ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 17-1129

FREE PRESS, ET AL.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

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

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

The petitioners are Free Press, Office of Communication of the United Church of Christ, Inc., Prometheus Radio Project, Media Mobilizing Project, Media Alliance, National Hispanic Media Coalition, and Common Cause. The respondents are the Federal Communications Commission and the United States of America. The intervenors are ION Media Networks, Inc., the National Association of Broadcasters, Nexstar Broadcasting, Inc., Sinclair Broadcast Group, Inc., Tribune Media Company, Trinity Christian Center of Santa Ana, Inc., Twenty-First Century Fox, Inc., and Univision Communications Inc.

2. Rulings under review.

Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, 32 FCC Rcd 3390 (2017) (JA___) ("*Reconsideration Order*").

3. Related cases.

Another case before this Court, *Twenty-First Century Fox, Inc. v. FCC* (No. 16-1375), involves a challenge to an earlier order in this proceeding. On December 21, 2016, the Court granted a motion to hold that case in abeyance. We are aware of no other pending cases related to this case.

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GLOSSARY

CAA	Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3
DTV	digital television
JSA	joint sales agreement
1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56
UHF	ultra high frequency
VHF	very high frequency

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BRIEF FOR RESPONDENTS

INTRODUCTION

In this case, petitioners challenge the Federal Communications Commission's reasonable decision to reinstate a longstanding method for calculating a television broadcaster's permissible audience reach while the agency reviews whether its current audience reach limits still make sense in light of increased competition and technological advancement. The FCC's decision to restore temporarily a settled framework that had previously been in place for three decades rests well within its discretion under the Administrative Procedure Act,

other Congressional enactments, and its own rules. This Court should therefore reject petitioners' various challenges to the reconsideration order under review.

Historically, the FCC has imposed a limit on the percentage of U.S. households that a broadcaster's commercial television stations may reach. Both Congress and the FCC have adjusted this national audience reach cap (generally upward) over time as necessary to further the public interest, including the Commission's stated goals of promoting competition, diversity, and localism. From 1985 until 2016, compliance with the cap was measured based on two interrelated metrics—(1) a percentage "cap" reflecting a broadcaster's maximum permissible theoretical national audience reach and (2) a formula used to determine whether the broadcaster had in fact exceeded that ceiling.

The FCC's formula was straightforward: It calculated compliance by counting all households that a broadcaster could theoretically reach with its very high frequency ("VHF") television stations, but only half of the households that a broadcaster could theoretically reach with its ultra high frequency ("UHF") television stations. This "UHF discount" reflected historical differences in analog signal strength between UHF and VHF stations and the increased cost of building and operating UHF stations. Together, the percentage ceiling and the UHF discount reflected a collective policy judgment on the extent to which a single broadcaster could permeate the national market consistent with the public interest.

Last year, the FCC voted to eliminate the UHF discount, citing technological developments since it was first adopted, while refusing to consider whether to adjust the national audience reach cap above its present level (39 percent). *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, 31 FCC Rcd 10213, 10213-14 ¶¶ 1-3, 10226 ¶ 28 (2016) (JA___, ___-___, ___) ("*Repeal Order*"). In doing so, the Commission recognized that elimination of the discount had the effect of substantially tightening the cap. For that reason, it "grandfathered" existing station groups that would have violated the cap after the discount was removed. *Id.* ¶ 47 (JA___). But the Commission refused to consider whether the public interest—including the policies of competition, diversity, and localism—might require that the cap itself be adjusted in light of the discount's elimination and increased competition in the market for video programming. *Id.* ¶ 40 (JA___-___).

In response to a petition for reconsideration, the FCC found in April 2017 that it had "erred" by eliminating the UHF discount "without considering whether the cap should be raised to mitigate the regulatory impact" of removing the discount. *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, 32 FCC Rcd 3390, 3395 ¶ 14 (2017) (JA___, ___) ("*Reconsideration Order*"). On reconsideration, the Commission rejected its prior piecemeal, patchwork regulatory approach that married elimination of the

UHF discount with selective exemptions for certain broadcasters. Instead, the agency decided to restore the UHF discount temporarily so that it could initiate a new rulemaking later this year to evaluate the propriety of the discount "as part of a broader reassessment of the national audience reach cap." *Id.* ¶ 15 (JA___).

The FCC's prior decision in the *Repeal Order* to subject broadcasters to a stricter cap without any showing that a more stringent limit furthered the public interest was itself arbitrary and capricious. But even if it were not, the FCC had ample discretion to reverse course in the *Reconsideration Order* to reset the playing field while it evaluated the continued wisdom of the cap and the discount in tandem. Rather than assume that the public interest is best served by the existing cap, no UHF discount, and grandfathered exemptions, the Commission has now decided to solicit a robust public record on, and consider the need for, the present cap and the discount as a whole in light of current marketplace realities.

This decision was reasonable and consistent with law in all respects. The petition for review should be denied.

JURISDICTION

The *Reconsideration Order* was published in the Federal Register on May 5, 2017. 82 Fed. Reg. 21124. Petitioners filed a timely petition for review within 60 days of that publication. *See* 28 U.S.C. § 2344; 47 C.F.R. § 1.4(b)(1). This Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

As we explain in Section I of the Argument below, we believe that petitioners have failed to establish their standing to challenge the *Reconsideration Order*.

QUESTION PRESENTED

Whether the FCC reasonably decided to reconsider its elimination of the UHF discount based on its determination that the discount and the national audience reach cap should be jointly evaluated in a future rulemaking because they are inextricably linked.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in an addendum to this brief.

COUNTERSTATEMENT

A. The National Audience Reach Cap And The UHF Discount

Historically, "[i]n 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." *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978). Consistent with that theory, the FCC in 1985 adopted a rule limiting the percentage of U.S. households that a licensee's commercial television stations may reach. *Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC 2d

74, 88-94 ¶¶ 33-44 (1985) ("*1985 Order*"). In this context, a station's reach is not defined by actual viewership, but by the number of television households in the market where the station is located. *See* 47 C.F.R. § 73.3555(e)(2)(i).

As part of the rule establishing the national audience limit, the Commission prescribed a methodology for calculating each station's "reach." Due to differences between UHF and VHF signal strengths and other impediments to delivering UHF signals to viewers, the Commission assessed compliance with the audience reach cap by applying a "UHF discount"—*i.e.*, an estimate that attributed to the owners of UHF stations only 50 percent of the households that those stations could theoretically reach. *1985 Order*, 100 FCC 2d at 93 ¶¶ 43, 44.[1] By its very nature, this methodology ensured a higher overall cap than one that treated UHF and VHF stations equally.

Originally, the rule prohibited a single entity from owning stations that, in the aggregate, reached more than 25 percent of television households nationwide. *1985 Order*, 100 FCC 2d at 90-92 ¶¶ 39-40. As part of the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56, Congress directed the FCC to amend its rules by increasing the national audience reach limitation for

[1] "UHF" and "VHF" denote the radio frequency range on which a television station transmits its signal. UHF includes frequencies "ranging from about 300 MHz to about 3 GHz." NEWTON'S TELECOM DICTIONARY 1263 (28th ed. 2014). VHF includes "frequencies between about 30 MHz and 300 MHz." *Id*. at 1297.

television stations to 35 percent of television households. *See* 1996 Act, § 202(c)(1)(B), 110 Stat. 111. In accordance with this directive, the Commission amended its rules to raise the audience reach cap to 35 percent. *Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations)*, 11 FCC Rcd 12374, 12374-75 ¶¶ 2-3 (1996). The UHF discount continued to apply. *Id.* at 12375 ¶ 4.

The Commission next addressed the audience reach cap in 2000. During a biennial review of its broadcast ownership rules mandated by section 202(h) of the 1996 Act, Pub. L. No. 104-104, 110 Stat. 56, 111-12, the Commission decided to retain both the 35 percent audience reach cap and the UHF discount. *1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 15 FCC Rcd 11058, 11072-75 ¶¶ 25-30, 11078-80 ¶¶ 35-38 (2000) ("*1998 Biennial Review Order*").[2] On review, this Court did not question the FCC's authority to revise the cap, but held that on the existing

[2] Although the Commission at that time decided to retain the audience reach cap "at its current level for the present," the agency acknowledged its authority to revise the cap in the future, saying that it would continue to study marketplace developments "before [it made] any alteration to the national limit." *1998 Biennial Review Order*, 15 FCC Rcd at 11072 ¶ 25.

record, the agency had not adequately justified its finding that retaining the 35 percent cap was in the public interest. *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1041-44 (D.C. Cir. 2002).

In its next biennial review proceeding, the Commission concluded that "an audience reach cap of 35% is not necessary to promote diversity or competition in any relevant market." *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13842 ¶ 578 (2003) ("*2002 Biennial Review Order*"). The agency also found, however, that "a national cap at some level" was "needed to promote localism by preserving the balance of power between networks and affiliates." *Id.* The Commission accordingly decided to raise the audience reach cap to 45 percent of television households. *Id.* at 13843-44 ¶¶ 581-583. Once again, it retained the UHF discount. *Id.* at 13845-47 ¶¶ 586-591.

The next year, Congress enacted legislation directing the Commission "to modify its rules to set the cap at 39 percent of national television households." *Reconsideration Order* ¶ 6 (JA___) (citing Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) ("CAA")). The CAA amended section 202(c)(1)(B) of the 1996 Act "by striking '35 percent' and inserting '39 percent,'" CAA, § 629(1), but otherwise used the same language that

Congress used in 1996 when it directed the Commission to make a one-time change to the cap.[3] Congress did not direct the FCC to reconsider the use of the UHF discount in determining compliance with the cap. In light of the CAA, the Third Circuit held that pending challenges to the FCC's decisions to raise the cap to 45 percent and to retain the UHF discount were moot. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 395-97 (3d Cir. 2004) ("*Prometheus I*"). The cap has remained at 39 percent since 2004.

B. The *Repeal Order*

For years, the FCC had "anticipated" that the nation's transition from analog television to digital television ("DTV") "would substantially equalize UHF and VHF signals," eliminating "the technical basis for the UHF discount." *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, 28 FCC Rcd 14324, 14330 ¶ 16 (2013) (JA___, ___) ("*Notice*").[4] The Commission did not, however, immediately seek to eliminate the UHF discount when the transition from analog television to DTV was completed in

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[3] The CAA also amended section 202(h) of the 1996 Act "to require a quadrennial review of the Commission's broadcast ownership rules, rather than the previously mandated biennial review." *Reconsideration Order* ¶ 6 (JA___). As amended, section 202(h) exempts "any rules relating to the 39 percent national audience reach limitation" from the quadrennial review requirement. *Id.* (quoting CAA, § 629(3)).

[4] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13847 ¶ 591; *1998 Biennial Review Order*, 15 FCC Rcd at 11079-80 ¶¶ 37-38.

2009. Instead, four years later, the Commission (split 2-1) issued a notice proposing to eliminate the UHF discount. *Id.* ¶¶ 1-2 (JA___-___). But even though the national audience reach cap had remained unchanged for nearly a decade, and eliminating the UHF discount without adjusting the cap by definition has the effect of tightening the cap, the notice—over the objection of Commissioner Pai—did not seek comment on whether the cap itself should be reconsidered. *See id.*, 28 FCC Rcd at 14344 (dissenting statement of Commissioner Pai) (JA___) (while the *Notice* "proposes to tighten the national cap, it does not seek comment on whether doing so would be a good idea").

After reviewing comments on its proposal, the agency, in a 3-2 decision, abolished the discount in 2016 (seven years after the DTV transition was complete). *Repeal Order* ¶ 1 (JA___).

The Commission first determined that it had "authority to modify the national audience reach cap, including the authority to revise or eliminate the UHF discount." *Repeal Order* ¶ 21 (JA___). It then went on to conclude that because "UHF stations are no longer technically inferior in any way to VHF stations," the UHF discount was "obsolete." *Id.* ¶ 28 (JA___). On the basis of these findings, the Commission decided to "eliminate the discount from the calculation of the national audience reach cap to preserve the effectiveness of this rule." *Id.* ¶ 3 (JA___).

In reaching this conclusion, the Commission did not address the question whether, with the discount eliminated, the cap would remain at a level that served the public interest. Instead, the agency rejected arguments that it "should reexamine" the cap "in conjunction with [its] examination of the UHF discount." *Repeal Order* ¶ 40 (JA___). It noted that reviewing the cap was "not within the scope of the *Notice*," *id.*, without acknowledging that the *Notice* could have included this issue if the Commission had accepted Commissioner Pai's suggestion to that effect. *See Notice*, 28 FCC Rcd at 14344 (dissenting statement of Commissioner Pai) (JA___). The Commission also said that "[i]nitiating a new rulemaking proceeding to undertake a complex review of the public interest basis for the national cap … would only delay the correction of audience reach calculations necessitated by the DTV transition." *Repeal Order* ¶ 40 (JA___). This problem, however, was of the Commission's own making: The Commission could easily have reexamined the cap during the three-year period between issuance of the *Notice* and adoption of the *Repeal Order*. Instead, the Commission opted to eliminate the discount immediately, without considering whether the cap would remain in the public interest without the discount.

In doing so, the FCC recognized that eliminating the discount would effectively tighten the cap. To limit the disruptive impact of this change, the Commission grandfathered "broadcast station ownership groups that would exceed

the 39 percent national audience reach cap as a result of the elimination of the UHF discount as of September 26, 2013, *i.e.*, the date of the *Notice*." *Repeal Order* ¶ 47 (JA___). The agency also grandfathered "proposed station combinations for which an assignment or transfer application was pending with the Commission or that were part of a transaction that had received Commission approval as of [the date of the *Notice*] if such station groups would otherwise exceed the cap." *Id.*

Commissioners Pai and O'Rielly dissented. Commissioner Pai maintained that the FCC should not repeal the UHF discount without considering "whether the current national cap … is sound or whether there is a need to make it more stringent." *Repeal Order*, 31 FCC Rcd at 10248 (dissenting statement of Commissioner Pai) (JA___). Commissioner O'Rielly stated that he believed the Commission lacked authority to eliminate the UHF discount. He also said that even if the agency had authority to do so, it should not "tinker with" the UHF discount "calculation methodology without any consideration of the current validity" of the "rule it modifies." *Id.* at 10251 (dissenting statement of Commissioner O'Rielly) (JA___).

C. The *Reconsideration Order*

ION Media Networks and Trinity Christian Center of Santa Ana, Inc. (collectively, "ION") jointly petitioned for reconsideration of the *Repeal Order*. ION argued that the FCC "was wrong" to eliminate the UHF discount "without

analyzing" how repeal of the discount would affect "the national audience reach cap and determining that the result would be in the public interest." Petition for Reconsideration at 4 (JA___). ION asserted that the *Repeal Order* had triggered "an unprecedented and unwarranted tightening of the national audience reach cap—doubling overnight the calculated audience reach of every UHF station in the country and substantially increasing the calculated audience reach of every station owner that holds one or more UHF stations." *Id.* at 3 (JA___). ION contended that "the FCC had no basis" for eliminating the UHF discount "[w]ithout evidence that the public interest demanded a tightening of the national cap." *Id.* at 4 (JA___).

In April 2017, the FCC granted ION's petition for reconsideration and reinstated the UHF discount. *Reconsideration Order* ¶ 1 (JA___-___). The Commission concluded on reconsideration that "eliminating the UHF discount on a piecemeal basis, without considering the national cap as a whole, was arbitrary and capricious" as well as "unwise from a public policy perspective." *Id.* ¶ 13 (JA___).

The Commission explained that the *Repeal Order* "failed to provide a reasoned explanation for eliminating the discount"—and "substantially tightening the impact of the cap"—without "conducting a broader review of the cap" or "considering whether the cap should be raised to mitigate the regulatory impact" of ending the discount. *Reconsideration Order* ¶ 14 (JA___). In the Commission's

judgment, this error was compounded by the agency's failure to take account of "the greatly increased options for consumers in the selection and viewing of video programming" since the cap was last modified in 2004. *Id.* ¶ 15 (JA___). The *Repeal Order* "failed to consider" whether, in light of those changes, it was in the public interest to take "an action that would have the impact of substantially tightening the cap." *Id.*

In justifying its reversal of the *Repeal Order*, the Commission explained that the cap and the discount are "inextricably linked." *Reconsideration Order* ¶ 1 (JA___); *see also id.*, 32 FCC Rcd at 3405 (statement of Chairman Pai) (JA___). The "cap establishes a limit," while "the discount defines how to calculate whether the limit is reached." *Id.* ¶ 12 (JA___-___). Given the integral connection between the discount and the cap, the Commission concluded that it had "erred" by eliminating the discount "without simultaneously reassessing the cap." *Id.* ¶ 13 (JA___). It decided "to rectify [this] error by reinstating the discount" so that it could consider any changes to the discount "as part of a broader reassessment" of the cap, which it committed to undertake later in 2017. *Id.* ¶ 15 (JA___).

D. Subsequent Developments

On May 26, 2017, petitioners filed an emergency motion to stay the *Reconsideration Order* pending review. On June 1, 2017, this Court entered an administrative stay. The Court denied petitioners' stay motion and dissolved the

administrative stay on June 15, 2017. On that day, the *Reconsideration Order* took effect, and the UHF discount was reinstated.

SUMMARY OF ARGUMENT

In its *Reconsideration Order*, the FCC reasonably concluded that it had put the cart before the horse when it eliminated the UHF discount. As the Commission explained on reconsideration, the UHF discount and the national audience reach cap are inextricably intertwined. The discount is an integral part of the methodology for calculating the reach to which the cap applies. The *Repeal Order* nevertheless eliminated the discount without considering whether the audience reach cap would remain at a level that served the public interest after the discount was removed.

The Commission has now reasonably determined that because the discount and the cap are interrelated, they should be analyzed in tandem. To accomplish this objective, and to ensure that any change to the discount would be properly considered in the context of a comprehensive review of the cap, the Commission reasonably decided to reinstate the discount while it jointly reviewed the discount and the cap in a subsequent rulemaking.

I. As an initial matter, petitioners lack Article III standing to challenge the *Reconsideration Order* because they have failed to produce any evidence that they or their members suffered any concrete or particularized injury on account of the

FCC's decision to reinstitute the UHF discount. *See Rainbow/PUSH Coal. v. FCC*, 330 F.3d 539, 542 (D.C. Cir. 2003).

II. Petitioners' claims also fail on the merits. As the Commission explained in the *Reconsideration Order*, the UHF discount serves no purpose independent of the audience reach cap. The discount exists solely to modify the application of the cap to owners of UHF television stations. Recognizing that the discount and the cap are inextricably linked, the Commission reasonably concluded in the order on review that before it made any changes to the discount, it should examine the discount and the cap together. *Reconsideration Order* ¶¶ 10-15 (JA___-___).

When the FCC eliminated the discount in 2016, it reviewed the discount separately from the cap, and it expressly refused to reexamine the cap. As a result, the *Repeal Order* did not fully consider the consequences of repealing the discount. In effect, eliminating the discount substantially tightened the cap for owners of UHF stations. Yet the Commission in the *Repeal Order* "failed to consider whether this *de facto* tightening of the national cap was in the public interest and justified by current marketplace conditions." *Reconsideration Order* ¶ 1 (JA___).

On reconsideration, the Commission reasonably concluded that it erred by examining the discount in a vacuum, "without considering the national cap as a whole," *Reconsideration Order* ¶ 13 (JA___), or assessing "whether the cap should be raised to mitigate the regulatory impact of eliminating the UHF discount." *Id.*

¶ 14 (JA___). The Commission had good reason to discard the approach it had adopted in the *Repeal Order* because it had addressed only half of the relevant question. While the *Repeal Order* concluded that the UHF discount should be eliminated, it failed to consider whether, with the discount removed, the cap would remain at a level that served the public interest. In an analogous case, the Third Circuit recently ruled that it was arbitrary and capricious for the FCC to "put the cart before the horse" by modifying the methodology for calculating another broadcast ownership cap without first finding whether the cap itself continued to serve the public interest. *See Prometheus Radio Project v. FCC*, 824 F.3d 33, 59 (3d Cir. 2016) ("*Prometheus III*"); *id.* at 54-60. It was well within the FCC's discretion to avoid the same potential pitfall here.

III. The Commission reasonably found that it has statutory authority to revise the national audience reach cap. Petitioners' claim to the contrary (Br. 34-42) is both procedurally barred and wrong on the merits.

Although petitioners now contend that the FCC lacks authority to revise the cap, they took the opposite position at an earlier stage in the administrative proceeding. Because they took conflicting positions before the Commission, and because they did not timely raise their challenge to the agency's authority in the proceeding below, petitioners did not give the FCC a fair opportunity to pass on their argument that the agency lacks authority to alter the cap. Consequently, they

are precluded from raising that claim in this Court. *See* 47 U.S.C. § 405(a); *Busse Broad. Corp. v. FCC*, 87 F.3d 1456, 1460-62 (D.C. Cir. 1996).

Even if the argument were not procedurally barred, there is no merit to petitioners' assertion that the FCC lacks authority to revise the cap. As the Commission explained, Congress could have foreclosed the agency from altering the cap by enacting it into statutory law; instead, on two separate occasions (in 1996 and 2004), Congress simply chose to direct the FCC to revise its rule, thereby leaving the agency free to reconsider that rule in the future. *See Repeal Order* ¶¶ 21, 23 (JA___-___); *Reconsideration Order* n.60 (JA___).

IV. To rectify the *Repeal Order*'s failure to review the discount and the cap in tandem, the Commission reasonably decided to restore the discount immediately. Prior to the *Repeal Order*, the discount had been in place for the past three decades. The agency explained that "reinstating the discount" would allow it to consider any change to the discount "as part of a broader reassessment of the national audience reach cap." *Reconsideration Order* ¶ 15 (JA___).

Petitioners contend that it was unreasonable for the FCC to reinstate the UHF discount now, pending the agency's review of the audience reach cap. Br. 42-46. They suggest that the repeal of the discount should have remained in effect while the Commission considered whether to make further adjustments to the cap. But it was reasonable for the Commission to reverse a rule change that had the

effect of significantly tightening the cap when the order adopting the rule change failed to address whether a more stringent cap was in the public interest. *See Prometheus III*, 824 F.3d at 54-60.

STANDARD OF REVIEW

The FCC's *Reconsideration Order* must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Under this highly deferential standard of review," the Court "presumes the validity of agency action." *Cellco P'ship v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004) (internal quotation marks omitted). The Court "is not to ask whether [the challenged] regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). To prevail, "[t]he Commission need only articulate a 'rational connection between the facts found and the choice made.'" *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Insofar as petitioners challenge the FCC's interpretation of its statutory authority to modify the audience reach cap, their challenge is reviewed under *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). If "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43.

But "if the statute is silent or ambiguous with respect to the specific issue, the question" for the Court is whether the agency has adopted "a permissible construction of the statute." *Id.* at 843; *see also City of Arlington v. FCC*, 569 U.S. 290, 307 (2013). If the implementing agency's reading of an ambiguous statute is reasonable, the Court must "accept the agency's construction of the statute, even if the agency's reading differs from what the [Court] believes is the best statutory interpretation." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

ARGUMENT

I. PETITIONERS LACK STANDING TO CHALLENGE THE *RECONSIDERATION ORDER*

As an initial matter, on the specific facts of this case, petitioners lack standing to challenge the *Reconsideration Order* under this Court's rules and case law. Because their standing "is not apparent from the administrative record," D.C. Cir. Rule 28(a)(7), petitioners have an obligation to establish their standing in their

opening brief (submitting evidence if necessary). *Sierra Club v. EPA*, 292 F.3d 895, 900-01 (D.C. Cir. 2002). Petitioners have failed to carry their burden.[5]

To establish standing to challenge a Commission order, petitioners "must produce actual evidence, not mere allegations, of facts that support [their] standing." *Rainbow/PUSH*, 330 F.3d at 542. In addition, because petitioners appear to be claiming associational standing on behalf of their members—none of whom they identify and none of whom are subject to the challenged agency action—"standing is 'substantially more difficult to establish.'" *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 851 F.3d 1324, 1327 (D.C. Cir. 2017) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)).

Here, the declaration that petitioner Free Press submitted in support of standing makes only vague and conclusory assertions that its members are "regular television viewers" who are "adversely affected by concentration of control in broadcast ownership." *See* Pet. Br., Att. A. While this Court has acknowledged

[5] Petitioners broadly assert that their standing "is apparent from the administrative record" because they "all participated" in the proceeding below "and have members who are harmed by the reinstatement of the UHF discount." Br. 24. This claim rests solely on a footnote to an April 2017 ex parte letter filed by two of the petitioners. *See* Br. 24 n.69 (citing Institute for Public Representation Ex Parte Letter, April 13, 2017, at 1 n.1 (JA___)). While that footnote makes general claims about the benefits of competition, diversity, and localism in broadcast markets, it does not specify how petitioners or their individual members are injured by the challenged FCC order.

that viewers may be able to challenge Commission orders in appropriate cases, *see Office of Commc'n of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966), such standing is not "automatic," but must be proved through "concrete and particularized" evidence of actual injury. *See Rainbow/PUSH*, 330 F.3d at 544 (rejecting similar threadbare affidavits as insufficient to establish standing); *Rainbow/PUSH Coal. v. FCC*, 396 F.3d 1235, 1240 (D.C. Cir. 2005). Petitioners' bare assertions, bereft of any factual support, fall short of that required showing.[6]

II. THE COMMISSION REASONABLY GRANTED RECONSIDERATION BASED ON ITS CONCLUSION THAT THE UHF DISCOUNT AND THE NATIONAL AUDIENCE REACH CAP SHOULD BE EXAMINED IN TANDEM IN A FUTURE RULEMAKING

The Commission reasonably concluded in the *Reconsideration Order* that it had previously erred by eliminating the UHF discount without also reexamining the national audience reach cap, because the discount and the cap are inextricably intertwined.

The national audience reach cap "establishes a limit" on the percentage of American households that may be served by a single licensee's television stations.

[6] While this Court previously upheld a claim of listener standing to challenge the Commission's assignment of radio licenses under its duopoly rule, in that case, the FCC did not challenge the sufficiency of evidence that showed that specific, named individuals were listeners who lived in a local community directly affected by the FCC's order. *See Llerandi v. FCC*, 863 F.2d 79, 85-86 (D.C. Cir. 1988); *see also Rainbow/PUSH*, 396 F.3d at 1242-43 (reaffirming *Llerandi*).

Reconsideration Order ¶ 12 (JA___-___). From the inception of the audience reach cap in 1985 until the *Repeal Order* in 2016, the FCC had applied a "UHF discount"—*i.e.*, UHF stations were "attributed with 50 percent of the television households in their … market," 47 C.F.R. § 73.3555(e)(2)(i), when calculating the "national audience reach" that is limited by the FCC's rule. The UHF discount, in other words, "defines how to calculate whether the limit is reached," *Reconsideration Order* ¶ 12 (JA___), and is an integral component of the methodology for calculating the national audience reach cap. The discount has no purpose independent of the cap. The two are thus "inextricably linked." *Id.* ¶ 1 (JA___).

Starting in 1985, the formula for calculating the audience reach limit was

$$x + \tfrac{1}{2}(y) = z$$

where x is the number of households in markets served by a broadcaster's VHF stations, y is the number of households in markets served by a broadcaster's UHF stations, and z is the number of households attributed to the broadcaster's stations for purposes of the audience reach cap.[7]

[7] For purposes of this calculation, if a broadcaster owns more than one station in a market, the households in the market are only counted once. 47 C.F.R. § 73.3555(e)(2)(ii).

The *Repeal Order* changed this equation by removing the discount for UHF stations, so that

$$x + y = z$$

This modification significantly tightened the cap for owners of UHF stations, "doubling overnight the calculated audience reach of every UHF station in the country." Petition for Reconsideration at 3 (JA___).[8]

For example, if a broadcaster owned VHF stations in markets with 10 million households and UHF stations in other markets with 30 million households, the broadcaster's audience reach under the original formula was 25 million households (*i.e.*, all 10 million households in the markets served by the VHF stations plus half of the 30 million households in the markets served by the UHF stations). After the *Repeal Order* eliminated the UHF discount, however, the audience reach of those same stations swelled from 25 million to 40 million households. Thus, the *Repeal Order* caused the owners of UHF stations to move considerably closer to—or even above—the audience reach cap without acquiring a single new station.

[8] The Commission recognized that because "elimination of the UHF discount would affect the calculation of the national audience reach for broadcast station groups with UHF stations," some existing groups might exceed the national cap "solely as a result of the termination of the UHF discount." *Repeal Order* ¶ 41 (JA___). To prevent this outcome, the *Repeal Order* grandfathered existing station combinations as of September 26, 2013 (the date of the *Notice*). *Id.* ¶ 47 (JA___).

Despite the undeniable interrelationship between the discount and the cap, the *Repeal Order* failed to "reexamine the national audience reach cap in conjunction with [its] examination of the UHF discount." *Repeal Order* ¶ 40 (JA___). On reconsideration, the Commission determined that "eliminating the UHF discount on a piecemeal basis, without considering the national cap as a whole, was arbitrary and capricious" as well as "unwise from a public policy perspective." *Reconsideration Order* ¶ 13 (JA___). Recognizing the inextricable link between the UHF discount and the audience reach cap, the FCC decided on reconsideration "to review the discount and cap together as a matter of sound policy and logic." *Id*. n.41 (JA___).

That decision was "both reasonable and reasonably explained." *Multicultural Media, Telecom & Internet Council v. FCC*, 2017 WL 4625401, *3 (D.C. Cir. Oct. 17, 2017). It was also well within the agency's "broad discretion in structuring its own proceedings." *City of Angels Broad., Inc. v. FCC*, 745 F.2d 656, 664 (D.C. Cir. 1984); *see also FCC v. Schreiber*, 381 U.S. 279, 289 (1965); 47 U.S.C. § 154(j) ("The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.").

In the *Reconsideration Order*, the FCC reasonably concluded and explained that its initial decision to review the UHF discount apart from the audience reach cap ignored the integral connection between the discount and the cap. "Any

adjustment to the UHF discount affects compliance with the national audience reach cap," and the FCC's decision to terminate the discount in 2016 had "the effect of substantially tightening the cap in some cases." *Reconsideration Order* ¶ 13 (JA___). Yet the *Repeal Order* "never explained why tightening the cap was in the public interest or justified by current marketplace conditions." *Id.* Nor did the *Repeal Order* make any findings that "the current cap, including the UHF discount, was harming competition, diversity, or localism"—the policy objectives underlying the ownership rules. *Id.*

In the Commission's view, this error was "all the more problematic" because the "options for consumers in the selection and viewing of video programming" had "greatly increased" since the cap was last modified in 2004. *Reconsideration Order* ¶ 15 (JA___). Those changes to the competitive landscape, the Commission reasoned, would plainly be relevant to assessing whether the cap was set at the proper level. The *Repeal Order* did not "adequately consider the impact of those changes on the appropriateness of eliminating the UHF discount while not adjusting the national cap." *Id.*

To be sure, the Commission did "not disagree" with petitioners' assertion that the UHF discount "no longer has a sound technical basis" after the DTV transition. *Reconsideration Order* ¶ 14 (JA___). But the technical basis for the discount is not the only rational basis for the FCC to keep it in place. As an initial

matter, broadcasters have relied on the discount in planning business decisions, as the Commission recognized when it grandfathered certain station groups. Moreover, the FCC could reasonably have concluded that it should not eliminate the discount without also determining the appropriateness of the cap.

The *Repeal Order* maintained that eliminating the UHF discount was necessary "to preserve the effectiveness" of the audience reach cap. *Repeal Order* ¶ 3 (JA___). The effectiveness of the cap, however, ultimately depends on whether the cap is set at an appropriate level—an issue the FCC failed to address in the *Repeal Order*. When it rescinded the discount in 2016, the Commission did not even consider whether further modifications might be needed to ensure that the cap remained at a level consistent with the public interest. On reconsideration, the Commission reasonably found that until it addresses that question and determines the proper level of the cap, it cannot know for sure whether the purpose of the cap would be "furthered" (Br. 32) by repealing the UHF discount.[9]

[9] Like the FCC, the Third Circuit has recognized the integral connection between the discount and the cap. After Congress directed the FCC in 2004 to amend its rules to reduce the cap from 45 percent to 39 percent, the Third Circuit held that challenges to both the 45 percent cap and the FCC's retention of the UHF discount had become moot, even though the CAA made no mention of the UHF discount. *Prometheus I*, 373 F.3d at 395-97. The court explained that it could not "entertain challenges" to the FCC's 2003 decision to retain the UHF discount because reducing or eliminating the discount would effectively alter the audience reach limit. *Id*. at 396.

In short, the Commission recognized that the *Repeal Order* had considered only half of the question before the agency—whether technological changes had undermined the original justification for the UHF discount. The *Repeal Order* neglected to consider whether the national audience reach cap (of which the UHF discount is a part) would remain at a level that continued to serve the public interest if the discount were repealed. The Commission reasonably concluded that examining the discount apart from the cap, without evaluating the effect of the discount's elimination on the cap's level, was unreasonable and unwise. "[B]y eliminating the UHF discount in isolation, the Commission was not able to determine whether the change promotes the public interest purposes of the cap itself." *Reconsideration Order* ¶ 11 (JA___).

The Commission's decision to abandon the *Repeal Order*'s piecemeal approach is firmly supported by judicial precedent. When the agency took a similarly fragmented approach in adopting a rule attributing television joint sales agreements ("JSAs") for purposes of assessing compliance with the FCC's broadcast ownership limits, without first evaluating the continued propriety of those limits, the Third Circuit vacated the agency's action. *Prometheus III*, 824 F.3d at 54-60.

As the Third Circuit explained, the JSA attribution rule—like the UHF discount—was inextricably tied to the underlying ownership rules: "Attribution

rules do not exist separately from the ownership rules to which they relate…. The purpose of the [attribution rules] is to delimit the scope of the [ownership caps]." *Prometheus III*, 824 F.3d at 59. Like the elimination of the UHF discount, the FCC's decision to attribute television JSAs had the effect of "making [ownership caps] more stringent." *Id.* at 58. The Third Circuit held that the FCC could not "logically demonstrate" that this tightening of ownership restrictions was "in the public interest" without first determining whether "the preexisting ownership rules [were] sound…. [T]he public interest might not be served by closing loopholes to rules that should no longer exist." *Id*. The *Reconsideration Order* here avoids a similar potential misstep.

To be sure, as petitioners observe (Br. 30), agencies are not always required to "address all questions at the same time." But the FCC also was not required to engage in piecemeal review of the discount and the cap. On reconsideration, the Commission reasonably decided "to review the discount and cap together as a matter of sound policy and logic." *Reconsideration Order* n.41 (JA___). As this Court has recognized, the sort of incremental approach favored by petitioners can be ill-advised and even irrational in some instances. *See, e.g., Democratic Nat'l Comm. v. FCC*, 460 F.2d 913, 917 (D.C. Cir. 1972) ("this court has specifically suggested that the FCC would be better advised to treat [certain] related matters in an extensive rule-making proceeding rather than have the rules carved out

piecemeal in adversary proceedings"). Indeed, this Court long ago cautioned that "the Commission cannot 'restructure [an] entire industry on a piecemeal basis' through a rule that utterly fails to consider how the likely future resolution of crucial issues will affect the rule's rationale." *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1210 (D.C. Cir. 1984) (quoting *ITT World Commc'ns, Inc. v. FCC*, 725 F.2d 732, 754 (D.C. Cir. 1984)). In this case, it made little sense for the Commission to implement a methodological change that significantly tightened the national audience reach cap if the public interest might require, upon subsequent examination, that the cap be loosened. *See ITT World*, 725 F.2d at 754 ("an agency does not act rationally when it chooses and implements one policy and decides to consider the merits of a potentially inconsistent policy in the very near future").

Petitioners argue that the Commission in the *Repeal Order* sufficiently "justified its decision to address the UHF discount as a standalone matter." Br. 29. They base this claim primarily on the agency's assertion in the *Repeal Order* that "[i]nitiating a new rulemaking proceeding to undertake a complex review of the public interest basis for the national cap … would only delay the correction of audience reach calculations necessitated by the DTV transition." *Repeal Order* ¶ 40 (JA___). But it took the agency three years from the issuance of the *Notice* to adopt the *Repeal Order*. The Commission could have completed a reassessment of

the cap during that three-year period, as Commissioner Pai suggested in his dissent from the 2013 *Notice*.

The *Repeal Order* also asserted that elimination of the UHF discount was necessary to "maintain[] the efficacy of the national cap," *Repeal Order* ¶ 40 (JA___), by "bring[ing] the cap back into alignment with its stated level." *Id.* (JA___). But this change marked a sharp departure from more than three decades of agency practice. Until the *Repeal Order*, the Commission had always applied the UHF discount when calculating a broadcaster's compliance with the audience reach cap. In its haste to dispense with the discount, the *Repeal Order* declined to assess whether the newly modified—and considerably tighter—cap would continue to serve its intended purpose after the discount was eliminated.[10] And even if the *Repeal Order* was itself justified, the FCC nevertheless was free to revisit that determination as long as it provided a reasoned explanation for doing so. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The Commission amply explained its change in policy here: It concluded that it made more sense to consider the cap and the discount together rather than separately

[10] Nor did "the self-imposed narrow scope" of the *Notice* justify the agency's previous refusal to revisit the cap. *Reconsideration Order* ¶ 14 (JA___). As the *Reconsideration Order* explained, "[n]othing prevented the Commission from issuing a broader notice at the outset or broadening the scope of the proceeding by issuing a further notice to consider whether the public interest would be served by retaining the cap while eliminating the UHF discount." *Id.* (JA___-___).

because they are interrelated components of the same underlying policy judgment about permissible audience reach.

Petitioners also assert that the Commission has not always evaluated the discount in conjunction with the cap. They maintain that the agency "previously examined the UHF discount in isolation from the ownership cap … in both 1998 and 2006." Br. 31. In the proceedings cited by petitioners, however, the FCC merely sought comment on whether it should modify or eliminate the discount.[11] As petitioners acknowledge, neither of those proceedings resulted in any change to the discount apart from a change in the cap.[12]

III. THE COMMISSION HAS AUTHORITY TO REEVALUATE AND REVISE THE NATIONAL AUDIENCE REACH CAP

Petitioners further contend that there was no reason for the Commission to delay the elimination of the UHF discount pending evaluation of the national

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[11] *See* Br. 8 & nn.22-23 (citing *1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 13 FCC Rcd 11276, 11285 (1998)); Br. 12 & n.32 (citing *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 21 FCC Rcd 8834, 8848-49 (2006)).

[12] *See* Br. 8 & n.24 (citing *1998 Biennial Review Order*, 15 FCC Rcd at 11080); Br. 12 & nn.33-34 (citing *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 23 FCC Rcd 2010, 2085 (2008)).

audience reach cap because the agency lacks authority to revise that cap. Br. 34-42. This argument has been forfeited. In any event, it is meritless.

In the proceeding below, in ex parte filings submitted in April 2017, petitioners argued that the Commission lacked authority to revise the cap. *See Reconsideration Order* n.60 (JA___). Earlier in the same proceeding, however, petitioners took the opposite position, asserting that the FCC *had* authority to change the cap.[13] When a party takes "inconsistent positions" on an issue before the FCC, the agency does not receive "a fair opportunity to address" the argument

[13] *See* Opposition of Public Interest Commenters, Jan. 10, 2017, at 3 (JA___) ("As the Commission rightly contemplated in 2013, it 'has the authority to modify the national television ownership rule, including the authority to revise or eliminate the UHF discount.'") (quoting *Notice* ¶ 13 (JA___)); Reply Comments of Common Cause *et al*., Jan. 13, 2014, at 7 (JA___) ("Broadcast commenters argue at length—and incorrectly—that the Commission doesn't have authority even to change the cap absent express Congressional mandate.").

that the party adopts on appeal, and the argument is barred by section 405(a) of the Communications Act, 47 U.S.C. § 405(a). *See Busse*, 87 F.3d at 1461.[14]

Petitioners also forfeited their authority argument because they raised the issue too late in the proceeding below. The ex parte filings in which petitioners challenged the FCC's authority to revise the cap were dismissed by the Commission as "out-of-time oppositions" to the petition for reconsideration. *Reconsideration Order* n.60 (JA___) (citing 47 C.F.R. § 1.429(f)). Petitioners do not challenge that procedural ruling. Because they did not timely present their authority argument to the Commission, petitioners are precluded from raising that claim here for that reason as well. *See* 47 U.S.C. § 405(a); *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 199-200 (D.C. Cir. 2003); *Virgin Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1236-37 (D.C. Cir. 1993).

[14] Apart from petitioners' inconsistent filings, no other party argued (as petitioners do now) that the FCC had authority to eliminate the discount but not to change the 39 percent cap. Nor did Commissioner O'Rielly's dissent from the *Repeal Order* give the agency an opportunity to pass on the claim now raised by petitioners. *See Office of Commc'n of United Church of Christ v. FCC*, 465 F.2d 519, 523-24 (D.C. Cir. 1972). Unlike petitioners, Commissioner O'Rielly asserted that the FCC lacked "authority to modify the National Television Ownership Rule in any way, *including eliminating the UHF discount*." *Repeal Order*, 31 FCC Rcd at 10251 (dissenting statement of Commissioner O'Rielly) (JA___) (emphasis added). Accordingly, the FCC was not "afforded a fair opportunity to pass" on petitioners' argument. *See Globalstar, Inc. v. FCC*, 564 F.3d 476, 484 (D.C. Cir. 2009) (quoting *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1182 (D.C. Cir. 2003)).

In any event, even if it were not procedurally barred, petitioners' contention that the Commission lacks authority to revise the cap is baseless. It rests entirely on petitioners' misguided reading of the 2004 CAA, which directed the FCC to amend its audience reach cap rule to set the cap at 39 percent. According to petitioners, "[t]he *only* reasonable reading of the CAA" is that "it prohibits the FCC from raising the cap above 39%" but "does not take away the FCC's ability to determine how to calculate the cap" or to abolish the UHF discount. Br. 36 (emphasis added). That claim cannot withstand scrutiny.

Contrary to petitioners' assertions, the plain text of the CAA, the structure of the Communications Act as a whole, and past agency practice all support the FCC's conclusion that it remains free to revise the cap.

The CAA amended section 202(c)(1)(B) of the 1996 Act "by striking '35 percent' and inserting '39 percent.'" CAA, § 629 (1). As a result of this amendment, section 202(c) of the 1996 Act directed the FCC to "modify its rules for multiple ownership" set forth in 47 C.F.R. § 73.3555 "by increasing the national audience reach limitation for television stations to 39 percent." 1996 Act, § 202(c)(1)(B) (as amended). The CAA also amended section 202(h) of the 1996 Act to specify that the requirement to conduct a quadrennial review of many of the FCC's broadcast ownership rules "does not apply to any rules relating to the 39

percent national audience reach limitation in subsection (c)(1)(B)." CAA, § 629(3).

In the *Repeal Order*, the Commission reasonably explained that the CAA "simply directed the Commission to revise its rules to reflect a 39 percent national audience reach cap and removed" the cap "from the Commission's quadrennial review requirement." *Repeal Order* ¶ 21 (JA___). The CAA "did not impose a statutory national audience reach cap or prohibit the Commission from evaluating the elements of this rule." *Id.*

Of course, as the Commission noted, Congress "could have foreclosed the Commission from ever revising the national audience reach cap" by codifying the level of the cap in the Communications Act "or by otherwise withdrawing Commission authority to modify the cap." *Repeal Order* ¶ 23 (JA___). When Congress wishes to impose statutory constraints on the Commission's discretion, it knows how to do so.[15] Congress placed no such restrictions on the FCC's authority to revise the audience reach cap, "opting instead" to direct the agency in

[15] *See, e.g.*, 47 U.S.C. § 152(b) (generally prohibiting the FCC from regulating intrastate telecommunications service); *id.* § 160(d) (the FCC generally "may not forbear from applying the requirements of section 251(c) or 271 under [section 10(a)] until it determines that those requirements have been fully implemented"); *id.* § 271(d)(4) ("The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in [section 271(c)(2)(B)]."); *id.* § 332(c)(1)(A) (the FCC may not forbear from applying any provision of section 201, 202, or 208 to commercial mobile services).

2004 to amend its rules to reduce the cap "from 45 percent to 39 percent and relieving the Commission of the obligation to reevaluate the … cap in the mandated quadrennial ownership review." *Id.* It did not amend the Communications Act to embed the 39 percent cap into statutory law or preclude the FCC from ever revisiting the cap in the future if circumstances warranted.

The structure of the Communications Act as a whole reinforces the FCC's reading of the 2004 CAA. The Commission explained that "the Communications Act gives the Commission the statutory authority to revisit its own rules and revise or eliminate them when it concludes such action is appropriate." *Repeal Order* ¶ 21 (JA___) (citing 47 U.S.C. §§ 154(i), 303(r)). The Commission further noted that "no statute," including the 2004 CAA, "bars the Commission from revisiting the cap" outside the quadrennial review process. *Id.* (JA___). Accordingly, Congress's decision to remove the national audience reach cap from the quadrennial review did not alter the FCC's preexisting authority to reconsider and revise its own rules. *See id.* ¶¶ 21, 23 (JA___-___).

Moreover, the Commission's reading of the CAA is entirely consistent with past Congressional and agency practice under section 202(c)(1)(B) of the 1996 Act. When Congress directed the FCC in 1996 to amend its rules to set the audience reach cap at 35 percent, it used the same language that it preserved in the 2004 CAA. The Commission reasonably interpreted that language as allowing it to

amend its rule in the future to change the cap in light of changed market conditions. *See 1998 Biennial Review Order*, 15 FCC Rcd at 11072 ¶ 25 (asserting that it might alter the cap if market conditions justified a change); *2002 Biennial Review Order*, 18 FCC Rcd at 13842-43 ¶¶ 578-83 (adjusting the audience reach cap to account for changed market conditions). Indeed, when the Commission decided to preserve the 35 percent cap in its 1998 biennial review, this Court concluded that it was arbitrary and capricious for the FCC to do so without demonstrating that the cap remained in the public interest. *See Fox Television Stations*, 280 F.3d at 1041-44. This result would make no sense if the FCC were categorically prohibited from changing the cap.

The FCC responded to *Fox Television Stations* by increasing the cap to 45 percent in 2002, again acknowledging its authority to revise the cap. At that juncture, had Congress determined that both the Commission and this Court misinterpreted the scope of the FCC's authority under the 1996 Act, it could easily have enacted language in the 2004 CAA to mandate a 39 percent cap without regard to FCC rules. Instead, Congress once again directed the FCC to "modify its rules" to reflect a 39 percent cap. By keeping the same formulation that it previously used in 1996, Congress again left open the possibility that the agency could later amend its rules to modify the audience reach cap.

Even if the text, structure, and history of the 2004 CAA left room for ambiguity, however, the FCC's interpretation would be entitled to deference under *Chevron*, 467 U.S. at 842-43.

Petitioners claim that the FCC's determination in the *Repeal Order* that it had authority to revise the audience reach cap "was in the nature of *dicta*." Br. 41. Not so. The Commission's unequivocal ruling that it "has the authority to modify the national audience reach cap," *Repeal Order* ¶ 21 (JA___), responded to arguments that it lacked authority to eliminate the UHF discount because it had no authority to revise the cap. *See id.* ¶ 20 & n.73 (JA___) (citing comments of 21st Century Fox). That ruling "remain[ed] undisturbed" on reconsideration, and the Commission cited it to respond to petitioners' untimely arguments that the agency possessed authority to eliminate the discount but lacked authority to alter the cap. *Reconsideration Order* n.60 (JA___).

Finally, even if there were some doubt as to the Commission's authority to change the cap, that doubt would not render the reasoning in the *Reconsideration Order* arbitrary and capricious. To the contrary, the Commission could reasonably have decided to reinstate the UHF discount now pending a subsequent rulemaking to seek public comment on the scope of its authority. Indeed, if it turned out that petitioners were correct that the FCC lacks authority to change the cap, "then it follows that the Commission does not have authority to eliminate the discount,

which [is] part of the cap." *Reconsideration Order* n.60 (JA___). In that circumstance, the only proper course of action would be to do precisely what the *Reconsideration Order* did: reinstate the UHF discount.

IV. THE COMMISSION REASONABLY DECIDED TO REINSTATE THE UHF DISCOUNT IMMEDIATELY WHILE IT EVALUATED THE DISCOUNT AND THE CAP IN TANDEM

Petitioners further claim that, even if the Commission had authority to reconsider the cap at a future date, it was nevertheless arbitrary and capricious for the Commission to reinstate the discount pending the agency's joint review of the discount and the cap. Br. 42-46. They suggest that the FCC's August 2016 decision to eliminate the discount should have remained in effect while the Commission conducted further review of the cap. But the Commission had determined on reconsideration that the *Repeal Order* "failed to provide a reasoned basis to eliminate the discount in isolation without also fully considering whether the cap should be modified." *Reconsideration Order* ¶ 10 (JA___). To "rectify" this failure, the Commission reasonably decided on reconsideration to reinstate the discount so that it could consider any change to the discount "as part of a broader reassessment" of the cap, to begin later in 2017. *Id*. ¶ 15 (JA___).

The Commission reasonably concluded that reinstatement of the discount was appropriate because it simply "return[ed] broadcasters to the status quo ante for purposes of calculating their compliance with the cap." *Reconsideration*

Order, Appendix B, ¶ 3 (JA___). Prior to the *Repeal Order*, the agency had applied the discount to the national audience reach cap for all 31 years of the cap's existence (from 1985 to 2016). And the Commission found no evidence that application of the discount after the DTV transition in 2009 had undermined the efficacy of the cap. *See Reconsideration Order* ¶ 13 (JA___) (the *Repeal Order* "presented no examples of how the current cap, including the UHF discount, was harming competition, diversity, or localism").

By contrast, the discount had been repealed for only five months (during which a petition for reconsideration was pending) before the *Reconsideration Order* was issued. And eliminating the discount had "the effect of substantially tightening the cap" for UHF station owners, even though the *Repeal Order* "never explained why tightening the cap was in the public interest." *Reconsideration Order* ¶ 13 (JA___).

On reconsideration, the Commission reasonably declined to leave in place this major modification to the cap, which had been adopted only a short time ago and had not been adequately justified. Instead, the Commission chose to restore the cap to its previous level by "reinstating the UHF discount for the time being," pending the completion of "a comprehensive rulemaking … to determine whether to retain [the discount] and/or modify the national cap." *Reconsideration Order*

¶ 1 (JA___). That decision fell comfortably within the agency's "broad discretion" to "structur[e] its own proceedings." *See City of Angels*, 745 F.2d at 664.

Petitioners nonetheless hypothesize that "the real reason" the FCC reinstated the discount was "to allow increased consolidation," and they point to the proposed acquisition of Tribune Media Company's television stations by Sinclair Broadcast Group. Br. 33. Petitioners' suggestion, which is wholly unsupported, runs counter to the well-settled rule that federal agencies, including the FCC, are presumed to act in good faith. *Comcast Corp. v. FCC*, 526 F.3d 763, 769 n.2 (D.C. Cir. 2008).

Furthermore, the Commission has not yet ruled on the proposed acquisition, and it could disapprove Sinclair's acquisition of Tribune's stations or impose conditions on the transaction. Indeed, as petitioners acknowledge (Br. 45), the FCC could condition approval of that (or any other) transaction on the parties "coming into compliance" with any "rules adopted in the future pending rulemaking" regarding the national audience reach cap. The Department of Justice is also reviewing the merger under the Hart-Scott-Rodino Act and could seek relief from the courts if it appears anticompetitive.

Finally, even if the FCC approves the Sinclair-Tribune transaction (or any other acquisition of television stations) before the Commission's evaluation of the national audience reach cap is completed, aggrieved parties could seek judicial review of any such approvals. Reinstatement of the UHF discount thus does not

divest petitioners of their ability to challenge the approval of any broadcast television transaction (including Sinclair-Tribune) as inconsistent with the public interest.

Petitioners also assert that the comprehensive review of the cap that the Commission has committed to undertake "is unlikely to ever take place, and at best, could take a long time." Br. 46. But the Commission has committed to commencing a rulemaking in 2017 to conduct a joint review of the audience reach cap and the UHF discount. *Reconsideration Order* ¶ 10 (JA___). In the meantime, particularly in light of the UHF discount's decades-long existence, it was reasonable for the Commission to conclude that it should make no changes to the discount until it determined whether the audience reach cap would continue to serve the public interest at its current level.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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November 7, 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FREE PRESS, ET AL., PETITIONERS, V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	NO. 17-1129

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 9,997 words.

This brief also 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 2013 in 14-point Times Roman font.

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November 7, 2017

STATUTORY ADDENDUM

47 U.S.C. 154(i) & (j)
47 U.S.C. 303(r)
47 U.S.C. 405

Telecommunications Act of 1996, §202(c) and 202(h),
Pub. L. No. 104-104, 110 Stat. 56, 111-12

Consolidated Appropriations Act 2004, §629,
Pub. L. No. 108-199, 118 Stat. 3, 99-100

47 C.F.R. 73.3555(e)

47 U.S.C. § 154(i) & (j)

§ 154. Federal Communications Commission

* * * *

(i) Duties and powers

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

(j) Conduct of proceedings; hearings

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

47 U.S.C. § 303(r)

§ 303. Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall--

* * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

47 U.S.C. § 405

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under

section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

Telecommunications Act of 1996, §§ 202(c) & 202(h)
Pub. L. No. 104-104
(Original Text)

BROADCAST OWNERSHIP.

* * * *

(c) Television Ownership Limitations.—

(1) National ownership limitations.—The Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations (47 C.F.R. 73.3555)--

(A) by eliminating the restrictions on the number of television stations that a person or entity may directly or indirectly own, operate, or control, or have a cognizable interest in, nationwide; and

(B) by increasing the national audience reach limitation for television stations to 35 percent.

* * * *

(h) Further Commission Review.—The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

Consolidated Appropriations Act, 2004, §629
Pub. L. No. 108-199

The Telecommunications Act of 1996 is amended as follows—

(c) in section 202(c)(1)(B) by striking "35 percent" and inserting "39 percent";

(d) in section 202(c) by adding the following new paragraphs at the end:

"(3) Divestiture.—A person or entity that exceeds the 39 percent national audience reach limitation for television stations in paragraph (1)(B) through grant, transfer, or assignment of an additional license for a commercial television broadcast station shall have not more than 2 years after exceeding such limitation to come into compliance with such limitation. This divestiture requirement shall not apply to persons or entities that exceed the 39 percent national audience reach limitation through population growth.

"(4) Forbearance.—Section 10 of the Communications Act of 1934 (47 U.S.C. 160) shall not apply to any person or entity that exceeds the 39 percent national audience reach limitation for television stations in paragraph (1)(B);"; and

(e) in section 202(h) by striking "biennially" and inserting "quadrennially" and by adding the following new flush sentence at the end:

"This subsection does not apply to any rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B).".

47 C.F.R. § 73.3555(e)

§ 73.3555 Multiple ownership.

* * * *

(e) National television multiple ownership rule.

(1) No license for a commercial television broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors having a cognizable interest in television stations which have an aggregate national audience reach exceeding thirty-nine (39) percent.

(2) For purposes of this paragraph (e):

(i) National audience reach means the total number of television households in the Nielsen Designated Market Areas (DMAs) in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license. For purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their DMA market.

(ii) No market shall be counted more than once in making this calculation.

(3) Divestiture. A person or entity that exceeds the thirty-nine (39) percent national audience reach limitation for television stations in paragraph (e)(1) of this section through grant, transfer, or assignment of an additional license for a commercial television broadcast station shall have not more than 2 years after exceeding such limitation to come into compliance with such limitation. This divestiture requirement shall not apply to persons or entities that exceed the 39 percent national audience reach limitation through population growth.

CERTIFICATE OF FILING AND SERVICE

I, James M. Carr, hereby certify that on November 7, 2017, I filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/ James M. Carr

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