.pdf (last visited May 7, 2010) (showing boundaries for Nielsen DMAs and Arbitron metro markets).

2008 Order. In particular, one approach presented on the record below, the Super Tier Proposal, would have relaxed the radio ownership rule in markets with 60 or more stations—*i.e.*, in the nation’s seventeen largest markets. Relaxing numerical limits in the largest markets constitutes a reasonable and less restrictive alternative to retaining across the board the previously existing numerical limits on local radio ownership, which have remained unchanged since 1996 despite four periodic media ownership reviews under Section 202(h). Here, the Commission failed to “consider [this] less restrictive alternative[] and [to] explain its reasons for failing to adopt [it].” *Cincinnati Bell*, 69 F.3d at 762; *accord State Farm*, 463 U.S. at 48.

In the Super Tier Proposal, the Commission had before it a modest deregulatory, reasonable alternative to retaining the existing numerical limits. In particular, this alternative was more balanced and reflective of increased competition from new media, and reflective of concerns regarding the ability of traditional media to remain viable. *See supra* pp. 23-25. The Super Tier Proposal also rationally took into account the reality that, in the largest markets, terrestrial radio stations face competition from a large number of diverse stations, and also from media services offered over multiple new platforms. In contrast, the numerical limits retained by the Commission irrationally fail to distinguish between dramatically different large markets. For example, under the limits retained, the same caps apply in Cincinnati as apply in New York City. CCC

Opening Comments at 58 (JA____). The Commission provided no legally sufficient basis to justify imposing the same local radio ownership caps in such distinctly different markets, and there is none.

“An agency must justify its failure to take account of circumstances that appear to warrant different treatment for different parties.” *Petroleum Commc’ns*, 22 F.3d at 1172 (citations omitted). Here, the Commission effectively dismissed the Super Tier Proposal, along with other similar deregulatory arguments, in a single-sentence footnote: “[W]e decline to relax our rule as recommended by some commenters.” *2008 Order* ¶ 118 n.382 (JA____). In so doing, the Commission gave “vexingly terse” treatment to this substantial argument. *Petroleum Commc’ns*, 22 F.3d at 1172. The Commission’s failure to explain why it failed to take advantage of an available alternative means for solving the given problem was arbitrary and capricious. *State Farm*, 463 U.S. at 48 (concluding that “alternative way[s] of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment”); *Cincinnati Bell*, 69 F.3d at 761 (“The FCC is required to give an explanation when it declines to adopt less restrictive measures in promulgating its rules.”) (citation omitted).

C. The Commission’s Rationale For Retaining The Existing Numerical Limits Is Internally Inconsistent.

Refusing to modify the existing numerical limits, the Commission stated that it was relying on “the Commission’s public interest objectives of ensuring that the

benefits of competition and diversity are realized in local radio markets.” *2008 Order* ¶ 117 (JA____). In the ensuing discussion, the Commission wholly failed to support its cursory assertion that the existing numerical limits enhance diversity, providing not a scintilla of record evidence that this is actually so. *Id.* ¶¶ 117-123 (JA____ - ____). And, indeed, the Commission later waffled between assertions that the local radio ownership rule does not further the interest in diversity, *id.* ¶ 128 (JA____), and that “retaining the current, competition-based numerical limits on local radio ownership will promote diversity indirectly,” *id.* ¶ 129 (JA____). Accordingly, the Commission’s partial reliance on diversity as a justification for retaining the existing numerical limits suffers from “fundamental inconsistencies” that are the hallmark wholly irrational decision-making. *Air Line Pilots Ass’n v. FAA*, 3 F.3d 449, 453-54 (D.C. Cir. 1993).

* * *

For the above reasons, the Commission’s failure to adopt the Super Tier Proposal or otherwise relax the local radio ownership rule in the largest markets is contrary to Section 202(h) of the 1996 Act and is arbitrary and capricious under the APA.

III. THE COMMISSION’S FAILURE TO REPEAL THE AM/FM SUBCAPS WAS UNLAWFUL.

In its *2003 Order*, the Commission retained the AM/FM subcaps that are part of the local radio ownership rule. *2002 Biennial Review Order*, 18 F.C.C.R. at

13733-34 (¶ 294). On review, this Court concluded that the Commission had failed adequately to support its decision to retain the subcaps and, moreover, had completely failed to explain “why it is necessary to impose an AM subcap at all.” *Prometheus*, 373 F.3d at 434-35. The Commission again retained the AM/FM subcaps in the order on review, *2008 Order* ¶ 134 (JA____), and, notwithstanding this Court’s clear admonition to explain the need for the subcaps, again fell short of adequately justifying its decision under Section 202(h) of the 1996 Act and the APA. The continued retention of the AM/FM subcaps was thus unlawful.

First, in the *2008 Order*, the Commission justified its retention of the AM/FM subcaps by relying, as in the *2003 Order*, on purported technical and marketplace differences between AM and FM stations, and by simply accepting at face value the arguments of the two commenters who urged retention of the subcaps. *2008 Order* ¶¶ 133-34 (JA____-__). The Commission did not, however, cite or provide any actual evidence of technical inferiority or of marketplace differences. *See generally id.* ¶¶ 130-34 (____-__). In fact, the Commission ignored affirmative record evidence undermining the subcaps’ primary policy justifications. In so doing, the Commission arbitrarily failed to “consider[] the relevant information brought to its attention” on this rationale. *Bethlehem Steel Corp. v. EPA*, 651 F.2d 861, 867 (3d Cir. 1981); *cf. also Natural Res. Def. Council*, 790 F.2d at 302 (concluding the agency’s claim “is blatantly contradicted by a

wealth of evidence in the record, including repeated statements by the [agency] itself”). Without regard for the evidentiary support for elimination of the subcaps, the Commission relied instead on “broadly stated ‘findings’” and “generalized conclusions.” *Cincinnati Bell*, 69 F.3d at 764. The law requires more.

Second, the Commission’s analysis of the technical and marketplace issues underlying its retention of the subcaps was insufficient. The FCC failed to reasonably consider arguments that the transition to a digital radio broadcasting environment would obviate any perceived technical differences between stations in the AM and FM services. *CCC Opening Comments* at 70-72 (JA___-__); *CCC Reply Comments* at 51 (JA___). Given that this transition will *eliminate* the primary rationale for retaining AM subcaps, *CCC Reply Comments* at 51 (JA___), it is a meaningful comment that the Commission was obliged to address, *Darrell Andrews Trucking, Inc. v. Fed. Motor Carrier Safety Admin.*, 296 F.3d 1120, 1134 (D.C. Cir. 2002); *Iowa v. FCC*, 218 F.3d 756, 759 (D.C. Cir. 2000), but it did not do so.

Neither did the Commission address other meaningful comments that AM stations offer “daytime coverage contours that substantially exceed those of FM stations” and, for some, “can be heard across much of the country at night.” *CCC 12/11/2007 Comments* at 6 (JA___). And, in weighing its diversity interest, the Commission also irrationally failed to consider arguments that repeal of the

AM/FM subcaps likely would spur substantial market activity and thereby foster increased opportunities for small business and minority radio ownership. *CCC Opening Comments* at 72-73 (___-__); *CCC Reply Comments* at 52 (JA___); *CCC 12/11/2007 Comments* at 7-8 (JA___-__). At a minimum, the Commission was required to provide a reasoned explanation on the record for its decision to reject such arguments. *State Farm*, 463 U.S. at 48 (“an agency must cogently explain why it has exercised its discretion in a given manner”) (citations omitted); *Bethlehem Steel*, 651 F.2d at 876-77; *Petroleum Commc’ns*, 22 F.3d at 1172. This too, the agency failed to do.

Third, the Commission’s rationale for retaining the AM/FM subcaps is internally inconsistent. To make the point that AM subcaps are necessary, the Commission relied upon record evidence that AM stations in certain local markets often achieve high ratings. *2008 Order* ¶ 134 (JA___-__) (citing *CCC Opening Comments* at 66-73). Earlier in that same paragraph, however, the Commission asserted that AM stations are inferior to FM stations in various respects, including their audience share. *Id.* (describing AM stations as having “lesser bandwidth, inferior audio signal, and *smaller radio audiences* due to technical differences”). Even assuming that the Commission’s latter assertion was rationally supported by

record evidence, which it is not,¹¹ one of two things is true: either AM stations are inferior and an FM subcap is warranted, or AM stations are *not* inferior and no rational basis exists for capping ownership in either service. “The Commission cannot have it both ways.” *Gen. Chem.*, 817 F.2d at 854. Regardless, what this internal inconsistency shows is that the Commission’s decision to continue to retain both the AM and FM subcaps was not the result of reasoned decisionmaking and thus cannot stand.

* * *

For the above reasons, the Commission’s failure to eliminate the AM/FM subcaps is contrary to Section 202(h) of the 1996 Act and is arbitrary and capricious under the APA.

IV. THE LOCAL RADIO OWNERSHIP RULE VIOLATES THE FIRST AMENDMENT.

Finally, the local radio ownership rule cannot be squared with the First Amendment.¹² The rule imposes a substantial and asymmetrical regulatory burden

¹¹ Clear Channel’s comments established that AM stations are *not* inferior in any respect to FM stations. *CCC Opening Comments* at 67-69 (JA____ - __); *CCC Reply Comments* at 50-51 (____ - __).

¹² *See NAB Reply Comments* at 10 (JA____) (arguing that “the Commission can no longer maintain its disparate regulation of local stations consistent with the commands of the First Amendment); *see also id.* at 8-14 (JA____ - __); *CBS Reply Comments* at 19-20 (JA____ - __) (renewing constitutional arguments regarding broadcast ownership rules as expressed in 2002 Biennial Review proceeding

on broadcasters without compelling justification and thus fails under strict scrutiny. It further violates broadcasters' First Amendment rights by relying upon a content-based theory of diversity and localism and cannot satisfy strict scrutiny. Even assuming that intermediate scrutiny applies, the rule still fails to pass constitutional muster. *Time Warner*, 240 F.3d at 1130.

As an initial matter, and as explained above, *Red Lion*, 395 U.S. 367 (1969), should be overruled because the scarcity doctrine lacks any continuing validity in the present technological world. Yet, even under *Red Lion* and its progeny, the Commission cannot, consistent with the First Amendment, impose substantial and asymmetrical regulatory burdens on a particular class of speakers, such as broadcasters.¹³ Nor can it manipulate the actual content of broadcast programming absent some compelling justification.

First, the local radio ownership rule is an asymmetrical regulation that places a substantial regulatory burden on local radio broadcasters, singling them

(citing Comments of Fox Entertainment Group, Inc., et al., MB Docket No. 02-277, et al., (Jan. 2, 2003)).

¹³ The First Amendment fully protects the interests of those who operate local radio stations, and these interests include the right to speak freely, the right to choose and reach their desired audience, and the right to determine the content of their programming. *See, e.g., League of Women Voters*, 468 U.S. at 378 (“[W]e have . . . made clear that broadcasters are engaged in a vital and independent form of communicative activity.”); *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998); *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 110 (1973).

out from among other media speakers, without justification. The First Amendment demands exacting scrutiny of regulations that treat similarly situated speakers differently and, to survive scrutiny here, the government must demonstrate that such differential treatment is necessary to the achievement of some “counterbalancing interest of compelling importance.” *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983). The Commission fell far short of this burden, and the local radio ownership rule therefore cannot be sustained.

The FCC’s media ownership regime singles out broadcasters—and, in the case of the local radio ownership rule, local radio broadcasters in particular—among many other speakers in the now-burgeoning media marketplace by imposing substantial burdens on a local station’s ability to speak to its chosen audience. The record below plainly shows that technological and competitive developments have dramatically altered the media landscape, and that local radio now competes with many new media platforms, none of which are subject to similar limitations on their speech. *See supra* pp. 23-25. The record also shows that, due in part to increased competition from unregulated counterparts, local radio owners face significant financial pressures. *See supra* pp. 24-25. The local radio ownership rule plainly “discriminate[s] among media” and, as such, “present[s] serious First Amendment concerns.” *Turner Broad.*, 512 U.S. at 659.

Absent some compelling justification, the Commission's disparate radio ownership rule must fail, as it handicaps only one type of speaker in the media marketplace. Yet, no compelling justification exists to maintain the rules.

Second, the local radio ownership rule violates the First Amendment because it is based upon impermissible effort to manipulate the content of broadcast programming. In effect, the radio ownership regulation on review is little more than a pretext by which the Commission seeks to control what such broadcasters air and, thus, what the public watches and hears.

Although the analysis of diversity in the *2008 Order* is fundamentally inconsistent, *see supra* pp. 20, 29, it is clear that the Commission improperly relied on the content of speech to justify retaining the rule. In particular, the Commission took into account considerations of programming content and format diversity. *2008 Order* ¶¶ 127-129 (JA____-____). For example, the Commission considered arguments that consolidation has led to a "paucity of news programming compared to advertising airtime," *2008 Order* ¶ 128 (JA____), and that it "creates more homogenized programming," *id.* ¶ 128 n.403 (JA____). The Commission also relied on the content of programming in its discussion of the localism rationale. *Id.* ¶ 125 (JA____). Indeed, the concept of "localism" itself is *inherently* content-based, as it more highly values one type of content—local content—over others. By rationalizing the rule with reference to the content of

radio stations' speech, the Commission effectively utilized its licensing authority to promote certain types of speech at the expense of others and, thereby, ran afoul of the First Amendment. *Turner*, 512 U.S. at 642 (stating that "regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content" violate the First Amendment); *accord R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 126 (1991).

In any event, even assuming that intermediate scrutiny applies, the rule still fails because it burdens more speech than necessary to further the Commission's asserted interests, *Time Warner*, 240 F.3d at 1130, *i.e.*, promoting competition and enhancing diversity and localism, *see 2008 Order* ¶ 113 (JA ____). Indeed, the local radio ownership rule actually *disserves* those interests. As discussed above, the record before the Commission shows that the media marketplace is robustly competitive. *See supra* pp. 4-5, 23-25. It also shows that common ownership actually *enhances* diversity and localism. *See supra* pp. 21-22. Accordingly, and even under intermediate scrutiny, the local radio ownership rule in its present, unmodified form is more burdensome than necessary to further the Commission's asserted interests. *See Chi. Cable Commc'ns v. Chi. Cable Comm'n*, 879 F.2d 1540, 1550 (7th Cir. 1989).

* * *

For the above reasons, the local radio ownership rule violates the First Amendment.

CONCLUSION

For the foregoing reasons, Clear Channel respectfully requests that the Court set aside the local radio ownership rule.¹⁴

¹⁴ Vacatur is appropriate in this case because the Commission has already had an opportunity to provide an adequate explanation for its decision to retain the rule on remand from *Prometheus* and has once again failed to do so. See 5 U.S.C. § 706 (providing that a “reviewing court shall . . . set aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”) (emphasis added); *Comcast v. FCC*, 579 F.3d 1, 19 (D.C. Cir. 2009) (finding “no trouble concluding” that vacatur of FCC’s cable horizontal ownership rule was appropriate given agency’s failure, on remand from prior judicial decision holding rule to be arbitrary and capricious, to provide an adequate explanation for the rule). Since the adoption of Section 202(h), the Commission has made clear that it has no intention of relaxing the numerical limits for radio ownership or modifying the subcaps. Another remand would simply perpetuate the cycle of the FCC addressing judicial directives for reconsideration in an upcoming ownership review, depriving regulated entities such as Clear Channel of effective relief from unlawful agency action.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP PURSUANT TO L.A.R. 46.1

I, Helgi C. Walker, hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Helgi C. Walker

Helgi C. Walker

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

Pursuant to Fed. R. App. P. 32(a)(7)(C) and L.A.R. 31.1(c), counsel for Clear Channel certifies that this brief complies with the applicable type-volume limitations of Fed. R. App. P. 32(a)(7)(B). The attached brief for Petitioners complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it is printed using a proportionally spaced, 14-point Times New Roman typeface and contains 8,470 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This certificate was prepared in reliance on the word count of the word-processing system (Microsoft Word) used to prepare this brief.

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

/s/ Helgi C. Walker

Helgi C. Walker

ADDENDUM

STATUTES AND REGULATIONS

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Pub. L. No. 104-104, 110 Stat. 56, § 202(h)

(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.

ADDENDUM

47 C.F.R. § 73.3555

(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); and

(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.

(2) Overlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service.

* * *

CERTIFICATE OF SERVICE

I, Helgi C. Walker, hereby certify that on this 17th day of May, 2010, the foregoing document was filed electronically using the Third Circuit's electronic filing system. I further certify that I caused a true and accurate copy of the foregoing document to be served on the following persons electronically via the Notice of Activity generated by this Court's Case Management / Electronic Case Filing system or by electronic mail upon consent, as appropriate:

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