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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.

**ON PETITION FOR REVIEW FROM THE
FEDERAL COMMUNICATIONS COMMISSION**

BRIEF FOR PETITIONER CLEAR CHANNEL COMMUNICATIONS, INC.

Miguel A. Estrada
Michael J. Edney
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
TEL: 202.955.8500
FAX: 202.467.0539

Andrew G. McBride
Richard J. Bodorff*
Helgi C. Walker
Eve Klindera Reed
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
TEL: 202.719.7000
FAX: 202.719.7049

Counsel for Clear Channel Communications, Inc.

November 3, 2003

* Counsel of Record

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and LAR 26.1, undersigned counsel respectfully submits this corporate disclosure statement for Clear Channel Communications, Inc.

Clear Channel Communications, Inc. is a publicly held company. Clear Channel Communications, Inc. has no parent company. No publicly owned company owns more than ten percent of its stock, nor does any other publicly owned company have a financial interest in the outcome of this litigation.

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Richard J. Bodorff

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STATEMENT OF JURISDICTION

The Federal Communications Commission ("Commission" or "FCC") had jurisdiction under Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(h) ("Section 202(h)" of the "1996 Act"). This Court has jurisdiction over the Commission's final order under 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342 and 2344.

Clear Channel Communications, Inc. ("Clear Channel") timely filed its petition for review in the D.C. Circuit on October 3, 2003. JA0034-36 (Petition for Review, No. 03-1333 (D.C. Cir. filed Oct. 3, 2003)). Other petitions for review were filed in various United States Courts of Appeal. Pursuant to the lottery provisions of 28 U.S.C. § 2112 and an August 19, 2003 Order of the Judicial Panel on Multidistrict Litigation, all petitions for review were transferred to this Court.

STATEMENT OF ISSUES

1. Whether the FCC violated Section 202(h) of the 1996 Act and Section 706 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, when it construed the "necessary in the public interest" standard of Section 202(h), which mandates a biennial review of broadcast ownership regulations in the interest of

"regulatory reform," merely to restate the general "public interest" test that governs the initial adoption of rules;[1]

2. Whether the Commission violated Section 202(h) and acted arbitrarily and capriciously under the APA when it retained unmodified the eight-station cap on radio ownership in all markets with forty-five or more stations, while adopting a market definition rule that increased ownership restrictions in those markets;[2]

3. Whether the FCC violated Section 202(h), acted arbitrarily and capriciously under the APA, and failed to meet its duty to avoid constitutional difficulties under the Takings and Due Process Clauses when it imposed severe new restrictions on the transferability of certain radio station groups;[3]

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[1] *See* JA0041-42 (*2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules*, 18 F.C.C.R. 13620, 13624-25 (¶¶10-12) (2003) ("*Order*") (hereinafter cited by reference to the Joint Appendix and relevant paragraph numbers only)); Comments of Clear Channel Communications, Inc., MB Docket No. 02-277, *et al.* (Jan. 2, 2003), at 2-3); JA4538-66 (Comments of Fox Entertainment Group, Inc. *et al.*, MB Docket No. 02-277, *et al.* (Jan. 2, 2003), at Ex. 1).

[2] *See* JA0135-49, JA0151-52 (¶¶248-286, 291); JA5512-5514 (*Ex Parte* Letter of Clear Channel Communications, Inc., MB Docket No. 02-277, *et al.* (May 29, 2003) ("Clear Channel Letter")); JA5423-26 (*Ex Parte* Letter of Viacom, Inc., MB Docket No. 02-277, *et al.* (May 15, 2003) ("Viacom Letter")); JA5386-5412 (*Ex Parte* Presentation of Bear Stearns, MB Docket No. 02-277, *et al.* (May 8, 2003) ("*Defining Moment*")).

[3] *See* JA0228, JA0230 (¶¶487, 489-90); JA4890-95 (Reply Comments of Clear Channel Communications, Inc., MB Docket No. 02-277, *et al.* at 10-15 (Feb. 2, 2003) ("*CCC Omnibus Reply Comments*")); JA2433-37 (Comments of Clear

4. Whether the Commission violated Section 202(h), acted arbitrarily and capriciously under the APA, and failed to meet its duty to avoid constitutional difficulties under the Takings and Due Process Clauses when it expanded the class of sales and marketing agreements subject to attribution under the radio ownership rules and refused to "grandfather" such agreements.[4]

STATUTES

The text of relevant statutes is included in an addendum.

STATEMENT OF RELATED CASES

This case has not previously been before this Court.

Cellco Partnership v. FCC, No. 02-1262 (D.C. Cir. filed Aug. 19, 2002), and *Verizon Telephone Companies v. FCC*, No. 03-1080 (D.C. Cir. filed Mar. 21, 2003), which are petitions for review of FCC orders in the 2000 and 2002 biennial reviews of its telecommunications regulations, respectively, involve issues relevant to this case. Briefing is complete in both cases and the D.C. Circuit has scheduled oral argument in both cases for December 15, 2003.

Channel Communications, Inc., MM Docket No 00-244, at 5-8 (Feb. 26, 2001) ("*CCC Definitions Comments*")).

[4] JA0146-47, JA0164, JA0165, JA0230-31 (¶¶280 & nn.592-93, 322, 325, 491); JA4892-95 (*CCC Omnibus Reply Comments*, at 12-15); JA3286 (Comments of Clear Channel Communications, Inc., MM Docket Nos. 01-317, *et al.*, at 27 (Mar. 27, 2002) ("*CCC Local Radio Ownership Comments*")).

Newspaper Ass'n of America v. FCC, No. 00-1375 (D.C. Cir. filed Aug. 16, 2000), is a petition for review of the Commission's decision to retain the newspaper/broadcast cross-ownership rule in its 1998 biennial review and involves issues relevant to this case. That case is currently being held in abeyance.

Two other cases, now concluded, were before the federal courts in connection with certain of the media ownership rules at issue in these consolidated cases. *See Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 ("*Fox* "), *reh'g granted in part*, 293 F.3d 537 (D.C. Cir. 2002) ("*Fox II*").

Certain parties other than Clear Channel have filed petitions for reconsideration of the *Order* with the FCC. *See generally* MM Docket No. 02-277.

STATEMENT OF THE CASE

Section 202(h) of the 1996 Act requires the FCC to review its broadcast ownership rules biennially, to "determine whether any such rules are necessary in the public interest," and to repeal or to modify any rule that no longer meets that standard. On September 23, 2002, the Commission initiated the 2002 biennial review of its media ownership rules, including the local radio ownership rule. JA3450-3523 (*2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules*, 17 F.C.C.R. 18503 (2002) ("*Omnibus NPRM*")). At

the same time, the FCC consolidated two existing proceedings regarding its local radio ownership rules with the 2002 biennial review. *See* JA3453 (*id.* at 18506). In July 2003, the Commission issued the *Order*, which changed a number of its media ownership rules, including the local radio ownership rule. *See* JA0135-49, JA0151-52 (¶¶248-286, 291). These consolidated appeals followed.

STATEMENT OF FACTS

I. THE TELECOMMUNICATIONS ACT OF 1996.

As the Supreme Court has observed, the 1996 Act was an "unusually important legislative enactment." *Reno v. ACLU*, 521 U.S. 844, 857 (1997). Its "primary purpose was to *reduce regulation*." *Id.* (emphasis added). Congress "set in motion a process to deregulate the structure of the broadcast … industry." *Fox*, 280 F.3d at 1033. To that end, Section 202 of the Act effected landmark changes in the rules governing ownership of broadcast media outlets, moving across the board to lift or to loosen federal regulations limiting media ownership rights. *See* § 202(a) (eliminating national radio station ownership cap); § 202(b) (increasing numerical limits for local radio station ownership and eliminating audience share limitation); § 202(c) (eliminating national television station ownership cap, increasing national audience reach limitation, and ordering rulemaking on local ownership limits); § 202(d) (relaxing one-to-a-market rule); § 202(e) (easing dual

network ownership restrictions); § 202(f) (abolishing cable-broadcast cross-ownership restriction).

With respect to local radio ownership, Section 202(b) required the FCC to raise its limits on the number of stations that an entity could own in a particular market and to eliminate other restrictions. Previously, the Commission had prohibited common ownership of any more than four stations, even in the largest markets, and superimposed on that cap a presumption that any combination resulting in an audience share higher than twenty-five percent would contravene the public interest. *See Revision of Radio Rules and Policies*, 7 F.C.C.R. 6387, 6393, 6406 (1992) ("*Radio Rules First Reconsideration*"). The 1996 Act expanded multiple ownership rights, by precluding the FCC from setting common ownership limits any more restrictive than: eight stations in markets with forty-five or more stations, with five or fewer in the same service (AM or FM), § 202(b)(1)(A); seven stations in markets with thirty to forty-four stations, with four or fewer in the same service, § 202(b)(1)(B); six stations in markets with fifteen to twenty-nine stations, with four or fewer in the same service, § 202(b)(1)(C); and five stations in markets with fourteen or fewer stations, with three or fewer in the same service, provided that no single entity could own more than fifty percent of the stations in such market, § 202(b)(1)(D). Congress authorized the Commission to further relax even these limitations in order to permit greater common ownership if such ownership

"will result in an increase in the number of radio broadcast stations in operation." § 202(b)(2). At the time that Congress made these changes, the FCC defined a radio market as the geographic area covered by the overlapping contours of the stations proposed for common ownership. *See* 47 C.F.R. § 73.3555(a)(1).

Section 202(h) accompanied these dramatic, deregulatory provisions. That subsection mandates that the Commission review its broadcast ownership rules every two years "as part of its regulatory reform review," and that it "shall determine whether any of such rules are necessary in the public interest as a result of competition" and "shall repeal or modify any regulation it determines to be no longer in the public interest." § 202(h). As courts have found, Section 202(h) plainly was meant to "continue the process of deregulation" that the rest of Section 202—and indeed, the entire 1996 Act—commenced. *Fox*, 280 F.3d at 1033.

II. SUBSEQUENT REGULATORY ACTION.

Following passage of the 1996 Act, the FCC amended its radio regulations as mandated by Section 202(b), leaving intact the traditional market definition. *See Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996*, 11 F.C.C.R. 12368 (1996). It implemented Section 202(b) without notice and comment, recognizing that the statute prohibited "any discretionary action on the part of the Commission." *Id.* at 12371.

In its first biennial review, the FCC bemoaned the effects of the deregulation mandated by Section 202(b) and simultaneously indicated that it would initiate a rulemaking to change the definition of radio markets. *1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules*, 15 F.C.C.R. 11058, 11087-91 (2000). Individual Commissioners saw this strategy for what it was: an improper means of evading Congress's mandate and increasing regulatory burdens. Then-Commissioner Powell explained in the resultant rulemaking that the "effect of eliminating the Commission's current methodology and replacing it with a commercially defined market (such as Arbitron) would be to shrink markets, and thereby substantially limit the number of stations one could own." *Definition of Radio Markets*, 15 F.C.C.R. 25077, 25100 (2000) ("*Definitions NPRM*") (Concurring Statement of Commissioner Powell). He cautioned that the FCC should not "us[e] the rulemaking process as a means to circumvent specific statutory provisions and effectuate a different result than Congress intended." *Id.*; *see* JA2429 (*id.* at 25096 (Separate Statement of Commissioner Susan Ness) ("[W]hatever definition we adopt should be consistent with the intent of Congress ... in relaxing radio ownership restrictions")); JA2432 (*id.* at 25099 (Separate Statement of Commissioner Harold Furchtgott-Roth) (FCC should not manipulate the "definition of 'markets' in order to cut back on the concentration levels that Congress expressly set")).

The Commission eventually consolidated that rulemaking with another proceeding regarding the local radio ownership rules. JA2487-2536 (*Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 F.C.C.R. 19861 (2001) ("*Local Radio Ownership NPRM*")). Although the FCC in 1996 read Section 202(b) as affording it no discretion whatsoever, the *Local Radio Ownership NPRM* inquired whether the Commission's "public interest" authority permitted it to set numerical limits for common ownership at levels *lower* than those established by statute. JA2496-2511 (*Id.* at 19871-85). The FCC then rolled that entire proceeding into the 2002 biennial review. JA3453 (*Omnibus NPRM*, 17 F.C.C.R. at 18506).

III. JUDICIAL REVIEW OF THE FCC'S PRIOR BIENNIAL REVIEW DECISIONS.

Prior biennial reviews under Section 202(h) have commanded substantial attention from the D.C. Circuit. *See generally Fox*, 280 F.3d 1027; *Sinclair*, 284 F.3d 148. In *Fox*, the Court reviewed the FCC's decisions in the 1998 biennial review to retain the national television ownership cap and the cable/broadcast cross-ownership rule. The Court reversed, finding that Section 202(h) imposes "a presumption in favor" of deregulation, *Fox*, 280 F.3d at 1048, and that the Commission had failed to rebut that presumption by demonstrating the existence of concrete problems that the rules under review actually solved, *id.* at 1044-45. Furthermore, *Fox* made clear that during the biennial review the FCC must either

supply clear evidence to justify the retention of rules or repeal them. *Id*. at 1042 ("[t]he Commission's wait-and-see approach cannot be squared with its statutory mandate"). Specifically, the agency must assess the "state of competition" for the relevant market and "link" those facts to the continuing need for a rule, *id*. at 1044, and may *not* rely exclusively upon "predictive judgments" or inferences to support retention of a rule, *id.* at 1051. In *Sinclair*, the D.C. Circuit overturned the FCC's decision regarding the local television ownership rule, reiterating that "[S]ection 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules." 284 F.3d at 159. The proceedings that led to the *Order* were conducted partially on remand from *Fox* and *Sinclair*. JA0039 (¶1).[5]

IV. THE 2002 BIENNIAL REVIEW.

A. The Governing Legal Standard.

The FCC acknowledged in the *Order* that Section 202(h) requires it to determine whether its rules remain "necessary in the public interest." JA0041-42 (¶11). To establish the principles governing that review, the Commission expressly cross-referenced its decision in the contemporaneous biennial review of telecommunications regulations under Section 11 of the Communications Act,

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[5] Thus, under the "law of the case" doctrine, *Fox* and *Sinclair* are binding on this Court with respect to the proper standard for the Commission's Section 202(h) review of the remanded rules. It cannot seriously be contended that a different standard of review applies to the biennial review of the local radio ownership rule, which was governed by that same statute.

which contains the same "necessary in the public interest" language as Section 202(h). JA0042 (¶11 n.15) (citing *2002 Biennial Regulatory Review*, 18 F.C.C.R. 4726, 4730 (2003) ("*Section 11 Report*")). There, the FCC interpreted the "necessary in the public interest" standard to embody nothing more than the ordinary public interest test that applies when the Commission "adopt[s] a rule in the first instance." *Section 11 Report*, 18 F.C.C.R. at 4730. The FCC claimed there was "no evidence that Congress intended to impose a new or higher standard for what is 'necessary in the public interest' for purposes of" the biennial review, a conclusion that it attempted to justify largely on the basis of judicial constructions of the term "necessary" in other statutes to mean "useful," "convenient," or "appropriate." *Id.* at 4731.[6]

B. The Local Radio Ownership Rule.

During the 2002 biennial review, Clear Channel, Viacom, and others argued that the Commission should modify the eight-station cap in markets with sixty or more stations to permit common ownership of as many as ten radio stations, with no more than seven in any service. *See* JA5512-14 (Clear Channel Letter);

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[6] Given the *Order*'s explicit incorporation of this interpretation of the governing standard of review, Citizen Petitioners and Intervenors' ("Citizens") argument that the Commission's construction of 202(h) contradicts the *Section 11 Report*, *see* Citizens' Br. 21, 27-28, is incomprehensible. For purposes of its 2002 broadcast biennial review, the FCC clearly *adopted* the lax reading of "necessary in the public interest" set forth in the *Section 11 Report*.

JA5423-26 (Viacom Letter). The proposal was necessary to correct for the "reality that some markets will see a reduction in the number of stations that any operator could be permitted to own" under an Arbitron-based market definition and to restore Congress's particularized judgment regarding the maximum levels of common ownership regulation in the 1996 Act. JA5404 (*Defining Moment*, at 22). Viacom further argued that the FCC was required to "take into account the competitive environment in which radio operates, particularly in larger markets," that there was no need for any radio caps at all, and that there was certainly "no justification for treating large markets, which may have 60, 75, 95 or more stations, like medium-sized markets with 40 or 45 stations." JA5423 (Viacom Letter, at 1); *see* JA5513 (Clear Channel Letter, at 2).

Although the Commission adopted an Arbitron-based market definition, it rejected arguments that it had to counterbalance that decision by establishing a ten-station cap for markets with sixty or more stations and, instead, refused to modify the eight-station cap in any way. JA0135-49, JA0151 (¶¶248-286, 291). The FCC's explanation for its decision not to make this crucial adjustment consists of a single paragraph. The Commission stated that "[t]here is no evidence in the record that indicates that the efficiencies of consolidating radio stations increase appreciably for combinations involving more than eight radio stations" and that "a large market [may] appear more competitive than it actually is" due to signal

crowding and related phenomena. JA0151 (¶291). It concluded that, "[b]y capping the numerical limit at eight stations, we seek to guard against consolidation of the strongest stations in a market in the hands of too few owners and to ensure a market structure that fosters opportunities for new entry into radio broadcasting." *Id.* Nowhere did the FCC attempt to reconcile this statement with the statutory mandates of Sections 202(b) and 202(h) or its own recognition of the benefits of consolidation in the *Order* and in prior decisions.

C. <u>Transferability Of Combinations In Excess Of The Newly Restricted Local Radio Ownership Limits.</u>

Clear Channel also argued that whatever changes the Commission might make to the local radio ownership rule, it must at least permit the free transfer of all *existing* radio combinations. Clear Channel detailed how owners had been encouraged to acquire the combinations at issue by the FCC's 1992 determination that increased levels of common ownership would bring "considerable public benefit[s]" to American radio listeners, JA2434-37 (*CCC Definitions Comments*, at 5-8) (quoting *Radio Rules First Reconsideration*, 7 F.C.C.R. at 6393)), and by Congress's 1996 judgment that "[i]ncreased multiple ownership opportunities w[ould] allow radio operators to obtain efficiencies," JA4890 (*CCC Omnibus Reply Comments*, at 10 (quoting 141 Cong. Rec. S8424 (daily ed. June 15, 1995) (remarks of Sen. Burns)), that were necessary to permit radio to "grow strong and

well into the next century," 141 Cong. Rec. S8076 (daily ed. June 9, 1995) (remarks of Sen. Pressler); *see* JA2434 (*CCC Definitions Comments*, at 5).

Clear Channel further noted that it had made significant investments in reliance on the 1996 Act and the Commission's implementing rules, paying premium prices to purchase pre-existing station groups that reflected the efficiencies of joint operation and spending millions consolidating (and improving) the operations and facilities of individually purchased stations. JA2435 (*CCC Definitions Comments*, at 6); JA4891 (*CCC Omnibus Reply Comments*, at 11). As Clear Channel explained, requiring owners to disaggregate clusters for sale would prevent them from recouping these substantial investments. JA2435 (*CCC Definitions Comments*, at 6 & n.14).

When previously revising its ownership rules, Clear Channel observed, the FCC had expressly recognized the need to respect market realities and the reasonable financial expectations of broadcast licensees by allowing transfers of combinations that complied with the Commission's ownership limits at the time of acquisition but exceeded those limits at the time of transfer. JA4892-93 (*CCC Omnibus Reply Comments*, at 12-13). Clear Channel also argued that a restriction on the transfer of combinations rendered illegal by new ownership limits would violate the Takings and Due Process Clauses of the Constitution. JA4893-95 (*Id.* at 13-15).

The FCC conclusorily stated that it would prohibit the transfer of combinations that violate the modified local radio ownership rule at the time of sale, subject to a limited exception for sales to "eligible entities." JA0230 (¶489). The Commission defined "eligible entities" as companies with six million dollars or less in annual revenue. *Id.* Only such entities may acquire non-compliant combinations, only they may freely transfer them to other "eligible entities," and only they may transfer them to non-"eligible entities" after holding them for at least three years. JA0230 (¶490).

D. **<u>Attribution Of And Refusal To Grandfather Additional Sales And Programming Agreements.</u>**

Finally, Clear Channel and others argued that the FCC should maintain its existing policies concerning the attribution of sales and programming agreements.[7] In particular, Clear Channel urged the Commission to maintain its long-standing position, reiterated two years earlier, that JSAs should be non-attributable, noting that "[n]othing ha[d] transpired over the succeeding two years that would justify

[7] A joint sales agreement (or "JSA") typically authorizes a broker to sell advertising time for a station in return for a fee paid to the station. JA0161-62 (¶316). A local marketing agreement (or "LMA") allows a broker to produce or to supply a portion of the station's programming, often in return for a fee, and "typically provide[s] that the broker may sell advertising time and retain the advertising revenue for the programming it provides to the brokered station." JA0163 (¶319).

reconsideration" of that conclusion. JA3286 (*CCC Local Radio Ownership Comments*, at 27).

Clear Channel also argued that, if the FCC were to attribute additional sales and programming agreements, then it should fully grandfather all existing radio combinations, including such agreements. Because grandfathering had been the Commission's consistent policy to date, any other result "could severely and unnecessarily restrict the marketability of stations and station combinations that involve brokerage agreements and seriously undermine the utility of such agreements." JA4892 (*CCC Omnibus Reply Comments*, at 12 (quoting *Revision of Radio Rules and Policies*, 9 F.C.C.R. 7183, 7193 (1994) ("*Radio Rules Second Reconsideration*")). Clear Channel also explained that a failure to allow free transfers of brokerage arrangements would disrupt the reasonable business expectations of radio licensees and amount to an unconstitutional taking and invalid retroactive regulation. JA4893-95 (*Id.* at 13-15). Relying solely on its purported "experience" and "judgment" in administering the local radio ownership rules, and without any market analysis whatsoever, the FCC decided based on entirely circular reasoning that JSAs should now be attributable because "JSAs may convey sufficient influence or control over advertising to be considered attributable." JA0164 (¶322).

The *Order* also increased the number of LMAs that are attributable under the local radio ownership rules. First, the shift in market definition from a contour overlap approach to the Arbitron standard potentially expanded the number of LMAs (and owned stations) that are attributable in a given market. JA0146-47 (¶280).[8] Second, the Commission increased the number of LMAs that could be attributable by including any station (both owned and LMAs) that BIA considers "home" to an Arbitron metro market in determining compliance with the local radio ownership limits. JA0146-47 (¶280 & nn.592-93).

Rather than following its consistent practice of grandfathering previously valid agreements when changing its ownership rules, the FCC gave licensees only two years from the effective date of its *Order* to terminate sales and programming agreements that do not comply with the modified local radio ownership rules, and refused to allow *any* transfers of non-compliant combinations that included the newly attributable sales and programming agreements. JA0165, JA0230-31 (¶¶325, 491).

SUMMARY OF ARGUMENT

In the *Order*, the Commission applied for the first time its conclusions regarding the appropriate standard of review under Section 202(h). By reducing

[8] Previously, only those LMAs with stations having principal community contour overlap with an owned station were attributable. *See* 47 C.F.R. § 73.3555, note 2.

that standard to nothing more than the minimal requirements of ordinary rulemaking, the FCC evaded its statutory duty critically to review its media ownership rules with an eye toward "regulatory reform" in light of present market conditions, to determine whether those regulations are "necessary in the public interest," and to modify or to repeal them if they no longer meet that test. That fundamental legal error pervades the agency's conclusions regarding each aspect of the radio rules contested here and, combined with multiple violations of the APA, requires this Court to vacate the portions of the *Order* retaining the eight-station cap, prohibiting the free transferability of non-compliant combinations, and deciding to attribute and not to grandfather additional sales and marketing agreements.[9] This Court should remand to the Commission with instructions to reconsider each of these issues in compliance with the correct Section 202(h) standard and the APA.

STANDARD OF REVIEW

The FCC's biennial review of media ownership rules is subject to review under Section 202(h), which places the burden on the agency to justify retention of its regulations by demonstrating (1) the existence of a regulatory problem through record evidence and (2) a firm link between the problem and its regulatory

[9] *See Fox*, 280 F.3d at 1052-53 (vacating rule erroneously retained during biennial review).

solution. *Sinclair*, 284 F.3d at 159, 165; *Fox*, 280 F.3d at 1044-45, 1048. Section 202(h) does not allow the Commission to rely solely upon predictive judgments to support retention of a rule. Rather, the FCC must show that the rule is justified given the present state of the relevant market. *See Fox*, 280 F.3d at 1051.

The propriety of the Commission's interpretation of Section 202(h) is governed by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which begins with a determination of congressional intent. *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987). If "[t]he words, structure, and history of the [statute] clearly reveal that Congress intended," *id.* at 124, a particular interpretation, that interpretation "must be given effect," *id.* at 123; *see Chevron*, 467 U.S. at 843 n.9. Even if Congress has not spoken directly to the question at issue, an agency interpretation must be "based on a permissible construction of the statute" and not otherwise "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 842-44. In addition, courts view agency interpretations of statutes that limit agency discretion or overturn prior agency actions with particular scrutiny. *Indep. Ins. Agents of Am., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 838 F.2d 627, 632 (2d Cir. 1988).

The FCC's *Order* is also subject to review under the APA, which generally requires this Court to "hold unlawful and set aside agency action, findings, and

conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

ARGUMENT

I. THE COMMISSION MISCONSTRUED ITS STATUTORY DUTY UNDER SECTION 202(h).

As noted above, the FCC construed the legal standard governing the biennial review to require no more than a showing that a rule is "useful" or "appropriate." *See supra*, pp.10-11. This understanding of the biennial review statute—which infects the entire analysis of the radio rules[10]—is fundamentally flawed and requires reversal. *See Ommaya v. Nat'l Insts. of Health*, 726 F.2d 827, 830-31 (D.C. Cir. 1984) (application of "incorrect test" is an "error [that] goes to the entire proceeding").

A. The FCC's Interpretation Of The Biennial Review Standard Is Fundamentally Inconsistent With The Text, Context, And Purpose Of The Statute And Renders The Biennial Review Mandate A Nullity.

The Commission's interpretation of Section 202(h) suffers from at least two fundamental flaws. *First*, the interpretation of Section 202(h)'s "necessary in the public interest" standard to permit the retention of regulations that are "useful" or

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[10] *See*, *e.g.*, JA0149 (¶288) (the current radio rule "represent[s] a *reasonable* means for promoting the public interest") (emphasis added); JA0152 (¶292) (finding it "*reasonable* to allow greater levels of concentration in smaller radio markets") (emphasis added); JA0153 (¶294) (elimination of service caps is not "*consistent with* our interest in protecting competition") (emphasis added).

"appropriate" is invalid. "[I]n any case of statutory construction, [the] analysis begins with 'the language of the statute.'" *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). The common or ordinary definition of "necessary" is "absolutely required," "indispensable," or "essential." *Webster's Third International Dictionary* 1511 (1976); *Oxford English Dictionary* (2001) ("Indispensable, vital, essential, requisite"). The FCC's construction of Section 202(h)'s "necessary in the public interest" standard, which interprets the term "necessary" to mean "useful" or "appropriate," is "simply not in accord with the ordinary and fair meaning of [the statute's] terms." *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 389-90 (1999).

Even if the term "necessary" were ambiguous in Section 202(h), the Commission's interpretation directly conflicts with the purpose of the 1996 Act—"to promote competition and *reduce regulation*." 1996 Act, preamble (emphasis added); *see* S. Conf. Rep. No. 104-230, at 1 (1996) (Congress meant to provide a "pro-competitive, *de-regulatory*, national policy framework") (emphasis added); *ACLU*, 521 U.S. at 857.[11] Accordingly, every time the courts have confronted the

[11] It is a "fundamental canon of statutory construction that the words of a statute must be read … with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Statutory language must be interpreted against "the backdrop of what Congress was attempting to accomplish." *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990). "[C]ourts construing statutes enacted specifically to prohibit agency action ought to be especially careful not to allow dubious arguments advanced by the agency in

word "necessary" in the context of a limitation on regulatory authority in the 1996 Act, they have rejected a reading of the term to mean merely "useful" or "appropriate." *Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 510, 512 (D.C. Cir. 2003) ("*CTIA*") (rules are necessary if they are "required to achieve a desired goal;" agency must demonstrate "the existence of a strong connection" between its regulation and the goal it seeks to accomplish); *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 423 (D.C. Cir. 2000) ("necessary" is limited "to that which is required to achieve a desired goal"); *see Iowa Utils. Bd.*, 525 U.S. at 389-90 & n.11 (rejecting expansive reading of "necessary").

The structure and context of Section 202(h) reinforce the interpretation of these courts.[12] Section 202(h) is preceded by no fewer than six subsections that dramatically reduced federal media regulation, either by eliminating or substantially relaxing prior limitations on ownership rights. This framework makes clear that the statute was specifically designed to carry the "process of deregulation" into the future, *Fox*, 280 F.3d at 1033, and to prohibit the FCC from

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behalf of its proffered construction to thwart congressional intent expressed with reasonable clarity, under the guise of deferring to agency expertise." *Indep. Ins. Agents of Am.*, 838 F.2d at 632.

[12] *CTIA*, 330 F.3d at 510 (in statutory interpretation, context is "crucial").

retaining regulations that are no longer necessary to accomplish a defined purpose.[13]

Second, by equating its biennial review duties with those under which it labors in the context of traditional rulemaking and applying that lax standard throughout the portions of the *Order* concerning the radio rules, the Commission offered a completely unsupportable interpretation of the statute. The context and purpose of Section 202(h) could not be more different than the context and purpose of the original Communications Act, which created the FCC and was designed "*to provide for the regulation of* interstate and foreign communication." Communications Act of 1934, preamble (emphasis added).

The text of Section 202(h) further establishes that its regulatory reform standard differs radically from the original Communications Act's capacious, power-granting provisions. The provision that grants the Commission regulatory

[13] The legislative history of Section 11, which mandates a "regulatory reform review" that the Section 202(h) review is a "part of," § 202(h), further demonstrates Congress's intent that the biennial review form a significant part of the 1996 Act's deregulatory program and limit the Commission's authority. Congress intended to establish "a process that will require continuing justification for rules and regulations e[very] 2 years." 141 Cong. Rec. S7888 (daily ed. June 7, 1995) (Statement of Sen. Pressler). That is, "[e]very 2 years … all the rules and regulations will be on the table." *Id.*; *see id.* at S7887 (biennial review was meant to "ensure[] that regulations applicable to the telecommunications industry remain *current* and *necessary* in light of changes in the industry") (emphases added); *id.* at S7889 (Commission was to conduct a "continuing attic-to-basement review of all regulations on a 2 year cycle").

power over radio communications authorizes the agency to "[m]ake such rules and regulations … as *may* be necessary." 47 U.S.C. § 303(r) (emphasis added). Section 202(h), on the other hand, uses the language of command—the Commission "*shall* review," "*shall* determine," and "*shall* repeal or modify" rules during the biennial review. § 202(h) (emphases added). It is beyond doubt that the use of "may" vests an agency with broad discretion, while the use of "shall" elsewhere in the same statute imposes "discretionless obligations." *Lopez v. Davis*, 531 U.S. 230, 241 (2001). Accordingly, precedent broadly construing the term "necessary" when used as part of general power-granting phrases is inapposite here.

The FCC's interpretation of Section 202(h) to require it to make no more rigorous an inquiry than in ordinary rulemaking contravenes the well-established principle that statutes must be read "to give effect, if possible, to every clause and word of a statute" and to avoid "emasculat[ing] an entire section." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). If Section 202(h) did not exist, black-letter administrative law would require the Commission "carefully [to] monitor the effects of its regulations and [to] make adjustments where circumstances so require." *ACLU v. FCC*, 823 F.2d 1554, 1565 (D.C. Cir. 1987); *see HBO, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977). The FCC's construction of Section 202(h)

simply to restate its preexisting, garden-variety administrative law obligations would render Section 202(h) a nullity and thus cannot stand.

B. The Commission's Interpretation Of Section 202(h) Violates *Fox* And *Sinclair.*

1. The FCC Refused To Apply The Statutory Presumption In Favor Of Deregulation.

Although the Commission paid lip service to the "presumption in favor of repealing or modifying the ownership rules" that the D.C. Circuit twice found in Section 202(h), *see Fox*, 280 F.3d at 1048; *Sinclair*, 284 F.3d at 159, the agency failed to give that presumption any actual effect in its determinations regarding the radio rules.[14]

First, the FCC's equation of the 202(h) standard with that which applies to ordinary rulemaking reads the statutory presumption out of the statute. Indeed, even aside from the precise meaning of the term "necessary" in Section 202(h), the presumption in favor of deregulation *alone* distinguishes the standard that applies in the biennial review from that which applies in the agency's exercise of its general rulemaking authority:

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[14] Citizens are wrong to suggest that *Fox* and *Sinclair* do not require a presumption in favor of deregulation. *See* Citizens' Br. 22-26. Although the panel in *Fox* ultimately vacated its holding with respect to the meaning of the word "necessary," leaving *that* question "open," *id.* at 25, it left intact its holding that Section 202(h) establishes a presumption in favor of deregulation. *See* 293 F.3d at 540. These two legal principles are analytically distinct, notwithstanding Citizens' attempt to conflate them. The Commission recognized the continuing validity of the presumption in the *Omnibus NPRM*. JA3456 (17 F.C.C.R. at 18512).

> Although a decision under § 202(h) to retain a rule is similar to an agency's denial of a petition for rulemaking, the underlying procedures *differ in at least one important respect* that requires a *different approach* upon judicial review: Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules.

Fox, 280 F.3d at 1048 (emphases added).[15] If a "different approach upon judicial review" is required, *id.*, then *a fortiori* the agency's approach in reaching *its* decision must also be "different" from its analysis when it initially adopts rules under the "plain public interest" test.

Second, as discussed in detail below, the Commission in its analysis of the radio rules failed to satisfy its affirmative obligation to supply clear evidence of the necessity of its rules in the biennial review. The FCC, contrary to Congress's clear command, placed the burden on parties advocating the reduction of regulatory

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[15] Citizens incorrectly claim that the deregulatory presumption applies only in the context of remedies. Citizens Br. 25. *Sinclair* and *Fox*, even as modified on rehearing, belie this claim. In *Sinclair*, the Court *began* its discussion of the proper standard under Section 202(h) by noting that the provision carries "with it a presumption in favor of repealing or modifying the ownership rules," 284 F.3d at 152, 159 (quoting *Fox*, 280 F.3d at 1048), and specifically stated that its "review" of the FCC's decision was "informed" by Section 202(h) and its deregulatory presumption, *id.* at 159. Moreover, the Court in *Fox* made clear during its substantive discussion of the FCC's decision to retain rules that the agency bore the burden of justification, thereby giving effect to the presumption in those portions of its decision. *See* 280 F.3d at 1044.

burdens to establish the wisdom of their position, turning the statutory presumption on its head. *See infra*, Sections II-IV.[16]

2. The Commission Persisted In Demanding That It May Retain Rules Based Solely Upon Its Predictive Judgment.

As noted above, prior biennial review decisions prohibit the FCC from relying exclusively upon "predictive judgments" or inferences to support retention of a rule. *Fox*, 280 F.3d at 1051; *see supra*, pp.9-10. Although the Commission may be able to rely on reasonable assumptions and expectations in adopting rules in the first instance, the agency simply cannot rely solely upon inferences and predictions while discharging its biennial review mandate, which necessarily turns upon an analysis of *present market conditions. Fox*, 280 F.3d at 1051. As explained below, however, the FCC throughout its discussion of the radio rules relied upon predictive judgments, unsupported by or even contrary to empirical

[16] The Commission's approach is also entirely inconsistent with prior statements by the FCC regarding the burdens that Congress placed on the *agency* in the biennial review. *See Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers*, 16 F.C.C.R. 19911, 19985 (2001) ("[I]f we cannot identify a federal need for a regulation, we are not justified in maintaining [it]."); *see also 1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules*, 15 F.C.C.R. 11058, 11151 (2000) (Separate Statement of Commissioner Michael Powell) ("I start with the proposition that the rules are *no longer necessary* and demand that *the Commission* justify their continued validity.") (emphases added). The failure of the FCC to reconcile the approach in the *Order* with its previous conclusions is arbitrary and capricious. *See infra*, Section II.B.

evidence, about the effect that its rules "might," "could" or were "likely" to have, in clear violation of the mandates in *Fox* and *Sinclair*. *See infra*, Sections II-IV.

II. THE COMMISSION'S RETENTION OF THE EIGHT-STATION CAP IS UNLAWFUL.

A. The FCC's Retention Of The Eight-Station Cap Violates Section 202(h) Of The 1996 Act.

The Commission did not even attempt to meet the proper legal standard under Section 202(h) for retention of the eight-station cap for local radio markets with sixty or more stations. *First*, the FCC never asked—much less answered—whether that cap is "necessary in the public interest as the result of competition." § 202(h). The Commission's entire rationale for retaining the cap in its 1996 form was premised upon the absence of record evidence on increased efficiencies of common ownership of more than eight stations, and the supposed presence of "marginal" and geographically-dispersed stations in larger markets. JA0151-52 (¶291). Nowhere did the FCC even *profess* to consider whether the cap continues to be "necessary"—that is, whether it is "required to achieve a desired goal" or whether there is a "strong connection" between the rule and the interests it supposedly furthers. *CTIA*, 330 F.3d at 510, 512. Nor did it deign to establish that: (1) a regulatory problem exists; and (2) its regulation is a required part of a solution not otherwise provided by market forces. *Sinclair*, 284 F.3d at 159; *Fox*, 280 F.3d at 1044; *see CTIA*, 330 F.3d at 510, 512. Although the Commission

articulated its goal as "seek[ing] to guard against consolidation ... and to ensure a market structure that fosters new opportunities for new entry," JA0151-52 (¶291), it never demonstrated that undue consolidation and limited entry were indeed problems in large markets or explained how the cap is "required to" solve those problems. *CTIA*, 330 F.3d at 510; *see Fox*, 280 F.3d at 1044.

Second, by focusing on the purported *absence* of evidence in favor of relaxation of the eight-station cap, JA0151-52 (¶291), the FCC improperly shifted the burden to *commenters* who proposed modification of that limit to prove the benefits of increased common ownership. It is the *Commission*, however, that must adduce *positive* evidence that a rule is still "necessary" to overcome the "presumption in favor of repealing or modifying the ownership rules." *Fox*, 280 F.3d at 1048; *see Sinclair*, 284 F.3d at 159, 165.

Third, the FCC's reasons for retaining the eight-station cap consist of nothing but the type of unsubstantiated predictive judgments that Section 202(h) prohibits. *Fox*, 280 F.3d at 1042, 1044, 1051. The Commission asserted conditionally that large radio markets "tend" to cover large areas and to be marked by signal-crowding, that they therefore "may" include a high number of small stations and geographically-dispersed stations, and that these tendencies "may" create an illusion of competition. JA0151-52 (¶291). This is just one predictive judgment heaped on top of another, revealing the FCC's total dependence on

prognostication instead of actual evidence. To the extent the Commission sought to rely on the Los Angeles market to bolster this string of conjecture, *id.*, a "single" example "is just not enough to suggest an otherwise significant problem held in check only by the" eight-station cap. *Fox*, 280 F.3d at 1051.

Fourth, the FCC's failure to raise the cap violated Section 202(h) by increasing the net regulatory burdens on radio licensees. When Congress increased common ownership rights in Section 202(b), it did so with full awareness of the Commission's contour-based market definition. At the same time, Congress set in motion the regulatory reform process, which obligates the FCC to evaluate biennially whether *further relaxation*—not additional restriction—is appropriate based upon competitive developments. As the *Order* concedes, however, the switch to an Arbitron-based market definition standard rendered the existing local radio ownership limits more restrictive such that in some markets "the number of stations an entity may own would decrease." JA0226 (¶483); *see* NAB Br. 15-17.

Although Section 202(b) may not have locked into place the particular market definition that existed in 1996, it certainly gave the Commission no discretion whatsoever to alter that definition in a way that effectively *tightens* the numerical caps beyond the maximum levels of common ownership regulation set by Congress in Section 202(b). *See* NAB Br. 13-20; *see also* H. Rep. No. 104-204 (1995), at 118 (Congress assumed that the FCC would not change its regulatory

methodologies "so as to impede the objectives" of the 1996 Act); *Nat'l Sec. Archive v. DOD*, 880 F.2d 1381, 1388 (D.C. Cir. 1989) (rejecting agency interpretation that would "frustrate Congress's purpose"). Section 202(b) set specific maximum levels of regulation, § 202(b)(1), and authorized the Commission only to further *decrease* those levels, § 202(b)(2).

Indeed, the FCC itself has recognized that it lacks authority to depart from the Section 202(b) limits, except to *relax* ownership rights, *supra*, pp.7-8, and that Section 202(h) further prohibits the imposition of new regulatory burdens. *Section 11 Report*, 18 F.C.C.R. at 4729 ("add[ing] or expand[ing]" regulations, "as opposed to modifying or eliminating existing rules," is "beyond the scope" of the biennial review); *2000 Biennial Regulatory Review*, 16 F.C.C.R. 1207, 1213 (2001) ("as a part of the biennial review process, we do not intend to impose new obligations on parties in lieu of current ones, unless we are persuaded that the former are *less burdensome* than the latter and are necessary to protect the public interest") (emphasis added). The Commission's refusal to, at a minimum, make an adjustment to the eight-station cap that counterbalances the new restrictions imposed by the Arbitron-based market definition rule cannot stand under Sections 202(b) and 202(h).

B. **The FCC's Retention Of The Eight-Station Cap Violates The APA.**

The Commission's retention of the eight-station cap for all markets with more than 45 stations is also arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A). *First*, the FCC's decision to shift to an Arbitron-based market definition methodology caused a number of arbitrary anomalies, *see* NAB Br. 24-25, which the "super tier" adjustment would have remedied and which the Commission did not otherwise adequately address. Specifically, the modification of the eight-station cap was expressly proffered to the FCC as a required solution to the tightening of common ownership restrictions effected by the Arbitron-based market definition rule.

Such action was necessary to reconcile the Commission's action with the deregulatory aims of Sections 202(b) and 202(h), rather than to frustrate them, and would have addressed the arbitrary effects of the new standard. The FCC never explained why it refused to take advantage of this available fix, which is the essence of arbitrary and capricious decisionmaking. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) ("alternative way of achieving the [stated] objectives ... should have been addressed and adequate reasons given for its abandonment"); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 761 (6th Cir. 1995) ("The FCC is required to give an explanation when it declines to adopt less restrictive measures in promulgating its rules."). Indeed, its refusal to

do so suggests that the Commission's *true* purpose in switching the market definition was to undermine the deregulation effected by 202(b). *Cf. supra*, pp.7-8.

The FCC's related and similarly unexplained failure to act consistently with its prior statements regarding the impropriety of imposing new regulatory burdens in the context of the biennial review, *see supra*, p.31, is also arbitrary and capricious, because "an agency changing its course must apply a reasoned analysis." *Mazza v. Dep't of Health and Human Servs.*, 903 F.2d 953, 959 (3rd Cir. 1990); *Natural Resources Defense Council v. EPA*, 683 F.2d 752, 760 (3rd Cir. 1982) ("*NRDC I*") ("sharp changes of agency course constitute 'danger signals' to which a reviewing court must be alert"). The Commission's failure to respond to the comments of those who expressly advanced modification of the eight-station cap as a means of redressing the imbalance in ownership rights that would flow from the proposed market definition constitutes yet another arbitrary and capricious act. *State Farm*, 463 U.S. at 43, 50-51 (failure to respond to commenters' arguments renders agency decision arbitrary and capricious); *Bethlehem Steel Corp. v. EPA*, 651 F.2d 861, 867 (3rd Cir. 1981) (decision arbitrary and capricious where agency failed to "consider[] the relevant information" brought to its attention); *see Darrell Andrews Trucking, Inc. v. Fed. Motor Carrier Safety Admin.*, 296 F.3d 1120, 1134-35 (D.C. Cir. 2002); *Iowa v. FCC*, 218 F.3d 756, 759 (D.C. Cir. 2000).

Second, the FCC's refusal to modify the eight-station cap in large markets based on unspecified concerns about undue "consolidation," JA0151-52 (¶291), directly conflicts with statements elsewhere in the *Order* as to the number of competitors needed to ensure robust competition in local markets. According to the Commission, "both 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 (¶289). Allowing firms in a sixty-station market to own ten stations, however, would *still* ensure *six* firms and, *on the FCC's own theory*, provide sufficient competition to protect the public interest. The Commission's speculation about signal crowding in its discussion of the super tier says nothing about why the theory and studies upon which the FCC otherwise relied would not apply in larger markets. *See* JA0150 (¶289 n.609). The Commission's failure to allow common ownership of at least ten stations in a sixty-station market is thus inconsistent with its own description of the only applicable empirical evidence cited in the *Order*, and its failure even to attempt to explain this inconsistency is arbitrary and capricious. *State Farm*, 463 U.S. at 57; *Sinclair*, 284 F.3d at 162-65; *Natural Resources Defense Council v. EPA*, 790 F.2d 289, 302 (3rd Cir. 1986) ("*NRDC II*") (agency decision arbitrary and capricious where it was "blatantly contradicted

by a wealth of evidence in the record, including repeated statements by [the agency] itself").

Third, the FCC failed to provide an adequate justification for the disparate regulatory treatment of larger radio markets as compared to mid-sized and small radio markets and thus did not engage in "reasoned decisionmaking." *State Farm*, 463 U.S. at 52; *NRDC II*, 790 F.2d at 297-98. As Clear Channel noted below, modification of the radio ownership rule to allow common ownership of ten stations in markets with sixty or more stations would permit, at most, joint ownership of 17% of a market's stations. JA5513 (Clear Channel Letter, at 2). This level of concentration is even *less than* the maximum percentage of common ownership—18% for markets with forty-five to fifty stations—allowed under the eight-station cap. The current cap concedes that 18% common ownership is permissible; without the adjustment, however, owners in larger markets are restricted to unjustifiably smaller percentages. Even under the proposed adjustment, the permissible common ownership would be far smaller than 18% in some of the largest markets: for example, 7.9% (or ten out of 127) in Chicago and 6.8% (or ten out of 147) in New York. The Commission, again, offered no

justification for why such comparatively low percentage ownership limits are necessary to protect against concentration in markets with over sixty stations.[17]

Fourth, the FCC ignored changed circumstances within the radio industry. The Commission must, of course, "carefully monitor the effects of its regulations and make adjustments where circumstances so require." *ACLU*, 823 F.2d at 1565; *see supra*, p.24. Here, the FCC did not consider *any* of the changes in the radio market since 1996 that militate in favor of a higher cap. Among other things, and as the Commission repeatedly acknowledged elsewhere in the *Order*, the number of radio stations in all local markets, including the largest ones, has increased dramatically over time. JA0065-85, JA0193 (¶¶86-128, 387). There are now approximately sixteen markets with more than sixty stations—and several with upwards of one hundred. JA5404-05 (*Defining Moment* at 22, Ex. 7). While a single numerical cap for *all* markets above the forty-five-station tier may have been reasonable at a time when few markets had over sixty stations, that cap is

[17] This unexplained disparate treatment is even more pronounced when markets with over sixty stations are compared to smaller markets. In markets with fifteen or fewer stations, one entity can own as much as 50% of the stations in the market; in markets with fifteen to twenty-nine stations, as much as 40%; and in markets with thirty to forty-four stations, up to 23%. In larger markets, an entity may hold as much as 17.8% in markets with forty-five to fifty-nine stations, 13.3% in markets with sixty to one hundred, and 7.9% in markets with more than one hundred stations. The Commission in its refusal to modify the eight-station cap provided no explanation at all as to why larger markets with more voices should be subject to a significantly more restrictive ownership regime than smaller markets. Logic and economics suggest precisely the opposite conclusion.

now unduly restrictive for the many markets that have grown and far surpass the forty-five-station level. Given this significant alteration in the structure of radio markets, the "one-size-fits-all" approach for markets with more than 45 stations is no longer rational.

Fifth, the FCC's decision to retain intact the eight-station cap cannot logically be squared with the Commission's decision to relax almost every other media ownership limit at issue in the proceeding. *See Sinclair*, 284 F.3d at 162-65; *accord Fox*, 280 F.3d at 1044-45. Of the six rules under review, the Commission retained only the local radio caps, including the eight-station cap, as well as the dual network rule. Radio was the only industry that emerged from the biennial review with more regulatory burdens than it started with. *See* JA0136-49 (¶¶250-286) (switch to Arbitron market definition and restriction of permissible ownership levels); JA0151-52 (¶291) (retention of eight-station cap for markets with more than 60 stations); JA0153-59 (¶¶296-310) (retention of all caps); JA0161-65 (¶316-325) (attribution of JSAs); JA0228-30 (¶¶487-490) (limits on transferability of combinations rendered illegal by new restrictions).

In relaxing the local television ownership rule, for example, the FCC reasoned that "television broadcast stations are not the only media outlets contributing to viewpoint diversity in local markets." JA0107 (¶178). But the same is *equally true* for radio broadcast stations in large markets. Thus, just as

focusing solely on television broadcasters when evaluating local market restrictions for them "would result in a rule that is overly restrictive both for competition and diversity purposes, because it would fail to include other participants in some relevant product markets and in the marketplace of ideas," JA0107 (¶179), considering only radio stations when evaluating the efficacy of the eight-station cap is similarly restrictive.[18] If the "abundance" that "characterize[s]" "[t]oday's media marketplace," which is significantly more sophisticated than "just a decade ago," JA0065 (¶86), warranted substantial deregulation with respect to these other rules, there is no rational justification for denying even the slightest regulatory relief to—indeed, *increasing* the aggregate burdens on—large-market radio broadcasters. The Commission's failure to reconcile its refusal to ease the limits here with its statements elsewhere is arbitrary and capricious. *Sinclair*, 284

[18] In the context of the radio-television cross-ownership rule, the Commission specifically recognized that radio stations are but one of many participants in the media industry, relying on that ground to modify the radio/television cross-ownership rule. JA0193 (¶387) ("[I]n today's media market there are more media outlets than ever before."). Similarly, in the course of deciding to lift the absolute bans on cross-ownership of certain media properties, the FCC found that common ownership of "media outlets" provides for "tangible economic efficiencies, such as sharing of technical support staff," which in turn may "increase the amount of diverse, competitive news and local information available to the public, and allow the combined entities to compete more effectively." JA0175 (¶347); *see* JA0179, JA0184 (¶¶356, 365). Again, the Commission cannot rely upon the benefits of common ownership and the plethora of media outlets in one context, and refuse to recognize those facts in another.

F.3d at 164 (faulting the FCC for failing to explain why it "defin[ed] 'voices' differently in the cross-ownership and local ownership rules").

By irrationally maintaining—in fact, tightening—ownership restrictions on large-market radio broadcasters while loosening the ownership rules governing other media entities, the Commission has created a scheme that, as a whole, is a crazy quilt of regulations. Its practical effect is to put large-market radio broadcasters at a competitive disadvantage—without any rational basis—with respect to other media companies with whom they compete for audience and advertising. The decision also exacerbates the preexisting disparity between the broadcasters and newspaper companies, internet radio providers and publishers, and cable companies, to name a few, who are under less restrictive ownership rules.

Finally, the FCC's primary reason for keeping the eight-station cap collapses upon inspection. The Commission suggested that "marginal" stations might artificially inflate the number of stations in a market, and that a higher cap thus might allow "undue" concentration in markets over the sixty-station threshold. JA0151-52 (¶291). The FCC first reasoned that larger markets, such as Los Angeles, "cover a large area geographically." *Id.* This, however, is equally true

with respect to markets outside of the proposed “super tier” and provides no basis for the agency’s decision.[19]

The Commission next stated that larger markets “tend to be more ‘crowded’ in terms of radio signals,” resulting in a greater number of “small radio stations.” JA0151 (¶291). The presence of small or dispersed stations is not unique to large markets, however, but occurs in markets of *all* sizes. In addition, even if “super tier” markets would have included a larger absolute number, but not necessarily a larger proportion, of stations with less powerful technical facilities, the FCC was wrong to suggest that such stations are not active competitors in those markets. In Washington, D.C., the *top-ranked* FM station—WMMJ(FM)—is a Class A station (and thus a “weaker” station in the Commission’s view). *See* BIA Financial Network, *Investing in Radio Market Report 2003* (2d ed. Winter 2003). In Philadelphia, the only Class A FM station in the commercial band—WPHI(FM)—is similarly a formidable competitor, achieving ratings that are comparable to or exceed those of a number of technically more powerful stations. *See id.*

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[19] San Antonio, for example, which falls below the proposed “super tier” threshold, covers 7,341 square miles and is nearly 50% larger than Los Angeles, which covers only 4,850 square miles. *See* National Ass’n of Counties, About Counties, Data & Demographics, at http://www.naco.org/Content/NavigationMenu/About_Counties/Data_and_Demographics/Data_and_Demographics.htm (providing geographic area information for counties included in Arbitron metro markets) (last visited Nov. 1, 2003). San Antonio is also larger than twelve of the fourteen markets that would have fallen within the proposed “super tier.” *See id.*

So-called "small radio stations" also play an important role in viewpoint, program, outlet, source, and minority and female ownership diversity—as the FCC itself had to acknowledge. JA0151 (¶291) (small stations often are "strong competitors in their markets"). These are the very goals that the Commission elsewhere asserts that it seeks to promote. JA0044-54 (¶¶18-52). To encourage the proliferation of these stations as a valuable public good in one context but discount their existence in the competitive market in another is nothing if not arbitrary. *Cf. Sinclair*, 284 F.3d at 162-65. The FCC's vastly overbroad and fundamentally flawed explanation that so-called "marginal stations" in one particular market render competition at current ownership levels somehow illusory simply cannot justify the refusal to modify the cap in markets with more than 60 stations.

In sum, the Commission's decision to retain the eight-station cap for all radio markets with forty-five or more stations represents an arbitrary refusal to create a coherent whole of radio regulations, suffers from fatal internal inconsistencies, fails to acknowledge significant changes in circumstances in the radio industry and media markets in general, and is fundamentally inconsistent with the approach taken in evaluating other ownership rules. In addition, the FCC did not address the arguments of commenters who argued that the modification was necessary to right the imbalance that would be created by adoption of the

Arbitron market definition and who contended that vigorous competition in large markets obviated the need for the eight-station cap. Each of these flaws is an independent violation of the duty to engage in reasoned decisionmaking, and taken together they render the FCC's decision to retain the eight-station cap patently unlawful.

III. THE SEVERE LIMITATIONS ON THE TRANSFERABILITY OF CLUSTERS THAT DO NOT COMPLY WITH THE REVISED LOCAL RADIO OWNERSHIP RULE ARE UNLAWFUL.

A. The New Limitations On Transferability Violate Section 202(h).

Before the *Order*, radio station combinations created in compliance with the radio rules were freely transferable. Moreover, the great weight of FCC precedent favored the free transferability of combinations that were permissible when acquired but later conflicted with the new regulations, recognizing that maintenance of the status quo creates no new harm to public interest goals. *See infra*, pp.46-47. But here, in the wake of the Order's contraction of common ownership rights, the Commission *banned* all transfers save to certain "eligible entities."

In adopting this severe restriction on transferability, the FCC never even asked the basic question that Section 202(h) requires it to answer—whether this change was "necessary in the public interest." JA0228-29 (¶487). And the

Commission certainly did not provide evidence of any such need sufficient to overcome the "presumption in favor of" deregulation. *Fox*, 280 F.3d at 1048.

By imposing a new limitation on ownership rights and thus effectively *increasing* the regulatory burdens of radio licensees *via* the biennial review, the FCC also ignored Congress's deregulatory command and overstepped its authority under 202(h). But, as the Commission has previously concluded, in the biennial review process "[a]dding rules … is clearly beyond the immediate task." *Section 11 Report*, 18 F.C.C.R. at 4729; *see supra*, pp.31.

The FCC's sole basis for denying free transferability was its speculation that forcing divestitures "*could* afford new entrants the opportunity to enter the media marketplace" and "*could* give smaller station owners already in the market the opportunity to acquire more stations." JA0229 (¶487) (emphases added). The Commission provided no empirical evidence to support either the need for or the likelihood of this effect. With respect to the "eligible entity" exception to the prohibition on transferability, the FCC engaged in the same sort of unadorned prognostication, noting its "*belie[f]*" that the rule would "further" similar goals. JA0229-30 (¶488) (emphasis added). In the biennial review, however, the Commission may not rely upon "predictive judgments" without more. *Fox*, 280 F.3d at 1051; *see id.* at 1042.

B. <u>The New Limitations On Transferability Violate The APA.</u>

The Commission's refusal to allow group owners freely to transfer combinations that were legal prior to the adoption of the revised radio limits is also arbitrary and capricious. *First*, the FCC "entirely failed to consider an important aspect of the problem" before it and "offered an explanation for its decision that runs counter to the evidence" on the record in this proceeding. *State Farm*, 463 U.S. at 43; *Humphreys v. DEA*, 96 F.3d 658, 663 (3rd Cir. 1996); *Ams. Disabled for Accessible Pub. Transp. v. Skinner*, 881 F.2d 1184, 1201 (3rd Cir. 1989). The Commission entirely ignored the fact that, in compliance with its previous rules, present owners invested millions of dollars to create station clusters that were capable of providing the efficiencies and public interest benefits that result from common ownership, and that its drastic limitation on transferability would render that investment worthless. Instead, the agency focused on the expectations of *purchasers*, stating that "[b]uyers will be on notice that ownership combinations must comply at the time of the acquisition of the stations," while in the next breath conceding that "present owners" had "expectations" because they "acquired stations under the current ownership rules." JA0228-29 (¶487).

Of course, future "[b]uyers will be on notice"—which, as the record established, will depress station prices, depriving sellers of the benefits of their "expect[ed]" investments. *Id.*; *see* JA2435 (*CCC Definition Comments*, at 6).

Overlooking the practical effect of its decision on present owners and ignoring record evidence, the FCC concluded summarily that "owners [would] have sufficient time to minimize any specific complications due to joint operations." JA0229 (¶487). Even if such summary conclusions could satisfy the APA, the Commission's statement only addresses the costs of disaggregation and ignores that present owners will never recover the increased value of the combined entities under the FCC's new rules.

In addition, in response to commenters' arguments that "prohibiting transfers of station groups that exceed the new ownership limits would be unacceptably disruptive or would negatively impact the availability of bank financing," the Commission said only that it "rejecte[ed]" them. This response is so conclusory as to be "intolerably mute," *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), and is arbitrary and capricious because the agency did "not articulate[] any reason" for its conclusion, *Mazza*, 903 F.2d at 959.

The FCC's decision to allow transfers of non-compliant combinations to a limited class of "eligible entities" as a purported means of furthering new entry by and growth of small businesses, *see* JA0229 (¶488), is fraught with the same errors under the APA. The Commission did not purport to analyze whether companies with six million dollars or less in annual revenue would actually be able to obtain

the level of financing needed to acquire the radio combinations at issue but, rather, seems to have summarily concluded that its "exception" might improve diversity of ownership, competition, and localism. *See id.* By overlooking the obvious practical problems that these small companies are sure to face in obtaining the funds necessary to finance transactions—problems that would preclude the achievement of the Commission's posited goals[20]—the FCC here too arbitrarily ignored part of the regulatory problem before it. *State Farm*, 463 U.S. at 43; *Humphreys*, 96 F.3d at 662.

Second, the Commission failed to explain its departure from precedent allowing the transfer of noncompliant radio station clusters assembled in compliance with existing rules. When the FCC revised its radio ownership rules in 1992, it explicitly declined to restrict the transfer of groups acquired in compliance with the limits adopted in its order but which later grew to a level exceeding the

[20] An "eligible entity" is a radio company with no more than six million dollars in annual revenue. JA0230 (¶489). Many of the clusters subject to forced breakup under the *Order* are valued at amounts far beyond the reach of "eligible entities." Even single-station transactions in mid-sized markets often far exceed the annual revenue of these entities. *See*, *e.g.*, Changing Hands, Broadcasting and Cable (Mar. 3, 2003), at 29 (single FM station in York, Pennsylvania sold for nine million dollars). Station groups in similarly sized markets sell for significantly higher amounts. *See*, *e.g.*, Changing Hands, Broadcasting and Cable (Jan. 13, 2003), at 48 (combination of two FM stations and two AM stations in Peoria, Illinois sold for thirty-seven million dollars). The values of these transactions do not even begin to approach the values of a large number of the combinations that must be disaggregated at the time of sale, particularly those in top-ranked markets.

audience share limit, because its goal had been "to promote robust competition," and "penalizing enterprises that grow into stronger competitors [was] [in]consistent with this objective." *Radio Rules First Reconsideration*, 7 F.C.C.R. at 6397.

The Commission also historically allowed the intact transfer of numerous radio and other broadcast combinations, consistently recognizing that transfer of an existing combination "do[es] not increase the combined advertising revenue shares of … existing groups or result in increased levels of ownership concentration." *AMFM, Inc.*, 15 F.C.C.R. 16062, 16069 (2000); *see Solar Broadcasting Co.*, 17 F.C.C.R. 5467, 5475 (2002); *Jacor Communications, Inc.*, 14 F.C.C.R. 6867, 6905-06 (1999); *Am. Radio Sys. Corp.*, 13 F.C.C.R. 12430, 12437-48, 12442-43 (1998); *see also*, *e.g.*, *EWS News Corp.*, 12 F.C.C.R. 20243, 20247 (1997) (awarding waiver and stating that "since grant of this application will preserve an existing combination, we do not believe that continued joint ownership of the stations will decrease the level of diversity and competition in the market").

The FCC did not attempt to reconcile its decision to all but eliminate the right to transfer combinations with these previous decisions, stating only that its decision was "consistent with" its *Radio Rules First Reconsideration* decision because at the time of the rule change, no noncompliant clusters existed and thus "grandfathering existing combinations was not at issue." JA0229 (¶487 n.1039). But the Commission in that decision *allowed* the transfer of combinations that

complied with the new limits at the time of acquisition but exceeded those limits at the time of sale. Here, the FCC prohibited precisely the same type of transfer. The Commission simply disavowed any inconsistency and provided no analysis whatsoever for its different approach in this proceeding. *See Sinclair*, 284 F.3d at 162-65; *Fox*, 280 F.3d at 1044-45; *Mazza*, 903 F.2d at 959; *NRDC II*, 790 F.2d at 298; *Greater Boston Television Corp.*, 444 F.2d at 852. The FCC, moreover, did not mention—much less provide a basis for departing from—the prior decisions recognizing that transfers of existing combinations merely maintain the *status quo* and do not cause competitive harm. The fact that the Commission failed even to reference these precedents in the face of Clear Channel's substantial reliance upon them in its comments constitutes a separate violation of the APA. *Darrell Andrews Trucking, Inc.*, 296 F.3d at 1134-35; *Iowa*, 218 F.3d at 759; *Bethlehem Steep Corp.*, 651 F.2d at 867.

Third, although Clear Channel argued that refusing to allow transfers of existing radio combinations would violate the Takings and Due Process Clauses of the Constitution, the FCC ignored those comments too. But administrative agencies are not free to ignore arguments that a particular course of action creates serious constitutional questions. *See Meredith Corp. v. FCC*, 809 F.2d 863, 872 (D.C. Cir. 1987); *WAIT Radio v. FCC*, 418 F.2d 1153, 1156 (D.C. Cir. 1969).

C. <u>The New Limitations On Transferability Raise Serious Constitutional Questions.</u>

The *Order*'s severe restriction on the transferability of station groups properly assembled under prior ownership rules raises serious constitutional concerns under the Takings and Due Process Clauses of the Constitution. *See* JA4893-95 (*CCC Omnibus Reply Comments*, at 13-15). Administrative agencies, like courts, are obliged to avoid results that create serious constitutional problems, *see DeBartolo Corp. v. Fla. Gulf Coast Trades Council*, 485 U.S. 568, 588 (1988); *Williams v. Babbitt*, 115 F.3d 657, 662-63 (9th Cir. 1997), and the Commission thus should have fashioned a rule on transferability that would obviate these problems.

Property ownership includes the right "to … dispose of" property as the holder desires. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). Also, radio licensees also have constitutionally protected rights in the investments made to purchase or to assemble station groups. By prohibiting the transfer of combinations assembled in full compliance with prior rules to parties other than "eligible entities,"[21] the FCC's decision gravely threatens the protected right of disposition as well as present owners' ability to recoup prudent past

[21] *See supra*, n.20. By banning all would-be purchasers save those who cannot afford or obtain the financing necessary to buy the groups at even their original investment value, if not the current fair market value, the Commission's rule on transfer drastically curtails the ability of the sellers to obtain just compensation.

investments. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (requiring compliance with subsequently enacted regulations is a taking where government encouraged investment in reliance on prior regulatory regime).

Indeed, station owners made these investments in direct reliance on the 1992 and 1996 revisions of the ownership rules and at the *explicit* encouragement of Congress and the Commission. *See supra*, pp.13-14. Group owners thus reasonably expected to be able to sell station groups intact and, at a minimum, to recoup the substantial investments made to create them. By disallowing parties from enjoying the future benefits of their investments, or even recovering those investments at all, the FCC has engaged in exactly the kind of governmental "bait and switch" that, absent a "significant threat to the common welfare," *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987), the Takings Clause prohibits, *Kaiser Aetna*, 444 U.S. at 179-80.

The Commission's refusal to allow free transferability also creates grave problems under the Fifth Amendment's Due Process Clause, under which retroactive regulations that "change the legal consequences of transactions long closed" are highly disfavored. *E. Enters. v. Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); *see United States v. Sec. Indus. Bank*, 459 U.S. 70, 78 (1982). Because allowing such transfers, as the FCC has repeatedly acknowledged, would not increase concentration levels in

local radio markets but instead merely would maintain the *status quo*, the ban on transferability does not serve any "legitimate" government interest necessary to justify a retroactive regulation. *E. Enters.*, 524 U.S. at 549 (Kennedy, J., concurring in the judgment and dissenting in part); *accord id.* at 528-31 (plurality opinion of O'Connor, J.); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976) (retroactive effects of regulations must be supported by an independent, legitimate justification).[22] The Commission's decision is also "fundamentally unfair," *E. Enters.*, 524 U.S. at 549 (Kennedy, J., concurring in the judgment and dissenting in part); *accord id.* at 530-31 (plurality opinion of O'Connor, J.), as it deprives radio station owners of the benefits of investments made long ago in reliance on existing government policies that not only did not prohibit the relevant transactions but affirmatively *encouraged* them. *See supra*, pp.13-14.

Because of the unfairness that these constitutional concerns reflect, agencies are generally not authorized to make retroactive changes "in the absence of an explicit command from Congress." *Sec. Indus. Bank*, 459 U.S. at 81; *see Bowen v.*

[22] In so far as the Commission seeks to promote diversity of ownership *via* the transferability restriction, the "eligible entities" who can buy the properties in question need only hold them for three years, JA0230 (¶490)—so any actual public benefits of the limitation are entirely transient, while the loss of value to the prior owner is permanent. Indeed, the prior owner's loss is the eligible entity's gain because that entity may reap the economic benefits of the high-valued non-compliant combination, either by transferring it to another eligible entity within three years, or by transferring it to another party after three years.

Georgetown Univ. Hosp., 488 U.S. 204, 208-09 (1979). Far from such a clear statutory authorization, Section 202(h) mandates that the FCC avoid even prospective increases in regulatory burdens, much less those with retroactive effects.[23]

The presence of these serious constitutional questions obligated the Commission to craft a rule that respected reasonable investment-backed expectations. Its failure to do so requires a remand.

IV. THE COMMISSION'S DECISION TO ATTRIBUTE ADDITIONAL SALES AND MARKETING AGREEMENTS UNDER THE LOCAL RADIO OWNERSHIP RULE AND REFUSAL TO GRANDFATHER NEWLY ATTRIBUTABLE AGREEMENTS IS UNLAWFUL.

A. The FCC's Attribution Of Additional Sales And Programming Agreements, Without Grandfathering Existing Agreements, Violates Section 202(h).

The Commission's decisions to attribute JSAs, *see* JA0161-65 (¶¶316-24), and additional LMAs, *see* JA0146-47 (¶280 nn.592-93)), in calculating compliance with the local radio ownership limits also effectively increase regulatory burdens on licensees. By "increas[ing] the number of radio stations that count toward an entity's numerical ownership limit," the FCC—as it acknowledged—effectively lowered the numerical ownership caps in local markets. JA0226 (¶483). The

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[23] Moreover, a "rule that has unreasonable secondary retroactivity—for example, altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule—may for that reason be 'arbitrary' or 'capricious,' and thus invalid." *Bowen*, 488 U.S. at 220 (Scalia, J. concurring) (internal citation omitted).

Commission's determination that licensees must terminate newly attributable sales and marketing agreements or otherwise come into compliance with the new rules within two years of the effective date of the *Order*, *see* JA0165, JA0230-31 (¶¶325, 491), aggravates this clear violation of Section 202(h).

The effect of the FCC's decision—an overall increase in regulation—simply cannot be squared with Congress's clear intention in Section 202(h) to cause a net decline in the regulatory burdens under which licensees must operate. Even if the adoption of new regulations were permissible under Section 202(h), the *Order* contains no analysis as to whether the expansion of its attribution rules regarding JSAs and LMAs and the related refusal to grandfather such arrangements are in fact "necessary in the public interest." Nor does the *Order* contain any reference to competition in the relevant markets. The analysis in the *Order*—which does not even present informed speculation, let alone evidence that a change in the Commission's attribution rules was "required to achieve a desired goal"—thus falls woefully short of Section 202(h)'s requirements. *CTIA*, 330 F.3d at 510; *see* *Fox*, 280 F.3d 1042, 1044, 1051.

B. <u>The New Rules Attributing JSAs And Certain LMAs And The Refusal To Grandfather Those Agreements Violate The APA.</u>

The FCC's decisions to count JSAs, *see* JA0161-65 (¶¶316-24), and additional LMAs, *see* JA0146-47 (¶280 nn.592-93), in calculating compliance with the local radio ownership limits, as well as its refusal to grandfather those now-

attributable interests, *see* JA0165, JA0230-31 (¶¶325, 491), are also arbitrary and capricious.

In deciding that all JSAs should now be attributable, the Commission provided no explanation—much less the "reasoned" decisionmaking demanded by the APA—for departing from its previous decision that JSA attribution was inappropriate. The FCC in 1999 acknowledged that JSAs "help promote diversity by enabling smaller stations to stay on the air" and, in the absence of evidence of abuse, declined to attribute such agreements. *Review of the Commission's Regulations Governing Attribution of Broadcast/Cable/MDS Interests*, 14 F.C.C.R. 12559, 12612 (1999). Clear Channel argued that "[n]othing has transpired over the succeeding two years that would justify reconsideration of these positions," JA3286 (*CCC Local Radio Ownership Comments*, at 27), but the FCC did nothing more than state its "disagree[ment]" with this argument, JA0164 (¶322).

Although an agency may reverse a prior decision, it must explain the reasons for doing so in detail. *See State Farm*, 463 U.S. at 57. Neither the Commission's vague reference to its "experience administering the local radio ownership rule" without any elaboration of what that "experience" revealed, nor its entirely circular assertion that JSAs should be attributable because they "may convey sufficient influence or control over advertising to be considered attributable" without any

explanation of how that "influence or control" is manifested, meets this standard. JA0164 (¶322).

Moreover, the FCC did not identify any "abuses" by radio licensees since 1999, but instead simply stated its summary conclusion and moved on. This failure—ignoring the analytical framework set forth by the Commission itself in 1999—renders the agency's decision arbitrary and capricious. *NRDC II*, 790 F.2d at 309 (decision arbitrary and capricious where agency "failed to provide any plausible reason" and "cited no data whatsoever" to support its conclusion); *see Sinclair*, 284 F.3d at 162-65; *Fox*, 280 F.3d at 1044-45; *Greater Boston Television Corp.*, 444 F.2d at 852. At a minimum, the FCC's failure to respond to Clear Channel's argument regarding the problems associated with departing from the agency's precedent—including Clear Channel's demonstration that nothing had transpired to justify such departure—constitutes an independent error requiring remand. *Darrell Andrews Trucking, Inc.*, 296 F.3d at 1134-35; *Iowa*, 218 F.3d at 759; *Bethlehem Steel Corp.*, 651 F.2d at 867.

The Commission's decision to attribute additional LMAs, *see* JA0146-47 (¶280 nn.592-93), similarly fails to satisfy the reasoned-decisionmaking requirement. Buried in two footnotes is the FCC's declaration that it "will count [such] station[s] as participating" in a radio market because that decision "makes

sense." *Id.* This explanation is far too conclusory to satisfy the APA. *See NRDC II*, 790 F.2d at 309; *Greater Boston Television Corp.*, 444 F.2d at 852.

The Commission's further decision to require parties to these newly-attributable agreements to terminate them or otherwise to comply with the revised local radio ownership rules within two years, *see* JA0165, JA0230-31 (¶¶325, 491), suffers from three analytical errors that render this aspect of the *Order* arbitrary and capricious too. *First*, as Clear Channel argued in its comments, the FCC previously had grandfathered brokerage agreements, recognizing that any other result "could severely and unnecessarily restrict the marketability of stations and station combinations that involve brokerage agreements and seriously undermine the utility of such agreements." JA4892 (*CCC Omnibus Reply Comments*, at 12 (quoting *Radio Rules Second Reconsideration*, 9 F.C.C.R. at 7193)). The Commission provided no discussion as to why it reached a different conclusion here, stating instead simply that the two-year period it had chosen "will give licensees sufficient time." JA0165 (¶325). The *Order* provides no explanation, nor could it, as to why grandfathering of brokerage agreements was appropriate in 1992 but in 2003 two years is "sufficient." *See Sinclair*, 284 F.3d at 162-65; *Fox*, 280 F.3d at 1044-45; *NRDC II*, 790 F.2d at 309; *Greater Boston Television Corp.*, 444 F.2d at 852.

Second, the FCC's refusal to grandfather newly attributable JSAs and LMAs is inconsistent with its decision to grandfather owned clusters in this very *Order*. The agency specifically recognized that a failure to grandfather owned combinations "would unfairly penalize parties who bought stations in good faith in accordance with the Commission's rules," that owners "should be afforded an opportunity to retain the value of their investments made in reliance on [the FCC's] rules and orders," and "that compulsory divestiture would be too disruptive to the industry." JA0227 (¶484). The Commission further concluded that "[o]n balance, any benefit to competition from forcing divestiture is likely to be outweighed by these countervailing considerations." *Id.*

In the context of newly attributable JSAs and LMAs, however, the FCC declined to adopt a grandfathering policy. Nowhere did the Commission even attempt to explain why the considerations that prompted it to grandfather *owned* combinations did not support a similar result with respect to *newly attributable* JSAs and LMAs. *See* JA0165, 0230-31 (¶¶325, 491). In fact, the same considerations *do* apply in the context of LMAs and JSAs—termination of such agreements penalizes parties who entered into them in reliance on the FCC's rules, deprives them of the ability to retain the value of their investments, and will disrupt private contractual arrangements. The APA affirmatively obligated the Commission to reconcile these internal inconsistencies in its *Order*, and the

agency's failure to do so requires a remand. *See*, *e.g.*, *Airline Pilots Ass'n v. FAA*, 3 F.3d 449, 450 (D.C. Cir. 1993); *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 855 (D.C. Cir. 1986); *NRDC II*, 790 F.2d at 302.

Third, the Commission ignored Clear Channel's comments on these issues. The FCC did not try to reconcile its decision regarding JSA attribution with its previous 1999 conclusion that JSAs should not be attributable, even though Clear Channel asserted that the Commission's 1999 determination remained correct. In addition, Clear Channel argued that full grandfathering was necessary to avoid violating the Constitutional rights of parties to JSAs and LMAs, but the FCC here too was silent. The agency's failure to address Clear Channel's "significant comments" is yet another reason why remand is required. *E.g.*, *Darrell Andrews Trucking, Inc.*, 296 F.3d at 1134-35; *Meredith Corp.*, 809 F.2d at 872; *Bethlehem Steel Corp.*, 651 F.2d at 867; *WAIT Radio*, 418 F.2d at 1156.

C. The Commission's Attribution Of JSAs And Additional LMAs And Its Refusal To Grandfather Those Agreements Raises Serious Constitutional Concerns.

As with the new limitations on transferability, the FCC's decision to attribute JSAs and additional LMAs, without grandfathering existing agreements, raises serious constitutional questions under the Fifth Amendment. These agreements are, at bottom, contracts. "Valid contracts are property" protected by the Takings Clause. *Lynch v. United States*, 292 U.S. 571, 579 (1934). Moreover,

parties to contractual agreements have constitutionally protected property rights in the value of the prudent investments made in furtherance of such agreements. *See Kaiser Aetna*, 444 U.S. at 179-80.

The Commission's previous regulatory regime, under which fewer LMAs were attributable and JSAs were not attributable at all, created reasonable investment-backed expectations that such agreements could continue in accord with local radio ownership limits. The FCC's change in policy deprives parties of the benefits of their contractual agreements and investments made in furtherance of those agreements, without providing any evidence of countervailing public interest benefits—thus raising serious problems under the Takings Clause. *See supra*, Section III.C.

Moreover, this aspect of the Commission's decision triggers real concerns about Due Process. *See id.* The FCC has gone back in time and changed the consequences of transactions that are now closed, without providing any evidence that the change is necessary to promote a legitimate government interest. Accordingly, its decision to require termination of JSAs and LMAs within two years of the effective date of the *Order* constitutes impermissible retroactive rulemaking.

CONCLUSION

For the foregoing reasons, Clear Channel respectfully requests that the Court (1) reverse the Commission's decision regarding the proper interpretation of Section 202(h), (2) vacate the portions of the *Order* wherein the Commission decided to retain the eight-station cap, to prohibit free transferability, and to attribute and not to grandfather certain JSAs and LMAs, and (3) remand this proceeding to the FCC with instructions that, if it wishes to attempt to reinstate these aspects of the *Order*, it must reconsider each issue in compliance with Section 202(h) and the APA.

Respectfully submitted,

____
Andrew G. McBride

____
Richard J. Bodorff*

Miguel A. Estrada
Michael J. Edney
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
TEL: 202.955.8500
FAX: 202.467.0539

Helgi C. Walker
Eve Klindera Reed
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
TEL: 202.719.7000
FAX: 202.719.7049

November 3, 2003

* Counsel of Record

CERTIFICATION OF BAR MEMBERSHIP PURSUANT TO LAR 46.1

I, Richard J. Bodorff, hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

____
Richard J. Bodorff

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C)

Pursuant to Fed. R. App. P. 32, counsel for Clear Channel certifies that this brief complies with the applicable type-volume limitations. The attached brief for Petitioner is printed using a proportionally spaced, 14-point Times New Roman typeface and contains 13,860 words. This certificate was prepared in reliance on the word count of the word-processing system (Microsoft Word) used to prepare this brief.

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Richard J. Bodorff

STATUTORY ADDENDUM

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Statutory Provisions

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Section 202 of the Telecommunications Act of 1996,
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5 U.S.C. § 706 (2002)

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.

Section 202 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 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 CFR § 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 CFR § 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 CFR § 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 CFR 73.658(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 CFR § 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 CFR § 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.

(i) Elimination of Statutory Restriction.--Section 613(a) (47 U.S.C. § 533(a)) is amended--

(1) by striking paragraph (1);

(2) by redesignating paragraph (2) as subsection (a);

(3) by redesignating subparagraphs (A) and (B) as paragraphs (1) and (2), respectively;

(4) by striking "and" at the end of paragraph (1) (as so redesignated);

(5) by striking the period at the end of paragraph (2) (as so redesignated) and inserting "; and"; and

(6) by adding at the end the following new paragraph:

(3) shall not apply the requirements of this subsection to any cable operator in any franchise area in which a cable operator is subject to effective competition as determined under section 623(l).

CERTIFICATE OF SERVICE

I, Eve Klindera Reed, hereby certify that, on this 3rd day of November, 2003, I caused two true and correct copies of the foregoing Brief for Petitioner Clear Channel Communications, Inc. to be sent via UPS for early morning delivery to the parties listed below.

____
Eve Klindera Reed

Nancy C. Garrison
U.S. Department of Justice
Antitrust Division
Patrick Henry Bldg.
601 D Street, N.W., Room 10353
Washington, DC 20530

Counsel for United States of America

John A. Rogovin
Daniel M. Armstrong
Jacob M. Lewis
C. Grey Pash, Jr.
Nandan M. Joshi
Federal Communications Commission
C/O Office of the Secretary, FCC
9300 East Hampton Drive
Capitol Heights, MD 20743

Counsel for Federal Communications Commission

Michael D. Hays
Kenneth D. Salomon
John R. Feore, Jr.
M. Anne Swanson
Theodore L. Radway
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, DC 20036-6802

Counsel for Media General, Inc. Paxson Communications Corporation, Millcreek Broadcasting, L.L.C., and Simmons Media Group, LLC

Donald B. Verrilli, Jr.
Ian Heath Gershengorn
Michael B. DeSanctis
Jenner & Block, LLC
601 Thirteenth Street, N.W.
Washington, DC 20005

Henry L. Baumann
Jack N. Goodman
Jerianne N. Timmerman
National Association of Broadcasters
1771 N Street, N.W.
Washington, DC 20036

Counsel for National Association of Broadcasters

Henk Brands
Patrick S. Campbell
Paul, Weiss, Rifkind, Wharton & Garrison
LLP
1615 L Street, N.W.
Suite 1300
Washington, DC 20036

Counsel for Fox Entertainment Group, Inc., Fox Television Stations, Inc., and Viacom Inc.

Ellen S. Agress
The News Corporation Limited
1211 Avenue of the Americas
New York, New York 10036

Maureen A. O'Connell
The News Corporation Limited
444 North Capitol St., N.W., Suite 740
Washington, DC 20001

Counsel for Fox Entertainment Group, Inc., and Fox Television Stations, Inc

Robert A. Long, Jr.
Jennifer A. Johnson
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004-2401

Counsel for CBS Television Network Affiliates Association, NBC Television Affiliates, and Network Affiliated Stations Alliance

Shelby D. Green
Pace University School of Law
78 No. Broadway
White Plains, NY 10603

Counsel for The National Council of the Churches of Christ in the United States

Michael D. Fricklas
Mark C. Morril
Viacom Inc.
1515 Broadway
New York, NY 10036

Counsel for Viacom Inc.

Michael K. Kellogg
Mark L. Evans
Kellogg, Huber, Hansen, Todd & Evans,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036

Lawrence Tu
Susan Weiner
National Broadcasting Company, Inc.
30 Rockefeller Plaza
New York, New York 10112

F. William LeBeau
National Broadcasting Company, Inc.
1299 Pennsylvania Ave., N.W.
Washington, DC 20004

Counsel for National Broadcasting Company, Inc., and Telemundo Communications Group, Inc.

Wade H. Hargrove
Mark J. Prak
Brooks, Pierce, McLendon, Humphrey & Leonard
1600 Wachovia Capitol Center
150 Fayetteville Street Mall
Raleigh, NC 27601

Counsel for the ABC Television Affiliates Association and the Network Affiliated Stations Alliance

Andrew Jay Schwartzman
Cheryl A. Leanza
Harold Feld
Media Access Project
Suite 1118
1625 K Street, N.W.
Washington, DC 20006

Counsel for the Prometheus Radio Project, Fairness and Accuracy in Reporting, and Center for Digital Democracy

Angela J. Campbell
James A. Bachtell
Citizens Communications Center Project
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, DC 20001

Counsel for Media Alliance and the Office of Communication of the Untied Church of Christ, Inc.

Kathryn R. Schmeltzer
Barry H. Gottfried
Paul A. Cicelski
Scott R. Flick
Brendan Holland
Christopher J. Sadowski
Shaw Pittman LLP
2300 N Street, N.W.
Washington, DC 20036

Counsel for Sinclair Broadcast Group, Inc., and Univision Communications, Inc.

Samuel L. Spear
Spear Wilderman Borish Endy Spear & Runckel
Suite 1400
230 South Broad Street
Philadelphia, PA 19102

Counsel for the Prometheus Radio Project

Jerome M. Marcus
Berger & Montague, P.C.
1622 Locust Street
Philadelphia, PA 19103

Dianne Smith
Special Projects Counsel
Capitol Broadcasting Co., Inc.
2619 Western Boulevard
Raleigh, NC 27606

Counsel for Capitol Broadcasting Company, Inc.

David Honig
Executive Director
Minority Media and Telecommunications Council
3636 16th Street, N.W. #B-366
Washington, DC 20010

Counsel for Minority Media and Telecommunications Council, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, Inc., PRLDEF-Institute for Puerto Rican Policy, UNITY: Journalists of Color, Inc., and Women's Institute for Freedom of the Press

Crane H. Kenney
Tribune Company
435 N. Michigan Avenue
Chicago, IL 60611

Carter G. Phillips
R. Clark Wadlow
Mark D. Schneider
James P. Young
Anita L. Wallgren
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, DC 20005

Counsel for Tribune Company

David P. Fleming
General Counsel, Gannett Broadcasting
Gannett Co., Inc.
7650 Jones Branch Drive
McLean, VA 22107

Counsel for Gannett Co., Inc.

Guy Kerr
Senior Vice President/Law and Government & Secretary
Belo Corp.
400 South Record Street
Dallas, TX 75202

Counsel for Belo Corp.

John F. Sturm
President and Chief Executive Officer
Newspaper Association of America
1921 Gallows Road
Suite 600
Vienna, VA 22182-3900

Counsel for the Newspaper Association of America

David A. Irwin
Alan C. Campbell
Jason S. Roberts
Irwin, Campbell & Tannenwald, P.C.
1730 Rhode Island Avenue, N.W.
Suite 200
Washington, DC 20036-3101

Counsel for Sunbelt Communications Company, Diversified Communications, Press Communications, LLC, and Family Stations, Inc

Glenn B. Manishin
Stephanie A. Joyce
Kelley Drye & Warren LLP
8000 Towers Crescent Drive
Suite 1200
Vienna, VA 22182

Gene Kimmelman
Senior Director of Public Policy and Advocacy
Consumers Union
1666 Connecticut Avenue, N.W.
Suite 310
Washington, DC 20009-1039

Counsel for Consumer Federation of America and Consumers Union

James R. Bayes
John E. Fiorini, III
Kathleen A. Kirby
Wiley Rein & Fielding LLP
1776 K Street, NW
Washington, DC 20006

Counsel for the Newspaper Association of America, Gannett Co., Inc., Belo Corp., Morris Communications Company, LLC, and Emmis Communications Corporation

Paul C. Besozzi
Stephen Diaz Gavin
Patton Boggs LLP
2550 M Street, N.W.
Washington, DC 20037

Timothy R. Smith
Nassau Broadcasting Holdings, Inc.
Nassau Broadcasting II, L.L.C.
619 Alexander Road, 3rd Floor
Princeton, NJ 08540

Counsel for Nassau Broadcasting II, L.L.C., and Nassau Broadcasting Holdings, Inc.

Rachel Weintraub
Assistant General Counsel
Consumer Federation of America
1424 16th Street, N.W., Suite 604
Washington, DC 20036

Counsel for Consumer Federation of America and Consumers Union