

Nos. 03-3388, 03-3577, 03-3578, 03-3579, 03-3580, 03-3581, 03-3582,  
03-3651, 03-3665, 03-3675, 03-3708, 03-3894, 03-3950, 03-3951 & 03-4073

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

PROMETHEUS RADIO PROJECT, *et al.*,  
*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION, and  
THE UNITED STATES OF AMERICA,  
*Respondents.*

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On Petition for Review of an Order  
of the Federal Communications Commission

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**AMENDED BRIEF FOR CITIZEN PETITIONERS AND INTERVENORS**

**PROMETHEUS RADIO PROJECT, MEDIA ALLIANCE, NATIONAL COUNCIL  
OF THE CHURCHES OF CHRIST IN THE UNITED STATES, FAIRNESS AND  
ACCURACY IN REPORTING, CENTER FOR DIGITAL DEMOCRACY AND  
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**November 13, 2003**

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Third Circuit Local Appellate Rule 26.1 and Federal Rule of Appellate Procedure 26.1, Citizen Petitioners submit this Corporate Disclosure Statement:

Prometheus Radio Project, Media Alliance, National Counsel of the Churches of Christ in the United States, Fairness and Accuracy in Reporting, Center for Digital Democracy, Consumers Union, and Consumer Federation of America have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Respectfully Submitted,

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**TABLE OF CONTENTS**

CORPORATE DISCLOSURE STATEMENT ..... i

TABLE OF AUTHORITIES .....v

JURISDICTIONAL STATEMENT ..... 1

RELATED CASES..... 1

ISSUES PRESENTED..... 1

STATEMENT OF THE CASE ..... 2

STATEMENT OF THE FACTS..... 2

    A. History of Broadcast Media Concentration Regulation ..... 3

    B. Early Deregulation Initiatives ..... 6

    C. Section 202(h) And The Telecommunications Act of 1996..... 8

    D. The 2002 Biennial Review..... 9

    E. The Media Concentration Decision.....12

        1. The Cross-Ownership Rules ..... 14

        2. The TV Duopoly Rule ..... 15

        3. The Local Radio Rule ..... 15

        4. The National TV Rule..... 16

        5. The Dissenting Votes ..... 16

STANDARD OF REVIEW .....17

SUMMARY OF ARGUMENT .....18

ARGUMENT.....21

I. THE FCC ERRONEOUSLY APPLIED A PRESUMPTION IN FAVOR OF DEREGULATION UNDER SECTION 202(h) .....21

A.	The Fox Decision As Amended On Rehearing Does Not Support the Commission’s Claim that Section 202(h) Creates A Deregulatory Presumption. ....	22
B.	The FCC’s Interpretation of Section 202(h) Is Inconsistent With How the Commission Has Interpreted the Same Language in Other Cases.....	27
C.	The Structure of Section 202(h) Contradicts the FCC’s Construction .....	31
D.	The Traditional Public Interest Standard Should Apply To the Commission’s Decisions In This Case .....	32
II.	THE COMMISSION’S REVERSAL OF ITS CROSS-OWNERSHIP AND OTHER MEDIA CONCENTRATION RULES IS ARBITRARY, CAPRICIOUS AND WITHOUT SUPPORT IN THE RECORD.....	33
A.	The Commission’s Decision to Replace the NBCO Prohibition With the Cross Media Limit Based On a New “Diversity Index” Is Arbitrary and Capricious.....	34
1.	Repeal of the NBCO Rule Is Not Rationally Linked To the Record Evidence .....	34
2.	The Diversity Index Is the Unlawful Product Of Plainly Inadequate Public Notice .....	39
3.	The Commission’s Selection And Weighing of Media For Inclusion In the DI is Not Rationally Related to Its Purpose .....	41
4.	The DI’s Misuse of Antitrust Principles and Measures Is Plainly Erroneous and at Odds with the Public Interest Standard.....	44
B.	The Revised Local TV Ownership Rule Is Arbitrary and Capricious.....	49
1.	The FCC’s Conclusion that the Local TV Rule Is Unnecessary to Ensure Diversity or Localism Is Not Supported by the Record.....	50

2.	The FCC Fails to Justify Its Selection of Numerical Limits for Television Ownership .....	52
3.	The Commission’s Efficiency Justifications Are Without Substantial Record Support.....	55
4.	The Commission Provided Inadequate Notice Regarding Modifications to the Local TV Rule.....	56
C.	The Revised Local Radio Rule is Arbitrary and Capricious .....	58
1.	The FCC’s Determination that the Existing Limits Are Not Too High Is Illusory .....	58
2.	The Decision to Count Noncommercial Stations Is Inconsistent with the Conclusion that Existing Limits Serve the Public Interest .....	60
3.	The Commission Provided Inadequate Notice Regarding the Inclusion of Noncommercial Stations.....	61
D.	The FCC’s Decision To Utilize Bright Line Rules While Refusing To Consider Challenges To Transfers In Compliance With The Rules Violates The Communications Act.....	62
	CONCLUSION .....	64
	STATUTORY ADDENDUM	

## **TABLE OF AUTHORITIES**

### **FEDERAL CASES**

<i>Am. Disabled for Accessible Pub. Transport. v. Skinner</i> , 881 F.2d 1184 (3d Cir. 1989).....	17
<i>Am. Iron &amp; Steel Inst. v. EPA</i> , 568 F.2d 284 (3d Cir. 1977).....	39, 40
<i>Appalachian States Low-Level Radioactive Waste Comm’n v. O’Leary</i> , 93 F.3d 103 (3d Cir. 1996).....	27
<i>Archernar Broad. Co. v. FCC</i> , 62 F.3d 1441 (D.C. Cir. 1995).....	42
<i>Assoc. Press v. United States</i> , 52 F. Supp. 362 (S.D.N.Y. 1943), <i>aff’d</i> , 326 U.S. 1.....	33
<i>Assoc. Press v. United States</i> , 326 U.S. 1 (1945).....	5, 32, 48
<i>AT&amp;T Corp. v. FCC</i> , 236 F.3d 729 (D.C. Cir. 2001).....	45
<i>AT&amp;T Corp. v. Iowa Util. Bd.</i> , 525 U.S. 366 (1999).....	30
<i>Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.</i> , 419 U.S. 281 (1974).....	38
<i>Brown Shoe Co. v. United States</i> , 370 U.S. 294 (1962).....	44
<i>Celcom Communications Corp. v. FCC</i> , 789 F.2d 67 (D.C. Cir. 1986).....	51
<i>Cellular Telecomm. &amp; Internet Assoc. v. FCC</i> , 330 F.3d 502 (D.C. Cir. 2003).....	29
<i>Chevron U.S.A., Inc. v. NRDC</i> , 467 U.S. 837 (1984).....	27
<i>Columbia Broad. Sys., Inc. v. FCC</i> , 412 U.S. 94 (1973).....	32
<i>Complex Horsehead Res. Dev. Co. v. Browner</i> , 16 F.3d 1246 (D.C. Cir. 1994).....	41

<i>Continental Airlines v. CAB</i> , 519 F.2d 944 (D.C. Cir. 1975).....	18
<i>Donovan v. Adams Steel Erection, Inc.</i> , 766 F.2d 804 (3d Cir. 1985).....	18
<i>FCC v. NCCB</i> , 436 U.S. 775 (1978) .....	5, 6, 32
<i>FCC v. WNCN Listeners Guild</i> , 450 U.S. 582 (1981) .....	33
<i>Fox Television Stations, Inc. v. FCC</i> (“ <i>Fox I</i> ”), 280 F.3d 1027, modified on rehearing 293 F.3d 537 (D.C. Cir. 2002).....	<i>passim</i>
<i>Fox Television Stations, Inc. v. FCC</i> (“ <i>Fox II</i> ”), 293 F.3d 537 (D.C. Cir. 2002).....	<i>passim</i>
<i>GTE Serv. Corp. v. FCC</i> , 205 F.3d 416 (D.C. Cir. 2000) .....	30
<i>Humphreys v. DEA</i> , 96 F.3d 658 (3d Cir. 1996).....	17
<i>Matsushita Elec. Indus. Co. v. Epstein</i> , 516 U.S. 367 (1996) .....	27
<i>Mazza v. Sec’y of Dep’t of Health and Human Serv.</i> , 903 F.2d 953 (3d Cir. 1990).....	18
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819).....	29
<i>Metro. Council of NAACP Branches v. FCC</i> , 46 F.3d 1154 (D.C. Cir. 1995) .....	33
<i>Mobay Chem. Corp. v. Gorsuch</i> , 682 F.2d 419 (3d Cir. 1982) .....	40
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974) .....	29
<i>Motor Vehicle Mgrs. Ass’n v. State Farm Mutual Auto. Ins. Co.</i> , 463 U.S. 29 (1983) .....	<i>passim</i>
<i>Nat’l Broad. Co. v U.S.</i> , 319 U.S. 190 (1943) .....	4, 6
<i>Natural Res. Def. Council v. EPA</i> , 790 F.2d 289 (3d Cir. 1986).....	39
<i>Red Lion Broad. Co. v. FCC</i> , 395 U.S. 367 (1969) .....	3, 4, 6

<i>Robbins v. Reagan</i> , 780 F.2d 37 (D.C. Cir. 1985) .....	18
<i>Shell Oil Co. v. EPA</i> , 950 F.2d 741 (D.C. Cir. 1991) .....	40, 58, 61
<i>Sinclair Broad. Group, Inc. v. FCC</i> , 284 F.3d 148 (D.C. Cir. 2002) ... <i>passim</i>	
<i>Sullivan v. Stroop</i> , 496 U.S. 478 (1990) .....	30
<i>TVA v. Hill</i> , 437 U.S. 153 (1978) .....	27
<i>United States v. Storer Broad. Co.</i> , 351 U.S. 192 (1956) .....	5-6, 62
<i>W.R. Grace &amp; Co. v. EPA</i> , 261 F.3d 330 (3d Cir. 2001) .....	18

## FCC CASES

<i>1998 Biennial Review Report</i> , 15 FCC Rcd 11,058 (2000) .....	9
<i>2002 Biennial Regulatory Review</i> , 18 FCC Rcd 4726 (2003).....	27, 28
<i>CHET-5 Broad., L.P.</i> , 14 FCC Rcd 13,041 (1999).....	62
<i>Lar Daly</i> , 40 FCC 314 (1960) .....	46
<i>Multiple Ownership of AM, FM and Television Broadcast Stations</i> , 100 FCC 2d 74 (1985) .....	7
<i>Oliver Productions, Inc.</i> , 4 FCC Rcd 5953 (1989) .....	46
<i>Regulations Governing Television Broadcasting</i> , 14 FCC Rcd 12,903 (1999), <i>rev'd Sinclair</i> , 284 F.3d 148.....	8-9, 57
<i>Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets</i> , 16 FCC Rcd 19 (2001).....	8

## STATUTES AND REGULATIONS

5 U.S.C. §§553(b)-(c) .....	2
5 U.S.C. §706(2).....	2, 17, 21
28 U.S.C. §2342-44 .....	1
47 C.F.R. §73.3555(b)(2)(ii) .....	49
47 C.F.R. §73.3555(c).....	49
47 U.S.C. §151 .....	1
47 U.S.C. §154(i).....	30
47 U.S.C. §201 .....	30
47 U.S.C. §303b.....	46, 56
47 U.S.C. §303(r).....	30
47 U.S.C. §307(b).....	3
47 U.S.C. §309(a) .....	62
47 U.S.C. §309 (e) .....	62
47 U.S.C. §310(d).....	62
47 U.S.C. §315 .....	46
47 U.S.C. §402(a) .....	1
Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §2(a)(10), 106 Stat. 1460 (1992).....	4
Second Supplemental Appropriations Act, §304, 98 Stat. 1369 (1984).....	7
Telecommunications Act of 1996, §202, 110 Stat. 56 (1996).....	<i>passim</i>

## MISCELLANEOUS

<i>Black's Law Dictionary</i> 1029 (6th ed. 1990) .....	30
U.S. Dept. of Justice, 1997 Horizontal Merger Guidelines §1.5	44-45, 47, 52
T. Bresnahan & P. Reiss, <i>Entry and Competition in Concentrated Markets</i> , 99 J. Pol. Econ. 997-1009 (1991) .....	60

## **JURISDICTIONAL STATEMENT**

This is an appeal of an agency decision under the Communications Act of 1934, 47 U.S.C. §151 *et seq.* This Court's jurisdiction is based on 47 U.S.C. §402(a) and 28 U.S.C. §§2342-44. The Judicial Panel on Multidistrict Litigation consolidated all petitions for review in this Court on August 19, 2003.

## **RELATED CASES**

Two related appeals, now concluded, have previously been before the federal courts in connection with the media ownership rules at issue in these consolidated cases. *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (“*Fox I*”), *modified on rehearing*, 293 F.3d 537 (D.C. Cir. 2002) (“*Fox II*”), and *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002). Citizen Petitioners are unaware of any other related cases.

## **ISSUES PRESENTED**

1. Whether Section 202(h) of the Telecommunications Act of 1996 requires a “presumption in favor of repealing or modifying” media ownership rules in the Federal Communications Commission’s (“FCC” or “Commission”) biennial review proceedings.
2. Whether the FCC’s modification and repeal of its longstanding media ownership rules is arbitrary and capricious or otherwise not in

accordance with law under the Administrative Procedure Act (“APA”), 5 U.S.C. §706(2).

3. Whether the FCC’s deregulatory actions are inconsistent with its “public interest” obligations under the Communications Act.

4. Whether the FCC violated the notice and comment requirements of the APA, 5 U.S.C. §§553(b)-(c).

### **STATEMENT OF THE CASE**

Citizen Petitioners seek review of the FCC’s Order in 2002 Biennial Regulatory Review, which was conducted under Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (“1996 Act”), and which resulted in the modification and repeal of several rules regulating multiple ownership of broadcast stations.<sup>1</sup> Their Petitions for Review have been consolidated with several other petitions for review of the same Order.

### **STATEMENT OF THE FACTS**

By a vote of 3-2, the FCC in June 2003 issued a controversial decision that radically overhauled longstanding rules promoting competition and diversity by curbing excessive concentration of broadcast media ownership.

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<sup>1</sup> There is no doubt that petitioners have standing, both in their own right, and as representatives of their members. *See* Declarations attached to

The Commission’s new rules on media concentration are contrary to the Communications Act’s standards, including prior federal court decisions construing Section 202(h), and violate the agency’s fundamental administrative mandate to engage in rational, record-based decision-making.

**A. History of Broadcast Media Concentration Regulation**

Broadcast media concentration has been a major concern of the FCC since the early days of radio and is central to the agency’s mission. The Commission is charged under the Communications Act with ensuring “localism” in broadcast media. 47 U.S.C. §307(b). It also has an obligation under the First Amendment—because of the limited number of television and radio licenses that can coexist in constrained broadcast spectrum and the importance of information dissemination to democracy—to ensure that broadcasters “present those views and voices which are representative of [their] community and which would otherwise . . . be barred from the airwaves.” *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389 (1969).

The *quid pro quo* for broadcasters’ right to exclusive use of publicly owned spectrum is their commitment under the Communications Act to serve the “public interest,” because it is “the right of viewers and listeners,

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Motions for Stay filed by Prometheus Radio, Media Alliance and National Council of Churches.

not the right of broadcasters, which is paramount... the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here.”<sup>2</sup> *Id.* at 390. This “trusteeship” theory of broadcast licensing has been a pervasive influence on the FCC’s regulatory approach to media concentration for nearly 70 years. Concerned that national radio networks held too much economic power over affiliates and were therefore impeding the diversity and localism objectives of broadcasting, beginning in the late 1930s the FCC sought to control the power of national radio networks. In *National Broadcasting Co. v. United States*, the Supreme Court affirmed the FCC’s power to regulate radio networks, ruling that the Act’s “public interest” standard is not unconstitutionally vague and that the scarcity of spectrum justifies imposition of public interest obligations on broadcasters. 319 U.S. 190, 226-27 (1943).

Two years later, the Court affirmed the application of the antitrust laws to the media, articulating a broad principle that the First Amendment

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<sup>2</sup> The courts have declined to overrule the spectrum scarcity rationale of *Red Lion*, and Congress has repeatedly endorsed the localism and related public interest obligations of broadcast licensees. *See, e.g.*, Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §2(a)(10), 106 Stat. 1460 (1992). (“A primary objective and benefit of our Nation’s system of regulation of television broadcasting is the local origina-

“rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.” *Assoc. Press v. United States*, 326 U.S. 1, 20 (1945). As Justice Black wrote, “[s]urely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.” *Id.*

Since then, the evolution of broadcast media regulation has continued “on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power.” *FCC v. NCCB*, 436 U.S. 775, 780 (1978). This objective has been implemented “by a series of regulations imposing increasingly stringent restrictions on multiple ownership of broadcast stations.” *Id.*

When adopted, the Chain Broadcasting regulations prohibited network ownership of more than one AM station in the same market. Later, limitations were placed on the total number of licenses an entity may own or control, known as the “7-7-7” rule because it limited a single licensee to no more than seven stations in each of the TV, AM and FM services. *United*

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tion of programming. There is a substantial governmental interest in

*States v. Storer Broad. Co.*, 351 U.S. 192 (1956). Finally, the FCC prohibited common ownership of a VHF television station and any radio station serving the same market and, in 1974, barred broadcast licensees from owning or controlling newspapers in the same geographic markets.

All of these rules—including the newspaper-broadcast cross-ownership prohibition—were affirmed by the courts under the same public interest and First Amendment principles developed in *Red Lion*, *National Broadcasting and Associated Press*. “Requiring those who wish to obtain a broadcast license to demonstrate that such would serve the ‘public interest’ does not restrict the speech of those who are denied licenses; rather, it preserves the interests of the ‘people as a whole . . . in free speech.’” *NCCB*, 436 U.S. at 800 (1978) (quoting *Red Lion*, 395 U.S. at 390).

### **B. Early Deregulation Initiatives**

Beginning in the 1980s, the FCC adopted a softer approach to media regulation, overturning or scaling back a series of regulations, such as the prime time access and syndication and financial exclusivity rules, which had served to limit the economic power of the national networks by constraining network-produced content. But the FCC’s attempts to act directly on broadcast media concentration limitations met a very different fate.

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ensuring its continuation.”)

In 1984, the Commission proposed to repeal all national broadcast ownership limits after six years, during which time a transitional “12-12-12” cap was to be employed. Congress reacted promptly by imposing a six-month moratorium on the new rules. Second Supplemental Appropriations Act, Pub. L. No. 98-396, §304, 98 Stat. 1369 (1984). During the moratorium, the FCC adopted a new TV “audience reach” limit, under which no licensee could operate television stations reaching more than 25% of the nation’s TV households. *Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC2d 74, 76 (1985). The Commission also held that UHF television stations should not carry the same weight in audience share measures, due to “the inherent physical limitations of this medium,” and therefore applied a 50% “discount” to UHF audiences for purposes of the new share-based concentration rules. *Id.* at 93-94.

It was not until 1989 that the FCC initially eased its “one to a market” radio rule, allowing waiver requests for TV-radio cross-ownership in the 25 largest television markets. For the first time, these cross-ownership revisions introduced the concept of market “voices,” permitting consolidation so long as there were 30 independently-owned broadcast “voices” in the market. In 1992, the FCC went further, adopting a tiered approach to radio concentration that allowed ownership of two AM and two

FM stations in the largest markets. *See generally Rules and Policies Concerning Multiple Ownership Of Radio Broadcast Stations in Local Markets*, 16 FCCRcd 19,861, 19,862-68 (2001).

**C. Section 202(h) And The Telecommunications Act of 1996**

In 1996, Congress undertook the most sweeping revisions of the Communications Act since it was enacted in 1934. The Telecommunications Act of 1996 eliminated all limits on national radio ownership and retained the national television audience reach cap first established by the Commission in 1984, but raised it from 25% to 35%. 1996 Act §202(c)(1). Congress also significantly eased local radio ownership limits, establishing a four-tier sliding scale limit depending on market size. *Id.* §202(b)(1).

The 1996 Act did not modify the local TV ownership rules, but instead directed the FCC to “conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate” those rules. *Id.* §202(c)(2). In 1999, the Commission responded by permitting local TV “duopolies”—common ownership of two TV stations in any market—so long as one of the stations was not among the four highest-rated and there remained eight independently-owned television “voices.” *Regulations Governing*

*Television Broadcasting*, 14 FCCRcd 12,903 (1999), *rev'd Sinclair*, 284 F.3d 148.

The 1996 Act also included Section 202(h), which directed the FCC to conduct biennial reviews of its broadcast concentration rules and “to determine whether any of such rules are necessary in the public interest as the result of competition.” Of importance to this case, Section 202(h) instructs that “[t]he Commission shall repeal or modify any regulation it determines to be no longer in the public interest.” The Commission’s first “biennial review,” which retained the 35% national ownership cap, was reversed by the D.C. Circuit. *1998 Biennial Review Report*, 15 FCCRcd 11,058 (2000), *rev'd., Fox I*, 280 F.3d 1027, *modified on rehearing, Fox II*, 293 F.3d 537.

#### **D. The 2002 Biennial Review**

The FCC conducted its first two biennial review proceedings by issuing Notices of Inquiry, general requests for public input that do not propose adoption or revision of specific regulations. However, it initiated the 2002 Biennial Review, which led to the Order under consideration here, by issuing a Notice of Proposed Rulemaking (“NPRM”). Yet the NRPM proposed no specific rule changes and asked only a series of general questions related to media concentration and market changes.

Commissioner Martin cautioned that the NPRM should have “provide[d] more guidance to industries and consumers regarding our direction.”

JA3522.

The media concentration docket was one of the largest and most complex proceedings ever conducted by the FCC. The Commission consolidated the records of its national television ownership and local duopoly dockets, on remand from the *Fox* and *Sinclair* decisions, with previously opened dockets on local radio ownership and broadcast cross-ownership. Even so, there were, from the outset, concerns about inadequate notice and insufficient disclosure of the informal, non-scientific consumer research studies conducted by FCC staff and consultants without peer review or comment.

The comment phase of the proceeding was unusually short given the scope of the issues. Comments were due within 60 days of release of the “media ownership working group” studies (“MOWG”), which were conducted by the FCC staff and outside researchers. JA3450. However, when the studies were released on October 2, 2002, the Commission had no plans to permit scrutiny of the actual underlying data. JA3664. The data

sets were finally released to the public on December 4, two days after the original comment deadline.<sup>3</sup>

The Commission also received a tremendous volume of email and written communications from ordinary citizens expressing opposition to changes in the media concentration rules. By the time the Commission voted, the steady stream of public comments had turned into a torrent, with the FCC hearing from nearly two million people opposing the relaxation of the rules but only a few supporting relaxation. JA0396.

As the proceeding continued, it became a matter of increasing concern that the Commission was not collecting essential information. *See, e.g.*, JA4887-88. In early spring 2003, press reports suggested that the Commission was developing a new tool, dubbed the “diversity index,” as a substitute for numerical cross-ownership rules.<sup>4</sup> As public and private

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<sup>3</sup> Public Notice, FCC Releases Additional Data Set for Media Ownership Study, DA02-3353 (Dec. 4, 2002). After extensive negotiations, the FCC on November 5, 2002 agreed to make the survey data available—but under terms of a protective order requiring onsite review using an FCC computer—and the Commission extended the comment period for one month. Public Notice, FCC Adopts Procedures for Public Access to Data, DA02-2980 (Nov. 5, 2002).

<sup>4</sup> *See, e.g.*, Edmund Sanders, *FCC Eyes An Index for Media Mergers*, Los Angeles Times, February 10, 2003, at C1 (reporting that FCC Chairman has offered “reward to first staff economist who can bring him an objective scientific formula...”); Doug Halonen, *FCC “Diversity Index”: Formula to Calculate Ownership*, TV Week, March 3, 2003, at 6 (“It’s as close to

requests that the details of any such mechanism be published for public comment were spurned,<sup>5</sup> members of Congress began to call for “public review of proposed changes.”<sup>6</sup> Two Commissioners also attempted to exercise the customarily honored request that the FCC’s vote be delayed for public comment on the “diversity index.” JA0372-73. The Commission majority, however, held firm to the scheduled June 2, 2003 vote.

### **E. The Media Concentration Decision**

The Order starts from the legal premise that Section 202(h) contains within it a “presumption in favor of repealing or modifying” the ownership rules which “upends” the ordinary *State Farm* doctrine that imposes a high burden on agencies which seek to rescind any of their rules. The Commission cites *Fox* and *Sinclair* as authority for imposing this unusual test, but does not otherwise explain its reasoning. The Order concludes that “a basic tenet of national communications policy [is] that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public,” and that “[a] diverse and robust

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science as we can do,’ said Ken Ferree, one of Mr. Powell’s top lieutenants, last week.”)

<sup>5</sup> See, e.g., JA5148-54, JA 5155-60, and Edmund Sanders, *Fight Brews at FCC on Media Merger Rules*, Los Angeles Times, March 28, 2003, at C1 (reporting that “some commissioners are complaining that Powell is withholding key details” on proposed formula)

marketplace of ideas is the foundation of our democracy.” JA0044. The FCC strongly reaffirms its policy goals of competition, diversity and localism, recognizing the historic roots and statutory emphasis “on ensuring that local television and radio stations are responsive to the needs and interests of their local communities.” JA0060. It emphasizes that localism involves both “the selection of programming responsive to local needs and interests, and local news quantity and quality.” JA0061.

The Commission found that viewpoint diversity, which “refers to the availability of media content reflecting a variety of perspectives,” is “a paramount objective . . . because the free flow of ideas under-girds and sustains our system of government.” JA0048. It also emphasized its traditional assumption of a link between ownership diversity and viewpoint diversity. JA0047.

In uncharacteristically gushing prose, the Commission trumpeted the “explosion” in consumer media choices made possible by cable and satellite television and the Internet over the past two decades, relying extensively on “informal” snap-shot analyses that bore little relation to the other analyses relied upon or submitted to the Commission. *See, e.g.*, JA0069-70. When it turned to specific media concentration rules, the Order held that most of the

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<sup>6</sup> JA5118, JA5146. *See also Three Senators Ask FCC to Allow*

existing ownership restrictions rules were no longer “necessary” to achieve the Communications Act’s goals of diversity, localism and competition.

### **1. The Cross-Ownership Rules**

The Order replaced both the TV-radio and newspaper-broadcast cross-ownership rules (“NBCO”) with the new Cross Media Limit (“CML”), prohibiting newspaper-broadcast and TV-radio combinations only in markets with three or fewer TV stations. JA0216-17. As the pre-release press accounts predicted, the CML is based on the “diversity index,” described as a “method for analyzing and measuring the availability of outlets that contribute to viewpoint diversity in local media markets.” JA0194.

The diversity index purports to identify “at risk” markets using a heavily modified version of the formula for measuring market concentration—the Herfindahl-Hirschman Index or “HHI”—applied by antitrust enforcement agencies to analyze mergers. JA0208. For instance, the diversity index assumes equal market share for all broadcast outlets in a market, directly at odds with standard HHI analysis (which looks at *actual* market share), and therefore does nothing to further the diversity objective of assessing media concentration. The resulting CML standard in fact

eviscerates the cross-ownership restrictions, allowing combinations in “media markets . . . where 97.7% of Americans live.” JA0407.

## **2. The TV Duopoly Rule**

The Order vastly expanded TV “duopolies,” where one broadcaster can own two television stations in a market, making them possible in markets reaching over 95% of viewers. JA0416. The new rules permit common ownership of two TV licenses in any market so long as both stations are not among the top-4 ranked stations. JA0110. Although the NPRM did not indicate that the Commission even contemplated allowing ownership of more than two TV stations per market, the Order allows triopolies (*i.e.*, ownership of three stations) in markets with 18 or more TV stations, which collectively account for more than 25% of the population. JA0416.

## **3. The Local Radio Rule**

The FCC concluded it would tighten the local radio rules by modifying their market definitions, to better protect against concentration. JA0132. However, it also decided, without notice, to count noncommercial stations in addition to commercial stations in determining the relevant cap, JA0131, a change that paradoxically allowed increased consolidation in many markets.

#### **4. The National TV Rule**

The Order increased the national television audience cap, first adopted in 1984 and modified by Congress in the 1996 Act, from 35% to 45%.

JA0233. At the same time, the FCC declined to repeal or modify the 50% “UHF discount.” JA0233-34. As a result, the UHF discount allows a single broadcast owner to reach up to 90% of households nationwide. JA0407.

#### **5. The Dissenting Votes**

The Order was accompanied by two detailed and passionate dissents.

Commissioner Copps wrote:

I dissent on grounds of substance. I dissent on grounds of process. I dissent because today the Federal Communications Commission empowers America’s new Media Elite with unacceptable levels of influence over the media on which our society and our democracy so heavily depend.

JA0367. He stressed that the decision-making process and record development were flawed and that the majority’s reasoning was arbitrary and result-oriented.

Commissioner Adelstein emphasized the majority’s improper statutory analysis and the importance of structural ownership rules in protecting democratic values. He challenged the Commission’s premises, pointing out that localism should not be sacrificed to efficiency, that diversity is more than viewpoints, that innovation depends on openness and new entrants, and that ideas cannot be commoditized. JA0393.

## STANDARD OF REVIEW

Pursuant to the Administrative Procedure Act (“APA”), courts are to hold unlawful administrative decisions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or rules promulgated “without observance of procedure required by law.” 5 U.S.C. §706(2). The arbitrary and capricious standard of review requires a court to determine whether the agency has examined the relevant data and articulated a “rational connection” between the facts found and the choices made.

*Motor Vehicle Mgrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). An administrative decision is arbitrary and capricious if:

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Id.*; *Am. Disabled for Accessible Pub. Transp. v. Skinner*, 881 F.2d 1184, 1201 (3d Cir. 1989); *Humphreys v. DEA*, 96 F.3d 658, 662-66 (3d Cir. 1996).

The arbitrary and capricious standard also requires that an agency’s actions must be supported by “substantial evidence on the record considered as a whole.” *Id.* “[W]e will not search the record to find support for the agency's decision unless its ‘conclusions [are] ... readily apparent’ so that

‘broad inferential leaps of logic [are] not needed to reach the determinations.’” *W.R. Grace & Co. v. EPA*, 261 F.3d 330, 338 (3d Cir. 2001) (citations omitted). A decision characterized by abrupt shifts in policy or failure to acknowledge or address contradictory evidence “triggers scrutiny to ensure that the agency’s change of course is not based on impermissible or irrelevant factors,” *Robbins v. Reagan*, 780 F.2d 37, 48 (D.C. Cir. 1985); *Mazza v. Sec’y of Dep’t of Health and Human Serv.*, 903 F.2d 953, 959 (3d Cir. 1990); *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 809-10 (3d Cir. 1985), or is “a product of ‘result-oriented’ rationalization.” *Continental Airlines v. CAB*, 519 F.2d 944, 957 (D.C. Cir. 1975).

### **SUMMARY OF ARGUMENT**

The Federal Communications Commission has eviscerated a system of media ownership regulation that has protected the free flow of information in our democracy for seven decades. From the outset, the constant evolution of the electronic mass media has made change the rule, not the exception. Because change is not inherently good or bad, the FCC has adjusted its rules over time to encourage new media outlets to develop and flourish while ensuring that all media serve the core statutory principles of localism, competition and diversity.

Until now. In the case before the Court, the FCC has elevated change to be a goal for its own sake, rather than a process that serves the American public.

The Commission first attempts to stack the deck in its favor by asserting that Section 202(h) of the 1996 Telecommunications Act creates a presumption in favor of repealing or modifying its broadcast ownership rules. This, the Commission says, “upends” the Supreme Court’s *State Farm* doctrine which requires agencies to have especially strong, and well explained, grounds for repealing long-standing rules.

Although it does not explain the basis for this assertion, the Commission appears to rely, incorrectly, upon portions of the D.C. Circuit’s *Fox* decision, which were modified on rehearing at the FCC’s request. This purported presumption cannot be reconciled with the FCC’s own readings of Section 202(h) and the public interest standard of the Communications Act.

Even if the FCC were correct in applying its radical revision of the applicable legal standards, its compilation and analysis of the factual record are so replete with errors that they fail any possible legal test. The Commission not only violated the notice and comment requirements of the APA, but its reasoning is arbitrary and capricious.

The Commission based its repeal of all local cross-ownership rules and substitution of a new “cross media limit” upon an untested “diversity index” which is designed to give the appearance of science to a set of illogical and inconsistent assumptions. Among other things, the index irrationally and self-servingly selects which media are included, and assigns relative weights to those media in a manner which does grave injustice to the facts and to the antitrust principles which the FCC claims to have emulated.

The FCC’s analysis of the benefits of its current rules is predicated on a stated goal of improving local news programming, but actually, and irrationally, ignores the impact on local news. Thus, while it does nothing to assess or promote the production of local news on TV, it hypothesizes a competitive market where none exists and, where the record evidence actually demonstrates the opposite.

The Commission also commits reversible error in redesigning its local radio rules. While it devotes considerable effort to developing a new market definition that purportedly closes loopholes and somewhat restricts ownership, the Commission quietly, without soliciting comment, and with little discussion, includes non-commercial radio stations in the relevant universe. This change effectively nullifies any benefits that might have come from the market definition changes.

Finally, the FCC tips the scale in favor of deregulation by articulating an inherently unfair standard that would allow mergers in violation of its rules on a case-by-case basis, but forbid citizens and competitors from opposing mergers on a case-by-case basis.

## **ARGUMENT**

### **I. THE FCC ERRONEOUSLY APPLIED A PRESUMPTION IN FAVOR OF DEREGULATION UNDER SECTION 202(h)**

The FCC based its findings that the broadcast cross-ownership, TV duopoly and local radio rules are no longer appropriate upon an erroneous and unexplained interpretation that Section 202(h) of the 1996 Act creates a “presumption in favor of repealing or modifying the ownership rules.” This presumption, it said, “appears to upend the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule.” JA0041-42 (*citing* 5 U.S.C. §706(2)(A) and *State Farm*, 463 U.S. 29). This interpretation should be rejected for two reasons. *First*, there is nothing in the statute or legislative history that justifies such a radical revision of the Communications Act’s public interest standard and overruling a fundamental principle of modern administrative law. *Second*, in this case, the Commission’s interpretation of the statute contradicts, without explanation, its own previously adopted reading of the same term just two months earlier in a carefully reasoned opinion. Under no

circumstances does Section 202(h) excuse the Commission from its obligations under the APA. Even if the Court were to accept the Commission's notion that Section 202(h) creates a presumption in favor of deregulation, the agency's incomplete, contradictory analyses of media market concentration would still require the Court to overturn these rules as arbitrary, capricious and without substantial record support, as explained further below.

**A. The Fox Decision As Amended On Rehearing Does Not Support the Commission's Claim that Section 202(h) Creates A Deregulatory Presumption.**

Section 202(h) provides that:

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.

The Commission's terse statutory analysis, JA0041, erroneously relies on portions of a D.C. Circuit opinion which was modified on rehearing. In *Fox I*, the court declared that Section 202(h) "is clear that a regulation should be retained *only insofar as it is necessary in, not merely consonant with, the public interest.*" 280 F.3d at 1050 (D.C. Cir. 2002) (emphasis added). Applying that definition, the court also said that "Section 202(h)

carries with it a presumption in favor of repealing or modifying the ownership rules” because “the Commission may retain a rule only if it reasonably determines that the rule is ‘necessary in the public interest.’” *Id.* at 1048.

While the FCC does no more than cite *Fox I* and *Sinclair* in the Order, that is clearly the basis for its assertion that Section 202(h) “upends” traditional administrative law principles. Where an agency reverses course and overrules existing regulations, the APA ordinarily demands a heightened administrative rationale and more exacting judicial scrutiny. As *State Farm* explains:

[a] settled course of behavior embodies the agency’s informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.

463 U.S. at 43 (quotations omitted). Accordingly, “an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.” *Id.*

To the extent that the FCC’s reasoning can be discerned, it apparently holds that *State Farm* does not apply because of the *Fox I* court’s initial declaration that Section 202(h) creates a deregulatory presumption. What

the Commission does not mention, much less explain, is that the FCC itself successfully petitioned the panel to rehear that case, arguing that the court had needlessly ruled that “necessary” means “indispensable.” In response, the D.C. Circuit panel *deleted* the relevant paragraph of its opinion:

Next, Time Warner argues that the Commission applied too lenient a standard when it concluded only that the CBCO Rule “continues to serve the public interest,” *1998 Report* ¶ 102, and not that it was “necessary” in the public interest. Again the Commission is silent, but this time *we agree with Time Warner; the Commission appears to have applied too low a standard*. The statute is clear that a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest.

*Fox I*, 280 F.3d at 1050 (emphasis added). In its place, the court substituted the following paragraph:

Next, Time Warner argues that the Commission applied too lenient a standard when it concluded only that the CBCO Rule “continues to serve the public interest,” *1998 Report* ¶ 102, and not that it was “necessary” in the public interest. Again the Commission is silent, but nonetheless we do not reach the merits of Time Warner's argument. This important question was barely raised by the petitioners and was not addressed at all by the Commission or the intervenors. *Even if “necessary in the public interest” means simply “continues to serve the public interest,” for the reasons given above and below, the Commission’s decision . . . cannot stand.*

*Fox II*, 293 F.3d at 541 (emphasis added). Moreover, the rehearing decision expressly pointed out that the phrase “not merely consonant with . . . the

public interest” in the initial decision was “not necessary to the opinion,” and that its deletion thereby “leaves this question open.” *Id.* at 540.

The FCC’s silence leaves unexplained why it believes that the *Fox* decision’s reference to a “presumption” in any way affects how the FCC is to apply Section 202(h). In the initial decision, the *Fox* court clearly considered the “presumption” to relate only to its *own* options on judicial review. *Fox I*, 280 F.3d at 1047-48. Its only discussion of the “presumption” was in the “remedy” section of the opinion when it considered what action *it* should direct; the court *never* discussed the “presumption” in connection with how the *FCC* should apply Section 202(h). Specifically, the Court held that, because of the “presumption,” reviewing courts have more latitude when reviewing the FCC’s decision to retain a rule under Section 202(h) than they would ordinarily have in reviewing a simple decision not to initiate a rulemaking under the APA. *Id.*, 280 F.3d at 1048. Indeed, it was for this very reason that the *Fox* court held that it had the extraordinary option on review of vacating, rather than merely remanding a rule. *Id.*

Nor does the FCC discuss the impact of the *Fox* rehearing decision on the precedential value of *Sinclair*. In that case, which was issued *after* the initial *Fox* opinion but *before* rehearing was granted, a different panel of the

D.C. Circuit reversed the Commission's 1999 TV duopoly decision. *Sinclair*, 284 F.3d at 152. The panel did not itself construe Section 202(h), but rather cited *Fox* for the proposition that the Act embodies a “presumption” in favor of repealing or modifying media concentration rules.” *Id.* at 159, quoting *Fox I*, 280 F.3d at 1048. In other words, this aspect of *Sinclair* is only as valid as the language upon which it relies.

Thus, the Commission is wrong in its unexplained reliance on *Fox I* and *Sinclair* as authority for applying a “presumption in favor of repealing or modifying its rules.” The purported presumption is a corollary of now abandoned *Fox I* language that had construed the word “necessary” in Section 202(h) to mean “indispensable.” Stripped of the holding, as well as the *Fox* panel's initial declaration that the FCC had “applied too low a standard” because Section 202(h) does not permit retention of a rule which is “merely consonant with” the public interest, the *Fox I* reference to a presumption is mere *dicta*. The D.C. Circuit made this eminently clear by emphasizing on rehearing that it was “leaving this question open.” *Fox II*, 293 F.3d at 540.

**B. The FCC’s Interpretation of Section 202(h) Is Inconsistent With How the Commission Has Interpreted the Same Language in Other Cases.**

When the term “necessary in the public interest” is examined under the Commission’s own reading of the statute, it is clear that Section 202(h) does *not* “upend” the traditional *State Farm* requirement for a greater degree of administrative support when an agency reverses established rules. Indeed, the law is settled that unless a statute plainly overrules judicial precedent—evidently not the case here—it cannot be construed to work such a change *sub silentio*.<sup>7</sup>

Since *Fox II* “left open” the question whether “necessary in the public interest” imposes a higher burden on the FCC for retaining media concentration rules, the agency’s construction of the phrase is entitled to deference under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). See *Appalachian States Low-Level Radioactive Waste Comm’n v. O’Leary*, 93 F.3d 103, 108 (3d Cir. 1996). Its carefully reasoned reading of “necessary in the public interest” in the 2002 Biennial Regulatory Review decision of

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<sup>7</sup> Generally, in “the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.” *TVA v. Hill*, 437 U.S. 153, 190 (1978). See *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996) (“The rarity with which we have discovered implied repeals is due to the relatively stringent standard for such findings,

March 2003 stands in marked contrast to its unexplained adoption of a “presumption” in favor of deregulation here. The FCC is entitled to no deference for the unexplained action in the case now before the Court.

In its *2002 Biennial Regulatory Review* decision, which is cited but not otherwise discussed in the Order, JA0042 (n.15), the Commission formally “t[ook] th[e] opportunity to consider ... what it means for a rule to be ‘necessary in the public interest.’” 18 FCCRcd 4726, 4730 (2003). Interpreting Section 11 of the 1996 Act, which is expressly cross-referenced in Section 202(h) and uses the same operative language, the Commission found that “necessary” means “useful, convenient, or appropriate to the public interest – not strictly essential or indispensable to the public interest.” *Id.* at 4731-32. In this decision, the Commission explicitly addressed *Fox*, and explained why it disagreed with the initial panel decision. *Id.* at 4730. It also rejected the view that “Section 11 obligates the Commission to eliminate immediately any rule that it cannot determine is ‘essential’ or ‘indispensable’ to promoting the public interest.” *Id.*

The Commission has adhered to the same position not once, but twice, in appellate cases, namely that “[a]lthough *Fox* and *Sinclair* allude to a statutory presumption, the court did not endorse a strict construction of the

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namely, that there be an “irreconcilable conflict” between the two federal

‘necessary in the public interest’ standard in either case” and “expressly declined to rule on the meaning of the statutory standard.”<sup>8</sup> *See also Cellular Telecomm. & Internet Ass’n v. FCC*, 330 F.3d 502, 511 (D.C. Cir. 2003) (affirming FCC construction of “necessary” in Section 10(a) of the 1996 Act “because it is difficult to imagine a regulation whose enforcement is *absolutely required* or *indispensable* to protect consumers”) (emphasis in original).

That interpretation is also manifestly correct as a matter of statutory construction. While “necessary” may mean “indispensable,” it can also mean “useful” or “appropriate.” *E.g.*, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819) (“necessary” in the Necessary and Proper Clause means “convenient, or useful”). The word “must be considered in the connection in which it is used, as it is a word susceptible of various meanings,” and while it “may import absolute physical necessity or inevitability,” it may also “import that which is only convenient, useful, appropriate,

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statutes at issue.”); *Morton v. Mancari*, 417 U.S. 535, 549 (1974).

<sup>8</sup> Brief for Respondents in No. 03-1080, *Verizon v. FCC* (D.C. Cir.), at 38, available at <http://www.fcc.gov/ogc/briefs/03-1080.pdf>. The Commission’s brief also said that “the Court in *Sinclair* upheld the bulk of the challenged rule as ‘necessary in the public interest’ without articulating a new or higher public interest yardstick. Although the Court in *Sinclair* remanded certain aspects of the rule, it did so because it found the Commission’s explanation to be ‘deficien[t],’ rather than because it failed to satisfy a stringent public interest test.” *Id.*

suitable, proper, or conducive to the end sought.” *Black’s Law Dictionary* 1029 (6th ed. 1990).

The term “necessary” does not stand alone in Section 202(h), but appears as part of the phrase “necessary in the public interest.” Several sections of the Act likewise direct the FCC to prescribe rules that are “necessary in the public interest,” 47 U.S.C. §201(b), or “necessary in the execution of its functions,” *id.* §154(i), or “necessary to carry out the provisions” of the Act. *Id.* §303(r).<sup>9</sup> All of these provisions enable the FCC to promulgate implementing regulations that are consistent with the public interest; they do not require the agency to make any showing of indispensability. The phrase “necessary in the public interest” should have the same meaning in all these uses because “identical words used in different parts of the same act are intended to have the same meaning.” *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990).

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<sup>9</sup> To be sure, the term “necessary” occurs in other provisions of the Act where context suggests a more restrictive meaning. *See AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366 (1999); *GTE Serv. Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000). But those decisions construed the term “necessary” when it appeared within a “circumscribed statutory provision that seeks to ensure competition in areas of advanced technology in telecommunications,” *GTE Serv. Corp.*, 205 F.3d at 421, not when it appears, as it does in Section 202(h), in reference to the Commission’s general rulemaking authority.

### **C. The Structure of Section 202(h) Contradicts the FCC's Construction**

Nothing in the plain language of Section 202(h) compels the conclusion that it contains a presumption in favor of deregulation. To the contrary, the structure of that section compels the opposite reading.

Section 202(h) has two sentences, each of which address different yet related tasks. The first sentence requires the FCC to “determine” whether “any” media concentration rules “are necessary in the public interest.” The second sentence sets forth what the FCC should do when a rule fails that test, *i.e.*, it should repeal or modify any such “regulation it determines to be no longer in the public interest.”

Now that the Commission has definitively interpreted the phrase “necessary in the public interest” to mean “useful” and not “indispensable,” the term “public interest” as used in the second sentence must be conformed to agree with the meaning it has in the first sentence. It would be utterly illogical to read the “public interest” differently in two consecutive sentences. Moreover, the pairing of these directives – and, particularly, the repetition of the verb “determine” – shows that they are linked. The “determin[ation]” required by the first sentence will form the basis of the decision to repeal or modify in the second. Once “necessary in the public interest” is interpreted to mean “useful” and not “indispensable,” as the FCC and the

courts have appropriately held, the only way to harmonize the two sentences is to apply a traditional, rather than heightened, meaning to the phrase “public interest” in the second sentence.

**D. The Traditional Public Interest Standard Should Apply To the Commission’s Decisions In This Case**

As the Commission itself said about its successful rehearing petition in *Fox*,

As we argued..., this holding is not compelled by the statute or legislative history. Moreover, it would require the Commission to conclude that Congress intended either to modify fundamentally the statutory public interest standard...or to create a dysfunctional scheme in which the agency could adopt rules upon finding them in the public interest, but could retain them for only two years unless they can be shown to meet a higher standard....

18 FCCRcd at 4730, n.21.

The Commission has inexplicably departed from this position, misreading *Fox* to create a deregulatory presumption which does exactly what the Commission earlier said *Fox* did not do, which is “to modify fundamentally the statutory public interest standard.” *Id.*<sup>10</sup>

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<sup>10</sup> Under the public interest standard the Commission is obligated to promote the objectives of the First Amendment. As the Supreme Court has explained, “the ‘public interest’ standard necessarily invites reference to First Amendment principles,” *Columbia Broad. System, Inc. v. FCC*, 412 U.S. 94, 122 (1973), and, in particular, to the First Amendment goal of achieving “the widest possible dissemination of information from diverse and antagonistic sources.” *FCC v. NCCB*, 436 U.S. at 795 (citations omitted); *Assoc. Press*, 326 U.S. at 20. The FCC and the courts have

## II. THE COMMISSION’S REVERSAL OF ITS CROSS-OWNERSHIP AND OTHER MEDIA CONCENTRATION RULES IS ARBITRARY, CAPRICIOUS AND WITHOUT SUPPORT IN THE RECORD

The Commission’s development and application of the rulemaking record is no less result-oriented, and no more rational, than its legal analysis. Despite the Order’s length, it is plainly deficient. Although the FCC properly identified viewpoint diversity and localism as central policy objectives, its conclusion that the NBCO and local TV rules are now unnecessary to achieve those goals hinges on unsubstantiated assertions and faulty, contradictory evidence. The FCC’s adoption of the new CML and use of a “diversity index” in lieu of actual market structure evidence cannot be harmonized with settled principles of competition. None of the FCC’s conclusions meet the Communications Act command to achieve the “public interest” in wide dissemination of information from diverse and antagonistic sources.

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consistently reiterated that the agency’s public interest obligation includes the duty to ensure that the public has access to diverse sources of information. *E.g.*, *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 604 (1981); *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1162 (D.C. Cir. 1995). As Judge Learned Hand elegantly wrote in his district court opinion in *Associated Press*, “it is only by cross-lights from varying directions that full illumination can be secured.” *Assoc. Press v. United States*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff’d*, 326 U.S. 1 (1945).

**A. The Commission’s Decision to Replace the NBCO Prohibition With the Cross Media Limit Based On a New “Diversity Index” Is Arbitrary and Capricious**

Since 1974, the NBCO rule has prohibited a single company from owning a broadcast station and a daily newspaper serving the same community. The Order concluded that the rule is no longer needed to promote viewpoint diversity and replaced it with the CML, which allows common ownership of daily newspapers and broadcast stations in 179 markets representing more than 97.7% of the population. JA0419. Thus, in Philadelphia, for example, the *Philadelphia Inquirer* may now own the first-, fifth- and sixth-ranked TV stations, along with eight radio stations (including all the all-news stations).

**1. Repeal of the NBCO Rule Is Not Rationally Linked To the Record Evidence**

The Order failed to supply a rationale for this dramatic change that meets the *State Farm* standard for an agency’s reversal of direction. The FCC paradoxically found that viewpoint diversity, a principal goal it reaffirmed, “is most easily measured through news and public affairs programming,” JA0048, but nonetheless failed to reflect the real-world availability of local news and public affairs programming in its decision. This failing is particularly conspicuous because the Commission recognized that local news programming “relates most directly to the Commission’s

core policy objective of facilitating robust democratic discourse in the media.” JA0048. In fact, the Commission all but abandoned this goal in choosing not to promote the widest possible dissemination of viewpoints, but instead merely to prevent the complete suppression of ideas. “In the context of evaluating viewpoint diversity, this approach reflects a measure of the likelihood that some particular viewpoint might be censored or foreclosed, *i.e.*, blocked from transmission to the public.” JA0205.

The Order purports to rely on two measures to assess diversity of local content: “the selection of programming responsive to local needs and interests, and local news quantity and quality.” JA0061. Although the Commission recited that the record “provides ample evidence that competing media outlets abound in markets of all sizes, each providing a platform for civic discourse,” JA0184, that is plainly not the case. Virtually every “platform” relied on by the Commission is either irrelevant to local viewpoint diversity,<sup>11</sup> completely unsupported by any record evidence,<sup>12</sup> or

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<sup>11</sup> For example, while cable television systems carry national satellite-delivered networks like CNN, this national programming does not contribute to viewpoint diversity on local issues. Indeed, the FCC decided not to even include cable in the DI. JA0202. Similarly the statistic that some percentage of Americans spend nine hours online per week, without any evidence as to what they are doing online, is irrelevant. The Internet is not a significant source of local news. *See infra* at Part II.A.3.

<sup>12</sup> For example, the Order provides no support for the claim the “many” cable systems carry local public, educational and governmental

directly contradicted by the record.<sup>13</sup> The Order disagreed with “parties that assert that there is little diversity in media markets,” JA0185, but did not explain why and provided no linkage between the national sources the FCC highlights and the “programming responsive to local needs and interests” it found was the benchmark of local media diversity.

The FCC plainly cannot justify repealing the NBCO based on what it describes as the “multimedia landscape” now available to consumers because none of these sources satisfies the localism and diversity objectives of the rule. JA0080-85. Only one paragraph addresses the availability of local news; it finds that the amount of local news per TV station per day has increased since 1980 and that several regional and local news networks had been launched on cable systems. JA0083(¶122). The Commission simply disregards undisputed facts in the record. For example, it ignores the fact that half of all commercial TV stations do not provide news at all,<sup>14</sup> that local radio is diminishing news coverage, JA4838, that few local cable

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channels, and the record indicates otherwise, JA4843, and ignores the fact that few cable systems carry local news. JA5464-65.

<sup>13</sup> *E.g.*, JA0184(nn.829, 835) noting contrary evidence presented by numerous commenters, but failing to explain why its rejection.

<sup>14</sup> Comparing the total number of broadcast stations from BIA Financial Network, 2003 Television Market Report, tbl. 3, with the number of stations that offer news as noted in Fox Comments, Economic Study A, News and Public Affairs Programming Offered by the Four Top-Ranked Versus Lower-Ranked Television Stations.

systems offer a significant quantity of news and information, JA4843-45, and that the Internet is not a source of local news. JA4846-47. Thus, the FCC's conclusion lacks substantial support in the record and violates the APA's basic standard for rational administrative decisions.

The Commission's principal "empirical" evidence is the much-criticized MOWG Study No. 7.<sup>15</sup> This study purports to find that television stations owned by newspaper companies on average provide more and higher quality news programming than other stations. JA0173-74. However, the study does not ask the relevant question. Because many markets still have newspaper-TV combinations that were "grandfathered" when the FCC adopted the NBCO rule, the study could have compared news programming on cross-owned and other TV stations. Instead, it compared TV stations associated with newspaper companies, whether or not they are located in the same market, with TV stations not owned by newspapers. Thus, MOWG 7 cannot support the conclusion that repealing the NBCO rule would lead to *increased* local news.<sup>16</sup>

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<sup>15</sup> See, e.g., CFA Reply Comments, at 22-26 (Feb. 3, 2003), JA4839, JA4868, JA4488.

<sup>16</sup> Although the FCC cites comments that try to extract the relevant data from the MOWG study, JA0173(n.760, citing NAA Comments at 14-15), data from six markets, even if not otherwise questionable, is not statistically significant. The FCC even admits that the "PEJ Study" it cites is

Turning to anecdotal evidence, the Order cites examples from industry comments purporting to show “how efficiencies from cross-ownership translate into better local service,” JA0174-76, while rejecting without explanation comparable evidence from public interest groups that common ownership has *reduced* local news and other local programming. JA0176-78. Thus, the record provides no support for the conclusion that allowing wholesale cross-ownership would benefit the public.

The Order is also internally inconsistent. The FCC’s conclusion that the NBCO rule is no longer necessary for diversity or localism directly contradicts its conclusion in another part of the Order that local radio limits remain necessary to protect viewpoint diversity. JA0131. Not only does the public rely more on newspapers than radio for local news, JA5460-62, but most communities have only one major daily newspaper, while they have multiple radio stations. So, if anything, the FCC’s own analysis demonstrates that the newspaper-broadcast prohibition is more important to promoting viewpoint diversity than the radio rules, which the Order retains.

Where, as here, an agency purports to resolve key factual issues, it must provide an explanation of how it did so, based on the record. *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285

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“statistically insignificant and cannot be considered reliable or convincing

(1974); *Natural Res. Def. Council v. EPA*, 790 F.2d 289, 297-98 (3d Cir. 1986). The Commission’s rescission of the cross-ownership rules thus fails the basic APA requirement that the agency articulate a “rational connection” between its decisions and the record evidence. *State Farm*, 463 U.S. at 43.

## **2. The Diversity Index Is the Unlawful Product Of Plainly Inadequate Public Notice**

In adopting the new CML, the FCC acted in gross violation of the APA’s fundamental requirement to provide adequate public notice of proposed changes to administrative rules. Neither the NBCO NPRM, JA2458, nor the 2002 Biennial Review NPRM, JA3450, set forth or even described the Diversity Index (“DI”) on which the CML is based because the DI was formulated, in secret, after the comment period closed. This foreclosed informed public comment, which in turn might have prevented the many analytical errors infecting the new DI metric.

The purpose of the APA’s notice requirement is to “give the public an opportunity to participate in the rule-making process,” thus enabling an agency “to educate itself before establishing rules and procedures which have a substantial impact on those regulated.” *Am. Iron and Steel Institute v. EPA*, 568 F.2d 284, 291 (3d Cir. 1977). Notice must be “sufficient to fairly apprise interested parties of all significant subjects and issues involved.” *Id.*

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evidence.” JA0174(n.766).

(citation omitted). *See also Mobay Chem. Corp. v. Gorsuch*, 682 F.2d 419, 427 (3d Cir. 1982).

This case typifies the type of “generalities” this Court and others have routinely condemned. At best, the NPRM indicated the FCC was looking for a “new metric” and asked only “what other measures of diversity, quantitative or qualitative, should we consider.” JA3467. The first time the public even heard about possible use of a DI was in trade press reports, and the Commission rejected subsequent requests that the DI be released for public comment. It is settled that “under the standards of the APA, notice must necessarily come—if at all—from the Agency.” *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991). The DI therefore cannot stand because the Commission never provided any notice, let alone notice sufficient to fairly apprise interested parties about the central analytical measure adopted in the Order. *Am. Iron*, 568 F.2d at 284.

Because the Commission did not give adequate notice of this and other important modifications, *see infra* Parts II.B.4, C.3., and the rules are interrelated such that “any change to one rule may affect the need for other rules to be retained, modified, or eliminated,” JA3453-54, “at no point was the public able to evaluate and comment upon how all these rule changes might work in concert.” JA0427. Thus, the notice for the entire proceeding

was inadequate. *See Complex Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1267-68 (D.C. Cir. 1994).

### **3. The Commission's Selection And Weighing of Media For Inclusion In the DI is Not Rationally Related to Its Purpose**

While the Order concludes that diversity is best measured by local news, the DI includes media with little or no local news or which provide content that duplicates existing local sources. As a result, the DI fails to achieve the Commission's stated objectives and violates the *State Farm* requirement that decisions exhibit a rational connection between facts found and the agency's policy choices.

The DI accords a home shopping station with no news the same significance as a local TV station with the leading news department. It counts all radio stations, even though the record demonstrates that many radio stations provide no news and the amount and diversity are declining.<sup>17</sup> It includes the Internet, even though the record shows it is predominantly an alternative means to access *national* news *already* provided by major media

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<sup>17</sup> CFA NBCO Comments at 85 n.155. For instance, UCC cited a study by the Radio and Television News Directors Association showing that between 1994 and 2001, the number of full-time and part-time staff in radio newsrooms decreased an average of 43.8% and 71.4% respectively. JA4839-40.

companies.<sup>18</sup> Indeed, the Commission’s MOWG Study No. 3 emphasized that the Internet is inherently a “nonlocal” medium, JA3561, JA3566-67, and neither of the examples of Internet news sources cited by the Order —the *Drudge Report* and *Salon*—provide local news. JA0207.

Counting the Internet as a separate news source also contravenes the Commission’s goal of preserving distinct editorial viewpoints, JA0194, and dramatically skews the results. For example, despite the FCC’s characterization of the impact of including the Internet as “relatively small,” JA0207, including the Internet in the DI for New York gives it more weight than the top eight TV stations in the market combined, since each TV station has a weight of 1.5% compared to the Internet’s total weight of 12.5%. JA0306. The FCC’s choice of media sources for the DI thus epitomizes agency action to which “no deference is due [because] the agency has stopped shy of carefully considering the disputed facts.” *Archernar Broad. Co. v. FCC*, 62 F.3d 1441, 1447 (D.C. Cir. 1995).

After deciding what media to include in the DI, the Commission assigns weights as follows: broadcast TV 33.8%, daily newspapers 20.2%, weekly newspapers 8.6%, radio 24.9% and Internet 12.5%. JA0201-03,

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<sup>18</sup> See JA4816; CFA Newspaper Reply Comments at 87 (citing Media Metrix study).

JA0306. These weights overstate the importance of radio and the Internet, while understating the importance of TV and daily newspapers.

To derive its “weights,” the Commission relied primarily on a consumer survey by Nielsen Media Research, known as MOWG Study No. 8, that included several questions regarding which sources consumers use for news. JA0197-98. However, the survey questions were not designed to elicit the information needed to construct the DI,<sup>19</sup> nor were the questions worded to gather reliable data.<sup>20</sup>

Even industry commenters questioned the validity of this study. JA0198, JA5535-53 (statement of Professor Jerry A. Hausman submitted by Media General, May 28, 2003). Moreover, these weights are inconsistent with the Commission’s conclusion elsewhere that newspapers and TV stations are the dominant sources for local news, JA0172, and with record

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<sup>19</sup> For example, Question 10 asks “what single source do you use most often for local and national news and current affairs?” The survey never asks what sources used most often for local news only, even though local news is the focus of the DI.

<sup>20</sup> For example, Question 1 asked “What source, if any, have you used in the past 7 days for local news and current affairs?” This question fails to establish which is the primary local news source, permitting respondents to list every possible source regardless of importance. The results therefore incorrectly suggest that every source is equally significant. The poll further skewed the results by following up with “In the past 7 days, have you used the Internet for local news and current affairs?” — a question posed only to those who did *not* list the Internet in response to Question 1. These

evidence demonstration the TV and newspaper dominate the news media market. JA5460-64, JA3066. Thus, the FCC failed to draw a rational connection between the record and its conclusions.

#### **4. The DI's Misuse of Antitrust Principles and Measures Is Plainly Erroneous and at Odds with the Public Interest Standard**

The DI is modeled on the antitrust concentration index, known as the "HHI," employed by the Justice Department and Federal Trade Commission to assess the competitive impact of mergers and acquisitions. The Order considerably modified the HHI, purportedly to better reflect the special needs of diversity analysis under the Communications Act. In fact, the opposite is the case. The Commission's modifications to the HHI result in a meaningless formula that contradicts mainstream antitrust analysis and fails to reflect the quite different roles of communications regulation and antitrust.

First, the Commission chose to calculate the DI based on an assumption of *equal market shares* for every media outlet in the market. JA0208. It is a bedrock principle of antitrust that the competitive effect of mergers is decided by reference, in the first instance, to market share. *Brown Shoe Co. v. United States*, 370 U.S. 294, 343 (1962); DOJ/FTC 1997

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inaccurate questions magnify the prevalence of Internet use, incorrectly

Horizontal Merger Guidelines §1.5. As the DI and HHI both mathematically total the squared market shares of every firm, assuming equal shares causes the DI to be artificially low, leading to absurd results.<sup>21</sup> For example, in New York, the Dutchess County Community College TV station receives 50% *more* weight in the DI than the *New York Times* and equal weight with the local ABC television affiliate. The FCC has elsewhere held that actual market share figures are required to assess competition, *see AT&T Corp. v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001), and there is no theoretical or factual reason to differ where diversity is at issue. Media outlets with greater market share clearly have a louder voice.

The FCC offers two meager justifications for attributing equal market shares. The Commission first claims that current share is not an accurate predictor because “media outlets can rapidly expand their distribution of content (including local news and current affairs) at very low marginal cost.” JA0206. Yet, this ignores the fact that in another part of the Order, the Commission credits studies showing the rising costs of producing news and public affairs programming. JA0102-04. Moreover, the FCC

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portraying it as a meaningful local news source.

<sup>21</sup> Emphasizing that market share equates to advertising revenue, and revenue equates to publishing power, intervenors CFA and CU provided detailed analysis on the record showing the FCC’s position on equal market

relies extensively on market share as the basis for the top-4 restriction in the local TV rule, JA0113-14, and in other parts of the Order,<sup>22</sup> indicating that its hesitancy here is based on something other than an objective concern with the validity of market share analysis.

The Commission then suggests that employing market share measures in the DI would require it to maintain programming information that would “present both legal/Constitutional and data collection problems.” JA0206. The FCC offers no legal analysis or case law in support of this assertion. In fact, its MOWG study No. 7 and other studies not only collected such information, but encountered no difficulty comparing the amount of news provided by network and non-network owned TV affiliates.<sup>23</sup>

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shares to be fallacious as a matter of both theory and market reality. JA5460-83.

<sup>22</sup> For example, to justify allowing more same-market television combinations, the FCC cites an “increase in viewership of the lower-ranked of the two stations in the combination, evidencing a welfare enhancing effect for consumers.” JA0112-13. Similarly, the FCC concludes, based on market share trends, that broadcasters and newspapers are suffering and must be allowed to merge in order to preserve their economic viability. JA0181.

<sup>23</sup> JA 3568. The FCC routinely makes similar determinations. For example, it declares certain programs to be *bona fide* news programs under Section 315 of the Act. *See, e.g., Oliver Productions, Inc.*, 4 FCCRcd 5953 (1989) (ruling that “The McLaughlin Group” is a *bona fide* newscast); *Lar Daly*, 40 FCC 314 (1960) (finding that NBC’s “Today Show” qualifies as a *bona fide* news interview). *See also* 47 USC §303b(a)(2) (requiring FCC to

Second, in modifying the HHI, the Commission arbitrarily departed from the normal antitrust criteria for identifying competitively risky combinations. For antitrust purposes, a 100-point increase in the post-merger HHI triggers further review, DOJ/FTC 1997 Horizontal Merger Guidelines §1.5, while the DI only considers increases of *at least 400 points* to be of concern. JA0215. The FCC explains this inconsistency by noting that the Justice Department has not “filed suit to block a merger that produced less than a 400 or more point HHI change” in “many years.” JA0215. This ignores the fact that antitrust authorities engage in case-by-case review of mergers that increase the HHI by 100 points, and if the government announces its intent to challenge a merger, the vast majority of mergers are modified by consent decrees or abandoned, thus mooting the need for litigation.

More importantly, the antitrust function of the HHI and the prophylactic purpose of the FCC’s media concentration rules are markedly different. Regulatory limits on concentration are designed to avoid combinations that may result in loss of viewpoint diversity, whether or not they rise to the level of a Clayton Act antitrust violation. The FCC’s opposite approach undermines one of the most obvious implications of First

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consider extent to which TV stations provide children’s educational

Amendment jurisprudence, that democratic discourse demands more protection than mere commerce.<sup>24</sup> The FCC has previously adhered to the position, endorsed by the courts, that the antitrust merger guidelines “might be too low as their purpose lay in defining the point at which antitrust scrutiny is required, and not in encouraging a wide array of voices and viewpoints.” *Sinclair*, 284 F.3d at 153.<sup>25</sup> To suggest, as the Order holds, that a regulatory approach for promoting diversity of viewpoint should allow more consolidation than the applicable antitrust merger standard is backwards.

Third, the DI yields results that are absurd on their face. At the end of this process, the FCC adopts a “bright line” rule that allows cross-ownership so long as a market has three television stations. It matters not whether the proposed merger is between a daily newspaper with small circulation and a low-rated television station with no local news program (which might

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programming).

<sup>24</sup> *See, e.g., Assoc. Press v. United States*, 326 U.S. 1, 27 (1945) (Frankfurter, J., concurring) (“Truth and understanding are not wares like peanuts and potatoes. And so, the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect.”) *See also* JA5051-66.

<sup>25</sup> “Congress may, in the regulation of broadcasting, constitutionally pursue values other than efficiency—including in particular diversity in

benefit the public by allowing the television station to begin offering local news), or whether the merger is between the only daily newspaper and the only television station with a local news program (thus resulting in a clear diminution of diversity and competition in local news). For example, the new rules would allow a Philadelphia TV station with 395,000 daily viewers to merge with a newspaper with 405,000 readers, but would prohibit a TV station with 275,000 daily viewers from merging with a TV station with 200,000 daily viewers. The DI therefore typifies arbitrary and capricious agency decision-making and should be vacated.

**B. The Revised Local TV Ownership Rule Is Arbitrary and Capricious**

In modifying the local TV ownership rule, the Commission acted in part on remand from the *Sinclair* case. There, the court of appeals affirmed that “the local ownership rule furthers diversity at the local level and is necessary in the ‘public interest’ under §202(h),” but held that the FCC had not justified different definitions of “voices” in the local television and radio-TV cross-ownership rules. *Sinclair*, 284 F.3d at 160, 162.<sup>26</sup> However,

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programming, for which diversity of ownership is perhaps an aspirational but surely not an irrational proxy.” *Fox I*, 280 F.3d at 1047.

<sup>26</sup> The local television ownership rule counts only independently-owned full-power broadcast television stations as “voices,” 47 C.F.R. §73.3555(b)(2)(ii), while the radio-TV cross-ownership rule counts TV, radio, daily newspapers, and the cable system as “voices.” *Id.* §73.3555(c).

the Commission’s decision below to eliminate the duopoly rule is based not on any remand directive, but rather on the FCC’s unsupported conclusion that “other” media are adequate to promote viewpoint diversity. Like the broadcast cross-ownership rules, the new local TV ownership rule is the product of arbitrary reasoning and faulty notice and must be reversed.

**1. The FCC’s Conclusion that the Local TV Rule Is Unnecessary to Ensure Diversity or Localism Is Not Supported by the Record**

The Commission’s repeal of the local TV duopoly rule is premised on two erroneous and unsupported assumptions. First, the FCC “find[s] that media other than television broadcast stations contribute to viewpoint diversity in local markets” and that “the majority of markets have an abundance of viewpoint diversity.” JA0104. Once again, however, the Commission’s broad-sweeping rhetoric is not matched by evidence in the record. The Order cites none, and as discussed above the “multimedia landscape” the Commission describes is in no way linked to the localism and diversity objectives of the Act. *See* Part II.A.2 *supra*.

The Commission’s second irrational assumption is that rules designed to foster competition will necessarily ensure viewpoint diversity. It explains:

because markets defined for competition purposes (*i.e.*, defined in terms of which entities compete with each other in economic terms) are generally more narrow than markets defined for diversity purposes (*i.e.*, defined in terms of which entities

compete in the dissemination of ideas), our ownership limits on radio and television ownership also serve our diversity goal. By ensuring that several competitors remain within each of the radio and television services, we also ensure that a number of independent outlets for viewpoint will remain in every local market, thereby ensuring that our diversity goal will be promoted.

JA0085-86. This premise is demonstrably untrue. Every commercial broadcast station sells advertising time. Yet only half of all commercial stations air local news programming, JA4601, which is the accepted focus of diversity. JA0098. Because this assumption is manifestly inaccurate, the Commission's conclusion that the local TV rule is unnecessary for viewpoint diversity must fail.

The FCC's conclusion that the local TV rule is not necessary to ensure localism also lacks substantial record support. The Commission accepts suggestions by industry commenters that allowing local consolidation will give stations greater resources to provide more or better quality local news, JA0098-100, yet ignores or rejects competing evidence that common ownership has actually reduced local news and other local programming. JA0100-01. Where an agency resolves disputed factual issues without explaining its record basis for doing so, it violates the APA. *See, e.g., Celcom Communications Corp. v. FCC*, 789 F.2d 67, 71 (D.C. Cir. 1986).

## 2. The FCC Fails to Justify Its Selection of Numerical Limits for Television Ownership

In developing the new local TV rule, the Commission once again looked to the HHI used in merger analysis, this time selecting an HHI of 1800 as the benchmark for competitively suspect combinations. This threshold is at the upper limit of the region the Merger Guidelines define as “moderately concentrated” and above which the antitrust agencies are “likely” to challenge a merger. (Indeed, the Merger Guidelines express concern about the competitive impact of mergers in markets with HHIs of 1000, which is the equivalent of a market with 10 equally-sized competitors.) DOJ/FTC 1997 Horizontal Merger Guidelines §1.5. Nonetheless, the FCC’s approach provides *blanket* approval to all such transactions in compliance with its rule, regardless of actual market impact.

As with its cross-ownership analysis, the FCC simply assumed equal-share TV stations for expediency, ignoring reality. Thus, the Commission explains that a market with 18 television stations could have 6 owners each owning 3 stations, or that a market with 12 stations could have 6 owners with 2 stations each, and that in each case HHI would not exceed 1800. On that esoteric basis, the Order permits triopolies in all markets with 18 or more TV stations, and duopolies in all other markets, subject only to a prohibition of mergers among two top-4 stations. JA0087.

Although agency line-drawing deserves some deference, this explanation is so irrational that it must be rejected. Television market shares vary widely, and that variation has a pronounced impact on the actual HHI of any given market. Indeed, the Commission admits as much in noting the disparity in audience size between the top four and other stations. JA0113. In the case of New York, which is the *least* concentrated market for which the Commission identified TV stations, JA0306-19, the current market is already just below the upper limit of the moderately concentrated zone, with an HHI of 1624. The Commission's new rules irrationally allow duopolies and triopolies to drive that HHI to over 2800, with no prior review or approval.<sup>27</sup>

In Philadelphia, for example, Viacom owns KYW-TV (CBS) and WPSG (UPN), giving it a market share of 25%. Since there are 19 stations in this market, Viacom could also purchase fifth-ranked WPHL. Although this market is already highly concentrated, with an HHI of 2037, the newly-formed triopoly would give Viacom a 34% viewing share, and increase the HHI level by 450 points to 2487.

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<sup>27</sup> All HHI analyses are performed using data from BIA Financial Network, Investing In Television Market Report 2003 (5th ed. 2003).

In Harrisburg, the top five television stations have market shares of 40, 21, 20, 15 and 4%, respectively. If the first ranked station were to acquire the fifth ranked station, which the FCC's new rule permits, it would have a combined market share of 44% and cause the HHI to rise to 3002 from 2682.

Such mergers, which cause concerns under the antitrust laws, should raise even greater concern in the context of diversity analysis, but the Commission gives them a free pass. Nor can antitrust authorities, who concern themselves primarily with commercial matters, be counted upon to give proper consideration to diversity and localism concerns.

While the FCC's refusal to base its analysis on the actual audience share of the stations, relying instead on a mere "head count" of outlets, thoroughly distorts the analysis, its inability even to consistently count outlets compounds the arbitrariness of the new rule. Under the NBCO rule, the Commission counts each UHF station the same as VHF stations. Here, where it serves its purposes, the Commission gives UHF stations full weight, yet in creating the national TV ownership rule, UHF stations are treated as half. JA0233.

The inconsistent treatment of market share within and between the rules renders them arbitrary and capricious. The Commission based its

decision to ban mergers among top-4 local TV stations and top-4 national networks on their audience size and other qualitative characteristics, finding that they are anticompetitive, *e.g.*, JA0114, JA0116, JA0271-73, distort markets, JA0113-14, JA0269-73, and provide no public interest benefits. JA0113-14, JA0274. Yet it inexplicably presented no analysis of the audience share and other characteristics of TV-newspaper combinations, which have the same effects on local media markets.

### **3. The Commission’s Efficiency Justifications Are Without Substantial Record Support**

The Commission attempts to justify such high levels of concentration on the ground that ownership of multiple same-market stations can lead to operating efficiencies. JA0112-13. It finds that the high cost of local news and public affairs programming threatens existing programming and “precludes the development of new programming.” JA0097. However, the FCC engaged in virtually no analysis of the type or quality of news offered, and the few facts it cites do not justify its conclusion. *See* Part II.A.1 *supra*.

In contrast, the FCC adopted clear rules to ensure improved program production elsewhere *in the same rule*. The Order requires an applicant seeking to own more than one top-4 TV station to demonstrate affirmatively that the proposed combination will produce public interest benefits, and for license renewal requires the applicants to produce “a specific, factual

showing of the program-related benefits that have accrued to the public.”

JA0128. The justifications for both rules are the same: that operating efficiencies will increase news production. But the FCC does not explain why it inconsistently assumes that some (smaller market) stations will necessarily increase news production while other (larger market) stations must make a specific showing to justify consolidation.

While the efficiency rationale looks to an increased *amount* of local news over *diversity* in local news, the record does not support the claim that mergers increase the quantity of news in the market. CFA Reply Comments, at 22-26 (Feb. 3, 2003). Moreover, under this curious analysis, the Commission equates the public interest in two television stations repeating the same news program with that of two independently produced news programs covering different issues and presenting different perspectives. This conclusion is in direct contrast to the FCC’s finding that it was unacceptable for two stations to rely on the same children’s educational programming to meet their obligations under 47 USC 303b(a). JA0109.

#### **4. The Commission Provided Inadequate Notice Regarding Modifications to the Local TV Rule**

The Commission failed to give adequate notice regarding two important modifications to the TV duopoly rule. One modification allows, for the first time ever, common ownership of *three* television stations

serving the same area (“triopolies”). The other modification amends the waiver criteria to make it easy for an owner to buy other stations in the same market.

The public did not and could not fairly have anticipated that the FCC would allow triopolies. The 2002 NPRM sought comment only on three alternatives: “(1) case-by-case approach; (2) outlet specific rules; and (3) a single local media ownership rule covering all outlets.” JA3485. As Commissioner Adelstein observed, “strictly on the basis of empirical evidence of common ownership of two television stations, the majority leaps ahead to triopolies.” JA0416.

In fact, until renamed, the local TV rule was known as the “duopoly rule,” precisely because it prohibited common ownership or control of *two* TV stations serving the same area. *See, e.g.*, JA0086-87, JA3474-75. Until 1999, ownership of only two stations was prohibited except under restrictive waiver standards. *Regulations Governing Television Broadcasting*, 14 FCCRcd 12,903 (1999).

The Commission also modified the criteria for waivers without mentioning that possibility in the NPRM. The Order states that it expanded the waiver standard at the request of NAB and other commenters. JA0127.

However, comments do not constitute adequate notice. *Shell Oil*, 950 F.2d at 751.

The new waiver standard will make it extremely difficult for any new potential entrant, including minorities and women, to purchase a television station and thus has a significant effect on diversity, localism and competition.

**C. The Revised Local Radio Rule is Arbitrary and Capricious**

In analyzing the Commission’s local radio limits, the Order concludes that the ownership tiers established in the Act continue to promote the public interest in competition and “decline[s] to relax the rule to allow greater consolidation in local radio markets.” JA0149-50. In actuality, however, the Commission arbitrarily and capriciously permits additional consolidation in many radio markets by counting noncommercial radio stations in local markets. JA0131.

**1. The FCC’s Determination that the Existing Limits Are Not Too High Is Illusory**

The Commission concludes that the existing tiered local radio limits ensure sufficient competition on the ground that “economic theory and empirical studies suggest that a market that has five or more relatively equally sized firms can achieve a level of market performance comparable to

a fragmented, structurally competitive market.” JA0150. This “five competitor” approach suffers from same defect discussed above at 41-43 because the Commission assumes a “market with five or more relatively equally sized firms,” JA0150, when the record shows that in most markets, the top two stations dominate and that there may be very few other radio station owners of measurable size. JA3275-78. For instance, in Philadelphia, the top two radio station owners control 55.5% of the local commercial audience share. UCC Radio Comments, Attach. 1 at 20 (Mar. 26, 2002) *See also* JA0150-52 (FCC finds top two firms in Los Angeles get 60.2% of revenue).

This analytical approach is also contradicted by the economic literature. The Commission relies on a handful of economic studies, JA0150, that simply do not support its conclusion. Two of the three articles cited are theoretical, involving no data whatsoever. All three precede, and conflict with, the most recent rewrite of the Merger Guidelines by suggesting that the moderately concentrated threshold should be set at 2000, the equivalent of five equally-sized competitors. While the articles examined the nuances of oligopolistic markets, the strongest conclusion reached in the only article that involves empirical analysis is that more

competitive markets are to be preferred.<sup>28</sup> It finds that “[W]hile prices level off between three and five dealers, they are higher than unconcentrated market prices. Thus, it appears that there are other intermediate ranges of concentration in which entry increases competition and lowers prices.”<sup>29</sup>

The Commission cannot disregard these findings without discussing whether the oligopolistic market structure it accepts adequately achieves its express goal of promoting robust democratic discourse, when the very studies it relies upon demonstrate that more players in the market yield competitive benefits.

## **2. The Decision to Count Noncommercial Stations Is Inconsistent with the Conclusion that Existing Limits Serve the Public Interest**

Section 202(b) of the 1996 Act specifies that radio markets are only to include “commercial radio stations.” Counting noncommercial radio stations significantly raises the number of commercial stations that can be owned under the local radio rules. On average, one-quarter of the radio stations in a given market are comprised of noncommercial stations, many of which have limited reach. *Ex Parte* Notice of Viacom, at 8 (May 5, 2003). For example, the Philadelphia metro market has 40 commercial radio

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<sup>28</sup> T. Bresnahan & P. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. Pol. Econ. 997-1009 (1991).

<sup>29</sup> *Id.* at 1006.

stations, which allows one broadcaster to own up to seven stations. By including the 19 noncommercial stations, the Philadelphia market is put into the top ownership tier that allows one owner to have eight radio stations. Thus, while it professes to maintain the 1996 Act's radio ownership limits, the "fine print" of the Commission's decision does exactly the opposite.

### **3. The Commission Provided Inadequate Notice Regarding the Inclusion of Noncommercial Stations**

The FCC also failed to give adequate notice of this significant modification of the local radio rule. In none of the three *Notices* related to the radio rule did the Commission propose or even mention counting non-commercial stations. The single paragraph in the Order explaining the inclusion of noncommercial stations cites two *ex parte* submissions by Viacom. JA0153. However, because proposals made in comments do not constitute adequate notice, *see Shell Oil*, 950 F.2d at 751, proposals in *ex parte* letters filed less than a month before the decision *a fortiori* cannot constitute sufficient notice under the APA.<sup>30</sup>

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<sup>30</sup> An explanation of the FCC's somewhat atypical informal rulemaking practice may be of assistance to the Court. Many federal agencies discourage or prohibit communications after reply comments are filed. At the FCC, the number and scope of written "*ex parte* notices" often exceed what is filed in formal comments. Many legal memoranda and expert reports in the record of this case were filed as *ex parte* submissions. The FCC has an advanced Internet site that ordinarily enables parties to

**D. The FCC’s Decision To Utilize Bright Line Rules While Refusing To Consider Challenges To Transfers In Compliance With The Rules Violates The Communications Act**

The Communications Act obligates the FCC to make an affirmative finding that a transfer or assignment of broadcast licenses will serve the public interest. 47 U.S.C. §§ 309(a), (e), 310(d). *United States v. Storer Broadcasting Co.* upheld the Commission’s authority to adopt ownership rules that embodied its view of the public interest, but cautioned that “in each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the public interest.” 351 U.S. 192, 205 (1956). The Commission followed the Supreme Court in construing Section 309(a) to impose “an independent obligation” to consider whether a proposed license transfer that complies with ownership limits would nonetheless be inconsistent with public interest.” *See, e.g., CHET-5 Broading, L.P.*, 14 FCCRcd 13,041, 13,043 (1999).

The FCC admits that the “bright line rules” it adopts “may be over-inclusive, by preventing transactions that would result in increased

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track such filings, however, there were some 17,000 “ex parte” filings in this proceeding. Viacom’s 291 page May 5, 2003 notice referred to in the text above was one of 322 submissions filed that day. Thus, it was effectively

efficiencies, or under-inclusive, by allowing transactions that would raise concerns, if the circumstances of the case were reviewed.” JA0063.

Because some transactions in violation of the rules may nonetheless serve the public interest, the Commission will consider requests for waiver of its rules from applicants. JA0127-28, JA0225-26. Yet, it explicitly refuses to individually review proposed mergers that comply with the rules. JA0231-32 (terminating policy of “flagging” for closer review of radio transfers which result in one entity controlling 50%, or two controlling 70% ad revenues); JA0216 (refusing to consider how the DI applies to particular transactions or subject transactions not barred by the CML to anything more than “routine Commission review”); JA0409-10 (discussing the Order’s failure to allow the Commission to consider the facts of individual cases).

This approach allows broadcasters to request waivers of the rules, but prohibits citizens living in the affected communities from challenging a transaction that contravenes the public interest. Because the new rules will result in approval of license transfers that are not in the public interest, the rules are not in accordance with the law.

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impossible for parties to monitor, much less respond to, submissions made in the final weeks of the proceeding.

## CONCLUSION

For all these reasons, the Commission's Order should be reversed and its new media concentration rules vacated.

Respectfully submitted,

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October 21, 2003

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that (1) this brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because the brief contains 13,822 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14-point Times New Roman type.

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## **CERTIFICATE OF ADMISSION**

Pursuant to Third Circuit Rules 28.3(d) and 46.1(e), I certify that I am  
a member of the bar of this Court.

---

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**STATUTORY ADDENDUM**

## **STATUTORY ADDENDUM**

### TABLE OF CONTENTS

Administrative Procedure Act, 5 U.S.C. §553.....	3
5 U.S.C. §706 .....	5
Cable Television Consumer Protection and Competition Act of 1992 § 2(a), 106 Stat. 1460.....	6
Communications Act of 1934, 47 U.S.C. Pub. L. No. 102-385, § 151 .....	10
47 U.S.C. § 154(i).....	11
47 U.S.C. § 201.....	12
47 U.S.C. §303(r).....	13
47 U.S.C. § 303b.....	14
47 U.S.C. §307(b).....	15
47 U.S.C. § 309(a), (e).....	16

47 U.S.C. § 310(d).....	17
47 U.S.C. § 315(a).....	18
47 U.S.C. § 402(a).....	19
Second Supplemental Appropriations Act Pub. L. No. 98-396, § 304, 98 Stat. 1369 (1984) .....	20
Telecommunications Act of 1996 Pub. L. No. 104-104, § 202, 110 Stat. 56 (1996) .....	21
47 C.F.R. § 73.3555.....	24

## ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. §553

### § 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

- (1) a military or foreign affairs function of the United States; or
- (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

- (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
- (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

**(d)** The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

- (1)** a substantive rule which grants or recognizes an exemption or relieves a restriction;
- (2)** interpretative rules and statements of policy; or
- (3)** as otherwise provided by the agency for good cause found and published with the rule.

**(e)** Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

## 5 U.S.C. §706

### **§ 706. Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

**CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION**  
**ACT OF 1992 § 2(A), 106 STAT. 1460**

**§ 2. Findings; Policy; Definitions**

**(a) Findings.**--The Congress finds and declares the following:

**(1)** Pursuant to the Cable Communications Policy Act of 1984 [this subchapter], rates for cable television services have been deregulated in approximately 97 percent of all franchises since December 29, 1986. Since rate deregulation, monthly rates for the lowest priced basic cable service have increased by 40 percent or more for 28 percent of cable television subscribers. Although the average number of basic channels has increased from about 24 to 30, average monthly rates have increased by 29 percent during the same period. The average monthly cable rate has increased almost 3 times as much as the Consumer Price Index since rate deregulation.

**(2)** For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers.

**(3)** There has been a substantial increase in the penetration of cable television systems over the past decade. Nearly 56,000,000 households, over 60 percent of the households with televisions, subscribe to cable television, and this percentage is almost certain to increase. As a result of this growth, the cable television industry has become a dominant nationwide video medium.

**(4)** The cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers.

**(5)** The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.

**(6)** There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.

**(7)** There is a substantial governmental and First Amendment interest in ensuring that cable subscribers have access to local noncommercial educational stations which Congress has authorized, as expressed in section 396(a)(5) of the Communications Act of 1934 [section 396(a)(5) of this title]. The distribution of unique noncommercial, educational programming services advances that interest.

**(8)** The Federal Government has a substantial interest in making all nonduplicative local public television services available on cable systems because--

**(A)** public television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens;

**(B)** public television is a local community institution, supported through local tax dollars and voluntary citizen contributions in excess of \$10,800,000,000 since 1972, that provides public service programming that is responsive to the needs and interests of the local community;

**(C)** the Federal Government, in recognition of public television's integral role in serving the educational and informational needs of local communities, has invested more than \$3,000,000,000 in public broadcasting since 1969; and

**(D)** absent carriage requirements there is a substantial likelihood that citizens, who have supported local public television services, will be deprived of those services.

**(9)** The Federal Government has a substantial interest in having cable systems carry the signals of local commercial television stations because the carriage of such signals is necessary to serve the goals contained in section 307(b) of the Communications Act of 1934 [section 307(b) of this title] of providing a fair, efficient, and equitable distribution of broadcast services.

**(10)** A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation.

**(11)** Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.

**(12)** Broadcast television programming is supported by revenues generated from advertising broadcast over stations. Such programming is otherwise free to those who own television sets and do not require cable transmission to receive broadcast signals. There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.

- (13)** As a result of the growth of cable television, there has been a marked shift in market share from broadcast television to cable television services.
- (14)** Cable television systems and broadcast television stations increasingly compete for television advertising revenues. As the proportion of households subscribing to cable television increases, proportionately more advertising revenues will be reallocated from broadcast to cable television systems.
- (15)** A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator. As a result, there is an economic incentive for cable systems to terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position. There is a substantial likelihood that absent the reimposition of such a requirement, additional local broadcast signals will be deleted, repositioned, or not carried.
- (16)** As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals, coupled with the absence of a requirement that such systems carry local broadcast signals, the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.
- (17)** Consumers who subscribe to cable television often do so to obtain local broadcast signals which they otherwise would not be able to receive, or to obtain improved signals. Most subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services. The regulatory system created by the Cable Communications Policy Act of 1984 [this subchapter] was premised upon the continued existence of mandatory carriage obligations for cable systems, ensuring that local stations would be protected from anticompetitive conduct by cable systems.
- (18)** Cable television systems often are the single most efficient distribution system for television programming. A Government mandate for a substantial societal investment in alternative distribution systems for cable subscribers, such as the 'A/B' input selector antenna system, is not an enduring or feasible method of distribution and is not in the public interest.
- (19)** At the same time, broadcast programming that is carried remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates, independent television stations, and public television stations. Also cable programming placed on channels adjacent to popular off- the-air signals obtains a larger audience than on other channel positions. Cable systems, therefore,

obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of the broadcaster or any copyright liability. This has resulted in an effective subsidy of the development of cable systems by local broadcasters. While at one time, when cable systems did not attempt to compete with local broadcasters for programming, audience, and advertising, this subsidy may have been appropriate, it is so no longer and results in a competitive imbalance between the 2 industries.

**(20)** The Cable Communications Policy Act of 1984 [this subchapter], in its amendments to the Communications Act of 1934 [this chapter], limited the regulatory authority of franchising authorities over cable operators. Franchising authorities are finding it difficult under the current regulatory scheme to deny renewals to cable systems that are not adequately serving cable subscribers.

**(21)** Cable systems should be encouraged to carry low-power television stations licensed to the communities served by those systems where the low-power station creates and broadcasts, as a substantial part of its programming day, local programming.

**COMMUNICATIONS ACT OF 1934, 47 U.S.C. PUB. L. NO. 102-385, § 151**

**§ 151. Purposes of chapter; Federal Communications Commission created**

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

**47 U.S.C. § 154(I)**

**§ 154. Federal Communication Commission**

**(i) Duties and powers**

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

## 47 U.S.C. § 201

### § 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

**47 U.S.C. 303(R)**

**§ 303. Powers and duties of Commission**

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

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

**47 U.S.C. § 303B**

**§ 303b. Consideration of children's television service in broadcast license renewal**

(a) After the standards required by section 303a of this title are in effect, the Commission shall, in its review of any application for renewal of a commercial or noncommercial television broadcast license, consider the extent to which the licensee--

- (1) has complied with such standards; and
- (2) has served the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs.

(b) In addition to consideration of the licensee's programming as required under subsection (a) of this section, the Commission may consider--

- (1) any special nonbroadcast efforts by the licensee which enhance the educational and informational value of such programming to children; and
- (2) any special efforts by the licensee to produce or support programming broadcast by another station in the licensee's marketplace which is specifically designed to serve the educational and informational needs of children.

**47 U.S.C. §307(B)**

**§ 307. Licenses**

**(b) Allocation of facilities**

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

**47 U.S.C. § 309(A), (E)**

**§ 309. Application for license**

**(a) Considerations in granting application**

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

**(e) Hearings; intervention; evidence; burden of proof**

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

**47 U.S.C. § 310(D)**

**§ 310. License ownership restrictions**

**(d) Assignment and transfer of construction permit or station license**

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

**47 U.S.C. § 315(A)**

**§ 315. Candidates for public office**

(a) Equal opportunities requirement; censorship prohibition; allowance of station use; news appearances exception; public interest; public issues discussion opportunities

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station:

*Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any--

- (1) bona fide newscast,
- (2) bona fide news interview,
- (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
- (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

**47 U.S.C. § 402(A)**

**§ 402. Judicial review of Commission's orders and decisions**

**(a) Procedure**

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

**SECOND SUPPLEMENTAL APPROPRIATIONS ACT PUB. L. NO. 98-396,**

**§ 304, 98 STAT. 1369**

§ 304. No funds appropriated by this or any other Act to the Federal Communications Commission may be used to implement the Commission's decision adopted on July 26, 1984, in Docket GEN 83-1009 as it applies to television licenses, prior to April 1, 1985, or for sixty days after the Commission's reconsideration of its decision in this matter, whichever is later. The term "implement" shall include but not be limited to processing, review, approval, or acquisition of any interest in or the transfer or assignment of television licenses.

**TELECOMMUNICATIONS ACT OF 1996 PUB. L. NO. 104-104, § 202, 110**  
**STAT. 56**

**§ 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.

**(e) Dual Network Changes.** The Commission shall revise section 73.658(g) of its regulations (47 C.F.R. 658(g)) to permit a television broadcast station to affiliate with a person or entity that maintains 2 or more networks of television broadcast stations unless such dual or multiple networks are composed of--

(1) two or more persons or entities that, on the date of enactment of the Telecommunications Act of 1996, are "networks" as defined in section 73.3613(a)(1) of the Commission's regulations (47 C.F.R. 73.3613(a)(1)); or

(2) any network described in paragraph (1) and an English-language program distribution service that, on such date, provides 4 or more hours of programming per week on a national basis pursuant to network affiliation arrangements with local television broadcast stations in markets reaching more than 75 percent of television homes (as measured by a national ratings service).

**(f) Cable Cross Ownership.**

(1) Elimination of Restrictions. The Commission shall revise section 76.501 of its regulations (47 C.F.R. 76.501) to permit a person or entity to own or control a network of broadcast stations and a cable system.

(2) Safeguards Against Discrimination. The Commission shall revise such regulations if necessary to ensure carriage, channel positioning, and nondiscriminatory treatment of nonaffiliated broadcast stations by a cable system described in paragraph (1).

**(g) Local Marketing Agreements.** Nothing in this section shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is in compliance with the regulations of the Commission.

**(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 C.F.R. § 73.3555**

**§ 73.3555. Multiple ownership.**

**(a)(1) Local radio ownership rule.** A person or single entity (or entities under common control) may have a cognizable interest in licenses for AM or FM radio broadcast stations in accordance with the following limits:

- (i) In a radio market with 45 or more full-power, commercial and noncommercial radio stations, not more than 8 commercial radio stations in total and not more than 5 commercial stations in the same service (AM or FM);
- (ii) In a radio market with between 30 and 44 (inclusive) full-power, commercial and noncommercial radio stations, not more than 7 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM);
- (iii) In a radio market with between 15 and 29 (inclusive) full-power, commercial and noncommercial radio stations, not more than 6 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM);
- (iv) In a radio market with 14 or fewer full-power, commercial and noncommercial radio stations, not more than 5 commercial radio stations in total and not more than 3 commercial stations in the same service (AM or FM); provided, however, that no person or single entity (or entities under common control) may have a cognizable interest in more than 50% of the full-power, commercial and noncommercial radio stations in such market unless the combination of stations comprises not more than one AM and one FM station.

(2) [Reserved]

**(b) Local television multiple ownership rule.**

(1) For purposes of this section, a television station's market shall be defined as the Designated Market Area (DMA) to which it is assigned by Nielsen Media Research or any successor entity at the time the application to acquire or construct the station(s) is filed. Puerto Rico, Guam, and the U.S. Virgin Islands each will be considered a single market.

(2) An entity may have a cognizable interest in more than one full-power commercial television broadcast station in the same DMA in accordance with the following conditions and limits:

(i) At the time the application to acquire or construct the station(s) is filed, no more than one of the stations that will be attributed to such entity is 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; and

(ii)(A) Subject to paragraph (b)(2)(i) of this section, in a DMA with 17 or fewer full-power commercial and noncommercial television broadcast stations, an entity may have a cognizable interest in no more than 2 commercial television broadcast stations; or

(B) Subject to paragraph (b)(2)(i) of this section, in a DMA with 18 or more full-power commercial and noncommercial television broadcast stations, an entity may have a cognizable interest in no more than 3 commercial television broadcast stations.

**(c) Cross-Media Limits.** Cross-ownership of a daily newspaper and commercial broadcast stations, or of commercial broadcast radio and television stations, is permitted without limitation except as follows:

(1) In Nielsen Designated Market Areas (DMAs) to which three or fewer full-power commercial and noncommercial educational television stations are assigned, no newspaper/broadcast or radio/television cross-ownership is permitted.

(2) In DMAs to which at least four but not more than eight full-power commercial and noncommercial educational television stations are assigned, an entity that directly or indirectly owns, operates or controls a daily newspaper may have a cognizable interest in either:

(i) One, but not more than one, commercial television station in combination with radio stations up to 50% of the applicable local radio limit for the market; or,

(ii) Radio stations up to 100% of the applicable local radio limit if it does not have a cognizable interest in a television station in the market.

(3) The foregoing limits on newspaper/broadcast cross-ownership do not apply to any new daily newspaper inaugurated by a broadcaster.

**(d) National television multiple ownership rule.**

(1) No license for a commercial television broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors having a cognizable interest in television stations which have an aggregate national audience reach exceeding forty-five (45) percent.

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

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

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

(e) The ownership limits of this section are not applicable to noncommercial educational FM and noncommercial educational TV stations. However, the attribution standards set forth in the Notes to this section will be used to determine attribution for noncommercial educational FM and TV applicants, such as in evaluating mutually exclusive applications pursuant to subpart K.