Nos. 08–3078, 08–4454, 08–4455, 08–4456, 08–4457, 08–4458, 08–4459, 08–4460, 08–4461, 08–4462, 08–4463, 08–4464, 08–4465, 08–4466, 08–4467, 08–4468, 08–4469, 08–4470, 08–4471, 08–4472, 08–4473, 08–4474, 08–4475, 08–4476, 08–4477, 08–4478, 08–4652

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 OF PETITIONERS NATIONAL ASSOCIATION OF BROADCASTERS AND COALITION OF SMALLER MARKET TELEVISION STATIONS

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 08-4472

NATIONAL ASSOCIATION OF BROADCASTERS

v.

FEDERAL COMMUNICATIONS COMMISSION

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, National Association of Broadcasters (NAB) makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

NAB is a non-profit, incorporated association of radio and television stations and broadcast networks. NAB has no parent corporation.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

NAB has not issued any shares or debt securities to the public, and thus no publicly held company holds 10% or more of NAB's stock.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

There are no such corporations.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

(Signature of Counsel or Party) Dated: 5/17/10

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and
Statement of Financial Interest

No. 08-4652

The Coalition of Smaller Market Television Stations
and Raycom Media, Inc.

v.

Federal Communications Commission

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, the Coalition of Smaller Market Television Stations and Raycom Media, Inc. makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

The Coalition of Smaller Market Television Stations is a group of television station owners whose purpose is to advance the interest of its members on issues implicated by this case. The Coalition has no parent corporation. Coalition member LIN Television Corporation's parent corporation is LIN Media Corp. Freedom Broadcasting, Inc.'s parent corporation is Freedom Communications, Inc. Coalition member Cordillera Communications is a wholly owned subsidiary of the Evening Post Publishing Company.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

A group of entities ultimately controlled by GAMCO Investors, Inc. collectively own a 10% or greater interest in Coalition member Lin Television Corporation's parent LIN Media Corp. A group of entities ultimately controlled by GAMCO Investors, Inc. also collectively own a 10% or greater interest in Coalition member Fisher Communications, Inc. A group of entities ultimately controlled by Blackstone Group LP collectively hold a 10% or greater interest in Freedom Communications Holdings, Inc., parent of Freedom Communications, Inc., which is in turn parent of Coalition member Freedom Broadcasting, Inc.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

There are no such corporations.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

Robert A. Long, Jr. / ETB
(Signature of Counsel or Party)

Dated: 5/17/10

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JURISDICTIONAL STATEMENT

The Federal Communications Commission (the "Commission") had jurisdiction over this matter under § 202(h) of the Telecommunications Act of 1996 (the "1996 Act"), Pub. L. No. 104-104, 110 Stat. 56, as amended by § 629 of the Consolidated Appropriations Act of 2004 (the "2004 Act"), Pub. L. No. 108-199, 118 Stat. 3. The order under review is a final order of the Commission. It was released on February 4, 2008, and published in the Federal Register on February 21, 2008. *See Report and Order and Order on Reconsideration*, 23 F.C.C.R. 2010 (2008). The National Association of Broadcasters ("NAB") filed its petition for review on March 4, 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). The Coalition of Smaller Market Television Stations and Raycom Media, Inc. (jointly "Coalition") filed their petition in the same court on March 6, 2008. The NAB and Coalition petitions, and others challenging the same order, were consolidated in the Ninth Circuit by lottery pursuant to 28 U.S.C. § 2112(a)(3). The Ninth Circuit transferred the consolidated cases to this Court pursuant to 28 U.S.C. § 2112(a)(5).

ISSUES PRESENTED FOR REVIEW

1. Whether the Commission acted arbitrarily and capriciously or contrary to law in failing to reform the local television ownership rule. (The Commission addressed this issue at ¶¶ 87-109 of its order. It was raised, *inter alia*,

at 10/23/06 NAB Comments 87-110 and 10/23/06 Coalition Comments 6-27.)[1]

2. Whether the Commission acted arbitrarily and capriciously or contrary to law in failing to reform the local radio ownership rule. (The Commission addressed this issue at ¶¶ 110-138 of its order. It was raised, *inter alia*, at 10/23/06 NAB Comments 71-87.)

3. Whether the Commission acted arbitrarily and capriciously or contrary to law in retaining the newspaper-broadcast cross-ownership rule with only modest relaxation. (The Commission addressed this issue at ¶¶ 13-79 of its order. It was raised, *inter alia*, at 10/23/06 NAB Comments 110-20.)

4. Whether the Commission acted arbitrarily and capriciously or contrary to law in failing to reform the radio-television cross-ownership rule. (The Commission addressed this issue at ¶¶ 80-86 of its order. It was raised, *inter alia*, at 10/23/06 NAB Comments 120-24.)

STATEMENT OF RELATED CASES AND PROCEEDINGS

The agency order under review results from a proceeding that encompassed the remand of *Prometheus Radio Project v. FCC*, No. 03-3388 (3d Cir. 2004).

Petitioners are aware of no related case pending before this Court other than those already consolidated for this Court's review. In addition to these consolidated cases, Petitioners are aware of the following related cases or

[1] The Coalition challenges only the Commission's retention of the local television ownership rule, and accordingly it joins only Part I of the Argument in this brief.

proceedings: *Prometheus Radio Project v. FCC*, No. 03-3388 (3d Cir.) (and cases consolidated therewith); *In re Sinclair Broadcast Group*, No. 08-4466 (3d Cir.); *Newspaper Association of America v. FCC*, No. 00-1375 (D.C. Cir.); *Sinclair Broadcast Group, Inc. v. FCC*, No. 01-1079 (D.C. Cir.); *Tribune Co. v. FCC*, No. 07-1488 (D.C. Cir.); *Zell v. FCC*, No. 07-1489 (D.C. Cir.); *2010 Review of Media Ownership Rules*, MB Docket No. 09-182 (FCC); *2006 Quadrennial Regulatory Review*, MB Docket No. 06-121 (FCC) (and proceedings consolidated therewith); and *2002 Biennial Regulatory Review*, MB Docket No. 02-277 (FCC) (and proceedings consolidated therewith).

STATEMENT OF THE CASE

These consolidated cases involve multiple petitions for review of the Commission's 2008 order concluding its periodic review of its broadcast ownership rules. *Report and Order and Order on Reconsideration*, 23 F.C.C.R. 2010 (2008) ("2008 Order"). In the 2008 Order, the Commission (1) retained its local television ownership rule, which restricts the number of television stations that an entity can own in a single market; (2) retained its local radio ownership rule, which restricts the number of radio stations that an entity can own in a single market; (3) made minor revisions pertaining to waiver of its newspaper-broadcast cross-ownership rule, but declined to repeal the prohibition on joint ownership of a daily newspaper and a radio or television station in the same market; and (4) retained its radio-television cross-ownership rule, which restricts the number of radio and television stations that can be jointly owned in a single market.

Petitions for review of the 2008 Order were filed in numerous circuits, consolidated in the Ninth Circuit, and transferred to this Court, which stayed the Order. The Court initially held the cases in abeyance, then lifted the stay and directed that the appeals proceed.

STATEMENT OF FACTS

A. Background

The Commission's broadcast ownership rules restrict ownership of multiple local television stations or local radio stations, as well as "cross-ownership" of different types of local media outlets. Traditionally, the Commission has justified these rules as promoting competition, diversity, localism, or some combination of these goals. *See, e.g.*, 2008 Order ¶ 9; *Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13,620, ¶¶ 17-79 (2003) ("2003 Order").

In the Telecommunications Act of 1996, Congress directly addressed – and, in some cases, altered – the Commission's existing ownership rules. Congress instructed the Commission to "conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate" its restrictions on ownership of multiple television stations in the same market. 1996 Act § 202(c)(2). Congress also prescribed specific numerical limits on common ownership of same-market radio stations – limits that eased the Commission's restrictions, allowing beneficial combinations that strengthened a struggling industry. *See id.* § 202(b)(1). Finally, Congress required the Commission to conduct biennial reviews of *all* the broadcast ownership rules to "determine whether any of such rules are necessary in the public interest as the result of competition," and directed the Commission to "repeal or modify any regulation it determines to be no longer in the public interest." *Id.* § 202(h).[2] Thus, the Commission must affirmatively justify retention of its existing rules. *See, e.g.*, *Prometheus Radio Project v. FCC*, 373 F.3d 372, 395 (3d Cir. 2004).

B. The Commission's Initial Regulatory Review And The *Sinclair* Decision

Acting pursuant to Congress's instructions, the Commission revised its local television ownership (or "duopoly") rule in 1999. *See Review of the Commission's Regulations Governing Television Broadcasting, Report and Order*, 14 F.C.C.R. 12,903 (1999) ("1999 Order"). For several decades prior to that order, the Commission had barred an entity from owning more than one television station in a viewing market. 2003 Order ¶ 135. Under the revised rule, a single entity could own two stations with overlapping signal contours in the same "designated market area" ("DMA") if at least one of the stations was not among the four highest-ranked in the market *and* at least eight independently owned "voices" would

[2] In 2004, Congress amended the Act to make the Commission's obligation quadrennial rather than biennial. *See* 2004 Act § 629.

remain in the market post-merger – the so-called "top-four/eight-voices" test. 1999 Order ¶ 8.[3] For purposes of this rule, the Commission counted only full-power television stations as "voices." *Id.* In the same order, the Commission revised its radio-television cross-ownership rule to allow common ownership of a television station and a specified number of radio stations in the same market, with the exact number depending on how many "independent voices" remained post-merger. *Id.* ¶ 9. For purposes of this rule, however, the Commission defined "voices" more broadly, to include in-market, independently owned television stations, radio stations, and daily newspapers, as well as wired cable service. *Id.* ¶ 10.

Reviewing the 1999 Order, the D.C. Circuit held that the Commission had acted arbitrarily by counting only local television stations as "voices" for purposes of the duopoly rule's eight-voices requirement. *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 162-65 (D.C. Cir. 2002). "Having found for purposes of [radio-television] cross-ownership that counting other media voices 'more accurately reflects the actual level of diversity and competition in the market,'" the court reasoned, "the Commission never explains why such diversity and competition should not also be reflected in its definition of 'voices' for the local

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[3] DMAs are county-based geographic areas designated by Nielsen Media Research based on television viewership patterns. A station's rank is "determined using the station's most recent all-day audience share, as measured by Nielsen." 2003 Order ¶ 186.

[television] ownership rule." *Id.* at 164 (quoting 1999 Order ¶ 107). Although the Commission had justified its decision by stating that it was "unable to reach a definitive conclusion at this time as to the extent to which other media serve as readily available substitutes for broadcast television," 1999 Order ¶ 69, the court rejected this "wait-and-see approach" as inconsistent with the Commission's mandate to "repeal or modify" any ownership rule not "necessary in the public interest." 284 F.3d at 164 (quoting *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1042 (D.C. Cir. 2002), *modified on reh'g on other grounds*, 293 F.3d 537 (D.C. Cir. 2002)) (internal quotation marks omitted). The court therefore remanded the local television rule to the Commission for further consideration. *Id.* at 169. Judge Sentelle would have vacated the rule altogether. *Id.* at 171-72 (Sentelle, J., concurring in part and dissenting in part).

C. The Commission's 2003 Order And The *Prometheus* Decision

The Commission's reconsideration of the local television ownership rule on remand from the D.C. Circuit took place in the context of its 2002 Biennial Review, which culminated in the 2003 Order. In that order, the Commission replaced its 1999 duopoly rule with a rule permitting common ownership of (1) two commercial television stations in markets with 17 or fewer full-power stations and (2) three such stations in all other markets. 2003 Order ¶ 134. Unlike the 1999 rule, the new rule did not include an "eight-voices" requirement, though it did retain the "top-four" prohibition. *See id.*

The Commission based this new rule on its conclusion that common ownership of multiple television stations in a market conferred benefits on the public without harming viewpoint diversity. Thus, the Commission found that common ownership can create efficiencies yielding more and better local news and other local programming. *Id.* ¶ 164. The Commission also found that "media other than television broadcast stations contribute to viewpoint diversity in local markets," so that the 1999 rule "is not necessary to achieve our diversity goal." *Id.* ¶ 171. And the Commission concluded that "in light of the myriad sources of competition to local television broadcast stations," an eight-voices requirement was "not necessary in the public interest to protect competition" for viewers – that is, to give "the assurance of a sufficient number of strong rivals actively engaged in competition for viewing audiences." *Id.* ¶ 133.

The 2003 Order also addressed the Commission's other ownership rules. The Commission modified certain aspects of the local radio ownership rule relating to how stations should be counted, but retained the specific numerical limits on common ownership set by Congress in 1996. *Id.* ¶ 239. The Commission also eliminated its ban on cross-ownership of a daily newspaper and a same-market broadcast station and removed its separate limits on radio-television cross-ownership. *Id.* ¶¶ 368-69, 371. In place of these two rules, the Commission adopted a single set of "cross-media" limits, which provided a unified framework governing cross-ownership of newspapers, radio stations, and television stations. *Id.* ¶¶ 432-81.

Petitions for review were filed in various courts of appeals and were consolidated in this Court, which stayed the new rules – thus leaving in effect the ownership rules as they existed prior to the 2003 Order. *Prometheus,* 373 F.3d at 382.

In 2004, this Court upheld certain of the Commission's actions, but deemed others arbitrary and capricious. With respect to the duopoly rule, the Court upheld the Commission's determination that "media other than broadcast television contribute to viewpoint diversity." *Id.* at 414. The Court also upheld the Commission's determination that common ownership can create efficiencies that "translate[] into improved local news and public interest programming," thus advancing localism. *Id.* at 415-16. Nonetheless, the Court found flaws in the agency's methodology for arriving at its numerical ownership limits, and therefore remanded those limits for further consideration. *Id.* at 419-20.

As for the local radio ownership rule, this Court likewise remanded the Commission's specific numerical limits. *Id.* at 423-30. The Commission had rationalized those limits as "ensur[ing] five equal-sized competitors," but had insufficiently explained why this was the appropriate goal, or how its limits would achieve that goal. *Id.* at 432-34.

Addressing cross-ownership, this Court specifically upheld the Commission's decision to lift the newspaper-broadcast cross-ownership ban. *Id.* at 398. The Court explained that "the Commission reasonably concluded that it did not have enough confidence in the proposition that commonly owned outlets have a uniform [viewpoint] bias to warrant sustaining the cross-ownership ban" on diversity grounds. *Id.* at 399-400. In addition, the Court upheld the Commission's "conclusion that the . . . ban undermined localism" and its finding that "diverse viewpoints from other media sources in local markets (such as cable and the Internet) compensate for viewpoints lost to newspaper/broadcast combinations." *Id*. But the Court concluded that the Commission had inadequately justified the specific cross-media limits chosen. *Id.* at 402-11.

Based on these conclusions, this Court remanded for the Commission to further consider certain aspects of the 2003 Order. The Court kept its stay in place, so that parties continued to be bound by the rules in effect prior to the 2003 Order. *Id.* at 435.[4]

D. The Commission's 2008 Order

The Commission addressed the issues resulting from the *Prometheus* remand

[4] On rehearing, this Court did allow certain local radio rules in the 2003 Order relating to defining and determining the size of markets to go into effect. *See* 2008 Order ¶ 4.

in the context of its 2006 Quadrennial Review, which culminated in the 2008 Order. Using as its baseline the rules that pre-dated the 2003 Order (because *Prometheus* had stayed the rules set forth in the 2003 Order itself), the 2008 Order retained unchanged the local television ownership rule, which it justified as promoting competition; retained unchanged the local radio ownership rule, which it justified as promoting competition; modestly relaxed the newspaper-broadcast cross-ownership rule, which it justified as promoting diversity; and retained unchanged the radio-television cross-ownership rule, which it likewise justified as promoting diversity.

1. *Local Television Ownership Rule*

In the 2008 Order, the Commission retained the duopoly rule from the 1999 Order – *i.e.*, the very rule that the D.C. Circuit had held arbitrary and capricious. Under that rule – which has now been in effect for over a decade, despite the D.C. Circuit's decision – a single entity may own two television stations with overlapping signal contours in the same DMA only if at least one of those stations is not rated among the DMA's top four and at least eight independent full-power television stations would remain in the DMA post-merger. 2008 Order ¶ 87. That rule effectively prohibits common ownership altogether in 154 markets – nearly three-quarters of the markets in the nation – as those markets contain fewer than nine stations. 1/16/07 Coalition Comments 2.

Citing numerous comments, the Commission's order "recognize[d] that owning a second in-market station can result in substantial savings in overhead and management costs and can allow the local broadcaster to innovate by spreading its fixed costs and operating capital over a large number of operating units and to better compete with non-broadcast content providers for advertising dollars." 2008 Order ¶ 98. It also conceded that "these potential significant benefits of duopolies . . . outweigh commenters' speculative claims that duopolies harm diversity and competition." *Id.* Indeed, the Commission expressly found that the duopoly rule was "not necessary to foster diversity." *Id.* ¶ 100. Finally, the Commission acknowledged that, in the 2003 Order, it had concluded that the present duopoly rule was *not* necessary to protect competition, in light of "'the competitive impact of other video programming outlets' on local broadcasters." *Id.* ¶ 101 (quoting 2003 Order ¶¶ 133, 140).

Nevertheless, the Commission concluded that the rule *now* was necessary to "promote[] competition for viewers and advertisers within local television markets." *Id.* ¶ 97. It asserted: "Because we are retaining the rule primarily to foster competition among local television stations, our determination regarding the continued need for the rule does not depend on the competitive impact of other video programming outlets." *Id.* ¶ 101. At no point did the Commission explain why its goal was to foster competition only among local television stations, rather than among video or media outlets more broadly.

As to the benefits of this "competition," the Commission stated – without citation – that "[c]ompetition . . . provides an incentive to television stations to invest in better programming and to provide programming that is preferred by viewers," and that local television stations' "incentives to respond to conditions in local markets . . . may be diminished by mergers between stations that reduce competition to anticompetitive levels." *Id.* ¶ 97. The Commission also asserted that "[c]ompetition among local broadcast stations is . . . necessary to preserve competition for advertising by local businesses that want to advertise their products on television." *Id.* The Commission nowhere explained its basis for concluding that greater common ownership of local television stations undermines these goals. *See id.* It did assert, however, that it "cannot rely on competition from cable programmers to respond to local needs and interests because most cable programming is provided by cable networks, and those networks respond primarily to national and regional forces." *Id.*

On the other side of the balance, the Commission acknowledged that it had previously determined that the duopoly rule in its present form "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." *Id.* ¶ 103. Yet the Commission now concluded that the record was "unpersuasive regarding the effects of multiple ownership on local programming." *Id.* The Commission reached this conclusion despite noting evidence that multiple ownership *does* lead to more and better local programming, and despite *rejecting* some commenters' assertions to the contrary. *Id.*

With respect to the eight-voices requirement, the Commission asserted that "a minimum of eight independently owned-and-operated television stations is appropriate to ensure that there will be robust competition in the local television marketplace." *Id.* ¶ 99. Observing that eight such stations would encompass four independently owned-and-operated stations unaffiliated with a major network, the Commission found it "prudent to require the presence of at least four [such stations] in order to ensure vibrant competition in the local television marketplace." *Id.* The Commission did not explain, however, why the "presence" of non-network affiliates is "required" to "ensure vibrant competition," or why "at least four" are needed. *Id.*

As to its decision to count only full-power television stations among the necessary eight voices, the Commission acknowledged that "other types of media, such as radio, newspapers, cable, and the Internet, contribute to viewpoint diversity within local markets." *Id.* ¶ 100. Yet the Commission justified excluding those voices from consideration on the ground that its "primary goal in preserving the rule is to foster competition among local television stations," and not to promote diversity, which it asserted was the primary purpose of the cross-ownership rules. *Id.*

2. *Local Radio Ownership Rule*

The Commission also decided to retain the numerical limits on common ownership of local radio stations that Congress prescribed in 1996. *Id.* ¶ 110 n.357. The Commission justified the rule – under which the applicable limits depend on the number of stations in the market – as necessary "to protect competition in local radio markets." *Id.* ¶ 110.

Responding to requests to make the rule *more* restrictive, the Commission stressed that before 1992, when it first permitted common ownership of radio stations in the same market, "the local radio ownership rules did not effectively recognize that a certain level of consolidation can be efficient." *Id.* ¶ 119. In addition, the Commission found that rolling back earlier changes "would disrupt the marketplace by necessitating widespread divestitures" that "could undermine efficiency gains that such firms otherwise might realize from their current economies of scale," which could in turn decrease stations' "ability to provide their local communities with quality programming." *Id.* ¶ 120.

The Commission also rejected requests that it relax the limits by increasing the ownership cap in the largest markets or eliminating "subcaps" on common ownership of particular numbers of AM or FM stations. *See, e.g.*, 10/23/06 Clear

Channel Comments 66-73; 2008 Order ¶¶ 118 & n.382, 130-34. The Commission stated that existing "numerical limits on radio station ownership help to keep the available radio spectrum from becoming 'locked up' in the hands of one or a few owners, thus helping to prevent the formation of market power in local radio markets." 2008 Order ¶ 116. The Commission also asserted that existing radio ownership levels had led to "appreciable, albeit small, increases in advertising rates." *Id.* ¶ 118. It did not otherwise attempt to explain why certain levels of common ownership were "too high" or why they would result in the formation of market power. *Id.*

3. *Newspaper-Broadcast Cross-Ownership Rule*

Noting that the complete ban on cross-ownership of a newspaper and a broadcast station in the same market had been in effect since 1975, the Commission took what it described as "a modest step" toward loosening that ban. *Id.* ¶ 13. The Commission adopted a presumption, in the top 20 markets, that (a) common ownership of a daily newspaper and a radio station is not inconsistent with the public interest; and (b) common ownership of a daily newspaper and a television station is not inconsistent with the public interest so long as the television station is not among the market's top four and at least eight independent "major media voices" would remain in the market post-merger. *Id.* For purposes of this rule, the Commission defined "major media voices" as "full-power commercial and noncommercial television stations and major newspapers." *Id.* ¶ 57 & n.183. All other newspaper-broadcast combinations are presumed not to be in the public interest. Either presumption, however, can be overcome by a detailed, multi-factor public-interest review of a particular proposed transaction. *Id*. ¶ 13; *see also id.* ¶ 68.

The Commission grounded its relaxation of the newspaper-broadcast cross-ownership ban on "dramatic changes" in the media marketplace. *Id.* ¶ 24. When the ban was adopted in 1975, "a person wishing to provide local news to reach a mass audience on a frequent basis in his or her local community had only two reliably effective options: (1) produce a written publication, or (2) acquire a full-power broadcast license." *Id.* ¶ 23. Now, by contrast, "listeners and readers [have] gravitate[d] toward new sources of information and entertainment" such as satellite radio, the Internet, and various platforms for multichannel video programming distribution including cable and direct broadcast satellite ("DBS"). *Id.* ¶ 24. And since 1975, newspapers have suffered a "steep reduction in . . . circulation" and flattened advertising revenues. *Id.* ¶ 28. Given that "newspapers continue to play a critical role in the production of news and information in our society," the Commission found it "critical that our rules do not unduly stifle efficient combinations that are likely to preserve or increase the amount and quality of local news available to consumers via newspaper and broadcast outlets." *Id.* ¶ 35.

Against this background, the Commission stated that it "continue[d] to find evidence that cross-ownership in the largest markets can preserve newspapers' viability without threatening diversity by allowing them to spread their operational costs across multiple platforms," thus "improv[ing] or increas[ing] the news offered by the broadcaster and the newspaper." *Id.* ¶ 39. The Commission stressed, however, that it was retaining some newspaper-broadcast cross-ownership limits to preserve viewpoint diversity, because it was "not in a position to conclude that ownership can never influence viewpoint." *Id.* ¶ 49; *see also id.* ¶ 46.

4. *Radio-Television Cross-Ownership Rule*

Finally, the Commission's 2008 Order retained the version of the radio-television cross-ownership rule in effect since 1999 (which the 2003 Order had eliminated in favor of the later-invalidated cross-media limits). *Id.* ¶ 82. The rule restricts common ownership of radio and television stations in a single market to varying degrees, depending on the number of independently owned "voices" remaining in the market post-merger. *Id.* ¶ 80 n.259. For purposes of this rule, "voices" include radio stations, television stations, daily newspapers with a certain circulation, and wired cable service. *Id.*

Despite having adopted the rule to promote both diversity and competition, the Commission now rested solely on the goal of diversity. *See id.* The Commission asserted that the local television and radio ownership rules "are chiefly concerned with competition and rivalry among entities providing the same service," while "cross-ownership rules aim to maintain a vibrant marketplace of ideas to ensure a diversity of editorial content." *Id.* ¶ 84. Because radio and television "serve as substitutes at least to some degree for diversity purposes," the Commission concluded, "there remains a need to retain a cross-ownership rule to ensure that viewpoint diversity is adequately protected." *Id.*

SUMMARY OF ARGUMENT

This Court cannot uphold the Commission's failure to meaningfully review its outdated broadcast ownership restrictions. The Commission has made conclusory assertions, contradicted itself, changed course without explanation, failed to consider important aspects of the problem it faced, failed to respond to significant comments, and acted contrary to the evidence. Given these problems, it is unsurprising that the Commission's order does not pass muster under the Administrative Procedure Act ("APA"), which forbids arbitrary and capricious agency action, or under § 202(h), which requires the Commission to repeal or modify any rule no longer in the public interest and to justify any decision to retain a rule.

Most notably, the local television ownership rule is arbitrary and contrary to law in multiple respects, and this Court should vacate it. First, the Commission has once again decided that it will count only television stations as "voices" for purposes of that rule, even though it employs a different and broader definition of "voices" for purposes of its radio-television cross-ownership rule. That is exactly the inconsistency that the D.C. Circuit identified as arbitrary and capricious in *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002). Indeed, the Commission has simply readopted the very same rule that *Sinclair* remanded – and it has attempted to justify its defiance of *Sinclair* by insisting that the rule suddenly serves a different purpose now than it did then. That is irrational on its face, and is also contradicted by other portions of the 2008 Order itself, not to mention decades of Commission precedent. In addition, the record before the Commission overwhelmingly demonstrates that limiting "voices" to television stations ignores the actual state of competition in the marketplace.

Second, the Commission has insufficiently justified its abrupt reversal on the question of whether the current local television rule advances competition. In 2003, the Commission found that the *same rule* now under review actually *harms* competition, and that greater common ownership of television stations would be efficient and beneficial in several ways. In the order at issue here, the Commission reached exactly the opposite conclusion – without ever explaining, in the face of a contrary record, why the top-four/eight-voices rule now aids competition rather than undermining it. Moreover, the Commission did not even mention the small and mid-sized markets (representing nearly three-quarters of all television markets) in which the rule effectively bars *any* common ownership, even though the record powerfully demonstrates that such ownership is especially necessary in those markets. That is the epitome of arbitrary agency action.

Even beyond all of these problems, the Commission's competition "analysis" is hollow at its core. The Commission abstractly discussed the benefits of "competition" without ever linking those asserted benefits to anything about the specific local television rule it chose. The Commission did not explain *how* that rule improves programming or prevents anti-competitive increases in advertising rates – or even how one would determine whether a market is experiencing "anti-competitive" conditions. Nor did the Commission explain why the local television rule serves any pro-competitive function that the relevant antitrust authorities do not already perform.

The Commission's other ownership rules are also worthy of this Court's close scrutiny. As to the local radio rule, the Commission was justified in not cutting back on the radio ownership levels set by Congress in 1996, given extraordinary changes in the media landscape and the strong evidence that common ownership of radio stations advances the Commission's public interest goals. But based on the record, the Commission should have further reformed the local radio rule to allow broadcasters increased flexibility in forming efficient ownership structures. As to the newspaper-broadcast cross-ownership rule, the

Commission appropriately lifted the outmoded ban on cross-ownership that had been in place since 1975, but should not have continued to retain restrictions on such cross-ownership. And as to the radio-television cross-ownership rule, the Commission acted arbitrarily and capriciously, and did not provide a sufficient justification under § 202(h), for retaining its existing limits.

STANDARD OF REVIEW

Under the APA, a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A), (C). This standard requires a reviewing court to "ensure that, in reaching its decision, the agency examined the relevant data and articulated a satisfactory explanation for its action." *Prometheus*, 373 F.3d at 389-90. An agency has acted arbitrarily and capriciously when it "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that 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). Under this standard, an order is arbitrary and capricious where the agency fails to respond to "all significant comments." *ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987); *see Natural Resources Defense Council, Inc. v. EPA*, 790 F.2d 289, 315 (3d Cir. 1986).

Further, the APA requires an agency that "sharply change[s] its substantive policy" to provide a reasoned explanation for the change. *Pa. Fed'n of Sportsmen's Clubs, Inc. v. Kempthorne*, 497 F.3d 337, 350-51 (3d Cir. 2007) (internal quotation marks omitted); *see also FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810-13 (2009) (agency changing stance must "provide reasoned explanation for its action" and "show that there are good reasons for the new policy"). "An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past." *Fox*, 129 S. Ct. at 1824 (Kennedy, J., concurring). The agency's "failure to address itself to the contrary views it expressed" in support of an earlier version of a rule will "undermine[] its present rationale," particularly where the "later decision does not indicate . . . reason to repudiate its prior conclusion." *Fox*, 280 F.3d at 1043.

In addition, as this Court recognized in *Prometheus*, when regulations are "promulgated as part of the periodic review requirements of § 202(h)," which requires the Commission to "repeal or modify any regulation it determines to be no longer in the public interest," judicial review "is informed by that provision." 373 F.3d at 390-91. Charged with ensuring that the Commission's regulations "keep pace with the competitive changes in the marketplace," *id.* at 391, the Commission cannot retain an existing ownership rule without explanation, or rely on evidence from the rule's initial adoption. Rather, to "retain" or "modify" an existing rule, "it must do so in the public interest and support its decision with a reasoned analysis." *Id*. at 395.

ARGUMENT

I. The FCC's Readoption Of The Local Television Ownership Rule Is Arbitrary And Capricious And Violates § 202(h)

The Commission readopted the top-four/eight-voices local television ownership rule ostensibly to promote competition. In so doing, it failed in two ways to comply with the court's mandate in *Sinclair* and with its obligations under the APA and § 202(h). *First*, in deciding how to count "voices" for purposes of the eight-voices requirement, the Commission concluded that local broadcast television stations compete only against other such stations – despite the D.C. Circuit's prior holding that this very conclusion was arbitrary and capricious, and even though the record evidence did not remotely support that crabbed view of the relevant market. *Second*, the Commission inadequately demonstrated that the top-four/eight-voices rule will promote competition – a conclusion that the agency itself disclaimed in the 2003 Order. Given the Commission's repeated failures, this Court should vacate the local television rule as arbitrary and capricious and contrary to § 202(h), rather than merely remanding it.

A. The Commission's Decision To Count Only Local Television Stations As Voices Is Inconsistent With The D.C. Circuit's Ruling In *Sinclair* And With The Requirements Of The APA And § 202(h)

1. The Commission's Decision To Exclude All Voices Other Than Local Television Stations Cannot Be Squared With The D.C. Circuit's Mandate In *Sinclair*

The top-four/eight-voices local television rule that the Commission approved in the 2008 Order is the very same rule that the D.C. Circuit remanded as arbitrary and capricious in 2002 in *Sinclair*. That rule has now been in effect for more than a decade – and it remains as unjustifiable now as it was then. The Commission cannot provide a reasoned explanation for why it counts market "voices" in one way for its local television ownership rule (which deems only television stations to be "voices") and in a different way for its radio-television cross-ownership rule (which deems television stations, radio stations, newspapers, and cable service to be "voices"). This Court should give force to the D.C. Circuit's ruling and bring an end to the Commission's ill-conceived local television ownership restrictions.

In *Sinclair*, the Commission defended its decision to count only broadcast television "voices" when applying the duopoly rule as necessary to promote both competition and diversity in local television markets. *See* 284 F.3d at 163-65. The D.C. Circuit rejected the Commission's explanation. In particular, the court chided the Commission for "not provid[ing] any justification for counting fewer types of 'voices' in the local ownership rule than it counted in its rule on cross-ownership of radio and television stations." *Id*. at 162; *see also id.* at 164 (noting that the Commission "found for purposes of cross-ownership that counting other media voices 'more accurately reflects the actual level of diversity and competition in the market'"). On that basis, the D.C. Circuit held that the Commission had acted arbitrarily and had insufficiently justified exclusion of voices other than broadcast television as "necessary in the public interest." *Id*. at 165, 169.

In the 2003 Order, the subject of this Court's *Prometheus* decision, the Commission eliminated any eight-voices requirement. Now, however, the Commission has once again counted voices other than local broadcast stations for purposes of the radio-television cross-ownership rule, yet failed to count them for purposes of the local television ownership rule. 2008 Order ¶ 100. To justify this flagrant disregard of the D.C. Circuit's mandate, the 2008 Order merely asserted that the cross-ownership rules are "designed to foster viewpoint diversity," while the local television rule is necessary only "to preserve competition among broadcast television stations in local markets." *Id*. In other words, the Commission purported to abandon rationales it previously had offered to justify its rules.

For three reasons, the Commission's explanation is meritless. First, that explanation is a transparent effort to evade the *Sinclair* mandate. Having previously recognized that both the radio-television cross-ownership rule and the local television rule serve the same interests, the Commission has attempted to eliminate the arbitrary inconsistency between the rules simply by peeling off the "competition" label from one and the "diversity" label from the other.

Second, the Commission's own descriptions of the interests served by the duopoly rule demonstrate that while the Commission asserts that the rule is needed to promote competition but not diversity, it has now redefined "competition" to *include* diversity (and localism). In the 2008 Order, the Commission stated that the top-four/eight-voices rule promotes competition because it gives viewers "higher quality programming" that is "responsive to local needs and interests." *Id*. ¶¶ 97, 99. The Commission also claimed that the rule is necessary to promote competition because it prevents a "loss of newscasts" and "ensures that local television stations . . . will provide dynamic and vibrant alternative fare, including local news and public affairs programming." *Id*. ¶¶ 99, 101. Thus, in the Commission's own view, the duopoly rule promotes competition *as a means of achieving diversity*.

Indeed, while the Commission now styles locally responsive or public affairs-oriented programming as a benefit of increased competition, it has always treated that result as intimately bound up with diversity – including at other points in the 2008 Order itself. *See, e.g., id.* ¶ 68 (finding that the modified newspaper-broadcast cross-ownership rule, which examines the extent to which a proposed merger will "increase the amount of local news disseminated," will "enable the Commission to preserve and potentially increase localism and viewpoint diversity"); *see also* 2003 Order ¶¶ 393-394 ("[F]ostering diversity is one of the principal goals of the Commission's media broadcast ownership rules. . . . News and public affairs programming is the clearest example of programming that can provide viewpoint diversity."). As this Court noted in *Prometheus*, "the Commission's recognized indicator of viewpoint diversity in local markets" is the "provi[sion] of independent local news." 373 F.3d at 405.

Third, even if the Commission's labels could be accepted at face value, both the 2008 Order itself and Commission precedent refute the assertion that the local television rule is concerned solely with competition while the cross-ownership rules are concerned solely with diversity. For instance, the Commission concluded in the 2008 Order that the newspaper/broadcast cross-ownership rule will "protect competition and media diversity" – not just the latter. 2008 Order ¶ 63. It also concluded that the single-service local ownership rules – including the television rule – "encourage . . . diversity." *Id*. ¶ 63 n.207.

Past Commission orders – stretching back for decades – confirm these conclusions. Since the inception of the single-service local ownership rules and the cross-ownership rules, the Commission has *always* understood *both* to advance the dual goals of competition and diversity. *See* 1999 Order ¶ 15 (stating that "[a]ll of our broadcast cross-ownership and multiple ownership rules, including" the local television and radio-television cross-ownership rules, "are based on these 'twin goals' of competition and diversity"); *Report and Order*, 22 F.C.C.2d 306, ¶ 3 (1970) (when originally adopting the radio-television cross-ownership rule, Commission stated that "multiple-ownership rules . . . (1) [f]oster[] maximum competition in broadcasting, and (2) promot[e] diversification of programming sources and viewpoints"); *Report and Order*, 45 F.C.C. 1476, ¶ 2 (1964) (when adopting earlier version of its duopoly rule, Commission stated that "multiple ownership rules seek to promote maximum diversification of program and service viewpoints and to prevent undue concentration of economic power").

Accordingly, the Commission cannot evade the *Sinclair* mandate simply by asserting that the two inconsistent ownership rules now serve different purposes. The 2008 Order presents *exactly the same inconsistency* that was the basis of the holding in *Sinclair*, and there is no ground for distinguishing that case from this one. This Court should therefore hold that the Commission's local television ownership rule is arbitrary and capricious and contrary to § 202(h).

2. The Commission's Conclusion That Local Television Stations Compete Only With Each Other Is Not Supported By The Evidence

The Commission's disregard of the *Sinclair* mandate, and the blatant and unjustified disparity between the Commission's voice-counting methodologies, is reason enough for this Court to invalidate the duopoly rule. But there is another, independently sufficient reason why that rule cannot stand: the evidence in the record overwhelmingly showed that local television stations compete for audiences and advertisers with cable operators, satellite operators, and Internet outlets, and not merely with other television stations. The Commission did not acknowledge or address the bulk of this evidence, even though it is consistent with the Commission's own findings in other proceedings. Thus, for this reason as well, the Commission's selection of which media outlets count toward the eight-voices requirement was arbitrary and capricious and inconsistent with § 202(h). *See ACLU*, 823 F.2d at 1581 (agency action is arbitrary unless it "respond[s] to all significant comments, for the opportunity to comment is meaningless unless the agency responds to significant points raised by the public" (internal quotation marks omitted)); *Natural Resources Defense Council*, 790 F.2d at 315.

In the 2008 Order, the Commission pointed to no empirical evidence supporting its premise that local television stations compete only against each other. *See* 2008 Order ¶¶ 97-102. Instead, it simply asserted that "given our conclusion that the local television ownership rule is necessary to preserve competition among broadcast television stations in local markets, it is appropriate to limit our voices test to television stations in that rule." *Id.* ¶ 100. That is a tautology; it fails to explain why the 2008 Order limits the competitive market to local television stations in the first place.

The Commission's assertion also is insufficient to discharge its obligation to address all significant comments and rationally base the rule on the record evidence. Numerous parties submitted lengthy comments, many of which were accompanied by economic studies or other data, compellingly demonstrating that local television stations do indeed compete for both audiences and advertisers with a variety of other programming outlets. For example, commenters supplied empirical evidence that increases in cable and satellite viewing have significantly affected the competitive position of local television stations. *See*, *e.g.*, 10/23/06 NAB Comments 25-31, 106-07, Attach. C (study showing that low and declining viewership of in-market broadcast television stations results from increasing viewership of cable, satellite, and out-of-market stations); *id.* Attach. F (showing growth of cable's share of local television advertising revenues); 1/16/07 NAB Comments 30-32; 12/11/07 NAB Comments 19-22; 10/23/06 NBC Universal Comments 7-12 (citing study demonstrating that cable is making serious inroads into local advertising sales); *id*. App. at 2 (data showing cable is a significant competitor to broadcast television stations for locally targeted advertising). Commenters refuted any suggestion that cable does not compete at the local level, *see* 2008 Order ¶ 97, highlighting the distinction between (1) cable programmers and networks, which often are national or regional players; and (2) cable operators, which are franchised and compete locally and are responsive to local audiences and advertisers. *See, e.g.*, 10/23/06 NAB Comments 107-09. Commenters also demonstrated that Internet-based media such as YouTube, Google Video, and iTunes are beginning to win audiences and advertisers at the expense of local television stations. *See, e.g.*, 10/23/06 Hearst-Argyle Television Comments 5-13; 10/23/06 NBC Universal Comments 10-12; 10/23/06 Coalition Comments 6, 8-9 n.12; 1/16/07 NAB Comments 19-30; 10/23/06 NAB Comments 12-22, 32-35.

Bolstering this powerful evidence, *the Commission itself* has previously recognized that cable operators compete with local television stations in local markets. The Commission's cable-broadcast cross-ownership rule, first instituted in the 1970s, had "the effect of prohibiting common ownership of a broadcast station and a cable television system in the same local market." *Fox*, 280 F.3d at 1035. The rule was necessary, according to the Commission, not just to "preserv[e] the voices of independent broadcast stations," but also to "safeguard competition." *Id*. at 1036, 1042; *see id*. at 1051. Thus, the Commission recognized that cable operators and local television stations compete against each other at the local level.[5]

That recognition extended to other orders as well. Just before issuing the

[5] The Commission enforced this rule until the D.C. Circuit vacated it. *See Fox*, 280 F.3d at 1049.

2008 Order, the Commission expressly acknowledged that "broadcasters face increasing competition from cable operators for advertising dollars," explaining that "'[t]rends confirm that increasingly consolidated cable operators are making troubling inroads into the local advertising market – a critical source of support for free, over-the-air television.'" *In re Carriage of Digital TV Broad. Signals*, 22 F.C.C.R. 21064, ¶ 55 n.192 (2007) ("*Carriage Order*"). The Commission similarly found, in a report on video competition, that cable advertising revenues and non-broadcast viewership continue to increase in local television markets. *See Twelfth Annual Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 F.C.C.R. 2503, 2506-07, 2521, 2579 (2006) (cited in 10/23/06 NAB Comments 6, 25, 29, and 1/16/07 NAB Comments 31-32).

The Commission's decision to exclude all media outlets other than local television stations when applying the top-four/eight-voices rule cannot be reconciled with these findings and with the evidence in this proceeding – and the Commission did not even attempt to do so. Instead of counting only broadcast television stations, the Commission should have considered *all* outlets that compete for advertising and audiences in local markets. Such a methodology for determining "voices" would give a far more accurate picture of how common ownership of two stations would affect competition. The Commission's contrary decision not only flies in the face of *Sinclair*, but is indefensible in its own right. *See Natural Resources Defense Council*, 790 F.2d at 315; *see also Sinclair*, 284 F.3d at 165 (explaining that the Commission has the burden to "demonstrate that its exclusion of non-broadcast media from the eight voices exception is 'necessary in the public interest'").

Notably, this is not the first time that the Commission has ignored broader competitive forces in an effort to sustain media ownership restrictions. The Commission's actions in retaining the top-four/eight-voices requirement closely parallel its actions in retaining unchanged the national cable ownership cap – a rule that the D.C. Circuit ultimately vacated. *See Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009). In 2001, the D.C. Circuit remanded the cable ownership limit, which the Commission justified as promoting competition, and instructed the agency to consider how competitive pressure from DBS affected the competitive position of cable. *Id.* at 3-4. On remand, the Commission again adopted the very same rule. The D.C. Circuit held that the Commission had acted arbitrarily by ignoring the court's "explicit direction" in the previous case "to consider the competitive impact" of other outlets, and likewise ignoring the substantial record evidence regarding competition from DBS and other changes in the marketplace. *Id*. at 7-8; *see also id.* at 7-8, 10 (criticizing the Commission for relying on "non-empirical observations" to justify retaining the limit).

The Commission's decision in the 2008 Order to readopt the top-four/eight-voices test suffers from precisely the same shortcomings. The outcome in this case should therefore be no different from the outcome in *Comcast*.

B. The Commission Failed To Justify Readopting An Ownership Rule Prohibiting The Very Common Ownership That It Previously Recognized Would Be Pro-Competitive

Even aside from its arbitrary decision to count only broadcast television stations for purposes of the eight-voices requirement, the Commission's readoption of the top-four/eight voices rule is fatally flawed. The Commission's 2003 Order rejected that rule on the ground that it did *not* promote competition, and, in many markets, actually undermined that goal. In the 2008 Order, however, the Commission inexplicably decided that the rule *does* promote competition, and retained the rule solely on that ground.

The Commission failed to justify this about-face – and, indeed, the record evidence overwhelmingly demonstrates that the Commission's newfound conclusion is insupportable. In addition, the Commission did not even mention the rule's damaging effect on smaller-market stations, let alone justify that effect. That is a remarkable omission given that the rule categorically prohibits *any* common ownership in the nearly 75% of markets nationwide that have fewer than nine stations. *See* 1/16/07 Coalition Comments 2. Finally, the Commission failed to provide any affirmative explanation for why its chosen rule actually advances the public interest in competition, or why it does so in a way that does not merely duplicate the effect of the antitrust laws. For each of these reasons, the Commission has acted arbitrarily and capriciously, and has failed to fulfill its "obligation" under § 202(h) "periodically to justify its existing regulations" and repeal or modify those that are no longer in the public interest. *Prometheus*, 373 F.3d at 394-95.

1. The Commission Failed To Adequately Explain Its Reversal On Whether The Current Ownership Rule Is Necessary In The Public Interest

An agency is not prohibited from reversing itself – but it must adequately explain its decision to take such a step. *See Kempthorne*, 497 F.3d at 350-51; *Dillmon v. NTSB*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009). A reasoned explanation for readopting the 1999 local television rule is nowhere to be found in the Commission's 2008 Order.

At the outset, there is no question that the 2008 Order contrasts sharply with portions of the 2003 Order that this Court upheld in *Prometheus.* In the 2003 Order, the Commission found – based on "numerous empirical studies" – that the rule rejected in *Sinclair* does not promote competition. 2003 Order ¶ 140. To the contrary, the Commission concluded, the rule actually harms competition, "hinder[ing] the realization of efficiencies by prohibiting common ownership of television stations in most DMAs." *Id.* ¶ 147. The Commission therefore decided that "the potential efficiencies and cost savings of multiple station ownership should be available to stations in a larger number of DMAs than permitted by" the top-four/eight-voices rule. *Id.* The Commission also found in the 2003 Order, based on "persuasive anecdotal and empirical evidence of how . . . combinations have improved local coverage," that the top-four/eight-voices rule harms localism. *Id.* ¶ 157; *see also id.* ¶¶ 159-64.

In *Prometheus*, this Court upheld these conclusions. To be sure, the Court ultimately invalidated the "specific numerical limits" that the Commission selected in place of the top-four/eight-voices rule. 373 F.3d at 418-20, 435. But *Prometheus* held that the Commission had correctly concluded that replacing that rule with a less restrictive one would indeed advance the public interest, because common ownership would result in "consumer welfare enhancing efficiencies" that would "translate[] into improved local news and public interest programming." *Id.* at 415-16.

Nevertheless, in the 2008 Order the agency chose to "reverse" itself, insisting that it had now discovered that "eliminating the rule *could* harm competition among broadcast television stations in local markets." 2008 Order ¶ 101 (emphasis added). As to the eight-voices requirement, the Commission stated generally that "[p]reserving the independent ownership in each local market of four stations that are neither owned by or affiliated with a major network nor commonly owned with a network affiliate in that market will help to ensure that local television stations, spurred by competition, will provide dynamic and vibrant alternative fare, including local news and public affairs programming." *Id.* ¶ 99; *see also id.* ¶ 103 (deeming the record "unpersuasive regarding the effects of multiple ownership on local programming").

The Commission's analysis of the issue ended there, with what amounts to a "conclusory assertion that the rule is . . . necessary" – and such an assertion is wholly "insufficient to allay doubts that the FCC itself previously raised." *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 885 (D.C. Cir. 1999). Strikingly, the Commission nowhere attempted to explain in the 2008 Order why the 2003 Order was wrong to conclude that increased common ownership leads to welfare-enhancing efficiencies. Indeed, the Commission discussed *no evidence at all* – empirical or otherwise – supporting its new conclusion that the top-four/eight-voices rule is necessary to promote competition. Rather, it cited only a few scattered assertions made by commenters, and did not mention, much less analyze, any of the evidence that those commenters offered. *See* 2008 Order ¶¶ 101, 103. That is insufficient to uphold the agency's obligation to justify its drastic change in course. *See Fox*, 280 F.3d at 1043.

Moreover, the Commission's absence of reasoned justification for the change is particularly egregious given the record evidence in this proceeding. That evidence – to which the Commission's conclusory discussion simply failed to respond – strongly confirmed the agency's *prior* conclusion that the rule actually *undermines* the goal of competition.

Most notably, the record clearly demonstrated that the inability to form more efficient ownership structures threatens many local stations' viability and inhibits the creation of locally responsive programming. *See, e.g.*, 10/23/06 NAB Comments 89-102; 1/16/07 NAB Comments 59-70; 1/16/07 Coalition Comments 1-2. NAB submitted detailed data showing that lower-rated stations (including network affiliates) face deteriorating financial conditions that threaten their news and other local operations. *See* 10/23/06 NAB Comments 94-98, Attach. J (analysis of stations' declining financial position in medium and small markets); 11/1/07 NAB Ex Parte 29-31, Attach. A (data on changes in stations' profits in markets 51 and above). NAB and others also submitted empirical evidence showing that same-market combinations between a financially struggling station and a more financially stable one have created efficiencies that produce public interest benefits, including news and public affairs programming and other programming valued by viewers. *See, e.g.*, 10/23/06 NAB Comments 99-100, Attach. H (study demonstrating that acquired stations in duopolies increased revenue and audience shares, thus showing they offered programming more attractive to audiences after combining); *id.* at 100 (discussing duopolies in Kansas

City, Seattle, and San Francisco that significantly enhanced stations' locally produced programming, including news); 11/1/07 NAB Comments (attaching study showing that stations in duopolies or local marketing agreements are significantly more likely to air local news and public affairs programming); 10/23/06 Coalition Comments 10-12 (citing studies and other evidence to the same effect); 10/23/06 Belo Comments 22-27; 10/23/06 Gannett Comments 46.

Indeed, one of the Commission's *own* studies shows exactly the same thing – although the Commission nowhere mentioned that study in addressing the local television ownership rule. *See* Media Ownership Study 4 ("Shiman Study"), *available at* http://www.fcc.gov/ownership/studies.html. The Shiman Study found that the "financial strength of the parent [of a television station], measured by its revenues, is associated with a larger news output." *Id*. at I-21. It also found that co-ownership of same-market stations "has a large, positive, statistically significant impact on the quantity of news programming." *Id*. Given that the Commission discussed the Shiman Study (as well as a number of peer reviews of the study that the Commission solicited) at length in the section of the 2008 Order dealing with restrictions on cross-ownership, *see* 2008 Order ¶ 42 n.151, its decision to ignore the study in its local television discussion is inexplicable.

This evidence demonstrates that without the ability to merge, many stations are likely to continue to struggle financially. As a result, they will be unable to maintain their level of service (including news programming) to local communities. A rule permitting more efficient ownership arrangements, by contrast, would – the evidence showed – substantially enhance the Commission's public interest goals. The Commission's failure to address this evidence epitomizes arbitrary and capricious action. *See ACLU*, 823 F.2d at 1581; *Natural Resources Defense Council*, 790 F.2d at 315. The evidence also underscores the Commission's complete failure to meaningfully address its repudiation of the 2003 Order's findings that the top-four/eight-voices rule is not necessary in the public interest. *See Fox*, 129 S. Ct. at 1811 (holding that an agency must provide a detailed justification when "its new policy rests upon factual findings that contradict those which underlay its prior policy").

2. The Commission Entirely Failed To Address The Current Rule's Effect On Stations In Small And Medium-Sized Markets, A Key Aspect Of The Problem Before It

Not only did the Commission fail to adequately justify its reversal on whether the current duopoly rule promotes competition, but it entirely failed to consider a key aspect of that issue: the rule's effect in small and mid-sized markets. In 154 of the country's 210 local television markets, the top-four/eight-voices rule prohibits any common ownership at all, because those markets have fewer than nine stations. *See* 1/16/07 Coalition Comments 2. Moreover, the top-four restriction alone would prohibit any common ownership in the 91 markets that have fewer than five stations. *See id.* at 21. Yet the Commission *nowhere even mentioned* the rule's impact on the ability of stations in small and mid-sized markets to compete and to offer local news and public affairs programming, even though the evidence on this point was voluminous. That extraordinary hole in the order makes it arbitrary and capricious, by definition. *See State Farm*, 463 U.S. at 43 (agency action is arbitrary where it "entirely failed to consider an important aspect of the problem").

Notably, when the Commission rejected the eight-voices restriction in 2003, its determination that the rule was anti-competitive rested largely on the effect on stations in small and medium-sized markets. The Commission explained that "[b]y limiting common ownership of television stations [to] local markets where at least eight independently owned TV stations would remain post-merger, the current rule prohibits mergers that would increase efficiency in small and mid-sized markets – mergers that would thereby promote competition." 2003 Order ¶ 140. The Commission also specifically noted that "owners of television stations in small and mid-sized markets are experiencing greater competitive difficulty than stations in larger markets," and cited data that "confirm that the ability of local stations to compete successfully . . . is meaningfully (and negatively) affected" in such markets. *Id.* ¶ 201; *see also id.* ¶ 227. Accordingly, the Commission not only abandoned the eight-voices requirement, but also contemplated waivers of the top-four prohibition for smaller market mergers. *Id.* ¶ 227. The Commission's attentiveness to the particular circumstances of small and mid-sized markets did not escape this Court's notice. *See* 373 F.3d at 416 ("the Commission's [2003] local television rule is protective of small-market stations").

In its 2008 decision to readopt the top-four/eight-voices rule, however, the Commission ignored the small and medium-sized markets altogether, saying not a single word about how the rule would affect stations in those markets, or whether it would promote competition there despite barring common ownership entirely. Indeed, smaller markets cannot obtain any of the ostensible benefits of the duopoly rule, since there is no possibility that they will contain "four stations that are neither owned by or affiliated with a major network nor commonly owned with a network affiliate" – the Commission's basic justification for the eight-voices requirement. 2008 Order ¶ 99. Given this disparity between the Commission's explanation for why its rule is necessary and the reality in nearly three-quarters of the nation's markets, the Commission's assertion "that the eight voices test is supported by the general structure of the local television market place" is indefensible. *Id.*; *see also Prometheus*, 373 F.3d at 420-21; *Fox*, 280 F.3d at 1043.

Nothing in the record justifies the Commission's oversight. To the contrary, voluminous data, which the Commission ignored (and which were similar to data relied upon in the 2003 Order), demonstrated that the current ownership rule prevents common ownership exactly where it is most essential. The record showed that this problem has only grown more acute in the years since the 2003 Order. *See, e.g.*, 10/23/06 Coalition Comments 6-9, 13 n.29 (explaining that, since the 2003 Order, "economic pressures have become even more intense and smaller market broadcasters find themselves in an increasingly precarious position"); *id.* at 13 n.29. Because it does not address *any* of this evidence, the Commission's rulemaking is necessarily arbitrary. *See Natural Resources Defense Council*, 790 F.2d at 315; *City of Waukesha v. EPA*, 320 F.3d 228, 258 (D.C. Cir. 2003).

As an initial matter, there is no question that many stations in smaller markets are in serious financial straits. According to data presented by NAB, the lowest 25% of stations in markets outside the top 50 suffered declining profitability from 1996 to 2005, as well as actual losses in most of these years. 11/1/07 NAB Ex Parte 29-31; *id.* at Attach. A. And even the strongest stations in small markets are not immune from these economic pressures. As one commenter explained, "many small and mid-sized market television stations – including stations ranked among the top four in a market – experience negative pre-tax profits." 10/23/06 Granite Broadcasting Corporation Comments 5; *see also* 1/16/07 NAB Comments 64-70, Attach. A; 10/23/06 NAB Comments 89-98, Attach. J; 12/11/07 NAB Comments 22-23; 10/23/06 Cascade Broadcasting Group Comments 1-4; 10/23/06 Hoak Media Comments 2-7.

Indeed, *the Commission itself* acknowledged in another proceeding in late 2007 that small-market broadcasters face serious financial hardships – although the 2008 Order displayed no awareness of that fact. In that 2007 order, the Commission stated that "the economic health of local broadcasters is substantially weaker," and that "[t]he hardship is . . . particularly great for broadcasters in smaller markets, who generally have more restricted revenue opportunities." *Carriage Order* ¶ 55 n.192; *see also* 10/23/06 NAB Comments, Attach. F (showing that average station revenue per television household is lower in smaller markets).

As discussed above, stations that struggle financially are likely to reduce local programming, including news. *See supra* p. 39; 1/16/07 Coalition Comments 1-2 (demonstrating that in 22 smaller markets where stations are operating under the most financial duress yet are barred from any mergers, stations have eliminated their newscasts); *see also* 7/26/06 Media General Ex Parte, Attach. 1. For hard-hit stations in smaller markets, then, it is particularly important to access the advantages associated with common ownership – advantages that in turn benefit the public. In such markets, "local station combinations have enjoyed increased efficiency benefits and produced better and more responsive local programming, while stations that have been barred from combining have dropped their local news programming and experienced mounting losses." 10/23/06 Coalition Comments

13 n.29. Hard data back up this conclusion. *See, e.g.*, 10/23/06 NAB Comments 99-100, 105-06 (citing studies showing that "due to the growing expense of starting a new local news operation, the small and medium market stations currently without local newscasts are highly unlikely to initiate them, unless they are allowed to combine with stations that already have local news operations," and establishing that duopolies in medium and small markets have "enabled stations to add or expand local news programming specifically"); *id*. at 94.[6]

Whether or not the Commission accepted these data, the agency was obliged to at least address how stations in small- and medium-sized markets would fare under the rule it chose. It completely abdicated this responsibility. Accordingly, although the Commission previously had identified the effects of its ownership policy on smaller-market stations as an important aspect of the regulatory problem, it "entirely failed to consider [that] important aspect of the problem" when it readopted the current ownership rule in the 2008 Order. *Prometheus*, 373 F.3d at 420-21; *cf.* 2008 Order ¶ 50 (noting in newspaper/broadcast cross-ownership

[6] In addition, the Commission's conclusion that the top-four restriction is justified by a "significant 'cushion' of audience share" that "continues to separate the top four stations from the fifth-ranked stations" is deeply flawed in the context of smaller markets (as well as more generally). 2008 Order ¶ 102. As NAB demonstrated, "the audience share disparity between the first- or second-ranked stations and all other stations in most smaller markets is so great that, if the third- and fourth-ranked stations were allowed to combine, these stations' combined viewing shares would still be *less* than or equal to the audience share of the top-ranked station in about 80% of these markets." 10/23/06 NAB Comments 103-04; *id*. Attach. K; *see also* 10/23/06 Hearst-Argyle Comments 38-42.

discussion that "[w]hat may make sense for Portland, Maine, does not necessarily make sense for New York City"). By not even acknowledging the effects of the current television ownership rule on smaller-market stations, the Commission failed to "display awareness that it is changing position[s]" on whether that rule impedes competition in smaller markets. *Dillmon*, 588 F.3d at 1089 (internal quotation marks omitted). The Commission, in short, did not "provide[] a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Prometheus*, 373 F.3d at 420-21 (internal quotation marks omitted).

3. The Commission Failed To Adequately Justify The Current Rule As Necessary To Promote Competition

Even setting aside all of these critical problems, the Commission has not satisfied § 202(h) because it has not adequately explained why the top-four/eight-voices rule is necessary to promote the stated goal of competition. Indeed, the Commission has not established any link at all between the local television rule and the Commission's competition goals.

The Commission offered two principal reasons why competition in local television markets is important. First, the Commission explained, competition "provides an incentive to television stations to invest in better programming and to provide programming that is preferred by viewers." 2008 Order ¶ 97. Second, the Commission stated, "[c]ompetition among local broadcast television stations is . . .

necessary to preserve competition for advertising by local businesses that want to advertise their products on television. Lower advertising costs benefit consumers . . . ." *Id.*

But even as it touted these theoretical benefits of competition, the Commission failed to explain why the top-four/eight-voices rule was necessary to achieve better programming and lower advertising rates. With respect to the goal of improving programming, the Commission stated that "[l]ocal broadcast television stations have incentives to respond to conditions in local markets," *id.*, a proposition that is surely true. But the Commission attempted to justify its ownership restrictions simply by asserting that "those incentives may be diminished by mergers between stations that reduce competition to anti-competitive levels." *Id.* On its face, that statement is purely speculative, and does not explain how the common ownership that the rule prohibits would in fact "reduce competition to anti-competitive levels," or even how one might determine when "anti-competitive levels" have been reached. In the end, the Commission's conclusion rests on the unsupported assumption that any additional common ownership will lead not only to increased market share, but also to increased market power.

As for the goal of preventing anti-competitive increases in advertising rates, whether the rule is necessary to promote this goal is an empirical question – rooted in *current* market conditions – that the Commission did not even attempt to answer. The portion of the 2008 Order discussing advertising rates simply cites the 2003 Order. That is not sufficient to meet the Commission's statutory obligation to reconsider every four years – in light of changing market conditions and competitive dynamics – whether ownership rules *remain* "necessary in the public interest." 1996 Act § 202(h). And, in any event, the 2003 Order cannot possibly demonstrate that the current rule is necessary to control advertising rates, because the Commission decided in that earlier order that competition would be promoted by a much *less* restrictive rule than the one that the Commission has now readopted. Moreover, the Commission concluded in a separate proceeding in 2007 that the "economic health of local broadcasters" has deteriorated significantly, in part because "broadcasters face increasing competition from cable operators for advertising dollars." *Carriage Order*, 22 F.C.C.R. at ¶ 55 n.192. In light of that conclusion, it is difficult to understand how the Commission could have reasonably determined in the 2008 Order that it needed to restrict *broadcasters'* ability to form efficient ownership structures in order to prevent anti-competitive advertising prices.

Finally, the Commission never even tried to explain why the current ownership rule is necessary in light of generally applicable antitrust laws – another "fail[ure] to consider an important aspect of the problem" of local television competition. *State Farm*, 463 U.S. at 43. The Commission itself described its rule as aimed at preventing "the exercise of market power." 2008 Order ¶ 97 (citing 2003 Order ¶ 152). But federal antitrust law thoroughly polices mergers and acquisitions that may result in market power. *See, e.g.*, *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 170-71 (1964) (Clayton Act arrests even "incipient threats to competition"). The Commission nowhere elucidated why antitrust enforcement by the Justice Department or the Federal Trade Commission is insufficient, or why the Commission needs to provide an additional layer of protection for competition in the local television industry. And while the *Prometheus* Court posited that the duopoly rule was not duplicative of antitrust enforcement because the rule addresses the public interest in diversity and localism as well as in competition, 373 F.3d at 413-14, the Commission has now *specifically disclaimed* any reason for the rule other than competition. 2008 Order ¶ 100. In light of that stated change in rationale, the Commission's failure to consider the effect of antitrust review in the local television context is arbitrary and capricious.[7]

[7] The *Prometheus* Court noted that parties must notify the antitrust authorities of a proposed merger only if the transaction is a "large" one. 373 F.3d at 414 (citing 15 U.S.C. § 18(a)). But the Commission separately requires all applications for a television station assignment or transfer of control to be publicly noticed, *see* 47 C.F.R. § 73.3580, and any individual or organization – including the competitors of an entity that plans to merge – may alert the Justice Department or the FTC to a potentially problematic transaction, whether large or small. *See, e.g.*, U.S. Dep't of

In sum, the Commission has failed to adequately explain why the local television rule is necessary to advance its goal. This failure is an independently sufficient reason to reject the top-four/eight-voices restriction. *See Prometheus*, 373 F.3d at 395; *State Farm*, 463 U.S. at 43 (agency action is arbitrary unless it "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action including a rational connection between the facts found and the choice made").

C. Vacatur Of the Local Ownership Rule Is The Appropriate Remedy

Where an agency commits a relatively minor error in the process of promulgating a rule or order, the "the appropriate course of action is to remand the matter to [the agency] for further consideration and explanation, without disturbing the rule itself." *Public Citizen Health Research Group v. United States Dep't of Labor*, 557 F.3d 165, 191 (3d Cir. 2009). But where an agency commits a more serious error, vacatur is appropriate, so long as that course of action would not significantly disrupt the agency's regulatory program. *See Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd*., 252 F.3d 246, 263 (3d Cir. 2001); *Comcast*, 579 F.3d at 8 ("[W]e have not hesitated to vacate a rule when the agency has not responded to empirical data or to an argument inconsistent with its

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Justice, Antitrust Enforcement and the Consumer, *available at* http://www.justice.gov/atr/public/div_stats/211491.htm (last visited May 14, 2010).

conclusion.”).

The deficiencies in the Commission’s local television rule are severe, and vacatur is clearly warranted here. The Commission already has had several opportunities to promulgate the duopoly rule with the benefit of judicial guidance on how to comply with the 1996 Act and the APA, *see Sinclair*, 284 F.3d at 163-65; *Prometheus*, 373 F.3d at 412-21, but has ignored the D.C. Circuit’s mandate and the weight of evidence in the record, and ultimately failed to act lawfully. This “game of administrative keep-away,” *In re Core Comm’ns, Inc.*, 531 F.3d 849, 859 (D.C. Cir. 2008), has lasted more than a decade. It is clear that the current ownership rule is “likely irredeemable,” and “the probability that the Commission would be able to justify” retaining the rule in its current form “is low.” *Fox*, 280 F.3d at 1048, 1053; *Core Comm’ns*, 531 F.3d at 857-62. In addition, any “disruption” that vacatur might create here “is relatively insubstantial.” *Fox*, 280 F.3d at 1048-49, 1053; *see also Comcast*, 579 F.3d at 9 (noting lack of disruption from vacatur of cable rule where parties “will remain subject to, and competition will be safeguarded by, the generally applicable antitrust laws”). For these reasons, the Court should vacate rather than remand the rule.

II. The FCC Was Justified In Not Increasing Restrictions On Radio Ownership And Should Have Further Reformed The Local Radio Rule

A. Vast Changes In The Media Landscape Lessen Any Concerns Associated With Common Ownership And Demonstrate The Need For Efficient Ownership Structures In Local Radio Markets

With respect to local radio ownership, Congress directed the Commission in the 1996 Act to begin by loosening its restrictions, and specified precise numerical limits that the Commission should adopt as a starting point. *See* 1996 Act § 202(b)(1). Since the Commission adopted those limits, it has remained subject to the obligation to periodically determine whether they remain "necessary in the public interest as a result of competition." Yet the Commission has never changed the numerical limits first set by Congress in the 1996 Act. *See* 2008 Order ¶¶ 110-11.

The record before the Commission showed that, since those limits were first established, the media landscape has changed dramatically, with a vast array of new media outlets and platforms emerging. Direct competitors to terrestrial radio have emerged and become popular, such as satellite radio, Internet radio, DBS- and cable-based music services, MP3 players, and podcasts. *See, e.g.*, 10/23/06 NAB Comments 5-7, 12-20, 84-85; 1/16/07 NAB Comments 32-34; 10/23/06 Clear Channel Comments 10-17, 51; 1/16/07 Clear Channel Comments 4-6. The result of all these changes is more competition, more sources of programming and outlet diversity, and more contributors to localism. *See, e.g.*, 10/23/06 NAB Comments

24-28, 31-35, 38-41, 49-54.

At the same time, the record showed, broadcast radio stations have experienced declining revenues and listenership, due in no small part to vastly increased competition from traditional and nontraditional media. *See* 10/23/06 NAB Comments 73-74, 85-86, Attach. D; 1/16/07 NAB Comments 51; 10/23/06 Clear Channel Comments 52-53; 1/16/07 Clear Channel Comments 43-44. Local radio stations thus have an ongoing need for the synergies that common ownership can yield. *See, e.g.*, 10/23/06 NAB Comments 72-73, 84-86; 1/16/07 NAB Comments 50-52; *see also* 2008 Order ¶ 119 & n.384 ("We do not seek to undermine the benefits that consolidation has brought to the financial stability of the radio industry.").

B. The Record Showed That Common Ownership Furthers Significant Public Interests And That Disrupting Radio Ownership Patterns Would Have Harmed The Listening Public

With respect to each of the Commission's three public-interest objectives – diversity, localism, and competition – the Commission was justified in not imposing additional restrictions on local radio ownership.

First, the Commission's conclusions with respect to diversity were supported by substantial evidence. That evidence included a highly detailed study conducted for the Commission, which unambiguously demonstrated that common ownership of radio stations enhances programming diversity. *See* Tasneem Chipty, CRA

International, Inc., *Station Ownership and Programming in Radio* (June 24, 2007) (cited in 10/22/2007 NAB Comments 19-21, 24-25). Based on this and other evidence, the Commission was correct to conclude that "common ownership allowable under our tiers is not associated with reductions in format or programming diversity." 2008 Order ¶ 128; *see, e.g.*, 10/23/06 NAB Comments 39-42, 79-84, Attach. G. Likewise, it was correct to conclude that "market level analysis suggests that more concentrated markets have fewer stations with the same format categories, and therefore more format diversity," that "large national radio owners offer more formats," and that "common ownership results in more diversity in actual programs aired." 2008 Order ¶ 128 n.404; *see, e.g.*, 1/16/07 NAB Comments 37-43; 10/22/07 NAB Comments 18-23; 12/11/07 NAB Comments 25-26; 10/23/06 Clear Channel Comments 17-22, 22-32, 41-43; 1/16/07 Clear Channel Comments 13-26. In so concluding, the Commission properly rejected the view that diversity of ownership necessarily results in diversity of programming or format, or that those types of diversity require diversity of ownership.

The Commission's conclusions are consistent not only with the evidence before it, but also with common sense. It is not logical for an owner of multiple stations in the same market to "double up" on formats, artists, playlists, or viewpoints, and thus see its stations cannibalize each other's market shares. To the contrary, a single owner has an incentive to appeal to as many segments of listeners as possible, by ensuring that stations air a broad variety of programming and viewpoints. And common ownership creates an especially hospitable environment for innovative or narrowly targeted programming: an owner of multiple stations has greater tolerance for the risks associated with such programming, the costs of which can be spread across multiple stations. *See, e.g.*, 10/23/06 Clear Channel Comments 18-19, 41; *Revision of Radio Rules and Policies*, 6 F.C.C.R. 3275, ¶ 5 (1991).

Second, the Commission was correct to conclude that "the evidence does not show that consolidation in local markets has harmed localism." 2008 Order ¶ 126. To the contrary, the evidence showed that common ownership *benefits* localism. Under the current rules, broadcasters provide a plethora of locally responsive programming. *See, e.g.*, 10/23/06 NAB Comments 76-84; 11/1/07 NAB Comments 26-27; 12/11/07 NAB Comments 24-26; 10/23/06 Clear Channel Comments 32-43; 1/16/07 Clear Channel Comments 26-34; *see also* GAO, *Media Programming: Factors Influencing the Availability of Independent Programming in Television and Programming Decisions in Radio*, GAO-10-369 (Mar. 2010) (concluding that, because within individual selected markets, the top radio formats differ from the top radio formats nationally, programming decisions are locally based, and reflect the preferences and interests of listeners within a given market).

Third, as to competition, the Commission correctly noted that efficiencies result from common ownership. *See* 2008 Order ¶ 119 & n.384; *see also* 2003 Order ¶ 293. With broadcast radio stations facing greater competitive challenges than ever before, their need for flexibility to form efficient ownership structures has only increased. *See* 10/23/06 NAB Comments 31-35, 74-78, 84-86; 1/16/07 NAB Comments 50-52.

Thus, the Commission was correct to resist calls for further restrictions on local radio ownership. It certainly was not arbitrary and capricious to conclude that "[m]aking the numerical limits more restrictive" – as some commenters sought – "would be inconsistent with Congress' decision to relax the local radio ownership limits in the 1996 Telecommunications Act and would disserve the public interest by unduly disrupting the radio broadcasting industry." 2008 Order ¶ 117; *see also id.* ¶ 120 (discussing disruption likely to result from divestiture); *id.* ¶ 122. To the contrary, the record in this proceeding reaffirmed the need to give local radio broadcasters *more* leeway for making efficient ownership arrangements to allow them to compete in today's digital, multichannel marketplace.

III. The Commission Was Justified In Relaxing The Newspaper-Broadcast Cross-Ownership Ban But Should Have Eliminated This Outdated Restriction

As noted above, the Commission's complete ban on newspaper-broadcast combinations dated back to 1975, and persisted for decades even in the face of dramatic changes in the media landscape. Those changes helped persuade this Court to uphold the Commission's 2003 determination that the complete ban was not necessary in the public interest. *See Prometheus*, 373 F.3d at 398-400.

In the proceedings that gave rise to the 2008 Order, the Commission again had before it evidence that the media marketplace had changed dramatically, and that newspapers face financial pressures capable of relief through cross-ownership. *See* 2008 Order ¶¶ 21-34, 39. The record also contained abundant evidence that cross-ownership allows newspapers and broadcast stations to join forces to undertake more and better news reporting. *See, e.g.*, *id.* ¶¶ 39-40, 42, 44-46; 1/16/07 NAB Comments 81-84; 10/23/06 NAB Comments 117-19; 10/22/07 NAB Comments 4-10; 12/11/07 NAB Comments 4-5. Based on this evidence, the Commission was correct to conclude – as it had done in 2003 – that the newspaper-broadcast cross-ownership ban was no longer necessary. *See* 2008 Order ¶ 19.

Even so, the 2008 Order effects only a very modest relaxation of the complete ban. It does not actually authorize any combinations; rather, it merely creates a "positive presumption" that certain combinations are in the public interest. *See* 2008 Order ¶ 53. Every proposed combination, that is, will still be subject to the Commission's case-by-case review. *See id.* ¶ 52. And even the positive presumption applies only in a very limited set of circumstances – only in the top 20 markets and, with respect to newspaper-television combinations, only where the eight-voices requirement is satisfied and the top-four restriction is not implicated. *See id.* ¶ 53.

The clear need to relax the newspaper-broadcast cross-ownership ban left the Commission on solid ground in taking the modest step that it took. *See, e.g.*, 12/11/07 NAB Comments 7-15. Indeed, the Commission should have gone even further by eliminating the cross-ownership restriction entirely. *See, e.g.*, Br. of Petitioner Newspaper Association of America Parts I-II; Br. of Petitioner Media General Parts I-II.

IV. The Commission Acted Arbitrarily And Capriciously In Deciding To Retain The Radio-Television Cross-Ownership Rule

In addition to leaving the local radio and local television ownership restrictions intact, the Commission declined to loosen or repeal the radio-television cross-ownership rule, which has been in effect in its current form since 1999. The Commission made this decision despite recognizing that radio-television cross-ownership can yield important public interest benefits and efficiencies. 2008 Order ¶ 83; *see* 10/22/07 NAB Comments 11-12; 11/1/07 NAB Comments 18-21. Especially in view of that recognition, the Commission's decision to retain the rule was arbitrary and capricious.

The Commission based its decision to retain the rule entirely on the premise that "diversity of ownership promotes diversity of viewpoints." 2008 Order ¶ 82. Yet besides citing the 2003 Order, the Commission did not explain why that premise is correct. Indeed, evidence before the Commission showed that diversity of ownership does *not* necessarily promote diversity of viewpoints and may even have the opposite effect. *See* 10/23/06 NAB Comments 42-48; 1/16/07 NAB Comments 37-43; 1/16/07 Clear Channel Comments 25 n.99 (noting natural incentive for owners of multiple stations to offer broader array of viewpoints); 10/23/06 Hearst-Argyle Comments Attach. 1, 13-14 (joint declaration of leading experts explaining that in media markets, common ownership is likely to increase diversity because it creates an incentive to diversify outlets' content).

Moreover, even assuming that diversity of ownership *does* promote diversity of viewpoints, the Commission failed to articulate why the local radio and local television ownership rules are insufficient to accomplish that objective. The Commission attempted to address this point by insisting that the local radio ownership rule and the local television ownership rule – unlike the radio-television cross-ownership rule – are not designed to promote diversity. 2008 Order ¶ 84. As explained above in the discussion of the duopoly rule, the Commission's newly minted distinction between the rules' purposes cannot withstand scrutiny. *See supra* pp. 26-29. But regardless of the *purpose* of the single-service ownership rules, by definition they promote diversity of ownership. And if the Commission is correct that "diversity of ownership promotes diversity of viewpoints," 2008 Order ¶ 82, then under its own reasoning the single-service rules likewise promote diversity of viewpoints. The Commission therefore had to explain why *additional* regulation is needed to ensure sufficient viewpoint diversity. This it did not do.

To be sure, the 2008 Order did not institute "cross-media" limits along the lines of the ones instituted by the 2003 Order. *See* 2008 Order ¶ 82. But it does not follow that the *absence* of such limits means that the 1999 radio-television cross-ownership rule must remain in place. Rather, under § 202(h), there must be some affirmative justification for the rule in the first instance, such as an explanation of why the rule is needed to ensure diversity. Instead of providing such a justification, the Commission simply began from the premise that it must retain some cross-ownership rule. 2008 Order ¶ 82. That approach cannot be squared with the mandate of § 202(h) to periodically determine whether restrictions remain "necessary in the public interest."

Finally, the Commission never explained how it is rational, in a competitive multichannel environment, to burden broadcasters with disadvantages to which their competitors are not subject. Under the cross-ownership rules, a cable television operator, which plays a gatekeeping role with respect to *all* video programming reaching its subscribers, may own as many radio stations as the local radio ownership rule permits. Yet the owner of a single broadcast television station may not. *See* 10/23/06 NAB Comments 122-23. That disparity – which the Commission never noted, much less sought to justify – confirms that the

Commission acted arbitrarily and capriciously in retaining the radio-television cross-ownership rule.

CONCLUSION

For the foregoing reasons, this Court should vacate the local television ownership rule and, at a minimum, remand the other ownership rules for the Commission to further consider repealing or reducing their restrictions.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP PURSUANT TO LAR 46.1

I, Elaine J. Goldenberg, hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Elaine J. Goldenberg
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May 17, 2010

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Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify the following:

This brief complies with the applicable type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 13,941 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure, based upon a word count of the brief using the word count function of the 2003 version of Microsoft Word.

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/s/ Elaine J. Goldenberg
Elaine J. Goldenberg

May 17, 2010

CERTIFICATE OF SERVICE

I, Elaine J. Goldenberg, hereby certify that on May 17, 2010, I electronically filed the foregoing Brief of Petitioners National Association of Broadcasters and Coalition of Smaller Market Television Stations with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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