IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 08-3078, ET AL.

PROMETHEUS RADIO PROJECT, ET AL.,

APPELLANTS-PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,

APPELLEE-RESPONDENTS

ON NOTICES OF APPEAL AND PETITIONS FOR REVIEW OF
ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR FCC AND UNITED STATES

PRELIMINARY STATEMENT

Section 202(h) of the Telecommunications Act of 1996 obligates the Federal Communications Commission ("Commission") to review its media ownership rules quadrennially and to "repeal or modify any regulation it determines to be no longer in the public interest." 110 Stat. 111-12. In *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), this Court remanded, for further explanation, the Commission's 2003 decision modifying its media ownership rules under that provision.

In response to that remand, and in satisfaction of the ongoing review obligation imposed by Section 202(h), the Commission in 2008 modified its decades-old rule prohibiting common ownership of a daily newspaper and a broadcast station to establish a presumption in favor of allowing newspaper/broadcast combinations in the largest 20 markets. The Commission also adopted measures to increase broadcast industry participation by small businesses, including minorities and women.

The Commission has broad discretion to establish and revise its media ownership rules in order to balance its competing policies of promoting competition, localism, and diversity and the changing facts of a dynamic media marketplace. *See, e.g.*, *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 796 (1978) ("*NCCB*"); *United States v. Storer Broad.*, 351 U.S. 192, 203-06 (1956). 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. Disagreement with reasonable policy judgment and line-drawing is not invalidating; nor is the fact that the record might support a different conclusion, so long as the result the Commission reached is within the range of permissible choices before it at the time.

The Commission's statutory obligation to re-evaluate its media ownership rules every four years reflects the rapidly changing, dynamic nature of the media marketplace. Even now, the Commission is taking a fresh look at its media ownership rules as part of the 2010 quadrennial review. What rule revisions might be supported by the up-to-date record to be generated in that proceeding remain to be seen. It is enough for present purposes that the revisions the Commission adopted in its 2008 order, on the basis of the record before it at the time, were within its broad discretion to regulate in the public interest.

STATEMENT OF ISSUES PRESENTED

1. Whether the Commission's incremental loosening of its 35-year prohibition on common ownership of newspapers and broadcast stations was reasonable.

2. Whether the Commission's decision to approve five longstanding newspaper/broadcast combinations and to defer action on other pending requests to waive the newspaper/broadcast cross-ownership rule was reasonable.

3. Whether the Commission's decision to retain its radio/television cross-ownership, local television ownership, local radio ownership, and dual network rules in their existing form was reasonable.

4. Whether the Commission's revision or retention of these rules was consistent with the First and Fifth Amendments.

5. Whether the Commission took reasonable steps to promote policies that enhance broadcast station ownership by minorities and women.

6. Whether the Court should either transfer the notices of appeal among these cases to the U.S. Court of Appeals for the District of Columbia Circuit, or dismiss them itself for lack of jurisdiction.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the rule making portions of the FCC's order in this case pursuant to 47 U.S.C. §402(a) and 28 U.S.C. §2342(1). The order was released on February 4, 2008. *2006 Quadrennial Regulatory Review*, 23

FCC Rcd 2010 (2008) ("*2008 Order*") (JA 226). A summary was published in the Federal Register on February 21, 2008. 73 Fed. Reg. 9481 (2008). Each of the petitions for review was filed within 60 days of that date, as required by 28 U.S.C. §2344. On March 11, 2008, the Judicial Panel on Multidistrict Litigation consolidated all petitions for review in the U.S. Court of Appeals for the Ninth Circuit. By an order dated November 4, 2008, the Ninth Circuit transferred the consolidated petitions for review to this Court.

The *2008 Order* also contained adjudicatory decisions involving waiver requests relating to particular broadcasting licenses. Exclusive jurisdiction to review FCC radio or television broadcast licensing actions is by notice of appeal to the D.C. Circuit. 47 U.S.C. §402(b). A number of parties filed notices of appeal of the *2008 Order* in the D.C. Circuit.

Those appeals were consolidated with the petitions for review in this Court.[1] Appellants have moved to transfer their appeals back to the D.C. Circuit. Petitioners Office of Communication of the United Church of Christ and Media Alliance moved to dismiss the notices of appeal in the D.C. Circuit on the ground that the notices do not fall within 47 U.S.C. §402(b). Neither the D.C. Circuit nor the Ninth Circuit acted on that motion, and it was ultimately transferred to this Court, where it remains pending.

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[1] The consolidated notices of appeal are Nos. 08-4460 (Media General, Inc.); 08-4469 (Newspaper Association of America); 08-4473 (Cox Enterprises, Inc., Cox Radio, Inc., Cox Broadcasting, Inc., Miami Valley Broadcasting Corp.); 08-4474 (Belo Corp.); 08-4476 (Morris Communications Co.). The United States is not a party to these cases.

As the Commission has previously explained, it agrees with the motion and maintains that the appeals should be dismissed by the D.C. Circuit (which would have jurisdiction over them if they were properly brought under Section 402(b)), or by this Court. *See* Response of FCC to Motion to Dismiss, Nos. 08-4460, 08-4469, 08-4473, 08-4474, 08-4476 (filed March 26, 2009). Section 402(b) provides for exclusive jurisdiction over actions brought by a proper party involving grant or denial of license applications or other specific matters not involved in the *2008 Order*. In this case, Section 402(b) does not apply. One appellant (Media General) is the beneficiary of a waiver grant and thus cannot claim to be aggrieved by the Commission's action as required by the statute; two appellants (Cox and Miami Valley Broadcasting) seek review of Commission action granting them additional time to modify their waiver requests, and their appeals thus are not ripe; the remaining appellants (NAA, Belo, and Morris) state only that they are challenging the Commission's failure to repeal or relax rules and do not claim to challenge any action in the *2008 Order* that could come within the scope of Section 402(b).

Petitioner Prometheus Radio Project seeks review of a related Commission order. *See Promoting Diversification of Ownership in the Broadcasting Services*, 23 FCC Rcd 5922 (2008) ("*Diversity Order*") (JA 4929). The *Diversity Order* was released on March 5, 2008, and a summary was published in the Federal Register on May 16, 2008. 73 Fed. Reg. 28361 (2008). The petition for review of that order was timely filed in this Court on July 15, 2008. It was docketed as No. 08-3078 and thereafter consolidated with the other petitions for review and notices of appeal in this case.

STATUTES AND REGULATIONS

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

STATEMENT OF RELATED CASES

This case has not previously been before this Court. However, the Commission's action in this case was partly in response to the remand by this Court in *Prometheus Radio Project v. FCC*, 373 F.3d 372 (2004). In addition, the FCC's local television station ownership rule was before the D.C. Circuit in *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (2002).

COUNTERSTATEMENT

I. STATUTORY AND REGULATORY BACKGROUND

A. The FCC's Broadcast Ownership Rules

"In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." *NCCB*, 436 U.S. at 780. For example, in regulations that the Supreme Court upheld in *National Broad. Co. v. United States*, 319 U.S. 190, 206-08 (1943) ("*NBC*"), the Commission prohibited broadcast networks from owning more than one station in a given community. Subsequently, the Commission promulgated rules upheld in *Storer Broadcasting*, 351 U.S. at 203-06, limiting the total number of radio and TV stations a single entity could own nationwide. *See Amendment of Sections 3.35, 3.240 and 3.636 of* *the Rules and Regulations relating to Multiple Ownership of AM, FM, and Television Broadcast Stations*, 9 Radio Reg. (P&F) 1563, 1567-69 ¶¶9-11 (1953). In 1975, the Commission adopted a ban on common ownership of a daily newspaper and a broadcast station in the same local market. *Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 50 F.C.C.2d 1046 (1975) ("*1975 Order*"), *amended on reconsideration*, 53 F.C.C.2d 589 (1975). In *NCCB*, the Supreme Court upheld the Commission's newspaper/broadcast cross-ownership prohibition as a "reasonable means of promoting the public interest in diversified mass communications." *See* 436 U.S. at 796-802.

In the broadcast area, the problems before the Commission often can "not be solved at once and for all time by rigid rules-of-thumb." *NBC*, 319 U.S. at 225. As a result, the agency may adjust its regulations "[i]f time and changing circumstances reveal that the 'public interest' is not served by [their] application." *Ibid.* The Commission has accordingly adjusted its broadcast ownership rules in recent years to take account of developments in the media marketplace, such as the significant increase in the number of broadcast outlets and the advent of competing video programming providers. Thus, the Commission in 1984 raised the national ownership limits for broadcast television. *Amendment of Section 73.3555 (formerly 73.35, 73.240, and 73.636) of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations,* 100 F.C.C.2d 74, 84 ¶22, 90 ¶38 (1984). And in 1989, the Commission relaxed its radio/television cross-ownership rule by implementing a more lenient waiver policy for applications involving radio and television combinations in the top 25 markets. *Amendment of Section 73.3555 of the Commission's Rules*, 4 FCC Rcd 1741 ¶1 (1989).

B. The 1996 Telecommunications Act

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), made a number of statutory changes that affected the FCC's media ownership rules. Among other things, the 1996 Act modified the Commission's national ownership restrictions by removing the limits on the number of radio or television stations that a single entity could own nationwide. §202(a), 202(c)(1)(A), 110 Stat. 110-11. Congress also eased the Commission's local radio ownership restrictions, §202(b), 110 Stat. 110-11, and directed the Commission to conduct a rulemaking to determine whether to "retain, modify, or eliminate" its local television ownership limitations, §202(c)(2), 110 Stat. 111. The 1996 Act also directed the Commission to further relax its radio/television cross-ownership rule by extending its waiver policy to the "top 50 markets," §202(d), 110 Stat. 111, and to revise the "dual network" rule to permit common ownership of two or more broadcast television networks, other than the six (now four) largest. §202(e), 110 Stat. 111.

Finally, Section 202(h) of the 1996 Act instituted a "biennial review" requirement, which obligated the Commission to: (1) "review its rules adopted pursuant to this section and all of its ownership rules biennially," (2) "determine whether any of such rules are necessary in the public interest as the result of competition," and (3) "repeal or modify any regulation it determines to be no longer in the public interest." 110 Stat. 111-12. In 2004 Congress modified the statute to require such review every four years, beginning in 2006.[2]

C. The *Sinclair* Decision

In line with its ongoing examination of its broadcast ownership rules, and guided by the statutory directives of the 1996 Act, the Commission in 1999 adopted an order revising its local television ownership rule. *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903 (1999) ("*Local TV Ownership Order*"), *on reconsideration*, 16 FCC Rcd 1067 (2001). The revised local television rule continued to permit common ownership of two television stations whose signals did not overlap, 14 FCC Rcd at 12926 ¶47, and for the first time enabled common ownership of two television stations with overlapping signals if "at least eight independently owned and operating full power commercial and noncommercial TV stations would remain post-merger …, and the two merging stations are not both among the four top-ranked stations in the market, as measured by audience share." 14 FCC Rcd at 12932-33 ¶64 (JA 452-53).

The D.C. Circuit reviewed the Commission's 1999 revision of its local television ownership rule in *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002). The court emphasized that "[w]here issues involve 'elusive' and 'not easily defined' areas such as programming diversity in broadcasting," it was obligated to "accord[] broad leeway to the Commission's line-drawing determinations." 284 F.3d at 159 (citation omitted). It also rejected a First Amendment

[2] Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 3, 100 (2004).

challenge to the rule as "foreclosed by" Supreme Court and circuit precedent, *id*. at 167-69, and found that the Commission had "adequately explained how the local ownership rule furthers diversity at the local level and is necessary in the 'public interest' under §202(h) of the 1996 Act." *Id*. at 160. But because the court found that the Commission had not adequately explained its different approach in the local television ownership rule compared to its rule on cross-ownership of radio and television stations, the court remanded the rule for further consideration by the Commission. *Id*. at 162, 169.

D. The 2002 Biennial Review

In 2002, in accordance with its (then biennial) review obligations, the Commission initiated a "comprehensive review" of its broadcast ownership rules, which culminated in July 2003. *2002 Biennial Regulatory Review*, 18 FCC Rcd 13620 (2003) ("*2003 Order*") (JA 950). The Commission performed this review in light of its "longstanding goals" of promoting diversity, competition, and localism – and taking account of the changes in the marketplace, including the Internet. *2003 Order*, 18 FCC Rcd at 13623, 13661 ¶¶4, 117 (JA 953, 991). By promoting diversity, and more particularly viewpoint diversity, the Commission meant to help ensure "the availability of media content reflecting a variety of perspectives," recognizing that a "diverse and robust marketplace of ideas is the foundation of our democracy." *Id.* at 13627 ¶19 (JA 957). The Commission also reaffirmed its "longstanding commitment to promoting competition by ensuring pro-competitive market structures," stating that "[c]onsumers receive more choice, lower prices, and more innovative services in competitive markets than they do in markets where one or more firms exercises market power." *Id.* at 13638 ¶57 (JA 968). Finally, the Commission made clear that localism "continues to be an important policy objective," and that "local television and radio stations" have long been required to be "responsive to the needs and interests of their local communities." *Id.* at 13643 ¶¶73-74 (JA 973).

The *2003 Order* established a new cross-media rule to govern cross-ownership of daily newspapers, television stations, and radio stations, and modified two other rules that limit common ownership of multiple radio and multiple television stations in a single local market.

Cross-Media Rule. The cross-media rule adopted in the *2003 Order* prohibited combinations involving a daily newspaper and a broadcast station, or a radio station and a television station, in local markets with three or fewer television stations. *2003 Order,* 18 FCC Rcd at 13798 ¶454 (JA 1128). In local markets with four to eight television stations, such cross-media combinations would be permitted with certain limitations. *Id.* at 13802-03 ¶466 (JA 1132-33). In local markets with nine or more television stations, the Commission declined to impose any cross-media limit. *Id.* at 13804 ¶473 (JA 1134). In establishing its cross-media limits, the Commission utilized a "Diversity Index"—a tool based loosely on the Herfindahl-Hirshmann Index (HHI) used in antitrust analysis—to "inform [its] judgments about the need for ownership limits" and "where [the agency] should draw lines between diverse and concentrated markets." *Id.* at 13776 ¶391 (JA 1106).

Local Television Ownership Rule. Like the cross-media rule, the Commission's revised local television ownership rule established ownership restrictions that were tied to the number of television stations in the local market. Under the rule, a party was permitted to own two commercial television stations in individual markets with 17 or fewer television stations, and three commercial stations in markets with 18 or more television stations. *2003 Order*, 18 FCC Rcd at 13668 ¶134 (JA 998). The rule, moreover, prohibited combinations among the four highest-rated television stations in the market. *Id.* at 13692 ¶186 (JA 1022).

Local Radio Ownership Rule. The Commission also retained its numerical limits on local radio station ownership, which Congress had directed the Commission to establish in the 1996 Act. Much like the local television rule, the local radio rule limited the number of commercial radio stations a single party may own in a local market according to the number of radio stations located in the market. Although it did not change the numerical caps themselves, the Commission did change its application of those limits in two ways: It revised the method of determining the scope of the radio market to which the rule's numerical limits apply, *2003 Order*, 18 FCC Rcd at 13724 ¶¶273-274 (JA 1054), and it required inclusion of noncommercial radio stations when counting the number of radio stations in the market. *Id.* at 13734 ¶295 (JA 1064).

Dual Network Rule. Finally, the Commission decided to retain its "dual network" rule, which prohibits mergers among the top four broadcast television networks (ABC, NBC, CBS, and Fox). *2003 Order*, 18 FCC Rcd at 13847-58 ¶¶592-621 (JA 1177-88).

E. The *Prometheus* Decision

Numerous parties sought judicial review of the *2003 Order* in several circuits, and the cases were consolidated in this Court. On June 24, 2004, the Court issued its decision on the merits. It held that the Commission's structural limits on broadcast ownership do not violate the First and Fifth Amendment rights of newspaper owners or broadcasters. *Prometheus*, 373 F.3d at 401-02. The Court held that petitioners' First Amendment arguments were foreclosed by *NCCB*, in which the Supreme Court upheld the nationwide ban on newspaper/broadcast cross-ownership as "a reasonable means of promoting the public interest in diversified mass communications." *Id.* at 401 (quoting *NCCB*, 436 U.S. at 802). In addition, the Court explained that, even if *NCCB* did not control, it would assess petitioners' First Amendment challenges under rational-basis review in light of the continuing physical scarcity of broadcast spectrum. *Id.* at 402 (explaining that regulation of use of broadcast spectrum is necessary because "many more people would like access to [broadcast spectrum] than can be accommodated"). Similarly, the Court held that petitioners' equal protection claims were foreclosed by the Supreme Court's rejection in *NCCB* of an equal protection challenge to the newspaper/broadcast cross-ownership restriction. *Id*. at 401. The Court added that the development of more media outlets since *NCCB* was decided in 1978 was not a basis for reaching a different result. *Ibid.* The Court likewise rejected petitioners' argument that Section 202(h) of the 1996 Act limits the agency's authority to adopt ownership restrictions. *Id.* at 394-95; *see id.* at 444 (Scirica, C. J., dissenting)

("[T]he statute does not foreclose the possibility of increased regulation under the biennial review if the Commission finds such action in the public interest.").

In a portion of the panel opinion from which Chief Judge Scirica dissented, the Court concluded that the Commission's cross-media rule and local television and radio rules should be remanded for "additional justification or modification." 373 F.3d at 382. For each of the three rules, the majority rejected the reasoning underlying the specific limits that the Commission had adopted (or, in the case of the local radio rule, retained).

Cross-Media Rule. The Court concluded that the Commission's cross-media rule was not supported by a "reasoned analysis." 373 F.3d at 402. The majority focused its criticism on the Commission's use of the Diversity Index to guide its judgment in setting ownership limits for local media markets of various sizes. In particular, the majority rejected the Commission's decision to assign equal weight to "all outlets within the same media type (that is, television stations, daily papers, or radio stations)." *Id.* at 408. In the majority's view, the equal share assignment "makes unrealistic assumptions about media outlets' relative contributions to viewpoint diversity in local markets." *Ibid.* The Court also found the Diversity Index flawed because, in the view of the panel majority, it "gave too much weight to the Internet as a media outlet." *Id.* at 403.

Local Television Ownership Rule. The Court likewise remanded the Commission's local television ownership limits. 373 F.3d at 418-20. In constructing the 2003 local television rule, the Commission adopted a goal of preserving six equal-sized competitors (*2003 Order,* 18 FCC Rcd at 13693 ¶192 (JA 1023)), and generally treated each television station in the market as having equal significance. In line with its analysis of the cross-media limits, the panel majority rejected that approach because it found "no evidence" supporting the Commission's equal weighting of local stations; and it further concluded that such weighting was unreasonable insofar as it allowed concentration – as measured by audience share – to exceed an HHI of 1800. 373 F.3d at 419. The Court therefore remanded the numerical limits for local television ownership "for the Commission to support and harmonize its rationale." *Id.* at 420.

Local Radio Ownership Rule. The Court upheld much of the Commission's approach to local radio ownership, including the Commission's decision to adopt a new methodology for delineating local radio markets, 373 F.3d at 423, and to include noncommercial stations in local markets for purposes of applying the ownership rules. *Id.* at 425. The Court agreed that the Commission's use of numerical limits to prevent undue concentration of radio stations by a single party was "rational and in the public interest." *Id.* at 431-32.

The majority concluded, however, that the Commission's decision to retain the existing numerical limits – which the Commission had established at Congress's specific direction in the 1996 Act – was not supported by "reasoned analysis." 373 F.3d at 431. As with the other local ownership rules, the majority rejected the Commission's reliance on a benchmark that evaluated competition or diversity in terms of a number of outlets rather than audience shares. *Id.* at 433-34. The majority emphasized that it was not passing judgment on the ultimate permissibility of the particular ownership rules the Commission chose. Instead, the Court stated, "the Commission gets another chance to justify its actions." *Id.* at 382.

II. THE 2006 QUADRENNIAL REVIEW

The Commission initiated its 2006 quadrennial review proceeding in July 2006 with a Further Notice of Proposed Rule Making. *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules*, 21 FCC Rcd 8834 (2006) ("*Further Notice*") (JA 1940). In response to that *Further Notice* as well as a *Second Further Notice,*[3] some commenters argued in favor of substantially easing or eliminating the rules. Others expressed significant concerns about the level and potential consequences of media consolidation, including concerns that such consolidation results in a loss of viewpoint diversity and negatively affects competition.

In addition to receiving and reviewing these public comments, the Commission conducted or commissioned ten studies and included numerous other studies in the record of the proceeding.[4] The Commission also conducted six media ownership hearings around the country and heard divergent testimony from a number

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[3] *2006 Quadrennial Regulatory Review – Review of The Commission's Broadcast Ownership Rules*, 22 FCC Rcd 14215 (2007) ("*Second Further Notice*") (JA 4282).

[4] *See FCC Seeks Comment on Research Studies on Media Ownership,* Public Notice, 22 FCC Rcd 14313 (2007) (JA 3583) for a description of the studies. The studies themselves are available at: http://www.fcc.gov/ownership/studies.html.

of commenters and speakers as to whether the media ownership rules should be relaxed, retained, or tightened.[5]

In February 2008, the Commission concluded the quadrennial review of its media ownership rules with the release of the *2008 Order*. A majority of the Commission determined that it should "modify the newspaper/broadcast cross-ownership rule, and . . . generally retain the other broadcast ownership rules currently in effect." *2008 Order* ¶1 (JA 227). The Commission majority described its approach as a "cautious" one.

> By modestly loosening the 32-year prohibition on newspaper/broadcast cross-ownership, our approach balances the concerns of many commenters that we not permit excessive consolidation with concerns of other commenters that we afford some relief to assure continued diversity and investment in local news programming. We believe that the decisions we adopt today serve our public interest goals, appropriately take account of the current media marketplace, and comply with our statutory responsibilities.

Id. ¶5 (JA 229-30). Two Commissioners dissented. They argued that there had been excessive consolidation of media ownership in recent years, and they disagreed in particular with the majority's decision to relax the newspaper/broadcast cross-ownership rule. *See* JA 331, 338.

Newspaper/Broadcast Cross-Ownership Rule

The Commission once again found that "retention of a complete ban" on newspaper/broadcast cross-ownership was "not necessary in the public interest,"

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[5] Media Ownership hearings were held in Los Angeles and El Segundo, California; Nashville, Tennessee; Harrisburg, Pennsylvania; Tampa, Florida; Chicago, Illinois; and Seattle, Washington. Transcripts and audio webcasts of the hearings are available at http://www.fcc.gov/ownership/hearings.html.

particularly in light of the considerable recent turmoil in the media marketplace and the newspaper industry, *2008 Order* ¶¶19, 24-38 (JA 237, 240-48). The agency also reaffirmed its earlier finding that "some cross-ownership limits are necessary to guard against 'an elevated risk of harm to the range and breadth of viewpoints that may be available to the public.'" *Id.* ¶49 (JA 254-55) (quoting *2003 Order,* 18 FCC Rcd at 13793 ¶442 (JA 1123)). But given the extensive flaws that the Court found in the *2003 Order's* Diversity Index and cross-media limits, the Commission decided to abandon those limits in favor of a new rule. *Id.* ¶17 (JA 237).

The new cross-ownership rule presumes that it is not inconsistent with the public interest for a single entity to own a daily newspaper and a radio station in one or more of the top 20 Nielsen designated market areas ("DMAs"). *2008 Order* ¶13 (JA 234-35). The rule also presumes that it is not inconsistent with the public interest for a single entity to own a daily newspaper and a television station in the top 20 DMAs, so long as (1) the television station is not ranked among the top four stations in the market and (2) at least eight independent "major media voices" remain in the market. *Ibid.*

"In all other instances" – including all proposed mergers in DMAs ranked below the top 20 – the rule presumes that "a newspaper/broadcast station combination would not be in the public interest." *2008 Order* ¶13 (JA 235); *see also id.* ¶63 (JA 262). "In two special circumstances," though, the Commission "will reverse the negative presumption that applies to those proposed combinations that do not otherwise qualify for a positive presumption." *Id.* ¶65 (JA 263). First, the

Commission will apply a positive (rather than negative) presumption to any proposed combination where the newspaper or broadcast outlet "is failed or failing." *Ibid.* (JA 264). Second, the Commission "will reverse the negative presumption when a proposed combination … initiates local news programming of at least seven hours per week on a broadcast outlet that otherwise was not offering local newscasts prior to the combined operations." *Id.* ¶67 (JA 265).

Under the new rule, the Commission will evaluate proposed newspaper/broadcast combinations "on a case-by-case basis." *2008 Order* ¶52 (JA 256). Parties objecting to a transaction with a positive presumption "will have a high hurdle to persuade the Commission that the transaction should not be approved." *Id.* ¶68 (JA 265). Conversely, "any applicant attempting to overcome a negative presumption about a major newspaper and television station combination" will be required "to demonstrate by clear and convincing evidence that, post-merger, the merged entity will increase the diversity of independent news outlets … and increase competition among independent news sources in the relevant market." *Ibid.*

"[N]o matter which presumption applies," the Commission will consider four "specific factors in determining whether permitting a particular combination in a particular market would be in the public interest." *2008 Order* ¶52 (JA 256). The four factors are: (1) whether the proposed merger will "increase the amount of local news disseminated through" the combining media outlets; (2) whether each of the combining media outlets will continue to "exercise its own independent news judgment"; (3) the "level of concentration" in the market; and (4) the "financial condition" of the newspaper or broadcast station (and if either is in "financial distress," the proposed future owner's "commitment to invest significantly in newsroom operations"). *Id.* ¶13 (JA 235).

Newspaper/Broadcast Applications

The Commission also acted in the *2008 Order* on five pending requests (one by Gannett and four by Media General) for waiver of the newspaper/broadcast cross-ownership rule to allow the maintenance of local combinations of one newspaper and one broadcast station that were acquired prior to 2001. The Commission concluded that the five waivers were in the public interest because of the "synergies that have already been achieved from the newspaper/broadcast station combination, the new services provided to local communities by the combination, the harms … associated with required divestitures, the prolonged period of uncertainty surrounding the status of the newspaper/broadcast cross-ownership ban, and the length of time that the waiver request has been pending." *2008 Order* ¶77 (JA 271). In the case of other pending waiver requests that involved (i) more than one newspaper or broadcast station or (ii) an entity that had been granted a temporary waiver pending completion of the 2006 review, the Commission did not grant a waiver, but instead required either the amendment of the pending waiver request or the filing of a new request for a permanent waiver for consideration under the new presumption framework. *Id.* ¶78 (JA 272).

Radio/Television Cross-Ownership Rule

The Commission decided to retain the radio/television cross-ownership rule that it adopted in 1999, which limits the number of commercial radio and television stations an entity may own in the same market. *See 2008 Order* ¶¶80-86 (JA 273-76). Specifically, the rule allows a party to own up to two television stations (so long as permitted under the local television ownership rule) and up to six radio stations (to the extent permitted by the local radio ownership rule) in a market where at least 20 independently owned media "voices" would remain following a merger. 47 C.F.R. §73.3555(c) (2009). In markets where parties may own a combination of two television stations and six radio stations, the rule allows a party alternatively to own one television station and seven radio stations. *2008 Order* n.259 (JA 273). A party may own up to two television stations (as permitted under the current local television ownership rule) and up to four radio stations (as permitted under the local radio ownership rule) in markets where, post-merger, at least 10 independently owned media voices would remain. *Ibid.* A combination of two television stations (as permitted under the local television ownership rule) and one radio station is allowed regardless of the number of voices remaining in the market. *Ibid.*

The Commission acknowledged that it had sought to eliminate the radio/ television cross-ownership rule in its *2003 Order*, but that approach, it explained, "was based in large part on our adoption of the cross-media limits" that the Court later invalidated in the *Prometheus* decision. *2008 Order* ¶82 (JA 274). Having concluded that the cross-media limits were no longer supportable, the Commission found that it "must adopt diversity protection provisions to act in their place, and therefore retain the current radio/television cross-ownership rule." *Ibid.*

Local Television Ownership Rule

The Commission also found that its restrictions on common ownership of television stations in local markets continue to be necessary "in order to preserve adequate levels of competition within local television markets." *2008 Order* ¶87 (JA 276). Under the local television ownership rule, an entity may own two television stations in the same DMA if: (1) the Grade B contours[6] of the stations do not overlap; or (2) at least one of the stations in the combination is not ranked among the top four stations in the DMA in terms of audience share, *and* at least eight independently owned and operating commercial or non-commercial full-power broadcast television stations would remain in the DMA after the combination. 47 C.F.R. §73.3555(b) (2009).

The Commission acknowledged that it was changing course from the new rule it sought to adopt in the *2003 Order*, which would have allowed ownership of up to three TV stations (and wider ownership of two TV stations) in a market, but explained that it was reversing that "determination" – which this Court invalidated – "because we find that eliminating the rule could harm competition among broadcast television stations in local markets." *2008 Order* ¶101 (JA 282).

Finally, the Commission reinstated what was known as the "failed station solicitation rule" – a requirement that an applicant for a waiver of the local television ownership rule provide notice of the sale of a failed, failing or unbuilt station

[6] The Grade B contour is the geographical representation of an area served by a specified television signal strength. 47 C.F.R. §73.683; *see Prometheus*, 373 F.3d at 413 n.43.

to potential out-of-market buyers before it could sell the station to an in-market buyer. This Court in *Prometheus* had remanded for further explanation the Commission's attempt to eliminate that requirement in 2003, *see 2003 Order*, 18 FCC Rcd at 13708 ¶225 (JA 1038), because the Commission did not consider its potential impact on minority ownership. *See Prometheus,* 373 F.3d at 421-22. The Commission explained that after further consideration it decided to reinstate the failed station solicitation rule because it is "necessary to ensure that out-of-market buyers, including qualified minority broadcasters, have notice of, and an opportunity to bid for, a station before it is combined with an in-market station." *2008 Order* ¶109 (JA 285). The Commission stated that it was inappropriate to assume, as had been the case in the *2003 Order,* that "no out-of-market buyer will be interested unless an effort is made to find one." *Ibid.*

<u>Local Radio Ownership Rule</u>

The Commission also concluded that its existing local radio ownership rule remains necessary in the public interest to protect competition in local radio markets. *2008 Order* ¶110 (JA 285). Under that rule, an entity may own, operate, or control: (1) up to eight commercial radio stations, not more than five of which are in the same service (*i.e.*, AM or FM), in a radio market with 45 or more full-power, commercial and noncommercial radio stations; (2) up to seven commercial radio stations, not more than four of which are in the same service, in a radio market with between 30 and 44 full-power, commercial and noncommercial radio stations; (3) up to six commercial radio stations, not more than four of which are in the same service, in a radio market with between 15 and 29 full-power, commercial and noncommercial radio stations; and (4) up to five commercial radio stations, not more than three of which are in the same service, in a radio market with 14 or fewer full-power, commercial and noncommercial radio stations, except that an entity may not own, operate, or control more than 50 percent of the stations in such a market. *See* 47 C.F.R. §73.3555(a) (2009).

The existing rule, the Commission found, represents "a reasonable means for promoting the public interest as it relates to competition. … [N]umerical 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 (JA 288). In addition, the Commission concluded that "retaining the current, competition-based numerical limits on local radio ownership will promote diversity indirectly for the same reasons that the Commission pointed to in the [*2003 Order*]." *Id.* ¶129 (JA 294); *see also 2003 Order*, 18 FCC Rcd at 13739-42 ¶¶305-315 (JA 1069-72).

Noting the substantial consolidation in the radio industry at both the national and local level following the Commission's changes in its radio ownership rules in 1992 and Congress' further relaxation of local radio ownership limits in 1996, the Commission found that "data in the record supports the conclusion that the current numerical limits are not unduly restrictive and that additional consolidation would not serve the Commission's competitive goals." *2008 Order* ¶118 (JA 289-90).

The Commission also reaffirmed the separate AM and FM ownership limits, known as "AM/FM subcaps," which further limit ownership of AM and FM radio stations within the overall limits for local radio station ownership. The Commission found that "retaining the current competition-based subcaps will promote diversity indirectly by facilitating and encouraging entry into the local media market by new and underrepresented parties, and we thus conclude that the AM subcaps are in the public interest." *2008 Order* ¶133 (JA 296).

<u>*Dual Network Rule*</u>

Finally, the Commission retained the "dual network rule," which prohibits a broadcast station from affiliating with "a person or entity that maintains two or more networks of television broadcast stations [where] such dual or multiple networks are composed of two or more persons or entities that, on February 8, 1996, were 'networks' as defined in Section 73.3613(a)(1) of the Commission's regulations (that is, ABC, CBS, Fox, and NBC)." 47 C.F.R. §73.658(g) (2009). The Commission had also retained the rule in 2003, concluding that it was necessary in the public interest to promote competition and localism. *2003 Order*, 18 FCC Rcd at 13850-58 ¶¶599-621 (JA 1180-88). No party sought judicial review of that rule in the prior *Prometheus* litigation.

In this proceeding, the Commission noted, few parties had commented on the rule, and almost all supported retaining the rule in its present form. *2008 Order* ¶141 (JA 299). The Commission said that it had found no evidence in this record "convincing us that a departure from our [2003] decision to retain the rule in its current form is warranted." *Ibid.* (JA 300).

III. THE DIVERSITY ORDER

One petitioner, Prometheus Radio Project, seeks review of a related Commission order that the agency adopted at the same time as the *2008 Order*. *See*

Promoting Diversification of Ownership in the Broadcasting Services, 23 FCC Rcd 5922 (2008) ("*Diversity Order*") (JA 4929). In the *Diversity Order*, the Commission took a number of "steps to increase participation in the broadcasting industry by new entrants and small businesses, including minority- and women-owned businesses, which historically have not been well-represented in the broadcasting industry." *Id.* ¶1 (JA 4931). Among other things, the Commission modified its rules to give "eligible entities" easier access to financing, *id.* ¶¶29-34 (JA 4942-44), more time to complete construction of broadcast facilities, *id.* ¶¶15-16 (JA 4937-38), and the opportunity to purchase a station from a licensee whose license is in jeopardy, *id.* ¶¶38-39 (JA 4945-46).

For purposes of these initiatives, the Commission continued to employ a definition of "eligible entity" it had used in the *2003 Order*, *i.e.*, any entity that would qualify as a small business consistent with Small Business Administration standards for its industry grouping, based on revenue. *Diversity Order* ¶¶6-7 (JA 4932-33).

IV. THE 2010 QUADRENNIAL REVIEW

The current Commission (four of the five members of which have been appointed since the *2003 Order*) has continued to examine its media ownership rules in line with its quadrennial review obligation. On May 25, 2010, after holding a number of workshops to help frame the issues that had begun in 2009, the Commission issued a Notice of Inquiry for its fifth such review. *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules*, FCC 10-92 (May 25, 2010) ("*2010 NOI*"). The notice sets forth the

Commission's intent to "seek a comprehensive understanding of the current media marketplace in order to determine whether the current ownership rules are necessary in the public interest as the result of competition." *Id.* ¶3. As the Commission stated:

> Given the profound marketplace, economic, and industry changes in recent years, we commence this proceeding with no preconceived notions about the framework that will result from this review or what rules we will adopt. We will examine ownership issues based on the record that is established in this proceeding and will seek to establish a forward-looking framework based on the media marketplace of today, not on marketplace factors as they may have existed in the past.

Ibid. Since then, the Commission has announced that it is commissioning at least nine economic studies to evaluate the current marketplace and the state of the media industry,[7] and numerous parties have filed comments in response to the *2010 NOI.*[8]

SUMMARY OF ARGUMENT

Consistent with its longstanding policy of simultaneously promoting and balancing the values of diversity, competition and localism, the Commission in 2008 modestly loosened the decades-old newspaper/broadcast cross-ownership ban while keeping the rest of its media ownership rules unchanged for the time being.

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[7] *See* Public Notice, "Media Bureau Announces the Release of Requests for Quotation for Media Ownership Studies and Seeks Suggestions for Additional Studies in Media Ownership Proceeding," DA-10-1084 (Media Bur., June 16, 2010).

[8] *See* Public Notice, "Media Bureau Announces Comment Deadlines for Notice of Inquiry in Media Ownership Proceeding," DA-1066 (Media Bur., June 11, 2010) (establishing July 12, 2010 and July 26, 2010, respectively, as the dates for filing comments and reply comments).

In doing so, the Commission permissibly took account of three overarching considerations: (1) the uncertain evidence in the record at the time regarding lasting trends in the media marketplace, particularly involving the state of the newspaper industry; (2) the Commission's continuing obligation to review its ownership rules quadrennially, which permits the agency, in conditions of uncertainty, to act in increments; and (3) the fact that the newspaper/broadcast cross-ownership rule was the only one of the Commission's media ownership rules that had not been substantially relaxed over time.

The specific regulatory lines the Commission drew when implementing these overarching principles were within the range of the agency's broad discretion to regulate media ownership in the public interest. The parties challenging the *2008 Order* cannot prevail on review by pointing to alternative rules the Commission might also permissibly have chosen or might choose at the end of its 2010 quadrennial review on an up-to-date record. Instead they must show that the rules adopted in the *2008 Order* fall outside the Commission's broad discretion given the record before the agency at that time. This they cannot do.[9]

1. The Commission reasonably revised its decades-old ban on newspaper/ broadcast cross-ownership by establishing a framework that, as a general matter,

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[9] The Commission's regulation of broadcast license ownership confers no antitrust immunity. *United States v. Radio Corp. of America*, 358 U.S. 334, 346 (1959). *See also* 1996 Act, §601(b) (the 1996 Act does not "modify, impair, or supersede the applicability of any of the antitrust laws"). The Department of Justice reviews broadcast mergers under the antitrust laws. The standards of the antitrust laws are distinct from those of the Communications Act, and their application may lead to different conclusions.

rebuttably presumes that a proposed newspaper/broadcast combination in one of the top 20 markets will be in the public interest. The revised rule permissibly balances the potential benefits and synergies of newspaper/broadcast mergers with the continuing need to preserve viewpoint diversity by preventing excessive media consolidation.

The media petitioners object to the Commission's conclusion that the revised rule is necessary to promote viewpoint diversity. But as the Supreme Court long ago recognized, the Commission has "acted rationally in finding that diversification of ownership [will] enhance the possibility of achieving greater diversity of viewpoints." *NCCB*, 436 U.S. at 796. The record before the Commission in 2008 showed that newspapers and broadcast stations remained the most significant sources of local news for American consumers. The record therefore supported the Commission's conclusion that newspaper/broadcast combinations continue to pose a serious threat to viewpoint diversity.

2. The Commission also permissibly grandfathered five longstanding newspaper/broadcast combinations in light of the synergies already generated by the combinations, the new services they had provided to their communities, and the disruption that would be caused by their divestiture. The Citizen Petitioners' objections to the Commission's approvals, which were never raised before the Commission in this proceeding, are more properly seen as objections to the license renewal proceedings and therefore belong in the D.C. Circuit. In any event, the Commission's analysis was entirely consistent with the public interest considera-

tions related to grandfathering outlined (and upheld by the Supreme Court) when the agency first adopted its newspaper/broadcast cross-ownership rule.

3. The Commission reasonably determined to retain its radio/television cross-ownership rule. In 2003, the agency had decided that the rule was no longer necessary in light of its newly adopted cross-media limits. In the 2004 *Prometheus* decision, however, this Court found the cross-media limits arbitrary; on remand, the limits (and the associated Diversity Index) were abandoned. Without cross-media limits, the Commission reasonably concluded that the radio/television cross-ownership rule remained necessary to promote viewpoint diversity.

4. The Commission found that its local television ownership rule likewise remains necessary to protect competition in local markets. Although in 2003 the Commission had relaxed the rule to permit one entity to own three stations in the largest markets and two stations in smaller markets, this Court in *Prometheus* remanded that revision as inadequately explained. In the *2008 Order*, the Commission decided on account of competition concerns to retain the existing pre-2003 version of the rule, which permits an entity to own two stations in a local market provided that neither is among the top four local stations in audience share and eight stations will remain after the combination. The Commission has broad discretion to revisit prior policy choices and lines drawn so long as it explains its new approach. This is particularly true where, as here, its prior determination has not survived judicial review. The Commission also addressed the D.C. Circuit's remand in *Sinclair*, explaining that because the rule's focus was on competition among local television stations, it was appropriate to count only television stations

in determining how many voices are in a market and not other types of media such as radio, newspapers, cable or the Internet.

5. The Commission's decision to retain the local radio ownership rule was also reasonable and supported by the record. Noting the substantial national and local consolidation that had occurred in radio with relaxation of the Commission's rules in the 1990s, the Commission concluded that maintaining the existing limits was necessary to (1) guard against further consolidation that could harm competition in local markets and (2) ensure a market structure that would continue to provide opportunities for new entrants. The Commission explained that the existing limits struck a balance between relaxing the limits to permit greater consolidation (which could put at risk the Commission's competition goal) and making the limits more restrictive (which would reduce or eliminate the benefits of limited common ownership). The Commission also adequately explained its decision to retain the local radio ownership rule's limits on AM and FM ownership, finding that the "subcaps" promoted new entry (because AM stations are far less expensive to acquire than FM stations) and prevented excessive market power in those markets in which AM stations were dominant.

6. The Commission also had good reason to retain the dual network rule, which was not even challenged in the prior *Prometheus* litigation. As the Commission explained, a merger of two or more of the top four broadcast networks would harm competition in the program acquisition and national advertising markets, and would hamper the ability of local affiliates to serve their communities.

7. Petitioners renew their previously unsuccessful attacks on the constitutionality of the Commission's media ownership rules, including the revised newspaper/broadcast cross-ownership rule. The same arguments have been rejected by the Supreme Court and this Court, *see Prometheus*, 373 F.3d at 401-02, and petitioners have provided no basis for this Court to revisit that conclusion.

8. Finally, the Commission took reasonable steps to promote ownership of broadcast stations by small businesses, including businesses owned by minorities and women. The Citizen Petitioners complain that the Commission should have tightened its media ownership rules in order to promote minority ownership, but it was within the Commission's permissible policy discretion to adopt a different approach.

ARGUMENT

I. STANDARD OF REVIEW.

FCC rules adopted or modified through the informal rulemaking procedures of the Administrative Procedure Act may be overturned only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A); *Prometheus*, 373 F.3d at 389-90. The scope of review is "narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). "[A] reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute," *id.* at 41, and the agency's decision will be affirmed so long as the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *Id*. at 42. *See FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1810 (2009). Where the agency's decision is "bound up with a record-based factual conclusion," it must be affirmed if it is supported by "substantial evidence." *Dickinson v. Zurko*, 527 U.S. 150, 164 (1999).

The Federal Communications Act grants the Commission "broad" and "expansive" powers to allocate broadcast licenses in the "public interest, convenience and necessity." *FCC v. WNCN Listeners' Guild*, 450 U.S. 582, 594 (1981); *NCCB*, 436 U.S. at 795; *NBC*, 319 U.S. at 219. *See* 47 U.S.C. §§307(a), 309(a), 310(d). The Act's public interest standard is "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *WNCN*, 450 U.S. at 593 (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940)). The standard "leaves wide discretion and calls for imaginative interpretation." *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953). The Commission's broad authority means that "the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference," and "is not to be set aside" as long as the agency's implementation of the public interest standard is "based on a rational weighing of competing policies." *WNCN*, 450 U.S. at 596.

Where, as here, Commission decisions are "primarily of a judgmental or predictive nature," "complete factual support in the record … is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'" *NCCB*, 436 U.S. at 813-14 (citation omitted). Indeed, "where issues involve 'elusive' and 'not easily defined' areas such as programming diversity in broadcasting," judicial review "is considerably more deferential, according broad leeway to the Commission's line-drawing determinations." *Sinclair*, 284 F.3d at 159.

II. THE COMMISSION REASONABLY REVISED ITS NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE.

In 1975, the FCC adopted a rule prohibiting common ownership of both a full-power broadcast station and a daily newspaper when the broadcast station's service contour encompasses the newspaper's city of publication. *1975 Order*, 50 F.C.C.2d at 1074-78 ¶¶100-107. The rule was intended to promote "enhanced diversity of viewpoints" among mass media. *NCCB*, 436 U.S. at 786. At the time this rule was adopted, the FCC grandfathered most existing newspaper/broadcast combinations, requiring divestiture only in "the most egregious cases." *1975 Order*, 50 F.C.C.2d at 1080 ¶112.

In 2003, as part of its biennial review of media ownership rules under Section 202(h), the Commission determined that an absolute ban on newspaper/broadcast cross-ownership was no longer necessary in the public interest. *2003 Order,* 18 FCC Rcd at 13747-67 ¶¶328-369 (JA 1077-97). In place of the cross-ownership prohibition, the Commission established certain "cross-media limits," which it derived from a complex formula called the Diversity Index. This formula was "developed as a measure of viewpoint diversity in local markets to identify those 'at-risk' markets where consolidation would have a deleterious effect." *Prometheus,* 373 F.3d at 388. On the basis of the Diversity Index, the Commission decided to bar newspaper/broadcast combinations only in markets with three or fewer television stations. *2003 Order*, 18 FCC Rcd at 13799-800 ¶¶456, 459 (JA 1129-30). The agency also imposed some restrictions on newspaper/broadcast cross-ownership in "small to medium size markets (those with between four and eight television stations)." *Id.* at 13802-03 ¶466 (JA 1132-33).

The cross-media limits never took effect. This Court stayed them pending judicial review. *See Prometheus*, 373 F.3d at 389. On review, the Court upheld the two principal findings underlying the FCC's modified approach to regulating newspaper/broadcast cross-ownership: (1) a "blanket ban" on cross-ownership "was no longer in the public interest," *id.* at 398; but (2) "retaining some limits" on newspaper/broadcast combinations "was necessary to ensure [viewpoint] diversity," *id.* at 401. In addition, the Court rejected constitutional challenges to the Commission's continued regulation of cross-ownership. *Id.* at 401-02. At the same time, however, the Court found fault with the specific cross-media limits adopted by the agency and the Diversity Index on which they were based. *Id.* at 402-11. Stating that the cross-media limits "employ several irrational assumptions and inconsistencies," *id.* at 402, the Court remanded "for the Commission to justify or modify its approach to setting numerical limits." *Id.* at 435.

On remand, the Commission modestly revised the newspaper/broadcast cross-ownership rule. It replaced the flat ban on cross-ownership with a case-by-case review process that would be guided by certain presumptions. The Commission explained that its new rule was "designed to promote diversity by presumptively prohibiting combinations in the markets with the fewest number of voices, while presumptively permitting certain combinations in the largest markets where the loss of diversity is not a significant risk." *2008 Order* ¶49 (JA 255). The presumptions, the Commission predicted, would help companies respond to new marketplace challenges by allowing newspapers and broadcast stations "to explore synergies in certain circumstances." *Id.* ¶51 (JA 255). At the same time, recognizing the continuing need to protect viewpoint diversity, the rule "maintains safeguards to ensure that consumers continue to enjoy the benefits that flow from the operation of multiple, competing sources of news and information." *Ibid.*

While many parties to the agency proceeding urged a more deregulatory tack, the Commission concluded that its "cautious approach" in this area properly "balances the need to support the availability and sustainability of local news and informational programming" with the need "to preserve diversity and to avoid significantly increasing local ownership concentration." *Id.* ¶20 (JA 239).

Several petitioners challenge various aspects of the FCC's new newspaper/broadcast cross-ownership rule. Their claims, however, involve (at best) policy disagreements rather than legal error.

A. The FCC Provided Adequate Notice Of The New Rule.

The Citizen Petitioners maintain that the FCC violated the APA by failing to provide sufficient notice of the new rule before adopting it. Citizens Br. 27-29. This argument is unfounded. Contrary to the Citizen Petitioners' contention, the APA does not obligate the FCC to include "rule proposals" in its notice. As this Court has recognized, "the APA requires a notice to provide *either* 'the terms or substance of the proposed rule' *or* 'a description of the subjects and issues involved.'" *Citizens for Health v. Leavitt*, 428 F.3d 167, 186 (3d Cir. 2005) (quoting 5 U.S.C. §553(b)(3)). A notice that contains no rule proposals complies with the APA so long as it is "sufficient to fairly apprise interested parties of all significant subjects and issues involved." *NVE Inc. v. Department of Health & Human Services,* 436 F.3d 182, 191 (3d Cir. 2006) (quoting *American Iron & Steel Inst. v. EPA,* 568 F.2d 284, 291 (3d Cir. 1977)).

The *Further Notice* in this proceeding plainly informed interested parties of the newspaper/broadcast cross-ownership issues the FCC was considering. In that notice, the Commission tentatively concluded that its Diversity Index was "an inaccurate tool for measuring diversity," *Further Notice* ¶32 (JA 1954), and sought comment on alternative methods of prescribing cross-ownership limits. Specifically, the Commission asked: "Should limits vary depending upon the characteristics of local markets? If so, what characteristics should be considered, and how should they be factored into any limits?" *Ibid.*

In the *2008 Order*, the Commission affirmed its tentative conclusion that the Diversity Index "is an inaccurate tool for measuring diversity" and declined to "reinstate the cross-media limits or rely on the [Diversity Index]." *2008 Order* ¶17 (JA 237). Instead, the agency crafted a new rule featuring revised cross-ownership limits. The questions that the agency posed in the *Further Notice* anticipated that the agency might establish a rule the application of which might "vary depending upon the characteristics of local markets." *Further Notice* ¶32 (JA 1954). The Commission's decision ultimately to conduct case-by-case evaluation of proposed combinations likewise flowed logically from the questions in the *Further Notice* about whether to tailor cross-ownership limits to the specific characteristics of local markets. The Commission's new rule, which ties the waiver presumption to the size of the relevant local market, was thus "a logical outgrowth of its notice" and complied with the APA. *Covad Comm. Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006).[10]

B. Substantial Record Evidence Supports The Commission's Conclusion That Continued Regulation Of Newspaper/ Broadcast Cross-Ownership Is In The Public Interest.

In *Prometheus*, this Court held that it was reasonable for the FCC to conclude that even though "a blanket prohibition on newspaper/broadcast cross-ownership [was] no longer in the public interest," "retaining some limits" on cross-ownership "was necessary to ensure diversity." *Prometheus*, 373 F.3d at 400-01. Here, too, substantial record evidence supported the Commission's finding that some restrictions on cross-ownership remain "necessary to guard against 'an elevated risk of harm to the range and breadth of viewpoints that may be available to the public.'" *2008 Order* ¶49 (JA 254-55) (quoting *2003 Order*, 18 FCC Rcd at 13793 ¶442 (JA 1123)).

The record gathered for the *2008 Order* contained "examples of existing media outlets, such as newspapers, introducing a new media outlet into the market, such as an Internet website, but using both outlets to provide the same local content

[10] Because the *Further Notice* "was adequate for APA compliance purposes, it is immaterial" whether a subsequent press release by the then-FCC Chairman inviting comment on his more detailed proposal satisfied APA notice requirements. *2008 Order* n.47 (JA 234). We note, however, that this press release provided a further opportunity for public comment, and on a proposal that closely mirrored the rule that the Commission ultimately adopted. *See* News Release, Nov. 13, 2007 (JA 4564-67).

for consumers." *2008 Order* ¶49 (JA 255) (citing CU Comments at 136-47 (JA 4381-92)). Faced with this evidence that commonly owned media outlets sometimes adopt the same viewpoint, the Commission was "not in a position to conclude that ownership can never influence viewpoint." *Ibid.* To protect against the realistic prospect that consolidation of media outlets in some instances could harm viewpoint diversity, the Commission adopted a presumption against newspaper/broadcast cross-ownership in markets below the top 20. Because these smaller markets generally have fewer media outlets than the top 20 markets do, they are more vulnerable to the risk that media consolidation could severely reduce viewpoint diversity. *See id.* ¶¶56, 63 (JA 258, 263).

The Commission's determination that cross-ownership limits remained necessary to ensure diversity was not "unsupported." Media General Br. 30; *see* NAA Br. 40. In *Prometheus*, this Court found "ample evidence … that ownership can influence viewpoint." *Prometheus*, 373 F.3d at 400 n.26. Similarly, in this proceeding, the Commission found evidence that some commonly owned media outlets "provide the same local content for consumers." *2008 Order* ¶49 (JA 255) (citing CU Comments at 136-47 (JA 4381-92)). *See also 2003 Order*, 18 FCC Rcd at 13687 ¶174 (JA 1017). This evidence of a link between ownership and viewpoint supported the Commission's concern that newspaper/broadcast cross-ownership could threaten viewpoint diversity in certain circumstances.[11]

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[11] Petitioners claim that the "Milyo Study" (Ownership Study 6) casts doubt on the Commission's finding that cross-ownership can harm diversity. NAA Br. 38-39; Tribune Br. 25-30; Media General Br. 29. The Milyo Study, however, concluded only that "there is little consistent and significant difference in the partisan slant of

Indeed, in affirming the Commission's 1975 newspaper/broadcast cross-ownership ban in *NCCB*, the Supreme Court found that the "the rulemaking record" "did not conclusively establish" that a cross-ownership ban "would in fact lead to increases in the diversity of viewpoints among local communications media." 436 U.S. at 796. The Court nonetheless ruled that "the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints." *Ibid.* The Court recognized that some element of predictive judgment is inherent in any analysis of viewpoint diversity because "[d]iversity and its effects are … elusive concepts, not easily defined," and "evidence of specific abuses by common owners is difficult to compile." *Id.* at 796-97 (internal quotations omitted). Like the Supreme Court in *NCCB*, this Court has recognized that the Commission's "predictive judgments about matters within its expertise are entitled to substantial deference." *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 221 (3d Cir. 2007).

Media General and Tribune argue that the Commission, in assessing the need for cross-ownership limits, gave insufficient weight to the contribution of independent Internet news sites to viewpoint diversity. Media General Br. 31-33; Tribune Br. 30. But the agency was appropriately cautious in its analysis of new media, especially after this Court's ruling in 2004 that the FCC had not justified its weighting of the Internet in its Diversity Index. *See Prometheus*, 373 F.3d at 404-

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cross-owned stations and other major network-affiliated stations in the same market." Milyo Study at 29 (JA 3877). The study made no attempt to compare the viewpoints of newspapers and their cross-owned broadcast stations.

08. While the Commission acknowledged the Internet's contribution to diversity, it was unable to find that the Internet was a "major" source "of local news or information." *2008 Order* ¶58 (JA 260). According to evidence in the record gathered for the *2008 Order*, "only a small percentage of people use the Internet frequently for local news and information," and consumers who search the Internet for news "overwhelmingly go to the web sites of local or national television sources or to the sites of daily newspapers." *Id.* ¶¶57-58 (JA 259-60) (citing CU Comments at 136-47 (JA 4381-92)). The record also provided "relatively unanimous support" for the conclusion that "consumers continue predominantly to get their local news from daily newspapers and broadcast television." *Id.* ¶57 (JA 258). On the basis of this evidence, it was permissible for the Commission to count "as major media voices only those outlets that consumers most rely on as sources of local news and information": full-power television stations and major newspapers. *Ibid.* (JA 259).[12]

NAA maintains that "viewpoint diversity should be examined according to the availability of alternative sources of news and information, rather than the relative importance of various outlets." NAA Br. 39. In *Prometheus*, however, this Court held that the Commission was justified in "retaining some limits" on news-

[12] Contrary to Media General's suggestion (Br. 33), the Commission did not "dismiss[] altogether the contribution new media outlets make." The agency's decision to relax the newspaper/broadcast cross-ownership ban was based in part on evidence that "Internet use by both consumers and competitors is changing how traditional news media operate" and diminishing "mainstream media power over information flow." *2008 Order* ¶36 (JA 246-47).

paper/broadcast cross-ownership "to ensure diversity" because the record in that case established that "the Internet and cable … do not outrank newspapers and broadcast television" as sources of local news. *Prometheus*, 373 F.3d at 400-01. Here, as in *Prometheus,* the Commission permissibly found that the continued predominance of newspapers and television stations as sources of local news warranted continued regulation of newspaper/broadcast cross-ownership.

Petitioners argue that the FCC should have more substantially relaxed – or even eliminated – its cross-ownership restrictions in light of the newspaper industry's financial difficulties. Media General Br. 23-25; NAA Br. 34; NAB Br. 57-59. The Commission addressed the issue by adopting a presumption favoring the approval of any newspaper/broadcast combination that involves a "failed or failing" newspaper or broadcast outlet. *2008 Order* ¶65 (JA 264). The Commission additionally emphasized that its review of proposed transactions under the new rule would include consideration of "whether a newspaper or a broadcast station in a proposed combination is in financial distress." *Id.* ¶74 (JA 269). These features of the new rule showed due sensitivity to the financial plight of newspapers, insofar as it was revealed by the 2008 record.

C. The Commission Reasonably Established A Case-By-Case Review Process.

Contrary to NAA's contention (Br. 44-50), the FCC rationally explained why it adopted a case-by-case review process instead of a bright-line rule to regulate newspaper/broadcast cross-ownership. It noted that the need to enforce cross-ownership limits in a particular market "for the protection of diversity depends on the particular nature of both the market at issue and the transaction at issue." *2008 Order* ¶50 (JA 255). The Commission reasoned that an "inflexible 'one-size-fits-all' rule" would not adequately account for "the diversity of media markets across the country as well as the diversity of media transactions." *Ibid.*

The "inconclusiveness of some of the data" on the relationship between newspaper/broadcast combinations and the provision of local information to the public and the "disagreement as to the outcome of the studies" before the Commission that examined the subject provided further support for the FCC's decision "to undertake a case-by-case review of particular combinations in particular markets, rather than providing hard, across-the-board limits." *2008 Order* ¶46 (JA 254). The Commission found that its "case-by-case approach" would allow for "a more fully informed assessment that a proposed transaction in a particular market actually will increase the total amount of local news generated by the combined outlets." *Ibid.*[13]

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[13] Tribune and NAA assert that case-by-case review of the impact of cross-ownership on localism is unwarranted because some localism studies showed a positive correlation between cross-ownership and local news coverage. Tribune Br. 31; NAA Br. 36-38. But peer review revealed that those studies lacked the comprehensive data needed to support a finding that cross-ownership would promote localism in all markets under all circumstances. *See, e.g., 2008 Order* n.149 (JA 251) (while Study 6 provides "evidence consistent with overall trends and patterns for the period of time that it studies," it "may not represent the behavior of all news outlets all the time"); *id.* n.147 (JA 251) ("the author of Study 6 acknowledges the limitations of his data"); *id.* n.151 (JA 252) (noting "the limitations of the data" used by Study 4.1). Given gaps in the data, the Commission reasoned that case-by-case review would permit "a more fully informed assessment" of how a given transaction would affect local news coverage in a specific market. *Id.* ¶46 (JA 254).

More fundamentally, "given the long history of the newspaper/broadcast cross-ownership rule," the Commission sensibly chose "to proceed cautiously in relaxing" the rule, *2008 Order* n.206 (JA 262), rather than effecting a sudden and dramatic change.[14]

The Commission acknowledged that in 2003 it had found that, "on balance, the benefits of precision that case-by-case review … would provide were outweighed by the benefits of bright-line rules." *2008 Order* ¶54 (JA 257) (citing *2003 Order*, 18 FCC Rcd at 13645 ¶82 (JA 975)). The agency came to a different conclusion when it revisited the issue in 2008, and it satisfied APA requirements by explaining why. *See FCC v. Fox Television*, 129 S.Ct. at 1810-11 (agency action not subject to heightened scrutiny or more searching standard of review simply because it is changing policy). Noting that "bright-line rules can be over-inclusive or under-inclusive," the Commission determined in 2008 that case-by-case analysis of proposed newspaper/broadcast combinations would provide a much more accurate assessment of the impact of particular transactions in particular markets. *2008 Order* ¶54 (JA 257). And while a bright-line rule might produce more predictable outcomes, the Commission reasoned that "the built-in

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[14] NAA argues that "at the very least," the Commission should have categorically authorized "combinations in all markets in which a sufficiently 'robust number of diverse media sources' exist." NAA Br. 40 (quoting *2008 Order* ¶19 (JA 238)). The Commission reasonably determined, however, that even in the largest markets, a rebuttable presumption would be appropriate to permit the Commission to retain the ability to assess the impact of a particular transaction on localism and diversity in the particular market. *2008 Order* ¶¶46, 50 (JA 254-55).

presumptions and the public interest test" employed by the new rule would "provide adequate predictability for the industry." *Ibid.*

The Commission also rejected arguments that "a case-by-case approach will impose undue regulatory burdens." *Id.* n.178 (JA 257). It predicted that, "in comparison to the number of applications triggering the local radio, local television, and radio/television ownership rules," there will be relatively few newspaper/ broadcast applications filed. *Id.* ¶54 (JA 257). On the basis of that prediction, which is "entitled to substantial deference," *Time Warner Telecom*, 507 F.3d at 221, the Commission reasonably determined that "the more case-specific nature of the review" under its new rule would "not be unduly burdensome for the industry." *2008 Order* ¶54 (JA 257).

D. The Commission Reasonably Established A Positive Waiver Presumption For The Top 20 Markets.

1. The Line Between The Top 20 And Other Markets Is Reasonable. Tribune and Media General challenge the new newspaper/broadcast rule's distinction between the top 20 markets (where a positive presumption generally applies) and all other markets (where a negative presumption generally applies). Tribune Br. 41-42; Media General Br. 34-38. This challenge faces a very high hurdle. "Deference to the Commission's judgment is highest when assessing the rationality of the agency's line-drawing endeavors." *Prometheus*, 373 F.3d at 410-11. Courts are "generally unwilling" to disturb the FCC's line-drawing "unless a petitioner can demonstrate that lines drawn are patently unreasonable, having no relationship to the underlying regulatory problem." *Covad*, 450 F.3d at 541 (internal quotations omitted). Petitioners have made no such showing here.

Contrary to Media General's contention (Br. 35), record evidence documented "notable differences between the top 20 markets and all other [markets]." *2008 Order* ¶56 (JA 257). For example, the Commission found that 18 of the top 20 markets – but "none of the [markets] ranked 21 through 25" – have "at least 10 independently owned television stations." *Ibid.* (JA 258). "Additionally, while [17] of the top 20 [markets] have at least two newspapers with a circulation of at least 5 percent" of the market's households, "four of the five [markets] ranked 21 through 25 have only one such newspaper." *Ibid.* Industry data further showed that the top 20 markets, on average, have significantly more independently owned television stations, radio stations, and major newspapers than less populous markets do. *Ibid.* On the basis of this evidence, the Commission concluded that newspaper/broadcast combinations "generally raise fewer diversity concerns" in the top 20 markets because those markets "have more media outlets." *Id.* ¶55 (JA 257).[15]

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[15] Media General wrongly asserts (Br. 38) that the Commission "drew the line at the top-20 markets based" solely "on the number of television broadcast stations" in those markets, "without regard to the presence of any other type of media outlet." This claim rests entirely on congressional testimony that the FCC's then-Chairman gave *before* the Commission adopted the *2008 Order*. Notwithstanding the former Chairman's antecedent statements, FCC orders, "like judicial opinions, speak for themselves." *PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1001 (D.C. Cir. 1999) (internal quotations omitted). The Commission plainly stated in the *2008 Order* that it treated the 20 largest markets differently from the rest because those markets generally have more media outlets – not just television stations, but radio stations and newspapers as well. *2008 Order* ¶¶55-56 (JA 257-58).

Tribune contends that the positive presumption should have been extended to markets 21 through 50 because "combinations in these markets could also leave at least eight independently owned 'major media voices.'" Tribune Br. 41-42. But in defining the scope of the positive presumption, the Commission had to draw the line somewhere. "The relevant question" for the Court is whether the FCC's line-drawing falls "within a zone of reasonableness, not whether" the line drawn by the agency is "precisely right." *WorldCom, Inc. v. FCC*, 238 F.3d 449, 462 (D.C. Cir. 2001) (internal quotations omitted).

Judged by this deferential standard, the Commission's decision to limit the positive presumption to the top 20 markets should be upheld. Unlike markets 21 through 30, which have an average of only 9.5 major media voices (full power television stations and major daily newspapers), "the top 20 markets, on average, have 15.5 major voices." *2008 Order* ¶56 (JA 258). Moreover, all of the top 20 markets "have at least eight television stations and one major newspaper." *Id.* ¶60 (JA 261). The same cannot be said for all smaller markets, which average less than 10 major media voices. *Id.* ¶56 (JA 258). As for "total voices" (independently owned television stations, radio stations, and newspapers), the 20 largest markets average 87.8, compared to 65 on average for the next 10 markets. *Ibid.* In short, because "the top 20 [markets] share a robustness in media and outlet diversity that is not matched in smaller markets," *id.* ¶63 (JA 263), the Commission had good reason to limit the new rule's positive presumption to the top 20 markets.[16]

[16] Media General contends that the "top 20" presumption is inconsistent with the Commission's statement in 1999 that "a market-size restriction" on radio/television

Contrary to NAA's assertions (Br. 41-43), the *2008 Order* is entirely consistent with this Court's directives on remand. According to NAA (Br. 41), the agency was required to "use the 2003 cross-media limits as a baseline" and focus on addressing the "three discrete flaws" that the Court found in those limits. The Court's remand, however, directed the Commission on remand "to justify *or modify* its approach to setting numerical limits." *Prometheus*, 373 F.3d at 435 (emphasis added). The Commission permissibly responded to the remand decision by modifying its approach to setting limits on cross-ownership.

NAA argues that the FCC failed to comply with Section 202(h) because it "retained" an inflexible cross-ownership ban (Br. 26), or in the alternative, did not modify the 1975 ban in "any meaningful sense" (Br. 28), after finding that such a rigid ban no longer served the public interest. This argument ignores the important ways in which the 2008 rule eased the 1975 rule's broad prohibition of newspaper/broadcast combinations. During the more than three decades that the old

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cross-ownership was "unnecessary for purposes of competition and diversity as long as there are a minimum number of independent sources of news and information available to listeners." Media General Br. 35 (quoting *Local TV Ownership Order*, 14 FCC Rcd at 12949 ¶107) . That statement concerned the bright-line rule governing radio/television cross-ownership. When the Commission made that statement, it was not contemplating the sort of rule at issue here: a rule creating a case-by-case review process that would be guided by presumptions. For this new type of rule, it made sense for the Commission to base its presumptions on a market's rank – a statistic that is clearly defined and readily ascertainable – rather than the number of independent news sources in a market – a number that is not always self-evident and may be the subject of controversy. The Commission adopted easily identifiable triggers for its presumptions so that the rule as a whole would continue to "provide adequate predictability for the industry." *2008 Order* ¶54 (JA 257).

rule was in effect, the Commission seldom granted permanent waivers. By contrast, the new rule creates "a presumption that generally will permit certain newspaper/broadcast station combinations in the largest 20 markets." *2008 Order* ¶20 (JA 238). Whereas the old rule placed a heavy burden of proof on parties seeking approval of newspaper/broadcast combinations, the new rule provides that parties objecting to a proposed combination in one of the top 20 markets, where a positive presumption applies, "will have a high hurdle to persuade the Commission that the transaction should not be approved." *Id.* ¶68 (JA 265). In light of this basic change to the Commission's regulatory framework, NAA cannot seriously claim that the Commission left its 1975 cross-ownership rule unchanged.

Tribune complains that the FCC's new rule unjustifiably deviated from the agency's previous analysis of cross-ownership regulation under Section 202(h). Tribune Br. 24-25. When the Commission conducted its Section 202(h) review in 2003, it "eliminated any newspaper-broadcast cross-ownership restrictions in media markets that had nine or more television stations." Tribune Br. 24; *see 2003 Order*, 18 FCC Rcd at 13804 ¶473 (JA 1134). Tribune contends that the Commission failed to explain why it "reversed course" from the *2003 Order* "and reinstated ownership restrictions in the largest cities." Tribune Br. 25. Similarly, NAA and Media General assert that the Commission offered no justification for the new rule's "significant retrenchment from the *2003 Order*" (NAA Br. 42) and its creation of "a *much more restrictive* regime than the one the *2003 Order* contemplated" (Media General Br. 21).

All of these arguments ignore the effect of this Court's *Prometheus* remand, which raised fundamental questions about the lines drawn by the 2003 cross-ownership rule. For example, the Commission's decision to impose no cross-media restrictions in markets with nine or more television stations rested in large part on an analysis of those markets under the Diversity Index – the methodology that this Court criticized and remanded in *Prometheus*. *See 2003 Order*, 18 FCC Rcd at 13804-06 ¶¶472-479 (JA 1134-36). On remand, the Commission determined that it could not justify any of the 2003 limits or the flawed methodology on which they were based. *2008 Order* ¶17 (JA 237). Accordingly, the agency decided to take a more "modest step in loosening the complete ban on cross-ownership." *Id.* ¶13 (JA 234).

2. The "Top Four" Prohibition Is Warranted. The Commission reasonably refused to apply a positive presumption to any newspaper/television combination involving a "top four" station. *2008 Order* ¶61 (JA 261). It explained that such combinations "are likely to cause a greater harm to diversity in a market" because "a daily newspaper and the top four [television] stations" are "the most influential providers of local news in their markets." *Ibid.* Because the Commission expressly justified its "top four" restriction on newspaper/television combinations on diversity grounds (that is, promoting a multiplicity of viewpoints), Media General is wrong when it claims (Br. 38-39) that the agency irrationally based the restriction on a competition rationale.

Tribune (Br. 46) acknowledges the FCC's concerns about diversity, but asserts that they cannot justify the "top four" prohibition because "the record evidence does not support a viewpoint diversity rationale" for regulating newspaper/broadcast cross-ownership. To the contrary, as we explained in Part II.B. above, the Commission found substantial evidence that cross-ownership limits remained necessary to ensure diversity.

3. The Rule's Definition of Major Media Voices Is Reasonable. For purposes of the newspaper/broadcast cross-ownership rule, the FCC defines "major media voices" as "full-power commercial and noncommercial television stations and major newspapers" (*i.e.*, newspapers that are published at least four days a week and have a circulation exceeding 5 percent of the market's households). *See 2008 Order* ¶57 & n.183 (JA 258). By contrast, the radio/television cross-ownership rule defines "major media voices" to include radio stations and cable systems as well as television stations and newspapers. *See 2008 Order* n.259 (JA 273). Media General and Tribune contend that it was arbitrary for the Commission to adopt different definitions of "major media voices" for different rules. Media General Br. 39; Tribune Br. 43-44. But the Commission cogently explained why it adopted a narrower definition for purposes of the newspaper/broadcast rule.

The Commission reasoned that because newspaper/television combinations "involve the two most important types of sources for news and information," the "voices test applied to such combinations" should include only "*major* voices in order to ensure that diversity in the market is safeguarded." *2008 Order* n.259 (JA 273) (emphasis added). In this context, therefore, the Commission chose to count "as major media voices only those outlets that consumers most rely on as sources of local news and information": full-power television stations and major newspapers. *Id.* ¶57 (JA 259). This "cautious approach" was designed to "ensure" that the Commission would not erroneously "presume that sufficient diversity of major local news sources will remain in a top 20 market" after a newspaper/television merger "if such a presumption is not warranted." *Ibid.*

The Commission counts more media outlets as "voices" under the radio/ television cross-ownership rule. Because the combinations regulated by that rule include radio stations, the rule sensibly adds radio stations to the media "voices" that would remain post-merger. *2008 Order* n.259 (JA 273). More generally, because "radio is a significantly less important source of news and information than newspapers or television," the radio/television rule includes in its "voice" count "additional sources of viewpoint diversity that are less significant than newspapers and television stations." *Ibid.*

Although the newspaper/broadcast rule counts only "major" newspapers (those with circulation rates exceeding 5 percent) as "major media voices," the rule's restrictions apply to combinations involving any daily newspaper. Tribune argues that it is arbitrary for the rule to prohibit combinations between broadcast stations and "non-major" newspapers because such combinations "would have no effect on the number of 'major media voices' in the market." Tribune Br. 45; *see also id.* at 46-47 (arguing that the FCC's treatment of major and non-major newspapers is "internally contradictory"). This argument wrongly assumes that small daily newspapers have no real impact on viewpoint diversity.

The Commission did not include low-circulation newspapers in its count of "major media voices" because, as part of its cautious approach to relaxing the newspaper/broadcast rule, it counted "only those outlets that consumers rely upon *most* as sources of local news and information." *Order* n.183 (JA 258) (emphasis added). Nonetheless, the Commission recognized that even less-read daily newspapers rank among "the most influential providers of local news in their markets." *Id.* ¶61 (JA 261). For that reason, the new rule provides for case-by-case review of all proposed combinations between broadcast stations and daily newspapers. The Commission has made clear, however, that "combinations involving non-major newspapers … will not face as high a hurdle" in obtaining FCC approval "as those involving major newspapers" because smaller newspapers are less influential than major newspapers. *Id.* n.220 (JA 265).

The Commission similarly declared that, compared to newspaper/television mergers, "proposed newspaper/radio combinations will not face as high a hurdle" in winning FCC authorization because "radio is generally a less influential voice than television." *2008 Order* n.220 (JA 265); *see also id.* ¶73 (JA 268). In addition, unlike newspaper/television combinations, newspaper/radio transactions are not subject to a "top four" prohibition or a "major media voices" test. A positive presumption applies to *all* proposed newspaper/radio combinations in the top 20 markets. *2008 Order* ¶53 (JA 256). Thus, there is no basis for NAA's claim (Br. 55) that the new rule "subjects newspaper/radio combinations to the very same restrictions as newspaper/television combinations."

Tribune and NAA assert that the retention of *any* limits on newspaper/radio cross-ownership is unjustified because radio stations are not considered "major media voices" for purposes of the newspaper/television cross-ownership rule and thus cannot be considered significant outlets even in the context of radio transactions. Tribune Br. 45; NAA Br. 55-57. The Commission disagreed. While it recognized that "radio stations generally have less of an impact on local diversity than television stations," the Commission could not ignore the possibility that in a specific local market, the "combination of a daily newspaper with one or more radio stations may have significant negative implications for the range of viewpoints available." *2008 Order* n.206 (JA 262). The Commission was especially concerned about small and medium-sized markets, "where such combinations pose a greater risk to viewpoint diversity." *Ibid.* It reasonably concluded that case-by-case review was necessary to provide assurance that newspaper/radio combinations would not harm diversity in any market.

4. The Local News and Four Factor Tests Provide Appropriate Guides For Commission Discretion. Under the new rule, the Commission "will reverse the negative presumption" that applies to markets below the top 20 if a proposed combination "initiates local news programming of at least seven hours per week on a broadcast outlet that otherwise was not offering local newscasts prior to the combined operations." *2008 Order* ¶67 (JA 265). In addition, in evaluating whether a particular newspaper/broadcast combination should be permitted under the new rule, the Commission will consider four factors: (1) whether the proposed merger will "increase the amount of local news disseminated through" the combining media outlets; (2) whether each of the combining media outlets will continue to "exercise its own independent news judgment"; (3) the "level of concentration" in the market; and (4) the "financial condition" of the newspaper or broadcast station (and if either is in "financial distress," the proposed owner's "commitment to invest significantly in newsroom operations"). *Id.* ¶13 (JA 235).

a. The Local News Test. The Citizen Petitioners complain that the local news test for reversing the negative presumption is too ambiguous because "the term 'local news' is not defined." Citizens Br. 32. But the Commission *did* define the term. It declared, consistent with the public interest, that "'local news' includes traditional newscasts as well as programming that addresses issues of local political interest or issues of public importance in the market." *2008 Order* ¶70 (JA 266). This definition ensures that the public will receive some material benefit from a newspaper/broadcast combination that produces seven or more hours of local news per week on a broadcast station that previously offered none.

The Citizen Petitioners claim that it is "unclear" how "the Commission will monitor combinations to see if they live up to their commitments" under the local news test. Citizens Br. 32. The *2008 Order* removes any doubt. It requires applicants whose station licenses "are approved as a result" of the local news test "to report to the Commission annually regarding how they have followed through on their commitment to initiate at least seven hours a week of local news." *2008 Order* ¶67 (JA 265).

b. The Four-Factor Test. The Citizen Petitioners broadly assert that the four-factor test for evaluating waiver requests "is so vague and full of exceptions that it undermines rather than serves" the FCC's goal of protecting diversity. Citizens Br. 30. But they fail to identify any feature of the test that is inconsistent with the rule's purpose, and each of the factors has long been a relevant aspect of the Commission's public interest inquiry. *See 1975 Order*, 50 F.C.C.2d at 1085 ¶119; *NBC*, 319 U.S. at 203 (noting the importance of local public affairs coverage in the FCC's public interest analysis).

The Citizen Petitioners contend (Br. 32) that the *2008 Order* provided no means for the Commission to assess whether a waiver recipient has satisfied its commitments. As this Court has noted, however, a licensee's compliance with its commitments can be "easily monitored by the Commission" through the license renewal process. *New Jersey Coalition for Fair Broadcasting v. FCC*, 574 F.2d 1119, 1127 (3d Cir. 1978).

The Citizen Petitioners complain that the *2008 Order* created "no enforcement mechanism" to deal with waiver recipients who fail to fulfill their commitments. Citizens Br. 32. No new mechanisms are required, because the federal government already has a wide array of tools at its disposal to ensure that broadcast licensees make good on their promises. Licensees that make false or misleading statements to the FCC are subject to substantial monetary forfeitures under 47 U.S.C. §503. *See, e.g., Citicasters Licenses, L.P.*, 22 FCC Rcd 19324, 19337-39 ¶¶35-44 (Med. Bur. 2007). In particularly serious cases, a licensee's misrepresentations to the FCC can result in license revocation or denial of license renewal. *See* 47 U.S.C. §312(a); *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946); *Contemporary Media, Inc. v. FCC*, 214 F.3d 187 (D.C. Cir. 2000). In addition, willful false statements to a government agency are punishable by fine or imprisonment under 18 U.S.C. §1001. These harsh penalties provide a powerful incentive for FCC licensees to fulfill any commitments they make to the Commission.[17]

While the Citizen Petitioners complain that the four-factor test is too lenient, Tribune and Cox assert that the test is overly intrusive. Tribune Br. 33-40; Cox Br. 33-34. Insofar as Tribune and Cox contend that the four-factor test amounts to content-based regulation, they are essentially challenging the constitutionality of the new rule. As we explain in Part VIII below, there is no merit to petitioners' assertion that the rule violates the First Amendment.

Tribune also claims (Br. 38-39) that the four-factor test amounts to the unauthorized regulation of newspapers. That is not the case. Instead, the rule regulates broadcast stations, by providing guidance to the agency in assessing

[17] The Citizen Petitioners also claim (Br. 33-36) that the Commission's rules and procedures do not give the public adequate notice of pending newspaper/broadcast waiver requests. They are wrong. "[A]pplications for Commission approval of proposed newspaper/broadcast combinations are subject to the local public notice filing requirements of Section 73.3580 of the Commission's rules." *2008 Order* ¶79 (JA 273). Under this rule, an applicant for a broadcast license must inform the local community of the application by publishing a notice in a local newspaper and broadcasting an announcement. 47 C.F.R. §§73.3580(c)-(d). In addition, "to further ensure adequate local public notice" of waiver applications under the new rule, "the Commission will flag such applications in its public notices as seeking waiver of the newspaper/broadcast cross-ownership rule." *2008 Order* ¶79 (JA 273). Although the Citizen Petitioners contend that this "flagging" procedure is insufficient to "give meaningful notice" to the public (Br. 36), they never raised this objection in the proceeding below, so they cannot make it now. *See* 47 U.S.C. §405(a); *Service Elec. Cable TV v. FCC*, 468 F.2d 674, 676-77 (3d Cir. 1972). Even if this claim had not been waived, it is insubstantial. The Commission's "flagging" procedure, in tandem with the newspaper and broadcast notices required by 47 C.F.R. §73.3580, will provide sufficient public notice of newspaper/broadcast waiver requests.

whether common ownership of a daily newspaper and a broadcast station should be permitted in the public interest. It has no application unless a newspaper seeks to be held in common ownership with a broadcast station, and then only if the two companies serve the same local market.

Tribune complains (Br. 39) that the new rule "will force" applicants "to offer concessions … to gain FCC approval" of newspaper/broadcast combinations. Of course, if an applicant would prefer not to make such concessions, it can simply decide against pursuing common ownership. In any event, there is nothing new or improper about the Commission taking account of commitments from broadcast licensees concerning the licensee's public interest obligations. For example, in the 1970s, this Court held that the Commission adopted "a reasonable plan for improving New Jersey television service" when it "elicited commitments from stations regarding the use of news personnel and equipment which are deliberately planned to focus greater attention to New Jersey affairs." *New Jersey Coalition for Fair Broadcasting*, 574 F.2d at 1126.

E. The Commission Was Justified In Treating Newspaper/ Broadcast Combinations Differently From Other Media Mergers.

The newspaper/broadcast rule places greater restrictions on newspaper/ broadcast cross-ownership than on radio/television cross-ownership. A newspaper owner can own no more than "one commercial AM or FM radio station or one TV broadcast station" in the market where the newspaper is published. *2008 Order* ¶63 (JA 262). By contrast, in certain circumstances, the radio/television cross-ownership rule allows a single entity to own as many as two television stations and six radio stations (or, alternatively, one television station and seven radio stations) in a single market. *Id.* n.259 (JA 273). Tribune and NAA contend that this disparity in the rules is irrational and unjustified. Tribune Br. 42-43; NAA Br. 51-54. This argument is unfounded.

The Commission explained that it "traditionally has been more cautious in allowing newspaper/broadcast combinations than in allowing broadcast-only combinations due to the unique attributes of newspapers." *2008 Order* n.206 (JA 262). Notwithstanding the proliferation of new sources of information in today's evolving media marketplace, the Commission found that newspapers remain "the most organized, systematic gatherers of news and information in their communities." *Id.* ¶35 (JA 246); *see also* CU Comments at 136-47 (JA 4381-92). On the basis of the record here, which reflected the fact that as of 2008 newspapers occupied a particularly prominent place among news media, the Commission was justifiably concerned that the adverse impact of newspaper/broadcast combinations on viewpoint diversity could be especially severe.

The Commission also reasoned that it should "proceed cautiously in relaxing" the newspaper/broadcast cross-ownership rule in light of the rule's "long history." *2008 Order* n.206 (JA 262). While the radio/television cross-ownership rule "has been substantially relaxed over the years," *id.* ¶80 (JA 274), the ban on newspaper/broadcast cross-ownership "remained in effect without modification for over three decades," *id.* ¶13 (JA 234). Against this backdrop, the Commission decided to "take a modest step in loosening the complete ban" on newspaper/broadcast cross-ownership. *Ibid.* It is well settled that the FCC may proceed "incrementally" when it decides to revisit a longstanding rule. *See National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1002 (2005).

NAA complains (Br. 54) that the FCC treats newspapers differently from other media outlets (such as cable operators, satellite television operators, and Internet-based services), which face no restrictions on cross-ownership of broadcast stations. As the Commission explained, however, newspapers are different from these other media. The record showed that consumers "predominantly" get their local news "from daily newspapers and broadcast television." *2008 Order* ¶57 (JA 258). While the Commission acknowledged that "other types of outlets" – including cable networks and the Internet – "contribute to diversity," none of those outlets is nearly as significant a source of local news as newspapers are. *Id.* ¶58 (JA 259-60). For that reason, mergers between broadcast stations and media outlets other than newspapers do not pose the same risk to viewpoint diversity that newspaper/broadcast combinations do.

III. THE COMMISSION'S GRANDFATHERING OF PENDING WAIVER APPLICATIONS WAS REASONABLE.

At the time the Commission was considering revisions to its newspaper/ broadcast cross-ownership rule, several applications for waiver of the old rule were still pending. As part of the *2008 Order*, the Commission granted "a limited number" of these waiver requests "to permit the continuance of existing combinations of a newspaper and a single broadcast station that were formed by acquisitions occurring after the date of the broadcast station's last renewal." *2008 Order* ¶77 (JA 271). Specifically, the Commission granted permanent waivers authorizing

Gannett's combination in Phoenix and Media General's combinations in four other markets. The Commission decided to "grandfather these combinations in the same manner" as it had grandfathered similar combinations in 1975. *Ibid.* Citing a variety of factors – including efficiencies that Gannett's and Media General's combinations had achieved, "the new services" they had "provided to [their] local communities," and "the harms [that would be] associated with required divestitures" – the Commission found that "the public interest would be served" by granting waivers to preserve these particular combinations. *Ibid.*

The Citizen Petitioners challenge these waiver grants on both procedural and substantive grounds. Citizens Br. 37-43. As a threshold matter, the Court should dismiss these claims because they were never presented to the Commission. Under section 405 of the Communications Act, a party may not seek judicial review of a claim upon which the FCC has been given no "opportunity to pass." 47 U.S.C. §405(a); *Service Elec.*, 468 F.2d at 676-77. "[W]hen a petitioner has no reason to raise an argument until the FCC issues an order that makes the issue relevant, the petitioner must file a petition for reconsideration with the Commission before it may seek judicial review." *Qwest Corp. v. FCC,* 482 F.3d 471, 474 (D.C. Cir. 2007) (internal quotations omitted). By failing to present the FCC with an opportunity to address their objections to the waiver grants, the Citizen Petitioners have waived these claims.

Even if it were not barred by section 405, the Citizen Petitioners' challenge properly belongs in the D.C. Circuit. Under the 1975 rule, a newspaper could purchase a broadcast station and hold the commonly owned combination until the end of the broadcast station's license term. *1975 Order*, 50 F.C.C.2d at 1076 n.25. The only relevant effect of the waiver (and the only potential injury to the Citizen Petitioners) is that it permits the grant of related applications for license renewal, which otherwise would be barred by the cross-ownership rule.[18] For the Citizen Petitioners, the grandfathering raises a *licensing* issue. And exclusive jurisdiction to review FCC license renewals and other radio licensing actions is by notice of appeal to the D.C. Circuit. 47 U.S.C. §402(b); *see Folden v. United States*, 379 F.3d 1344, 1356 (Fed. Cir. 2004). The Citizen Petitioners' challenge to the waiver grants therefore can be decided only by the D.C. Circuit on appeal from the Commission's grant of the license renewals. *See North Amer. Catholic Educ. Prog. Found. v. FCC*, 437 F.3d 1206, 1209-10 (D.C. Cir. 2006).

In any event, even if the arguments concerning the waiver grants were not procedurally barred, they lack merit. The Citizen Petitioners argue (Br. 40-41) that the FCC violated the APA by failing to state in its rulemaking notice that it proposed to grant waivers. By its terms, however, the APA's notice requirement applies only to "rule making." *See* 5 U.S.C. §553(b). FCC rulings on party-specific waiver requests (such as the waiver grants challenged here) are adjudications, not rulemakings. *See Tribune Co. v. FCC*, 133 F.3d 61, 68-69 (D.C. Cir. 1998). Adjudications are not subject to the APA's notice requirement. *See MacLean v.*

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[18] Parties filed an application for Commission review of the Media Bureau's grant of Media General's license renewal application. *See* note 19 below. No party challenged the Media Bureau's grant of Gannett's license renewal application.

Department of Homeland Security, 543 F.3d 1145, 1151 (9th Cir. 2008); *R/T 182, LLC v. FAA*, 519 F.3d 307, 310 (6th Cir. 2008).

The Citizen Petitioners complain (Br. 41) that the *2008 Order* failed to address Free Press's objections to Media General's waiver requests. But those objections were not raised in this proceeding. They were presented in the separate proceedings before the agency concerning Media General's license renewal applications. *See* 47 U.S.C. §310(b). Those renewal proceedings remain pending because Free Press and the NAACP have filed an application for Commission review of the Media Bureau's decision to renew Media General's licenses.[19] When the Commission rules on this application for review, it will have an opportunity to address Free Press's arguments in the proceeding concerning Media General's waivers. It is therefore premature for the Citizen Petitioners to claim (Br. 41) that Free Press has been denied its "right to be heard."

The Citizen Petitioners also assert (Br. 41) that the FCC based its decision to grant permanent waivers to Gannett and Media General on "impermissible or irrelevant factors." To the contrary, the considerations that led the Commission to grant those waivers mirrored the concerns that motivated the agency to grandfather certain combinations when it adopted the original cross-ownership rule in 1975.

[19] Application for Review, *Application for Renewal of License WJHL-TV, Johnson City, Tennessee,* File No. BRCT-20050401BYS, *et al.* (filed April 24, 2008).

The Supreme Court upheld the FCC's 1975 grandfathering decision because it reflected "a rational weighing of competing policies." *NCCB*, 436 U.S. at 803.[20]

In the *2008 Order*, just as in 1975, the Commission recognized that divestiture of existing newspaper/broadcast combinations could cause "disruption for the industry and hardship for individual owners." *2008 Order* ¶77 (JA 271) (quoting *1975 Order*, 50 F.C.C.2d at 1078 ¶109). Consequently, in deciding whether to grant waivers to Gannett and Media General, the agency reasonably took into account "the harms … associated with required divestitures." *Ibid.*

As part of its justification for grandfathering combinations in 1975, the Commission found that "stability and continuity of ownership … serve important public purposes," especially in markets where "[t]raditions of service were established and have been continued." *1975 Order*, 50 F.C.C.2d at 1078 ¶109. The same rationale supported the Commission's grandfathering of Gannett's and Media General's combinations in 2008. "All of these combinations were acquired prior to 2001," and they remained intact throughout a "prolonged period of uncertainty surrounding the status of the newspaper/broadcast cross-ownership ban." *2008 Order* ¶77 (JA 271). The *2008 Order* cited record evidence that these particular

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[20] To be sure, the waiver recipients in this case were not in precisely the same posture as the combinations that were grandfathered in 1975. Before 1975, there was no prohibition on cross-ownership. By contrast, when Gannett and Media General formed their combinations, they knew that they could not maintain those arrangements unless the FCC's cross-ownership rule was waived or modified. The Commission determined that notwithstanding this distinction, many of the same factors that supported grandfathering in 1975 also justified the waiver grants in 2008.

combinations had increased the quantity and improved the quality of local news coverage in their markets. *Id.* nn.251-256 (JA 271-72).

The Commission declared in 1975 that "[a]scertaining and endeavoring to serve local needs was the key point" in deciding which combinations to grandfather. *1975 Order*, 50 F.C.C.2d at 1081 ¶114. In upholding the FCC's 1975 grandfathering decision, the Supreme Court held that the Commission could reasonably choose to grandfather some combinations "on the theory that preserving continuity of meritorious service furthers the public interest." *NCCB*, 436 U.S. at 805. These same factors influenced the Commission's 2008 decision to grandfather Gannett's and Media General's combinations. In particular, the Commission noted that these combinations, by achieving "synergies" through integrated news operations, had substantially expanded local news coverage and provided "new services" to their communities. *2008 Order* ¶77 (JA 271).

The Citizen Petitioners do not really dispute any of the FCC's findings supporting the waiver grants. Instead, they contend that the Commission acted improperly in granting these waivers because it applied neither the "waiver standards applicable at the time the license renewals were filed" by Gannett and Media General nor the revised waiver standards prescribed in 2008 by the new cross-ownership rule. Citizens Br. 41-42. The waiver grants in the *2008 Order*, though, applied the public interest inquiry that the Commission first elaborated on in the *1975 Order*. Under that inquiry, "if it could be shown for whatever reason that the purposes of the [cross-ownership] rule would be disserved by divestiture" – that is, if the rule "would be better served by continuation of the current ownership pattern" – a waiver "would be warranted." *1975 Order*, 50 F.C.C.2d at 1085 ¶119. The Commission here reasonably found that the rule's purposes – and the public interest – would be better served by preserving Gannett's and Media General's combinations.

Waiver of a Commission rule has always been "appropriate when particular facts would make strict compliance inconsistent with the public interest." *AT&T Wireless Servs. v. FCC*, 270 F.3d 959, 965 (D.C. Cir. 2001) (internal quotations omitted). Thus, the presumptions established by the *2008 Order* are "rebuttable," and exemptions from the rule can be based on "special circumstances." *2008 Order* n.175 (JA 256). The Commission's finding that requiring divestiture of the specific newspaper/broadcast combinations formed by Gannett and Media General would not serve the public interest made waiver of the cross-ownership rule warranted here.

The Commission, by contrast, declined to rule on any pending waiver requests that involved combinations of "more than one newspaper and/or more than one broadcast station." *2008 Order* ¶78 (JA 272). Cox's waiver requests for the Atlanta and Dayton markets fell into this category. *Id.* n.257 (JA 272). The Commission found it "inappropriate to grant these requests or grandfather these combinations across-the-board" because combinations involving "multiple newspapers and/or multiple broadcast stations … potentially raise heightened diversity concerns" not present with the Gannett and Media General combinations. *Id.* ¶78 (JA 272). The agency decided to examine these waiver requests involving a greater number of outlets "on a case-by-case basis" in future orders, applying the factors enumerated in the new rule. *Ibid.* It directed the affected licensees to address these factors by either amending their pending applications or filing requests for permanent waivers. *Ibid.*

Cox contends that the *2008 Order* improperly required it to file new waiver requests for two of its Atlanta radio stations, WSRV(FM) and WALR-FM. Cox Br. 27-33. Cox cannot raise these arguments here because no party ever presented them to the FCC. *See* 47 U.S.C. §405(a); *Qwest*, 482 F.3d at 474-77; *Service Elec.*, 468 F.2d at 676-77. Moreover, the Commission has not yet acted on Cox's waiver requests and indeed has extended the time for Cox to file modifications.[21] Judicial review of its claims, even if properly before this Court, is therefore premature.[22]

In any event, the claims are wholly without merit. There is no basis for Cox's assertion (Br. 27-31) that the FCC "rejected" Cox's "Longley-Rice" argument regarding WSRV(FM). In its pending license renewal application for that

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[21] Initially, the Commission gave these licensees "90 days after the effective date" of the *2008 Order* to either amend their original applications or file requests for permanent waivers. *2008 Order* ¶78 (JA 272). The licensees have asked that this deadline be postponed until 90 days after the issuance of a final court order on pending legal challenges to the new rule. While the Commission considers that request, the Media Bureau has granted a series of extensions of the filing deadline. The deadline is currently set for October 4, 2010. *See 2006 Quadrennial Regulatory Review*, DA 10-1181 (released June 29, 2010).

[22] Moreover, if Cox should be aggrieved by the Commission's action on its waiver request, its remedy would be to seek review of the Commission's ultimate action on its license renewal application. The exclusive forum for such review is the D. C. Circuit. *See* p. 61 above.

station, Cox had argued that a Longley-Rice study of the station's signal contour demonstrated that Cox's ownership of WSRV(FM) and the *Atlanta Journal-Constitution* did not violate the newspaper/broadcast cross-ownership rule. In the alternative, Cox requested a temporary waiver of the cross-ownership rule. *See* Cox Br. 8-12. As Cox admits (Br. 12), the *2008 Order* "is completely silent on the merits of WSRV(FM)'s Longley-Rice showing," which was appropriate because the *2008 Order* did not address the merits of Cox's waiver request for WSRV.

Nonetheless, Cox maintains (Br. 12) that the *2008 Order* "necessarily reject[ed]" Cox's Longley-Rice argument "by requiring Cox to seek a waiver" of the cross-ownership rule. The order did no such thing. It simply directed Cox and all similarly situated licensees to amend their pending applications – or to file requests for permanent waivers – in order to address the factors that will guide the Commission's waiver analysis under the 2008 rule. *2008 Order* ¶78 (JA 272). Cox may continue to press its argument that it is in compliance with the cross-ownership rule and does not need a waiver in its amended application.

Cox further claims (Br. 31-33) that the *2008 Order* "modified" its license for WALR-FM. Cox received that license in 1997 after the FCC granted Cox a temporary waiver of the newspaper/broadcast cross-ownership rule. *See NewCity Communications, Inc.*, 12 FCC Rcd 3929, 3951-53 ¶¶53-57 (1997) (JA 413, 435-37). Cox maintains that the temporary waiver remains in effect, and that the *2008 Order* effectively modified the license for WALR-FM by requiring Cox to "seek a different waiver." Cox Br. 32. Cox is mistaken.

The temporary waiver that Cox received in 1997 expired by its own terms in 2008. It was scheduled to terminate after the completion of "the pending radio-newspaper cross-ownership waiver proceeding, *Notice of Inquiry* in MM Docket No. 96-197." *NewCity Communications*, 12 FCC Rcd at 3958 ¶72 (JA 442). In 2001, the FCC replaced MM Docket No. 96-197 with MM Docket No. 01-235. *Cross-Ownership of Broadcast Stations and Newspapers*, 16 FCC Rcd 17283 (2001). Then in the *2008 Order*, the Commission terminated MM Docket No. 01-235. *See 2008 Order* ¶161 (JA 306). Once the newspaper/broadcast cross-ownership proceeding was completed, the temporary waiver permitting Cox's ownership of WALR-FM was no longer in effect, and Cox had to file a new "waiver request to permit the continued common ownership" of WALR-FM and the *Atlanta Journal-Constitution*. *NewCity Communications*, 12 FCC Rcd at 3958 ¶72 (JA 442).

IV. THE COMMISSION REASONABLY DECIDED TO RETAIN THE RADIO/TELEVISION CROSS-OWNERSHIP RULE.

The FCC's restrictions on radio/television cross-ownership have "been substantially relaxed over the years." *2008 Order* ¶80 (JA 274). The current radio/television cross-ownership rule was adopted in 1999. *Local TV Ownership Order*, 14 FCC Rcd at 12947 ¶100. It provides that, to the extent the FCC's local television and local radio ownership rules permit ownership of multiple stations, a party may own: (1) up to two television stations and up to six radio stations (or, alternatively, one television station and seven radio stations) "in a market where at least 20 independently owned media 'voices' would remain post-merger"; (2) up to two television stations and up to four radio stations "in markets where, post-merger, at least 10 independently owned media voices would remain"; or (3) two television stations and one radio station in any market, "regardless of the number of voices remaining" after the merger. *2008 Order* n.259 (JA 273).

In the *2003 Order*, the FCC determined that this rule was no longer necessary to promote viewpoint diversity in light of the agency's adoption at that time of new cross-media limits and modified local ownership rules. *2003 Order*, 18 FCC Rcd at 13774-75 ¶¶389-390 (JA 1104-05). Because this Court stayed the 2003 rules, however, the old cross-ownership rule remained in effect. After the Court invalidated the cross-media limits in 2004, thereby removing the predicate for eliminating the radio/television cross-ownership rule, the Commission decided to retain the radio/television cross-ownership rule. *2008 Order* ¶¶80-86 (JA 273-76).

In 2003, the Commission had determined that the *combination* of the local ownership rules *and* the cross-media limits would provide sufficient protection of viewpoint diversity to render the existing cross-ownership rule unnecessary. *2003 Order*, 18 FCC Rcd at 13774-75 ¶¶389-390 (JA 1104-05). Once the Court invalidated the cross-media limits, the Commission found it necessary to "adopt diversity protection provisions to act in their place." *2008 Order* ¶82 (JA 274).

NAB argues (Br. 60) that "the Commission failed to articulate why the local radio and local television ownership rules are [alone] insufficient" to protect diversity. NAB and CBS also contend that the agency provided no "affirmative justification" (NAB Br. 61) or "tenable explanation" (CBS Br. 21) for retaining the radio/television cross-ownership rule. To the contrary, the Commission specifically explained why radio/television cross-ownership limits are necessary. Because the public relies on "both radio and television for news and information," those two media "compete in the same diversity market" and "serve as substitutes at least to some degree for diversity purposes." *2008 Order* ¶84 (JA 275-76) (internal quotations omitted). Consequently, radio/television combinations have the potential to reduce viewpoint diversity in some markets. The local television and radio ownership rules do not restrict such combinations. By their terms, those rules only limit combinations of stations "providing the same service" (either radio or television). *Ibid.* (JA 275). Thus, "there remains a need to retain a [radio/television] cross-ownership rule to ensure that viewpoint diversity is adequately protected." *Ibid.* (JA 276) (internal quotations omitted).

NAB asserts (Br. 60) that record evidence in this proceeding "showed that diversity of ownership does *not* necessarily promote diversity of viewpoints and may even have the opposite effect." True enough. But the record contained evidence that commonly owned media outlets can also share (and promote) the same viewpoint. *See 2008 Order* ¶49 & n.169 (JA 255); CU Comments at 136-47 (JA 4381-92); *2003 Order*, 18 FCC Rcd at 13687 ¶174 (JA 1017). *See also* Section II.B., *supra*. In light of that evidence, it was reasonable for the Commission to maintain its longstanding, judicially endorsed position that "diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints." *NCCB*, 436 U.S. at 796. In light of that possibility, the Commission could not conclude that it would be in the "public interest" under §202(h) to eliminate the radio/television cross-ownership rule.

CBS argues (Br. 23-27) that the Commission's decision to retain the radio/ television cross-ownership rule cannot be squared with record evidence that the media market is growing more diverse. While the Commission acknowledged the evidence that new media (such as the Internet) "contribute to diversity," *2008 Order* ¶58 (JA 259), the record also contained substantial evidence that "traditional media" – broadcast television, newspapers, and broadcast radio – remain "the most frequently used and most important sources of local and national news," *id.* ¶57 (JA 258-59). Although CBS claims (Br. 21) that a "revolution" has transpired "in the media marketplace," the record here showed that one thing remained unchanged as of 2008: New media such as "the Internet and cable" still did "not outrank newspapers" or the broadcast media as sources of local news. *See Prometheus*, 373 F.3d at 400. The record reflected that broadcast television, newspapers, and broadcast radio remained the top three sources of local news for American consumers. *See 2008 Order* ¶57 & n.279 (JA 258-59, 276). Because these media continued to be the most prominent providers of local news, any combinations involving these media create a greater risk that viewpoint diversity could be harmed. In view of that risk, the Commission was justified in retaining cross-ownership restrictions on both newspaper/broadcast and radio/television combinations.

The Commission's decision to treat broadcasters differently from cable operators, which face no cross-ownership restrictions, is not "arbitrary," as NAB claims (Br. 61-62). In the Commission's judgment, mergers involving cable systems do not pose a serious threat to viewpoint diversity because cable television is not nearly as significant a source of local news as the broadcast media. *See 2008 Order* ¶58 (JA 260); *see also Prometheus*, 373 F.3d at 405 (finding "serious doubts as to the extent that cable provided independent local news – the Commission's recognized indicator of viewpoint diversity in local markets").

CBS erroneously claims (Br. 22) that the radio/television cross-ownership rule is "much more restrictive" than the cable/broadcast cross-ownership rule that the D.C. Circuit vacated as inadequately explained in *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1049-53 (D.C. Cir. 2002). The opposite is true. The cable/broadcast rule had "the effect of prohibiting common ownership of a broadcast station and a cable television system in the same local market." *Id.* at 1035. By contrast, the radio/television rule *permits* (limited) common ownership of a radio station and a television station in the same market. *See 2008 Order* n.259 (JA 273).

Given the fundamental differences between the cable/broadcast and radio/television rules, CBS's attempt to compare this case to *Fox* must fail. CBS Br. 21-22. When the D.C. Circuit vacated the cable/broadcast rule in *Fox*, it concluded that the rule's "across-the-board prohibition of cross-ownership" was hard to reconcile with the Commission's finding in the *Local TV Ownership Order* that "common ownership of two broadcast stations in the same local market need not unduly compromise diversity." *Fox*, 280 F.3d at 1052. No such conflict exists here. Consistent with the FCC's view that not all broadcast combinations unduly harm diversity, the radio/television rule permits, but limits, common ownership of radio and television stations in the same market.

CBS contends (Br. 22) that the radio/television cross-ownership rule "fails to meaningfully differentiate among markets." The rule's restrictions vary depending on whether the proposed merger will leave the affected market with at least 20, at least 10, or fewer than 10 independent "voices" (*i.e.*, broadcast television and radio stations, daily newspapers, and cable systems). *2008 Order* n.259 (JA 273). Although CBS says (Br. 23) that "the vast majority of markets have more than twenty independent voices," the network never explains why applying the least strict radio/television cross-ownership limitation would be unreasonable. In any event, over time, consolidation of media outlets could cause more markets to fall below the 20-voice threshold.

Lastly, CBS objects to the treatment of radio stations under the radio/television cross-ownership rule. CBS Br. 27-29. "In markets where parties may own a combination of two television stations and six radio stations, the rule allows a party alternatively to own one television station and seven radio stations." *2008 Order* n.259 (JA 273). CBS contends that this sort of "one-for-one substitution of television stations for radio stations" is inconsistent with the FCC's determination that radio stations have "a lesser impact on diversity" than television stations do. CBS Br. 28. CBS also complains that the rule allows "combinations that include the maximum number of television stations [*i.e.*, two] allowed under the local television ownership rule, but none involving the maximum number of radio stations [*i.e.*, eight] allowed under the local radio ownership rule." *Ibid.*

CBS simply takes issue with the Commission's decision (unchallenged since adopted in 1999) to limit radio/television combinations to "a total of eight outlets" per market. *Local TV Ownership Order*, 14 FCC Rcd at 12950 ¶108. That decision is not rendered unreasonable simply because it allows cross-ownership of up to two television stations (the maximum permitted by the local television rule), but only up to seven (rather than eight) radio stations (one less than the maximum permitted by the local radio rule). The Commission's focus on the bottom line (eight outlets in total) was in keeping with its concern with the overall impact on the number of commonly-owned outlets within a local market.

It was also reasonable for the Commission to conclude that, "in markets where there is sufficient competition and diversity to justify combinations involving two *television* stations and six radio stations, broadcasters should have the flexibility to purchase an additional *radio* station instead of a second television station," since the latter would form a combination that would be if anything less worrisome from the standpoint of diversity. *Local TV Ownership Order*, 14 FCC Rcd at 12950 ¶108. Because the lines drawn by the Commission reflected reasonable policy judgments, they should be upheld. *See WorldCom*, 238 F.3d at 462 ("the Commission has wide discretion to determine where to draw administrative lines") (quoting *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000)).

V. THE COMMISSION REASONABLY DECIDED TO RETAIN THE LOCAL TELEVISION OWNERSHIP RULE.

A. The Commission Adequately Explained Its Change Of Policy From The 2003 Order And Its Decision To Retain The Existing Rule.

In the *2003 Order*, the Commission relaxed the local television ownership rule to permit an entity to own up to two television stations in markets with 17 or fewer television stations and up to three television stations in markets with 18 or more while retaining the prohibition on combinations where one or more of the stations was ranked among the top four in the market. The Court in *Prometheus* upheld many of the Commission's determinations with respect to this rule, 373 F.3d at 414-18, but remanded the revised numerical limits for the Commission "to support and harmonize its rationale" after finding that the limits were based on an assumption regarding equal market shares that was unsupported by the record and could allow levels of concentration that exceeded the Commission's own benchmark for competition, *id*. at 419-20.

In the *2008 Order*, the Commission determined that there remained a need for a local television ownership rule because such a rule "promotes competition for viewers and advertisers within local television markets." *2008 Order* ¶97 (JA 280). As the Commission explained, "[i]n the video programming market, competitors profit by attracting new audiences and by attracting existing audiences away from their competitors," and thus "[c]ompetition . . . provides an incentive to television stations to invest in better programming and to provide programming that is preferred by viewers." *Ibid.* Competition among local television stations also “preserve[s] competition for advertising by local businesses that want to advertise their products on television,” thereby benefiting consumers through “[l]ower advertising costs.” *Ibid*.

But the Commission in the *2008 Order* decided against re-adopting the local television ownership limits it had set forth in the *2003 Order* (and this Court remanded). Instead, the agency chose to adhere to the pre-existing limits, adopted in 1999, that it had unsuccessfully attempted to revise. As the Commission candidly acknowledged, its decision to continue in effect the 1999 local television ownership rule reversed its 2003 determination that the rule should have been loosened. *2008 Order* ¶101 (JA 282). The Commission explained that it was reversing its 2003 “determination because we find that eliminating the [1999 version of the] rule could harm competition among broadcast television stations in local markets.” *Ibid.* In doing so, the Commission echoed the concerns of commenter AFL-CIO that failing to retain the 1999 rule would “trigger multiple station mergers in local markets,” and “result[] in a loss of newscasts and shared news product.” *Ibid*.

Contrary to petitioners’ contention (*see, e.g.,* Sinclair Br. 28-29), the Commission did not ignore the changes that had occurred in local television and video markets between 1999 and 2008. *See, e.g.*, *2008 Order* ¶¶6-8 (JA 230-32) (acknowledging and describing those changes). The agency simply concluded that, despite those developments, the rule continued to be necessary in the public interest in 2008 “in order to preserve adequate levels of competition within local television markets.” *Id.* ¶87 (JA 276).

The Commission's relaxation of the rule in 2003 was based on a determination that the then-current rule was "not the best means to promote our diversity goal" because the rule was "premised on the notion that only local TV stations contribute to viewpoint diversity" when, in fact, "media other than television broadcast stations contribute to viewpoint diversity in local markets." *2003 Order*, 18 FCC Rcd at 13668 ¶133 (JA 998). In the *2008 Order*, the Commission agreed that the local television ownership rule "is no longer necessary to foster *diversity* because there are other outlets for diversity of viewpoints in local markets, and a single-service ownership restriction is not necessary to foster diversity." *2008 Order* ¶100 (JA 281) (emphasis added).

The Commission explained, however, that the rule continued to be necessary to promote *competition* in local markets and that the existence of other media, including cable, satellite, and the Internet, did not sufficiently address this concern. *See 2008 Order* ¶¶97-102 (JA 280-83). For instance, the Commission stated, it could not "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*. ¶97 (JA 280). By contrast, "[l]ocal broadcast television stations have incentives to respond to conditions in local markets, and those incentives may be diminished by mergers between stations that reduce competition to anticompetitive levels." *Ibid*.

NAB suggests that the Commission has "redefined 'competition' to *include* diversity (and localism)." Br. 27. NAB ignores the distinction between the benefits of competition and the benefits of diversity. As the Commission explained, the "rule is no longer necessary to foster diversity because there are other outlets for diversity of viewpoint in local markets." *2008 Order* ¶100 (JA 281). However, the Commission anticipated, a benefit of retaining the rule to preserve competition among local television stations likely would be "higher quality programming provided to viewers," and "local television stations, spurred by competition, will provide dynamic and vibrant alternative fare, including local news and public affairs programming." *Id.* ¶¶97, 99 (JA 280-81). The Commission's reliance on these benefits of competition was rational.[23]

CBS complains that the Commission did not even "address the argument that triopolies" (ownership of three television stations in a local market) "should be allowed, much less explain why they should be prohibited in *all* markets." CBS Br. 30. But the Commission did explain why it believed the public interest was served by continuing at this time to apply the existing rule rather than the revision that had been remanded by this Court in *Prometheus*. *2008 Order* ¶101 (JA 282). If the Commission's explanation for retaining the existing limits as in the public interest to protect competition in local markets is reasonable, it need not address the advantages or disadvantages of some different limitation. *Association of Public-Safety*

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[23] NAB also claims that because the Commission's focus with respect to the local television ownership rule now is primarily on competition, it was obliged to explain why antitrust enforcement by the Department of Justice and the Federal Trade Commission is not adequate. Br. 50. However, the Court recognized in *Prometheus* that the public interest goal of preserving competition among local television stations has a different purpose from the goals of the antitrust authorities. 373 F.3d at 414. The Commission's decision to focus on competition as the primary goal of the local television ownership rule within the public interest framework should not affect that conclusion.

Communications Officials-Int'l, Inc. v. FCC, 76 F.3d 395, 400 (D.C. Cir. 1996) ("*APCO*") ("[T]he fact that there are other solutions to a problem is irrelevant provided that the option selected [by the FCC] is not irrational.").[24]

B. The Commission Adequately Explained Its Decision To Continue To Apply The "Top Four/Eight Voices" Test.

The Commission also retained the exception permitting an entity to own two television stations in the same DMA provided that: (1) specified signal contours of the two stations do not overlap; or (2) at least one of the stations is not ranked among the top four in audience share; and (3) at least eight voices, *i.e.*, at least eight independently owned, full-power commercial or non-commercial broadcast television stations, remain after the combination. *2008 Order* ¶87 (JA 276). Sinclair claims (Br. 34) that the Commission nowhere "articulate[s] why 'eight' television voices are necessary to promote competition." That is incorrect. The Commission explained that the "eight voices" test will effectively ensure that local markets include stations affiliated with each of the four major networks (*i.e.*, ABC, NBC, CBS, and Fox), plus at least an equal number of independently owned-and-operated broadcast television stations that are not affiliated with a major network. *Id.* ¶99 (JA 281). The Commission found that preserving independent ownership

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[24] Essentially the same response answers NAB's complaint (Br. 41) that the Commission failed to address the effect of the rule on smaller markets. The Commission's explanation for retaining the top four restriction and the eight voices test applies as well to smaller markets. Nothing in NAB's argument points to anything that would have compelled the Commission to explain why it did not provide an exception to the local television ownership rule for smaller markets. This is especially true since the Commission's focus on competition goals would be heightened in smaller markets with fewer station competitors.

in local markets 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 ensure that local television stations will be spurred by competition to provide higher quality programming, "including local news and public affairs programming." *Ibid.* "Recognizing the vital competitive role played in local television markets by stations that are not owned by or affiliated with the major networks' stations," the Commission believed it "important that there be a sufficient number of such stations that are truly independent of the major network stations in each market and that will therefore vigorously compete with each of the major network stations for viewers." *Ibid.*

The Commission also directly responded to the D.C. Circuit's remand in *Sinclair*, which asked the Commission to explain why it excluded non-broadcast media from its eight voices test even though such media were included for purposes of the radio/television cross-ownership rule. 284 F.3d at 165. The agency explained that it was "appropriate" to limit its voices test to television stations because of its determination that the rule remains necessary to preserve competition among broadcast television stations. *2008 Order* ¶100 (JA 282). The Commission explained:

> The local television ownership rule counts only broadcast television stations as voices because the local television ownership rule is designed to preserve competition in the local television market. The radio/television cross-ownership rule, by contrast, is designed to protect viewpoint diversity and thus takes into account a broader range of voices than does the local television rule. Furthermore, we count more voices in the radio/television cross-ownership rule than in the newspaper/broadcast cross-ownership rule because newspapers and

> television station combinations involve the two most important types of sources for news and information.

2008 Order n.259 (JA 273).

The Commission did not find, as NAB claims repeatedly, that "local broadcast television stations compete only with each other." Br. 29. Rather, it concluded that because the purpose of the rule is "primarily to foster competition among local television stations," the agency's "determination regarding the continued need for the rule does not depend on the competitive impact of other video programming outlets." *2008 Order* ¶101 (JA 282). The issue is not whether there was record evidence that other video programming outlets also compete with broadcast televisions stations to some degree. NAB Br. 30-34, Sinclair Br. 31-32. Rather, because the primary policy goal of the rule is to "foster competition among local television stations," it was reasonable for the Commission to focus only on other local broadcast stations in determining what voices to count.

Finally, the Commission adhered to the "top four" exception. As the Commission found, "[p]rohibiting mergers between the top four television stations in a market prevents well-established competitive harms," and "the top four prohibition remains necessary to prevent deleterious levels of concentration." *2008 Order* ¶102 (JA 282-83). The Commission's determination finds support in this Court's decision in *Prometheus*, which found that the top four exception was a reasonable line-drawing decision that was supported by evidence in the record. 373 F.3d at 417-18.

Petitioners cite evidence that they contend demonstrates that the restriction is no longer sustainable. Sinclair Br. 42-48, CBS Br. 39-46, However, as the

Commission explained, the "top four prohibition minimizes the likelihood that the market share of two merged stations will significantly overtake the market share of the largest station in a local market, which … could create welfare harms." *2008 Order* ¶102 (JA 283). The fact that there may be particular circumstances where this may not be true (as petitioners claim) does not substantially undermine the Commission's conclusion that, as a general matter, the rule is necessary to minimize the likelihood that such harms will occur. And the Commission added that "allowing two top four stations to merge would harm competition in the local broadcast television advertising market because the top four networks (whose affiliates tend to be the top four broadcasters in a given market) enjoy a large and growing advantage over other broadcasters with regard to advertising volume and prices." *Ibid.* Again, while this may not be the case in every situation, the fact that it is true in general provides further support for the reasonableness of the Commission's conclusion that the top four exception continued to be necessary because "combinations of top four stations … would be the most deleterious to competition." *Ibid.* (JA 282).

C. The Commission Reasonably Determined Not To Tighten The Local Television Ownership Rule.

The Citizen Petitioners contend that the Commission failed to address the impact of the digital television ("DTV") transition, which they contend justified making the local television rule more restrictive. Citizens Br. 43. They argue that because television broadcasters have the technical capability following the transition to digital broadcasting to provide multiple streams of programming, "digital technology permit[s] broadcasters to generate new revenue without the need to purchase multiple stations in any market." *Id.* at 45 (internal quotations omitted). However, the transition to digital television broadcasting was not completed until June 2009 – more than a year and a half after the Commission adopted the *2008 Order*. *See* "Full-Power TV Broadcasters Go All-Digital," (FCC News, June 13, 2009). At the time the *2008 Order* was adopted, the timing and nature of the transition were uncertain. It was reasonable for the Commission to move cautiously and not rely on an incomplete transition to a new technology as a basis for making the local television ownership rule more restrictive. The Citizen Petitioners, of course, remain free to raise this issue in the now-commenced 2010 quadrennial review proceeding.

VI. THE COMMISSION REASONABLY RETAINED THE LOCAL RADIO OWNERSHIP RULE.

The Commission also decided to maintain its current local radio ownership rule as necessary in the public interest to protect competition in local radio markets. *2008 Order* ¶110 (JA 285). The rule permits a single entity to own, operate or control from five to eight radio stations in a single local market, depending on market size, provided that one entity may not own more than 50 percent of the stations in a single local market. The rule also provides "subcaps" establishing, within the overall limitations, the number of stations that may be owned, operated or controlled in a single (AM or FM) service. *See* 47 C.F.R. §73.3555(a).

In the *2003 Order*, the Commission retained the numerical limits and the AM/FM service caps that Congress had adopted in the 1996 Act. *See 2003 Order*, 18 FCC Rcd at 13712, 13733-34 ¶¶239, 294 (JA 1042, 1063-64). In the *2008 Order*, the Commission largely reaffirmed that conclusion, finding that the rule continues to be necessary "for promoting the public interest as it relates to competition, and that 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 (JA 288).

Moreover, the Commission explained that the current numerical limits "strike the appropriate balance" because "relaxing the rule to permit greater consolidation would be inconsistent with the Commission's public interest objectives of ensuring that the benefits of competition and diversity are realized in local radio markets" and making the "limits more restrictive 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." *Id.* ¶117 (JA 288).

Petitioner Clear Channel challenges the Commission's decision to retain the local radio ownership rule, contending that the Commission failed to adequately explain its decision and that its conclusions lacked support in the record.[25]

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[25] Although petitioner NAB contends in its issues presented that the Commission "acted arbitrarily and capriciously or contrary to law in failing to reform the local radio ownership rule" (Br. 2), its actual argument with respect to this rule is directed to justifying the Commission's decision not to impose "additional restrictions on local radio ownership" (Br. 53-57).

A. The Decision To Retain The Rule Was Adequately Explained And Is Supported In The Record.

The Commission explained the basis for its conclusion that "retaining the numerical limits at the current level is necessary to protect against excessive market concentration." *2008 Order* ¶118 (JA 288). The Commission pointed out that changes in its rules in the early 1990s and the adoption of the 1996 Telecommunications Act had substantially relaxed the limits on both local and national radio ownership. Those changes resulted in significant consolidation at both the national and local level. Specifically, the Commission noted that "[t]he number of commercial radio station owners declined by 39 percent between 1996 and 2007," and that "[a]lthough the average number of commercial owners across all Arbitron radio markets currently is 9.4, the largest commercial firm in each Arbitron Metro market has, on average, 46 percent of the market's total radio advertising revenue, and the largest two firms have 74 percent of the revenue." *Ibid.* (JA 289). Indeed, the Commission observed that in "111 of the 299 Arbitron Metro markets, the top two commercial station owners control at least 80 percent of radio advertising revenue." *Ibid.* Moreover, the Commission stated, "evidence in the record indicates that the increase in concentration in commercial radio markets has resulted in appreciable, albeit small, increases in advertising rates." *Ibid.* (footnotes omitted). The Commission found that this evidence "supports the conclusion that the current numerical limits are not unduly restrictive and that additional consolidation would not serve the Commission's competitive goals." *Ibid.* (JA 289-90).

Clear Channel contends that the Commission "arbitrarily ignored record evidence and relied on irrelevant considerations" in reaching this conclusion. Br. 17. It is wrong on both points. The claim that the Commission ignored record evidence is incorrect because the Commission cited the very study – Media Ownership Study No. 5 (JA 4190) – that Clear Channel claimed it ignores. *See 2008 Order* n.381 (JA 289). That study found, among other things, that with respect to advertising prices, "consolidation in local radio has no statistically significant effect." Study No. 5 at 45 (JA 4235). However, the record also contained a study cited by the Commission finding that during a period of significant consolidation since the passage of the 1996 Telecommunications Act, "the cost of radio advertising has nearly doubled" while the Consumer Price Index increased 29 percent from 1996 until 2007. "In other words, the CPI increased approximately 3 percent per year during the time period, while the annual growth rate in radio [advertising] prices was approximately 10 percent." Media Ownership Study No. 10 at 15-16 (JA 3829-30), cited in *2008 Order* n.381 (JA 289). Thus, contrary to Clear Channel's contention, there was substantial evidence in the record supporting the Commission's conclusion that eliminating or relaxing the rule would not serve its competition goals.

Clear Channel asserts that the Commission relied on an "irrelevant consideration" when it noted an increase in radio consolidation at the national level (as well as the local level as discussed above) since the 1996 Act. Br. 19. Clear Channel asserts that national consolidation in radio ownership is "wholly irrelevant to the question whether *local* radio ownership caps remain justifiable." *Ibid.* But substantial record evidence showed significant consolidation of ownership at the local level both following the 1996 Act and more recently.[26] Moreover, the Commission's reference to the substantial national consolidation in radio ownership that has occurred since the 1996 Act (which Clear Channel could hardly dispute) does not undermine the Commission's conclusion that retaining the local radio ownership rule's existing numerical limits is "necessary to protect against excessive market concentration" at the local level. *2008 Order* ¶118 (JA 288).

Clear Channel also contends that the Commission failed adequately to evaluate a proposal the company had made to relax the local radio ownership rule in the largest markets. Br. 23-25. Clear Channel's argument is based on the erroneous premise that because it had presented the Commission with, so the company claims, "a reasonable, and less restrictive, alternative to the extant limits" (Br. 13), the Commission was obligated to explain why retaining its existing rule is the only or better way to achieve its goals. An agency, however, need not defend a policy choice on review by demonstrating that it is the only or the best way to address a problem. "[T]he fact that there are other solutions to a problem is irrelevant provided that the option selected [by the FCC] is not irrational." *APCO*, 76 F.3d at 400. "The FCC need not demonstrate that it has made the only acceptable decision, but rather that it has based its decision on a reasoned analysis supported by

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[26] *See, e.g.*, *2008 Order* ¶118 (JA 289), citing Ownership Study 10 at 1, 7-8, 22 (JA 3815, 3821-22, 3836); Future of Music Coalition Reply App., *False Premises, False Promises: A Quantitative History of Ownership Consolidation in the Radio Industry* at 50-81 (JA 3408-39).

the evidence before the Commission." *Id.* at 398. The Commission met that standard here.

B. The Decision To Retain The AM/FM "Subcaps" Was Adequately Explained And Is Supported In The Record.

The Commission adopted specific limitations on AM and FM radio station ownership in local markets in 1992 in order to "prevent one entity from putting together a powerful combination of stations in a single service that may enjoy an advantage over stations in a different service." *Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2778 ¶44 (1992). The Commission reasonably retained the separate ownership limits in 2008.

Clear Channel's contention that the Commission failed to justify retaining the specific AM and FM ownership limits, or subcaps, is unfounded. The Commission recognized that the Court in *Prometheus*, while apparently agreeing that the Commission had justified the FM limit on the basis of FM stations' technological and economic advantages, had held that the *2003 Order* did not adequately explain the decision to retain a limit on AM ownership and directed the Commission on remand to provide an explanation or modify its approach. *2008 Order* ¶130 (JA 294-95), *citing* 373 F.3d at 434-35. The Commission specifically sought comment on this issue on remand. *See Further Notice* ¶22 (JA 1950).

In the *2008 Order* (and contrary to Clear Channel's claim (Br. 30)), the Commission again acknowledged the evidence in the record detailing the "significant technical and marketplace differences between AM and FM stations." *2008 Order* ¶134 (JA 296) (citing *2003 Order*, 18 FCC Rcd at 13733-34 ¶294 (JA 1063-

64)). AM stations have less bandwidth than FM stations, and the fidelity of their audio signal is inferior to that of FM stations. *2008 Order* ¶134 (JA 296). Moreover, AM signal propagation varies with time of day, as a result of which many AM stations are required to cease operation at sunset. *See 2003 Order*, 18 FCC Rcd at 13733-34 ¶294 (JA 1063-64). As the Commission noted in the *2003 Order*, "[t]hese and other technical differences have an effect on radio listenership patterns." *Ibid*. (JA 1064). "As of 2002, 82% of radio audience comes from the FM service, while 18% of radio audience comes from the AM service." *Ibid.*

The Commission recognized that while viewed alone these differences might call for a cap only on FM ownership, *2008 Order* ¶134 (JA 296), other evidence in the record led it to conclude that eliminating the subcap rule for AM stations "would be inconsistent with our interest in protecting competition in local radio markets." *Ibid.* Specifically, it pointed to Clear Channel's comments that AM stations were ranked number one in 11 of the top 50 markets and were in the top three ranked stations in seven additional top 50 markets. The Commission thus concluded that even with respect to AM stations, the rule's limitation is "necessary to prevent excessive market power from being concentrated in the hands of one station owner." *Ibid.* Therefore, contrary to Clear Channel's argument (Br. 32), it was not inconsistent for the Commission to find that AM stations are inferior to FM stations while, in the same paragraph, noting that AM stations achieve high ratings in some markets. Despite the technical and marketplace advantages of FM stations over AM stations generally, there are nevertheless markets in which AM stations achieve dominant positions.

The Commission also concluded that the limitation on AM station ownership would serve the public interest by promoting new entry into radio broadcasting. The Commission pointed out the United Church of Christ's argument in its comments that "if the AM subcaps were removed, 'large companies could bid up the price of AM stations and further erode th[e] abysmally low representation' of minority and female radio station owners." *2008 Order* n.423 (JA 296). The Commission agreed that AM radio "remains a likely avenue for new entry into the media business, particularly by small businesses, women, minorities, and entrepreneurs seeking to meet market demand by providing programming to underserved communities. New entry promotes outlet diversity, which in turn enhances diversity and the public interest [because …] AM stations are generally far less expensive than FM stations, permitting entry with far lower capital investment." *Id.* ¶133 (JA 295-96). The Commission concluded that "retaining the current, competition-based subcaps will promote diversity indirectly by facilitating and encouraging entry into the local media market by new and underrepresented parties, and we thus conclude that the AM subcaps are in the public interest." *Ibid.* (JA 296).

Clear Channel's claim (Br. 31) that the transition to digital radio "would obviate any perceived technical differences between" AM and FM stations, ignores that digital radio is still in its early stages and has had very limited impact.[27] The

[27] As of July 8, 2009, of the approximately 4790 operating AM radio stations, only 292, about 6%, had been authorized to transmit digital signals. *See Broadcast Station Totals As Of December 31, 2009* (FCC News Release, Feb. 26, 2010); http://www.fcc.gov/mb/audio/digital.html.

Commission recognized in 2003 that the development of digital broadcasting may eventually help AM stations overcome technical limitations. *See 2003 Order*, 18 FCC Rcd at 13734 n.628 (JA 1064). But the *2008 Order* also pointed to comments contending that the digital transition may not have that effect, at least not immediately, because "FM stations have rights to more spectrum and are further along in their digital transition." *2008 Order* ¶132 (JA 295) (internal quotations omitted). Whatever the ultimate impact of the digital radio transition, it was reasonable for the Commission not to rely on that nascent technological development in this proceeding, particularly when it could be addressed in a more certain context in the 2010 (or later) Quadrennial Reviews.

VII. THE COMMISSION REASONABLY DECIDED TO RETAIN THE DUAL NETWORK RULE.

The FCC's "dual network" rule "permits common ownership of multiple broadcast networks, but prohibits a merger between or among the 'top four' networks" (*i.e.*, ABC, CBS, Fox, and NBC). *2008 Order* ¶139 (JA 298). In 2003, the Commission retained this rule, concluding that it was "necessary in the public interest to promote competition and localism." *2003 Order*, 18 FCC Rcd at 13848 ¶592 (JA 1178). The agency found that a merger of two or more of the top four networks would "harm competition in the program acquisition market," *id.* at 13852 ¶605 (JA 1182), "substantially lessen competition in the national advertising market," *id.* at 13853 ¶607 (JA 1183), and give networks "increased economic leverage over their affiliates, thereby diminishing" affiliates' ability "to serve their communities," *id*. at 13855 ¶611 (JA 1185). No party sought review of the Commission's retention of this rule in the previous *Prometheus* litigation.

In this proceeding, only a few parties filed comments concerning the dual network rule. Most supported retention of the rule. *2008 Order* ¶141 & n.443 (JA 299). Only two parties – Fox and CBS – argued for repeal. On the basis of this record, the Commission decided to retain the rule in its current form. It found no evidence that would warrant a departure from its 2003 decision to retain the rule. *Id.* ¶141 & n.451 (JA 299-300). The Commission explained: "We continue to believe that the four largest broadcast networks play a unique role in the electronic media and note that no other networks, cable or broadcast, reach nearly as large an audience as they do." *Id.* n.451 (JA 300). Accordingly, "for the same reasons recited" in the *2003 Order*, the Commission found that "the dual network rule is necessary in the public interest to promote competition and localism." *Id.* ¶141 (JA 300).

CBS, the only petitioner challenging the rule, asserts (Br. 47) that the Commission "failed to identify the characteristics that make" the top four broadcast networks "unique." On the contrary, the Commission extensively discussed the special characteristics of the top four networks when it decided to retain the dual network rule in 2003. *See 2003 Order*, 18 FCC Rcd at 13850-58 ¶¶599-621 (JA 1180-88). In 2008, the agency made clear that it retained the rule "for the same reasons" that it gave in 2003. *2008 Order* ¶141 (JA 300).

In the *2003 Order*, the Commission identified several distinctive features of the top four broadcast networks that justified retention of the dual network rule.

For one thing, those networks "comprise a 'strategic group' within the national advertising market" – *i.e.*, "a cluster of independent firms within an industry that pursue similar business strategies." *2003 Order*, 18 FCC Rcd at 13853 ¶607 & n.1259 (JA 1183). Unlike cable networks or emerging broadcast networks, which typically "target more specialized, niche audiences," the four major broadcast networks "supply their affiliated local stations with programming intended to attract mass audiences." *Id.* at 13853 n.1259 (JA 1183); *see also 2008 Order* n.439 (JA 298). The major networks "compete largely among themselves for advertisers that seek to reach" large, nationwide audiences. *2003 Order*, 18 FCC Rcd at 13853 ¶607 (JA 1183). For that reason, "a merger of two or more of the top-four networks would substantially lessen competition in the national advertising market, especially within the strategic group." *Ibid.*

In addition, notwithstanding the recent growth of cable television and satellite television, "the top-four networks continue to provide the greatest reach of any medium of mass communications." *2003 Order*, 18 FCC Rcd at 13853 ¶608 (JA 1183). Those networks generally "attract much larger prime-time audiences in relation to advertisement-supported cable networks." *Ibid*. "[N]o other networks, cable or broadcast, reach nearly as large an audience as [ABC, CBS, Fox, and NBC] do." *2008 Order* n.451 (JA 300). Because the top four broadcast networks "still have the largest concentration of viewers," they wield substantial "economic power" in the advertising market. *2003 Order*, 18 FCC Rcd at 13854 ¶609 (JA 1184).[28]

Finally, unlike cable networks, the top four broadcast networks have local affiliates throughout the country. Those affiliates produce local news broadcasts and other programming of special interest to their local communities. The FCC reasonably found that a merger between or among the top four broadcast networks "would harm localism by providing the top-four networks with increased economic leverage over their affiliates, thereby diminishing the ability of the affiliates to serve their communities." *2003 Order*, 18 FCC Rcd at 13855 ¶611 (JA 1185).

CBS contends (Br. 48) that when the Commission decided to retain the dual network rule in 2008, it "failed to confront the significant, relevant market changes that have taken place." But the only change cited by CBS – the greater variety of cable and broadcast networks available to viewers – has not altered the unique status of the top four broadcast networks in the media marketplace. Their clout in the advertising market remains unrivaled; and their affiliates are still the primary source of local news programming. *See 2008 Order* ¶102 (JA 283); NASA Comments at 6-7 (JA 2990-91). Therefore, it was reasonable for the Commission to conclude that the dual network rule remained "necessary in the public interest to promote competition and localism." *2008 Order* ¶141 (JA 300).

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[28] The unique position of the top four broadcast networks in the advertising market distinguishes them not only from other networks, but also from cable operators. Thus, CBS is wrong when it asserts (Br. 48) that the FCC had no basis for treating the major broadcast networks differently from cable operators.

CBS claims to find an inconsistency between the FCC's assertion that the dual network rule is necessary to protect competition and the agency's description of the media marketplace as "dynamic." CBS Br. 49-50 (quoting *2008 Order* ¶6 (JA 230)). This argument wilts under scrutiny. While the Commission generally described the media marketplace as "dynamic," it specifically noted that "the traditional 'mainstream media' still maintain leading roles in many respects." *2008 Order* ¶6 (JA 230). In particular, consistent with its market analysis in the *2003 Order*, the Commission in 2008 found that the top four broadcast networks continue to play a "unique role in the electronic media," and that "no other networks, cable or broadcast, reach nearly as large an audience as they do." *Id.* n.451 (JA 300). Given the persistent predominance of the four largest broadcast networks in the media marketplace, the Commission was justified in concluding that the dual network rule remained necessary to protect competition.

VIII. THE COMMISSION'S MEDIA OWNERSHIP RULES ARE CONSTITUTIONAL.

The media petitioners aggressively contend that all of the FCC's media ownership rules are unconstitutional.[29] Primarily, petitioners urge the Court to overturn the "scarcity" doctrine – the Supreme Court's longstanding rationale for applying less rigorous First Amendment scrutiny to federal regulation of broadcasting. *See NCCB*, 436 U.S. at 799; *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 386-92 (1969). Here, as in the 2004 litigation, the Court should

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[29] Media General Br. 40-60; Cox Br. 39-49; CBS Br. 53-59; Tribune Br. 32-33, 39-40, 47-50; NAA Br. 44; Clear Channel Br. 33-38; Sinclair Br. 49-52.

"decline [petitioners'] invitation to disregard precedent." *Prometheus*, 373 F.3d at 401. *See generally Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). "Even were [it] not constrained by Supreme Court precedent," the Court declared in *Prometheus* that it would still reject petitioners' "contention that the expansion of media outlets has rendered the broadcast spectrum less scarce." 373 F.3d at 402. Petitioners repeat that contention here, but it is no more persuasive now than it was in the 2004 litigation. "The abundance of non-broadcast media does not render the broadcast spectrum any less scarce." *Ibid.* Nothing in the record here alters "the fact that many more people would like access to [the broadcast spectrum] than can be accommodated." *Ibid.* (citing *NCCB*, 436 U.S. at 799).

Under this governing precedent, the FCC's media ownership rules do not violate the First Amendment because "they are rationally related to a substantial government interest." *Prometheus*, 373 F.3d at 402. Each of the rules is reasonably designed to advance a substantial government interest – whether promoting competition (the primary goal of the local television, local radio, and dual network rules) or protecting viewpoint diversity (the primary objective of the newspaper/broadcast and radio/television cross-ownership rules). *See NCCB*, 436 U.S. at 799-800; *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662-63 (1994).

Several petitioners claim that the revised newspaper/broadcast cross-ownership rule is unconstitutional because the specific factors guiding the Commission's discretion take account of the "local news" to be provided by the combined properties and therefore employ a form of "content-based" regulation that the First

Amendment generally forbids. Media General Br. 49-51; Cox Br. 39-43; Tribune Br. 37-38. On the contrary, the FCC'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." *National Association of Independent Television Producers & Distributors v. FCC*, 516 F.2d 526, 536 (2d Cir. 1975) ("*NAITPD*"); *see also Red Lion*, 395 U.S. at 395.[30] Indeed, the Commission "cannot do its job" of ensuring that broadcasters serve the public interest "without interesting itself in general program format and the kinds of programs broadcast by licensees." *NAITPD*, 516 F2d at 536.[31]

Media General and Cox argue that the newspaper/broadcast cross-ownership rule violates the Fifth Amendment by treating newspapers differently from other media. Media General Br. 56-60; Cox Br. 46-49. The Supreme Court rejected that argument in *NCCB*, and this Court is bound by that precedent. *See NCCB*, 436 U.S. at 801; *Prometheus*, 373 F.3d at 401.

Media General asserts (Br. 57-58) that the FCC cannot permissibly limit newspaper/broadcast cross-ownership while placing no ownership restrictions on

[30] There 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. Clear Channel Br. 36-37; CBS Br. 55-56.

[31] Contrary to Media General's suggestion (Br. 50), when the Commission assesses whether each of the media outlets in a proposed combination will exercise "independent news judgment," it focuses solely on how those outlets are structured, not on the content of their speech. Under the *2008 Order*, the Commission presumes that commonly owned media outlets will exercise independent news judgment if each outlet maintains its own separate news and editorial staff. *2008 Order* ¶71 (JA 267).

non-broadcast media (such as cable systems and Internet sites) that have developed since *NCCB* was decided. This Court rejected that argument in *Prometheus*. While it recognized that "there are more media outlets today … than there were in 1978 when *NCCB* was decided," the Court was not persuaded that these new non-broadcast media "contribute significantly to viewpoint diversity as sources of *local* news and information." *Prometheus*, 373 F.3d at 401. The record here confirms, at least for now, what the Court suspected: Daily newspapers remain a much more prominent source of local news than cable television, the Internet, or any other non-broadcast media. *See 2008 Order* ¶¶57-58 (JA 258-60). The Commission thus had a rational basis for treating newspapers differently from other non-broadcast media. Because those other media are "not similarly situated" to newspapers, petitioners' "equal protection claim must fail." *See Shuman ex rel. Shertzer v. Penn Manor School District*, 422 F.3d 141, 151 (3d Cir. 2005).

Finally, Sinclair contends (Br. 49) that the local television ownership rule violates the First Amendment because it "singles out television stations." Sinclair presented the same argument to the D.C. Circuit in a previous case, and that court rightly rejected Sinclair's claim, finding that the rule does not make any distinction that requires more than minimal scrutiny. *See Sinclair*, 284 F.3d at 168. The D.C. Circuit's decision precludes Sinclair from reasserting its constitutional argument here. *See Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 249 (3d Cir. 2006) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.") (quoting RESTATEMENT (SECOND) OF JUDGMENTS §27 (1982)).

IX. THE COMMISSION TOOK REASONABLE STEPS TO PROMOTE OWNERSHIP OF BROADCAST STATIONS BY MINORITIES AND WOMEN.

In *Prometheus*, the Court held that the Commission had arbitrarily repealed its Failed Station Solicitation Rule ("FSSR") – "its only policy specifically aimed at fostering minority television station ownership" – "without any discussion of the effect" of the rule's repeal "on minority television station ownership (and without ever acknowledging the decline in minority station ownership notwithstanding the FSSR)." *Prometheus*, 373 F.3d at 421. The Court remanded "[f]or correction of this omission." *Ibid.* It also directed the Commission to address "MMTC's other proposals for advancing minority and disadvantaged businesses." *Id.* at 421 n.59 (citing *2003 Order*, 18 FCC Rcd at 13636-37 ¶¶49, 52 (JA 966-67).

"To ensure" that the Commission did "not negatively impact minority owners," the agency on remand reinstated the FSSR. *2008 Order* ¶105 (JA 284). In addition, in a separate order adopted on the same day as the *2008 Order*, the Commission adopted a number of measures – including several of MMTC's proposals – to promote greater diversity in broadcast station ownership. *Diversity Order* ¶¶10-64 (JA 4935-52).

Contrary to the Citizen Petitioners' claim (Br. 53), the Court did not instruct the FCC on remand "to address the effect of the ownership limits on minority and female ownership." The Court simply directed the Commission to correct its failure to consider how the repeal of the FSSR (which had been adopted to promote diverse ownership) would affect minority ownership. *Prometheus*, 373 F.3d at 421. The Court also directed the agency to address MMTC's proposals for promoting minority ownership. *Id.* at 421 n.59. The Commission has reasonably responded to the Court's remand by restoring the FSSR and adopting several of MMTC's proposals.

The Citizen Petitioners complain (Br. 52) that the Commission "failed to consider the effect of the ownership rules on minority and female ownership." This is not true. The Commission expressly considered the effect on minority and female ownership when it reinstated the Failed Station Solicitation Rule and when it decided to retain the AM/FM subcap provision of the local radio ownership rule. *See* pp. 22, 90 above. This claim amounts to nothing more than a policy disagreement. Both the Commission and the Citizen Petitioners agree on the need "to increase participation in the broadcasting industry" by "minority- and women-owned businesses, which historically have not been well-represented" among station owners. *Diversity Order* ¶1 (JA 4931). The Citizen Petitioners would prefer to address this problem by tightening media ownership limits across-the-board. The Commission chose a different approach: making targeted changes in its ownership rules as well as adopting separate initiatives, such as rules that ban discrimination in broadcast transactions and facilitate market entry by small businesses, including firms owned by minorities and women. *See Diversity Order*

¶¶10-64 (JA 4935-52). This Court should not disturb the agency's reasonable policy judgment concerning how best to promote diversity in media ownership.[32]

The Citizen Petitioners contend (Br. 53) that the Commission "provided *no analysis* of [the] effectiveness" of the measures that it adopted in the *Diversity Order*. Any assessment of the future effectiveness of these newly adopted policies in 2008 necessarily would have been "of a judgmental or predictive nature" – the sort of analysis for which "complete factual support in the record … is not possible or required." *NCCB*, 436 U.S. at 813-14. The Commission offered just such an analysis here. It reasonably predicted that the steps it took in the *Diversity Order* "will be effective in creating new opportunities for broadcast ownership by a variety of small businesses and new entrants, including those owned by women and minorities." *Diversity Order* ¶9 (JA 4934). This reasonable predictive judgment commands deference. *NCCB*, 436 U.S. at 813-14; *Time Warner Telecom*, 507 F.3d at 221.

There is no basis for Citizen Petitioners' speculation (Br. 53) that the FCC's new rules granting preferences to small businesses (without regard to race or gender) "seem unlikely to result in increased ownership diversity." As the D.C. Circuit noted in an analogous context, a rule designed to promote the dissemination of

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[32] Insofar as the Citizen Petitioners suggest (Br. 49-51) that the FCC should have paid more attention to the Hammond study, which purported to find a link between increased media concentration and declining levels of minority and female ownership, we note that a peer review concluded that the Hammond study was "fatally flawed by a fundamental logical error that pervades every aspect of the analysis." McCullough Peer-review Report at 1 (JA 5153).

licenses (there, wireless service licenses) to small businesses (regardless of the owner's race or gender) "will incidentally benefit businesses owned by women and minorities" because "many such businesses will qualify as small businesses." *Omnipoint Corp. v. FCC*, 78 F.3d 620, 634 (D.C. Cir. 1996). By the same logic, the small business preferences that the FCC adopted in the *Diversity Order* are likely to increase broadcast station ownership by women and minorities. As the Commission observed, the measures that it adopted were "advocated by a variety of commenters [and] should help small businesses, including those owned by women and minorities, with access to financing and availability of spectrum, which have been identified as critical problem areas for new entrants into broadcasting, including women and minorities." *Diversity Order* ¶102 (JA 4964).

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for review. The Court should transfer to the District of Columbia Circuit or itself dismiss the notices of appeal consolidated with these cases as discussed above and in the Response of FCC to Motion to Dismiss. *See* p. 5 above. In the alternative, if the Court concludes that it has jurisdiction to consider the notices of appeal, the Court should affirm the actions of the FCC that have been appealed.[33]

[33] In the unlikely event that the Court concludes that a remand is warranted, it should decline petitioners' invitations to vacate the challenged rules. Even if the Court determines that a rule is "inadequately supported," the rule "need not necessarily be vacated." *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150 (D.C. Cir. 1993). "The decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Id.* at 150-51 (internal quotations omitted). Serious deficiencies would have to be established to make vacatur apppropriate. Moreover, because restrictions on media ownership have been in effect for decades, vacatur of these rules could cause substantial disruption. Accordingly, if the Court decides to remand this case, it should not vacate any of the challenged rules.

Respectfully submitted,

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July 21, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PROMETHEUS RADIO PROJECT, ET AL., APPELLANTS-PETITIONERS	)	
v.	)	NOS. 08-3078, ET AL.
FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, APPELLEE-RESPONDENTS	)	

CERTIFICATE OF COMPLIANCE

I hereby certify that (1) this brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because the brief contains 27,243 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii), and (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

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