ORAL ARGUMENT NOT YET SCHEDULED

Nos. 08-3078 et al.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PROMETHEUS RADIO PROJECT, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,

Respondents.

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

REPLY BRIEF FOR PETITIONER CLEAR CHANNEL COMMUNICATIONS, INC.

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STANDARD OF REVIEW

This case arises under Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "1996 Act"). That statute imposes on the Commission, at the very least, a heightened affirmative obligation to demonstrate that the rule at issue "remain[s] useful in the public interest" and to "support its decision with reasoned analysis." *Prometheus Radio Project v. FCC*, 373 F.3d 372, 395 (3d Cir. 2004); *see also Cellco P'ship v. FCC*, 357 F.3d 88, 98-99 (D.C. Cir. 2004).[1] Yet the Commission nowhere addresses Section 202(h) in its discussion of the standard of review.

Instead, the Commission suggests that nothing more than "arbitrary and capricious" review applies, treating this case as if it were merely a garden variety challenge under the Administrative Procedure Act ("APA"). FCC Br. at 2 ("The Commission's policy judgments and its line-drawing must be upheld so long as they are reasonable and supported by substantial evidence in the record before the agency."); *id*. at 27 ("The specific regulatory lines the Commission drew . . . were within the range of the agency's broad discretion to regulate media ownership in

[1] Properly understood, Section 202(h) "establishes a deregulatory presumption 'in favor of repealing or modifying the ownership rules'" which the Commission may overcome "only if it 'reasonably determines that the rule is necessary in the public interest.'" Br. at 9 (quoting *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002) ("*Fox I*"), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002)).

the public interest."). But this is wrong. Such a reading renders Section 202(h) meaningless and cannot be accepted. Br. at 10 n.7.[2]

Indeed, the Commission goes so far as to effectively ask this Court to rubber stamp its media ownership rules, taking a highly expansive view of its discretion in this case and claiming it "'is entitled to *substantial* judicial deference.'" FCC Br. at 32-33 (emphasis added, citation omitted); *see also id*. at 2. Drawing support from a line of antiquated case law, the Commission contends that it has broad discretion to establish and revise media ownership rules, and that its "'judgment regarding how the public interest is best served'" is "'not to be set aside' as long as the agency's implementation of the public interest standard is 'based on a rational weighing of competing policies.'" *Id*. at 33 (quoting *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981)).

This view is supported only by case law decided *before* Congress enacted Section 202(h) of the Act. Section 202(h) unquestionably altered the legal landscape. *Prometheus*, 373 F.3d at 391 (Section 202(h) "inform[s]" the standard of review). As the Commission elsewhere concedes, Section 202(h) of the 1996 Act "obligates" it "to review its media ownership rules quadrennially and 'to

[2] Intervenors Consumer Federation of America ("CFA") and Consumers Union ("CU") similarly ignore the substantive standard of review in Section 202(h) and contend that plain APA review applies. CFA/CU Br. at 1 (framing the "central question" as whether the NBCO Rule as revised is "consistent with the rulemaking requirements of the [APA], 5 U.S.C. §§ 553, 706"); *id*. at 7 ("The proper APA inquiry is whether the revisions made are rationally based on the rulemaking record before the agency."). Like the Commission, Intervenors err on this point.

repeal or modify any regulation it determines to be no longer in the public interest.'" FCC Br. at 1; *see also id*. at 2, 8. Accordingly, "substantial judicial deference" is not warranted.

Even if Section 202(h) did not apply here – which it clearly does – the Commission overstates the leniency of "arbitrary and capricious" review under Section 706 of the APA. The very cases that the FCC itself cites indicate that the Court's review "is to be searching and careful." *FCC v. Nat'l Citizens Comm. for Broad*., 436 U.S. 775, 803 (1975) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)). Other cases confirm that "a reviewing court may not merely rubber-stamp [an agency's] actions," *Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 151 (3d Cir. 2004) (Scirica, C.J.) (citation omitted), and must not allow "deference to the agency's judgments slip into 'judicial inertia,'" *State Farm Mut. Auto Ins. Co. v. Dole*, 802 F.2d 474, 486 (D.C. Cir. 1986) (quoting *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983)); *see also United States v. E.I. DuPont De Nemours & Co.*, 432 F.3d 161, 179 (3d Cir. 2005) (Scirica, C.J.) (noting that arbitrary and capricious review "contemplates a searching inquiry into the facts in order to determine whether the decision was based on a consideration of the relevant factors'" (citations omitted)). To satisfy the APA, the Commission must show, based on record evidence rather than merely unsupported speculation, that there is an actual regulatory problem in

need of fixing. *See, e.g.*, *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993) (invalidating FCC criterion for licensing broadcast applicants where after "years of experience with the policy" the FCC had "no evidence to indicate that it achieve[d]" the "benefits that the Commission attribute[d] to it," and the agency could no longer rely on "unverified predictions"); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 764 (6th Cir. 1995) (invalidating FCC rules found to be based on "generalized conclusions" and "broadly stated fears," rather than "documentary support"); *HBO, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) ("a regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist").

The APA, moreover, independently obligates the Commission to reevaluate its rules over time to take account of changed circumstances. *See, e.g.*, *Am. Trucking Ass'ns, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967) ("Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy."); *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) ("changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so"), *cert. denied sub nom. Galaxy Commc'ns Inc. v. FCC*, 506 U.S. 816 (1992); *see also Nat'l Broad. Co. v.*

United States, 319 U.S. 190, 225 (1943) ("[i]f time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations").

Similarly, the Commission seeks to avoid the impact of the First Amendment on the Court's review here. The Commission fails even to address the First Amendment in its discussion of the appropriate standard of review and relegates any response to petitioners' constitutional arguments to a throwaway section at the end of its brief. Where First Amendment interests are at stake, however, a reviewing court has "an obligation 'to make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression,'" and thus owes *no deference* to the agency's judgment. *CBS Corp. v. FCC*, 535 F.3d 167, 174 (3d Cir. 2008), *vacated on other grounds*, 129 S. Ct. 2176 (2009) (quoting *United States v. Various Articles of Merch., Schedule No. 287*, 230 F.3d 649, 652 (3d Cir. 2000) (quoting, in turn, *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (further citations omitted))).

For these reasons, the rules at issues are subject, at a bare minimum, to a more searching standard of review than the FCC suggests under Section 202(h), Section 706 of the APA, and the First Amendment. There is certainly no

"substantial deference" owed the agency's decisions because Section 202(h), which was meant to provide a systematic tool for meaningful regulatory review, would otherwise be rendered a nullity.

SUMMARY OF THE ARGUMENT

In *Prometheus*, this Court held that the Commission failed to provide a "reasoned analysis" to support its decision in the *2003 Order* to retain the numerical limits and the AM/FM subcaps contained in the local radio rule; the Court remanded these issues to the agency to provide "additional justification" or "modify its approach." 373 F.3d at 431, 435. As shown in Clear Channel's opening brief, the Commission in its *2008 Order* failed on both scores. The agency simply reinstated its prior conclusions, relying on largely the same rationale as before and evidence recycled from the 2002 biennial review proceeding.

In particular, the Commission has once again fallen short of its heightened burden to reevaluate and justify its refusal to repeal or otherwise relax the local radio ownership rule as required under Section 202(h). Indeed, the agency failed even to support its decision with the kind of reasoned analysis necessary to survive arbitrary and capricious review under the APA. Further, the *2008 Order* cannot be squared with the First Amendment. In response, the agency all but ignores the impact of Section 202(h), urges this Court to rubber-stamp its rule by applying

"substantial judicial deference," and fails to respond to the thrust of Clear Channel's constitutional challenge.

The agency's brief on appeal attempts to paint a picture of its *2008 Order* that is far more reasoned than the order itself supports. But the time for the agency to articulate its rationale for decision has long passed, and its appellate arguments thus cannot render the Commission's decision more sustainable under Section 202(h) or any less arbitrary and capricious. In its quest to shore up the rule, the agency also variously distorts Clear Channel's argument, relies on inapposite case law, and resurrects and relies upon evidence submitted in prior media ownership proceedings. And it wholly fails to respond – and thereby *acquiesces* in – Clear Channel's other arguments that show the *2008 Order* to be contrary to Section 202(h) and arbitrary and capricious in several respects.

Moreover, the Commission's brief repeatedly hints that rigorous review is not necessary here because it might implement some relaxation of the ownership rules in the 2010 Quadrennial Review. *See, e.g.*, FCC Br. at 2-3, 26-27, 91. But this possibility is of no legal consequence. Under Section 202(h), there will *always* be another media ownership review in the offing, but that future review does not relieve the agency of its obligation to undertake meaningful review in each current proceeding under 202(h). In any event, as history shows, the agency has consistently refused to make any appreciable relaxation in the local radio

ownership rule since Congress enacted Section 202(h) notwithstanding real competition in the market. The agency's effort to defend its order on the ground that it might undertake regulatory relief in the future thus rings hollow.[3]

The Commission's effort to minimize Clear Channel's First Amendment challenge also lacks persuasive force. The agency's primary line of attack is to refer back to this Court's decision in *Prometheus*. FCC Br. at 31. But this ignores the continued technological developments that now more than ever show the scarcity doctrine should be rejected. The Commission similarly ignores Clear Channel's argument that the rule runs afoul of the First Amendment by singling out and imposing special regulatory burdens on local radio broadcasters without justification. Br. at 34-36.

Because the local radio ownership rule is contrary to Section 202(h) of the 1996 Act, arbitrary and capricious under the APA, and constitutionally suspect, the Commission's decision once again to retain the rule without any modification – notwithstanding this Court's findings in *Prometheus* that the retention of the numerical limits and the AM/FM subcaps lacked any reasoned basis and clear

[3] Indeed, free, over-the-air radio struggles to remain competitive amidst multiple new unregulated platforms within local radio markets while the outdated regulatory regime consistently retained in the FCC's ownership reviews prevents the radio industry from achieving the efficiencies that other media companies are free to pursue. Br. at 24-25.

instructions to provide a better explanation for those decisions or to modify the rule – must now be vacated.

ARGUMENT

I. THE FCC FAILED TO REBUT THE ARGUMENT THAT ITS REFUSAL TO REPEAL OR RELAX THE LOCAL RADIO OWNERSHIP RULE WAS UNLAWFUL.

The Commission arbitrarily ignored record evidence and relied on irrelevant factors in concluding that competition justifies the rule. Br. at 17-20. *First*, Clear Channel demonstrated that the agency arbitrarily ignored record evidence submitted by Clear Channel and others below that shows that post-1996 Act consolidation had no effect on radio advertising rates, a finding also made in the FCC's own media study. *Id*. at 18. In response, the agency notes that it "cited the very study . . . that Clear Channel claimed it ignores." FCC Br. at 86. The agency distorts Clear Channel's argument – which pertained to the additional significant evidence submitted by Clear Channel and other commenters, and not Media Ownership Study No. 5 – and does not contest that it arbitrarily ignored *that* evidence. *Id*. As the agency offered an explanation for its conclusion here that "'runs counter to the evidence before the agency,'" Br. at 18, its rationale falls short of the mark of reasoned decisionmaking.

The agency also argues that "there was substantial evidence in the record" supporting its conclusion. FCC Br. at 87. This evidence consisted entirely of

Media Ownership Study No. 10, *id*. at 86-87, and a study underlying the agency's *2003 Order*, *see 2008 Order* n.381 (JA____) (showing the agency primarily relied on its *2003 Order* and a 2002 study filed in that proceeding). Media Ownership Study No. 10 standing alone does not amount to "substantial" evidence, particularly not in the face of significant evidence pointing the other way. And the *2008 Order* cannot be sustained on the basis of a study filed in the 2002 biennial review proceeding. Section 202(h) of the 1996 Act obligates the FCC to conduct an independent review every four years, and such "periodic reviews . . . operate as an 'ongoing mechanism to ensure that the Commission's regulatory framework would keep pace with the competitive changes in the marketplace[.]'" *Prometheus*, 373 F.3d at 391 (quoting *2003 Order* ¶¶ 16, 17). The administrative record for such reviews is *not* cumulative. Rather, Section 202(h) "requires the Commission to take a *fresh* look at its regulations periodically in order to ensure that they *remain* 'necessary in the public interest.'" *Id*. (emphasis added). A "fresh look" requires up-to-date record evidence that reflects recent "competitive changes in the marketplace," and the Commission cannot rationally insure that its existing ownership rules "remain 'necessary in the public interest'" *today* on the basis of evidence assembled four years before. Allowing the agency to rely on such out-of-date evidence, resurrected from prior quadrennial review proceedings, would obviate the purpose of Section 202(h) and countenance avoidance of the

FCC's independent obligation under the APA to ensure that its rules keep pace with changing circumstances over time.

Further, the Commission not only recycles support from its 2002 biennial review proceeding, but also the conclusion itself, despite the presence of new evidence that undercut both. *Compare 2003 Order* ¶ 290 ("And MOWG Study No. 4 indicates that the increase in concentration in radio markets has resulted in an appreciable, albeit small, increase in advertising rates.") *with 2008 Order* ¶ 118 (JA____) ("And evidence in the record indicates that the increase in concentration in commercial radio markets has resulted in appreciable, albeit small, increases in advertising rates."). Because "'the record belies the agency's conclusion,'" however, it is subject to reversal. Br. at 19 (citations omitted).

Second, Clear Channel showed that the agency arbitrarily relied on irrelevant considerations, in particular, evidence of increases in consolidation at the national level. *Id.* at 19-20. On appeal, the Commission contends that "substantial record evidence showed significant consolidation of ownership at the local level both following the 1996 Act and more recently." FCC Br. at 87. Yet, it also concedes partial reliance on evidence of increased national consolidation, and argues that its "reference to the substantial national consolidation in radio ownership . . . does not undermine [its] conclusion[.]" *Id*.

Even assuming that the Commission articulated an independent finding in its *2008 Order* of significant local consolidation – which it did not, *compare 2008 Order* ¶ 118 (JA____) (referring collectively to "consolidation of radio station ownership at both the national and the local level") *with* FCC Br. at 87 – the agency's conclusion would be no less arbitrary and capricious given its partial reliance on improper factors. Where, as here, the agency considers irrelevant factors (national consolidation) alongside proper factors (local consolidation), a reviewing court is left unable to discern whether the agency would have reached the same conclusion absent consideration of the irrelevant factors. Nor can it be said whether evidence of local consolidation here standing alone supports the agency's conclusion. *See MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 39-40 (D.C. Cir. 1990) (finding order arbitrary and capricious where "[m]uch of the FCC's explanation . . . appears to rest securely upon . . . forbidden considerations" and the court could not determine "from the FCC's order whether it considered" the rest of its explanation "to be independent of the impermissible factors and a sufficient basis for its conclusion in their absence" (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983))). Further, assurances of counsel on appeal that the Commission would have reached the same conclusion absent consideration of national consolidation are unsupported by the *2008 Order* itself and amount to little more than a *post hoc* rationalization that this

Court must reject. *Id*.; *State Farm*, 463 U.S. at 50 ("[T]he courts may not accept appellate counsel's post hoc rationalizations for agency action. It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."); *W.R. Grace & Co. v. U.S. EPA*, 261 F.3d 330, 338 (3d Cir. 2001) (Ambro, J.) ("[W]e may not accept appellate counsel's post hoc rationalizations for agency action. Put another way, an agency's order must be upheld on the same basis articulated in the order by the agency itself." (citing, *inter alia*, *SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947))); *Mercy Catholic*, 380 F.3d at 151 (Scirica, C.J.) ("[W]e may affirm the agency's decision only on grounds on which the agency actually relied, and not on the basis of alternative rationales or justifications put forward by counsel on appeal" (citing *SEC v. Chenery Corp*., 318 U.S. 80, 87 (1943))).

Finally, the FCC entirely fails to address Clear Channel's arguments that the agency's analysis of diversity is riddled with internal inconsistencies, Br. at 20, and that the agency arbitrarily ignored record evidence that common ownership *enhances* diversity and localism, *id.* at 21-23. The agency's failure to respond to these arguments establishes a strong inference that the Commission acquiesces in Clear Channel's assessment and operates as a waiver of any claim to the contrary. *Beazer East, Inc. v. The Mead Corp*., 412 F.3d 429, 437 n.11 (3d Cir. 2005) (appellee who "failed on appeal to respond to any of [appellant's] arguments on"

certain points "waive[d], as a practical matter anyway, any objections not obvious to the court to [those] specific points"); *Cincinnati Ins. Co. v. E. Atl. Ins. Co.*, 260 F.3d 742, 747 (7th Cir. 2001) (drawing inference that appellee acquiesced in appellant's argument by failing to respond). At a minimum, the Commission's failure to respond plainly indicates that it lacks any credible rejoinder. *See Fox I*, 280 F.3d at 1050 (finding "no basis upon which to reject" petitioner's points "inasmuch as the Commission does not respond to them") (vacating decision to retain cable/broadcast cross-ownership rule in 1998 biennial review).

II. THE AGENCY FAILED TO REBUT THE ARGUMENT THAT ITS FAILURE TO ADOPT THE SUPER TIER PROPOSAL OR OTHERWISE RELAX THE LOCAL RADIO OWNERSHIP RULE IN THE LARGEST MARKETS WAS UNLAWFUL.

As Clear Channel demonstrated in its brief, in rejecting the Super Tier Proposal and other calls to relax the rule in the largest markets, the Commission irrationally ignored record evidence of competition from new media and threats to the ability of traditional media to remain viable – the *very same factors* it elsewhere relied upon in relaxing the NBCO rule in the largest markets. Br. at 23-26. The Commission wholly fails to address this argument and, in so doing, raises a strong inference of acquiescence in Clear Channel's assessment and waives any claim to the contrary. *See Beazer East*, 412 F.3d at 437 n.11; *Cincinnati Ins. Co.*, 260 F.3d at 747. At a minimum, the agency's failure here amounts to a concession

that it can muster no colorable argument that its analysis of proposals to relax the rule satisfied Section 202(h) of the 1996 Act or Section 706 of the APA.

Clear Channel also argued that the Commission failed to explain its reasons for rejecting reasonable and less restrictive alternatives to simply retaining previous numerical limits. Br. at 26-28. Relying on *Association of Public-Safety Communications Officials-International, Inc. v. FCC*, 76 F.3d 395 (D.C. Cir. 1996) ("*APCO*"), the Commission contends that it "need not defend a policy choice on review by demonstrating that it is the only or the best way to address a problem." FCC Br. at 88. *APCO* is inapposite. There, the court reviewed the agency's policy choice under the standard articulated in the APA; here, Section 202(h) alters the calculus. *Prometheus*, 373 F.3d at 390 (where order "was promulgated as part of the periodic review requirements of § 202(h) of the 1996 Act," the court's "review standard is informed by that provision"). Even assuming that nothing more than APA review applies, which, as explained above, is erroneous, the court in *APCO* found that the FCC "did clearly address the alternatives that had been raised during the comment periods" and that its decision "explains that the FCC considered and rejected" such alternate proposals. *APCO*, 76 F.3d at 400. The same cannot be said of the Commission here, *2008 Order* n.382 (JA____) (rejecting calls to relax the rule in the largest markets in a single sentence buried in a single footnote), and the FCC indeed disclaims any obligation to have done so. While the agency may

not need to "defend" its rule by showing "it is the *only* or the *best* way to address a problem," FCC Br. at 88 (emphasis added), it must consider less restrictive alternatives and explain its reasons for rejecting them, Br. at 26-28. At any rate, Section 202(h) imposes a heightened affirmative obligation on the Commission to demonstrate that the rule "remain[s] useful in the public interest" and to "support its decision with a reasoned analysis." *Prometheus*, 373 F.3d at 395. This, the agency failed to do.

Finally, the Commission wholly fails to respond to Clear Channel's further argument that the agency's rationale for retaining the existing numerical limits was internally inconsistent. Br. at 28-29. Here again, the Commission's failure to respond creates an inference that it acquiesces in Clear Channel's argument, and waiver of any claim to the contrary. *See Beazer East*, 412 F.3d at 437 n.11; *Cincinnati Ins. Co.*, 260 F.3d at 747. It further suggests that the Commission can marshal no credible response.

III. THE FCC FAILED TO REBUT THE ARGUMENT THAT ITS FAILURE TO REPEAL THE AM/FM SUBCAPS WAS UNLAWFUL.

As Clear Channel showed in its brief, the FCC's decision to retain the AM/FM subcaps fell short of the mark of reasoned decision-making and, thus, is contrary to Section 202(h) of the 1996 Act and the APA. At the outset, the Commission mischaracterizes this Court's holding in *Prometheus* by suggesting that the Court found only the decision to retain the AM subcap to be inadequately

explained. FCC Br. at 88-89. This is not so. This Court held that "[t]he Commission did not support its decision to retain the AM/FM subcaps," *Prometheus*, 373 F.3d at 434-35, and simply focused on the particular internal inconsistency regarding the AM subcap as a means of demonstrating the irrationality of both subcaps. Apparently (at least at the time) cognizant of that fact, the FCC broadly sought comment on whether it should "retain the AM/FM subcaps" in the Notice of Proposed Rulemaking that led to the *2008 Order*. *2006 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules*, Further Notice of Proposed Rulemaking, 21 F.C.C.R. 8834, 8844 (¶ 22) (2006) ("*2006 Quadrennial Review FNPRM*") (JA____). FCC counsels' attempt to construe this as limited to issues concerning the AM subcap, FCC Br. 89 (citing *2006 Quadrennial FNRPM* ¶ 22), is unavailing, consists of *post hoc* rationalization that this Court must reject, *see supra* p. 12-13, and is in any case irrelevant to the question whether the Commission properly addressed the full panoply of subcap-related issues remanded by this Court for a better explanation or modification.

Although the Commission contends that it "acknowledged evidence in the record detailing the 'significant technical and marketplace differences between AM and FM radio stations,'" FCC Br. at 89 (citing *2008 Order* ¶ 134), the only "evidence" cited in paragraph 134 of its *2008 Order* consists of the *2003 Order*

and Clear Channel's comments, which in fact showed the *absence* of such differences. To the extent that the Commission relies on its *2003 Order* to justify its retention of AM/FM subcaps, FCC Br. at 89, such reliance is fruitless. As explained above, the Commission has an obligation under Section 202(h) to build an independent record in each successive periodic review. *See supra* p. 9-11. Its decisions must be based on that record, not prior ones, to insure that its regulatory framework "'keep[s] pace with the competitive changes in the marketplace'" and that its "regulations . . . remain 'necessary in the public interest.'" *Prometheus*, 373 F.3d at 391 (quoting *2003 Order* ¶¶ 16, 17). By relying in part on a 2002 study underlying the *2003 Order*, the Commission wholly fails to account for "competitive changes in the marketplace" since that time.

Moreover, to the extent that the Commission relies on Clear Channel's comments, those comments argued that "the separate AM and FM ownership limits rest on a number of Commission value judgments" including "a sweeping generalization about the viability and popularity of the respective services." Comments of Clear Channel Communications, Inc., MB Docket No. 06-121, et al. at 67 (Oct. 23, 2006) (JA___). Those comments further establish that AM stations are *not* inferior in any respect to FM stations. *Id*. at 67-71 (JA___-__); *see also* Br. at 33 n.11. Inasmuch as the agency plainly misconstrued Clear Channel's comments, its decision runs counter to the evidence and, thus, is arbitrary and

capricious. *State Farm*, 463 U.S. at 43 (an agency rule is arbitrary and capricious if the agency "offered an explanation for its decision that runs counter to the evidence before the agency").

The FCC's analysis of AM/FM subcaps also fell short because the Commission failed to reasonably consider Clear Channel's meaningful comment that the digital transition would obviate any perceived technical differences between stations in the AM and FM services. Br. at 31. Confronted with this fact, the Commission asserts that this comment "ignores that digital radio is still in its early stages and has had very limited impact." FCC Br. at 91. Yet, the Commission was obligated to provide a reasoned explanation *in the order on review* for its decision to reject meaningful comments, *State Farm*, 463 U.S. at 48, and *not* in its brief on appeal. *See supra* p. 12-13.

The Commission's fall-back positions seem to be that the *2008 Order* "pointed to comments contending that the digital transition may not have th[e] effect" of altering the technical advantages of FM over AM, and that the "impact of the digital radio transition . . . could be addressed in a more certain context in the 2010 (or later) Quadrennial Reviews." FCC Br. at 91. Both are wholly irrelevant to the question whether the agency addressed meaningful comments offered by Clear Channel, and its failure to do so independently renders its

decision arbitrary and capricious. Br. at 31. Moreover, as noted above, the promise of future action cannot remedy the legal failures here. *See supra* p. 7-8.[4]

IV. THE FCC FAILED TO REBUT THE ARGUMENT THAT THE LOCAL RADIO OWNERSHIP RULE VIOLATES THE FIRST AMENDMENT.

The Commission also fails persuasively to rebut Clear Channel's argument that the local radio ownership rule violates the First Amendment. *First*, the Commission fails to address the substance of petitioners' argument that technological developments have rendered obsolete the scarcity doctrine underlying *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Br. at 10-11, 34. Instead, the Commission merely urges this Court to respond as it did in *Prometheus*. FCC Br. at 96. Yet, such response wholly fails to account for further technological change in the media marketplace since that decision issued in 2004. To be sure, this Court cannot overrule *Red Lion*, but it can certainly signal to the Supreme Court that the time is ripe for such action; indeed, that is an important function of the circuit courts in the scheme of federal judicial review.

Second, the agency asserts that, under *Red Lion*, a rational basis standard applies. FCC Br. at 96. The Commission makes no attempt to show that its local

[4] The Commission does not even respond to Clear Channel's argument that it failed to address other meaningful comments. Br. at 31-32. This raises an inference that the agency acquiesces in Clear Channel's argument, and waives any claim to the contrary. *See Beazer East*, 412 F.3d at 437 n.11; *Cincinnati Ins. Co.*, 260 F.3d at 747. It further suggests that the Commission has no credible rejoinder to advance.

radio ownership rule can survive strict or even intermediate scrutiny in the face of Clear Channel's showing that it cannot satisfy either, *see* Br. at 34-37, and, thus, it waives any such argument, *see Beazer East*, 412 F.3d at 437 n.11; *Cincinnati Ins. Co*., 260 F.3d at 747.

Third, the agency utterly fails to respond to Clear Channel's argument that the local radio ownership rule constitutes an asymmetrical regulation that treats similarly situated speakers differently without justification, *see* Br. at 34-36, and thus concedes this point as well. Responding to a second argument, the agency asserts that "[t]here is no colorable basis for petitioners' contentions that the other media ownership rules are impermissibly content-based, inasmuch as they apply irrespective of the content of any programming." FCC Br. at 97 n.30. But this distorts matters.

As Clear Channel argued, the agency, in justifying retention of the local radio ownership rule, asserted that it would continue to limit the ownership rights of particular media speakers in order to promote certain types of speech (such as news and local programming) at the expense of others (advertising and "homogenous" speech of larger radio entities). Br. at 36-37 ("By rationalizing the rule with reference to the content of radio stations' speech, the Commission effectively utilized its licensing authority to promote certain types of speech at the expense of others and, thereby, ran afoul of the First Amendment"). The

"colorable basis" for this argument is the Commission's own rationale for the need to retain the rule, which is plainly not content-neutral, and Supreme Court precedent holding that "'regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content'" violate the First Amendment. *Id*. at 37 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994)). Indeed, as the Supreme Court recently affirmed, the First Amendment "reject[s] the premise that the Government has an interest 'in equalizing the relative ability of individuals and groups'" to have their voices heard because such action ultimately "deprive[s] the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 904, 899 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (per curiam)). Because the rule is motivated by an attempt to control content, it is, as Clear Channel showed, impermissible under the First Amendment.[5]

[5] The Commission cites *National Association of Independent Television Producers & Distributors v. FCC*, 516 F.2d 526, 536 (2d Cir. 1975) ("*NAITPD*"), and *Red Lion*, 395 U.S. at 395, for the proposition that the Commission's "general power 'to interest itself in the kinds of programs broadcast by licensees has consistently been sustained by the courts against arguments that the supervisory power violates the First Amendment.'" FCC Br. at 97. First, inasofar as *NAITPD* relies on *Red Lion*, *its* continuing validity is also in question should *Red Lion* be overruled. Second, the agency's ability to "interest itself in the kinds of programs broadcast by licensees" is something entirely different than limiting the ownership rights of particular media speakers in order to promote certain types of speech at the expense of others.

Finally, Intervenors CFA/CU argue that "the FCC has not . . . had the opportunity to solicit or analyze policy and jurisprudential alternatives to the *Red Lion* doctrine." CFA/CU Br. at 19. As an initial matter, the Commission does not advance this argument and its supporting Intervenors are thus foreclosed from doing so. *See, e.g.*, *Sw. Pa. Growth Alliance v. Browner*, 121 F.3d 106, 121 (3d Cir. 1997) ("an intervenor may argue only the issues raised by the principal parties and may not enlarge those issues"); *Ill. Bell Tel. Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990) ("[a]n intervening party may join issue only on a matter that has been brought before the court by another party"). Even if the Court could reach Intervenors' contention, it is simply incorrect. Since the Supreme Court first called for a signal from the agency on this issue over 25 years ago in *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984), the issue has been addressed voluminously in numerous FCC proceedings, including the media ownership reviews, and *still* nothing has happened. Moreover, there is no legal or practical basis for requiring the issue to arise in the context of a petition for rulemaking as opposed to the quadrennial review, CFA/CU Br. at 21, as the issue has been extensively and repeatedly discussed below and the consideration of constitutional issues by the courts is not limited by this distinction. Indeed, even the instant appeal would be an appropriate vehicle for the Supreme Court to resolve any question of the continuing vitality of *Red Lion* and the broadcast scarcity doctrine.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in its opening brief, Clear Channel respectfully requests that the Court set aside the local radio ownership rule.[6]

Respectfully submitted,

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[6] As Clear Channel argued in its brief, the appropriate remedy is vacatur of the local radio ownership rule. Br. at 38 n.14. In response, the Commission argues that, even if the Court concludes a remand is warranted, it should not vacate the challenged rules. FCC Br. at 103 n.33. In so doing, the agency ignores the fact that it *already had* an opportunity from this Court, on remand from *Prometheus*, to provide an adequate explanation for its decision to retain intact the local radio ownership rule. Having failed to do so, vacatur is now entirely appropriate.

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

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

/s/ Helgi C. Walker
Helgi C. Walker

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

Pursuant to Fed. R. App. P. 32(a)(7)(C) and L.A.R. 31.1(c), counsel for Clear Channel certifies that this brief complies with the applicable type-volume limitations of Fed. R. App. P. 32(a)(7)(B). The attached brief for Petitioners complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it is printed using a proportionally spaced, 14-point Times New Roman typeface and contains 5,734 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This certificate was prepared in reliance on the word count of the word-processing system (Microsoft Word) used to prepare this brief.

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

/s/ Helgi C. Walker
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CERTIFICATE OF SERVICE

I, Helgi C. Walker, hereby certify that on this 16th day of August, 2010, the foregoing document was filed 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.

I further certify that the required number of hard copies of the foregoing document were sent to the Office of the Clerk of the Court by overnight UPS on the same day as the brief was transmitted.

/s/ Helgi C. Walker
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