ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 17-1107, 17-1108, 17-1109, 17-1110, 17-1111, 18-1092,
18-1669, 18-1670, 18-1671, 18-2943, & 18-3335

PROMETHEUS RADIO PROJECT, ET AL.;
MULTICULTURAL MEDIA, TELECOM, AND INTERNET COUNCIL, ET AL.;
AND INDEPENDENT TELEVISION GROUP,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

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

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INTRODUCTION

In the orders under review, the Commission updated its media ownership rules to reflect today's dynamic and evolving media landscape.[1] Notably, in the 2017 *Reconsideration Order*, the Commission eliminated or modified various prohibitions on cross-ownership of media outlets that were adopted in a pre-Internet age when consumers had much more limited options for news and other content. As this Court has recognized, the perseverance of these outdated rules had imposed "significant expense" on parties that might otherwise "engage in profitable combinations."[2] The Commission concluded that its reforms would provide broadcasters and local newspapers with greater opportunities to compete in today's media marketplace and invest in new sources of local news and public interest programming.

In making these determinations, the Commission satisfied its quadrennial obligation under Section 202(h) of the Communications Act to

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[1] *2014 Quadrennial Regulatory Review—Review of the Commission's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 32 FCC Rcd 9802 (2017) (*Reconsideration Order*) (JA__); *2014 Quadrennial Regulatory Review—Review of the Commission's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 31 FCC Rcd 9864 (2016) (*Second R&O*) (JA__).

[2] *Prometheus Radio Project v. FCC*, 824 F.3d 33, 51-52 (3d Cir. 2016) (newspaper-broadcast cross-ownership rule) (*Prometheus III*).

"determine whether any of [its ownership] rules are necessary in the public interest as the result of competition," and to "repeal or modify" any such unnecessary rules.[3] Citizen Petitioners (a collection of public interest and advocacy groups[4]) do not challenge the Commission's core determination that competitive changes have rendered the media ownership rules at issue obsolete or in need of modification.

The Commission also reasonably "monitor[ed] the effect" of its rules on three public policy considerations that it has historically considered in the media ownership context—competition, localism, and diversity.[5] The Commission determined that preserving the preexisting rules was not necessary to advance these objectives; to the contrary, the old rules were on balance causing affirmative harm. Again, Citizen Petitioners do not contest the Commission's reasonable balancing of these public policy considerations.

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[3] Pub. L. No. 104-104, 110 Stat. 56 (1996 Act).

[4] These Petitioners are Prometheus Radio Project, Media Mobilizing Project, Free Press, Office of Communications of the United Church of Christ, National Association of Broadcast Employees and Technicians-Communications Workers of America, and Common Cause.

[5] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 391 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005) (*Prometheus I*) (quoting *2002 Biennial Regulatory Review*, 18 FCC Rcd 13620, 13623 ¶ 5 (2003) (*2003 Order*)).

Rather, Citizen Petitioners focus exclusively on one of these three public policy objectives (diversity) and one of five types of diversity that the Commission has historically considered as part of its analysis (female and minority ownership). They argue that the orders on review should be vacated because the Commission lacked substantial evidence to conclude that the rule changes would not significantly impact minority and female ownership. But this narrow challenge fails at the outset by neglecting to account for—let alone prove unlawful—the Commission's reasonable judgment that competitive changes and public policy considerations as a whole supported amendments of its rules under Section 202(h). In any event, the Commission carefully considered the potential effect of each of its rules on minority and female ownership and found no material impact.[6]

In contrast to Citizen Petitioners, Petitioner Independent Television Group (ITG) argues the FCC did not go far enough in modifying its local television ownership rule because the Commission retained its restriction on mergers among the top-four rated stations. But the record showed that this

[6] *Reconsideration Order* ¶¶ 44-48 (newspaper/broadcast cross-ownership rule) (JA__), ¶¶ 64-65 (radio/television cross-ownership rule) (JA__), ¶¶ 83-84 (local television ownership rule) (JA__), ¶ 107 n.315 (attribution of joint sales agreements); *see Second R&O* ¶¶ 124-128 (local radio ownership rule) (JA__).

prohibition was still an appropriate check to preserve competition in programming in most markets. And the Commission explained it would not apply the prohibition in instances where parties can demonstrate that the public interest benefits of a top-four merger would outweigh the costs.

Citizen Petitioners also claim that the Commission violated the Communications Act and this Court's mandates by readopting a revenue-based standard for who qualifies as an "eligible entity" for certain regulatory preferences without explicitly finding that the standard promotes female and minority ownership. But this Court merely required that the Commission "act promptly to bring the eligible entity definition to a close."[7] It has now done so (in the *Second R&O*) and reasonably concluded that its "eligible entity" definition would promote new entry into the broadcast industry of small businesses and entrepreneurs. These public policy rationales (which Citizen Petitioners do not challenge) suffice to support the Commission's eligible entity decision; there is no requirement that the Commission demonstrate that every ownership rule independently promotes every form of diversity. In any event, the Commission carefully considered alternative definitions directly aimed at promoting minority or female ownership and concluded that they

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[7] *Prometheus III*, 824 F.3d at 49.

could not be adopted consistent with the First and Fifth Amendments and would pose insurmountable administrative challenges. Citizen Petitioners, again, do not dispute these conclusions.

Notably, the Commission did propose and adopt a race- and gender-neutral radio incubator program (in the *Incubator Order*) specifically aimed at promoting ownership diversity and supported by data showing that similar measures in the past have "increased successful participation of small businesses owned by women and minorities[.]"[8] While the idea for an incubator has received bipartisan support since the 1990s, no prior Commission has ever put one in place. Citizen Petitioners and others—Multicultural Media, Telecom and Internet Council (MMTC) and National Association of Black Owned Broadcasters (NABOB)—challenge aspects of the incubator program, but these objections amount to mere disagreement with the reasonable lines that the Commission drew in exercising its expert judgment on how best to advance its statutory objectives.

In short, in the orders under review, the Commission adopted much-needed and long overdue regulatory reforms to empower local broadcasters

[8] *Rules & Policies to Promote New Entry & Ownership Diversity in the Broad. Servs.*, 33 FCC Rcd 7911, 7919-21 at ¶¶ 21-24 (2018) (*Incubator Order*) (JA__).

and newspapers to compete in an increasingly-crowded new media marketplace; instituted a first-of-its kind incubator program to promote ownership diversity; and fully complied with this Court's prior mandates. For the reasons set forth herein, all of petitioners' challenges to the orders under review are meritless, and their petitions should be denied.

QUESTIONS PRESENTED

1. Did the FCC reasonably update its media ownership rules pursuant to Section 202(h) in light of changes to competition in the modern media marketplace?

2. Was the agency's decision to retain the prohibition against common ownership of two of the top-four television stations in a local market—tied to a delineated process to lift the prohibition in appropriate instances—reasonable and supported by the record?

3. Did the FCC reasonably conclude, based on constitutional limits and the record before it, that race- and gender-conscious measures to promote minority and female broadcast ownership were not sustainable?

4. Did the FCC reasonably establish an incubator program to promote broadcast station ownership by new entrants, including minority and female applicants?

5. Did the FCC reasonably call for further comment on MMTC's proposal to extend the cable procurement rules to the broadcast industry, given a record that did not yet support the proposal?

JURISDICTION

Cases 17-1107, 17-1108, 17-1109, 17-1110, and 17-1111 are petitions for review of the *Second R&O* (JA__). The FCC released that order on August 25, 2016 and published notice of the order in the Federal Register on November 1, 2016. Petitioners in these cases petitioned for review in the U.S. Court of Appeals for the D.C. Circuit in cases docketed between November 11 and December 28, 2016. The D.C. Circuit transferred those cases here, and this Court docketed the cases under the present numbers on January 18, 2017.

Cases 18-1092, 18-1669, 18-1670, and 18-1671 are petitions for review of the *Reconsideration Order* (JA__). The FCC released that order on November 20, 2017 and published notice of the order in the Federal Register on January 8, 2018. Petitioners in case 18-1092 petitioned for review in this Court on January 16, 2018. Petitioners in cases 18-1669, 18-1670, and 18-1671 petitioned for review in the D.C. Circuit between February 20 and March 8, 2018. Those cases were transferred to this Court and docketed between April 3 and April 5, 2018.

Cases 18-2943 and 18-3335 are petitions for review of the *Incubator Order* (JA__). The FCC released that order on August 3, 2018 and published notice of the order in the Federal Register on August 28, 2018. These petitions for review were docketed between August 31, 2018 and October 22, 2018.

This Court's jurisdiction to review all of these cases rests on 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342 & 2344. However, as Intervenors explain (Int. Br. Section I), no petitioner other than ITG has even attempted to carry its burden to demonstrate standing. To do so, Petitioners must show a "concrete and particularized" injury in fact that is "fairly traceable" to the challenged action. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). A "mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization … is not sufficient." *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 279 (3d Cir. 2014) (citations and quotation marks omitted). When an organization sues on behalf of its members, it "must make specific allegations establishing that at least one identified member ha[s] suffered or would suffer harm." *Id.* 280 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009)). Again, no Petitioner other than ITG has even attempted such a showing.

Moreover, Citizen Petitioners, including Prometheus, have in past litigation alleged injuries purportedly stemming from the impact of media consolidation on employment and viewpoint diversity. However, here they do not challenge consolidation per se, but rather the alleged impact of the agency's actions on broadcast ownership by minorities and women. The link between any such impact and injury to Citizen Petitioners is not self-evident, and they do not attempt to draw such a link. Standing under one theory of injury does not give standing to assert a completely different claim. "[S]tanding is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). And while minority and female ownership may be a laudable goal, "generalized grievances shared by the public at large do not provide individual plaintiffs with standing." *Blunt*, 767 F.3d at 279–80 (alterations in original, quotation marks and citations omitted).

STATUTES AND REGULATIONS

Relevant statutes and regulations appear in an appendix to this brief.

COUNTERSTATEMENT

I. THE QUADRENNIAL REVIEW OBLIGATION

Section 202(h) of the Telecommunications Act of 1996, as amended, 47 U.S.C. § 303 note, requires the FCC to review its media ownership rules every four years. In doing so, the Commission must "determine whether any of such rules are necessary in the public interest as the result of competition," and "repeal or modify any regulation it determines to be no longer in the public interest." *Id*. "Congress intended [these] periodic reviews to operate as an 'ongoing mechanism to ensure that the Commission's regulatory framework would keep pace with the competitive changes in the marketplace.'" *Prometheus I*, 373 F.3d at 391.

While Section 202(h), on its face, is "limited to a review for whether ownership rules remain necessary in light of competition in the broadcast industry," *Prometheus III*, 824 F.3d at 38, the Commission historically has considered "three traditional public policy objectives" as part of its public interest analysis—"competition, diversity, and localism." *Prometheus I*, 373 F.3d at 386; *see also 2003 Order*, 18 FCC Rcd at 13627-45 ¶¶ 17-79. The Commission has identified five different types of diversity that may be relevant in this context—viewpoint, outlet, program, source, and minority and female ownership diversity. *Id.* at 13627 ¶ 18. Crafting rules to serve these objectives in a dynamic media landscape "necessarily involves deductions based on the expert knowledge of the agency." *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 814 (1978).

II. THE ORDERS ON REVIEW

A. The *Second Report And Order*.

In August 2016, in an order completing its combined 2010 and 2014 quadrennial reviews, the FCC decided generally to maintain its existing media ownership rules. *Second R&O* ¶¶ 17-233 (2016) (JA__).[9]

In the *Second R&O*, the Commission retained (1) the newspaper/ broadcast cross-ownership rule, which prohibited common ownership of a daily newspaper and a full-power broadcast station if the station's service contour encompassed the newspaper's community of publication, *id*. ¶¶ 129-197 (JA__); (2) the radio/television cross-ownership rule, which imposed limits on the number of television stations and radio stations that can be commonly owned in the same market, depending on the size of the market, *id*. ¶¶ 198-215 (JA___); (3) the local radio ownership rule, which limits the number of radio stations that can be commonly owned by a single entity, again depending on the number of stations in the market, *id*. ¶¶ 82-128 (JA___); and (4) the local television ownership rule, which allows common ownership of two television stations in the same market only if their signals do not overlap, or at least one of the stations is not among the top-four

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[9] Then-Commissioner (now-Chairman) Pai and Commissioner O'Rielly dissented.

stations in the market (the Top-Four Prohibition), and at least eight independently owned stations remain after the combination (the Eight-Voices Test), *id*. ¶¶ 17-81 (JA___).

The Commission also addressed this Court's remand in *Prometheus Radio Project v. FCC*, 652 F.3d 431, 471 (3d Cir. 2011) (*Prometheus II*), and *Prometheus III*, 824 F.3d at 49. In those cases, this Court required that the Commission "make a final determination as to whether to adopt a new ['eligible entity'] definition" for certain regulatory preferences. *Id.* 49. The Court did not "prejudge the outcome of this analysis; we only order that it must be completed." *Id.* Reviewing the record, the FCC readopted a revenue-based "eligible entity" standard. *Second R&O* ¶¶ 279-86 (JA__-__). The FCC concluded that doing so "is a reasonable and effective means of promoting broadcast station ownership by small businesses and potential new entrants" that would "encourage innovation and promote competition and viewpoint diversity," which are "two primary policy objectives that have traditionally guided" the Commission. *Id*. ¶¶ 280-281 (JA__-__).

The FCC declined to adopt the socially disadvantaged business (SDB) definition employed by the Small Business Administration "or [an]other race- or gender-conscious eligible entity standard," *id*. ¶ 297 (JA___), for purposes of these regulatory benefits, concluding that the record evidence was not sufficient to withstand the heightened judicial scrutiny that would be applicable to such a standard. *Id.* ¶¶ 297-305, 307-08 (JA__). While the FCC assumed, for purposes of its analysis, that a court "could be convinced that diversity of viewpoint is a compelling governmental interest," it found that the evidence did not demonstrate "the nearly complete or tightly bound nexus between diversity of viewpoint and minority ownership that would be required" to justify race-conscious measures under strict scrutiny. *Id.* ¶ 301 & n.913 (internal quotation marks and citations omitted) (JA__). The Commission also concluded that the "individualized review" required under strict scrutiny would "pose a number of significant administrative and practical challenges for the Commission and would not be feasible." *Id.* ¶ 305 (JA__).

Further, the FCC found that the record did not establish the required "strong basis in evidence" of past discrimination in the FCC licensing process or in the broadcast industry to justify race-conscious measures on a remedial basis. *Id.* ¶¶ 309-12 (JA__). The FCC also concluded that the available evidence did not demonstrate the meaningful link between broadcast diversity and female ownership required under intermediate scrutiny. *Id.* ¶ 308 (JA__). The agency expressed its willingness to revisit these issues in the future "if changed circumstances suggest a different outcome." *Id.* ¶ 316 (JA__). But it rejected arguments that it is required, by statute or this Court's mandates, to adopt race- or gender-based measures to promote ownership diversity. *Id.* ¶¶ 313-16 (JA__).

The FCC also declined to adopt a proposal that regulatory benefits be made available for entities that have overcome "disadvantage" (the "overcoming disadvantage proposal" (ODP)). *Id.* ¶ 306 (JA__). As the Commission explained, no commenter "proposed a method for the Commission to provide the type of individualized consideration that an ODP standard would require without being unduly resource-intensive and inconsistent with First Amendment values." *Id*. An inquiry into whether an applicant had "faced and overcome a 'substantial disadvantage'" would "inherently" involve the Commission in making a "subjective determination as to whether a particular applicant would be likely to contribute to viewpoint diversity." *Id.*

Finally, the FCC addressed diversity-related proposals by MMTC and others. *Id.* ¶¶ 317-36 (JA__). It declined to adopt an incubator program, especially because, as proposed, the program would rely on an ODP standard. *Id.* ¶¶ 319-21 (JA__). On the other hand, the FCC found potential merit in MMTC's proposal to extend FCC cable procurement rules to broadcasters, and stated that it would in a future proceeding evaluate "whether, and if so, how to extend the cable procurement requirements to the broadcasting industry." *Id.* ¶ 330 (JA__).

B. The *Reconsideration Order*.

The National Association of Broadcasters (NAB) and others petitioned for reconsideration of the *Second R&O*. In response, the Commission released an order in November 2017 resolving the petitions and reconsidering the agency's prior decisions. *Reconsideration Order* ¶ 2 & n.3 (JA__). In the *Reconsideration Order*, the FCC eliminated the newspaper/broadcast and radio/television cross-ownership rules, modified the local television ownership rule, and adopted a new incubator program.

1. The Cross-Ownership Rules.

Newspaper/broadcast cross-ownership rule. On reconsideration, the Commission concluded that the newspaper/broadcast cross-ownership rule is no longer necessary to protect viewpoint diversity due to dramatic changes in the media marketplace, including the substantial increase in the number of broadcast voices. *Id.* ¶¶ 16-22 (JA__). To the contrary, the Commission determined that, in an increasingly competitive media market that includes cable news and Internet-based news sources, repealing this cross-ownership rule would allow "combinations that can strengthen local voices and thus enable the combined outlets to better serve their communities"—promoting both competition and localism. *Id.* ¶ 25 (JA__).

The FCC further reasoned that in light of "the long decline of the newspaper industry, the loss of an independent daily newspaper voice in a community will have a much smaller impact on viewpoint diversity." *Id.* ¶ 25 (JA__); *see id.* ¶¶ 23-25 (JA__). In addition, the FCC found that repeal would not have a significant or disproportionate impact on minority and female broadcast ownership. *Id.* ¶¶ 44-48 (JA__).

Radio/television cross-ownership rule. The FCC likewise concluded that retention of the radio/television cross-ownership rule was no longer justified. *Id.* ¶¶ 54-65 (JA__). Broadcast radio's importance in contributing to viewpoint diversity has diminished over time, the Commission explained, and the *Second R&O* had unjustifiably discounted the diversity contributions of nontraditional media outlets, including independent, online sources and cable and satellite programming. *Id.* ¶¶ 55-61 (JA__). In addition, the FCC noted that common ownership of broadcast stations would continue to be limited by the local television and local radio rules, so that elimination of the cross-ownership rule will have little effect in most markets. *Id.* ¶ 62 (JA__). Repealing the rule would also benefit localism by allowing cross-ownership of more broadcast stations, which could increase investment in local news and public affairs programming. *Id.* ¶ 63 (JA__). Finally, the FCC concluded that eliminating the rule would not significantly or disproportionately impact minority and female ownership. *Id.* ¶¶ 64-65 (JA__).

2. Local Television Ownership Rule.

The FCC found that the local television ownership rule was "not supported by the record and must be modified." *Reconsideration Order* ¶ 66 (JA__). The agency accordingly rescinded the rule's Eight-Voices Test and adopted a "hybrid approach" to the Top-Four Prohibition to allow for flexibility where merited. *Id.*

a. Eight-Voices Test.

The Commission found that the Eight-Voices Test "is unsupported by the record or reasoned analysis and is no longer necessary in the public interest." *Id.* ¶ 73 (JA__). The agency explained that although the test is predicated on preserving both the four stations affiliated with the Big Four networks in most markets and at least four stations unaffiliated with those networks, the *Second R&O* did not explain "why the number of independent television stations must be equal to the number of top-performing stations in a market." *Id.* ¶¶ 74-75 (JA__). Indeed, as the Commission pointed out, "a significant gap in audience share between the top-four stations and the other stations in a market" could instead justify the opposite: "permitting the common ownership of non-top-four stations to form a stronger competitor…, even if fewer than eight independent voices remain." *Id.* ¶ 75 (JA__). On reconsideration, the Commission also found that the Eight-Voices Test prevented "combinations that would likely produce significant public interest benefits," including allowing "a local broadcast station to invest more resources in news or other public interest programming that meets the needs of its local community." *Id.* ¶ 77 (JA__). Because "the Eight-Voices Test denies the public interest benefits produced by common ownership without any evidence of countervailing benefits to competition from preserving the requirement," the Commission repealed this aspect of the rule. *Id.*

b. Top-Four Prohibition

"In contrast" to the Eight-Voices Test, the Commission found that the Top-Four Prohibition was still in the public interest, and that "the Commission's decision in the *Second* [*R&O*] to treat combinations of two top-four stations differently from other combinations is supported in the record." *Id.* ¶ 78 (JA__). Specifically, the FCC found that "ratings data in the record generally supported the Commission's [previous] line drawing," citing the staff analysis of 2012 ratings showing that, as in previous orders, "there is generally a 'significant cushion' of audience share percentage points' that 'separate[s] the top four stations from the fifth-ranked stations.'" *Id.* ¶ 79 &

n.230 (JA__). In response to arguments challenging these data, the Commission found that the "data were sufficiently recent and uncontradicted by any newer ratings data in the record, such that it was appropriate for the Commission [in the *Second R&*O] to rely on the data in reaching its decision." *Id.* ¶ 79 (JA__). The Commission likewise found that the record supported a finding of "the potential harms associated with top-four combinations," which "would generally result in a single firm's obtaining a significantly larger market share than other stations and reduced incentives for commonly owned local stations to compete for programming, advertising, and audience shares." *Id.* n.230 (JA__).

The agency nonetheless acknowledged that there might be "instances in which the application of the Top-Four Prohibition may not be warranted based on the circumstances in a particular market or with respect to a particular transaction." *Id*. ¶ 78 (JA__). It therefore adopted a "hybrid" approach in the *Reconsideration Order*, under which applicants can "request a case-by-case examination of a proposed combination that would otherwise be prohibited by the Top-Four Prohibition." *Id*. ¶ 81 (JA__). Those seeking a merger that would otherwise be prohibited must "establish that application of the Top-Four Prohibition is not in the public interest because the reduction in competition is minimal and is outweighed by public interest benefits." *Id*. ¶

82 (JA__). Because of the wide variations in markets and parties, the Commission did not set out "a rigid set of criteria," but instead explained the types of information likely to be relevant, including (1) ratings data of the proposed merged entity compared to the remaining market participants, (2) revenue share, (3) market characteristics, (4) likely effects on programming, and (5) any other relevant circumstances, "particularly any disparities primarily impacting small and mid-sized markets." *Id.* ¶ 82 (JA__).

The agency found that the modifications to the local television ownership rule would not have a significant impact on minority and female ownership. *Id.* ¶¶ 83-84 (JA__).

3. The Incubator Program

Finally, the FCC, in a change from the *Second R&O*, adopted an incubator program. *Id.* ¶¶ 124-25 (JA__). The agency invited comment on "how to determine eligibility for participation" in that program, *id.* ¶ 131 (JA__), and on whether to encourage participation by offering a local ownership rule waiver as a reward to established broadcasters. *Id.* ¶ 137 (JA__). The agency further asked whether to limit any such waivers to the market where incubation occurs or to allow them "in any similarly sized market," as well as how to "determine which markets are similar in size." *Id.*

C. The *Incubator Order*.

On August 3, 2018, the Commission established the specific details of its new incubator program. *Incubator Order* (JA__). Under the program, which is limited to radio service, *id.* ¶¶ 7, 11-15 (JA__),

> established broadcasters (i.e., incubating entities) will provide … new entrants or small broadcasters (i.e., incubated entities) with the training, financing, and access to resources that would be otherwise inaccessible to these entities. At the end of the incubation relationship, the incubated entity will either own a broadcast station or will retain ownership of a previously struggling station, now set on a firmer footing. In return for its support, the incubating entity will receive a [reward] waiver of the applicable local radio ownership rule that it can use either in the incubated market or in a comparable market ...

Id. ¶ 6 (JA__). To be eligible to participate, incubated entities must be new entrants—a modified version of the standard the FCC has long used to extend bidding credits in the broadcast license auction context[10]—and must qualify as small businesses. *Id.* ¶¶ 8, 16-34 (JA__). In adopting this standard, the FCC relied on evidence that access to capital is the primary barrier to broadcast station ownership and that "individuals seeking to purchase their first or second broadcast station … often face the most challenging financial hurdles." *Id.* ¶ 20 & n.39 (JA__). The FCC declined to adopt a race- or gender-conscious standard or an ODP standard for the same reasons it

[10] The modified standard limits eligible entities to attributable interests in three radio stations and no television stations. *Incubator Order* ¶ 19 (JA__).

identified in the *Second R&O*. *Id.* ¶¶ 28-29 (JA__). Nevertheless, based on data indicating that the new entrant standard has increased successful auction participation by minority- and female-owned bidders, the FCC anticipated that use of a similar standard would help to diversify the applicant pool for the new program. *Id.* ¶¶ 21-24 (JA__).

For purposes of using "reward waivers," the FCC stated that a market will be considered comparable to the market where incubation occurs if it "fall[s] within the same market size tier under our Local Radio Ownership Rule"[11] and has no fewer independent owners. *Id.* ¶ 67 (JA__). The FCC rejected a proposal further to restrict use of waivers in the highest tier to markets that are ranked within five of the incubation market under Nielsen's population-based rankings. *Id.* ¶ 68 (JA__).

D. Subsequent Developments: The 2018 Quadrennial

The Commission has since begun its 2018 quadrennial review. *2018 Quadrennial Regulatory Review*, Notice of Proposed Rulemaking, FCC 18-179, 2018 WL 6589803 (rel. Dec. 13, 2018) ("*2018 Quadrennial NPRM*") (ADD 1). Consistent with its commitment in the *Second R&O*, the FCC

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[11] The rule has four market tiers: (1) those with 45 or more commercial and noncommercial radio stations; (2) those that have between 30 and 44 stations; (3) those that have between 15 and 29 stations; and (4) those that have 14 or fewer stations. 47 C.F.R. § 73.3555(a)(1).

invited comment on MMTC's proposal to extend cable procurement rules to broadcasters. *Id.* ¶¶ 94-100 (ADD 35-38).

SUMMARY OF ARGUMENT

I. Citizen Petitioners provide no basis to second-guess the Commission's reasoned determination under Section 202(h) that changing marketplace conditions, and a balancing of the Commission's public policy objectives of competition, localism, and diversity, required elimination or modification of the media ownership rules at issue. Citizen Petitioners fail to challenge most of this carefully calibrated analysis, limiting their criticism only to arguing that the Commission failed to adduce substantial evidence to support its conclusions that the rule changes would have no material impact on minority and female ownership.

In any event, the Citizen Petitioners' criticisms of the FCC's treatment of data on minority and female ownership lack merit. The Commission provided sufficient notice of its comparison of data from different sources. The data comparison reinforced the FCC's conclusion, based on the record and its own expertise, that these rule changes would not have a significant effect on minority and female ownership. Nor should the data comparison have come as a surprise, given that Citizen Petitioner Free Press used similar data to produce two reports during the 2006 quadrennial review. Citizen

Petitioners also had ample opportunity to address the data comparison on reconsideration.

Furthermore, the agency reasonably explained its reliance on the data comparison in the absence of a continuous, unified data source, and Citizen Petitioners do not challenge the FCC's finding that the data reflected no overall decline in minority and female ownership during the period it examined. The Commission also treated the data consistently, judging it insufficient in both orders on review to warrant revising (in the *Second R&O*) or retaining (in the *Reconsideration Order*) the existing media ownership rules in order to promote or protect minority and female ownership. The Commission reasonably concluded in the *Reconsideration Order* that the link between its rule changes and ownership diversity was not strong enough to outweigh the countervailing benefits for updating its rules.

Finally, in response to the Court's direction that "the Commission should consider how the ongoing broadcast incentive auction affects minority and female ownership," *Prometheus III*, 824 F.3d at 54 n.13, the Commission reasonably deferred analysis of the auction's effect, explaining that such an evaluation would have been premature in this proceeding. The FCC did offer a preliminary analysis that the auction may not have a significant effect.

II. The Commission's modifications to its local television ownership rule were also appropriate. In particular, the decision to retain the Top-Four Prohibition—but to modify it by providing that the Commission would not apply the prohibition to applicants who could show that a merger would be in the public interest because the benefits of consolidation outweigh potential harms to competition—was reasonable and supported by evidence. As the agency explained, top-four mergers generally risk the greatest competitive harm because they "reduce[] incentives for commonly owned local stations to compete for programming, advertising, and audience shares." *Reconsideration Order* ¶ 79 n.230 (JA__). The agency drew the line at four stations because there is generally a "cushion" of ratings that separates the top-four stations—which are usually affiliated with the Big Four networks—from lower rated, often independent stations. It was therefore reasonable to treat such mergers differently from other mergers, especially given the Commission's determination to rescind the Eight-Voices Test as unsupported by the record. And the agency's detailed provisions for flexibility ensure that the agency's line drawing will not exclude mergers that actually are in the public interest.

III. The FCC reasonably defined "eligible entity," completing the process required by this Court's remand, by reinstating a revenue-based eligibility standard for purposes of certain regulatory benefits. The Commission determined that this would promote broadcast ownership by small businesses, while also concluding that race- and gender-conscious measures to promote minority and female ownership were not legally sustainable. Citizen Petitioners argue that the agency "unlawfully withheld and unreasonably delayed" action to promote minority and female ownership "and violated this Court's remand … to obtain data needed to implement that obligation." Citizens Br. 35-36. But this Court did not require that the Commission obtain additional data—only that the Commission bring its eligible entity determination to a close. The Commission has now done so, adopting an approach that furthers its statutory objectives within constitutional limits. In reaching that result, the FCC was not compelled to fund additional studies. On the contrary, all that this Court's mandate and the APA requires is that the Commission provide the public with an opportunity to comment and then reasonably consider all the significant evidence in the record in making its determinations. The Commission did so here.

IV. Citizen Petitioners also challenge the FCC's eligibility definition for the new incubator program because it purportedly will not do enough to promote minority and female ownership. That argument, however, ignores the agency's reasoned predictive judgment that the incubator program would benefit minority and female applicants and its conclusion that race- and gender-conscious measures would be legally unsustainable. The definition the agency adopted is reasonably tailored to the FCC's diversity goal for the incubator program, which is to promote broadcast ownership by *new entrants*—hence increasing the diversity of ownership generally. Its prediction that the definition will help to diversify the applicant pool for the incubator program was reasonable and consistent with the data in the record.

MMTC and NABOB contend the FCC failed to provide fair notice of its standard for determining where an incubating station could use the reward waiver it receives by helping an incubated station. In particular, these petitioners claim that the FCC ignored their concern about allowing a waiver obtained in one local radio market in the highest tier (45+ stations) to be used in any other local radio market in that tier. But the FCC defined comparability based on the market size tiers already in use in the local radio ownership rule, which has relied on these same tiers since 1996. Based on the notice, interested parties should have anticipated that the FCC might resort to these familiar tiers. And the FCC addressed MMTC's and NABOB's concern regarding application of the standard, reasonably predicting that reward waiver use would not be driven by market population. The FCC also explained its reasons for rejecting MMTC's and NABOB's proposed population-based limit.

V. Finally, MMTC and NABOB argue that the agency unreasonably delayed action in the *Second R&O* when it found "merit in exploring whether, and if so, how, to extend the cable procurement requirements to the broadcasting industry." *Second R&O* ¶ 330 (JA__). But at the time of that order, despite "multiple opportunities to voice support," "the record contain[ed] almost no support." *Id.* ¶ 324 (JA__). The agency therefore acted reasonably in tabling action until it could seek further comment. In 2018 it then issued a detailed notice explaining the many questions that remained and seeking the support that would be necessary to act. This was eminently reasonable. There is no basis for a judicially imposed timeline for the FCC to determine whether and how to extend the cable procurement rules to the broadcast industry.

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 I*, 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 Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The agency's decision will be affirmed so long as it has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *Id. See Council Tree Investors, Inc. v. FCC*, 863 F.3d 237, 240 (3d Cir. 2017) (*Council Tree IV*).

The Federal Communications Act grants the Commission "broad discretion" to allocate broadcast licenses in the "public interest, convenience and necessity." *FCC v. WNCN Listeners' Guild*, 450 U.S. 582, 593-94 (1981); *NCCB*, 436 U.S. at 795; *NBC*, 319 U.S. at 219. The FCC's broad discretion means that its "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." *Prometheus I*, 373 F.3d at 390 (quoting *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002)).

ARGUMENT

I. THE FCC REASONABLY UPDATED ITS OWNERSHIP RULES IN LIGHT OF INCREASED COMPETITION AND ITS ANALYSIS OF THE PUBLIC INTEREST AS A WHOLE.

On reconsideration, the FCC determined that its newspaper/broadcast and radio/television cross-ownership rules are no longer necessary in the public interest due to dramatic changes in the media marketplace. These changes include the substantially increased number of broadcast voices, the newspaper industry's decline, radio's diminished importance in contributing to viewpoint diversity, and the explosive growth of nontraditional media outlets, such as independent, online news outlets and cable and satellite programming. *Reconsideration Order* ¶¶ 16-31, 54-63 (JA__). As to the newspaper-broadcast cross-ownership rule, therefore, the FCC found that "[w]hatever the limited benefits for viewpoint diversity of retaining the rule, in today's competitive media environment, they are outweighed by the costs of preventing traditional news providers from pursuing cross-ownership investment opportunities to provide news and information in a manner that is likely to ensure a more informed electorate." *Id.* ¶ 9 (JA__). Likewise, considering the radio/television cross-ownership rule "in the context of the broader marketplace as it exists today, in which broadcast television, print, cable, and online sources all contribute to viewpoint diversity," the FCC concluded that "the wide selection of sources now available renders the [rule] obsolete in today's vibrant media marketplace." *Id.* ¶ 61 (JA__). In light of these developments, the FCC found that any benefits that the cross-ownership rules may still have in promoting viewpoint diversity were limited and outweighed by the competitive and localism benefits of eliminating them. *Id.*

In relaxing the local television ownership rule, the FCC found that there was no evidence to support the Eight-Voices Test's competitive rationale, and that eliminating the Test would better serve the rule's competitive and localism goals. *Id.* ¶¶ 73-77 (JA__). "Because of our actions today," the FCC concluded, "broadcasters and local newspapers will at last be given a greater opportunity to compete and thrive in the vibrant and fast-changing media marketplace. And in the end, it is consumers that will benefit, as broadcast stations and newspapers—those media outlets most committed to serving their local communities—will be better able to invest in local news and public interest programming and improve their overall service to those communities." *Id.* ¶ 1 (JA__).

Citizen Petitioners do not take issue with the Commission's determinations that increased competition in the modern media marketplace warrants eliminating the cross-ownership rules. Nor do they rebut the finding that no evidence or economic theory supports retention of the Eight-Voices Test. Instead, they focus their attention solely on their argument that rule changes will have an adverse impact on minority and female ownership.[12]

Citizen Petitioners' failure to acknowledge, engage with, or call into question the vast majority of the FCC's findings in support of updating the media ownership rules itself justifies affirming the agency's expert judgment. The Commission "enjoys broad discretion" when it "'must balance a number of potentially conflicting [statutory] objectives.'" *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009) (quoting *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999)). As the Commission has explained, "promoting minority and female ownership … is one of many – sometimes competing – goals that we must balance when setting our numerical ownership limits." *2014 Quadrennial Review*, 29 FCC Rcd 4371, 4417 ¶ 112 (2014) (*FNPRM*) (JA__). Citizen Petitioners ignore the other

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[12] Citizen Petitioners have waived any challenge to the FCC's competitive determinations by not raising them in their opening brief. *See Garza v. Citigroup Inc.*, 881 F.3d 277, 284 (3d Cir. 2018).

important policy objectives that the FCC considered in carrying out the quadrennial review, including Section 202(h)'s explicit mandate to consider "competition" as well as the Commission's longstanding consideration of localism and different forms of diversity. The Court should reject Citizen Petitioners' attack on the FCC's judgment that pursuant to its Section 202(h) mandate it must update its ownership rules to keep pace with marketplace developments.

A. The FCC Reasonably Concluded That Rule Changes Would Not Have A Material Impact On Minority And Female Ownership.

In any event, the FCC carefully considered the ownership diversity impact of the rule changes that it adopted, and concluded that those rule changes would not have a significant or disproportionate impact on minority and female ownership. *See Reconsideration Order* ¶¶ 44-48, 64-65, 83 (JA___). It reasoned that the rules at issue did not directly or indirectly promote or protect minority and female ownership. *Id.* ¶¶ 48, 65, 84 (JA__); *see FNPRM* ¶ 193 (rejecting "indirect measures that have no demonstrable effect on minority [and female] ownership and yet constrain all broadcast licensees.") (JA__). "Under Section 202(h)," the FCC explained, "we cannot continue to subject broadcast television licensees to aspects [of the ownership rules] that can no longer be justified based on the unsubstantiated hope that these restrictions will promote minority and female ownership." *Reconsideration Order* ¶ 84 (JA__); *id.* ¶ 65 (JA__). The FCC further noted reasons why it did "not believe that a study could extrapolate with any degree of confidence the effect that changing the Commission's cross-ownership rules would have on minority and female ownership levels … [A]ny attempt to do so would be misleading." *FNPRM* ¶ 198 n.595 (JA__).

In addition, the FCC pointed to broad support for eliminating the newspaper/broadcast cross-ownership rule, including from minority media owners, and evidence that broadcasters were more likely to purchase newspapers than the reverse following the rule's elimination. *Reconsideration Order* ¶¶ 44, 46 (JA__). In response to prior concerns that minority-owned stations would be targeted for acquisition if the ban on newspaper/television cross-ownership were relaxed for certain combinations, the FCC reasoned that "[r]emoving the ban across-the-board will ensure that no artificial incentives are created." *Id.* ¶ 46 (JA__). The FCC also observed that local radio ownership restrictions would continue to provide a backstop in the absence of the radio/television cross-ownership rule. *Id.* ¶ 64 (JA__). And the FCC rejected arguments that consolidation necessarily harms minority and female ownership. *FNPRM* ¶ 224 (JA__). Instead, it recognized "the presence of many disparate factors, including, most significantly, access to capital, as longstanding, persistent impediments to ownership diversity." *Id*.[13]

The FCC's determination that its rule changes would not significantly affect minority and female ownership was also based on an analysis of data from the National Telecommunications and Information Administration (NTIA) and FCC in the *Second R&O*. *Reconsideration Order* ¶¶ 44-48 (JA__), 64 (JA__), 83 (JA__). The NTIA data identified "32 minority-owned full power television stations in 1998" (the year before the one-to-a-market television rule was relaxed). *Second R&O* ¶ 77 (JA___). The FCC compared that data to its recent Form 323 ownership data. *Id.* Its comparison showed "that minority ownership has grown" since the one-to-a-market rule was repealed: "60 stations in 2009; 70 stations in 2011; and 83 stations in 2013." *Id*. "Data provided by [Citizen Petitioner] Free Press similarly show[ed] an increase in minority ownership after the Commission relaxed the Local Television Ownership Rule in 1999." *Id*. (noting a Free Press-submitted report showing 43 minority-owned television stations as of October 2007).

[13] The FCC has adopted measures to address such impediments directly, including the new incubator program. *See* § IV.A *infra*. Other FCC actions to promote ownership diversity include the AM radio revitalization initiative, facilitating capital investment, supporting enactment of tax legislation, and conducting conferences and workshops. *See Second R&O* ¶¶ 239-45 (JA__).

Likewise, NTIA ownership data from 1995—the year before the local radio ownership limits were relaxed and set to existing levels—identified 312 minority-owned radio stations. *Id.* ¶ 126 (JA__). Despite an initial decline (*see* Citizens Br. 28-29), the FCC's Form 323 data "demonstrate[d] that minority ownership has grown – indeed more than doubled – since the rule was relaxed: 644 stations in 2009, 756 stations in 2011; and 768 stations in 2013." *Id*. Based on that comparison, the FCC found that "previous relaxations of other ownership rules have not resulted in an overall decline in minority and female ownership of broadcast stations." *Reconsideration Order* ¶ 46 (JA___); *see id.* ¶¶ 64, 83 (JA__); *accord Second R&O* ¶¶ 77, 126 (JA___).

Citizen Petitioners do not challenge that finding. Nevertheless, they criticize the FCC's determination regarding the impact of its rule changes on ownership diversity based on the NTIA-FCC data comparison, ignoring the other evidence the FCC considered as well as the other goals the FCC balanced. Their criticisms do not suffice to invalidate the Commission's judgment due to their failure to address the FCC's findings in support of updating its media ownership rules. In any event, the criticisms lack merit.

B. The Commission Provided Sufficient Notice Of Its Analysis Of The Impact Of Rule Changes On Minority and Female Ownership.

Citizen Petitioners argue that the Commission did not give fair notice of its comparison of NTIA and FCC data. Citizens Br. 33-34. This argument lacks merit for two reasons.

First, the APA did not require express notice of the data comparison. The *FNPRM* was "sufficiently descriptive of the subjects and issues involved so that interested parties [could] offer informed criticism and comments." *Air Transport Ass'n of Am. v. Civil Aeronautics Bd.*, 732 F.2d 219, 224 (D.C. Cir. 1984) (notice adequate despite failure to make staff studies available for comment where the notice adequately framed the issues involved). The FCC requested all available information on the issue of minority and female ownership impact, *FNPRM* ¶¶ 70-73, 190-98, 222-24 (JA__), and expressed doubt "that a study could extrapolate with any degree of confidence the effect that changing the Commission's cross-ownership rules would have on minority and female ownership levels." *Id.* ¶ 198 n.595 (JA__). In the absence of other reliable data, the data comparison reinforced its conclusion, based on the record and its own expertise, that rule changes would not have a significant or disproportionate impact. "[A]n agency may use supplementary data, unavailable during the notice and comment period, that expand[s] on and confirm[s] information contained in the proposed rulemaking and addresses alleged deficiencies in the pre-existing data, so long as no prejudice is shown." *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991) (internal quotation marks and citation omitted). Nor should the FCC's use of the NTIA and FCC data have come as a surprise, particularly given Citizen Petitioner Free Press's use of "the FCC's and NTIA's historical data to produce two reports" during the 2006 quadrennial review. Citizens Br. 19.

Second, any possible error was rendered harmless because interested parties had ample opportunity to address the data comparison on reconsideration. *See Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir. 1984) (harmless error where parties had opportunity to address internal staff study on reconsideration) (citing *WNCN*, 450 U.S. at 591 n.22). The FCC relied on the same comparison in both the *Second R&O* and the *Reconsideration Order*. *See* p.43-45 *infra*. Under the FCC's rules, the latter order was preceded by a pleading cycle during which interested parties had the opportunity to offer criticism and comments regarding the comparison. *See* 47 C.F.R. §§ 1.429(e)-(g). Citizen Petitioners did not do so. Accordingly, they were not prejudiced by the lack of an opportunity to comment on the data comparison before the *Second R&O*.

C. The FCC's Analysis Of The Impact Of The Rule Changes On Minority And Female Ownership Was Supported By Substantial Evidence.

Citizen Petitioners argue that the Commission's analysis of the impact of its rule changes on minority and female ownership was "insubstantial" because it relied on "incomplete and inaccurate" data. Citizens Br. 26. That too is incorrect.

Substantial evidence is "such … evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison v. NLRB*, 305 U.S. 197, 229 (1938); *accord Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *AT&T Wireless v. Zoning Bd. of Adjustment of the Borough of Ho–Ho–Kus*, 197 F.3d 64, 71 (3d Cir. 1999) (substantial evidence standard applied to parties' competing methodologies). The evidence on which the FCC relied satisfies this deferential standard.

To be sure, the FCC recognized drawbacks with its comparison of NTIA and FCC data. As it stated, "combining older data with more recent data … introduces potential variation from differences in the way the data were collected rather than actual changes in the marketplace." *Second R&O* ¶ 77 n.211, ¶ 126 n.325 (JA__, __); *see id.* ¶¶ 77 n.212, 126 n.325 (recognizing flaws in NTIA data collection) (JA__, __); *see also id.* ¶¶ 259-70 (recognizing flaws in FCC ownership data collection and summarizing improvements) (JA__). But the agency reasonably explained that "in the absence of a continuous, unified data source," it had to "rely on the available data." *Id.* ¶ 77 n.211, ¶ 126 n.326 (JA__, __); *see* ¶ 77 n.212 (NTIA data "are the only data from that time period that are available for purposes of comparison and evaluation of claims that relaxation of the [local television rule] reduced minority ownership.") (JA__).[14] The Court "review[s] only for the use of relevant, not perfect, data." *Council Tree IV*, 863 F.3d at 244 (citing *Council Tree Investors, Inc. v. FCC*, 619 F.3d 235, 250 (3d Cir. 2010)) (*Council Tree III*). And it is well settled that the FCC's predictive judgments in this area necessarily involve deductions for which "complete factual support … is not possible or required." *NCCB*, 436 U.S. at 813.[15]

[14] Citizen Petitioners correctly say that the NTIA data "did not track female ownership at all." Citizens Br. 27. But no data on female ownership was available. *See Second R&O* ¶¶ 76 n.211, 126 n.326 (JA__, __). The FCC reasonably relied on the data that was available and was not required to fund new studies. *See* § I.D *infra*.

[15] Citizen Petitioners suggest the FCC acted inconsistently by using this data "even though it found a comparison combining old and new data sets unacceptable later in the same order." Citizens Br. 27. The FCC was not inconsistent, however, because the two contexts were different. In the latter context, the agency was explaining obstacles to designing future studies (of a link between viewpoint diversity and female ownership) likely to produce evidence strong enough to survive heightened judicial scrutiny. *Second R&O* ¶ 308 n.944 (JA__). Here, in contrast, the FCC was reasonably relying on the only data available to confirm its judgment about the likely impact of rule changes.

Citizen Petitioners also point out that the data reflected a decrease in minority ownership before the increases the FCC cited, and criticize the FCC for not considering "the level of ownership diversity that might have been achieved if not for the initial decrease in 1999." Citizens Br. 28; *see id.* 19. They also complain that the FCC did not control for increases in the total numbers of stations and improved ownership reporting. *Id.* 27-29.

These criticisms lack merit. The FCC was not required to consider "the level of ownership diversity that might have been achieved if not for the initial decrease in 1999," as it has never structured its rules to discourage owners from voluntarily selling their stations. *Cf. FNPRM* ¶ 193 ("Even assuming … some minority-owned stations would become acquisition targets if the [newspaper/broadcast cross-ownership] rule were loosened, we do not believe that such a possibility would preclude rule modifications that are otherwise consistent with our statutory mandate.") (JA__). And while the FCC acknowledged that improved reporting might account for some minority ownership increases during the period it analyzed, *Second R&O* ¶ 126 n.327 & accompanying text (JA__), Citizen Petitioners do not challenge the Commission's finding that the data reflected no "overall decline in minority and female ownership of broadcast stations." *Reconsideration Order* ¶ 46 (JA__); *id.* ¶¶ 64, 83 (JA__, __); *see Second R&O* ¶¶ 77, 126 (JA__, __).[16]

Citizen Petitioners also mistakenly contend that *State Farm*, 463 U.S. at 52, "explains the situation here precisely" because the FCC "relied on uncertain data to draw an unsubstantiated conclusion." Citizens Br. 30. There, the controversy centered on whether survey results regarding automatic seatbelts could be generalized. *State Farm*, 463 U.S. at 53. The Court emphasized that "it is within the agency's discretion to pass upon the generalizability of these field studies." *Id.* Nevertheless, it remanded because the agency failed to explain other available evidence. *See id.* 52-57. Citizen Petitioners do not point to evidence that the FCC failed to explain. Instead, they contest the FCC's determination that the rule changes it promulgated would not have a significant effect on minority and female ownership. But

[16] The cases on which Citizen Petitioners rely in support of their attack on the FCC's use of data are distinguishable. Citizens Br. 30-31. In *Prometheus II*, 652 F.3d at 470, the Court struck down the FCC's eligible entity definition in part because "the Commission referenced *no* data on television ownership by minorities or women and *no* data regarding commercial radio ownership by women," although its stated objective was to promote minority and female ownership. In *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1044 (D.C. Cir. 2002), the agency "provided no analysis of the state of competition in the television industry to justify its decision to retain the national ownership cap" (internal quotes omitted). In contrast, the FCC here examined the available data and based its impact analysis on that data.

that prediction was based on all the evidence in the record—the NTIA-FCC data comparison and other evidence—and "is precisely the type of issue which rests within the expertise of [the agency], and upon which a reviewing court must be most hesitant to intrude." *Id.* 53.

Citizen Petitioners further complain that the FCC cited two Free Press studies from 2007 as being consistent with the agency's prediction of no significant impact, even though those studies concluded that consolidation harms minority and female ownership. Citizens Br. 19; *see id.* 27-29. But the FCC cited the two studies only for its finding that there had been no overall decline in minority and female ownership after prior rule changes. *Second R&O* ¶¶ 77, 126 nn.215, 329 & accompanying text (JA__, __). Again, Citizen Petitioners do not challenge that finding.[17]

Citizen Petitioners also contend that the FCC arbitrarily relied on the same data, which it found too unreliable to justify tightening media

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[17] Nor was it unreasonable for the FCC to determine that its rule changes would not have a significant impact despite the Free Press study conclusions. The Free Press radio study "did not track [ownership] changes over time." Citizens Br. 19. And the focus of the television study— "transactions of stations owned by women and people of color," *id.*—is, as discussed above, one the FCC disavows because it has never structured its rules to discourage owners from voluntarily selling their stations. The FCC's determination was based on the entire record before it and its own expertise, including media marketplace developments after the studies.

ownership rules in the *Second R&O*, to justify relaxing the rules in the *Reconsideration Order*. Citizens Br. 31. The Commission, however, treated the ownership diversity data consistently in the two orders, judging it insufficient in both to warrant *either* revising (in the *Second R&O*) *or* retaining (in the *Reconsideration Order*) the rules in order to promote or protect minority and female ownership. As to the local television rule, for example, the FCC concluded in the *Second R&O* that "we have no evidence in the record that would permit us to infer causation"—that is, a decrease in minority and female ownership—from the rule's relaxation in the 1990s. *Second R&O* ¶ 78 (JA__). Accordingly, the FCC declined to tighten the rule to promote minority and female ownership. *Id.* Relying on its prior analysis, the FCC again concluded on reconsideration that "the record does not support a causal connection between modifications to the Local Television Ownership Rule and minority and female ownership levels." *Reconsideration Order* ¶ 83 & n.242 (JA__).[18] Instead of maintaining the status quo, the FCC loosened the rule on reconsideration. But it did so based on a balance of

[18] The FCC made the same findings regarding the local radio ownership rule and the cross-ownership rules: that evidence of prior rule changes impacting minority and female ownership failed to justify tightening the former or retaining the latter. *See Reconsideration Order* ¶¶ 48, 64-65 (JA__); *Second R&O* ¶ 126 (JA__).

public policy objectives that Citizen Petitioners ignore, as discussed above, *see* p.30-33 *supra*, not because it drew a different conclusion from the data on ownership diversity impact. As to that, the Commission concluded—consistent with the *Second R&O*—that the revision would not affect ownership diversity. *Reconsideration Order* ¶¶¶ 46, 64, 83 (JA__).

There is also no merit to Citizen Petitioners' argument that the FCC's prediction of no significant impact contravened precedent recognizing a connection between viewpoint diversity and minority and female ownership. Citizens Br. 31-33; *see id.* 24-25 (citing *Metro B'casting, Inc. v. FCC*, 497 U.S. 547, 579, 580 (1990)). The agency did carefully analyze such precedent to determine whether evidence of the connection might satisfy heightened judicial scrutiny. *Second R&O* ¶¶ 301-08 (JA__); *see* § III.B *infra*. The issue the FCC faced here was whether modification or retention of the existing media ownership rules was justified to promote or protect minority and female ownership, notwithstanding dramatic competitive changes in the media marketplace. The FCC reasonably concluded that the evidence of a link between rule changes and minority and female ownership levels was not strong enough to outweigh justifications for updating the rules. *Reconsideration Order* ¶¶ 48 (JA__), 65 (JA__), 84 (JA__). That conclusion neither contravened precedent nor departed from the FCC's ownership diversity goal. Citizen Petitioners' reliance on *Prometheus II* and other cases for the contention that the FCC acted arbitrarily by changing its media ownership rules therefore is misplaced. *See* Citizens Br. 32-33.

D. The FCC Was Not Required To Produce More Data Before Coming To A Decision.

Citizen Petitioners read the *Prometheus* cases to stand for the proposition that "the FCC cannot take action that has a strong probability of harming race/gender ownership until it has affirmatively studied the issue." Citizens Br. 37 (emphasis omitted). As discussed above, the FCC analyzed the question at length and determined that its rule changes were not likely to harm ownership diversity. *See* § I.A *supra*. In all events, the FCC *has* "affirmatively studied the issue," even if not in the exact manner that Citizen Petitioners would prefer. Citizen Petitioners' argument that the FCC had to produce more data also ignores the fact that its determinations as to the likely future effects of its rule changes were not amenable to rigid proof. This Court has recognized that predictions about the future impact of rules are "'inherently speculative.'" *Council Tree IV*, 863 F.3d at 243 (quoting *Council Tree III*, 619 F.3d at 252). "'In such circumstances complete factual support in the record for the Commission's judgment or prediction is not possible or required.'" *Council Tree III*, 619 F.3d at 252 (quoting *NCCB*, 436 U.S. at 813).

Citizen Petitioners' argument that the FCC has "the burden of data production" also lacks foundation. Citizens Br. 37. "The APA imposes no general obligation on agencies to produce empirical evidence." *Stillwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009). "Beyond the APA's minimum requirements, courts lack authority to impose upon [an] agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015) (internal quotation marks omitted).[19]

Citizen Petitioners participated in (and presented their own views in) the quadrennial review, and the FCC requested—more than once—all available information on minority and female ownership impact. *See FNPRM*

[19] Thus, the D.C. Circuit has expressly held that the FCC meets "its burden of proving that no harmful effects would flow from repeal of" a media ownership policy where it relies on the evidence in the record. *NAACP v. FCC*, 682 F.2d 993, 1001 (D.C. Cir. 1982), *abrogated on other grounds*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). In *NAACP*, the petitioner asserted that "the FCC improperly shifted the burden of proof to the complainants" and that "the agency should have done an independent study" before modifying a TV ownership policy. *Id.* The court rejected that argument out of hand. "An agency need not seek out all available information on the subject before it." *Id.* And while an agency "must attempt to have all viewpoints represented," it satisfies that obligation where the "[p]etitioner's views were directly represented … by [interested parties who] *could have submitted testimony of experts on the impact of the Policy*." *Id.* (emphasis added). The court also noted that "[i]ndeed, such information was requested by the FCC." *Id.*

¶¶ 70-73, 190-98, 222-24 (JA__); *NPRM* ¶¶ 27, 59, 91, 117, 134 (JA__). The FCC based its prediction on the record that developed in response. The APA does not require more. *See Melcher v. FCC*, 134 F.3d 1143, 1158 (D.C. Cir. 1998) (rejecting claim that FCC arbitrarily failed to conduct an empirical analysis to support determination that most rural telephone companies would not be subject to a licensing restriction based on overlap with basic trading areas, reasoning that "[t]he FCC was entitled to conduct, and did conduct, a general analysis based on informed conjecture."); *see also Texas Oil and Gas Ass'n v. EPA*, 161 F.3d 923, 935 (5th Cir. 1998) ("An agency's choice to proceed on the basis of 'imperfect information is not arbitrary and capricious unless there is simply no rational relationship' between the means used to account for any imperfections and the situation to which those means are applied.") (citing *American Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1004 (D.C. Cir. 1997)).

Prometheus III is not to the contrary. In *Prometheus III*, 824 F.3d at 49, this Court stated that "'[i]f [the FCC] needs more data to do so, it must get it.'" *See* Citizens Br. 37-38. But that instruction was made in the context of directing the FCC to "act promptly to bring the eligible entity definition to a close," *Prometheus III*, 824 F.3d at 49, which the agency has done. And in any event, the agency has determined that it does not need more data to resolve its quadrennial review.

E. The Commission Reasonably Deferred Analysis Of The Incentive Auction's Impact On Minority And Female Ownership.

Citizen Petitioners also argue that the FCC violated this Court's mandate (and acted arbitrarily) by not fully analyzing, in the orders under review, the effects of the incentive auction on minority and female ownership. Citizens Br. 34-35. This argument likewise lacks merit.

In *Prometheus III*, 824 F.3d at 54 n.13, this Court stated that "the Commission should consider how the ongoing broadcast incentive auction affects minority and female ownership." In the orders under review, the FCC reasonably explained that evaluation of the auction's impact was premature. *Reconsideration Order* ¶ 85 (JA__); *accord Second R&O* ¶¶ 79-81 (JA__). Although the auction was complete by the time of the *Reconsideration Order*, the post-auction transition was underway. *Incentive Auction Closing and Channel Reassignment Public Notice*, 32 FCC Rcd 2786 ¶ 1 (rel. Apr. 13, 2017) (*Auction PN*) (JA__). In particular, stations that had agreed through the incentive auction to relinquish the spectrum on which they had previously broadcast still had the opportunity, at the time of the *Reconsideration Order*, to enter channel sharing agreements with other stations and thus not to leave the air.[20] Over 80 percent of full-power, commercial stations with winning relinquishment bids elected to channel share. *See Reconsideration Order* n.248 (JA__) (citing *Auction PN*, Appx. A (JA__)). Such stations that elected to channel share have up to 15 months after receiving their share of auction proceeds to find a channel sharing partner. *See Incentive Auctions*, 30 FCC Rcd 6668, 6674 ¶ 16 (2015). It was entirely reasonable for the FCC to defer its analysis until the transition progresses far enough to determine how many of the stations that elected to keep broadcasting through channel sharing will find partners, and nothing in *Prometheus III* requires the Commission to evaluate the impact of the incentive auction before all the facts are in.[21]

Citizen Petitioners complain that the FCC "did not explain … how the facts now available to it prevented it from making at least a preliminary analysis" of the auction's impact. Citizens Br. 35. But the FCC did offer a preliminary analysis. As stated above, most full-power, commercial stations

[20] Channel sharing agreements, which the FCC authorized in connection with the auction, allow more than one station to broadcast simultaneously using different frequencies on the same six megahertz channel.

[21] Stations that do not find a partner by the deadline will have to cease broadcasting. *See Incentive Auctions*, 30 FCC Rcd at 6674 ¶ 16. But given the intention of most stations to channel share, Citizen Petitioners' statement that the auction "removed many more stations from the airwaves, resulting in fewer owners," Citizens Br. 36, lacks any basis.

with winning relinquishment bids elected to continue broadcasting after the auction through a channel sharing agreement. This suggested that "the auction may not have a significant impact" on minority and female ownership. *Reconsideration Order* n.248 (JA__).[22]

II. THE COMMISSION REASONABLY RETAINED A RESTRICTION ON COMBINATIONS BETWEEN THE TOP-FOUR TELEVISION STATIONS IN LOCAL MARKETS SUBJECT TO CASE-SPECIFIC FLEXIBILITY.

In contrast to the Citizen Petitioners, ITG attacks the *Reconsideration Order* for not loosening the ownership rules enough because the Commission retained a modified version of the local television ownership rule's Top-Four Prohibition. This attack too lacks merit.

A. The FCC's Retention Of A Modified Top-Four Prohibition Was Reasonable And Supported By The Record.

In retaining a modified version of the Top-Four Prohibition, the Commission relied on rationales very similar to those that have been twice accepted by this Court: (1) top-four mergers risk the greatest competitive harm and (2) there is generally a ratings cushion between top-four stations

[22] The FCC has also stated that auction participation "offers a significant and unprecedented opportunity for [minority and female broadcasters] to raise capital that may enable them to stay in the broadcasting business and strengthen their operations." *Incentive Auctions*, 29 FCC Rcd 6567, 6850 ¶ 695 (2014).

and others that justifies drawing the line at those stations. *See Prometheus I*, 373 F.3d at 417-18; *Prometheus II*, 652 F.3d at 460. Now, as then, the agency's determination was reasonable and supported by the record.

1. Top-Four Mergers Generally Risk The Greatest Competitive Harm

As the agency explained, top-four combinations "generally result" in the combined firm having a "significantly larger market share," which in turn can lead to "reduced incentives for commonly owned local stations to compete for programming, advertising, and audience shares." *Reconsideration Order* ¶ 79 n.230 (JA__). The Commission cited for support the *Second R&O*, in which it explained that top-four combinations can reduce competition "by giving once strong rivals incentives to coordinate their programming." *Second R&O* ¶ 44 (JA__). As this Court has noted, the Commission has consistently and reasonably found that consolidation is far more likely to yield net benefits "when the consolidation does not create a 'new largest entity.'" *Prometheus I*, 373 F.3d at 416 (internal citation omitted); *see Prometheus II*, 652 F.3d at 460 (upholding determination that a top-four merger "would often result in a single firm with a significantly larger market share than the others" which would "reduce incentives to improve programming that appeals to mass audiences"). It was reasonable for the agency to find that the record once again supported a finding of potential competitive harm.

ITG's attacks on this rationale are unconvincing. It first argues that the Commission relies "entirely" on a determination of competitive harm that the agency made in 2002. ITG Br. 27. But the FCC has made this finding anew in each succeeding quadrennial review, and this Court upheld those findings in both 2006 and 2010. *See Prometheus I*, 373 F.3d at 416; *Prometheus II*, 652 F.3d at 460; *2006 Quadrennial Regulatory Review*, 23 FCC Rcd 2010, 2066 ¶ 102 (2008); *Second R&O* ¶ 44 (JA__). Here, the agency's position was again supported by comments from several parties in this quadrennial review. *Second R&O* ¶ 41 (JA__).

ITG also argues that the agency has implicitly, and incorrectly, assumed that all top-four stations are roughly equal competitors, and points out that in some markets the third and fourth ranked stations combined would not be larger than the first. Br. 28. But the FCC has not made that assumption, nor does its rationale depend on a supposition that any merger in the top-four will always create a new biggest competitor. To be sure, this would "generally" be so with most mergers in most markets. *Reconsideration Order* n.230 (JA__); *Second R&O* ¶ 44 (JA__). And of course, any merger with the top ranked station would always create an even-more-dominant player. But even in cases where a third and fourth ranked station might merge without creating a new largest entity, the Commission reasonably determined in this context that the merger could still reduce competition and harm the public interest "by giving once strong rivals incentives to coordinate their programming." *Second R&O* ¶ 44 (JA__).[23]

ITG asserts that it was irrational for the Commission to find that a top-four merger would reduce the merged stations' incentives to compete. ITG Br. 28-29. But this Court has already upheld that rationale too, and it is based on sound economic principles. *See Prometheus I*, 373 F.3d at 416 (citing Preston McAfee & Michael Williams, *Horizontal Mergers and Antitrust Policy*, 40 J. Indus. Econ. 181–87 (June 1992)); *Prometheus II*, 652 F.3d at 460. ITG suggests that, because national networks compete against one another, their local broadcast affiliates necessarily will too—even if under a common owner—by broadcasting content from their respective affiliated networks. ITG Br. 29 & n.22. The agency considered and rejected this same argument in 2016 as unconvincing and based on only anecdotal evidence in two markets. *Second R&O* ¶ 44 & n.110 (JA__). The FCC has also explained that "competition is especially valuable during the parts of the day in which

[23] As discussed below, *see* § II.B, the FCC has provided for case-by-case consideration to allow for Top Four mergers where circumstances warrant.

local broadcast stations do not transmit the programming of affiliated broadcast networks and rely on local content uniquely relevant to the stations' communities." *Id.* ¶ 56 (JA__). ITG's emphasis on network competition alone ignores this effect of competition on local programming.

2. A Ratings "Cushion" Supports The Agency's Line-Drawing

The Commission concluded that there is "generally a significant cushion of audience share percentage points that separate[s] the top four stations from the fifth-ranked stations." *Reconsideration Order* ¶ 79 n.230 (JA__) (internal quotation marks and citations omitted). The Commission reasonably determined that this "cushion" supports the Top-Four Prohibition. As this Court said in *Prometheus I*, this gap in ratings between the fourth and fifth ranked stations "support[s] the Commission's restriction on combinations among the top-four stations as opposed to the top-three or some other number." 373 F.3d at 418; *see also Prometheus II*, 652 F.3d at 460.

The FCC found that this market structure continues, despite other shifts in the broadcast industry. *Reconsideration Order* n.230 (JA__) (citing *Second R&O* ¶ 43 (JA__)); *Second R&O* ¶ 43 (JA__) (citing staff analysis of 2012 Nielsen ratings). It is no coincidence that there is usually a sizeable cushion between the fourth and fifth largest stations. The top-four-rated broadcast stations are usually affiliated with the four largest television networks, *2003*

Order ¶ 195, which "have a distinctive ability to attract larger primetime audiences on a regular basis." *Second R&O* ¶ 216 (JA__). That is still true today. *Reconsideration Order* ¶ 74 (JA__).

To be clear, the FCC "has never based the top-four prohibition solely on the existence of the ratings cushion in every market." *Second R&O* n.104 (JA__). Instead, it has found such a ratings cushion to be "generally" the case. *Reconsideration Order* ¶ n.230 (JA__). For example, in 2002, the Commission determined that the cushion existed in two-thirds of the markets with five or more full-power commercial television stations. *2003 Order* ¶ 195; *see Prometheus I*, 373 F.3d at 418. Although the ratings cushion may not exist in every market, it "continues to exist in most markets and, as such, it continues to support [the agency's] decision to retain the top-four prohibition." *Second R&O* n.104 (JA__). And, as explained below, the Commission will not apply the Top-Four Prohibition where merger applicants can show that these assumptions do not hold. *See Reconsideration Order* ¶ 82 (JA__).

ITG argues that the FCC has never actually explained why the ratings cushion shows "a continued need to prevent any combination of top-four stations," Br. 27. But again, the ratings cushion is not itself a rationale for a prohibition on mergers—the reason for the prohibition is to preserve competition. Instead, the ratings cushion explains why the Commission draws the line where it does—a prohibition on combinations among the top-four "as opposed to the top-three or some other number." *Prometheus I*, 373 F3d at 417-18. This is classic line-drawing that is the prerogative of the agency so long as it is reasonable and reasonably explained. *Id*.

ITG also argues that the agency acted unreasonably because it did not explain precisely how much of a ratings cushion is "enough to affect competition," or in how many markets such a break occurs.[24] ITG Br. 26. But "the burden is on the petitioners" to show the line is "not within a zone of reasonableness as distinct from the question of whether the line drawn by the Commission is precisely right." *New Jersey Bd. of Pub. Utilities v. FERC*, 744 F.3d 74, 110 (3d Cir. 2014) (quoting *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1084 (D.C. Cir. 2002)). *See Prometheus I*, 373 F.3d at 390. The agency has explained why it has drawn the line at four stations, and

[24] ITG also argues the agency did not explain whether there are "also significant breaks between stations ranked among the top-four in many markets." ITG Br. 26. As explained above, the agency has not assumed that all top-four stations have roughly equal shares or that a top-four merger will always create a new largest entity. Instead, the agency has reasonably drawn the line where it did, based on the cushion, and applicants can argue that their mergers would nonetheless be in the public interest.

ITG cannot show that the line is unreasonable, or that another line is the only reasonable choice.

B. The Agency's New "Hybrid Approach" Allows For Circumstances Unique To Smaller Markets

The FCC has provided for case-by-case consideration to allow for otherwise prohibited Top Four mergers to "help mitigate the potential drawbacks associated with strict application of the Top-Four Prohibition, while still preserving the ease and efficiency of applying the rule." *Reconsideration Order* ¶ 81 (JA__). Under this approach, the Commission will permit top-four mergers where applicants can show that "the reduction in competition is minimal and is outweighed by public interest benefits." *Id.* ¶ 82 (JA__).

ITG's arguments against the Top-Four Prohibition are especially misplaced in light of this approach. ITG argues repeatedly that the Top-Four Prohibition is not suited to the smallest markets, which it asserts "face the greatest threats to their continued financial viability." ITG Br. 24; *id.* 26 (arguing it was irrational to deny efficiency gains in markets with a small number of stations). ITG also argues that the Top-Four Prohibition is irrational because in some markets the third and fourth ranked stations would not create a new largest competitor when merged. *Id.* 28. But the FCC fully acknowledged these possibilities, and it has invited information on precisely these factors when parties seek case-by-case consideration. *See Reconsideration Order* ¶ 82 (JA__) (inviting, *inter alia*, "ratings share data of the stations proposed to be combined compared with other stations in the market" and "any disparities primarily impacting small and mid-sized markets").[25]

ITG argues that the need for this hybrid approach shows that the agency was obligated instead to "change or repeal the rule or at least tailor it to prevent specific harms." ITG Br. 31. But "waiver processes are a permissible device for fine tuning regulations," and "waiver is an appropriate method of curtailing the inevitable excesses of the agency's [otherwise rational] general rule." *Nat'l Rural Telecom Ass'n v FCC*, 988 F.2d 174, 181 (D.C. Cir. 1993). That is precisely the case here: the Top-Four Prohibition is a rational balancing of harms and benefits for the mine-run of cases, and as a bright-line rule provides "ease and efficiency." *Reconsideration Order* ¶¶ 79-81 (JA__). However, if in specific cases the prohibition is "overinclusive," parties may ask for case-by-case consideration to "help mitigate potential

[25] ITG argues that the Commission's approach adds nothing to the agency's general obligation to consider waivers under *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). Br. 30-31. But this ignores the agency's extensive description of what applicants must show and what kind of evidence it expects will be relevant. *Reconsideration Order* ¶ 82 (JA__).

drawbacks associated with [the rule's] strict application." *Id.* ¶ 81 (JA__). That is entirely appropriate. *See Prometheus I*, 373 F.3d at 417.

C. The FCC Reasonably Treated The Top-Four Merger Prohibition Differently From The Eight-Voices Test.

ITG does not challenge the Commission's repeal of the Eight-Voices Test, but it argues that the reasons for repeal "equally apply" to the Top-Four Prohibition. Br. 23. The agency had good cause to treat the two rules differently. It found that "a significant gap in audience share persists between the top-four rated stations in a market and the remaining stations in most markets," *Reconsideration Order* ¶ 75 (JA__). It found "no justification," however, for requiring that the four top-performing stations be "balanced by an equal number of independent, lower-performing stations." *Id.*

Unlike the Top-Four Prohibition, which was "generally supported" by ratings data, *id.* ¶ 79 (JA__), the Eight-Voices Test "lack[ed] economic support, [was] inconsistent with the realities of the television marketplace, and prevent[ed] combinations that would likely produce significant public interest benefits." *Id.* ¶ 77 (JA__). The Commission found that "the Eight-Voices Test denies the public interest benefits produced by common ownership without any evidence of countervailing benefits to competition from preserving the requirement." *Id.*; *see id* ¶ 75(JA__) (the ratings cushion could "justify permitting the common ownership of non-top-four stations to form a stronger competitor"). This Court upheld the same finding of costs and benefits in the *2003 Order*. *See Prometheus I*, 373 F.3d at 415. In contrast to the Eight-Voices Test, the Commission found that the benefits of the Top-Four Prohibition outweighed its harms. *Reconsideration Order* n.230 (JA__).

ITG ignores these distinctions and argues that it was unreasonable to treat top-four mergers differently from other mergers. ITG Br. 23-26. But ITG emphasizes only the benefits that may come from consolidation (including efficiency and, in some cases, additional resources for local programming) (Br. 23-24, 26), without acknowledging the costs, including the potential harm to competition. The agency, however, must balance both the benefits and the costs of its rules, and it was reasonable for the FCC to conclude that the harms from consolidation among the top-four competitors would be greater than among lower rated stations.

Nor did the FCC assume that television station mergers could only provide benefits in larger markets, as ITG asserts. ITG Br. 24. Instead, the agency found that the Top-Four Prohibition was justified by the greater risks to competition posed by mergers between two of the top-four stations. To be sure, this means that television station mergers in markets with fewer than five stations will not be permitted without a waiver. But as this Court explained about a very similar balancing the Commission made in the *2003 Order*, "it was not unreasonable for the Commission to conclude, as it did, that the detriment of concentrated market power—*e.g.*, reduced incentive to improve programming of mass appeal—outweighed the efficiency benefits." *Prometheus I*, 373 F.3d at 417.

Finally, ITG argues that the agency's competition concerns are misplaced, citing to advertising pricing data that did not show higher rates for duopolies. ITG Br. 25. But advertising is only one aspect of competition among television stations. Here, the agency focused primarily on the benefits of competition for viewers rather than advertisers. *Reconsideration Order* n.230 (JA__); *Second R&O* ¶ 44 (JA__); *see also id.* ¶ 43 (JA__) (finding data on station revenues less relevant than audience share to competition analysis).

Thus, ITG cannot show that the agency was unreasonable in distinguishing between the Eight-Voices Test, which it repealed, and the Top-Four Prohibition, which it retained.

III. THE FCC REASONABLY COMPLIED WITH THIS COURT'S MANDATES BY REINSTATING A REVENUE-BASED "ELIGIBLE ENTITY" DEFINITION TO PROMOTE SMALL BUSINESSES AND REJECTING OTHER LEGALLY UNSUSTAINABLE PROPOSALS.

A. The Commission's Definition Promotes Its Statutory Objectives To Promote Competition And Viewpoint Diversity.

Citizen Petitioners' contention that the FCC failed to act in response to the Court's remand in *Prometheus III* (Citizens Br. 36-37) likewise has no basis. On the contrary, the FCC satisfied the Court's direction by resolving the eligible entity issue on remand, readopting a revenue-based standard, and explaining its basis for doing so. *Second R&O* ¶¶ 297-312 (JA__).

Specifically, the Commission concluded that the reinstated standard would serve to promote ownership opportunities for small businesses and new entrants generally, as well as to foster competition and viewpoint diversity, based on data during the period when the standard was previously in effect. *Second R&O* ¶¶ 280-84 (JA__). This reinstated standard is consistent with the FCC's statutory mandate to promote opportunities for small businesses, 47 U.S.C. § 309(j)(4)(D), and is familiar from the spectrum-auction context, where the FCC relies on a revenue-based standard to grant bidding credits. *See Updating Part 1 Competitive Bidding Rules*, 30 FCC Rcd 7493, 7522-26 (2015).

Citizen Petitioners do not challenge these rationales for the Commission's action. Rather, Citizen Petitioners contend that the eligible entity definition the FCC reinstated in the *Second R&O* violates the Court's mandate because the Commission's objective in adopting this definition was not to promote minority and female ownership. Citizens Br. 38-39. But nothing in the *Prometheus* decisions prevented the agency from reinstating the definition to serve different valid statutory objectives.

In ordering the agency "to act promptly to bring the eligible entity definition to a close," the Court emphasized that "[w]e do not intend to prejudge the outcome of this analysis; we only order that it must be completed." *Prometheus III*, 824 F.3d at 49; *see id.* 50 (rather than "adopting an SDB- or ODP-based definition (or something similar)," the FCC might "conclud[e] that it cannot do so."). This Court had concluded that the Commission's revenue-based standard was arbitrary only because, at the time, the Commission had not adequately explained how its definition "would achieve the stated goal" of increasing minority and female ownership. *Prometheus III*, 824 F.3d at 43 (quoting *Prometheus II*, 652 F.3d at 470).

The agency completed its analysis in the *Second R&O* within three months of the Court's order. On remand, the Commission made clear that its "stated goal[s]" in readopting its revenue-based definition are to promote competition, viewpoint diversity, and broadcast ownership by small businesses. Citizen Petitioners do not contend that a revenue-based eligible entity standard lacks record support or a sufficient connection to the goals the FCC identified on remand, only that it will not directly promote minority and female ownership. *Id*. But the Commission is not required to advance every public policy objective simultaneously in every action related to the media ownership rules and nothing in this Court's mandates require it to do so. Citizen Petitioners' failure to object to the actual rationales offered by the Commission is fatal to their challenge to the "eligible entity" definition.

B. The Commission Reasonably Concluded That Additional Proposals Directed At Promoting Minority And Female Ownership Were Not Legally Sustainable

After readopting a revenue-based "eligible entity" definition to promote small businesses, the Commission considered whether it could "adopt an additional standard … specifically to promote minority and female ownership of broadcast stations," and concluded that it could not do so, consistent with constitutional guarantees. *Second R&O* ¶¶ 287, 297-312 (JA__).

It is settled that, under the Constitution's equal protection provisions, "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995)). Under that standard, such classifications are constitutional only if they further governmental interests that are "compelling" and the means chosen are "narrowly tailored" to achieve the government's objectives. *Grutter*, 539 U.S. at 326. It is likewise settled that governmentally-imposed gender classifications are subject to an intermediate level of heightened constitutional scrutiny under which the government must proffer an "exceedingly persuasive" justification serving "important governmental objectives," and the "discriminatory means employed" must be "substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Both "[s]trict and intermediate scrutiny … in effect set up a presumption of invalidity that the defendant must rebut." *Hassan v. City of New York*, 804 F.3d 277, 298-99 (3d Cir. 2015).

In considering whether to adopt race- or gender-based measures to promote minority and female ownership of broadcast properties, the agency has repeatedly invited public comment, and commissioned studies, to try to develop the evidence necessary to satisfy those demanding standards. But based on careful analysis of the evidence in the record, the Commission concluded in the *Second R&O* that race- and gender-based eligible entity definitions were not sustainable under current equal protection law.

1. The Evidence Was Insufficient To Justify Race-Based Measures Under Strict Scrutiny.

The Commission began its analysis with the question whether the governmental interest at stake is sufficiently compelling to satisfy the first prong of strict scrutiny. *Second R&O* ¶ 300 (JA__). The Supreme Court recognized the FCC's interest in broadcast diversity as "important" in the 1990 *Metro Broadcasting* decision, 497 U.S. at 567, *overruled on other grounds by Adarand*, but did not define that interest with the level of precision that a court applying strict scrutiny is likely to require. *Second R&O* ¶ 300 (JA__); *FNPRM* ¶ 294 (JA__).[26] The Supreme Court has recognized a governmental interest in racial diversity as "compelling" only in the context of higher education. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 703 (2007) (striking down race-conscious primary and secondary school assignment plans). Nevertheless, for purposes of its analysis, the FCC assumed that it could establish a compelling interest in viewpoint diversity,[27] which the Supreme Court in another context recognized

[26] There are "five [different] types of diversity pertinent to media ownership policy: viewpoint, outlet, program, source, and minority and female ownership diversity." *2003 Order*, 18 FCC Rcd at 13627 ¶ 18.

[27] "Viewpoint diversity refers to the availability of media content reflecting a variety of perspectives. A diverse and robust marketplace of ideas is the foundation of our democracy." *2003 Order*, 18 FCC Rcd at 13627 ¶ 19.

as an interest "of the highest order." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994); *see Second R&O* ¶¶ 300-01 (JA__); *FNPRM* ¶¶ 285-87 (JA__).[28]

Beyond a compelling interest, measures subject to strict scrutiny must be narrowly tailored to advance the asserted interest. *Grutter*, 539 U.S. at 326. *Metro Broadcasting* found that the FCC's minority ownership policies were "substantially related" to achieving broadcast diversity. 497 U.S. at 569. But strict scrutiny requires more: "a direct rather than approximate fit of means to ends." *Id.* 620 (O'Connor, J., dissenting); *see Grutter*, 539 U.S. at 334 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).[29] To satisfy strict scrutiny, therefore, the FCC would have to demonstrate a "'tightly bound'" or "'nearly complete' nexus" between express race-based policies and the compelling goal of viewpoint diversity. *FNPRM* ¶ 298

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[28] It is unclear that the Supreme Court would agree with that assumption. Indeed, the D.C. Circuit, "[a]fter carefully analyzing *Metro Broadcasting*'s opinions and considering the impact of *Adarand*," concluded that broadcast diversity is *not* a compelling interest. *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 355 (D.C. Cir.), *rehearing denied*, 154 F.3d 487 (1998).

[29] The FCC looked to Justice O'Connor's *Metro Broadcasting* dissent because it addresses the nexus required to satisfy strict scrutiny, an issue the majority found unnecessary to address under intermediate scrutiny. *FNPRM* ¶ 298 (JA __); *see id.* ¶ 290 (disagreeing that "a nexus … sufficient to satisfy strict scrutiny already has been established and accepted by the Supreme Court" in *Metro Broadcasting*) (JA__).

(quoting *Metro Broadcasting*, 497 U.S. at 626 (O'Connor, J., dissenting)) (JA__); *see Second R&O* ¶¶ 301-04 (JA__); *FNPRM* ¶¶ 289-98 (JA__).

The available evidence did not establish the required nexus. As the Commission explained, "the two recent studies in the record that directly address the impact of minority ownership on viewpoint diversity find almost no statistically significant relationship between such ownership and their measure of viewpoint diversity." *Second R&O* ¶ 301 (JA__) (citing *FNPRM* ¶¶ 292-93 (JA__)). And while there were other studies in the record, they "largely concern[ed] program or format diversity rather than viewpoint diversity, which we believe is the only kind of diversity likely to be accepted as a compelling governmental interest under strict scrutiny." *Second R&O* ¶ 301 (JA__); *see FNPRM* ¶¶ 294, 296-97 (JA__). "Moreover, … many of those studies support only limited conclusions." *Second R&O* ¶ 301 (JA__); *see id.* ¶ 302 (JA__); *FNPRM* ¶¶ 294-297 & n.904 (JA__).[30] The FCC noted that commenters generally agreed "that the evidence is not sufficient to

[30] The FCC declined to rely on studies over ten years old, but noted that older studies also did not demonstrate a tight link between minority ownership and viewpoint diversity. *FNPRM* n.904 (JA__); *see Metro Broadcasting*, 497 U.S. at 626 (arguing the "host of empirical evidence," *id.* 580, discussed in the majority opinion established at best "some rational nexus" between minority ownership and broadcast diversity) (O'Connor, J., dissenting).

enable the Commission to adopt race-based measures." *Second R&O* ¶ 304 (JA__).

The FCC's conclusion was well-founded under current equal protection jurisprudence. Strict scrutiny is not satisfied by generalizations, and it cannot be assumed that every member of a minority group has a typical or distinct viewpoint. *See Metro Broadcasting*, 497 U.S. at 579. The Supreme Court's approach to this dilemma in *Metro Broadcasting*—application of a more forgiving standard of review—was repudiated in *Adarand*. In *Grutter*, the Court deferred to the Law School's academic judgment that it needed a "critical mass" of minority students to diminish the force of racial stereotypes. 539 U.S. at 333; *see id.* 319-20. But that approach to demonstrating the required nexus "is not easily transferable to broadcasting." *FNPRM* n.905 (JA__). While the presence of minority students can diminish the force of stereotypes, and admission of minority students can accomplish other state interests—training members of minority groups for business, military or other leadership positions, *Grutter*, 539 U.S. at 328-31—"there is no ironclad guarantee that each minority owner will contribute to diversity." *Metro Broadcasting*, 497 U.S. at 580. And station owners that are not members of minority groups may also contribute to diversity of viewpoints and programming. *See FNPRM* ¶ 294 (noting study finding that "non-minority stations provide a significant amount of minority-targeted programming") (JA__).

Narrow tailoring also requires "truly individualized consideration" of a range of potential diversity contributions, applied "in a flexible, non-mechanical way." *Grutter*, 539 U.S. at 334, 338-39. The Commission reasonably concluded that the individualized consideration of applicants that strict scrutiny requires is infeasible in the broadcast context. *Second R&O* ¶ 305 (JA__); *FNPRM* ¶¶ 299-300 (JA__). Indeed, the FCC "long ago abandoned assessing the relative strengths, weaknesses, and the probability of providing certain types of content as part of the broadcast licensing process." *FNPRM* n.913 (JA__).

2. The Evidence Was Insufficient To Justify Gender-Based Measures Under Intermediate Scrutiny.

Gender classifications are subject to intermediate scrutiny, under which state action must be substantially related to an important objective. *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *Hassan*, 804 F.3d at 298-99. Intermediate scrutiny is less exacting than strict scrutiny, but nonetheless requires an "exceedingly persuasive justification" for gender-conscious actions. *United States v. Virginia*, 518 U.S. at 530.

Applying intermediate scrutiny, the D.C. Circuit overturned the FCC's former gender preference policy—a comparative licensing credit—in *Lamprecht v. FCC*, 958 F.2d 382 (D.C Cir. 1992). Concluding that *Metro Broadcasting* had established broadcast diversity as an important objective, the court focused on the required nexus between that objective and the means chosen to promote it. *Id.* 391-92. The court found that the only available study failed to "establish [a] statistically meaningful link between ownership by women and programming of any particular kind." *Id.* 398.

Consistent with *Lamprecht*, the FCC concluded that the available evidence did not demonstrate the meaningful link between female ownership and broadcast diversity required under intermediate scrutiny. *Second R&O* ¶ 308 & n.946 (JA__); *see FNPRM* ¶¶ 297, 301 & n.900 (JA__). The only recent study in the record that addressed the relationship provided two analyses of content aired by women-owned and non-women-owned radio stations. The FCC found that these two analyses were too limited in scope to be probative. *FNPRM* n.923 (JA__); *see Second R&O* n.946 (JA__). The analyses were of content aired by women- and non-women-owned radio stations: (1) the syndicated talk shows "Imus in the Morning" and "The Rush Limbaugh Show;" and (2) talk shows hosted by five "conservatives" versus six "progressives." S. Derek Turner, *Off the Dial: Female and Minority*

Radio Station Ownership in the United States, 48-55 (June 2007). In addition to being limited in scope, they did not support the conclusion that female ownership is meaningfully linked to broadcast content. The largest difference the first analysis found was that 26.2% of women-owned news/talk radio stations aired "The Rush Limbaugh Show," versus 36.7% of non-women-owned stations. *Id.* 49. The other disparities were 2% or less. *Id.* The second analysis likewise did not find statistically significant differences. *Id.* at 51; *see also id.* 43 ("Our data indicate that there are significant differences in the formats aired by minority and non-minority owners, but not generally among female and non-female owners.").[31]

C. The FCC Reasonably Explained Its Decision Not To Conduct More Empirical Studies Regarding Minority And Female Ownership For Now.

Although Citizen Petitioners advocate collecting more accurate data on minority and female ownership, *see, e.g.*, Citizens Br. 44, such data would not bridge the evidentiary gap that the Commission laid out in depth in its constitutional analyses. As the FCC explained in the *Second R&O*, it conducted or funded numerous media ownership studies over the course of

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[31] The FCC also noted that the analyses did "not control for other factors that may explain both the presence of a greater diversity of talk shows and a higher percentage of female … ownership in certain markets." *Second R&O* n.946 (JA__).

the 2010 and 2014 quadrennial reviews, including diversity studies. *See Second R&O* ¶¶ 313, 316 (JA__, __); *FNPRM* ¶¶ 292-94, 315-16 (JA__, __); *NPRM* ¶¶ 171, 193 (JA__, __). The FCC also has commissioned studies in the past.[32] In 2010, the agency asked commenters to identify evidence that might help justify adoption of a race- or gender-based eligible entity definition. *NPRM* ¶¶ 163-64 (JA__). In 2014, the FCC set forth the relevant constitutional standards in detail, explained its tentative conclusion that the evidence produced by its own recent studies, as well as the evidence identified by commenters, would not satisfy those standards, and invited further comment. *FNPRM* ¶¶ 282-306 (JA__). Most commenters concurred with the FCC regarding the strength of the evidence. *See Second R&O* ¶¶ 304, 309 (JA__). Although some advocated more studies, none proposed "specific, executable studies" likely to bridge the evidentiary gap. *See id.* ¶¶ 301, 304, 308, 312, 315-316 (JA__, __). As the FCC explained, "neither the record in this proceeding nor the Commission's own efforts have produced additional study designs that we expect would develop the evidence necessary to support race- and/or gender-conscious measures," *id.* ¶ 316

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[32] Six studies the FCC commissioned pursuant to 47 U.S.C. § 257 are available at http://www.fcc.gov/opportunity/meb_study/.

(JA__)[33]—in other words, evidence sufficient to meet the constitutional standards set forth in Sections III.B.1-2 *supra*.

Thus, based on the time and resources required for more studies—"likely millions of dollars and several years"—and the mandate "to act promptly to bring the eligible entity definition to a close," *Prometheus III*, 824 F.3d at 49, the FCC declined to pursue more studies. As it emphasized, *see Second R&O* ¶ 316 (JA__), APA notice and comment procedures "permit parties to bring relevant information quickly to the agency's attention" in the event of new developments. *NARUC*, 737 F.2d at 1125 (failure to conduct study not violative of APA). The FCC's decision to proceed to an order with the record available after substantial opportunities for comment was well within its "broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities." *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007).

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[33] In contrast, the Ninth Circuit held that preparation of an environmental impact statement was mandated under NEPA where the record demonstrated that there existed low-cost studies the agency could do to dispel uncertainty as to the environmental effects of a proposed action. *National Parks & Conservation Assoc. v. Babbitt*, 241 F.3d 722 (9th Cir. 2001), *abrogated on other grounds*, *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139 (2010).

IV. THE FCC REASONABLY ESTABLISHED AN INCUBATOR PROGRAM TO PROMOTE BROADCAST OWNERSHIP DIVERSITY.

In the *Incubator Order*, the Commission established a program for the radio industry under which "established broadcasters (i.e., incubating entities) will provide . . . new entrants or small broadcasters (i.e., incubated entities) with the training, financing, and access to resources that would be otherwise inaccessible to these entities." *Id.* ¶ 6 (JA__). Citizen Petitioners challenge the FCC's eligibility definition for the new incubator program because it does not go far enough to promote minority and female ownership, ignoring the agency's conclusion that more direct measures would be legally unsustainable. MMTC and NABOB further contend that the FCC failed to provide fair notice of its standard for determining where an incubating station could use the reward waiver it receives by helping an incubated station, and arbitrarily rejected their concern about allowing a waiver obtained in one local radio market in the highest tier (45+ stations) to be used in any other local radio market in that tier. None of these arguments has merit.

A. The FCC Reasonably Defined Eligibility to Encourage New Entrants And Small Businesses, Including Minority And Female Applicants.

Citizen Petitioners argue that the Commission's eligibility definition for the incubator program is arbitrary because the FCC did not connect it to the goal of increasing minority and female ownership. Citizens Br. 39-43. Citizen Petitioners' complaint misses the point: the program is not designed only to help minorities and women, for the constitutional law reasons set forth above. *See* § III.B *supra*; *Incubator Order* ¶ 27 n.55 ("Commenters have not identified changes to proposed race- or gender-based [eligibility] definitions that would address previous concerns expressed by the Commission or provided analysis that persuades us that such a standard could withstand a constitutional challenge.") (JA__). But as even Citizen Petitioners acknowledge, the incubator program will promote minority and female ownership more than no program at all. Citizens Br. 39.

The FCC's eligibility definition is reasonably tailored to the agency's "ultimate goal" for the incubator program "to encourage new entry into the broadcast industry, an industry which—as our record demonstrates—is [an] extremely capital-intensive… [industry] .... The Commission has previously recognized, and the record here confirms, that new entrants and small businesses have had longstanding difficulties accessing the needed capital to participate in broadcast ownership." *Incubator Order* ¶ 18 (JA__). The new entrant prong of the standard is intended to "focus the program on entities that are new or comparatively new to the broadcasting industry … and small broadcasters …" *Id.* ¶ 20 (JA__). The standard "is targeted specifically to benefit those small entities seeking to enter the broadcast industry for the first time and to help broadcasters with one, two, or three radio stations to secure the toehold they have obtained in the industry." *Id.*

In adopting its eligibility definition, the Commission did not ignore its public policy objective of advancing minority and female ownership. To the contrary, the FCC considered three analyses of how a similar new entrant bidding credit in broadcast auctions affected minority- and female-owned businesses. *See id.* ¶¶ 21-24 (JA__). Based on the analyses, the FCC predicted that its eligibility standard would help "to diversify the applicant pool for the incubator program, by targeting those small broadcasters most in need of the support provided by the incubator program, including minority and female applicants." *Id.* ¶ 24 (JA__).

Citizen Petitioners complain that the analyses are unsophisticated and the underlying data unreliable. Citizens Br. 40-42. Their criticisms focus on NAB's analysis of nine auctions, but the other two analyses included data for 20 auctions. *See Incubator Order* ¶¶ 22-23 (JA__). And as we have explained, *see* p.40 *supra*, the Court "review[s] only for the use of relevant, not perfect, data." *Council Tree IV*, 863 F.3d at 244 (citing *Council Tree III*, 619 F.3d at 250).

Citizen Petitioners also argue that the FCC's analysis "fails for the same reason" as in *Earth Island Institute v. Hogarth*, 494 F.3d 757, 766 (9th Cir. 2007). Citizens Br. 42. But the two situations are not comparable. *Earth Island Institute* involved an agency finding (as to the impact of tuna fishery-related activities on dolphins) that was contrary to scientific evidence in the record. In contrast, this case involves an agency forecast that is not amenable to rigid proof, and is consistent with the record evidence. Contrary to Citizen Petitioners' contention, Citizens Br. 43, the FCC did not fail to address concerns that experience with the standard could not necessarily be applied outside the auction context. As the Commission explained, the new entrant criterion simply "provides a known mechanism for identifying smaller entities" and "entities that indicated eligibility for the bidding credit often also indicated that they were minority or female owned businesses." *Incubator Order* ¶ 21 n.43 (JA__). In the end, the predictive value of existing data for assessing a new program "is precisely the type of issue which rests within the expertise of [the agency], and upon which a reviewing court must be most hesitant to intrude." *State Farm*, 463 U.S. at 53.

B. The Commission Provided Fair Notice Of Its Comparable Market Definition.

MMTC and NABOB contend that the Commission's request for comment on how to determine which radio markets are similar in size for reward waiver purposes did not alert them that the FCC might use the market size tiers under the local radio ownership rule because, they contend, "size" "is generally understood in the broadcast industry to mean" population rather than number of stations. MMTC and NABOB Br. 16.[34] But nothing in the *Incubator NPRM* specified that the Commission was contemplating to measure market size by population. And it is a well-settled practice to measure the size of radio markets by the number of stations in those markets. The local radio ownership rule has four market size tiers: (1) 45 or more commercial and noncommercial radio stations; (2) between 30 and 44 stations; (3) between 15 and 29 stations; and (4) 14 or fewer stations. 47 C.F.R. § 73.3555(a)(1). Indeed, these same market tiers *are set forth in the 1996 Act*. 1996 Act § 202(b)(1), 110 Stat. at 110. And the FCC has relied on these same tiers to limit radio ownership—the very rule that would be subject to waiver here—for more than three decades. *See Prometheus I*, 373 F.3d at 421-22. In light of that statutory history and practice, interested parties

[34] The only support that MMTC and NABOB offer for the existence of this purported general understanding is two comments that, in supporting the proposal to allow use of reward waivers in comparable markets, suggested a population-based metric for market size. Neither comment suggests that the commenter interpreted the *Incubator NPRM*'s reference to market "size" to mean population, or supports the existence of any general understanding in the broadcasting industry. *See* NAB Comments in MB Docket No. 17-289 at 14 n.34 (Mar. 9, 2018) (JA__); Skip Finley Comments in MB Docket No. 17-289 at 4-5 (Mar. 9, 2018) (JA__).

"should have anticipated" that the FCC might resort to market tiers to define comparable markets, even if there were any question from the actual notice. *Agape Church, Inc. v. FCC*, 738 F.3d 397, 423 (D.C. Cir. 2013) (internal quotation marks and citations omitted). The FCC already uses the tiers for the local radio ownership rule; so interested parties reasonably should have anticipated that it might do so here.[35]

C. The Comparable Market Definition Promotes The Goals Of The Incubator Program.

MMTC and NABOB also argue that the FCC arbitrarily ignored their concern that, absent a population-based limitation on comparability of stations within the the highest tier of markets (those with 45 or more stations), the agency's *Incubator Order* will not lead to incubation in the most populous and racially diverse markets, because broadcasters will be able to

[35] MMTC and NABOB also fail to show prejudice. *See* 5 U.S.C. § 706. The FCC publicly released a draft with the final comparability standard three weeks before adopting the *Incubator Order*, after which they "met three times and had one telephone call with the FCC Staff to express concerns … particularly about the comparable market definition." MMTC and NABOB Br. 21. As discussed below, the agency fully engaged with their concerns, and the petitioners point to no new evidence they would have submitted if given the opportunity. *See id.* 21-22. Thus, they cannot "show that on remand [they] can mount a credible challenge … and [were] thus prejudiced by the absence of an opportunity to do so before the agency." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 202 (D.C. Cir. 2007) (internal quotation marks and citations omitted).

generate large financial returns by incubating in markets with relatively small populations (*e.g.*, Wilkes-Barre/Scranton, the 77th-ranked Nielsen local radio market) to obtain waivers for the most populated markets (*e.g.*, New York City, the first-ranked market). MMTC and NABOB Br. 27-32. This argument too lacks merit.

In establishing its comparability definition, the FCC sought to balance its "desire to limit the impact of any potential consolidation that could result from the use of a reward waiver" with the "goal of expanding broadcast station ownership opportunities for small businesses and potential new entrants by allowing an incubating entity to incubate in markets other than those in which it is at or near the applicable local radio ownership caps." *Incubator Order* ¶ 67 (JA__). In response to MMTC and NABOB, the FCC explained that use of reward waivers should be less of a concern in markets with more stations and independent owners than in markets with fewer stations and independent owners from the perspective of protecting viewpoint diversity. *Id.* ¶ 68 (JA__).[36] The FCC was willing to accept reward waivers of significant value in places like New York City in order to encourage incubation that otherwise would likely never happen in less populous markets like Wilkes-Barre/Scranton. *See id.* ¶ 70 (JA___) (predicting that the standard it adopted would "promot[e] the entry of new and diverse voices in broadcast radio"). The agency is entitled to rely on its judgment in these circumstances, particularly "where the issues involve 'elusive' and 'not easily defined' areas such as this." *Council Tree III*, 619 F.3d at 253 (internal quotation marks and citations omitted).

The FCC also predicted that, contrary to MMTC's and NABOB's argument, use of reward waivers would not be driven primarily by market population. As the agency explained, "ownership interests and circumstances vary widely among incumbent broadcasters." *Incubator Order* ¶ 68 (JA__). Accordingly, decisions where to use waivers will likely be "driven by where the group owner faces ownership restrictions or wishes to grow a successful

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[36] As the FCC explained, markets that are ranked closely based on their Nielsen rankings are not necessarily more "comparable" in terms of viewpoint diversity, the salient features of which are the number of stations and independent owners. *Id.* ¶ 68 (JA__). MMTC and NABOB complain that the FCC's example does not respond to their Wilkes-Barre/Scranton and New York hypothetical. Br. 29; *id.* 24-26. The point of the FCC's example was not to refute their hypothetical, but to illustrate why population rank is not indicative of comparability for purposes of viewpoint diversity.

cluster." *Id.* MMTC and NABOB challenge the FCC's analysis because "no regulatory bar prevents" reward waivers from being transferred to broadcasters in the most populous markets. MMTC and NABOB Br. 30. But the FCC expressly prohibited transfers of reward waivers, except where the broadcaster who earned the waiver already used it and seeks to transfer an existing station group. *Incubator Order* ¶ 65 (JA__).[37] In short, the assumption that the program can be manipulated by transferring waivers is unfounded.

V. THE FCC REASONABLY CALLED FOR FURTHER COMMENT ON EXTENDING THE CABLE PROCUREMENT RULES TO BROADCASTERS.

MMTC and NABOB argue that the FCC has unreasonably delayed action on MMTC's proposal to extend the "cable procurement rules" to broadcasters. When reviewing a claim of action unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), a court's "polestar is reasonableness." *Prometheus III*, 824 F.3d at 39 (quoting *Public Citizen Health Research Group v. Chao*, 314 F.3d 143, 151 (3d Cir. 2002)). Courts "afford[] the agency considerable deference in establishing a timetable for

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[37] Under those circumstances, the FCC reasoned, "[p]ermitting transfer … preserves any increase in value achieved by the incubating entity for its efforts in bringing a new broadcaster into the market." *Incubator Order* ¶ 65 (JA__).

completing its proceedings." *Oil, Chem. & Atomic Workers Union v. OSHA*, 145 F.3d 120, 123 (3d Cir. 1998) (quotation marks and citations omitted). Here, the agency has acted reasonably.

In 2012, the "Diversity and Competition Supporters" ("DCS"), an ad hoc group of which MMTC is a member, filed comments in the 2010 quadrennial review with 47 different proposals aimed to "increase minority and women participation in broadcasting." *See DCS Supplementary Comments*, FCC Docket No. 09-182 (filed April 3, 2012). Among these was a proposal to extend the Commission's cable procurement rule to broadcasting. *Id.* 21. The cable procurement rule is a subsection of the agency's Equal Employment Opportunity rules that apply to cable entities. 47 C.F.R. § 76.75. The procurement rule requires a cable entity to "[e]ncourage minority and female entrepreneurs to conduct business with all parts of its operation." *Id.* § 76.75(e). The agency adopted the rule pursuant to explicit authority granted by a provision of the Cable Communications Policy Act of 1984, 47 U.S.C. § 554(d)(2)(e). *See Review of the Commission's Broadcast And Cable Equal Employment Opportunity Rules And Policies*, 15 FCC Rcd 2329, 2421 n.4 (2000).

The FCC first addressed the proposal in its 2014 *FNPRM*, where it stated that although several of MMTC's proposals "are accompanied by detailed and thoughtful analysis," the agency believed they were outside the scope of the quadrennial review. *FNPRM* ¶ 317 (JA__). In *Prometheus III*, MMTC identified "a substantial number" of proposals that it argued were *not* outside the scope of the review, *Prometheus III*, 824 F.3d at 50 n.11, including the proposal to extend the cable procurement rule. The Commission in turn "represent[ed] that it [would] deal with them in" its upcoming order, and this Court noted its "expectation that the Commission will meet its proffered deadline." *Prometheus III*, 824 F.3d at 50 n.11.

In the *Second R&O*, the Commission addressed five proposals highlighted by MMTC. The agency first noted that despite "some general support…—primarily from MMTC" for many of the DCS proposals that the Commission had first addressed in the *FNPRM*, the record as then constituted did not "establish[] that these changes … would provide meaningful benefits to the intended beneficiaries." *Second R&O* ¶ 324 (JA__). Although "[c]ommenters have had multiple opportunities to voice support for these proposals and explain the potential benefits that would arise from their implementation," still "the record contains almost no support for the vast majority of these proposals." *Id.*

Addressing the procurement rule specifically, the agency found "there is merit in exploring whether, and if so, how, to extend the cable procurement requirements to the broadcasting industry." *Id.* ¶ 330 (JA__). It therefore stated it would "evaluate the feasibility of adopting similar procurement rules for the broadcasting industry." *Id.*

The Commission has since issued the *2018 Quadrennial NPRM* for the next quadrennial cycle. There, the agency set out a seven-paragraph call for comments on this proposal, including the statutory basis for extending the rule to the broadcast industry; whether a rule specifically targeting women and minorities would be subject to heightened scrutiny and, if so, whether the rule could survive such review; data on the likelihood that the rule would increase minority and female participation in the broadcast industry; how to measure the costs and benefits of such a rule; and the feasibility of the rule in light of differences between the cable and broadcast industries. *2018 Quadrennial NPRM* ¶¶ 94-100 (ADD 35-38).

Despite this agency attention, MMTC and NABOB contend that the Commission's resolution of whether to extend the cable procurement rule to broadcasting has been unreasonably delayed. Br. 32-38. But when the agency asked for comment on the proposal in 2014, it received almost no comments in response. Despite "multiple opportunities" to support and explain the proposals, the record as of 2016 failed to "establish[] that these changes … would provide meaningful benefits to the intended beneficiaries."

Second R&O ¶ 324 (JA__). MMTC claims now that there was "widespread support" for the proposal and "considerable evidence" of its benefits (Br. 32), but it does not provide citations. The Commission stated that the support the rule did receive was "primarily from MMTC" itself. *Second R&O* ¶ 324 (JA___). On this record, it was reasonable not to adopt the proposal in 2016 and to seek further comment in the next quadrennial.

In a similar situation in a different proceeding, MMTC had urged the FCC to require broadcasters to translate emergency alerts into other languages, and the agency instead called for further comment. *See Multicultural Media, Telecom & Internet Council v. FCC*, 873 F.3d 932 (D.C. Cir. 2017). MMTC alleged undue delay, but the court found "it was not unreasonable for the FCC to gather more information from relevant parties before deciding whether to" implement the proposal. *Id.* 937.

So too here. As the *2018 Quadrennial NPRM* shows, the agency needs to address a host of complex questions before acting on the proposal, including the FCC's statutory authority to adopt the proposal,[38] potential

[38] The cable procurement rule was issued pursuant to explicit statutory authority limited to the cable industry. There is no similar express grant of authority to issue similar policies for the broadcast industry.

constitutional obstacles,[39] and the likely effect of the rule if extended. In light of these issues, making a detailed call for further comment was an entirely reasonable means for moving forward.

The consequences of the agency's call for further comment are also modest, especially when compared to the other options available in 2016. MMTC argues that the agency delayed action that would increase minority and female ownership in the broadcast industry. Br. 37. But the effect, if any, that the rule would have on ownership is still an open question before the agency. *See 2018 Quadrennial NPRM* ¶ 99 (ADD 37) (citing MMTC's claims and stating "it is important to assess the likelihood that the regulation would have the desired effect"). Moreover, even if the rule will ultimately have the effect that MMTC hopes, tabling the issue in 2016 to call for further comment was preferable to rejecting it for lack of record support, or to

[39] The FCC's previous equal employment opportunity rules for broadcasting (as opposed to cable) were twice struck down as in conflict with *Adarand*. *See MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 15 (D.C. Cir. 2001); *Lutheran Church-Missouri Synod*, 141 F.3d at 344.

adopting the proposal given a record that might not have supported the rule against challenge.[40]

CONCLUSION

The petitions for review should be denied.[41]

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[40] MMTC nevertheless urges the Court to set a timeline for action on its proposal. Br. 37-38. That is unnecessary and unwarranted. The agency has already issued a detailed call for comment on the proposal in the new quadrennial proceeding, and there is every reason to expect that the agency will act, if the record allows. And of course, courts "afford[] the agency considerable deference in establishing a timetable for completing its proceedings," *Oil, Chemical & Atomic Workers Union*, 145 F.3d at 123. In essence, MMTC seeks a writ of mandamus to force the agency to act. This Court has already denied that relief. *See* February 7, 2018 Order.

[41] The Court need not address Citizen Petitioners' request for relief because their various substantive arguments lack merit. Nevertheless, two points bear mention. First, there is no basis for their extraordinary request to appoint a master to oversee the Commission's core data collection functions. *Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 65 (2004). Second, vacatur of the *Reconsideration Order* in its entirety would undo two rule changes that no petitioner has even mentioned: the reversal of the TV JSA attribution rule; and the creation of a narrow presumption in favor of certain local radio ownership rule waivers in the New York and Washington, D.C. markets. *Id.* ¶¶ 95-113 (JA__).

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March 22, 2019

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CERTIFICATE OF FILING AND SERVICE

I, William J. Scher, hereby certify that on March 22, 2019, I filed the foregoing Brief for Respondent with the Clerk of the Court for the United States Court of Appeals for the Third 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.

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2018 Quadrennial Regulatory Review

Notice of Proposed Rulemaking, FCC 18-179
(rel. Dec. 13, 2018)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
2018 Quadrennial Regulatory Review – Review of	)	MB Docket No. 18-349
the Commission's Broadcast Ownership Rules and	)	
Other Rules Adopted Pursuant to Section 202 of	)	
the Telecommunications Act of 1996	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: December 12, 2018 **Released: December 13, 2018**

Comment Date: [60 days after publication in the Federal Register]
Reply Comment Date: [90 days after publication in the Federal Register]

By the Commission: Chairman Pai and Commissioners O'Rielly and Carr issuing separate statements; Commissioner Rosenworcel approving in part, dissenting in part and issuing a statement

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I. INTRODUCTION

1. With this Notice of Proposed Rulemaking (NPRM), we initiate the Commission's 2018 quadrennial review of its media ownership rules. We launch this proceeding pursuant to the statutory requirement set forth in Section 202(h) of the Telecommunications Act of 1996 that we review our media ownership rules every four years to determine whether they remain "necessary in the public interest as the result of competition."[1] The three rules subject to review under Section 202(h) are the Local Radio Ownership Rule,[2] the Local Television Ownership Rule,[3] and the Dual Network Rule.[4] We seek comment

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996) (1996 Act); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) (Appropriations Act) (amending Sections 202(c) and 202(h) of the 1996 Act). In 2004, Congress revised the then-biennial review requirement to require such reviews quadrennially. *See* Appropriations Act § 629, 118 Stat. at 100.

[2] 47 CFR § 73.3555(a).

[3] *Id.* § 73.3555(b).

[4] *Id.* § 73.658(g).

herein on whether, given the current state of the media marketplace, we should retain, modify, or eliminate any of these rules.

2. As the Commission has observed, the media marketplace has seen dramatic changes since the Commission began conducting its periodic media ownership reviews in the late 1990s—an evolution that continues to this day.[5] Most notably, the growth of broadband Internet and other technologies has given consumers access to more content on more platforms than ever before. For instance, an overwhelming majority of Americans now have access to broadband Internet service, and they are increasingly using it to access online audio and video programming for entertainment and news content.[6] Data show that consumers today are watching more online video than ever.[7] In fact, nearly three in ten U.S. adults say that online streaming now constitutes their primary means of watching television,[8] and the largest audio and video streaming services count their users in the tens of millions.[9] Moreover, 43 percent of U.S. adults say they often get their news online, with online news consumption

[5] *See, e.g., 2014 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 et al.*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802, 9811-16, paras. 16-25 (2017) (*2010/2014 Quadrennial Review Order on Reconsideration*); *2014 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 et al.*, Second Report and Order, 31 FCC Rcd 9864, 9865, para. 1 (2016) (*2010/2014 Quadrennial Review Order*); *2014 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 et al.*, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4373, para. 5 (2014) (*2010/2014 Quadrennial Review FNPRM*); *2010 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 et al.*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, 17490-91, paras. 2-4 (2011) (*2010 Quadrennial Review NPRM*); *2010 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*, Notice of Inquiry, 25 FCC Rcd 6086, 6087-91, paras. 4-13 (2010) (*2010 Quadrennial Review NOI*); *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 et al.*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2014-15, paras. 6-8 (2008) (*2006 Quadrennial Review Order*); *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*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13647-48, paras. 86-88 (2003) (*2002 Biennial Review Order*).

[6] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2018 Broadband Deployment Report, 33 FCC Rcd 1660, 1675, para. 50 (2018) (finding that, as of year-end 2016, 92.3 percent of all Americans had access to fixed terrestrial broadband at speeds of 25 Mbps download/3 Mbps upload).

[7] Estimates indicate that U.S. adults now watch more than one hour of online video per day. *See, e.g., Time Flies: U.S. Adults Now Spend Nearly Half a Day Interacting with Media*, Nielsen (July 31, 2018), https://www.nielsen.com/us/en/insights/news/2018/time-flies-us-adults-now-spend-nearly-half-a-day-interacting-with-media.html (*Time Flies*) (finding that U.S. adults watch one hour and eleven minutes of video per day via a smartphone, tablet, computer, or TV-connected device); *U.S. Time Spent with Media*, eMarketer (Oct. 5, 2017), https://www.emarketer.com/Report/US-Time-Spent-with-Media-eMarketers-Updated-Estimates-2017/2002142 (finding that U.S. adults watch one hour and seventeen minutes of digital video per day).

[8] *About 6 in 10 Young Adults in U.S. Primarily Use Online Streaming to Watch TV*, Pew Research Center (Sept. 13, 2017), http://www.pewresearch.org/fact-tank/2017/09/13/about-6-in-10-young-adults-in-u-s-primarily-use-online-streaming-to-watch-tv/ (finding that 28 percent of all U.S. adults—and 61 percent of those between ages 18 and 29—say an online streaming service is the primary way they watch television).

[9] *See, e.g., Q4'17 top US video provider rankings*, S&P Global Market Intelligence (Apr. 2, 2018); Anne Steele, *Apple Music on Track to Overtake Spotify in U.S. Subscribers*, Wall Street Journal (Feb. 5, 2018).

increasing among every age group in recent years.[10] In addition, two-thirds of Americans are now getting at least some of their news through social media platforms.[11]

3. In the face of these trends, however, broadcast television and radio stations remain important fixtures in local communities. Despite new technologies competing for viewers' attention, the amount of video Americans watch has actually been on the rise—approaching six hours a day in 2018—with a majority continuing to consist of live or time-shifted traditional television viewing.[12] Similarly, more than 90 percent of Americans still listen to the radio each week.[13] Total broadcast industry revenues have appeared fairly stable in recent years.[14] Moreover, television remains a common place for Americans to get their news,[15] and some evidence suggests that broadcast television outlets produce a significant portion of the video news content published on websites and social media platforms.[16]

4. Last year, the Commission concluded its combined 2010/2014 Quadrennial Review proceeding by adopting an Order on Reconsideration that relaxed or eliminated outdated rules.[17] In doing so, the Commission recognized the dynamic nature of the media marketplace and the wealth of information sources now available to consumers.[18] The changes the Commission adopted in the

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[10] Jeffrey Gottfried and Elisa Shearer, *Americans' Online News Use Is Closing in on TV News Use*, Pew Research Center (Sept. 7, 2017), http://www.pewresearch.org/fact-tank/2017/09/07/americans-online-news-use-vs-tv-news-use/ (*Americans' Online News Use*).

[11] Katerina Eva Matsa and Elisa Shearer, *News Use Across Social Media Platforms 2018*, Pew Research Center (Sept. 10, 2018), http://www.journalism.org/2018/09/10/news-use-across-social-media-platforms-2018/.

[12] Nielsen, *Time Flies* (finding that U.S. adults watch five hours and fifty-seven minutes of video per day, including four hours and forty-six minutes of live and time-shifted television).

[13] *Id.* (finding that radio reaches 92 percent of U.S. adults on a weekly basis).

[14] *See, e.g., U.S. TV Station Industry Total Revenue Projections, 2008-2023 (Jun. 2018)*, S&P Global Market Intelligence (showing that total industry revenue for broadcast television stations declined only slightly (0.5 percent) from 2016 to 2017); *Radio's 2017 Revenue. Was It Up or Down?*, Radio Ink (Apr. 5, 2018), https://radioink.com/2018/04/05/radios-2017-revenue-was-it-up-or-down/ (citing BIA/Kelsey estimates that total industry revenue for radio stations declined just 0.2 percent from 2016 to 2017). These figures are particularly notable given that political election cycles, both federal and local, have a significant positive impact on broadcast advertising revenue, with even numbered years bringing in more revenue than odd numbered years.

[15] Pew Research Center, *Americans' Online News Use* (finding that 50 percent of U.S. adults often got news from television in 2017); *see also* Katerina Eva Matsa, *Fewer Americans Rely on TV News; What Type They Watch Varies by Who They Are*, Pew Research Center (Jan. 5, 2018), http://www.pewresearch.org/fact-tank/2018/01/05/fewer-americans-rely-on-tv-news-what-type-they-watch-varies-by-who-they-are/ (finding that 37 percent of all U.S. adults—and 57 percent of those 65 and older—often get news from local television).

[16] *See, e.g.*, Knight Foundation, Local TV News and the New Media Landscape: Part 1: The State of the Industry at 27 (Apr. 5, 2018) (finding that approximately 40.6 percent of daily visitors to local news websites visited the websites of commercial television outlets); Knight Foundation, Local TV News and the New Media Landscape: Part 3: The Future of Local News Video at 3 (Apr. 5, 2018) (concluding that "[t]raditional broadcasters are responsible for a significant portion of the news video published on social media, especially on Facebook"), https://knightfoundation.org/reports/local-tv-news-and-the-new-media-landscape.

[17] *See 2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9803, paras. 1-2. Additionally, earlier this year, the Commission created an incubator program to foster new entry into the broadcasting industry pursuant to the Commission's decision on reconsideration to adopt such a program. *See Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*, Report and Order, FCC 18-114 (Aug. 3, 2018) (*Incubator Order*).

[18] *See 2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9811-16, 9826-29, 9833-34, paras. 16-25, 55-60, 71-72.

2010/2014 proceeding were based on a record it had begun compiling as far back as 2009 (and had subsequently refreshed with the 2014 Quadrennial Review proceeding).[19]

5. Today, as required by Congress, we start a new proceeding to take a fresh look at our rules in light of the media landscape of 2018 and beyond. Accordingly, as discussed below, we seek comment on whether the three remaining rules subject to quadrennial review continue to be necessary in the public interest in their current forms or whether any of them should be modified or eliminated. Additionally, in the *2010/2014 Quadrennial Review Order*, the Commission committed to further examination of several proposals offered in the record of that proceeding as potential pro-diversity initiatives.[20] As described more fully below, these proposals include extending cable procurement requirements to broadcasters, adopting formulas aimed at creating media ownership limits that promote diversity, and developing a model for market-based, tradeable "diversity credits" to serve as an alternative method for setting ownership limits. Consistent with the Commission's previous commitment to explore these ideas, we seek comment on these proposals and related issues below.

II. BACKGROUND

6. The three rules under review in this proceeding—the Local Radio Ownership Rule, the Local Television Ownership Rule, and the Dual Network Rule—each have their roots in media ownership restrictions going back decades.[21] Pursuant to the 1996 Act, Congress requires the Commission to review these rules every four years to determine whether they are "necessary in the public interest as the result of competition" and to "repeal or modify any regulation [the Commission] determines to be no longer in the public interest."[22] The most recent of these statutorily required reviews was the combined 2010/2014 Quadrennial Review Proceeding.

7. On August 10, 2016, the Commission adopted the *2010/2014 Quadrennial Review Order*, which largely retained the then-existing media ownership rules with only minor modifications.[23] In addition, the Order adopted a requirement that commercial television stations file shared services agreements (SSAs) with the Commission but declined to make SSA relationships attributable.[24] The Order also reinstated the revenue-based eligible entity standard, as well as associated measures to encourage small business participation in the broadcast industry, but declined to implement diversity-related regulatory treatment preferences based on race- or gender-conscious definitions.[25] Several parties, including the National Association of Broadcasters (NAB), Nexstar Broadcasting, Inc. (Nexstar), and Connoisseur Media, LLC (Connoisseur), sought reconsideration of the *2010/2014 Quadrennial Review*

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[19] *See 2010/2014 Quadrennial Review FNPRM*, 29 FCC Rcd at 4373-74, paras. 6-7; *2010 Quadrennial Review NPRM*, 26 FCC Rcd at 17491-94, paras. 5-9.

[20] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 10006-07, paras. 330-32.

[21] *See, e.g., Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, 45 F.C.C. 1476 (1964) (prohibiting common ownership of television stations with intersecting Grade B contours); *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*18 F.C.C. 288, 290, para. 4 n.3 (1953) (citing 5 Fed. Reg. 2384 (1940), 6 Fed. Reg. 2284 (1941), and 8 Fed. Reg. 16065 (1943)) (stating that the Commission adopted multiple ownership rules for FM radio stations in 1940, television stations in 1941, and AM radio stations in 1943); *Amendment of Part 3 of the Commission's Rules*, 11 Fed. Reg. 33 (1946) (adopting a dual network rule for television networks).

[22] 1996 Act § 202(h); Appropriations Act § 629.

[23] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9865, para. 3.

[24] *Id.* at 9866, para. 5.

[25] *Id.* at 9866, para. 4.

Order by the Commission.[26] Multiple parties also sought judicial review, which remains pending with the Third Circuit.[27]

8. On November 16, 2017, the Commission adopted an Order on Reconsideration that reversed certain elements of the earlier *2010/2014 Quadrennial Review Order*, most notably by repealing the Newspaper/Broadcast Cross-Ownership Rule and the Radio/Television Cross-Ownership Rule and revising the Local Television Ownership Rule.[28] Specifically, on reconsideration, the Commission revised the Local Television Ownership Rule by eliminating the requirement that, in order to own two stations in a market, eight independent voices must remain in the market post-transaction.[29] The Commission found that the Eight-Voices Test was unsupported by the record or reasoned analysis and was no longer necessary in the public interest.[30] In addition, pursuant to the revised Local Television Ownership Rule, the Commission concluded that it would consider, on a case-by-case basis, combinations that would otherwise be barred by the prohibition on ownership of two top-four ranked stations in a market.[31] Finally, the *2010/2014 Quadrennial Review Order on Reconsideration* eliminated attribution for television joint sales agreements (JSAs) and retained the disclosure requirement for television SSAs.[32] Several parties sought judicial review of the *2010/2014 Quadrennial Review Order on Reconsideration*, which, like the judicial challenges to the *2010/2014 Quadrennial Review Order*, remains pending before the Third Circuit.[33] That court, however, rejected an emergency petition for writ of mandamus filed by Prometheus Radio Project and Media Mobilizing Project seeking to block the *2010/2014 Quadrennial Review Order on Reconsideration* from taking effect.[34] On reconsideration, the Commission also found that, while the record in the 2010/2014 Quadrennial Review Proceeding supported adoption of an incubator program to foster the entry of new and diverse voices in the broadcasting industry, the structure and implementation of such a program required further exploration.[35] Accordingly, the Commission sought comment on these issues, and on August 2, 2018, adopted a Report and Order establishing an incubator program to foster new entry into the broadcasting industry.[36] Under the program, an established broadcaster (i.e., incubating entity) will provide a new entrant or small broadcaster (i.e., incubated entity) with training, financing, and access to resources that would be otherwise inaccessible to these entities.[37] In return for this support, the incubating entity can receive a waiver of the applicable Local Radio Ownership Rule that it can use either in the incubated market or in a comparable market within three years of the successful conclusion of a qualifying incubation

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[26] *See* Petition for Reconsideration of Connoisseur Media, LLC, MB Docket. No. 14-50 (filed Dec. 1, 2016); Petition for Reconsideration of NAB, MB Docket. No. 14-50 (filed Dec. 1, 2016); Petition for Reconsideration of Nexstar Broadcasting, Inc., MB Docket. No. 14-50 (filed Dec. 1, 2016).

[27] Judicial challenges to the *2010/2014 Quadrennial Review Order* have been consolidated in the Third Circuit with challenges to the *2010/2014 Quadrennial Review Order on Reconsideration* and the *Incubator Order*. *See infra* n.40.

[28] *2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9803, para. 2.

[29] *Id.* at 9834-36, paras. 73-77.

[30] *Id.* at 9834, para. 73.

[31] *Id.* at 9836-39, paras. 78-82.

[32] *Id.* at 9848-54, 9855-57, paras. 101-13, 117-20.

[33] *See infra* n.40.

[34] Order, *Prometheus Radio Project et al. v. FCC et al.*, Nos. 17-1107 and 18-1092, Document No. 003112846874 (3rd Cir. Feb. 7, 2018).

[35] *2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9857, 9859, paras. 121, 126.

[36] *See 2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9859-64, paras. 126-45; *Incubator Order* at 1-2, para. 1.

[37] *Incubator Order* at 3, para. 6.

relationship.[38] One petitioner has sought reconsideration of the *Incubator Order* by the Commission.[39] In addition, several parties, including Prometheus Radio Project and Media Mobilizing Project, jointly, and MMTC and NABOB, jointly, have sought judicial review of the *Incubator Order*.[40] The Third Circuit has consolidated the petitions with pending challenges to the *2010/2014 Quadrennial Review Order* and the *2010/2014 Quadrennial Review Order on Reconsideration*.[41]

III. MEDIA OWNERSHIP RULES

A. Local Radio Ownership Rule

1. Introduction

9. In this section, we examine whether the Commission's current Local Radio Ownership Rule continues to be necessary in the public interest consistent with the statutory mandate of Section 202(h).[42] The Local Radio Ownership Rule limits both the total number of radio stations an entity may own within a local market and the number of radio stations within the market that the entity may own in the same service (AM or FM). The current radio ownership limits were set by Congress in 1996,[43] and the courts have upheld the Commission's retention of the rule in prior quadrennial reviews.[44] The Commission's primary rationale for maintaining the rule has been to promote competition among radio stations within a local market.[45] In addition, the Commission has recognized that the rule helps to promote viewpoint diversity and localism and is consistent with its policy goal of promoting minority and female ownership.[46]

10. We seek comment below on all aspects of the rule's implementation and on whether the current version of the rule remains necessary in the public interest as a result of competition and to support our other policy goals in today's radio marketplace. In addition, we consider how to apply the rule to Nielsen Audio Metro markets that are embedded within larger Nielsen Audio Metro markets, a question the Commission explored in the *2010/2014 Quadrennial Review Order on Reconsideration* and

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[38] *Id.* at 3, para. 6.

[39] *See* Petition for Reconsideration of Red Brennan Group, MB Docket No. 17-289 (filed Sept. 27, 2018).

[40] *See* Petition for Review of Prometheus Radio Project and Media Mobilizing Project, *Prometheus Radio Project and Media Mobilizing Project v. FCC*, No. 18-2943, Document No. 003113024980 (3rd Cir. Aug. 31, 2018); Petition for Review of Multicultural Media, Telecom and Internet Council, Inc. and National Association of Black Owned Broadcasters, *Multicultural Media, Telecom and Internet Council et al. v. FCC*, No. 18-1268, Document No. 1753058 (D.C. Cir. Sept. 27, 2018).

[41] Order, *Multicultural Media, Telecom, and Internet Council, Inc. v. FCC*, Nos. 17-1109 and 18-3335, Document No. 003113067217 (3rd Cir. Oct. 22, 2018); Order, *Prometheus Radio Project et al. v. FCC et al.*, Nos. 17-1107, 18-1092, and 18-2943, Document No. 003113028065 (3rd Cir. Sept. 7, 2018).

[42] *See* 1996 Act § 202(h).

[43] 1996 Act § 202(b)(1). Initially, only commercial radio stations were counted when determining the total number of radio stations in a market for purposes of the 1996 limits, but the Commission subsequently decided that noncommercial radio stations also should be included in those totals. *See 2002 Biennial Review Order*, 18 FCC Rcd at 13734, para. 295.

[44] *See, e.g.*, *Prometheus II*, 652 F.3d at 462-63.

[45] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9897, 9898-99, paras. 82, 87; *see also 2002 Biennial Review Order*, 18 FCC Rcd at 13712-13, para. 239; *2006 Quadrennial Review Order*, 23 FCC Rcd at 2069, para. 110.

[46] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9897, 9898-99, paras. 82, 87; *see also 2002 Biennial Review Order*, 18 FCC Rcd at 13738, 13739, paras. 303, 305-06; *2006 Quadrennial Review Order*, 23 FCC Rcd at 2075, 2077, paras. 124, 127.

committed to address further in this proceeding.[47] We ask commenters to explain in detail and to support with evidence the reasons for any rule changes they recommend.

2. Background

11. The Local Radio Ownership Rule allows an entity to own: (1) up to eight commercial radio stations in radio markets with at least 45 radio stations, no more than five of which may be in the same service (AM or FM); (2) up to seven commercial radio stations in radio markets with 30-44 radio stations, no more than four of which may be in the same service (AM or FM); (3) up to six commercial radio stations in radio markets with 15-29 radio stations, no more than four of which may be in the same service (AM or FM); and (4) up to five commercial radio stations in radio markets with 14 or fewer radio stations, no more than three of which may be in the same service (AM or FM), provided that the entity does not own more than 50 percent of the radio stations in the market unless the combination comprises not more than one AM and one FM station.[48] When determining the total number of radio stations within a market, only full-power commercial and noncommercial radio stations are counted for purposes of the rule.[49] Radio markets are defined by Nielsen Audio Metros where applicable, and the contour-overlap methodology is used in areas outside of defined and rated Nielsen Audio Metro markets.[50]

12. As it has in the past, the Commission concluded in its most recent media ownership review that local radio ownership limits promote competition,[51] and it found that public interest benefit to be a sufficient basis for retaining the current rule.[52] Additionally, the Commission affirmed its previous findings that competitive local radio markets help promote viewpoint diversity and localism, and it deemed the rule consistent with the Commission's goal of promoting minority and female broadcast ownership.[53] Accordingly, the Commission retained the rule without modification, although it provided several clarifications regarding the rule's implementation.[54] The Commission subsequently, on reconsideration, adopted a presumption in favor of waiving the rule for qualifying radio stations within embedded markets (i.e., smaller markets, as defined by Nielsen Audio, that are contained within the boundaries of a larger Nielsen Audio Metro market) where the parent market currently has multiple embedded markets (i.e., New York and Washington, DC).[55] Such a waiver would permit the applicant to

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[47] *2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9841-46, paras. 86-95.

[48] 47 CFR § 73.3555(a). Overlap between two stations in different services is allowed if neither of those stations overlaps a third station in the same service.

[49] *Id.*

[50] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13724-30, paras. 273-86 (replacing the contour-overlap methodology with Arbitron Metro—now Nielsen Audio Metro—market definitions, where available, and retaining a modified contour-overlap methodology on an interim basis for areas not defined by Nielsen Audio); *2006 Quadrennial Review Order*, 23 FCC Rcd at 2013, 2070-71, 2071-72, paras. 4, 111-12, 114 (affirming the use of Nielsen Audio Metro markets to define geographic markets); *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9898, para. 85 n.234 (finding no basis on which to revisit as part of its ownership review the interim contour-overlap methodology for non-Nielsen Audio Metro areas). An exception to this market definition approach is Puerto Rico, where the contour-overlap methodology applies even though Puerto Rico is a Nielsen Audio Metro market. *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9907, paras. 111-12.

[51] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9897, 9898-99, paras. 82, 87; *see also 2002 Biennial Review Order*, 18 FCC Rcd at 13712-13, para. 239; *2006 Quadrennial Review Order*, 23 FCC Rcd at 2069, para. 110.

[52] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9897, 9898-99, paras. 82, 87.

[53] *Id.*; *see also 2002 Biennial Review Order*, 18 FCC Rcd at 13738, 13739, paras. 303, 305-06; *2006 Quadrennial Review Order*, 23 FCC Rcd at 2075, 2077, paras. 124, 127.

[54] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9897, 9898-99, 9905-07, paras. 82, 87, 107-12.

[55] *2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9841, 9845-46, paras. 86, 94-95. Stations would qualify under two conditions: (1) compliance with the numerical ownership limits using the Nielsen

comply with ownership limits determined by examining only the embedded market, and not both the embedded and parent markets. The Commission stated that the presumption would apply pending further consideration of embedded market transactions in this 2018 quadrennial review.[56]

13. In anticipation of this 2018 review, NAB submitted a letter to the Chief of the Media Bureau recommending that the Commission relax its radio ownership limits in light of today's audio marketplace in which, it argues, radio stations compete for both listeners and advertisers with a host of other services, including streaming services, satellite radio, podcasts, Facebook, and YouTube.[57] NAB suggests allowing an entity in the top 75 Nielsen Audio Metro markets to own or control up to eight commercial FM stations and unlimited AM stations in any of those markets.[58] NAB also proposes that entities in those markets should be permitted to own up to two additional FM stations if they participated in the Commission's incubator program.[59] Finally, NAB proposes eliminating all limits on FM and AM ownership in all other markets.[60] Below we describe NAB's arguments and the counterarguments made in response thereto,[61] and we invite interested parties to comment and to put forth other ideas and proposals.

3. Discussion

14. As an overarching matter, we seek comment on whether the current Local Radio Ownership Rule remains necessary in the public interest as the result of competition. We seek comment specifically on whether there have been any changes in the marketplace since the Commission's *2010/2014 Quadrennial Review Order* that would affect our consideration of whether the Local Radio Ownership Rule remains necessary in the public interest to promote competition. We also seek comment on whether the Local Radio Ownership Rule is necessary to promote localism or viewpoint diversity.

15. In the event that we decide to retain the Local Radio Ownership Rule, we will analyze the relevant parts of the rule to examine whether each particular part remains necessary in the public interest as a result of competition or whether it should be modified or eliminated. To that end, as in prior quadrennial reviews, we seek comment on each of the specific aspects of the rule's operation, including the relevant product market, market size tiers, numerical limits, and AM/FM subcaps, in order to assess whether these subparts remain necessary or whether any or all of them should be modified or eliminated.[62]

16. Furthermore, in the event that the rule is retained but modified, we seek comment on

(Continued from previous page)
Audio Metro methodology in each embedded market, and (2) compliance with the ownership limits using the contour-overlap methodology applicable to undefined markets in lieu of the Commission's current parent market analysis. *Id.* at 9842, para. 90 n.262; *see also id.* at 9841, para. 86 n.251.

[56] *Id.* at 9841, 9845-46, paras. 86, 95.

[57] Letter from Rick Kaplan et al., Legal and Regulatory Affairs, NAB, to Michelle Carey, Chief, Media Bureau, FCC, at 1-4 (filed June 15, 2018) (NAB June 15, 2018 Letter). We will add to the public docket of this proceeding this submission and the other submissions to the Commission or its staff that are referenced in regard to the Local Radio Ownership Rule.

[58] *Id.* at 2.

[59] *Id.*; *see also Incubator Order*.

[60] NAB June 15, 2018 Letter at 2.

[61] *See* Letter from Edward G. Atsinger, Chief Executive Officer, and David P. Santrella, President Broadcast Media, Salem Media Group, to Hon. Ajit Pai, Chairman, FCC, at 1 (filed June 29, 2018) (Salem Media June 29, 2018 Letter) (arguing that relaxing FM subcaps would have a harmful effect on AM radio); Eric Rhoads, *Radio's Weak Argument to the FCC Reveals a Deeper Problem*, Radio Ink (Aug. 2, 2018), https://radioink.com/2018/08/02/radios-weak-argument-to-the-fcc-reveals-a-deeper-problem/ (challenging NAB's stance that radio stations compete for advertising with Internet companies like Google and Facebook).

[62] *See 2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9899-912, paras. 88-128.

whether and how the rule changes should apply to any pending applications. We also seek comment on whether to make permanent the interim contour-overlap methodology used to determine ownership limits in areas outside the boundaries of defined Nielsen Audio Metro markets. In addition, we seek comment on the issue of embedded market transactions. Finally, we seek comment on what effect, if any, our action might have on minority and female ownership. We ask commenters to support their claims and proposals with as much data and empirical evidence as possible and to discuss both the potential costs and potential benefits of any suggested rule revisions.

17. In the *2010/2014 Quadrennial Review Order*, the Commission concluded that the broadcast radio listening market remains the relevant product market for purposes of the Local Radio Ownership Rule.[63] Accordingly, the Commission declined to expand its definition of the market to include non-broadcast audio sources, such as satellite radio and online audio services.[64] The Commission reached its determination by assessing whether alternate sources of audio programming provide a meaningful substitute for local broadcast radio stations.[65] The Commission's analysis centered on the fact that broadcast radio stations provide "free, over-the-air programming tailored to the needs of the stations' local markets."[66] In contrast, satellite radio is a subscription service, online audio requires an Internet connection, and neither typically provides programming responsive to local needs and interests.[67]

18. In its recent letter proposing a relaxed radio rule, NAB argues that current ownership limits constrain the ability of radio broadcasters to compete on a level playing field in the digital audio world of 2018, particularly in smaller markets.[68] NAB suggests that the dominance of broadcast radio has faded alongside streaming services such as Pandora and Spotify, satellite radio, podcasts, Facebook, and YouTube.[69] NAB posits that the tailoring of needs and interests "now occurs on the basis of specific listeners, not just on the basis of local radio markets."[70] It suggests that the pertinent fact for consumers is not where providers of audio services like Sirius XM, Spotify, and Pandora are headquartered but where their services are accessible, which is in the same spaces where consumers can listen to AM/FM radio (e.g., their cars, homes, and offices).[71] NAB claims that allowing radio station owners to achieve economies of scale and scope would enable them to improve the quality of their informational and entertainment programming.[72] It argues that "the Commission cannot continue to ignore multiple major sources of competition for both listeners and advertisers in the audio marketplace."[73] Connoisseur and Townsquare Media, Inc. additionally assert that significant changes in the advertising market have caused considerable harm to local radio. They claim that "digital competitors like Google and Facebook have significantly affected the local advertising markets, capturing significant shares of local advertising

[63] *Id.* at 9899-901, paras. 90-94.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.* Not only does an Internet subscription involve a monthly charge, but the Commission observed that a significant portion of U.S. households at the time lacked access to a fixed Internet connection capable of streaming audio programming. *Id*. at n.253.

[68] NAB June 15, 2018 Letter at 1.

[69] *Id.*

[70] *Id.* at 2.

[71] *Id.* at 2-3.

[72] *Id.* at 3-4.

[73] *Id.* at 3.

dollars in every radio market."[74] They contend that such Internet services enjoy perceived advantages in selling advertising in that they can target advertising to individuals and do need not employ local sales forces.[75] According to these broadcasters, the appearance of these online competitors has drastically changed the advertising landscape, to the detriment of local broadcast radio.

19. The Chairman of Radio Ink Magazine responded to NAB's proposal by arguing that allowing radio broadcasters to buy more stations would not affect their ability to compete with Internet services like Google and Facebook.[76] He claims that advertisers do not view radio and Internet services as comparable outlets because their approaches to advertising are "so utterly different."[77] He attributes any loss in radio revenues to the failure of station owners to persuade advertisers that the distinctive benefits of radio advertising can enhance and supplement online advertising campaigns.[78] Likewise, iHeartMedia Inc. asserts that "the size of individual station portfolios has little, if any, relationship to the total dollars that an advertiser allocates to free, over-the-air broadcast radio."[79] iHeartMedia touts the resilience of the broadcast radio industry and observes that radio remains the preferred audio medium for entertainment and local news and information because "its focus is local and its impact is personal."[80]

20. The Commission received several comments in response to its request for information regarding the status of competition in the marketplace for the delivery of audio programming.[81] While we examined those comments within the context of our preparation of a biennial marketplace report for Congress, we also hereby incorporate those comments into the record of this proceeding and invite commenters to review and respond to those comments. For example, NAB provides information and statistical data purporting to show how fragmented the listening market has become.[82] A coalition of radio broadcasters agrees with NAB that new marketplace entrants have disrupted the traditional radio market and claims that, despite data showing that 93 percent of Americans still listen to AM and FM radio weekly, the amount of their radio listening has shrunk as they divide their time among other audio providers, which, it notes, are not subject to the same regulatory burdens as radio licensees.[83] In addition, other radio station owners assert that the Commission's ownership limits prevent them from achieving the scale and scope they need to compete with satellite radio and online audio services.[84] On the other hand, coalitions representing musicians, recording artists, and representatives of the music industry argue in that proceeding that AM/FM radio continues to dominate the audio marketplace and that history shows that

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[74] Letter from David D. Oxenford and Danielle K. Thumann, Wilkinson, Barker, Knauer, LLP, Counsel for Connoisseur Media, LLC, and Townsquare Media, Inc., to Marlene Dortch, Secretary, FCC, in MB Docket No. 18-227 (filed Nov. 13, 2018) at 1.

[75] Connoisseur et al. Comments in MB Docket No. 18-227 at 8-11.

[76] Rhoads at 1-4.

[77] *Id.* at 2.

[78] *Id.* at 2-4.

[79] Letter from Jessica Marventano, Senior Vice President, Government Affairs, iHeartMedia Inc., to Michelle Carey, Chief, Media Bureau, FCC, at 3-4 (filed Oct. 9, 2018) (iHeartMedia Oct. 9, 2018 Letter) (claiming that "innovation, ideas, relationships, compelling programming and data solutions" are what attracts advertisers).

[80] *Id.* at 2.

[81] *See Media Bureau Seeks Comment on the Status of Competition in the Marketplace for Delivery of Audio Programming*, MB Docket No. 18-227, Public Notice, DA 18-761 (July 23, 2018).

[82] NAB Comments in MB Docket No. 18-227 at 5-16; *see also* NAB Reply Comments in MB Docket No. 18-227 at 4 (arguing that "local radio stations now operate in a vastly expanded and highly competitive audio market providing unprecedented choices for consumers and advertisers and that continuing technological change will create still more options for audiences in the future").

[83] Connoisseur et al. Comments in MB Docket No. 18-227 at 3.

[84] Local Community Broadcasters Comments in MB Docket No. 18-227 at 1-2.

consolidation in the radio industry harms small broadcasters and leads to the homogenization of programming.[85] REC Networks claims that unlike free, over-the-air radio, online audio services are unavailable to many Americans due to cost or lack of broadband coverage.[86]

21. We seek comment on these different perspectives of the state of the audio marketplace and on whether and how they should affect our understanding of the market for purposes of the Local Radio Ownership Rule. In November 2017, the Department of Justice concluded that "[m]any local and national advertisers consider English-language broadcast radio to be a particularly effective or important means to reach their desired customers, and do not consider advertisements on other media, including non-English-language broadcast radio, digital music streaming services (such as Pandora), and television, to be reasonable substitutes."[87] Should we take this finding into account and, if so, how?

22. *Market Definition.* We seek comment on whether we should continue to consider only local broadcast radio stations for purposes of the Local Radio Ownership Rule or whether we should revise our market definition to include other audio sources. Do local radio stations face direct competition today from satellite radio and online audio services? To what extent has radio's ability to attract listeners and advertisers been affected by satellite radio and online audio? Do advertisers view satellite radio and audio streaming services as substitutes for advertising on broadcast radio? How should the impact of Internet services like Google and Facebook on local advertising markets factor into our consideration of the Local Radio Ownership Rule? Do consumers view non-broadcast audio services as meaningful substitutes for local radio stations? Do non-broadcast audio services provide programming that responds to the needs and interests of local markets? Does radio's free, over-the-air availability make it unique or non-substitutable in the audio marketplace? To what extent, if any, should we take into account the deployment of In Band On Channel (IBOC) digital radio technology and its role in enabling station owners to expand their program offerings and increase their economies of scale and scope? If we were to revise our market definition, what non-broadcast sources should we include, and how should we count them or otherwise factor them into our rule for purposes of determining market size tiers and numerical limits? Could or should we subtract from any consideration of non-broadcast sources the amount of online audio that listeners in a local market stream from over-the-air radio broadcasts? How would an expanded definition better serve our policy goals, if at all?

23. *Market Size Tiers.* In the *2010/2014 Quadrennial Review Order*, the Commission retained the Local Radio Ownership Rule's longstanding approach of imposing numerical ownership limits based on market size tiers and of determining market size by counting the number of commercial and noncommercial radio stations within the market.[88] The Commission declined to modify the rule to treat embedded markets as separate markets,[89] but it later eased its position by adopting a presumptive waiver standard to apply in the interim until it could examine the issue further in this 2018 quadrennial

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[85] musicFIRST Coalition and Future of Music Coalition Comments in MB Docket No. 18-227 at 7-13; *see also* musicFIRST Coalition and Future of Music Coalition Reply Comments in MB Docket No. 18-227 at 6-10 (claiming that innovation and investment help radio broadcasters compete, as opposed to consolidation, which is achieved at the expense of small and independent radio broadcasters).

[86] REC Networks Comments in MB Docket No. 18-227 at 1-2.

[87] *U.S.A. v. Entercom Communications Corp. and CBS Corp.*, Complaint (D.C. Dist. Ct.) (filed Nov. 1, 2017) at 4, para. 12, https://www.justice.gov/atr/case-document/file/1008371/download (stating that the acquisition of CBS Radio, Inc. by Entercom Communications Corporation would substantially lessen competition for the sale of radio advertisements targeting English-language listeners in the Boston, Sacramento, and San Francisco markets).

[88] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9901-04, paras. 95-103.

[89] *Id.* at 9903-04, paras. 101-03. Embedded markets are smaller Nielsen Audio Metro markets located within the boundaries of a larger Nielsen Audio Metro market (i.e., the parent market).

review.[90] We address the issue of embedded markets below.

24. In addition to retaining the rule's approach of using market size tiers, the Commission also kept in place the demarcations of the current rule's four tiers, which draw the lines among Nielsen Audio Metro markets at 45 plus, 30-44, 15-29, and 14 or fewer radio stations.[91] These same demarcations have existed since Congress established them in 1996,[92] although it was not until the *2002 Biennial Review Order* that the Commission included noncommercial radio stations in a market's station totals.[93] We seek comment on whether the Commission should retain its approach of using market size tiers, and if so, also on whether the current demarcations should remain in place. We also seek comment on whether there is any reason to discontinue including noncommercial radio stations in market counts. How well has the rule's tiered structure served the rule's purposes, and does it promote the policy goals of competition, localism, and viewpoint diversity in today's radio marketplace? NAB's proposal would divide radio markets into only two tiers—the top 75 Nielsen Audio Metro markets and all other markets (i.e., Nielsen Audio Metro markets outside of the top 75 and all undefined markets).[94] What would be the advantages and disadvantages of creating a different number of tiers, including moving from a four-tiered to a two-tiered approach? If we were to collapse four tiers into two, should we draw the line where NAB proposes? We invite commenters to offer alternative proposals for a tiered approach or for a different type of approach altogether. For example, if we were to change from tiers based on station counts, as first set by Congress, would it make more sense to consider tiers based on advertising revenue, or some other factor, rather than use Nielsen's Audio market rankings as NAB proposes, which are based on population? Would advertising revenue provide a sufficiently stable measurement and how would it fit with a view of the broadcast radio listening market as the relevant product market? How would the Commission and potential applicants obtain reliable advertising revenue data for all radio stations? We also reiterate our request in the preceding section for comment on whether and how we should factor non-broadcast audio sources in any tiered approach. For example: (1) if we modify our current tiers or create new tiers, should we account for variations across markets in broadband access and adoption rates; (2) should we treat fixed and mobile or wired and wireless broadband as the same; and (3) how granularly can and should we measure listening rates for satellite radio and online audio services?

25. In addition, should any modifications to the current tiered approach affect how we apply the rule to areas outside the boundaries of defined Nielsen Audio Metro markets, and if so, how? NAB proposes that we remove all radio ownership limits for undefined areas.[95] We seek comment on whether NAB's proposed approach would be consistent with our policy goals or would lead to excessive consolidation in those areas, and what alternative approach we could take in areas of the country that are undefined by Nielsen Audio. When it adopted the Arbitron Metro (now Nielsen Audio Metro) market definition for purposes of the radio rule in the *2002 Biennial Review Order*, the Commission stated at the time that the contour-overlap methodology, with slight revisions, would continue to apply to undefined markets on an interim basis.[96] That methodology remains in place today and has been employed successfully for years. Although the Commission was critical of the methodology in 2002, it declined to examine or revise the methodology in its most recent ownership review and saw no reason to revisit its

[90] *2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9841, 9845-46, paras. 86, 94-95.

[91] *See* 47 CFR § 73.3555(a)(1).

[92] 1996 Act § 202(b)(1).

[93] *2002 Biennial Review Order*, 18 FCC Rcd at 13734, para. 295.

[94] NAB June 15, 2018 Letter at 2.

[95] *Id.*

[96] *2002 Biennial Review Order*, 18 FCC Rcd at 13729-30, paras. 282-86.

approach in that proceeding.[97] The Commission found insufficient grounds for an argument that the interim methodology permitted too much consolidation in certain markets.[98] It pointed to the Commission's initial position that the interim approach was well-understood and that a case-by-case analysis would produce uncertainty.[99] We seek comment on whether our current approach is in fact the most effective and practical approach, and to that end, whether we therefore should make permanent the interim contour-overlap methodology long used to determine ownership limits in areas outside the boundaries of defined Nielsen Audio Metro markets. Any commenters opposed to our adopting the contour-overlap methodology on a permanent basis for undefined areas should explain their reasoning fully and propose a detailed alternative that is supported by evidence.

26. *Numerical Limits*. If the Commission decides that the rule is still necessary, are existing limits restricting the number of radio stations an entity may own within a radio market set appropriately for each of the market size tiers? In the *2010/2014 Quadrennial Review Order*, the Commission declined to relax the rule's numerical limits.[100] Nor did the Commission tighten the limits.[101]

27. We seek comment on whether it is necessary as a result of competition to maintain the numerical limits for any or all of the market size tiers. Do the current limits adequately prevent a radio broadcaster from amassing excessive local market power? Conversely, do they permit sufficient growth to enable radio broadcasters to obtain the additional assets they may need to improve the quality of their service? Commenters should provide concrete, actual examples of markets where the current limits are either too restrictive or too lenient, explain how those examples typify other markets in that tier, and specify the benefits to those markets that would be gained by revising the limits.

28. We also seek comment on whether we should account for the different signal strengths of radio stations by weighing different classes of radio stations differently for purposes of applying the numerical limits. For example, we could consider a Class A AM station to be worth two stations, whereas a Class D AM station could be counted as one half a station. What would be the costs and benefits of such an approach? What values should we accord the different classes of radio stations if we were to adopt such an approach? We note that the Commission has previously considered a proposal to assign different values to radio stations of different classes for purposes of determining market size tiers.[102] We seek comment on the idea of assigning varying weights to different classes of radio stations when applying the numerical limits.

29. In addition, we seek comment on NAB's suggestion to maintain the eight-station limit for the largest markets, but to apply it only to FM stations, thereby allowing unlimited AM ownership.[103] NAB further proposes allowing an owner in the largest markets to acquire up to two additional FM stations if it participates in the Commission's recently adopted incubator program.[104] NAB would identify the largest markets as the top 75 Nielsen Audio Metro markets.[105] For all other markets, NAB urges the

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[97] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9898, para. 85 n.234.

[98] *Id.*

[99] *Id.*

[100] *Id.* at 9904, para. 105; *see also 2010/2014 Quadrennial Review FNPRM*, 29 FCC Rcd at 4409, para. 92 & n.235.

[101] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9905, para. 106.

[102] *Id.* at 9902-03, paras. 97-100.

[103] NAB June 15, 2018 Letter at 2.

[104] *Id.* Under the Commission's incubation program, adopted after NAB submitted its proposal, the reward of a rule waiver is contingent upon successful completion of the program. *Incubator Order* at paras. 86-88. We presume that NAB's proposed reward waiver also would require the completion of a successful incubation.

[105] NAB June 15, 2018 Letter at 2.

elimination of numerical limits for both FM and AM services.[106] We seek comment on all aspects of NAB's recommended changes to the rule's numerical limits and invite commenters to offer any alternative ideas or proposals. What would be the likely effects of removing FM limits in most markets? What would be the likely effects of allowing unlimited AM ownership across all markets? Would such action, on balance, promote competition by enabling owners to increase their assets, or would it harm competition and/or ownership diversity by driving smaller broadcasters, including minority and women owners, from the marketplace? How would viewpoint diversity and localism be affected? The reward for successfully incubating a radio station under the Commission's recently adopted program is a waiver to exceed the applicable ownership limit by one radio station, and participants may use no more than one reward waiver per market.[107] Regarding NAB's proposal with respect to the top 75 markets, it is unclear whether NAB is suggesting that the successful incubation of one station should result in a waiver for two stations or that the successful incubation of two stations should entitle an owner to acquire two stations above the limit within the same market.[108] Either way, we seek comment on NAB's suggestion, noting that NAB submitted its proposal before the Commission had adopted the incubator program and established the final terms of the reward waiver.

30. *AM/FM Subcaps.* Relatedly, we seek comment on whether it is necessary to retain the rule's AM/FM subcaps, which limit the number of radio stations from the same service (i.e., AM or FM) that an entity may own in a single market. Currently, a broadcaster may not own more than five AM or five FM stations in markets in the largest market tier, four AM or four FM stations in markets in the two middle-sized tiers, or three AM or three FM stations in markets in the smallest tier.[109] The Commission deemed it appropriate to retain the existing subcaps in the *2010/2014 Quadrennial Review Order*.[110]

31. We seek comment on whether the Commission's previous reasons for maintaining subcaps are still valid. For example, have subcaps promoted market entry? Are subcaps still necessary given the Commission's efforts to revitalize AM radio? In other words, has the disparity between the FM and AM services been narrowed to an extent that we could consider relaxing or eliminating the subcaps? Since its 2010/2014 ownership review, the Commission has granted over 1,000 applications to acquire and relocate FM translators to rebroadcast AM stations.[111] Should the expanded and improved coverage of those AM stations affect our analysis of subcaps? Conversely, data from the 2010/2014 review indicated that the transition to digital radio actually exacerbated the divide between the services because AM stations have been slower to adopt digital radio technology.[112] What is the import of the current status of the digital radio transition for purposes of the subcap issue? If subcaps continue to promote competition or ownership diversity, or otherwise serve the public interest, are they currently set at the appropriate levels?

32. If we adopt any revisions to the rule, should the modified rule include AM or FM subcaps, and if so, how should they be applied? NAB's proposed changes to the rule essentially would

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[106] *Id.*

[107] *Incubator Order* at paras. 66, 70.

[108] *See* NAB June 15, 2018 Letter at 2.

[109] 47 CFR § 73.3555(a)(1).

[110] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9908, para. 114.

[111] *See Revitalization of the AM Radio Service*, Second Report and Order, 32 FCC Rcd 1724, 1724, para. 1 (2017); *see also Revitalization of the AM Radio Service*, First Report and Order, 30 FCC Rcd 12145, 12148-54, paras. 7-17 (2015) (opening two filing windows exclusively for AM licensees and permittees for applications to acquire and relocate FM translator stations).

[112] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9910, para. 120 n.314.

eliminate AM subcaps in all markets and retain FM subcaps in only the top 75 markets.[113] NAB does not explain why it would distinguish the FM service for restricted ownership in the top markets rather than limit the total number of radio stations in those markets irrespective of service,[114] and we seek comment on whether the proposal is supported by technical or marketplace differences between the services. In a letter filed shortly after NAB submitted its proposal, the owner of a network of AM stations argues that removing and/or relaxing FM subcaps would harm the AM service by facilitating the migration of content to the FM service.[115] Concurring with that view, iHeartMedia urges the Commission to loosen restrictions on AM ownership while retaining the existing FM subcaps.[116] It argues that doing so would be consistent with the Commission's efforts to revitalize AM radio.[117] Taking into consideration these competing positions, we seek comment on what limits, if any, should apply to AM and FM ownership, whether or not we retain the current market size tiers and numerical limits, and on whether and how any proposed revisions to the rule should include such limits.

33. *Embedded Markets*. To the extent that the Local Radio Ownership Rule is retained, how should it apply on a going-forward basis to radio stations in markets that contain multiple embedded markets? Multiple embedded markets currently exist only in the New York and Washington, DC markets.[118] Owners of radio stations in embedded markets must comply with the rule's numerical limits for both the embedded market and the parent market.

34. In response to the *2010/2014 Quadrennial Review FNPRM*, Connoisseur proposed that where a parent market encompasses multiple embedded markets, the ownership analysis for an acquisition in one embedded market should not include stations owned in the other embedded markets within the same parent market.[119] Connoisseur argued that embedded markets within the same parent market should be treated separately because they may reach different populations and the radio stations within different embedded markets have little or no contour overlap.[120] Citing its longstanding reliance on the market analysis of Nielsen Audio (formerly Arbitron), the Commission initially declined to adopt Connoisseur's proposal but stated that it would entertain market-specific waiver requests under Section 1.3 when the BIA listings in a parent market are not an accurate reflection of competition by embedded market stations.[121] On reconsideration, the Commission affirmed its earlier decision not to adopt an across-the-board change to its embedded market methodology.[122] However, it adopted a waiver standard whereby embedded market transactions in markets that then had multiple embedded markets (i.e., New York and Washington, DC) would be presumed to be in the public interest if they met a two-prong test that Connoisseur proposed on reconsideration.[123] First, as with the Commission's current methodology for embedded markets, a radio station owner seeking a rule waiver must comply with the applicable

[113] *See* NAB June 15, 2018 Letter at 2.

[114] *But see* Letter from Rick Kaplan, General Counsel and Executive Vice President, Legal and Regulatory Affairs, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 18-349 et al., at 2 (filed Dec. 7, 2018) (noting that NAB's comments regarding audio competition in MB Docket No. 18-227 discuss the "particular financial hardships and declining position of AM stations").

[115] Salem Media June 29, 2018 Letter at 1.

[116] iHeartMedia Oct. 9, 2018 Letter at 3.

[117] *Id.* at 2-4.

[118] *2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9845, para. 94 n.279.

[119] *See 2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9902-03, paras. 97, 101.

[120] *Id.* at 9903, para. 101; *see also 2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9842, 9843-44, paras. 90, 92.

[121] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9903-04, paras. 102-03.

[122] *2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9843-45, paras. 91-93.

[123] *Id.* at 9841, 9845-46, paras. 86, 94-95.

numerical ownership limit in each embedded market using the Nielsen Audio Metro methodology.[124] Second, instead of then also demonstrating compliance with the applicable numerical ownership limit based on the Commission's parent market analysis, the applicant must show that it also complies with the ownership limits as determined by the contour-overlap methodology ordinarily applicable in undefined markets.[125] If the applicant can demonstrate compliance with the applicable ownership limits under both prongs of this test, then there is a presumption that a waiver of the Local Radio Ownership Rule serves the public interest.[126]

35. The Commission adopted this presumptive waiver standard on an interim basis pending the outcome of this 2018 ownership review.[127] Accordingly, we seek comment on how to address the issue of embedded market transactions going forward. Should we make this presumptive waiver standard permanent? Should we modify it in any way? Should it apply to all current and future markets that contain multiple embedded markets, or should we limit its application to the two existing parent markets with multiple embedded markets? How do competition, diversity, and localism considerations affect the question? We note that embedded market designations can be updated and modified by Nielsen Audio as market conditions change, and that Nielsen Audio's radio station customers can request the designation of a new embedded market.[128] How could we guard against purchasers taking advantage of an anticipated designation of a new embedded market in a manner that would thwart the purpose of the rule's ownership limits?[129] For example, in the event that Nielsen Audio creates new, additional situations with multiple embedded markets within a larger parent market, should there be a waiting period before applicants can take advantage of that change in circumstance, similar to the waiting period applicable to changes in the stations reported as "home" to a Nielsen Audio Metro market? If we adopt any change to our approach to embedded markets, should we apply it also to markets with a single embedded market? Is there a distinction between markets with one embedded market and markets with multiple embedded markets such that we should vary our approach between those situations?

36. In the *2010/2014 Quadrennial Review Order on Reconsideration*, the Commission expressed its intent to consider also in this proceeding an alternate proposal previously set forth by NAB.[130] NAB suggests that stations licensed in embedded markets with signal coverage of less than 50 percent of the parent market's population not be considered part of the parent market for purposes of local ownership limit calculations.[131] We seek comment on whether we should adopt such an approach or any other across-the-board rule changes regarding embedded markets. Is there a need to implement a rule change that carves out a blanket exception to our current methodology given that there are only two parent markets containing multiple embedded markets? Or is a permanent presumptive waiver standard an adequate solution given how narrow its use is likely to be? We seek comment on the potential advantages and disadvantages of these various approaches and invite proposals for other ways to address embedded market transactions.

37. *Minority and Female Ownership*. In the *2010/2014 Quadrennial Review Order*, the

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[124] *Id.* at 9842, para. 90 n.262; *see also id.* at 9841, para. 86 n.251.

[125] *Id.* at 9842, para. 90 n.262; *see also id.* at 9841, para. 86 n.251.

[126] *Id.* at 9845-46, para. 95. The Commission found that this approach, and the presumptive waiver, would apply only in existing parent markets with multiple embedded markets, i.e., New York and Washington, DC.

[127] *Id.* at 9841, 9845-46, paras. 86, 95.

[128] *See id.* at 9845, para. 94 n.279.

[129] *See id.* at 9845-46, para. 95 n.281 (restricting the application of the interim presumptive waiver standard to New York and Washington, DC in order to avoid potential manipulation of embedded markets in other Nielsen Audio Metro markets).

[130] *Id.* at 9842, para. 90 n.264.

[131] *Id.*

Commission found the current Local Radio Ownership Rule to be consistent with its goal of promoting minority and female ownership of broadcast radio stations.[132] The Commission observed that the rule, while competition-based, indirectly promotes viewpoint diversity by facilitating "the presence of independently owned broadcast radio stations in the local market, thereby increasing the likelihood of a variety of viewpoints and preserving ownership opportunities for new entrants."[133] It pointed to AM/FM subcaps, and in particular AM subcaps, as elements of the rule that foster new entry.[134] However, the Commission chose not to tighten the rule because, among other reasons, available data did not show that stricter limits would increase minority and female radio ownership.[135] Similarly, the Commission found no indication of a causal link between Congress' loosening of local radio limits in 1996 and the increase in ownership diversity since then that would justify loosening the rules.[136] We seek comment on whether any new information has become available that would cause us to reevaluate the Commission's conclusions in the *2010/2014 Quadrennial Review Order*. We also seek comment on how retaining or modifying the Local Radio Ownership Rule might affect broadcast radio ownership and entry by small business owners, if at all.

38. *Cost-Benefit Analysis.* Finally, we seek comment on how to compare the benefits and costs associated with retaining, modifying, or eliminating the Local Radio Ownership Rule. We seek comments that explain the anticipated economic impact of any proposed action and, where possible, quantify benefits and costs of proposed actions and alternatives. Does the current Local Radio Ownership Rule create benefits or costs for any segment of consumers? Does the rule create benefits or costs for any segment of the industry that should be counted as social benefits or costs rather than transfers from one segment of the industry to another? How does the rule create these benefits and costs, and what evidence supports this explanation? How can the value of these benefits and costs be measured for parties receiving them? What factors create uncertainty about the existence or size of these benefits and costs, and how should the Commission's economic analysis take these uncertainties into account?

39. How would elimination of the Local Radio Ownership Rule alter any benefits and costs resulting from the current rule? What are the comparative benefits and costs of modifying the rule rather than eliminating it entirely? For instance, would loosening the current local radio ownership restrictions lead to any consumer benefits, such as increased competition, choice, innovation, or investment in programming? What amount of additional scale above the current ownership limit would be required to realize such benefits? Would these benefits conflict with, or come at a cost to, our traditional policy goals of competition, localism, or viewpoint diversity, and if so, how should we measure and evaluate these tradeoffs? What are the comparative benefits and costs of tightening the current restrictions? We seek comments that support claims about benefits and costs with relevant economic theory and evidence, including empirical analysis and data.

B. Local Television Ownership Rule

1. Introduction

40. The Local Television Ownership Rule limits the number of full power television stations an entity may own within the same local market. We seek comment below on all aspects of the rule's implementation and on whether the current version of the rule is necessary to serve the public interest in the current television marketplace. We seek comment on whether the rule continues to foster competition, the stated primary goal of the rule, and thus should be retained or whether the promotion of localism or viewpoint diversity also provides justification for retaining the rule. Further, we seek

[132] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9911, para. 125.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 9911-12, paras. 126-27.

[136] *Id.* at 9911-12, paras. 126, 128.

comment on whether and how the rule should be modified to take into account changes in both the broadcast television marketplace and the video programming distribution industry. If the rule is modified, we seek comment on whether and how the rule changes should apply to any pending applications. We ask commenters to explain in detail and to support the reasons for any proposed modification to the Local Television Ownership Rule with evidence and data.

2. Background

41. The Local Television Ownership Rule provides that an entity may own up to two television stations in the same Nielsen Designated Market Area (DMA)[137] if: (1) the digital noise limited service contours (NLSCs) of the stations (as determined by Section 73.622(e) of the Commission's rules) do not overlap; or (2) at the time the application to acquire or construct the station(s) is filed, at least one of the stations is not ranked among the top-four stations in the DMA, based on the most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service.[138] With respect to the latter provision—the Top-Four Prohibition—an applicant may request that the Commission examine the facts and circumstances in a market regarding a particular transaction, and based on the showing made by the applicant in a particular case, make a finding that permitting an entity to directly or indirectly own, operate, or control two top-four television stations licensed in the same DMA would serve the public interest, convenience, and necessity.[139] The Commission considers showings that the Top-Four Prohibition should not apply due to specific circumstances in a local market or with respect to a specific transaction on a case-by-case basis.[140]

42. The Commission concluded in its most recent media ownership review that local television ownership limits remained necessary to promote competition but found on reconsideration that the rule required modification to ensure that television stations were not prevented from achieving efficiencies that might improve their ability to serve their local markets in the face of an evolving video marketplace.[141] In particular, the Commission repealed the previous provision of the rule requiring at least eight independently owned television stations to remain in a DMA after any station acquisition in the DMA.[142] The Commission found that this Eight-Voices test was unsupported by the record or reasoned analysis and was no longer necessary in the public interest.[143] The Commission also added flexibility to the application of the Top-Four Prohibition by adopting the aforementioned case-by-case analysis.[144]

3. Discussion

43. As an initial matter, we seek comment on whether the current version of the Local Television Ownership Rule is necessary in the public interest as a result of competition. We note that the

[137] The Nielsen Company assigns each broadcast television station to a designated market area (DMA). The DMA boundaries and DMA data are owned solely and exclusively by Nielsen. Nielsen, *Nielsen DMA Maps*, http://www nielsen.com/intl-campaigns/us/dma-maps.html (last visited Aug, 8, 2018). Each DMA is a group of counties that form an exclusive geographic area in which the home market television stations hold a dominance of total hours viewed. There are 210 DMAs, covering the entire continental United States, Hawaii, and parts of Alaska.

[138] 47 CFR § 73.3555 (b)(1).

[139] *Id.* § 73.3555 (b)(2).

[140] *Id.*

[141] *2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9833-34, paras. 71-72.

[142] *Id.* at 9834, para. 73.

[143] *Id.*

[144] *Id.* at 9836, para. 78.

video marketplace continues to evolve rapidly.[145] Broadcasters in earlier quadrennial review proceedings have argued that local television ownership restrictions prevent them from competing effectively in the current video programming marketplace.[146] However, other commenters have supported retention of the restrictions because of the asserted need to prevent excessive consolidation of television stations and the unique nature of free, over-the-air broadcast television stations operating on spectrum licensed by the Commission for the benefit of the public.[147] We seek comment on how developments in the video programming industry that have emerged or continued since the last quadrennial review have affected whether the Local Television Ownership Rule is necessary as a result of competition and to promote localism and viewpoint diversity among local broadcast television stations.

44. The Commission stated in the *2010/2014 Quadrennial Review Order on Reconsideration* that, based on the record in that proceeding, a rule focused on preserving competition among local broadcast television stations was still warranted.[148] In particular, the Commission found that the rule remained necessary to promote competition among broadcast stations in local television viewing markets.[149] The Commission has found that such competition leads stations to invest in better and more locally tailored programming and to compete for advertising revenue and retransmission consent fees.[150] We seek comment on whether promoting competition among television stations in local viewing markets continues to be the proper framework within which to consider the rule, and if so, what forms of competition we should take into account under such a framework. For instance, how, if at all, should we consider competition among television stations for: viewers, advertisers, retransmission consent fees, network affiliation, the provision of local news or other programming, the production or acquisition of programming, innovation, or any other form of competition?

45. We also seek comment on whether the Local Television Ownership Rule is necessary to promote localism or viewpoint diversity. The Commission has previously stated that a competition-based rule, while not designed specifically to promote localism or viewpoint diversity, may still have such an effect.[151] Has our prior reliance on competition as the primary policy goal of the Local Television Ownership Rule concomitantly served as a proxy for preserving a certain level of localism or viewpoint diversity in local television markets that might otherwise be lost were we to find the rule no longer necessary for competition purposes?

46. In particular, we seek comment on whether a competition-based Local Television Ownership Rule promotes the production or provision of local programming. Localism has been a cornerstone of the Commission's broadcast regulation for decades.[152] The Commission has consistently found that broadcast licensees have an obligation to air programming that is responsive to the needs and

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[145] *Id.* at 9833-34, para. 72 (noting that consumers increasingly can access video programming delivered via MVPDs, the Internet, and mobile devices and that the online video distributor (OVD) industry continues to grow and evolve).

[146] *Id.* at 9871-72, para. 20.

[147] *Id.* at 9872, para. 21.

[148] *2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9833, para. 71. *See also 2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9872-75, paras. 23-30.

[149] *2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9833, para. 71; *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9872-73, para. 23.

[150] *2010/2014 Quadrennial Review FNPRM*, 29 FCC Rcd at 4381, para. 22.

[151] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9870-71, para. 17.

[152] *Deregulation of Radio*, 84 FCC 2d 968, 994, para. 58 (1981) ("The concept of localism was part and parcel of broadcast regulation virtually from its inception.").

interests of their communities of license.[153] Does promoting competition among broadcast stations incentivize stations to produce and improve local programming? Could or does competition from non-broadcast video sources, which have no local programming requirements, create the same incentives to produce and improve local programming?

47. In the event that the Commission decides to retain the Local Television Ownership Rule, we will analyze the relevant parts of the rule to examine whether each particular provision similarly remains necessary in the public interest as a result of competition or whether it should be modified or eliminated. To that end, we seek comment on specific aspects of the rule's operation, including the relevant product market, numerical limits, and the Top-Four Prohibition, in order to assess whether these subparts remain necessary or whether any or all of them should be modified or eliminated. We also seek comment on whether developments in the video programming industry involving multicasting, satellite stations, low power stations, and the next generation transmission standard have any implications on the Local Television Ownership Rule or its subparts.

48. *Market Definition*. We seek comment on the appropriate product market and market participants to consider, including whether the market for review of the Local Television Ownership Rule should include more than broadcast video programming.[154] The Commission stated in the *2010/2014 Quadrennial Review Order on Reconsideration* that finding a rule focused on preserving competition among local broadcast television stations was still warranted did not mean that changes outside the local broadcast television market should not factor into the Commission's assessment of the Local Television Ownership Rule or prevent the Commission from making adjustments to account for marketplace changes.[155] We seek comment on relevant marketplace changes and whether and how we should take such changes into account.

49. We also seek comment on whether and to what extent non-broadcast sources of video programming should be considered competitors to broadcast television stations. The Commission concluded in the previous quadrennial review proceeding that non-broadcast video offerings do not serve as meaningful substitutes for local broadcast television.[156] The Commission noted that video programming delivered by multichannel video programming distributors (MVPDs) is generally uniform across all markets, as is programming provided by online video distributors (OVDs).[157] Unlike local broadcast stations, MVPDs and OVDs were deemed not likely to make programming decisions based on conditions or preferences in local markets.[158] The Commission emphasized, however, that these conclusions could change in a future proceeding with a different record.[159]

50. In light of the evolving video marketplace, we seek comment on these prior findings. Do consumers consider broadcast television to be interchangeable with other sources of programming? If so, what other sources of video programming should be included in the analysis of a local product market? What factors should the Commission consider in analyzing non-broadcast sources of video programming? Should the Commission distinguish between linear and non-linear distributors of video?[160] In which

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[153] *Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425, 12425, para. 1 (2004).

[154] For instance, the Commission has previously concluded that the video programming market is distinct from the radio listening market. *2010/2014 Quadrennial Review FNPRM*, 29 FCC Rcd at 4380, para. 21.

[155] *2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9833-34, para. 72.

[156] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9874-75, paras. 27-28, 30.

[157] *Id.* at 9874, para. 27.

[158] *Id.*

[159] *2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9833, para. 71.

[160] A linear channel is one that distributes programming at a scheduled time. Non-linear programming, such as video-on-demand (VOD), is available at a time of the viewer's choosing. *Annual Assessment of the Status of*

product markets, if any, do non-broadcast video programmers compete with broadcast television programmers? Does broadcast television offer any programming for which there is no substitute available from non-broadcast video programmers? To what extent do consumers rely on broadcast television as their primary, or only, source of video programming?[161] Is the availability of non-broadcast video comparable to that of broadcast television?[162] Do viewers rely on or consume programming from local broadcast stations in a manner different from other sources of, potentially non-local, video programming? In addition, do any non-broadcast video programmers make programming decisions based on local markets or the actions of individual local television stations?[163]

51. We also seek comment on how advertisers select between local broadcast and non-broadcast sources. We seek studies and data that we can use to assess substitutability in local advertising among all sources of video in a DMA. The Commission previously found that the record data did not support arguments by broadcasters that advertisers no longer distinguish local broadcast television from non-broadcast sources of video programming when choosing how to allocate spending for local advertising.[164] We seek comment and new data about whether and how various video programming providers compete for local advertising revenue.

52. The Commission has stated that competition within a local market motivates a broadcast television station to invest in better programming and to provide programming tailored to the needs and interests of the local community in order to gain market share.[165] Viewers in the local market benefit from such competition among rival broadcast television stations in the form of higher quality programming.[166] Given how local programming has factored into our previous ownership analysis, we seek comment on whether, in evaluating the Local Television Ownership Rule, we should consider sources of local news and other local programming as a relevant product market. What are the most prominent sources of local news and local programming beyond broadcast television? Should non-video providers of news and information—such as radio, newspapers, Internet websites, and social media

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Competition in the Market for the Delivery of Video Programming, Notice of Inquiry, 29 FCC Rcd 1597, 1603, para. 15 n.23 (2014).

[161] In the most recent Video Competition Report, the Commission noted that number of households relying on over-the-air broadcast service exclusive of any MVPD service increased since the last report. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, 32 FCC Rcd 568, 571, para. 7 (2017) (*18th Video Competition Report*). Nielsen reports that this figure increased from 11.4 million television households in 2014 to 12.4 million television households in 2015, representing an increase from approximately 10 percent to 11 percent of all television households. *Id.* Figures from the National Association of Broadcasters (NAB) indicate that 26.7 million television households, or approximately 23 percent of all television households, rely exclusively on over-the-air television service on at least one television in the home. *Id.*

[162] For example, previously, the Commission has noted that the level of penetration of broadband service remains relevant when considering the extent to which online platforms may be meaningful substitutes for local broadcast television stations. *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9875, para. 30 n.68.

[163] For example, a cable operator deciding to carry a local sports event that is not being covered by the local broadcast stations may demonstrate how local broadcast stations' actions affect programming decisions by non-broadcast programmers.

[164] *Id.*; *see also United States v. Nexstar Broadcasting Group, Inc., et al.*, Complaint, 81 FR 63206, 63207-08, paras. 12-21 (Sept. 14, 2016) (*DOJ Nexstar-Media General Complaint*) (stating that media buyers often buy advertising on non-broadcast platforms alongside broadcast advertising as a supplement to, rather than a substitute for, broadcast advertising).

[165] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9875, para. 26.

[166] *Id.*

platforms—be examined in the product market analysis?[167] To what extent do potential viewers rely for local news on these alternative sources? Furthermore, are these sources originators of local programming, or do they simply aggregate or utilize content generated by traditional local news sources?[168] Are non-broadcast sources of local programming available in all DMAs? Is the depth of any coverage of local issues by non-broadcast platforms consistent across DMAs?[169] We seek comment on the availability and the variety of local video programming in each Nielsen DMA. We seek comment on how the Commission would, and whether the Commission should, evaluate local programming for purposes of any programming-based analysis.[170] We seek comment on whether defining the local product market for our television ownership rules to include specific types of programming would raise First Amendment concerns.

53. We seek comment too on what measures the Commission could use to assess competition among sources of local video programming or other local content. What data sources might the Commission use to determine which sources consumers consider substitutes? How should the Commission account for various providers of news, information, and video programming to the extent that some entities, such as OVDs and websites, may lack an industry standard for measuring viewership and engagement?[171]

54. We also seek comment on the relationship between the Commission's market definition for the Local Television Ownership Rule, and any changes thereto, and the market definition and analysis used by the Department of Justice (DOJ).[172] The Commission has stated that its market definition for

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[167] *See 2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9895-96 (Statement of Commissioner O'Rielly) (listing Internet sites and social media platforms as competitors to local broadcasters).

[168] We note that the Knight Foundation recently reported, among other findings, that traditional broadcasters produce a significant amount of news consumed online and that online-only local news websites are having a limited impact. *See generally* Knight Foundation, *Local TV News and the New Media Landscape*, (Apr. 5, 2018), https://knightfoundation.org/reports/local-tv-news-and-the-new-media-landscape.

[169] *See, e.g.*, Knight Foundation, *Local TV News and the New Media Landscape: Part 1: The State of the Industry*, at 18 (Apr. 5, 2018), https://knightfoundation.org/reports/local-tv-news-and-the-new-media-landscape (finding that online-only local news websites are "primarily a major market phenomenon").

[170] We note that the Commission has examined broadcast television programming for localism purposes in other proceedings. For example, the Commission's rules on market modification for purposes of MVPD carriage evaluate whether television stations provide "news coverage of issues of concern" or "carriage or coverage of sporting and other events of interest" to the local community at issue as one of the factors for determining if market modification is appropriate. 47 U.S.C. § 534(h)(1)(C)(ii)(I)-(V). Also, the Commission examined programming in several DMAs as part of a case study in its STELA Reauthorization Act Section 109 Report to Congress. *Designated Market Areas: Report to Congress Pursuant to Section 109 of the STELA Reauthorization Act of 2014*, Report, 31 FCC Rcd 5463 (MB 2016).

[171] Various firms, including Nielsen, are working to collect data on OVD viewership. *18th Video Competition Report*, 32 FCC Rcd at 640, para. 176. However, as yet, there is no single standard accepted and used industry-wide to the same extent that Nielsen is considered the industry standard for measuring television viewership. *Id.* at 624, 640, paras. 134, 176.

[172] The Department of Justice specifically examines local television broadcasters competing in the spot advertising market. *See, e.g.*, Complaint at paras. 14-22, *United States v. Gannett Co., Inc., et al.*, No. 1:13-cv-01984 (D.D.C. Dec. 16, 2013) (finding the relevant markets for analysis to be broadcast television spot advertising (product market) in the St. Louis DMA (geographic market)); Complaint at paras. 38-44, *United States v. Comcast Corp.*, No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011) (excluding broadcast television from the "video programming distribution" market, which included MVPDs and Online Video Programming distributors ("OVDs")); *see also* DOJ February 20, 2014 *2010/2014 Quadrennial Review FNPRM Ex Parte* Comments at 5, 8 (confirming that the relevant markets for antitrust review are the broadcast television spot advertising market in the stations' specific geographic market); Timothy J. Brennan & Michael A. Crew, *Gross Substitutes vs. Marginal Substitutes: Implications for Market Definition in the Postal Sector, in* The Role of the Postal and Delivery Sector in a Digital Age 1-15 (Michael A.

purposes of the Local Television Ownership Rule is similar to the market definition used by DOJ when evaluating broadcast television mergers in that the scope of the Commission's rule is similarly limited to local television broadcast stations.[173] DOJ's analysis, however, has historically focused on competition for advertising, whereas the Commission's rule focuses on multiple factors, including audience share.[174] Recently, DOJ has also looked at competition for retransmission consent licensing fees in local television markets.[175] We seek comment on whether and how DOJ's analytical framework should inform our own, and vice versa. Are there ways in which our current rule is either consistent or inconsistent with antitrust principles? Do other public interest considerations support the rule?

55. *Numerical Limit*. Currently, a broadcast licensee can own up to two television stations (i.e., a duopoly) in a DMA, subject to the requirements of the Local Television Ownership Rule.[176] If the Commission finds that retention of the local television rule remains in the public interest, should the Commission change the numerical limit on how many stations may be owned in a DMA? The Commission concluded that the previous record did not support the conclusion that the local television marketplace has changed sufficiently to justify tightening the rule's current numerical limit.[177] The Commission therefore declined to return to a single station per licensee television rule.[178] Likewise, the Commission did not find sufficient changes to justify loosening the numerical limit to permit ownership of a third in-market station.[179] We seek comment on whether changes in the video programming industry support modification of the numerical limit.

56. *Top-Four Prohibition*. If the Commission decides to retain the Local Television Ownership Rule, we seek comment on whether the Top-Four Prohibition should be retained or modified. The Commission found that the ratings data in the previous record generally supported the Commission's line drawing and the rule's focus on the top-four rated full power television stations in a market.[180] The Commission found that there typically remains a significant "cushion" of audience share points that separates the top-four stations in a market from the fifth-ranked station and below.[181] The Commission maintained that potential harms associated with top-four combinations also had support in the record.[182] We seek comment on the applicability of these previous conclusions based on new, updated ratings data and/or examples of existing commonly owned top-four station combinations.

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Crew & Timothy J. Brennan eds. 2013) (arguing that the loss of customers to a new technology does not necessarily mean that the new technology should be included in the market definition of the existing technology).

[173] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9875, para. 29; *2010/2014 Quadrennial Review FNPRM*, 29 FCC Rcd at 4383, para. 25 n.62; *see also DOJ Nexstar-Media General Complaint*, 81 FR at 63207-08, paras. 12-21 (stating that radio, newspapers, outdoor billboards, satellite and cable television networks, MVPD interconnects, and Internet-based media are not substitutes for broadcast television stations in the spot advertising market).

[174] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9875, para. 29.

[175] *See, e.g., DOJ Nexstar-Media General Complaint*, 81 FR at 63207, para. 12 (stating that "the licensing of broadcast television programming to MVPDs that retransmit the programming to subscribers in each of the DMA Markets" constitutes a relevant market under Section 7 of the Clayton Act); *see also Application of License Subsidiaries of Media General, Inc., from Shareholders of Media General, Inc. to Nexstar Media Group, Inc.*, Memorandum Opinion and Order, 32 FCC Rcd 183, 196-97, para. 35 (MB 2017) (finding that divestitures required by DOJ resolved any concerns about retransmission consent bargaining leverage within a local market).

[176] 47 CFR § 73.3555 (b)(1).

[177] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9878, para. 38.

[178] *Id.*

[179] *Id.* at 9878, para. 39.

[180] *2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9837, para. 79.

[181] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9880, para. 43.

[182] *2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9837, para. 79.

57. In the *2010/2014 Quadrennial Review Order on Reconsideration*, the Commission recognized that rigid application of the Top-Four Prohibition in all DMAs may not be supported by the unique conditions present in certain DMAs or with respect to certain transactions.[183] The Commission accordingly adopted a hybrid approach to allow applicants the ability to seek a case-by-case examination of a proposed combination that would otherwise be prohibited by the Top-Four Prohibition.[184] The record of that proceeding suggested the types of information that applicants could provide to help establish that application of the Top-Four Prohibition is not in the public interest because the reduction in competition is minimal and is outweighed by public interest benefits. Such information regarding the impacts on competition in the local market included (but was not limited to): (1) ratings share data of the stations proposed to be combined compared with other stations in the market; (2) revenue share data of the stations proposed to be combined compared with other stations in the market, including advertising (on-air and digital) and retransmission consent fees; (3) market characteristics, such as population and the number and types of broadcast television stations serving the market (including any strong competitors outside the top-four rated broadcast television stations); (4) the likely effects on programming meeting the needs and interests of the community; and (5) any other circumstances impacting the market, particularly any disparities primarily impacting small and mid-sized markets.[185]

58. We note that the Commission has observed previously that the justification for the Top-Four Prohibition does not apply in all markets or with respect to all transactions and recognized the need for increased flexibility in adopting the *2010/2014 Quadrennial Review Order on Reconsideration*. We seek comment on whether flexibility in applying the Top-Four prohibition remains necessary and, if so, whether the case-by-case approach is the most effective way to achieve it. If the Commission finds that a case-by-case analysis is the best approach, we seek comment on whether any of the examples of types of information suggested in the *2010/2014 Quadrennial Review Order on Reconsideration* serve as reliable factors in determining whether a top-four combination would serve the public interest. If so, should some factors be weighed more heavily than others in the analysis? Are there factors in addition to the examples provided in the *2010/2014 Quadrennial Review Order on Reconsideration* that the Commission should consider? What kinds of data should licensees provide to support their showings? Should the Commission adopt a more rigid set of criteria for its case-by-case determination?

59. Alternatively, should the Commission avoid a case-by-case or hybrid approach and establish a bright-line test that would permit common ownership of two top-four stations in all cases, or in particular markets or circumstances? For example, should we permit common ownership of the fourth-ranked station in a market and either the second-ranked station or third-ranked station in that same market? Should we allow combinations between the second-ranked station or third-ranked station in the same market? Should such combinations only be permitted in smaller markets where there is less advertising revenue available to support programming and station operations? We also seek comment on whether the Commission should create a presumption for permitting common ownership of two top-four stations if certain conditions are met. What conditions should the Commission consider to determine if a combination would not negatively impact competition? For example, should the Commission presume that a combination is permissible if the combined stations' share of the audience and/or advertising market share does not exceed a certain threshold?

60. If the Commission either retains the case-by-case approach or adopts a bright-line test, we seek comment on how to analyze competition in local television markets. In considering the effect of top-four combinations on local advertising markets, we seek studies that estimate the elasticity of demand for local advertising. In the absence of such studies, what data sources or types of data might the Commission use to assess substitutability in local advertising across dayparts, program types, and stations? What measures, in addition to viewership share, could be used to assess competition between

[183] *Id*,, para. 78.

[184] *Id.*

[185] *Id.*

stations in local programming? What data sources might we use to determine which programs or stations viewers consider substitutes?

61. A top-four combination may have different effects on competition among broadcast stations for viewers of different types of programming, for instance, local programming, network programming, and syndicated programming. Should the Commission weigh each competitive effect and, if so, how? If we consider specific categories of programming, should we look at the viewership of each type of programming, the amount of revenue generated for the local station by each type of programming, both, or something else? Top-four combinations may also affect the quantity or quality of local programming available in the market.[186] Although intended primarily to promote competition, does the Top-Four Prohibition also preserve, as a byproduct, a sufficient level of localism or viewpoint diversity in local markets? We seek comment on whether and how the Commission should consider elimination of an independent local news operation or a reduction in local news programming.

62. We seek comment on whether and how the Commission should weigh any effect on retransmission consent negotiations in evaluating the competitive effects under the Commission's case-by-case approach of top-four station combinations. Commenters in proceedings involving potential top-four station combinations consistently have raised the issue of potential retransmission consent fee increases as a result of reduced competition between stations and undue bargaining leverage for stations if commonly owned top-four stations are able to negotiate such fees jointly as a result of the combination.[187] We therefore seek comment on whether and how the Commission should weigh the effect on retransmission consent negotiations in evaluating top-four station combinations under its case-by-case approach.[188] Should the Commission maintain the Top-Four Prohibition for purposes of preventing any potential competitive harms caused by joint negotiation of retransmission consent fees by two commonly owned top-four stations in a DMA, and would such an approach be inconsistent with congressional intent in prohibiting joint negotiation only when conducted by non-commonly owned stations?[189]

63. If the Commission retains the Top-Four Prohibition, or a similar rule that relies on the ranking of stations by audience share or viewership, we seek comment on whether specific provisions of the rule should be modified. The rule currently determines a station's in-market ranking based on the

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[186] For example, one study submitted in the National Television Multiple Ownership Rule docket examined the share of local news stories found in locally produced news programs and suggested that locally produced news programming often includes both local and national news stories, and that some station owners require nationally produced news and commentary segments to be aired on all owned stations. Gregory J. Martin and Josh McCrain, *Local News and National Politics* (2018); Public Interest Commenters Reply, MB Docket No. 17-318, Exhibit A.

[187] *See* American Cable Association (ACA) Comments, MB Docket No. 17-179, at 3; American Civil Liberties Union (ACLU) Comments, MB Docket No. 17-179, at 8; American Television Alliance (ATVA) Comments, MB Docket No. 17-179, at 6; Attorneys General of the States of Illinois, Iowa, and Rhode Island Petition to Deny, MB Docket No. 17-179, at 15; Cinemoi et al. Petition to Deny, MB Docket No. 17-179, at 7; RIDE et al. Reply, MB Docket No. 17-179, at 4-5; NCTA-The Internet & Television Association Comments, File No. BALCDT-20180516AAY, at 2-3; ATVA Comments, File No. BALCDT-20180516AAY, at 5; NCTA-The Internet & Television Association, MB Docket No. 18-230, at 2-6.

[188] DOJ has previously recognized that common ownership of two major broadcast network affiliates can lead to diminished competition in the negotiation of retransmission agreements with MVPDs in local television markets. *See DOJ Nexstar-Media General Complaint*, 81 FR at 63209, para. 29 (stating that a station owner's bargaining position with MVPDs would be significantly strengthened if it could simultaneously black out at least two major broadcast networks in a DMA).

[189] In the STELA Reauthorization Act of 2014, Congress permitted joint negotiation of retransmission consent by commonly owned stations. At the time of the STELAR's passage, the Top-Four Prohibition prevented common ownership of more than one top-four station in a DMA. As a provision of the Local Television Ownership Rule, the Top-Four Prohibition is subject to quadrennial review (and repeal) if it is found to not be in the public interest. Subsequent to the STELAR's passage, the Commission created the ability for applicants to seek case-by-case examination of a top-four combination.

most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research.[190] We seek comment on whether this data point is still the most useful for accurately determining a station's ranking for purposes of the Top-Four Prohibition. Have there been changes in the industry that necessitate examining different data? We also seek comment on whether and how the Commission should account for instances where a station makes use of multicast streams, satellite stations, or translators. Should the ratings of these stations or streams be combined with the ratings of the primary station or stream to determine the station's ratings in the DMA? Why or why not? Lastly, based on Commission staff review of Nielsen data, there are instances where noncommercial television stations have audience shares comparable to those of commercial stations. Should the Commission distinguish between commercial and noncommercial stations for purposes of the Top-Four Prohibition? Why or why not?

64. We also seek comment on whether to provide clarification of the phrase "at the time the application to acquire or construct the station(s) is filed." Should entities filing an application submit as support audience share data for the most recent month, week, or sweeps period in relation to the date when the application was submitted to the Commission? Should the time frame for the submitted data be required to show a longer period of time? For example, should the Commission require applicants to submit ratings data over a three-year period to demonstrate that a station truly is or is not ranked among the top-four stations in the DMA "at the time the application to acquire or construct the station(s) is filed"?[191] If not, should the Commission take another approach to prevent circumvention of the Top-Four Prohibition's requirements based on anomalous data? Should it rely on the most recent period solely as a presumption, which might be rebutted by interested parties?

65. Given the longstanding nature of the Top-Four Prohibition, much of the discussion in this section focuses on the continued applicability of that rule and ways that it might be adjusted or clarified to apply in the current video marketplace. We also seek comment, however, on alternatives to the Top-Four Prohibition. Should common ownership of two stations in a market be permitted when at least one of the stations is not ranked among the top-three stations in the market, or among the top-two? What economic data support establishing such a top-three approach, in light of the significant differences in national audience share between the top-four national networks and others? Should the Commission distinguish between stations located in larger Nielsen DMAs and those in mid- to small-sized DMAs by adopting a tiered approach to application of any ranking-based prohibition? Should common ownership be permitted when there is a certain number of non-broadcast local video programing sources in a DMA? We seek comment on how these and any other proposals supported by the record would promote and protect competition in local television markets.

66. *Multicasting*. As a result of the digital television transition, all full-power television stations have the ability to use their available spectrum to broadcast not only their main program stream but also, if they choose, additional program streams—an activity commonly referred to as multicasting. The Commission previously distinguished the ability to multicast from owning a separate broadcast station.[192] Accordingly, the Commission has declined to impose restrictions on local television station ownership based on the ability to multicast.[193] The Commission also declined to regulate dual affiliations through multicasting, even in instances where a licensee is affiliated with more than one of the Big Four networks (ABC, CBS, Fox, and NBC) by using multicast streams. The record in the last quadrennial review indicated that dual affiliations involving two Big Four networks via multicasting were generally limited to smaller markets where there was an insufficient number of full-power commercial television

[190] 47 CFR § 73.3555 (b)(1)(ii).

[191] *2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9839, para. 82 (encouraging applicants to provide data over a substantial period (e.g. the past three years) similar to the requirement in the failing/failed station waiver test).

[192] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9892, para. 71.

[193] *Id.*

stations to accommodate each Big Four network or where other unique marketplace factors led to creating the dual affiliation.[194] The Commission stated, however, that it would continue to monitor this issue and take action in the future, if appropriate.[195]

67. We seek comment on how technical and other developments in the broadcast industry have affected multicasting. Are some multicast streams functioning as the equivalent of separate broadcast stations? We note that multicasting has enabled broadcasters to bring more programming to consumers, particularly in smaller, rural markets, by expanding the availability of the four major networks and newer networks.[196] Based on Commission staff review of Nielsen data, there are at least several dozen DMAs where a single entity holds affiliations with two Big Four networks by using a multicast stream to carry the second signal. We seek comment on the characteristics of DMAs where major network affiliations are carried on multicast streams. Are there certain markets where this practice is more commonplace? We seek comment on whether dual affiliations with major networks remains limited to smaller markets or if the practice has become more widespread. We seek comment on whether and how the Commission should evaluate multicast streams for purposes of the Local Television Ownership Rule.

68. *Satellite Stations.* Television satellite stations are full-power terrestrial broadcast stations authorized under Part 73 of the Commission's rules that generally retransmit some or all of the programming of another television station, known as the parent station, which typically is commonly owned or operated with the satellite station.[197] We seek comment on the use of television satellite stations, which are exempted from the Local Television Ownership Rule,[198] to carry two Big Four networks in a market. For instance, how should we treat a situation in which a licensee utilizes multicasting to air two Big Four networks on a parent station (e.g., one on the primary stream and one on a multicast stream), and airs the same two Big Four networks on a satellite station? How prevalent is this practice, and is it consistent with the purposes behind allowing television satellite stations in the first place, which are generally intended to bring over-the-air television service to unserved areas? Are there benefits to allowing this practice that outweigh any potential harms? We seek comment on whether this issue should be addressed through modification of the satellite exemption to the Local Television Ownership Rule or, alternatively, in the context of the satellite authorization process.

69. *Low Power Television Stations*. We note that changes in industry practice and technological advances may have extended the reach and enhanced the capabilities of classes of broadcast stations that are currently exempt from local television ownership limits.[199] Based on a review of Nielsen data by Commission staff, there are a significant number of instances where a low power station is affiliated with a Big Four network. By virtue of this affiliation, MVPDs are likely willing to carry the

[194] *Id.* at 9892, para. 72.

[195] *Id.* at 9892-93, para. 72.

[196] *18th Video Competition Report*, 32 FCC Rcd at 571, para. 8.

[197] *Streamlined Reauthorization Procedures for Assigned or Transferred Television Satellite Stations*, MB Docket Nos. 18-63, 17-105, Notice of Proposed Rulemaking, FCC 18-34, at 1, para. 2 (Mar. 23, 2018) (*Satellite TV Reauthorization NPRM*).

[198] 47 CFR § 73.3555 Note 5. In order for the exception to apply, a television station must obtain authorization as a satellite from the Commission, and it must be reauthorized as a satellite at the time of assignment or transfer of control. *Satellite TV Reauthorization NPRM* at 1, para. 1. The Commission has a pending proceeding that proposes to streamline the process for reauthorizing television satellite stations when they are assigned or transferred in combination with their previously approved parent station. *Id.*

[199] *See* 47 CFR § 74.732(b) (stating that low power TV and TV translator stations are not counted for purposes of the multiple ownership rules).

low power stations despite their status as low power stations.[200] If low power stations can in this way become the functional equivalent of full power stations in certain instances, should the Commission account for the number of low power television stations as part of its Local Television Ownership Rule in some way, and if so, how? For instance, should a low power station that is ranked among the top four stations in audience share in a DMA be counted as a top-four station for purposes of the Top-Four Prohibition?

70. *Next Generation Broadcast Television Transmission Standard*. Currently, the broadcast television industry is developing a new transmission standard called Advanced Television Systems Committee (ATSC) 3.0 with the intent of merging the capabilities of over-the-air broadcasting with the broadband viewing and information delivery methods of the Internet, using the same 6 MHz channels presently allocated for DTV service.[201] According to ATSC 3.0 advocates, the new standard has the potential to improve broadcast signal reception greatly, particularly on mobile devices and television receivers without outdoor antennas.[202] ATSC 3.0 will enable broadcasters to offer enhanced and innovative new features to consumers, including Ultra High Definition (UHD) picture and immersive audio, more localized programming content, an advanced emergency alert system (EAS) capable of waking up sleeping devices to warn consumers of imminent emergencies, better accessibility options, and interactive services.[203]

71. We seek comment on the implications, if any, of the new broadcast television transmission standard on the Local Television Ownership Rule. Conversely, we seek comment on whether any provisions of the Local Television Ownership Rule potentially could affect adoption and deployment of the new transmission standard. How, if at all, should the Commission consider in the context of local television ownership the decisions of television broadcasters to adopt voluntarily the ATSC 3.0 transmission standard going forward?

72. *Minority and Female Ownership*. We also seek comment on how retaining, modifying, or eliminating the local television rule would affect broadcast television ownership and entry by minority and female owners, if at all. The Commission has stated previously that, while the Local Television Ownership Rule promotes competition among broadcast television stations in local markets and is not meant to preserve or create specific amounts of minority and female ownership, the rule nevertheless promotes opportunities for diversity in local television ownership.[204] The competition-based rule helps to ensure the presence of independently owned broadcast television stations in the local market, thereby indirectly increasing the likelihood of a variety of viewpoints and preserving ownership opportunities for new entrants.[205] No data in the previous record indicated that the duopoly rule has reduced minority ownership or suggested that a return to the single station per licensee rule would increase ownership opportunities for minorities and women.[206] While the data did indicate an increase in minority ownership following relaxation of the Local Television Ownership Rule, there was no evidence in the record that established a causal connection.[207] We seek data and a new updated record on the effects of the Local Television Ownership Rule on minority and female broadcast ownership and entry. We also seek

[200] LPTV stations may qualify for must-carry on cable systems only under very limited circumstances set forth in section 614 of the Act. 47 U.S.C. § 534(c)(1); 47 U.S.C. § 534(h)(2).

[201] [201] *Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard*, Notice of Proposed Rulemaking, 32 FCC Rcd at 1670, 1671, para. 1 (2017).

[202] *Id.*

[203] *Id.*

[204] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9893-94, para. 75.

[205] *Id.* at 9894, para. 75.

[206] *Id.* at 9895, para. 77.

[207] *Id.* at 9895, para. 78.

comment on how retaining or modifying the local television rule might affect broadcast television ownership and entry by small business owners, if at all.

73. *Broadcast Spectrum Auction*. In the *2010/2014 Quadrennial Review Order*, the Commission stated that it could not analyze yet the implications of the incentive auction for the Local Television Ownership Rule. The Commission released a public notice on April 13, 2017, announcing the results of the reverse and forward auctions and the repacking of the broadcast television spectrum.[208] Pursuant to the Spectrum Act authorizing the incentive auction, the release of that Public Notice also marked the completion of the reverse and forward auctions and the start of the 39-month post-auction transition period.[209] Given the completion of the reverse and forward auctions and the subsequent surrender of spectrum and/or initiation of channel-sharing agreements, we seek comment on whether the auctions' effects on local television ownership have any implication on retention or modification of the Local Television Ownership Rule.

74. *Shared Service Agreements*. In the *2010/2014 Quadrennial Review Order*, the Commission adopted a definition of shared service agreements (SSAs) and a requirement that commercial television stations disclose SSAs by placing them in their online public inspection files.[210] The Commission found that lack of knowledge about the content, scope, and prevalence of SSAs impeded its ability to evaluate the impact of these agreements, if any, on the Commission's policy goals, particularly with respect to broadcast ownership.[211] Broadcast commenters in the proceeding opposed the disclosure requirement based on concerns that disclosure would be unduly burdensome, discourage stations from entering into SSAs, and constitute intrusion into the day-to-day operations of broadcast stations.[212] The *2010/2014 Quadrennial Review Order on Reconsideration* upheld the disclosure requirement, and the requirement became effective on March 23, 2018.[213] We seek comment on what action, if any, the Commission should take on SSAs in the context of our review of the Local Television Ownership Rule. Should we continue to require the filing of SSAs with the Commission or should that requirement be eliminated? What, if anything, have commenters learned from the filing of these agreements so far?

75. *Cost-Benefit Analysis*. Finally, we seek comment on how to compare the benefits and costs associated with retaining, modifying, or eliminating the Local Television Ownership Rule, including the Top-Four Prohibition. We seek comments supporting modification or elimination of the rule that explain the anticipated economic impact of any proposed action and, where possible, quantify benefits and costs of proposed actions and alternatives. Does the current Local Television Ownership Rule create benefits or costs for any segment of consumers? Does the rule create benefits or costs for any segment of the industry that should be counted as social benefits or costs rather than transfers from one segment of the industry to another? How does the rule create these benefits and costs, and what evidence supports this explanation? How can the value of these benefits and costs be measured for parties receiving them? What factors create uncertainty about the existence or size of these benefits and costs, and how should the Commission's economic analysis take these uncertainties into account?

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[208] *Incentive Auction Closing and Channel Reassignment Public Notice*, Public Notice, 32 FCC Rcd 2786, 2788, para. 1 (MB/WTB 2017).

[209] *Incentive Auction Closing and Channel Reassignment Public Notice*, 32 FCC Rcd at 2788, para. 1 (citing Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6402 (codified at 47 U.S.C. §309(j)(8)(G)), 6403 (codified at 47 U.S.C. § 1452), 126 Stat. 156 (2012)). The public notice also announced the broadcast television channel reassignments and reallocations of broadcast television spectrum for flexible use made in the repacking process. *Incentive Auction Closing and Channel Reassignment Public Notice*, 32 FCC Rcd at 2788, para. 1.

[210] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 10008, para. 338.

[211] *Id.* at 10009-10, para. 341.

[212] *Id.* at 10013, para. 351.

[213] *2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9854, para. 114.

76. How would elimination of the Local Television Ownership Rule alter these benefits and costs? What are the comparative benefits and costs of modifying the rule rather than eliminating it entirely? For instance, would loosening the current local television ownership restrictions lead to any consumer benefits, such as increased competition, choice, innovation, or investment in programming? What amount of additional scale above the current ownership limit would be required to realize such benefits? Would these benefits conflict with, or come at a cost to, our traditional policy goals of competition, localism, or viewpoint diversity, and if so, how should we measure and evaluate these tradeoffs? What are the comparative benefits and costs of tightening the current restrictions? We seek comments that support claims about benefits and costs with relevant economic theory and evidence, including empirical analysis and data.

C. Dual Network Rule

1. Introduction

77. In this section, pursuant to the statutory requirement imposed by Congress, we seek comment on whether the Dual Network Rule, which effectively prohibits a merger between or among the Big Four broadcast networks (ABC, CBS, Fox, and NBC), is necessary in the public interest as a result of competition or whether it should be modified or repealed. Specifically, we seek comment on whether the rule remains necessary to promote our goals of competition, viewpoint diversity and localism. In addition, we seek comment on whether the benefits of the rule continue to outweigh any costs.

2. Background

78. The Dual Network Rule provides: "A television broadcast station may affiliate with a person or entity that maintains two or more networks of television broadcast stations unless such dual or multiple networks are composed of two or more persons or entities that, on February 8, 1996, were 'networks' as defined in § 73.3613(a)(1) of the Commission's regulations (that is, ABC, CBS, Fox and NBC)."[214] Thus the rule permits common ownership of multiple broadcast networks, but effectively prohibits a merger between or among the Big Four networks, ABC, CBS, Fox and NBC. A version of the rule has existed since the 1940s, and had changed little prior to 1996, when the rule was modified in response to the Telecommunications Act of 1996.[215]

79. The Commission most recently considered the Dual Network Rule in the *2010/2014 Quadrennial Review Order* and concluded that the rule continues to be necessary in the public interest to promote competition and localism.[216] With respect to competition, the Commission found the rule

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[214] 47 CFR § 73.658(g). Section 73.3613(a)(1) in turn defines "network" as "any person, entity, or corporation which offers an inter-connected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states; and/or any person, entity, or corporation controlling, controlled by, or under common control with such person, entity or corporation." 47 CFR § 73.3613(a)(1).

[215] In the Telecommunications Act of 1996 Congress permitted common ownership of two or more broadcast networks, but not a merger among ABC, CBS, Fox or NBC, or between one these networks and the two largest emerging networks, UPN or WB. 1996 Act, § 202(e); *see also* S. Rep. No. 230, 104th Cong., 2d Sess. at 163; *2002 Biennial Review Order*, 18 FCC Rcd at n. 1240. In 2001, after concluding in its 1998 Biennial Review that the rule as applied to UPN and WB might no longer be in the public interest (*1998 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 Of the Telecommunications Act of 1996,* Order, 15 FCC Rcd 11058, 11098, para. 77 (2000)), the Commission further modified the dual network rule to permit a Big Four network to merge with or acquire UPN or WB. *Amendment of Section 73.658(g) of the Commission's Rules—The Dual Network Rule*, Report and Order, 16 FCC Rcd 11114 (2001); *see also 2002 Biennial Review Order*, 18 FCC Rcd at 13848, para. 594.

[216] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9952, 9954, 9958, 9959-60, paras. 216, 221, 229, 230-31.

necessary to promote both competition in the provision of primetime entertainment programming and the sale of national advertising.[217]

3. Discussion

80. *Competition.* We seek comment on whether the Dual Network Rule is necessary in the public interest as a result of competition. In conducting its analysis of whether the Dual Network Rule remains necessary, the Commission traditionally has considered broadcast networks as participating in the video marketplace in two ways: 1) assembling and distributing a collection of programming suitable for large, national audiences, and 2) selling advertising based on this programming to large, national advertisers. Does the Dual Network Rule continue to be relevant to competition or network behavior in either or both of these segments? The Commission previously has concluded that "the primetime entertainment programming provided by the Big Four broadcast networks and national television advertising time are each a distinct product—the availability, price, and quality of which could be restricted, to the detriment of consumers, if two [Big Four broadcast networks] were permitted to merge." [218] Does this conclusion remain valid?

81. With respect to viewership, in the *2010/2014 Quadrennial Review Order,* based on Nielsen data, the Commission concluded that, "while certain cable networks have continued to air a discrete number of individual programs or episodes that have become increasingly capable of attracting primetime audiences on par with, or even greater than, the top-four broadcast networks, no one cable network – let alone several – has been able to consistently deliver such audiences beyond individual programs or episodes."[219] The *18th Video Competition Report*, based on 2015 data, showed that broadcast affiliates still draw the largest share of total day and prime time viewing audiences in relation to independent stations and non-commercial and cable networks.[220] With respect to advertising rates, based on SNL Kagan data, the *2010/2014 Quadrennial Review Order* found a continued wide disparity in advertising rates and revenue earned by the Big Four broadcast networks and other broadcast and cable networks.[221] The *18th Video Competition Report* also showed that broadcast industry gross advertising revenue declined from $20,477,000 in 2014 to $18,879,000 in 2015 and from 75 percent to 69 percent as a share of total revenue, but that gross retransmission consent revenue increased.[222] We seek more current data on these topics. Do these, or other recent developments, have any implications for the Commission's competition rationale underlying the Dual Network Rule?

82. In addition, the Commission previously has found that the Big Four networks operate as a "strategic group" in the national advertising market and that they largely compete among themselves for

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[217] *Id*. at 9954, para. 221.

[218] *Id*. at 9958, para. 229.

[219] "Besides [a] few individual series or episodes, however, the highest-rated primetime entertainment programs on cable networks attracted, at most between 6 and 7 million viewers . . . . By contrast for most of 2015 there were, at minimum, a dozen—and in a number of weeks around two dozen or so—primetime entertainment programs on the top-four broadcast networks that attracted more than 7 million viewers, with some of the highest-rated episodes attracting between 18 and 26 million viewers." (citations omitted)). *Id*. at 9955, para. 225. *See also id.* at 9954-57, paras. 225-26.

[220] *18th Video Competition Report*, 32 FCC Rcd at 614, para. 117, Table III.B.3.

[221] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9957, para. 227. Specifically, between 2011-2014, the average of the four highest CPMs [cost per mille or cost per thousand views] among non-sports cable networks (MTV, Bravo, Discovery Channel and Food Network) was approximately $12.43, or approximately 44 percent less than the average CPM among the Big Four broadcast networks, which was approximately $22.31. The four cable networks with the highest net advertising revenue totals in 2014, TNT, USA, TBS and Nickelodeon/Nick at Nite, were projected to average approximately $1.04 billion in 2015 net advertising revenues, less than a third of the average revenues of $3.31 billion projected for the Big Four broadcast networks. *Id*. at 9957-9959, paras. 227-28.

[222] *18th Video Competition Report*, 32 FCC Rcd at 615, Table III.B.4.

the most significant portion of the national advertising market, namely, advertisers that seek to reach national mass audiences.[223] Does the Commission's "strategic group" finding still hold true? The Commission further has found that the programming provided by the Big Four networks was a distinct product that, when compared to other broadcast and cable programming, had a unique ability to regularly attract large prime-time audiences and thus command higher advertising rates.[224] Given the increasing number of video programmers in today's market, as well as the increasing popularity of their programming, is network broadcast programming still a distinct product? Does nightly network news programming, or any other programming, distinguish the broadcast networks, or are consumers now turning to other news or programming sources that remove this distinction? Are there other producers of mass audience programming such that a merger between two of the Big Four broadcast networks would no longer harm competition for national advertising? In the past, the Commission reviewed programming audience shares and the advertising rates and revenues of various programmers in making this determination.[225] Should the Commission continue to rely on these data, or are there other data or metrics it should consider? Are there better sources of relevant data than the Commission has considered in the past?

83. One of the biggest changes in the video programming market has been online distribution of programming from a variety of sources. Today, OVDs—including linear multichannel streaming services, both those from social media companies and other online platforms, and direct-to-consumer offerings by broadcast networks themselves—reach millions of consumers. Digital advertising on these or other online platforms is steadily increasing in market share and revenue share. How, if at all, have these changes affected competition for national broadcast television advertising? We seek comment on whether and how any such changes should affect our Dual Network Rule.

84. Finally, we seek comment on whether recent developments in the video programming and national advertising markets suggest that the Dual Network Rule should be modified to promote competition or eliminated. If the rule is modified, what changes should we make? Should networks be removed from or added to the rule? If so, which networks? What would be the basis for eliminating the rule? If the rule were eliminated, would antitrust statutes or any other statutes, rules, or policies serve as a sufficient backstop to prevent undue consolidation between or among the Big Four networks? Why or why not?

85. *Localism*. We seek comment on whether, consistent with the Commission's previous findings, the Dual Network Rule remains necessary to promote localism; in particular, by maintaining a balance of power between the Big Four networks and their local affiliates. To reach the largest possible national audience, the Big Four networks acquire their own broadcast stations, usually in the largest television markets, and enter into affiliation agreements with station owners throughout the rest of the country. Through affiliation, a model which has existed for more than fifty years, networks benefit through wide delivery of their programming, and network affiliates benefit by gaining access to high-quality programming. In the past, the Commission has found that the network-affiliate model balances competing interests: networks have an economic incentive to ensure that programming appeals to a mass, nationwide audience and is widely shown by affiliates. The Commission also concluded that affiliates, in contrast, have an economic incentive to gain viewers and attract advertising dollars by tailoring programming to their local audiences. The Commission has found that affiliates therefore have an incentive to influence network programming choices to ensure that the programming serves local needs

[223] *2002 Biennial Review* Order, 18 FCC Rcd at 13850, para. 601; *2006 Quadrennial Review Order*, 23 FCC Rcd at 2082, para. 140; *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9954, para. 221.

[224] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9952, 9954, 9958, paras. 216, 221, 229.

[225] *Id*. at 9954-9958, paras. 224-228.

and interests.[226] Affiliates also may decide individually to preempt network programming if other programming that better serves the local audience is available.[227] In previous reviews, the Commission has concluded that the Dual Network Rule is necessary to retain the balance of bargaining power between the Big Four networks and their affiliates, so that affiliates can ensure that the needs and interests of local viewers, or localism, is served.[228] We seek comment on whether these prior conclusions remain true in today's video marketplace.

86. Evidence suggests that broadcast network affiliation remains sought after and critical to many local stations' success.[229] For instance, while advertising revenue remains essential to broadcast stations, retransmission consent revenues now represent a much greater proportion of total revenue for many broadcast stations than they had previously, and stations with Big Four network affiliations often receive the lion's share of retransmission consent dollars from MVPDs in a local market.[230] In addition, whereas local affiliates were once paid by networks to distribute network programming, today networks seek and receive compensation from their affiliates in the form of reverse compensation payments.[231] According to one estimate, total industrywide reverse compensation payments paid by affiliates to broadcast networks have increased from roughly $300 million in 2010 to $2.9 billion in 2017.[232] There is some evidence too that networks now exert leverage through oversight or approval of affiliate retransmission consent negotiations,[233] and although not common, there have been some instances in recent years where a network dropped or threatened to drop a local affiliate in order to launch a network O&O station in the same market. To what extent do networks extract a share of retransmission consent payment received by their affiliates? How, if at all, should the Dual Network Rule account for these or other recent changes to the network/affiliate relationship?

87. In addition, the rise of online video options in recent years also may have altered the

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[226] *2002 Biennial Review Order*, 18 FCC Rcd at 13832, 13842, 13855, paras. 546-47, 578, 612-613; *see also Amendment of Section 73.355(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, 32 FCC Rcd 10785, 10791-92, para. 14 (2017) (National Cap NPRM).

[227] *See* 47 C.F.R. § 73.658(e); *2002 Biennial Review Order*, 18 FCC Rcd at 13855, paras. 612-613.

[228] *2002 Biennial Review Order*, 18 FCC Rcd at 13855-56, paras. 611, 615; *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9959-60, paras. 230-31. The Commission also has found that a national cap on the number of households nationwide that a broadcast station group reaches helps preserve this balance of bargaining power by preventing the excessive accumulation of audience reach by network-owned groups that are more likely to hold stations in multiple markets with large populations. *2002 Biennial Review Order*, 18 FCC Rcd at 13842-43, paras. 578-81.

[229] *See, e.g., Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4309-10, para. 170 (2011) (*Comcast-NBCU Order*) (noting that "the role of broadcast networks in the retransmission consent process is changing").

[230] Retransmission consent fees now account for roughly a quarter of broadcast revenues industrywide. *See 18th Video Competition Report*, 32 FCC Rcd at 618-19, paras. 124-26. These fees have increased from approximately $215 million in 2006 to $9.3 billion in 2017. SNL Kagan, Media Census (June 2017). *See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, Report on Cable Industry Prices, 31 FCC Rcd 11498, 11512 (MB 2016) (stating that the "average annual total amount paid for retransmission consent by a cable system was nearly $7.8 million in 2013 and $12.7 million in 2014, an increase of 63.2 percent").

[231] *See 18th Video Competition Report*, 32 FCC Rcd at 618, para. 124.

[232] SNL Kagan, Media Census (June 2017).

[233] *See, e.g., Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd 10327, 10338-39, para. 14 (2015) (describing network negotiation for retransmission consent on behalf of affiliates); *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2730-31, para. 22 (2011) (describing networks' rights to review or approve affiliates' retransmission consent contracts with MVPDs).

network-affiliate dynamic. As stated above, OVDs now reach millions of consumers, creating new opportunities for networks to achieve widespread distribution without the direct involvement of network affiliates. In the broadcast-MVPD world of retransmission consent, local affiliates may have some recourse against broadcast networks bypassing their affiliates in this manner by negotiating for, and if necessary enforcing via Commission rules, contractual network non-duplication rights, which protect a broadcast station's right to be the exclusive distributor of network programming within a specified geographic zone.[234] By contrast, in the world of online video distribution, local affiliates lack a comparable regulatory backstop. The ability of networks to achieve online distribution of network programming in a local market, without the need for local affiliates to consent, may give networks some additional leverage in the network-affiliate relationship that did not exist in the pre-online video world.[235] What implications, if any, do developments related to the growth of online video distribution have for the Dual Network Rule and its underlying localism rationale?

88. As the Commission has previously noted, the Dual Network Rule is intended to preserve the ability of local affiliates to advocate for local interests in programming decisions. Would a Big Four network merger reduce the ability of a network affiliate to use the availability of other top, independently-owned networks as a bargaining tool to influence programming decisions of its network, including the affiliate's ability to engage in a dialogue with its network over the suitability for local audiences of either the content or scheduling of network programming? Have changes discussed above, including the growth of online video or increased reverse compensation and retransmission consent fees, affected bargaining between networks and affiliates on programming and scheduling?

89. In light of the longstanding existence of the Dual Network Rule, has localism increased, decreased, or remained roughly the same over time? Are there recent examples where local affiliates have influenced network programming to better serve local needs? Are there other metrics by which we can assess the effect of the Dual Network Rule on localism? Have other changes affected the network/affiliate relationship, such that the Commission would need to adjust assumptions made in previous reviews of the Dual Network Rule? For instance, has the growth over the last two decades of station groups not owned and operated by networks changed the dynamic between networks and their affiliates? Finally, we seek comment on whether recent changes affecting the network-affiliate relationship suggest that the Dual Network Rule should be modified, rather than being retained or eliminated, to promote localism? If so, what modifications should we make that would better promote localism?

90. *Minority and Female Ownership*. The Commission previously concluded in the *2010/2014 Quadrennial Review Order* that, given the Dual Network Rule's unique focus on mergers involving the Big Four networks rather than ownership limits in local markets, the rule would not be expected to have any meaningful impact on minority and female ownership levels.[236] We seek comment on whether and how market or other changes since our last media ownership review may have affected this conclusion. We also seek comment on how retaining, modifying or eliminating the Dual Network Rule would affect broadcast television ownership and entry by minority and female owners, if at all. In addition, we seek comment on how retaining or modifying the Dual Network Rule might affect broadcast television ownership and entry by small business owners, if at all.

91. *Cost-Benefit Analysis.* In addition, we seek comment on how to compare the benefits and costs associated with retaining, modifying or eliminating the Dual Network Rule. We ask commenters

[234] *See* 47 CFR §§ 76.92 and 76.122; *see also Comcast-NBCU Order*, 26 FCC Rcd at 4306-12, paras. 163-78.

[235] *National Cap NPRM*, Comments of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates at 31 (filed Mar. 20, 2018) (stating that networks may allow OVDs to carry a "white feed," *i.e.*, a national network feed without any local affiliate content, including local news in the absence of the local station's signal and that OVDs will not negotiate with the station in such circumstances).

[236] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9960, para. 233.

supporting modification or elimination of the rule to explain the anticipated economic impact of any proposed action and, where possible, to quantify benefits and costs of proposed actions and alternatives. Does the current Dual Network Rule create benefits or costs for any segment of consumers? Does the rule create benefits or costs for any segment of the broadcast or broader video program distribution industry that should be counted as social benefits or costs rather than transfers from one segment of the industry to another? How does the Dual Network Rule create these benefits and costs, and what evidence supports this explanation? How can the value of these benefits and costs be measured for parties receiving them? What factors create uncertainty about the existence or size of these benefits and costs, and how should the Commission's economic analysis take these uncertainties into account?

92. How would elimination of the Dual Network Rule alter the benefits and costs? What are the comparative benefits and costs of modifying the rule rather than eliminating it entirely? For instance, would allowing certain of the Big Four networks and not others to merge lead to any consumer benefits, such as increased choice, innovation, or investment in programming? What amount of additional scale would be required to realize such benefits? Would these benefits conflict with, or come at a cost to, our traditional policy goals of competition, viewpoint diversity or localism, and if so, how should we measure and evaluate these tradeoffs? We ask commenters to support their claims about benefits and costs with relevant economic theory and evidence, including empirical analysis and data.

IV. DIVERSITY-RELATED PROPOSALS

93. In addition to addressing the structural media ownership rules, the *2010/2014 Quadrennial Review Order* also discussed five proposals advanced by MMTC, which had been winnowed down from a larger list of 24 proposals advocated by MMTC in the 2010/2014 Quadrennial Review proceeding.[237] MMTC focused on these five proposals based on guidance from the Third Circuit and discussions with Commission staff.[238] The Commission adopted one of the five proposals as part of the *2010/2014 Quadrennial Review Order* (namely, making the promotion of minority ownership an integral part of relevant FCC rule making proceedings) and committed to further examine the remaining four proposals. Recently, the Commission implemented another of these proposals, namely the suggestion that the Commission's EEO functions be relocated from the Media Bureau to the Enforcement Bureau.[239] The remaining three proposals include extending cable procurement requirements to broadcasters, developing a model for market-based tradeable "diversity credits" to serve as an alternative method for adopting ownership limits, and adopting formulas aimed at creating media ownership limits that promote diversity. Consistent with the *2010/2014 Quadrennial Review Order* we seek comment below on these proposals and related issues.[240]

94. *Extension of Cable Procurement Regulation*. As part of the 1992 Cable Act, Congress established the so-called cable procurement requirement, which states that a cable system must: "encourage minority and female entrepreneurs to conduct business with all parts of its operation; and . . . analyze the results of its efforts to recruit, hire, promote, and use the services of minorities and women and explain any difficulties encountered in implementing its equal employment opportunity program."[241] Based on this statutory requirement, the Commission promulgated Section 76.75(e), which provides that a

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[237] *Id.* at 10004-07, paras. 328-33.

[238] *Id.* at 10004-05, para. 328.

[239] *In the Matter of Equal Employment Opportunity Audit and Enforcement Team Deployment*, Order, FCC 18-103 (rel. July 24, 2018).

[240] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 10006-07, paras. 331-32. In the *2010/2014 Quadrennial Review Order*, the Commission stated that it would evaluate the feasibility of extending cable-procurement type rules to the broadcast industry. In addition, it committed to consider further the ideas of tradeable diversity credits and the two formulas to promote broadcast diversity and to solicit input on these particular ideas in the document initiating the next quadrennial review of the media ownership rules. *Id.*

[241] 47 U.S.C. § 554(d)(2)(E)-(F).

cable system must: "[e]ncourage minority and female entrepreneurs to conduct business with all parts of its operation." The rule explains that "[f]or example, this requirement may be met by: (1) Recruiting as wide as possible a pool of qualified entrepreneurs from sources such as employee referrals, community groups, contractors, associations, and other sources likely to be representative of minority and female interests."[242]

95. Over the years, some parties have advocated exploring whether this type of procurement requirement could be applied to either broadcasting or other FCC-regulated industries.[243] As noted above, in the *2010/2014 Quadrennial Review Order*, the Commission committed to review the feasibility of extending the cable procurement requirement to the broadcast industry.[244]

96. We seek comment on various aspects of this proposal beginning with the threshold issue of whether the Commission has authority to adopt a similar procurement requirement for broadcast licensees. We note as an initial matter that the cable procurement requirement and Section 76.75(e) of the Commission's rules flow directly from the statutory mandate pertaining explicitly to the cable industry contained in the 1992 Cable Act.[245] The Communications Act has requirements for equal employment opportunity applicable to broadcasters, but these do not extend to procurement.[246] Does this distinction reflect any limitation on the Commission's otherwise extensive Title III authority over broadcast licensees? We seek comment on potential sources of Commission authority, including any ancillary authority, to extend similar procurement regulation to the broadcast industry. [247]

97. In addition, we seek comment on whether by specifically identifying minority/female entrepreneurs the proposed rule would classify these entrepreneurs differently from others such as to trigger heightened judicial scrutiny.[248] If that is the case, how would such a rule comport with the Commission's previous finding that it lacked the evidence to satisfy the heightened scrutiny needed to justify race- or gender-based broadcast regulation?[249] Would the inclusion of any type of audit, review, or enforcement mechanism pursuant to which the Commission considered broadcasters' compliance with the requirement be problematic or interpreted as tacitly encouraging broadcasters to favor certain entrepreneurs to the detriment of others in a way that would trigger heightened scrutiny?[250]

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[242] 47 CFR § 76.75(e).

[243] *See, e.g.,* Recommendation on Procurement Issues, Emerging Technologies Subcommittee, Advisory Committee for Diversity in the Digital Age (June 10, 2008) available at http://transition fcc.gov/DiversityFAC/061008/procurement-061008.pdf (last visited Dec.7, 2018)(Recommendation on Procurement Issues).

[244] *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 10006, para. 330.

[245] 47 U.S.C. § 554(d)(2)(E).

[246] 47 U.S.C. § 334.

[247] In the past, supporters advocating an extension of the cable procurement rule have suggested that sections 151 and 257 of the Communications Act might form the basis of such an extension. *See* Recommendation on Procurement Issues. *See also Comcast Corp. v. FCC*, 600 F.3d 642, 651-61 (D.C. Cir. 2010) (extensively discussing Commission's reliance on ancillary authority in various proceedings).

[248] In *Adarand*, the Supreme Court held that any federal program in which the "government treats any person unequally because of his or her race" must satisfy the "strict scrutiny" constitutional standard of judicial review. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229-230 (1995). Likewise, any programs that are based on gender classifications would have to satisfy the "intermediate scrutiny" standard established for such classifications. *See 2010/2014 Quadrennial Review FNPRM* at 4508, para. 301 (citing *United States v. Virginia*, 518 U.S. 515, 531-33 (1996); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003)).

[249] *See 2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9961-62, 9987-99, paras. 236, 297-312.

[250] The D.C. Circuit has held previously that *any* pressure to hire or recruit based on protected classifications as a result of the threat of Commission investigation triggers strict scrutiny. *See MD/DC/DE Broadcasters Assoc. v. FCC*, 236 F.3d 13, 20-21 (D.C. Cir. 2001) (rejecting the Commission's position that, "unlike affirmative action in

98. If the broadcast procurement rule as proposed by MMTC would trigger heightened judicial scrutiny, can the proposed rule be modified to be race- and gender-neutral to avoid the potential legal impediments raised by a race- and gender-conscious broadcast procurement rule? And in that case, how would the requirement be stated? Would a race- and gender-neutral broadcast procurement rule be as effective as a race- and gender-conscious broadcast procurement rule?

99. In addition, we also seek comment on MMTC's assertion that Section 76.75(e) "has been a springboard for the migration of minority and women entrepreneurs into operating and ownership positions in the cable and satellite industries."[251] MMTC claims further that the rule has "contributed mightily to the economic success of scores of minority and women owned businesses engaged in banking, broker/dealer services, construction, fiber and satellite dish installation, programming, legal services, accounting, and much more."[252] In deciding whether to adopt additional regulations and extend a regulatory regime to additional industries, it is important to assess the likelihood that the regulation would have the desired effect of increasing minority and female participation in the broadcast industry. Consequently, we seek data on the degree to which Section 76.75(e), specifically, has promoted minority and women businesses and whether any broader trends in the intervening two decades since enactment of the cable procurement requirement have played a role in fostering greater minority and female participation in the cable industry.[253] In this regard, we also seek comment on the relative benefits and costs of extending Section 76.75(e) to the broadcast industry. How can the value of these benefits and costs be measured? We encourage commenters to include in their evaluations of the relative benefits and costs of adopting such a rule the types of analyses called for in the questions posed in earlier sections of the instant *NPRM* about benefit-cost analysis.[254]

100. Finally, we note that there are significant differences between the cable industry and the broadcast industry, and we seek comment on the feasibility – and utility – of imposing a Section 76.75(e)-type requirement on the broadcast industry. For example, the cable industry requires the construction and maintenance of a significant physical plant, unlike that required for broadcasting. As such, the cable industry purchases goods and services on a much larger scale than the broadcast industry,

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hiring, 'affirmative outreach' in recruitment does not implicate equal protection concerns because it merely expands the applicant pool, and an individual applicant has no right to compete against fewer rivals for a job"), *cert. denied*, 534 U.S. 1113 (2002); *Lutheran Church/Missouri Synod v. FCC*, 141 F.3d 344, 351 ("the crucial point is… whether [the EEO rules] oblige stations to grant some degree of preference to minorities in hiring."), *rehearing en banc denied*, 154 F.3d 487, 491 (D.C. Cir. 1998) ("the degree to which the regulations require, oblige, pressure, induce, or even encourage the hiring of particular races is not the logical determinant of whether the regulation calls for a racial classification… the FCC's regulations at issue here indisputably pressure—even if they do not explicitly direct or require—stations to make race-based hiring decisions") (denying petition for rehearing).

[251] *2010/2014 Quadrennial Regulatory Review,* Letter from Kim Keenan, President & CEO and David Honig, President Emeritus and Senior Advisor, MMTC, to Thomas Wheeler, Chairman, FCC, at 5 (filed June 24, 2016)(MMTC June 24, 2016, *Ex Parte* Letter).

[252] *Id*.

[253] *See, e.g.,* "What is Corporate Social Responsibility," Business News Daily (June 8, 2018), available at https://www.businessnewsdaily.com/4679-corporate-social-responsibility.html (describing a study by Cone Communications finding that more than 60 percent of Americans hope businesses will drive social and environmental change in the absence of government regulation); *see also* "Making the Most of Corporate Social Responsibility" by Tracey Keys, Thomas W. Malnight, and Kees van der Graaf, McKinsey Quarterly (Dec. 2009), available at https://www.mckinsey.com/featured-insights/leadership/making-the-most-of-corporate-social-responsibility (noting that "[i]ncreasingly, employees are choosing to work for organizations whose values resonate with their own.") and 2017 Comcast-NBCUniversal Corporate Social Responsibility Report, available at https://corporate.comcast.com/csr2017/suppliers-stir-up-fresh-perspectives (quoting Comcast's Chief Procurement Officer who stated that "[d]iversity within our supply chain gives our company a competitive edge, helps inspire innovation, and offers insights into the interests and needs of our customers. . . .").

[254] *See, e.g., supra* paras. 38-39.

as cable operators continuously build and upgrade their distribution network. Cable service by its nature requires the laying of fiber or coaxial cable to every home, along with in most instances the deployment of equipment at the customer's premises. In contrast, the over-the-air delivery of broadcast radio and television service does not require the broadcaster to build and maintain the same type of distribution network or necessitate the regular purchase of equipment and material on a volume similar to cable. Moreover, the laying and maintenance of extensive cable networks requires the employment and contracting of far more labor than is required in the broadcast sector. Similarly, cable operators, unlike broadcasters, maintain a direct billing relationship with their customers, which may also offer the potential for more contracting opportunities – in the form of outsourced billing or customer service functions – than exist in the broadcast industry. Accordingly, we seek input on the feasibility and utility of imposing a cable procurement-type of regulation on the broadcast sector.

101. *Develop a Model for Market-Based Tradeable Diversity Credits.* In reply comments submitted in the Commission's 2002 Biennial Review proceeding, a group of commenters, the Diversity and Competition Supporters (DCS), put forward a number of initiatives that it asserted would foster diversity, including the idea of tradeable "diversity credits" for the broadcast industry. Although the concept of diversity credits is not well-defined in the reply comments, the general idea appears to be that a system of "diversity credits" could be created that could be traded in a market-based system and redeemed by a station buyer to offset increased concentration that would result from a proposed transaction.[255] The DCS suggested that economists (presumably both at the Commission and beyond) could explore the concept and offered the idea of a tradeable diversity credit "in the hope that other parties will attempt to design a market-based Diversity Credit program."[256] The diversity credits proposal was put forth as a potential alternative to the use of the "voices tests" in the Commission's rules.[257] At the time, several of the Commission's structural media ownership rules included aspects that required that a minimum number of independent speakers or "voices" remain in a market in order for a transaction to be permitted consistent with those rules.[258]

102. The idea of tradeable diversity credits was developed further in a 2004 proposal drafted by a member of the Transactional Transparency Subcommittee of the FCC Advisory Committee on Diversity in the Digital Age.[259] The 2004 Diversity Credits Proposal suggested that the Commission consider a concept of diversity credits that would be linked to broadcast licenses. As set forth in the 2004 Diversity Credits Proposal, the number of diversity credits attached to each license would be commensurate with the extent to which the licensee of the station was considered to be "socially and

[255] *See 2010/2014 Quadrennial Review Order,* 31 FCC Rcd at 10006-07, para. 332; *see also 2010 Quadrennial Review NPRM*, Supplemental Comments of the Diversity and Competition Supporters in Response to the Notice of Proposed Rulemaking at 75 (filed Apr. 3, 2012) (DCS Supplemental NPRM Comments); MMTC June 24, 2016, *Ex Parte* Letter at 7-8.

[256] *See 2002 Biennial Regulatory Review*, Reply Comments of the Diversity and Competition Supporters at 34-38 (filed Feb. 3, 2003) (DCS 2002 Biennial Review Reply Comments). *See also* DCS Supplemental NPRM Comments at 75-76; MMTC June 24, 2016, *Ex Parte* Letter at 7-8.

[257] *See* DCS Supplemental NPRM Comments at 75; MMTC June 24, 2016, *Ex Parte* Letter at 7.

[258] *See 2010/2014 Quadrennial Review Order on Reconsideration*, 32 FCC Rcd at 9824-31, 9834-36, paras. 49-65, 73-77 (eliminating the eight-voices test from the Local Television Ownership Rule and repealing the Radio/Television Cross-Ownership Rule, which limited ownership based on the number of media voices remaining in a local market post-merger).

[259] Proposal on Diversity Credits, dated May 22, 2004 (drafted by David Honig as a member of the Transactional Transparency Subcommittee of the FCC Advisory Committee on Diversity in the Digital Age) available at https://www.fcc.gov/DiversityFAC/040614/DiversityCredits-whitepaper.doc (last visited Dec. 7, 2018) (2004 Diversity Credits Proposal). The 2004 Diversity Credits Proposal was never adopted by the FCC Advisory Committee on Diversity in the Digital Age.

economically disadvantaged."[260] The 2004 Diversity Credits Proposal suggested that when a transaction occurred that was deemed to promote diversity (*e.g.*, the breakup of a local radio ownership cluster, or the sale of a station to a socially and economically disadvantaged business), the Commission would award the seller additional diversity credits "commensurate with the extent to which the transaction promotes diversity."[261] Similarly, the 2004 Diversity Credits Proposal suggested that when a transaction reduced diversity (perhaps by creating an ownership combination or expanding an ownership cluster), the Commission would require the submission of a certain number of diversity credits from the buyer, commensurate with the extent to the which the transaction reduced diversity.[262] According to the 2004 Diversity Credits Proposal, when the number of diversity credits held by a company seeking approval of a transaction was insufficient to permit the company to gain approval, the buyer would need to purchase diversity credits on a secondary market from third-party companies with an excess of such credits.[263] Beyond providing very general examples, however, the 2004 Diversity Credits Proposal did not define what it meant by either "promoting" or "reducing" diversity, or how the impact of a particular transaction would be measured and quantified.

103. In the 2010/2014 Quadrennial Review proceeding, MMTC continued the advocacy for a concept of tradeable diversity credits. Specifically, MMTC asked the Commission to explore the feasibility of a diversity credit program and urged that it issue a Notice of Inquiry to commence a rulemaking proceeding to explore the issue.[264] Consistent with the Commission's commitment in the *2010/2014 Quadrennial Review Order*, we hereby seek comment on whether and how the Commission should create a system of tradeable diversity credits that would seek to foster ownership diversity in the broadcast industry.

104. As an initial matter, we seek input on the Commission's authority to adopt regulations establishing the framework of a tradeable diversity credit system in the context of our structural broadcast ownership rules or otherwise. The Communications Act of 1934, as amended, does not contain explicit authority for the creation of, or reliance on, such a program. When DCS first presented the diversity credits concept, it asserted that the Commission had authority under sections 303(f), (g), and (r) of the Communications Act to implement such a program.[265] We seek comment on the applicability of these Communications Act sections to a tradeable diversity credit scheme.

105. In addition, assuming the Commission were to find that it has authority for such a system, we seek comment on the feasibility of implementing a scheme that builds on determinations about social/economic disadvantage in light of the Commission's previous concerns about programs dependent on such determinations.[266] As proposed, the allocation of diversity credits was to be based on the extent to which the licensee of the station was considered to be "socially and economically disadvantaged."[267] How should such a term be defined? The 2004 Diversity Credits Proposal stated that "[m]inority status could be a factor in qualifying as an SDB if the Commission finds through rulemaking, that minorities, under certain conditions, are socially and economically disadvantaged in the broadcasting industry because of their race."[268] The 2004 Diversity Credits Proposal does not, however, provide any guidance about when an individual might or might not qualify on the basis of race. To the extent that this

[260] *See* 2004 Diversity Credits Proposal at 2.

[261] *Id*.

[262] *Id*.

[263] *Id*.

[264] *See* MMTC June 24, 2016, *Ex Parte* Letter at 8.

[265] *See* DCS 2002 Biennial Review Reply Comments at 37.

[266] *See 2010/2014 Quadrennial Review Order,* 31 FCC Rcd at 9961-62, 9987-99, paras. 236, 297-312.

[267] 2004 Diversity Credits Proposal at 2.

[268] *Id*. at 3.

definition would rely on the socially disadvantaged business (SDB) definition employed by the Small Business Administration (SBA),[269] we note that the Commission has previously declined to employ that definition in the media ownership context.[270] Specifically, in the *2010/2014 Quadrennial Review Order*, the Commission declined to adopt an SDB eligibility standard that would have recognized the race and ethnicity of applicants, or any other race- or gender-conscious measure. Based on the Commission's careful review of the extensive record developed in that proceeding, it found that the evidence did not establish a basis for race-conscious remedies and concluded that such measures were not likely to withstand review under the equal protection component of the Due Process Clause of the Constitution.[271] Given the Commission's previous finding that it lacks the evidence that courts have accepted in other contexts to satisfy the heightened constitutional scrutiny accorded to race- or gender-based classifications, [272] can we adopt a diversity credit program that considers race or gender, or other protected classes, in a manner that could withstand equal protection review? Commenters advocating for such a program should explain in detail, based on relevant judicial precedent and existing empirical data, how circumstances have changed such that the Commission could now overcome the significant evidentiary issues that it previously found would need to be resolved in order to adopt race- or gender-based policies that could withstand heightened judicial scrutiny.[273]

106. If the description of the socially and economically disadvantaged concept in the 2004 Diversity Credits Proposal was a precursor to the Overcoming Disadvantages Preference (ODP) concept that MMTC has advanced in subsequent Commission rulemaking proceedings, we note that the Commission previously has assessed the concept of an ODP and articulated its concern that the agency lacks the resources to conduct the individualized reviews recommended as a central component of implementing ODP.[274] We have similar concerns about the administrative and practical challenges of developing, implementing, and applying a diversity credit program. The 2004 Diversity Credits Proposal suggested that the diversity credit program rely on ascribing a number of diversity credits to each broadcast license or possibly each licensee.[275] Who would make that allocation of diversity credits, and on what criteria would the Commission or other arbiter determine the number of credits to be awarded to each station or licensee?

107. We also note that the design of such a program raises some potentially complicated definitional issues. How would the Commission define "diversity" in this context? Previously, the Commission has described several types of diversity, focusing on viewpoint diversity as the relevant

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[269] For example, the Small Business Administration administers the 8(a) Business Development Program "to assist eligible small disadvantaged business concerns." *See* 13 CFR §§ 124.1-124.4, 124.101-112. To qualify for the program, a small business must be unconditionally owned and controlled by one or more socially and economically disadvantaged individuals. 13 CFR § 124.101; *see also id.* at §§ 124.102–124.112 (discussing other eligibility requirements for the program). Under the program, African Americans, Hispanic Americans, Asian Pacific Americans, Subcontinent Pacific Americans, and Native Americans are presumed to qualify, and other individuals can qualify if they can show by a preponderance of the evidence that they are disadvantaged. 13 CFR §§ 124.103(b)-(c), 124.104(a).

[270] *See 2010/2014 Quadrennial Review Order,* 31 FCC Rcd at 998, para. 297.

[271] *See id.* at 9961-62, 9987-99, paras. 236, 297-312.

[272] *See id*.

[273] *See 2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9988-10001, paras. 300-316.

[274] *See 2010/2014 Quadrennial Review FNPRM*, 29 FCC Rcd at 4507, para. 300; *see also In the Matter of Updating Part 1 Competitive Bidding Rules,* Report and Order, Order on Reconsideration of the First Report and Order, Third Order on Reconsideration of the Second Report and Order, Third Report and Order, 30 FCC Rcd 7493, 7551, para. 138 (2015) (stating concerns about the complexity of implementing such a preference).

[275] *See* 2004 Diversity Credits Proposal at 2.

touchstone for purposes of the structural media ownership rules.[276] Would a tradeable diversity credit system have as its goal fostering viewpoint diversity, ownership diversity, both of these forms of diversity, or some other type of diversity?

108. Once the notion of diversity is established, how would parties – or the Commission – determine, qualitatively or quantitatively, whether a transaction was deemed to promote diversity or harm diversity? And how would the degree to which the transaction harms or benefits diversity be quantified, such that the number of credits awarded for, or required before approval of, such a transaction could be determined? For example, would the impact on diversity vary depending on the size of the market, the number of operators therein, or the characteristics of the stations involved in the transaction? Would the diversity credit program and the requirement that parties remit to the Commission a certain number of diversity credits in order to receive approval of a transaction replace the Commission's existing structural broadcast ownership rules, which are based primarily on other policy goals, such as competition and localism? Or would compliance with the diversity credit regime be an additional requirement before a transaction were permitted?

109. Recognizing that the diversity credits are intended to be used as a form of currency in the broadcast market, how could the Commission effectively test such a scheme to ensure it would not lead to any unintended consequences? Developing and implementing a system that ensures that the award of diversity credits leads to the desired result – increasing diverse ownership in the broadcast market – rather than inadvertently skewing the market towards an unintended outcome, including greater concentration or loss of localism and viewpoint diversity, would seem to be a particular challenge. We seek comment on how to address these issues.

110. Finally, we seek comment on the benefits and costs of adopting a diversity credits scheme. We encourage commenters to include in their evaluations the types of analyses called for in the questions posed in earlier sections of the instant *NPRM* about benefit-cost analysis.[277]

111. *Tipping Point Formula and Source Diversity Formula*. As noted above, the Commission committed in the *2010/2014 Quadrennial Review Order* to consider further two formulas that arose in previous proceedings and could ostensibly be used to establish media ownership limits while also promoting broadcast ownership diversity. Both formulas were first presented approximately fifteen years ago and have had few, if any, refinements in the intervening years. In 2002, MMTC proposed a "tipping point formula" for use in the local radio market in lieu of the "flagging" approach that was used at the time to identify potential radio transactions that might raise diversity and competition concerns and has since been abandoned.[278] And in 2003, the DCS proposed a "source diversity formula" for use in the

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[276] *See 2002 Biennial Review Order*, 18 FCC Record at 13627-37, paras. 18-52 (analyzing five types of diversity within the context of media ownership: viewpoint, outlet, program, source, and minority and female ownership diversity).

[277] *See, e.g., supra* paras. 39-40.

[278] *See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets and Definition of Radio Markets,* Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, Reply Comments of the Minority Media and Telecommunications Council at 22-24 (filed May 8, 2002) (2002 MMTC Reply Comments). In August 1998, the Commission began "flagging" public notices of radio station transactions that, based on an initial analysis by the staff, proposed a level of local radio concentration that implicated the Commission's public interest concern for maintaining diversity and competition. *See also 2002 Biennial Review Order*, 18 FCC Rcd at 13813, paras. 496-97. Under this policy, the Commission flagged proposed transactions that would result in one entity controlling 50 percent or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70 percent or more of the advertising revenues in that market. *Id.* Flagged transactions were then subject to a further competition analysis. *Id.* With the adoption of Arbitron markets as the basis for the radio market definition, the Commission chose to terminate the flagging policy.

broader media market.[279] The latter formula seemed to be an attempt to quantify the benefit derived from increased viewpoint diversity.[280]

112. Like the notion of tradeable diversity credits discussed above, both these formula proposals contain few details and raise a significant number of questions, which we seek to explore below. As with the diversity credits concept, the Communications Act does not provide explicit statutory authority to adopt or apply either of these formulas. Thus, we seek comment on possible sources of statutory authority for these proposals. Moreover, because there has been little by way of update to the formulas since they were initially proposed we also seek input generally on the relevance of these formulas to today's marketplace. Finally, the formulas also raise significant administrative and practical concerns that we discuss below and seek comment upon.

113. *Tipping Point Formula.* In 2002, MMTC proposed the "tipping point formula" as an alternative to the approach the Commission used at the time of flagging radio station transactions that, based on an initial analysis, would result in a level of local radio concentration that implicated public interest concerns for maintaining diversity and competition.[281] MMTC's tipping point formula was based on the premise that "platforms . . . [should] not control so much advertising revenue that well run independents cannot survive or offer meaningful local service."[282] MMTC states that its formula will show when "a market 'tips' in this manner."[283] MMTC, however, did not define many of the terms contained in its proposal, such as "independents," "well run independents," or "meaningful local service." The asserted goal of the formula is to assess how much "revenue" an "independent" would need (on average) to survive in a given market, with this number then being multiplied by the number of "independents" in that market.[284] Given that the "flagging" approach in use at the time relied on advertising revenues, the term "revenue" in the proposed tipping point formula would appear to also refer to advertising revenue.[285] By submitting its proposal, MMTC essentially suggested that the Commission should bar any transaction that would result in reducing the amount of revenue available to support independent operators in a market to a level below what could sustain those operators. Stated differently, a broadcaster would not be permitted to acquire competing stations in a market if as a result the broadcaster would hold combined revenue so large as to leave insufficient revenue for the independents in the market.[286] In its filing, MMTC provided the following variables as inputs for its formula, as well as the formula as shown below:

MR: Market revenue.

MR1: Amount of market revenue drawn by largest platform.

MR2: Amount of market revenue drawn by second largest platform.

IN: Number of independent stations in the market.

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[279] DCS 2002 Biennial Review Reply Comments at 17-24. Referring back to DCS's previous filings on the source diversity formula, MMTC subsequently requested that the Commission consider the feasibility of this formula. *See* MMTC June 24, 2016, *Ex Parte* Letter at 6-7.

[280] DCS 2002 Biennial Review Reply Comments at 17-24.

[281] *See* 2002 MMTC Reply Comments at 22-24; *see also 2002 Biennial Review Order*, 18 FCC Rcd at 13813, paras. 496-97 (describing the Commission's past policy of "flagging" proposed radio transactions).

[282] 2002 MMTC Reply Comments at ii.

[283] *Id*.

[284] *Id*. at 22-24.

[285] *See id*. at 24 (noting before laying out the variables associated with the formula that "advertising revenue limits that promote diversity would involve these variables and coefficients").

[286] *See id*. at 22-24.

SU: Minimum fixed cost for an independent station to stay on the air.

VFSU: Variability Factor for Survival Operations, reflecting the average amount of revenues per independent station that must be available in the market, collectively, to take account of variations among the independent stations and thereby ensure that well-run weak independents stay on the air.

LS: Minimum additional cost, beyond SU, for an independent station to offer a meaningful local service.

VFLS: Variability Factor for Local Service reflecting the average amount of revenue per independent station that must be available in the market, collectively, to take account of variations among the independent stations and thereby ensure that well-run weak independents remain viable.

LSTP: Local Service Tipping Point, i.e., the point at which, if the top two station groups control more revenue, independents will begin to lose their ability to offer meaningful local service.

SUTP: Survival Tipping Point, i.e., the point at which, if the top two station groups control more revenue, independents will be unable to meet their fixed operating costs and must, therefore, sell out or go dark.[287]

Based on these inputs, according to MMTC, the Local Service Tipping Point is the point at which: IN (SU + VFSU + LS + VFLS) = MR – (MR1 + MR2), and the Survival Tipping point is the point at which: IN (SU + VFSU) = MR – (MR1 + MR2).[288]

114. After presenting these variables, MMTC noted that "[t]he cost of maintaining a station on the air varies somewhat depending on local market factors."[289] According to MMTC, such regional or local differences "can be designed into a formula by indexing a market's cost of living relative to the national average."[290] MMTC stated that such an issue could be addressed in a negotiated rulemaking involving all interested parties.[291]

115. We seek comment on the various terms used in the formula. For example, how should the terms "independent" and "platform" be defined in the context of today's radio marketplace? How should the terms "well-run independent" and "well-run weak independent" be defined? What objective criteria can we apply to distinguish between a "well-run independent" and a "well-run weak independent," so as to ensure that use of a tipping point formula does not prop up stations that are either poorly managed or simply not airing programming that responds to the community's interests? What is meant by "meaningful local service"? We also seek comment on whether any determinations about how well a station is run or the concept of a "meaningful local service" might implicate First Amendment concerns.

116. The tipping point formula seems to rely on advertising revenues. If so, how would the Commission and potential applicants obtain reliable advertising revenue for all radio stations? If another type of revenue is more appropriate, what type of data would the Commission rely on to obtain information about this other form of revenue? How should the concept of "fixed operating costs" be quantified? How should the Commission account for local and regional cost differences?

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[287] *Id*. at 24-25.

[288] *Id*.

[289] *Id*. at 24, n.38.

[290] *Id*.

[291] *Id*.

117. Finally, we seek comment on what seems to be MMTC's fundamental premise behind the tipping point formula, namely, that retaining independents (however that term is defined) in a market maintains diversity (however that term is defined).[292] We also seek comment on the benefits and costs of adopting a tipping point formula. We encourage commenters to include in their evaluations the types of analyses called for in the questions posed in earlier sections of the instant *NPRM* about benefit-cost analysis.[293] We also invite commenters to address any other issues that they believe are raised by the tipping point formula proposal.

118. *Source Diversity Formula*. In a February 2003 filing, the DCS stated that it was offering the source diversity formula in response to then-Chairman Powell's challenge to "give a reward to anyone who derived a formula that provides an 'HHI for Diversity.'"[294] Although MMTC requested most recently in 2016 that the formula be considered by the Commission, there has been little refinement or development of the DCS's initial proposal.[295] Based on the DCS's 2003 filing, the source diversity formula appears to seek to measure the level of consumer welfare derived from viewpoint diversity in the broadcast market.[296] Unlike the tipping point formula, the source diversity formula does not appear to be limited to the radio sector. The DCS had suggested that the source diversity formula could be used as a "thermometer" to determine whether "a national or local market manifest[s] strong diversity, moderate diversity, or slight diversity."[297] The DCS proposed that the Commission conduct a negotiated rulemaking to determine what significance to accord to various "temperature readings" on the HHI for Diversity thermometer.[298] For example, what temperatures would reflect "poor health,"[299] versus measurements indicative of strong health. While not clearly stated, it appears that the DCS was suggesting the source diversity formula could be used in lieu of a "number of voices" test.[300]

119. DCS depicted the source diversity formula as shown below with the variables presented as follows: X = consumer welfare derived from viewpoint diversity; p = a program consumed from a particular source; g = the number of programs from a particular source that are available for consumption; C = the number of consumers consuming a particular program; T = consumers' mean media consumption time devoted to the absorption of viewpoints in a particular program; Z = consumers' mean attentiveness to a particular program; m = a source (including all outlets owned by that source); and n =

[292] *See generally* MMTC Reply Comments.

[293] *See, e.g., supra* paras. 38-39.

[294] 2002 DCS Biennial Review Reply Comments at 17. As part of its *2002 Biennial Regulatory Review*, the Commission developed a "Diversity Index" as a tool intended to measure the availability of outlets that contribute to viewpoint diversity in local media markets. *2002 Biennial Review Order*, 18 FCC Rcd at 13775-90, paras. 391-431. The *Prometheus I* court found several flaws with the Commission's creation of the index and remanded it to the Commission for further consideration. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 403-09 (3rd Cir. 2004). The Commission subsequently declined to revise and reinstate the index as a means of measuring market concentration, stating that "as the Commission has learned from experience, there are too many qualitative and quantitative variables in evaluating different markets and combinations to reduce the task at hand to a precise mathematical formula." *2006 Quadrennial Review Order*, 23 FCC Rcd at 2052-53, para. 73.

[295]*See* MMTC June 24, 2016, *Ex Parte* Letter at 6-7.

[296] 2002 DCS Biennial Review Reply Comments at 18-20.

[297] *Id*. at 23.

[298] *Id*.

[299] *Id*. DCS noted, however, that "[s]ecuring consensus on the temperature levels that reflect poor health will require skill and patience." *Id*. at 23, n. 38.

[300] *See id*. at 23-24 (stating that "[s]uch formulas, geared to market realities and consumer behavior, are far preferable to guesswork in establishing the number of voices needed to maximize consumer welfare.").

number of differently owned sources offering programs which are consumed.[301] As proposed, the formula reads as:[302]

$$X = n^{1 + (\frac{1}{n})} \hat{a}_{m = 1}^{n} \left(\hat{a}_{p = 1}^{g} CTZ \right)$$

When it presented the formula, the DCS acknowledged that the formula was imperfect and would need testing and validation before deployment.[303]

120. The DCS's formula raises several fundamental questions. Is the formula sufficiently comprehensive for commenters to gauge without additional explanation whether it can provide a meaningful assessment of consumer welfare and viewpoint diversity in a particular market? Are there terms used in the formula inputs that require definition prior to any assessment of the formula's utility? For example, do terms such as "source" and "program" need to be defined before analyzing the formula? Are there other terms that need defining? How will the formula inputs be obtained? For example, we seek comment on how to capture inputs such as "consumers' mean attentiveness to a particular program" and "consumers' mean media consumption time devoted to the absorption of viewpoints in a particular program." How should the Commission determine the level of diversity to ascribe to various formula results (e.g., "strong diversity," "moderate diversity," or "slight diversity")?

121. Finally, we seek comment on the benefits and costs of adopting a source diversity formula. We encourage commenters to include in their evaluations the types of analyses called for in the questions posed in earlier sections of the instant *NPRM* about benefit-cost analysis.[304] We also invite commenters to address any other issues that they believe are raised by the source diversity proposal.

V. PROCEDURAL MATTERS

122. *Ex Parte Rules—Permit-But-Disclose.* The proceeding that this Notice of Proposed Rulemaking initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[305] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are

[301] *Id*. at 21.

[302] *Id*.

[303] *Id*. In 2012, the DCS offered up this formula again, without offering any further explanation about the formula or addressing the significant concerns it itself had raised. DCS Supplemental NPRM Comments at 70-71. In its 2016 letter to then-Chairman Wheeler, MMTC asked that the Commission as part of its 2018 Quadrennial Review proceeding issue an NOI seeking public input on the formula, directing readers back to the DCS's 2012 filing. *See* MMTC June 24, 2016, *Ex Parte* Letter at 7.

[304] *See, e.g., supra* paras. 38-39.

[305] 47 CFR §§ 1.1200 *et seq*.

deemed to be written *ex parte* presentations and must be filed consistent with Section 1.1206(b), 47 CFR §1.1206(b). In proceedings governed by Section 1.49(f), 47 CFR § 1.49(f), or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the Commission's Electronic Comment Filing System (ECFS) available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

123. *Filing Requirements—Comments and Replies.* Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using ECFS. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Commenting parties may file comments in response to this Notice in MB Docket No. 18-349; interested parties are not required to file duplicate copies in the additional dockets listed in the caption of this notice.
- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://apps.fcc.gov/ecfs/.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.
- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
  - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, D.C. 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, D.C. 20554.

124. *Initial Regulatory Flexibility Act Analysis*—The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for notice and comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[306] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[307] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3)

[306] 5 U.S.C. § 603.

[307] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

satisfies any additional criteria established by the Small Business Administration (SBA).[308]

125. With respect to this Notice of Proposed Rulemaking, an Initial Regulatory Flexibility Analysis (IRFA) under the RFA is contained in the Appendix. Written public comments are requested on the IFRA and must be filed in accordance with the same filing deadlines as comments on this Notice of Proposed Rulemaking, with a distinct heading designating them as responses to the IRFA. In addition, a copy of this Notice of Proposed Rulemaking and the IRFA will be sent to the Chief Counsel for Advocacy of the SBA and will be published in the Federal Register.

126. *Paperwork Reduction Act*—This document seeks comment on whether the Commission should adopt new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens and pursuant to the Paperwork Reduction Act of 1995, Public Law 104-13, invites the general public and the Office of Management and Budget (OMB) to comment on these information collection requirements. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

127. *People with Disabilities*—To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

128. *Additional Information*—For additional information on this proceeding, please contact Brendan Holland of the Media Bureau, Industry Analysis Division, Brendan.Holland@fcc.gov, (202) 418-2757.

VI. ORDERING CLAUSES

129. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in Sections 1, 2(a), 4(i), 257, 303, 307, 309, 310, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 257, 303, 307, 309, 310, and 403, and Section 202(h) of the Telecommunications Act of 1996, this Notice of Proposed Rulemaking **IS ADOPTED**.

130. **IT IS FURTHER ORDERED** that, pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on the Notice of Proposed Rulemaking in MB Docket No. 18-349 on or before sixty (60) days after publication in the *Federal Register* and reply comments on or before ninety (90) days after publication in the *Federal Register*.

131. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Notice, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[308] 15 U.S.C. § 632.

APPENDIX

Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] the Commission has prepared this Initial Regulatory Flexibility Act Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in this *Notice of Proposed Rulemaking* (NPRM). The Commission requests written public comments on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments specified in the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2] In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposed Rules

2. This NPRM begins an examination of the Commission's media ownership rules and possible changes to these rules. As discussed in the NPRM, the Commission is required by statute to review its media ownership rules every four years to determine whether they "are necessary in the public interest as the result of competition."[4] Consistent with the Communications Act, the Commission must examine its media ownership rules and consider whether they continue to serve our public interest goals of competition, viewpoint diversity and localism, or whether they should be modified or eliminated. Specifically, the NPRM examines the three remaining media ownership rules, the Local Radio Ownership Rule, the Local Television Ownership Rule and the Dual Network Rule. In addition, the NPRM seeks comment on several proposals that were advanced in previous rule makings and which the Commission indicated it would examine further in the context of this review of its structural ownership rules. These proposals, to extend cable procurement requirements to broadcasters, develop a model for market-based, tradeable "diversity credits" to serve as an alternative method for adopting ownership limits, and adopt formulas aimed at creating media ownership limits that promote diversity, are presented by their proponents as initiatives that could further the Commission's diversity goal. The Commission anticipates that these initiatives, if ultimately adopted, might benefit small entities.

B. Legal Basis

3. The proposed action is authorized under Sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, and 310, and Section 202(h) of the Telecommunications Act of 1996.

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[1] 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

[2] 5 U.S.C. § 603(a).

[3] *Id*.

[4] Section 202(h) of the 1996 Act, 47 U.S.C. § 303 note. Section 202(h) of the 1996 Act further requires the Commission to "repeal or modify any regulation it determines to be no longer in the public interest."

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rule revisions, if adopted.[5] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[6] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act (SBA).[7] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[8] Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

5. *Television Broadcasting*. This U.S. Economic Census category "comprises establishments primarily engaged in broadcasting images together with sound."[9] These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.[10] These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having $38.5 million or less in annual receipts.[11] The 2012 Economic Census reports that 751 firms in this category operated in that year. Of that number, 656 had annual receipts of $25 million or less, 25 had annual receipts between $25 million and $49,999,999 and 70 had annual receipts of $50 million or more.[12] Based on this data, we estimate that the majority of commercial television broadcast stations are small entities under the applicable size standard.

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[5] 5 U.S.C. § 603(b)(3).

[6] 5 U.S.C. § 601(6); *see infra* note 7 (explaining the definition of "small business" under 5 U.S.C. § 601(3)); *see* 5 U.S.C. § 601(4) (defining "small organization" as "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register"); 5 U.S.C. § 601(5) (defining "small governmental jurisdiction" as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register").

[7] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632(a)(1)). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." *Id.*

[8] 15 U.S.C. § 632(a)(1)-(2)(A).

[9] U.S. Census Bureau, 2017 NAICS Definitions, "515120 Television Broadcasting," http://www.census.gov./cgi-bin/sssd/naics/naicsrch.

[10] *Id*.

[11] 13 C.F.R. § 121.201; 2012 NAICS code 515120.

[12] U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515120 Television Broadcasting). https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

6. Additionally, the Commission has estimated the number of licensed commercial television stations to be 1,349.[13] Of this total, 1,248 stations (or about 92.5 percent) had revenues of $38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) in November 2018, and therefore these stations qualify as small entities under the SBA definition.

7. *Radio Broadcasting.* This U.S. Economic Census category "comprises establishments primarily engaged in broadcasting aural programs by radio to the public."[14] Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having $38.5 million or less in annual receipts.[15] Economic Census data for 2012 show that 2,849 firms in this category operated in that year.[16] Of that number, 2,806 operated with annual receipts of less than $25 million per year, 17 with annual receipts between $25 million and $49,999,999 million and 26 with annual receipts of $50 million or more. [17] Based on this data, we estimate that the majority of commercial radio broadcast stations were small under the applicable SBA size standard.

8. Apart from the U.S. Economic Census, the Commission has estimated the number of licensed commercial AM radio stations to be 4,426 stations and the number of commercial FM radio stations to be 6,737, for a total number of 11,364.[18] Of this total, 11,355 stations (or 99.9 percent) had revenues of $38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) in November 2018, and therefore these stations qualify as small entities under the SBA definition.

9. In assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[19] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific radio or television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which the proposed rules may apply does not exclude any radio or television station from the definition of small business on this basis and is therefore possibly over-inclusive.

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[13] Broadcast Station Totals as of September 30, 2018, Press Release (MB Oct. 3, 2018) (September 30, 2018 Broadcast Station Totals),available at https://www fcc.gov/document/broadcast-station-totals-september-30-2018. While the Commission also reports the number of licensed noncommercial educational (NCE) broadcast stations, it does not compile and does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities. Further, the Local Radio Ownership Rule, the Local Television Ownership Rule and the Dual Network Rule apply only to combinations of commercial entities.

[14] U.S. Census Bureau, 2017 NAICS Definitions, "515112 Radio Stations," http://www.census.gov./cgi-bin/sssd/naics/naicsrch.

[15] 13 C.F.R. § 121.201; 2017 NAICS code 515112.

[16] U.S. Census Bureau, U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515112 Radio Stations) https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515112|.

[17] *Id*.

[18] September 30, 2018 Broadcast Station Totals.

[19] "[Business concerns] are affiliates of each other when one [concern] controls or has the power to control the other, or a third party or parties controls or has to power to control both." 13 CFR § 121.103(a)(1).

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

10. The proposals, if ultimately adopted, would require modification of several FCC forms and their instructions: (1) FCC Form 301, Application for Construction Permit for Commercial Broadcast Station; (2) FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License; and (3) FCC Form 315, Application for Consent to Transfer Control of Corporation Holding Broadcast Station Construction Permit or License. The Commission also would modify, as necessary, other forms that include in their instructions the media ownership rules or citations to media ownership proceedings, including Form 303-S, Application for Renewal License for AM, FM, TV, Translator, or LPTV Station and Form 323, Ownership Report for Commercial Broadcast Station. The impact of these changes will be the same on all entities, and we do not anticipate that compliance will require the expenditure of any additional resources or place additional burdens on small businesses.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

11. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[20]

12. The NPRM begins a statutorily mandated examination of whether three remaining media ownership rules remain in the public interest as a result of competition and promote the Commission's longstanding policy goals of competition, viewpoint diversity and localism. The NPRM acknowledges new technologies and changed marketplace conditions that affect whether the rules remain in the public interest in light of competition and the need to allow broadcasters, including small entities, to achieve the economies of scale and scope necessary to continue to compete in a changed marketplace. The NPRM considers measures designed to minimize the economic impact of any changes to these rules on firms generally, as well as initiatives designed to promote broadcast ownership opportunities among a diverse group of owners, including small entities. The NPRM also invites comment on the effects of any rule changes on different types of broadcasters (e.g., independent or network-affiliated), the benefits and costs associated with any proposals, and any potential to have significant impact on small entities.

13. The NPRM proposes no new reporting requirements, performance standards or other compliance obligations, although, as discussed above, it may modify, as necessary, certain existing reporting forms should it adopt any changes to its media ownership rules. Should the Commission ultimately adopt changes to its media ownership rules that could increase requirements or compliance burdens for small entities, it will determine whether possible exemptions, waiver opportunities, extended compliance deadlines or other measures would mitigate any potential impact on small entities.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule

14. None.

[20] *See* 5 U.S.C. § 603(c).

**STATEMENT OF
CHAIRMAN AJIT PAI**

Re: *2018 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* (MB Docket No. 18-349)

Many years ago, Congress required the FCC to conduct a review of certain media ownership rules every four years. Today, we kick off the 2018 quadrennial review of our Local Radio Ownership Rule, Local Television Ownership Rule, and Dual Network Rule. As Congress instructed, we're seeking to determine whether these rules remain "necessary in the public interest as the result of competition."

Specifically, we're teeing up a broad range of questions about these rules. We want to know whether, given the current state of the media marketplace, we should retain, modify, or eliminate any of them. We're keeping an open mind as to what, if anything, should change, and we hope to develop a robust record to guide us on the best path forward.

Our endpoints may be unclear right now, but the end goal is not: Our rules must keep pace with the modern media marketplace.

The reforms that this Commission adopted last year to do just that are already having a positive impact. For example, in 2017, we eliminated the outdated newspaper-radio cross-ownership rule. Thanks to that reform, the owner of Colorado's *Grand Junction Daily Sentinel* was recently able to purchase a radio station group in Grand Junction. I recently met Jay Seaton, who runs the *Daily Sentinel*. He told me that this transaction will help him disseminate news across more formats and appeal more to advertisers (revenue from which can be poured back into the business). As he put it, ending the cross-ownership ban was "fifteen years overdue." And if anyone doubts the positive impact it makes in small markets in particular, "come out here and try running a newspaper sometime. It's a real struggle."

Additionally, consistent with the Commission's commitment in the 2010/2014 quadrennial review order, we're seeking comment on several diversity-related proposals that were offered in the record of that proceeding.

Given that this Notice doesn't include any tentative conclusions, I'm disappointed that we were unable to secure a unanimous vote for it. But unfortunately, our dissenting colleague requested edits that did not comply with the law. Specifically, we were urged to delete any discussion of the Dual Network Rule from the Notice. But the Dual Network Rule is one of our media ownership rules that we are required by statute to review every four years. Whatever one's opinion of it, refusing to include it in our quadrennial review would have violated the law. As a result, a request to remove it from the Notice doesn't constitute a good-faith attempt to reach consensus but rather gives the appearance of looking for an excuse to dissent for political reasons.

As always, I'd like to thank the hard-working staff who worked on this item. From the Media Bureau: Ty Bream, Michelle Carey, Lyle Elder, Chad Guo, Brendan Holland, Tom Horan, Radhika Karmarkar, Julie Salovaara, Julie Saulnier, Holly Saurer, and Sarah Whitesell. And from the Office of General Counsel: Bill Dever, Dave Konczal, Jake Lewis, Bill Richardson, Bill Scher, and Royce Sherlock. Your efforts are much appreciated.

STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

Re: *2018 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* (MB Docket No. 18-349)

The item before us is a balanced effort to comply with our statutory obligation – itself the result of a bipartisan compromise – to review whether or what type of limitations should govern media ownership. I realize that some outside parties – and perhaps some internally – would prefer that we abdicate this responsibility, especially given the extensive litigation history and inevitable challenges that will eventually result. Others seem to cling to a vision of the media industry frozen in time in the early 1950s that has since been eviscerated by market developments and technological innovation. Despite these views, we are obligated under federal law to conduct this work.

From my perspective, this entire endeavor is an exciting opportunity, and I wholeheartedly welcome the beginning of our 2018 Quadrennial Review, even as we sneak it in just under deadline. In fact, everyone should embrace this effort because it is a chance to reformulate our media ownership rules to reflect the current marketplace. No one – including the Third Circuit Court of Appeals – should support maintaining rules that are outdated or restrict the ability of programming outlets to reasonably compete both domestically or globally. At its heart, this proceeding is about good government practices.

In reviewing the text, the document should be respected for what it does. While I would have endorsed more extensive relaxation of our rules and pushed the envelope further on our ultimate objective, I appreciate that parts of the previous draft that leaned a different way have been removed. That leaves a fairly benign document that appropriately tees up the relevant questions to allow for a meaningful comment process.

If I had one remaining concern, it's that the item still gives credence to the belief that certain audio or video offerings can be siloed into discrete segments. We must redefine and broaden the appropriate market definition to be consistent with consumer, advertising, and business realities. Contrast this Notice with the Competitive Marketplace Report (CMR), which has its own issues but correctly discusses and treats the audio and video markets each as a whole. The approach taken in the CMR, as well as other parts of the RAY BAUM'S Act of 2018, signal that Congress recognized the need to look holistically at the media marketplace, not in a piecemeal manner.

Substantively, I intend to pay specific attention, as this process continues, to how the Commission plans to reform our radio ownership rules. Despite substantial changes in the audio market, including increased competition for listeners and advertising dollars from satellite and Internet offerings, radio ownership rules have not undergone any significant changes since the 1990s. Proponents of keeping the current AM-FM subcaps have proffered underwhelming arguments. The debate has appropriately shifted to determining where to draw the line on the FM side, if at all, while permitting caps to be eliminated on the AM side.

Additionally, there is still more work to do to reform the television-related rules, as the Top-4 combination process is too susceptible to regulatory gamesmanship. We need to provide greater specificity or guidance, either via bright-line rules or presumptions, on which combinations are problematic and why. Depending on multiple variables, I tend to view a combination of the top station in a market and the number four station differently than a combination of the two largest stations.

Taken as whole, this item is the start, not the end, of yet another extensive quadrennial battle.

STATEMENT OF COMMISSIONER BRENDAN CARR

Re: *2018 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* (MB Docket No. 18-349)

In this Quadrennial Review, we examine whether certain media ownership rules dating back to 1940 should be updated to reflect new technology and market conditions. So as I was reading through this Notice, I started to wonder: What was the FCC doing in the early 1940s? And I stumbled across a delightful book, *Commissioners of the FCC, 1927-1994*. If it's not on your bookshelf already, maybe add it to your Christmas list or consider it as a stocking stuffer.

The Chairman of the FCC at the time was one James Lawrence Fly, who the book describes as a "lanky, six-feet, three-inch, begoggled Texan with sandy 'moth-eaten' hair." I hope future historians are kinder and simply describe me as bald with a squirrel-eaten beard. "He was said to be arrogant, offensive, hot-tempered, unfair, even ruthless, and to . . . love a bang-up fight." "Under Fly's strong management and direction," the book goes on, "the Commission established a commanding place for itself. According to some, his leadership was so strong that Fly was not merely the Chairman, he was the Commission." The parallels are striking. The book even describes Fly's fellow Commissioners as "being at swords' point with each other." No parallel there, of course.

Fly was preoccupied with what he viewed as the dangerous radio duopoly—NBC and CBS—and the specter of newspapers buying up broadcast networks. The result was a ban on long-term affiliation contracts with local stations and ownership of more than one station in a market. And, along the way, Fly approved the first commercial operation of a TV station, to less controversy or fanfare.

Today, you hear less concern about radio monopolists or newspaper titans swallowing up the rest of media. Things have changed. We call news and entertainment "content" because it's no longer just TV or radio or magazines—content has been liberated from its medium. So Congress got it right in the Telecom Act of 1996 when it required the Commission to ask in these quadrennial reviews whether our rules should change to keep up with the times. After all, who in 1996 could have foreseen how online streaming would fundamentally disrupt the video and audio marketplace?

For instance, as today's Communications Marketplace Report notes, Netflix this year will spend more than $8 billion on content, a quarter of which is for original shows. Amazon will spend $5 billion, Hulu: $3 billion. Next year, Google is expected to earn $48 billion in ad revenue, including in competition with broadcasters for local ad dollars. And Spotify and Pandora are increasingly competing for the ears of Americans whether we're at home or on the go. The golden age of television—or the platinum age of content—is the direct result of choice. The gatekeepers of the past are no longer gatekeepers. Americans, using a broadband connection, can access any content, from any device, anywhere.

So I look forward to reviewing the record on how the Commission's broadcast ownership rules impact competition in the video and audio marketplace. And I want to thank my colleagues as well for agreeing to add language that seeks additional comment on the relationship between the FCC's market definition and the one used in reviews by the Department of Justice.

Finally, I want to thank the Media Bureau for its work on this item. It has my support.

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL
APPROVING IN PART, DISSENTING IN PART**

Re: *2018 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* (MB Docket No. 18-349)

There was a time when we waited in the morning for the news to hit the front stoop in print and on paper. Then we gathered at night to bask in the glow of a single television screen for the evening news. Gone are the days. The world has changed. Not one of us expects our news and information to be available in such a limited way. Every one of us now looks for content at any time, in any place, and on any screen handy.

This is exciting. But let's be honest, it's also challenging. The economic models that sustained traditional newsgathering have been forever changed by digitization—and while new platforms are multiplying, what is viral is not always verifiable. The questions that result are undeniably complicated. How do we advance journalism when algorithms are ascendant? How do we advance trust in real facts instead of dismissing them as fake news? How do we foster a marketplace where there is competition for ideas so that we have the information we all need to make decisions about our lives, our communities, and our country?

There are no simple answers. But I think there are principles from the past that can guide us in the future. For decades, the FCC has built its media policies around the simple idea that localism, competition, and diversity matter. These values have their origin in the Communications Act. They may not be trendy, but they have stood the test of time. They continue to support journalism and jobs. I think it is essential that these principles lead this agency as it determines what comes next. Let me explain why.

Localism matters. Local broadcasting remains the most trusted source of news. When the unthinkable occurs, it is also the preferred source for local emergency information. But this month the University of North Carolina School of Media and Journalism released a study detailing the stark decline of local news in rural areas. Newspapers have collapsed, and stations are increasingly owned by national companies with limited ties to the communities they serve. What is emerging are news deserts—areas of the country where national news dominates but local news is disappearing.

Competition matters. It is axiomatic that more owners in more markets can mean more ideas. It can mean more news. The converse is also true. Too much consolidation can reduce the number of voices, jobs, and the newsgathering that results.

And finally, diversity matters. What we see and hear over the air says so much about who we are as individuals, as communities, and as a nation. For too long, women and minorities have struggled to take the reins at media outlets nationwide. Progress in diversity is slow. But study a bit of history and you can only come to one conclusion—excessive consolidation is unlikely to increase diversity and more likely to make the ownership of outlets look less like the communities they serve.

Once again—localism, competition, and diversity. These are the guiding principles I believe this agency should use in its Quadrennial Review of media ownership rules. I believe it is possible to use these guideposts to develop thoughtful reform.

In some ways, I believe today's rulemaking meets this mark, including with its proposals to rethink limitations on the ownership of AM radio and the proposals to increase ownership diversity of broadcast entities deserve serious consideration.

However, in other aspects it falls short. We suggest eliminating the dual network rule, clearing the way for the merger of our four largest broadcast networks. We seek comment on a proposal allowing a single company to own an unlimited number of FM and AM radio stations in most communities in this country. That could mean one company controls every radio station in the town where you live. We also fail to acknowledge that many new media sources are dependent on broadband—and in too many communities in this country, especially in rural areas, high-speed service is too hard to find.

To the extent this rulemaking offers thoughtful reform, I approve. But in other aspects, I dissent. It fails to honestly assess the impact of too many changes we propose on the values of localism, competition, and diversity that have informed this agency's media policies in the past—and I believe should still inform our efforts in the future.

Statutory Addendum

TELECOMMUNICATIONS ACT OF 1996, PL 104–104, February 8, 1996, 110 Stat 56

SEC. 202. BROADCAST OWNERSHIP.

(a) NATIONAL RADIO STATION OWNERSHIP RULE CHANGES REQUIRED.—The Commission shall modify section 73.3555 of its regulations (47 C.F.R. 73.3555) by eliminating any provisions limiting the number of AM or FM broadcast stations which may be owned or controlled by one entity nationally.

(b) LOCAL RADIO DIVERSITY.—

(1) APPLICABLE CAPS.—The Commission shall revise section 73.3555(a) of its regulations (47 C.F.R. 73.3555) to provide that—

(A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);

(B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);

(C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and

(D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.

(2) EXCEPTION.—Notwithstanding any limitation authorized by this subsection, the Commission may permit a person or entity to own, operate, or control, or have a cognizable interest in, radio broadcast stations if the Commission determines that such ownership, operation, control, or interest will result in an increase in the number of radio broadcast stations in operation.

(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.

(2) LOCAL OWNERSHIP LIMITATIONS.—The Commission shall conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market.

(d) RELAXATION OF ONE–TO–A–MARKET.—With respect to its enforcement of its one-to-a-market ownership rules under section 73.3555 of its regulations, the Commission shall extend its waiver policy to any of the top 50 markets, consistent with the public interest, convenience, and necessity.

* * * * *

(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.

47 U.S.C. § 309(j)

§ 309 Application for license

* * * * *

(j) Use of competitive bidding

(1) General authority

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

(2) Exemptions

The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission--

(A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that--

(i) are used to protect the safety of life, health, or property; and

(ii) are not made commercially available to the public;

(B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

(C) for stations described in section 397(6) of this title.

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combinations or groups of licenses in a single bid and to enter multiple alternative bids within a single bidding round. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;

(D) efficient and intensive use of the electromagnetic spectrum;

(E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed-

(i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services; and

(F) for any auction of eligible frequencies described in section 923(g)(2) of this title, the recovery of 110 percent of estimated relocation or sharing costs as provided to the Commission pursuant to section 923(g)(4) of this title.

(4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall--

(A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

(B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services;

(C) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;

(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures;

(E) require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits; and

(F) prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established, to obtain any license or permit being assigned pursuant to the competitive bidding, unless the Commission determines that such a reserve price or minimum bid is not in the public interest.

(5) Bidder and licensee qualification

No person shall be permitted to participate in a system of competitive bidding pursuant to this subsection unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing. No license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) of this section and sections 308(b) and 310 of this title. Consistent with the objectives described in paragraph (3), the Commission shall, by regulation, prescribe expedited procedures consistent with the procedures authorized by subsection (i)(2) of this section for the resolution of any substantial and material issues of fact concerning qualifications.

(6) Rules of construction

Nothing in this subsection, or in the use of competitive bidding, shall--

(A) alter spectrum allocation criteria and procedures established by the other provisions of this chapter;

(B) limit or otherwise affect the requirements of subsection (h) of this section, section 301, 304, 307, 310, or 606 of this title, or any other provision of this chapter (other than subsections (d)(2) and (e) of this section);

(C) diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses;

(D) be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection;

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;

(F) be construed to prohibit the Commission from issuing nationwide, regional, or local licenses or permits;

(G) be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology; or

(H) be construed to relieve any applicant for a license or permit of the obligation to pay charges imposed pursuant to section 158 of this title.

* * * * *

47 C.F.R. § 76.75

§ 76.75 Specific EEO program requirements.

Under the terms of its program, an employment unit must:

(a) Disseminate its equal employment opportunity program to job applicants, employees, and those with whom it regularly does business. For example, this requirement may be met by:

> (1) Posting notices in the employment unit's office and places of employment informing employees, and applicants for employment, of their equal employment opportunity rights, and their right to notify the Equal Employment Opportunity Commission, the Federal Communications Commission, or other appropriate agency, if they believe they have been discriminated against. Where a significant percentage of employees, employment applicants, or residents of the community of a cable television system of the relevant labor area are Hispanic, such notices should be posted in Spanish and English. Similar use should be made of other languages in such posted equal employment opportunity notices, where appropriate;

> (2) Placing a notice in bold type on the employment application informing prospective employees that discrimination because of race, color, religion, national origin, age or sex is prohibited and that they may notify the Equal Employment Opportunity Commission, the Federal Communications Commission, or other appropriate agency if they believe they have been discriminated against.

(b) Establish, maintain and carry out a positive continuing program of outreach activities designed to ensure equal opportunity and nondiscrimination in employment. The following activities shall be undertaken by each employment unit:

> (1) Recruit for every full-time job vacancy in its operation. A job filled by an internal promotion is not considered a vacancy for which recruitment is necessary. Nothing in this section shall be interpreted to require a multichannel video programming distributor to grant preferential treatment to any individual or group based on race, national origin, color, religion, age, or gender.

(i) An employment unit shall use recruitment sources for each vacancy sufficient in its reasonable, good faith judgment to widely disseminate information concerning the vacancy.

(ii) In addition to using such recruitment sources, a multichannel video programming distributor employment unit shall provide notification of each full-time vacancy to any organization that distributes information about employment opportunities to job seekers or refers job seekers to employers, upon request by such organization. To be entitled to notice of vacancies, the requesting organization must provide the multichannel video programming distributor employment unit with its name, mailing address, e-mail address (if applicable), telephone number, and contact person, and identify the category or categories of vacancies of which it requests notice. (An organization may request notice of all vacancies).

(2) Engage in at least two (if the unit has more than ten full-time employees and is not located in a smaller market) or one (if the unit has six to ten full-time employees and/or is located, in whole or in part, in a smaller market) of the following initiatives during each twelve-month period preceding the filing of an EEO program annual report:

(i) Participation in at least two job fairs by unit personnel who have substantial responsibility in the making of hiring decisions;

(ii) Hosting of at least one job fair;

(iii) Co-sponsoring at least one job fair with organizations in the business and professional community whose membership includes substantial participation of women and minorities;

(iv) Participation in at least two events sponsored by organizations representing groups present in the community interested in multichannel video programming distributor employment issues, including conventions, career days, workshops, and similar activities;

(v) Establishment of an internship program designed to assist members of the community in acquiring skills needed for multichannel video programming distributor employment;

(vi) Participation in job banks, Internet programs, and other programs designed to promote outreach generally (i.e., that are not primarily directed to providing notification of specific job vacancies);

(vii) Participation in a scholarship program designed to assist students interested in pursuing a career in multichannel video programming communications;

(viii) Establishment of training programs designed to enable unit personnel to acquire skills that could qualify them for higher level positions;

(ix) Establishment of a mentoring program for unit personnel;

(x) Participation in at least two events or programs sponsored by educational institutions relating to career opportunities in multichannel video programming communications;

(xi) Sponsorship of at least one event in the community designed to inform and educate members of the public as to employment opportunities in multichannel video programming communications;

(xii) Listing of each upper-level category opening in a job bank or newsletter of media trade groups whose membership includes substantial participation of women and minorities;

(xiii) Provision of assistance to unaffiliated non-profit entities in the maintenance of web sites that provide counseling on the process of searching for multichannel video programming employment and/or other career development assistance pertinent to multichannel video programming communications;

(xiv) Provision of training to management level personnel as to methods of ensuring equal employment opportunity and preventing discrimination;

(xv) Provision of training to personnel of unaffiliated non-profit organizations interested in multichannel video programming employment opportunities that would enable them to better refer job candidates for multichannel video programming positions;

(xvi) Participation in other activities reasonably calculated by the unit to further the goal of disseminating information as to employment opportunities in multichannel video programming to job candidates who might otherwise be unaware of such opportunities.

(c) Retain records sufficient to document that it has satisfied the requirements of paragraphs (b)(1) and (b)(2) of this section. Such records, which may be maintained in an electronic format, shall be retained for a period of seven years. Such records need not be submitted to the Commission unless specifically requested. The following records shall be maintained:

(1) Listings of all full-time job vacancies filled by the cable employment unit, identified by job title;

(2) For each such vacancy, the recruitment sources utilized to fill the vacancy (including, if applicable, organizations entitled to notification pursuant to paragraph (b)(1)(ii) of this section, which should be separately identified), identified by name, address, contact person, and telephone number;

(3) Dated copies of all advertisements, bulletins, letters, faxes, e-mails, or other communications announcing job vacancies;

(4) Documentation necessary to demonstrate performance of the initiatives required by paragraph (b)(2) of this section, if applicable, including information sufficient to fully disclose the nature of the initiative and the scope of the unit's participation, including the unit personnel involved;

(5) The total number of interviewees for each vacancy and the referral sources for each interviewee; and

(6) The date each vacancy was filled and the recruitment source that referred the hiree.

(d) Undertake to offer promotions of minorities and women in a non-discriminatory fashion to positions of greater responsibility. For example, this requirement may be met by:

(1) Instructing those who make decisions on placement and promotion that minority employees and females are to be considered without discrimination, and that job areas in which there is little or no minority or

female representation should be reviewed to determine whether this results from discrimination;

(2) Giving minority groups and female employees equal opportunity for positions which lead to higher positions. Inquiring as to the interest and skills of all lower paid employees with respect to any of the higher paid positions, followed by assistance, counselling, and effective measures to enable employees with interest and potential to qualify themselves for such positions;

(3) Providing opportunity to perform overtime work on a basis that does not discriminate against qualified minority group or female employees.

(e) Encourage minority and female entrepreneurs to conduct business with all parts of its operation. For example, this requirement may be met by:

(1) Recruiting as wide as possible a pool of qualified entrepreneurs from sources such as employee referrals, community groups, contractors, associations, and other sources likely to be representative of minority and female interests.

(f) A multichannel video programming distributor shall analyze its recruitment program on an ongoing basis to ensure that it is effective in achieving broad outreach, and address any problems found as a result of its analysis.

(g) Analyze on an ongoing basis its efforts to recruit, hire, promote and use services without discrimination on the basis of race, national origin, color, religion, age, or sex and explain any difficulties encountered in implementing its equal employment opportunity program. For example, this requirement may be met by:

(1) Where union agreements exist, cooperating with the union or unions in the development of programs to ensure all persons equal