

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

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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PROMETHEUS RADIO PROJECT, *et al.*,

*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION, and  
THE UNITED STATES OF AMERICA,

*Respondents,*

and consolidated cases.

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

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**BRIEF FOR INTERVENORS**

**Office of Communication of the United Church of Christ, Inc.**

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December 9, 2003

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Third Circuit Local Appellate Rule 26.1 and Federal Rule of Appellate Procedure 26.1, the Office of Communication of the United Church of Christ, Inc. submits this Corporate Disclosure Statement:

The Office of Communication of the United Church of Christ, Inc. has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Respectfully Submitted,

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December 9, 2003

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## **STATEMENT OF INTEREST**

Intervenor Office of Communication of the United Church of Christ, Inc. (“UCC”) develops media policy for the United Church of Christ, a not-for-profit, religious organization with approximately 1.4 million members in over 6,000 congregations throughout the United States and Puerto Rico. Over the past 30 years, UCC has participated in numerous FCC and judicial proceedings representing the rights of viewing and listening public. UCC filed comments in three of the rulemaking proceedings leading up to the rules at issue in this appeal. While UCC advocated for ownership rules that would be more protective of the public’s First Amendment right to a multiplicity of diverse and antagonistic sources of information and more responsive to the local concerns than those ultimately adopted by the FCC, UCC supports the FCC’s decision in response to arguments by Deregulatory Petitioners that the rules are unconstitutional or should have been further relaxed or repealed.

### **STATEMENTS OF JURISDICTION, RELATED CASES, THE CASE, THE FACTS, AND STANDARD OF REVIEW**

UCC generally adopts the Statements of the Respondent FCC in these matters.<sup>1</sup>

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<sup>1</sup> UCC has not had an opportunity to review Respondent’s brief and thus cannot determine whether it agrees fully with the FCC. However, in view of the large number of briefs addressing these issues, UCC did not think it would be useful to include separate Statements on these issues.

## **STATEMENT OF ISSUES PRESENTED**

1. Whether media ownership rules are a constitutional means of promoting the public's paramount First Amendment right to diverse sources of news and information?
2. Whether Cross Media Limits, which check concentration of newspapers, television, and radio, are constitutional and necessary in the public interest?
3. Whether the local television rule, including the top-four standard, serves the public interest?
4. Whether the FCC, to prevent consolidation and diminution of diversity in radio markets, properly retained the numeric caps, used Arbitron markets, and imposed restrictions on transfers of radio stations?

## **SUMMARY OF THE ARGUMENT**

The broadcast ownership rules are a Constitutional means of promoting the public's First Amendment right to diverse sources of news and information. The Supreme Court has consistently applied rational basis review to the FCC's broadcast ownership regulations because the broadcast spectrum is a scarce and valuable public resource licensed for use by the FCC. Because it is impossible for everyone who wants a license to get one, nobody has a First Amendment right to a license. Therefore, rules such as these, which promote the public interest in

competition, diversity and localism by denying licenses to parties who already operate a broadcast station or publish a newspaper in the market, easily pass rational basis review.

Although Deregulatory Petitioners argue that heightened scrutiny should apply because the proliferation of other media outlets has eliminated scarcity, the fact remains that there are still more would-be broadcasters than licenses to grant, and, despite repeated challenges (including some by the same parties), courts have reaffirmed the “scarcity doctrine.” Neither the FCC nor Congress has “signaled” an end to scarcity, and in fact, recent developments demonstrate that, if anything, demand for the limited spectrum has increased.

Moreover, the Court should reject the arguments of the Deregulatory Petitioners that the three local rules should be further relaxed or even eliminated. The Commission has replaced the strict prohibition against newspaper-broadcast cross ownership with Cross Media Limits (“CMLs”) that allow cross-ownership in markets serving the vast majority of Americans. CMLs, which apply to newspapers, radio stations and televisions, do not “single out” newspapers in violation of the Equal Protection Clause. Nor do they violate the First Amendment rights of newspaper-owners. The Supreme Court’s decision in *NCCB* controls here. Moreover, the record and Supreme Court precedent support the

Commission's determination that having newspapers and broadcast stations owned by different entities increases the diversity of viewpoints available to the public.

The Court should also reject the Networks' argument that the relaxed local television rule unnecessarily duplicates antitrust efforts. The FCC's role is distinct from the antitrust agencies because it is charged with protecting the public interest, which includes promoting diversity and localism as well as economic competition. When examining economic competition, the FCC focuses on competition for viewers rather than competition in the sale of advertising. Further, the FCC must affirmatively find that each license transfer serves the public interest, while antitrust agencies review only large broadcast mergers. And contrary to NAB's claims, the record shows that the restriction against mergers of top-four stations is essential to preserving diversity and competition in all markets.

The Court should also affirm the FCC's decision to retain the radio station caps at current levels and to revise the definition of markets. The record demonstrates extensive consolidation has already occurred, making new entry difficult and limiting opportunities for expression of local views and talent. Adoption of the Arbitron markets, even if viewed as tightening the current caps, does not violate Section 202(h) of the 1996 Act because nothing in the statute or legislative history prevents the Commission from tightening the regulations to better serve the public interest. Finally, restricting the transfer of groups of radio

stations in violation of the rules is a reasonable means of promoting diversity and competition and does not violate the takings clause of the Constitution since licensees have no property interest in broadcast licenses. For these reasons, the Court should deny the petitions of the Deregulatory Petitioners.

## ARGUMENT

### I. THE MEDIA OWNERSHIP RULES ARE A CONSTITUTIONAL MEANS OF PROMOTING THE PUBLIC'S PARAMOUNT FIRST AMENDMENT RIGHT TO DIVERSE SOURCES OF NEWS AND INFORMATION

UCC agrees with the FCC that the media ownership rules at issue in this case are subject only to rational basis review. JA0042, Order ¶13. Deregulatory Petitioners wrongly assert that heightened or intermediate scrutiny should apply, and that under this standard, the regulations violate the rights of broadcasters or would-be broadcasters. Tribune Br. 28-30; Networks Br. 20-21. While UCC believes that this Court is bound by the Supreme Court's determination in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 799 (1978) (“*NCCB*”), to apply rational basis scrutiny to the FCC's broadcast ownership rules, UCC writes separately to elaborate on the reasons why broadcast regulations traditionally have been reviewed under different First Amendment standards and why this differential treatment continues to be appropriate. Rather

than infringing the free speech of broadcasters, the regulations promote the public's paramount First Amendment interests.

**A. Because There Is No First Amendment Right To Broadcast, The Ownership Rules Are Subject Only To Rational Basis Review**

Arguments for heightened scrutiny are premised on the assumption that the denial of a broadcast license violates the free speech rights of would-be broadcasters. However, the Supreme Court has repeatedly made clear that broadcasting is subject to a different standard of review under the First Amendment than other types of media. This is because broadcast spectrum is a scarce, publicly-owned resource, and many more people would like to broadcast than can be accommodated. The Communications Act established a regulatory regime in which licenses are required to broadcast, and grant of licenses is conditioned on serving the public interest. Because not everyone who wants a license can have one, nobody has a First Amendment right to a license and denial thereof cannot infringe the First Amendment. Consequently, the criteria used for licensing is subject only to rational basis review, and every court that has considered ownership regulations of the type at issue here has found them to be a constitutional means of promoting the public interest in diversity.

As far back as 1943, the Supreme Court rejected a constitutional challenge brought by the broadcast networks against FCC ownership rules known as the “chain broadcasting rule.” The Court recognized that:

Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied . . . . The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of “public interest”), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the “public interest, convenience, or necessity.” Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

*National Broad. Co., Inc. v. United States*, 319 U.S. 190, 226 (1943).

Subsequently, in *Red Lion Broadcasting Co. v. FCC*, the Court unanimously observed that “[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.” 395 U.S. 367, 388 (1969). Thus,

as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. *A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens.* There is nothing in the First

Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

*Id.* at 389 (emphasis added).

While recognizing that the First Amendment applied to broadcasting, the Court explained:

Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.* It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. *It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.*

*Id.* at 390 (citations omitted)(emphasis added).

Similarly, in *NCCB*, the Supreme Court unanimously held:

The physical limitations of the broadcast spectrum are well known. Because of problems of interference between broadcast signals, a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public. In light of this physical scarcity, Government allocation and regulation of broadcast frequencies are essential, as we have often recognized . . . we see nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the "public interest" in diversification of the mass communications media.

436 U.S. at 799 (citations omitted). In *NCCB*, the Court found a rule prohibiting newspaper-broadcast cross-ownership (“NBCO”) to be “a reasonable means of promoting the public interest in diversified mass communications; thus they do not violate the First Amendment rights of those who will be denied broadcast licenses pursuant to them.” *Id.* at 802.

In numerous other cases, whether upholding or overturning the challenged regulation, the Supreme Court has applied a less rigorous First Amendment standard to evaluate broadcasting regulations. *See, e.g., CBS, Inc. v. FCC*, 453 U.S. 367, 394-95 (1981)(upholding constitutionality of a statute giving federal candidates reasonable access to broadcast stations); *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984)(finding content-based prohibition on public broadcasters unconstitutional). And in each case, the Court was concerned with ensuring public access to the information that it needs to effectively participate in the democratic process. *CBS*, 453 U.S. at 396 (access rules enhance ability of “the public to receive information necessary for the effective operation of the democratic process”); *League of Women Voters*, 468 U.S. at 380 (“[A]lthough the broadcasting industry plainly operates under restraints not imposed upon other media, the thrust of these restrictions has generally been to secure the public’s First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern”).

Appellate Courts have likewise applied a less rigorous standard of First Amendment scrutiny to broadcasting regulations due to the limited availability of the radio spectrum for broadcast purposes, and the paramount First Amendment rights of the public. *See, e.g., Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 975 (D.C. Cir. 1996), *rehearing en banc denied*, 105 F.3d 723 (D.C. Cir. 1997)(upholding a requirement that direct broadcast satellite operators reserve a portion of their channel capacity for noncommercial educational and informational programming to assure public access to diverse sources of information).

Indeed, in *Sinclair Broadcast Group, Inc. v. FCC*, the court determined that rational basis was the appropriate standard of review and under that standard found that the former (and more stringent) local television ownership rules did not violate broadcasters' First Amendment rights. 284 F.3d 148, 167-68 (D.C. Cir. 2002). Similarly, in *Fox Television Stations, Inc. v. FCC*, the D.C. Circuit rejected the Networks' claims that the national television ownership limit should be subject to intermediate scrutiny and found the rule constitutional. 280 F.3d 1027 (D.C. Cir. 2002)(“*Fox I*”), *modified on rehearing*, 293 F.3d 537 (D.C. Cir. 2002)(“*Fox II*”).<sup>2</sup>

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<sup>2</sup> In addition, in several recent cases, courts have found that government shut downs of unlicensed broadcast operations do not violate the broadcasters' First Amendment rights because there is no First Amendment right to broadcast without a license. *See, e.g., United States v. Szoka*, 260 F.3d 516, 526 (6th Cir. 2001); *United States v. Any and All Radio Station Equipment*, 93 F. Supp. 2d 414, 417, 420-21 (S.D.N.Y. 2000).

If the Networks are correct that the *Fox* decision is the “law of the case,” Networks Br. 19, than they should be precluded from arguing for intermediate scrutiny.

Thus, Deregulatory Petitioners’ claim that ownership rules infringe their First Amendment rights because the rules limit their ability to obtain additional broadcast licenses is directly contradicted by over a half century of Supreme Court rulings that there is no First Amendment right to a broadcast license and therefore such restrictions are subject to only rational basis scrutiny.

**B. Deregulatory Petitioners Have Presented No Reason For Departing From These Long-Standing Precedents**

Despite the overwhelming amount of law on the appropriate standard for reviewing broadcast regulation, the Networks argue that rational basis review applies since spectrum scarcity no longer exists due to technological developments. Network Br. 20-21. Tribune similarly argues that “‘scarcity rationale’ can no longer be sustained in light of developments in the sources for delivery of information over the past decades.” Tribune Br. 28. Both claims are based on a footnote in the Supreme Court’s 1984 *League of Women Voters* decision which, while recognizing criticism of the spectrum scarcity rationale for broadcast regulation, stated that “[w]e are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system

of broadcast regulation may be required.” 468 U.S. at 376-77 n.11. Both Petitioners claim that the “signal” has now been given. Network Br. 21; Tribune Br. 28-30. But this claim is no more than wishful thinking.

**1. Both the Supreme Court and the D.C. Circuit have reaffirmed the applicability of the scarcity doctrine**

At the outset, it is important to recognize that since *League of Women Voters*, the Court has had multiple opportunities to revisit the scarcity doctrine, yet has declined to do so. In *Turner Broadcasting Systems Inc. v. FCC*, the Court noted that “although courts and commentators have criticized the scarcity rationale . . . we have declined to question its continuing validity as support for our broadcast jurisprudence, and see no reason to do so here.” 512 U.S. 632, 638 (1994)(citations omitted)(“*Turner P*”). Even more recently in *Reno v. American Civil Liberties Union*, the Court acknowledged that the special justifications for regulation of the broadcast media due to spectrum scarcity did not apply to the Internet, which could not be considered scarce. 521 U.S. 844, 868, 870 (1997).

Moreover, the D.C. Circuit has repeatedly rejected the *very same arguments* about the end of scarcity raised by some of the Deregulatory Petitioners here. For example, the Networks argued in *Fox* that “in today’s populous media marketplace the ‘scarcity’ rationale . . . ‘makes no sense’ as a reason for regulating ownership.”

280 F.3d at 1045. Yet, the court concluded that the Networks “offered no convincing reason” why *NCCB* and *NBC* should not control because:

First, contrary to the implication of the networks' argument, this court is not in a position to reject the scarcity rationale even if we agree that it no longer makes sense. The Supreme Court has already heard the empirical case against that rationale and still "declined to question its continuing validity." *Turner I*, 512 U.S. 622 (1994). In any event, it is not the province of this court to determine when a prior decision of the Supreme Court has outlived its usefulness. *Agostini v. Felton*, 521 U.S. 203 (1997).

Second, contrary to the networks' express protestations, the scarcity rationale is implicated in this case. The scarcity rationale is based upon the limited physical capacity of the broadcast spectrum, which limited capacity means that "there are more would-be broadcasters than frequencies available." *Turner I*, 512 U.S. at 637. In the face of this limitation, the national ownership cap increases the number of different voices heard in the nation (albeit not the number heard in any one market). But for the scarcity rationale, that increase would be of no moment.

*Id.* at 1046 (citations omitted).<sup>3</sup>

Similarly, in *Sinclair*, the court found that:

*Sinclair's* protest that *NCCB* is no longer controlling because it is undermined by the advent of cable television, DBS, and the internet, is to no avail. The rationale in *NCCB*, based on the necessity that the Commission choose between competing applicants for the same channel and the idea that government allocation of broadcast frequencies is essential, applies here.

284 F.3d at 168-69.

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<sup>3</sup> The Networks concede that the *Fox* court rejected their scarcity argument. Networks Br. 21 n.23.

Finally, in *Tribune Co. v. FCC*, which found the FCC's refusal to grant a permanent waiver of the NBCO rule did not violate the First Amendment, the court rejected Tribune's scarcity argument:

Nor are we free to "reexamine the scarcity doctrine in this case on this record," as Tribune asks. The Supreme Court has told the lower federal courts in no uncertain terms that we are to leave the overruling of its opinions to the Court itself. *See State Oil Co. v. Khan*, 118 S.Ct. 275, 284; *see also United States v. \$639,558*, 955 F.2d 712, 718 (D.C. Cir. 1992). We are stuck with the scarcity doctrine until the day that the Supreme Court tells us that the *Red Lion* no longer rules the broadcast jungle.

133 F.3d 61, 69 (D.C. Cir. 1998)(parallel citations omitted).

Thus, both the Supreme Court and D.C. Circuit have repeatedly declined to reconsider the scarcity doctrine and have continued to apply rational basis scrutiny to FCC structural regulations.

## **2. Neither the FCC nor Congress has signaled revision of the scarcity doctrine**

Even if this court were free to reexamine the scarcity doctrine, the FCC has not signaled that it would be appropriate to do so. While the FCC was clearly aware of the changes in technology and growth in media outlets, JA0079-80, Order ¶120, it found that "the rational basis test is the appropriate standard to govern our broadcast ownership regulations *because spectrum scarcity* requires 'Government allocation and regulation of broadcast frequencies.'" JA0043, Order ¶14 (emphasis added).

Nonetheless, Tribune claims that the Order’s findings concerning “the explosion of media outlets in recent decades unequivocally establish that the scarcity rationale is no longer tenable.” Tribune Br. 29. However, as shown, *supra* I.B.1, scarcity refers to the physical scarcity of the spectrum and the fact that more people would like to use the spectrum than can be accommodated, not to the number of media outlets, many of which, such as cable and the internet, do not use the radio spectrum. Thus, despite the proliferation of media outlets, spectrum scarcity continues.

Deregulatory Petitioners next claim that the FCC’s 1987 *Syracuse Peace Council* (“*SPC*”) decision and the 1998 statement of Commissioners Powell and Furtchgott-Roth in the *Personal Attack and Political Editorial Rules* gave the signal that *Red Lion* should be revisited. See Tribune Br. 29, Networks Br. 21 n.23. To the extent that either decision may have constituted the Commission’s view that scarcity no longer existed, that is clearly not the Commission’s view today.<sup>4</sup>

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<sup>4</sup> The FCC’s *SPC* Council decision was affirmed on statutory grounds alone; the court declined to reach the constitutional issue. *SPC v. FCC*, 867 F.2d 654, 657-58 (D.C. Cir. 1989). Moreover, the *1998 Joint Statement of Commissioners Powell and Furtchgott-Roth* does not represent the view of the Commission, for which three votes is required. Two other Commissioners issued a Statement on the same day that characterized the FCC’s language in *SPC* as “eleven-year old dicta,” and “reaffirmed that the scarcity rationale remains.” *Joint Statement of Commissioners Ness and Tristani*, 13 FCC Rcd 21902, 21926-27 (1998). Chairman Kennard did not participate in the 1998 decision. However, after the court directed the FCC to

Tribune also asserts that Congress “has clearly spoken” in the 1996 Telecommunications Act by relaxing and requiring biennial review of the FCC’s ownership rules and in the 1997 Balanced Budget Act by mandating the award of new licenses by auction. Tribune Br. 28-29. But Tribune cites no language in either Act stating that spectrum scarcity no longer exists. While both Acts required the FCC to revise broadcast regulations, neither altered the fundamental regulatory scheme under which anyone seeking to broadcast must obtain a license conditioned on serving the public interest. Indeed, Section 204(a) of the 1996 Act mandates that broadcast licenses be renewed only where the FCC finds that “the station has served the public interest, convenience and necessity.” Telecommunications Act of 1996 (“1996 Act”), Pub. L. No. 104-104, 110 Stat. 56, §204(a), *codified at* 47 U.S.C. §309(k). Section 201 exacerbates spectrum scarcity by limiting eligibility for new digital television licenses to persons already licensed to operate a television station. *Id.* at §201, *codified at* 47 U.S.C. §336(a)(1). It also makes clear that digital licensees are obligated to serve the public interest. 47 U.S.C. §336(d). Moreover, Congress’ decision to auction licenses reflects not a lack of

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supplement its analysis, the Commission issued an order which “made clear that the dicta in *Syracuse Peace Council* regarding the appropriate level of First Amendment scrutiny has been rejected by Congress, this Commission and the courts.” *Repeal or Modification of the Personal Attack and Political Editorial Rules*, 15 FCC Rcd 19973, 19979 (2000).

scarcity, but rather the desire to recoup for the public some of the value of the licenses, which command high prices precisely because they are scarce.<sup>5</sup>

### **3. Scarcity has not been eliminated by technological advances**

Nor is it true that technological innovation has eliminated scarcity. *See* Networks Br. 21. The observation in *Red Lion* that “[a]dvances in technology . . . have led to more efficient utilization of the frequency spectrum, but uses for the spectrum have also grown apace” remains true today. *Red Lion*, 395 U.S. at 396-97. As UCC pointed out, “With the explosive growth of cellular telephone and other wireless services, spectrum is the gold of the early 21st century.” JA5077, UCC Reply Comments 27(citations omitted).

If anything, broadcast scarcity has actually increased. In deciding to license low power or microradio stations in 1999, the FCC “observed that in contrast to 1978, when it first adopted the microbroadcasting ban, “[n]ow . . . radio service is widely available throughout the country and very little spectrum remains available for new full-powered stations.” *Ruggiero v. FCC*, 278 F.3d 1323, 1325 (D.C. Cir. 2002), *rev’d en banc*, 317 F.3d 239 (D.C. Cir. 2002)(citing Low-Power

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<sup>5</sup> *See, e.g.*, 47 U.S.C. §309(j)(3)(C)(object of competitive bidding is “recovery for the public of a portion of the value of the public spectrum resource made available for commercial use”); *Time Warner*, 93 F.3d at 975 (finding the last DBS license was auctioned off for \$682.5 million). *See also* J.H. Snider, *The Citizen’s Guide to the Airwaves*, New America Foundation 11 (2003)(estimating total value of spectrum at \$771 billion).

Reconsideration, 15 FCC Rcd 19208, 19236 (2000)). And upon creating the new low-power FM service, the FCC received many more applications than could be granted.<sup>6</sup> Another indication of the continuing scarcity of broadcast spectrum is the large number of unlicensed “pirate” radio operators that the FCC has shut down or denied licenses to in recent years. *See Ruggiero*, 317 F.3d at 242 (finding that in 1998-2000, the FCC shut down more than a dozen unlicensed radio stations each month).

Indeed, at the oral argument on the stay request in this case, Networks’ counsel conceded the continued existence of scarcity when arguing that a stay would harm his clients because “[b]roadcast stations are rare commodities, are *scarce* commodities, which is, of course, precisely why we have the unfortunate *Red Lion* doctrine (sic) on the books.” Transcript of Hearing on Motion to Stay at 90 (emphasis added).

In sum, the case remains that more people want to use the spectrum than can be accommodated. Thus, it continues to be necessary for the FCC to license users of the spectrum. In determining who is eligible to receive a license, the FCC reasonably adopted rules that award licenses to persons with no or fewer interests in other media over those who already hold licenses or other forms of mass media.

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<sup>6</sup> As of last year, the Commission had licensed 63 low power FM stations, had granted 445 construction permits, and had 3,073 applications still pending. JA4828, UCC Comments 15.

Not only do such rules clearly pass muster under rational basis scrutiny, but they further the “purpose of the First Amendment to preserve an uninhibited marketplace of ideas.” *Red Lion*, 395 U.S. at 390.

## **II. FURTHER RELAXATION OR REPEAL OF THE RULES IS NOT JUSTIFIED AND WOULD HARM THE PUBLIC**

### **A. Cross Media Limits Are Constitutional And Necessary In The Public Interest**

The Order significantly relaxed NBCO restrictions, but, in the interest of maintaining local viewpoint diversity, the FCC did not eliminate cross-ownership restrictions entirely. While the 1975 NBCO rule placed an absolute bar on common ownership of a daily newspaper and full-service broadcast station in the same geographic market, the new Cross Media Limits (“CMLs”) only prohibit common ownership of a broadcast station and a newspaper in a market with fewer than four television stations. JA0216-18, Order ¶¶454, 456. This restriction only applies in markets representing less than 3% of the population. JA0407, Dissent of Commissioner Adelstein at 15. Notably, in markets of that size, a broadcast television owner is also limited to owning a single television station because of the prohibition against mergers among the top-four local stations, JA0086, Order ¶132, and common ownership of broadcast radio and broadcast television facilities is also prohibited. JA0219-20, Order ¶460. The CMLs impose some limits on cross-ownership in markets with four to eight television stations, JA0221, Order ¶466,

and no limits in markets with eight or more. JA0223, Order ¶473. Hence, the CMLs are significantly less restrictive than the former NBCO rule.

Nonetheless, some Deregulatory Petitioners argue that the CMLs violate Equal Protection, violate the First Amendment, and are unnecessary to promote diversity. UCC agrees with the FCC that these arguments are without merit.

**1. CMLs do not violate the Equal Protection Clause of the Fifth Amendment.**

Tribune argues that the CMLs violate Equal Protection by singling out newspapers. Tribune Br. 20. This assertion is simply wrong.

In *NCCB*, the Supreme Court summarily rejected the argument that the NBCO rules singled out newspaper-owners in violation of Equal Protection. 436 U.S. at 801-02. It found that “the regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communications were already treated . . . . [O]wners of radio stations, television stations, and newspapers alike are now restricted in their ability to acquire licenses for co-located broadcast stations.” *Id.* at 801. Just as the NBCO rule did not single out newspapers, the CMLs do not single out newspapers in the few markets in which the CMLs will actually have an effect. While the CMLs specifically limit cross-ownership of daily newspapers and co-located radio stations and/or television stations in some markets, they also limit cross-ownership of co-located radio and television stations in those markets. Other ownership rules continue to limit

ownership of multiple television stations, JA0087, Order ¶134, and multiple radio stations in the same market. JA0130, Order ¶236.

Tribune claims that *NCCB* is not controlling, however, because the “relevant set of ‘major media of mass communication’ is much broader than in 1975.”

Tribune Br. 22. But the record does not support this claim. The purpose of the CMLs is to ensure that the public has access to diverse *local* news sources.

JA0195-99, Order ¶¶394, 399, 406. The FCC found that “broadcast television, daily newspapers, and broadcast radio are the three media platforms that Americans turn to most often for *local* news and information.” JA0216, Order ¶452 (emphasis added); *see also* CFA Comments, MB Docket No. 02-277, 102-03 (Jan. 2, 2003)(“CFA Comments”).

While Tribune claims that “cable television systems, cable and broadcast networks, Internet sites and delivery services, satellite programmers and system operators, and programming studios” are also “major media of mass communication,” Tribune Br. 22-23, none are significant sources of local news and information. Cable systems and networks “almost exclusively offer national or broadly defined regional programming.” JA0112, Order ¶191. In fact, the FCC determined that cable does not have a significant enough impact on local diversity to even warrant inclusion in its Diversity Index. JA0201-02, Order ¶¶413, 414. Although a few cable systems offer a local news channel, such channels add little

viewpoint diversity since they are typically operated by a broadcaster or newspaper already in the market. JA3842-44, UCC Comments 29-31. Consequently, cable is not a major medium for local news and information.

Similar to cable, the record showed that the public primarily utilizes the Internet to obtain national news. The FCC observed that “[t]he growth of news-oriented websites likewise might not be considered particularly significant, because many do not focus on local news and information, and those that do are often operated by existing local media, such as broadcast stations and newspapers.” JA2466, NBCO Order ¶16. The most widely viewed Internet news sites—America Online, Yahoo News, MSNBC.com, and CNN.com—cover national news but not local news and public affairs. JA3165-66, UCC Reply Comments 10-11. To the extent the Internet is used for local news, most people visit the websites of their local newspaper or broadcast television stations. JA4846, UCC Comments 33. As a result, the Internet is largely a supplemental method of distributing news rather than an independent source of views on local issues.

Nor are the other “mass media” cited by Tribune sources of local news. “Satellite programmers and system operators” do not produce any original local news. At best, satellite operators retransmit the local news programming provided by broadcast television stations, and such retransmission only occurs in a minority of markets. JA4845-46, UCC Comments 32-33. Likewise, programming studios

do not produce or distribute local news but merely create entertainment programming that is sold to broadcast and cable networks.

Thus, the FCC appropriately limited the CMLs to television, radio and newspapers because they are the primary sources of local news and information. Because the CMLs do not single out newspapers, there is no basis for applying heightened scrutiny, and just as the NBCO rules upheld in *NCCB*, the CMLs are “a reasonable means of promoting the public interest in diversified mass communications.” 436 U.S. at 802.

None of the cases cited by Tribune provide any basis for employing a higher level of scrutiny than that applied in *NCCB*. None concern broadcasting and the only two involving the media are easily distinguishable because one type of media was singled out for special treatment. *Turner I* addressed the constitutionality of an FCC rule that required cable systems, and only cable systems, to retransmit the signals of broadcast television stations. 512 U.S. at 660. *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue* involved a state special use tax on paper and ink used in publishing which only applied in practice to a few large newspapers. 460 U.S. 575, 578-79, 581 (1983).<sup>7</sup> In contrast, the CMLs do not apply only to newspapers and do not single out newspapers from other media.

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<sup>7</sup> The *NCCB* Court distinguished *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), a case involving a tax similar to that in *Minneapolis Star*, because the “effect of the tax in *Grosjean* was ‘to limit the circulation of information to which

Even if the CMLs were seen as singling out newspapers, heightened scrutiny would not be required. The Supreme Court in *Turner I* observed:

[T]he fact that a law singles out a certain medium, or even the press as a whole, is insufficient by itself to raise First Amendment concerns. Rather, laws of this nature are constitutionally suspect only in certain circumstances . . . such heightened scrutiny is unwarranted when the differential treatment is justified by some characteristic of the particular medium being regulated.

512 U.S. at 660 (citations omitted). In that case, the Court found that intermediate scrutiny was appropriate for an FCC regulation on cable television systems because cable did not implicate scarcity rationale. *Id.* at 662. The CMLs, by contrast, involve broadcast licensing, and the unique characteristic of broadcasting—scarcity—mandates rational basis review. *See supra* I.A. *See also Buckley v. Valeo*, 424 U.S. 1, 49 (1976)(holding that broadcasting presents “unique and special problems not present in the traditional free speech case”). Because the CMLs provide a reasonable regulatory mechanism for assigning broadcast frequencies, heightened scrutiny is not warranted.<sup>8</sup>

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the public is entitled,’ an effect inconsistent with the protection conferred on the press by the First Amendment.” 436 U.S. at 801 (citations omitted).

<sup>8</sup> For the same reason, strict scrutiny would be inappropriate. In arguing for strict scrutiny, Tribune relies on *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972). Tribune Br. 21. That case has no application here. In *Mosley*, the Court applied heightened scrutiny to a content-based city-picketing ordinance. *Id.* at 95. The CMLs, however, are a content-neutral regulation of the broadcast spectrum.

Even if heightened scrutiny applied, the CMLs should be upheld because they serve a substantial governmental interest in protecting diversity and localism, and are narrowly tailored to that intent because they only apply in small markets

## **2. CMLs do not violate the First Amendment rights of broadcasters or newspaper-owners**

Tribune argues in the alternative that CMLs do not even pass rational basis review under *NCCB*. Specifically, Tribune claims that *NCCB* “presumed that limiting broadcasters’ speech could be justified by ‘the First Amendment goal of achieving the widest possible dissemination of information from diverse and antagonistic sources.’ *NCCB*, 436 US at 795.” Tribune Br. 26. Tribune concludes that because cross-ownership increases the dissemination of diverse information to the public, the CMLs actually impede the very First Amendment interest that they are designed to protect, particularly in small markets with fewer resources to provide news. Tribune Br. 27.

However, Tribune’s argument ignores the fundamental fact that information from the same owner is unlikely to be “diverse and antagonistic.” As the Supreme Court found in *NCCB*, “it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run.” 436 U.S. at 797

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that would suffer the greatest harms due to cross-ownership, JA0217-18, Order ¶456, can be waived if it can be shown that a particular combination would better protect diversity and localism. JA0225, Order ¶481.

(citations omitted).<sup>9</sup> The FCC also found that diversity of *ownership* is what matters in enabling diversity of *viewpoint*. See, e.g., JA0044-45, Order ¶20; JA0047, Order ¶26.

Moreover, such diversity is particularly important in small markets where there are only a few television stations, and those are the very markets where the CML applies.<sup>10</sup> Indeed, the *NCCB* Court upheld the FCC’s decision to require divestiture of co-owned newspapers and broadcast stations in 16 markets that had only one broadcast station and one daily newspaper because of the FCC’s reasonable “judgment that the need for diversification was especially great in cases of local monopoly.” 436 U.S. at 814.

Because the CMLs are reasonably designed to promote the public interest in diversity by ensuring a minimal number of “diverse and antagonistic” voices, the CMLs pass rational basis review and do not violate the First Amendment rights of either broadcasters or newspaper-owners.

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<sup>9</sup> The *NCCB* Court affirmed rules despite an FCC study finding that newspaper-owned stations in the same community provided superior program service in some categories. 436 U.S. at 807.

<sup>10</sup> Although CMLs are most important in small markets, Tribune relies on a study that uses the largest U.S. markets, JA3572, MOWG 7 at 3, to make its claim that efficiencies can be achieved by co-owned newspaper/broadcast combinations. Tribune Br. 27. MOWG 7 relies on RTNDA awards to gauge programming “quality,” but since only stations in the top 50 markets are eligible to receive this award, the quality of programming in the markets where CMLs are most needed is not measured.

**3. The record supports the Commission’s conclusion that diversified ownership results in diverse viewpoints.**

Tribune and other Deregulatory Parties argue that the CMLs are arbitrary because ownership does not affect content, and therefore allowing cross-ownership among major daily newspapers, radio, and broadcast television stations would have no negative impact on viewpoint diversity. *See, e.g.*, Tribune Br. 51; NAA Br. 24-27.

This claim is clearly at odds with the instant record and long-standing Supreme Court precedent. The Commission found CMLs instrumental to preserve “a diverse and robust marketplace of ideas [which] is the foundation of our democracy” because “there [is] a positive correlation between viewpoints expressed and ownership of an outlet,” JA0044-45, Order ¶¶19-20. Even if “local outlets are given free and independent editorial reign,” Tribune Br. 51, or “jointly owned outlets . . . avoid . . . espousing a particular viewpoint or speaking with one ‘voice,’” NAA Br. 39, the fact remains that “owners of media outlets clearly have the ability to affect public discourse, including political and governmental affairs, through their coverage of news and public affairs.” JA0047, Order ¶28.

In contrast to NAA claims that “broadcast reporters and executives, as well as newspaper writers and editors, simply do not select and present stories with an eye toward satisfying the views of their owner,” NAA Br. 39, the record in this

proceeding contains numerous studies and examples showing that owners' economic and political interests affect which news stories are presented and how they are presented. Some examples from the record are:

- A Pew Research Center for the People & the Press survey that included television journalists and executives at all four major networks, found that about one-quarter of journalists purposely avoided newsworthy stories and nearly as many softened the tone of stories to benefit the interests of their news organizations. JA4817, UCC Comments 4.
- A 2001 survey of 118 news directors found that both media owners and sponsors pressure reporters to slant the news. CFA Comments 44 (citing Marion Just, *et al.*, *News for Sale: Half of Stations Report Sponsor Pressure on News Decision*, Columbia Journalism Review-Project for Excellence in Journalism, Nov/Dec 2000, at 2).
- A 2002 study in the *Journal of Broadcasting & Electronic Media* found that outlets included more references to their own products and services and treated those items more favorably than others, thus exhibiting what is called a "synergy bias." JA4818, UCC Comments 5.
- A 2002 study examined newspaper coverage of more than 60 Senatorial campaigns across three election years. Despite the presumption of separation between editorial and news pages, the information on *news* pages was slanted in favor of the candidates endorsed on the newspaper's *editorial* pages. The study found further that this slant had a great effect on many political races. CFA Comments 41 (citing Kahn, *et al.*, *The Slant of News: How Editorial Endorsements Influence Campaign Coverage and Citizens' Views of Candidates*, 96 Am. Pol. Sci. Rev. 381 (2002)).

In addition to the above studies, comments provided specific examples illustrating how ownership affected content.

- In 1999, when the *Los Angeles Times* struck a deal with the Staples office supply company to publish a series about a new Staples-sponsored sports arena, the newspaper shared advertising revenue with Staples. The section

was written and published as a news item with no indication of the fact that it was an advertisement. Comments of the American Federation of Labor and Congress of Industrial Organizations, MB Docket No. 02-277, 20 (Jan. 2, 2003).

- “[W]hen the editor of Knight Ridder’s paper in Columbia, South Carolina disagreed with his publisher about the direction of local coverage, he was told ‘dissent was not in his job description.’” *Id.*
- In Tampa, Florida, the owner of a local daily newspaper and television station created a “Multi-Media Desk” to facilitate editorial cooperation. Although the editorial staffs were to remain independent, the newspaper’s media critic was forced to stop criticizing the television station. *Ex Parte* Testimony of Prometheus Radio Project, MB Docket No. 02-277, 1 (March 5, 2003).

These examples are only a small sample of the voluminous evidence presented to the Commission showing that ownership affects content, therefore affecting viewpoint diversity.<sup>11</sup>

Despite the evidence establishing a link between ownership and viewpoint, Tribune argues that a study by Professor David Pritchard (“Pritchard Study”) shows that there is “no evidence of owners’ influence on, or control of, news coverage by cross-owned newspapers and broadcast stations.” Tribune Br. 50. However, the record revealed fundamental problems with this study. First, the study’s sample of only ten newspaper-broadcast combinations, four of which are a single company, is an inadequate proxy for the national media marketplace. *See*

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<sup>11</sup> For a more in-depth look at ownership’s influence on content and the media, see Andrew Kreig, *Spiked: How Chain Management Corrupted America’s Oldest Newspaper* (Peregrine Press)(1987); Jim Bouton, *Foul Ball: My Life and Hard Times Trying to Save an Old Ballpark* (Midpoint Trade Books, Inc.)(2003).

JA4825, UCC Comments 12. Second, the Commission found that “the Pritchard [S]tudy is flawed by the absence of a control group of independently-owned newspapers and television stations with which to compare the tested stations.”

JA0046, Order ¶23; *see also* CFA Comments 47 n.68. Third, the “study consider[ed] a single, unprecedented national issue, the 2000 presidential election, without showing that the actions of media owners with regards to this single issue represent their actions on a wide variety of local, regional, and national issues.”

JA4825, UCC Comments 12. Hence, the Commission correctly decided not to place “significant probative value on this study’s assessment of ownership and viewpoint.” JA0047, Order ¶26.

Not only does the record support the Commission’s finding that ownership affects viewpoint, but the Supreme Court has repeatedly recognized this link. For example, in *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, the Court recognized that “editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt.” 412 U.S. 94, 124-25 (1973). *See also* *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 250 (1974)(“The abuses of bias and manipulative reportage are . . . the result of the vast accumulations of unreviewable power in the modern media empires”). More recently, in *Arkansas Educational Television Commission v. Forbes*, the Court found that “[p]ublic and private broadcasters alike are not only

permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming,” and that “[a] broadcaster by its nature will facilitate the expression of some viewpoints instead of others.” 523 U.S. 666, 673 (1998).

Thus, the CMLs promote viewpoint diversity and do not violate the Constitutional rights of newspaper publishers.

**B. The Local Television Rule Continues To Be Necessary In The Public Interest**

UCC agrees with the FCC that a local television rule continues to safeguard the public interest and addresses two arguments made by the Deregulatory Petitioners. First, the Networks contend that the local television ownership limits duplicate antitrust efforts and are therefore unnecessary. Network Br. 46. Second, NAB specifically opposes the restriction on mergers between two top four ranked stations in the same market. NAB Br. 44. Although the public interest would have been better served by retaining the old ownership rule, at a minimum, the revised local television rule including the top-four limitation is essential to the public interest in competition, diversity and localism.

**1. The FCC’s analysis is not duplicative of antitrust analysis**

The Networks assert that the local television limits serve “a single policy rationale: the need to safeguard competition.” Network Br. 46. Based on this

misinterpretation, they claim that the local television rule is unnecessary because it “duplicates the efforts” of the Department of Justice’s Antitrust Division (“DOJ”) and the Federal Trade Commission (“FTC”), which already safeguard competition in broadcasting. Network Br. 47.

**(a) The local television rule is intended to promote both competition and diversity**

The Networks’ argument that FCC duplicates antitrust analysis is based on the premise that the FCC’s only rationale for the local television rule is competition. Network Br. 46-47. However, the Networks read the Order selectively and quote portions of sentences out of context in order to make that claim. For example, the Networks say that the FCC found “no basis for retaining a local television ownership rule based on diversity.” Network Br. 46. However, the paragraph cited by the Networks actually says that the *old* rule is not necessary and that a *revised* rule will “promote viewpoint diversity.” JA0104, Order ¶171. Likewise, while the Networks claim that the FCC justified the local television limits solely on the basis of competition, Network Br. 46, the cited paragraph actually discusses modifications to the old rule as a way to protect diversity. JA0107, Order ¶180.

When read as a whole, the Order makes clear that retaining viewpoint diversity is a major goal of the revised rules. The FCC finds that by promoting

competition the rules “necessarily *also protect diversity*.” JA0107, Order ¶178 (emphasis added). The FCC set the “local television ownership caps only so high as necessary to protect competition in the delivered video market [in order to] achieve necessary protection *for diversity purposes* without unduly limiting speech.” JA0107, Order ¶180 (emphasis added). Thus, the Networks’ premise that the local television rules are intended only to protect competition is simply incorrect.

**(b) FCC review of license transfers is not duplicative of merger reviews by antitrust agencies**

In addition, the Networks incorrectly claim that the FCC’s review of license transfers duplicates the analysis undertaken by antitrust agencies. Each operates under a different statute and protects different interests. In addition, the FCC must review all license transfers, while the antitrust agencies review only large mergers.<sup>12</sup>

Under the Communications Act, no station license shall be transferred or assigned “except upon application to the Commission and upon finding by the

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<sup>12</sup> See generally Donald Russell & Sherri Lynn Wolson, *Dual Antitrust Review of Telecommunications Mergers by the Department of Justice and the Federal Communications Commission*, 11 Geo. Mason L. Rev. 143, 144-50 (2002)(comparing different statutory standards and procedures of FCC and antitrust agencies); Harold Feld, *The Need for FCC Merger Review*, 18 Comm. Lawyer 20 (Fall 2000).

Commission that the public interest, convenience, and necessity will be served thereby.” 47 U.S.C. §310(d). In analyzing whether a proposed transfer would serve the public interest, the Commission’s major policy goals are diversity, competition and localism. JA0044, Order ¶17.

In contrast, the antitrust agencies are charged with enforcing the Sherman and Clayton Acts and are concerned only with economic competition. In analyzing mergers under the *Merger Guidelines*, they seek to protect consumer economic welfare by ensuring that merging companies cannot raise prices above competitive levels. *U.S. Department of Justice and Federal Trade Commission, Revised 1992 Horizontal Merger Guidelines (“Merger Guidelines”) §0.1 (rev. 1997)*. In reviewing mergers involving license transfers, the antitrust agencies do not account for viewpoint diversity or localism, nor do they analyze competition in the “marketplace of ideas.” See Maurice Stucke & Allen Grunes, *Antitrust and the Marketplace of Ideas*, 69 *Antitrust L.J.* 249-50, 256-58 (2001).<sup>13</sup>

Moreover, the FCC and the antitrust agencies review of media mergers is designed to protect different interests and constituencies. Antitrust agencies seek

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<sup>13</sup> At his confirmation hearing, the nominee (since confirmed) for Assistant Attorney General for Antitrust testified “it was the FCC’s duty to monitor the media marketplace for diversity” and said that “the DOJ evaluates media mergers on solely economic factors.” *DOJ Antitrust Nominee Says Media Diversity is FCC’s Duty*, *Communications Daily* (May 22, 2003). See also JA5055-57, UCC Reply Comments 5-7, for an explanation of antitrust analysis under the *Merger Guidelines*.

to protect competition in economic markets. In reviewing broadcast mergers, antitrust agencies have identified the sale of advertising as the relevant product market. For example, in reviewing Fox Television's acquisition of a second television station in Salt Lake City, the DOJ determined that the relevant product market was television spot advertising.<sup>14</sup> Thus, antitrust review assesses "whether advertisers will end up paying more or getting less after a [broadcast] merger." Stucke & Grunes at 257. In other words, the consumer interest protected by antitrust review is the purchaser of advertising time. Antitrust review "does not address nonprice competition unrelated to advertising, including the quality of programming, listener choice, or the likely impact of these mergers on the marketplace of ideas." *Id.* Because the public receives television broadcasts for free, the provision of television programming is not considered a relevant product market for antitrust purposes.

The FCC, by contrast, "conclude[d] that our duty as an agency runs to consumers not advertisers." JA0059, Order ¶68. While the FCC examines advertising markets, it does so as a "proxy for consumer welfare in media

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<sup>14</sup> The Competitive Impact Statement in this case explained that divestiture of a station was needed to "preserve competition in the sale of broadcast television spot advertising time" because television advertising is unique; it combines sight, sound and movement for more memorable advertisements, reaches more potential viewers in the market, and advertisers likely will not switch to another advertising medium if television prices increase significantly. *The News Corp. Ltd.*, 66 Fed. Reg. 29997-01, 30003-04 (DOJ June 4, 2001)(proposed final judgment).

markets.” JA0059, Order ¶¶60.<sup>15</sup> Moreover, the FCC explained that “[a]lthough advertising markets continue to be a reasonable basis on which to evaluate competition among media companies, in this Order we will rely more heavily on other metrics.” JA0059, Order ¶¶61. The FCC concerned itself with “competition in the broadcast television advertising market . . . to the extent that it adds an extra level of protection *to viewers*.” JA0094, Order ¶¶151 (emphasis added).

Finally, the Communications Act requires the FCC to approve all license transfers only upon finding the transfer serves the public interest, 47 U.S.C. §310(d), while under the Hart-Scott-Rodino Act, antitrust agencies typically review only the larger media mergers.<sup>16</sup> Data on television stations sold since 2000 suggests that over 85% of television stations sold individually would not have been subject to antitrust review because the prices fell below the threshold

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<sup>15</sup> The Networks wrongly quote the FCC as acknowledging that “antitrust authorities look to the functioning of markets for advertising merely as a ‘proxy for consumer welfare.’” Network Br. 48. The FCC is actually referring to *its own* competition analysis as using advertising as a proxy. JA0057, Order ¶¶60.

Antitrust agencies use the advertising market not as a proxy, but as the actual market of concern because they are trying to protect advertisers from unfair prices.

<sup>16</sup> A merger must be reported to FTC and DOJ only if it meets the “Size-of-Person Test” and the “Size-of-Transaction Test.” The Size-of-Person Test is met if one of the parties has sales or assets of at least \$100 million and the other party has sales or assets of at least \$10 million. The Size-of-Transaction Test is met if, as a result of the transaction, the acquiring person will hold an aggregate amount of stock and assets of the acquired entity valued as more than \$50 million. The Size-of-Person Test is inapplicable in cases where the transaction is valued at more than \$200 million total. Hart-Scott-Rodino Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390 (codified as amended at 15 U.S.C. §18a (2002)).

requirements.<sup>17</sup> Thus, it is clear that FCC and antitrust functions are not duplicative and that it is essential for the FCC to retain a local television ownership rule.

**2. The top-four standard is not arbitrary and capricious**

An essential part of the local television rules is the restriction on mergers between top-four stations. While the FCC significantly relaxed the local television rule, it retained the top-four standard because it found that its elimination would result in serious and tangible public interest harms. JA0111-15, Order ¶¶189-91, 196-97. Despite the already substantial relaxation of the local rules, NAB asks the Court to vacate the top-four standard.

**(a) Public interest benefits cited by Deregulatory Petitioners do not arise from combinations among top-four ranked stations**

NAB claims that the FCC acted arbitrarily in recognizing public interest benefits arising from combinations among top-four ranked stations, but ignoring the same benefits in retaining the top-four standard. In reality, however, the public interest benefits NAB cites, NAB Br. 39-41, arise mostly from combinations involving stations ranked *outside* of the top-four. As the FCC recognized, mergers

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<sup>17</sup> See BIA Financial Network, Investing In Series: Television Market Report, DMAs 1-210 (2nd ed. 2003). Based on a survey of listed station prices in all DMAs.

between top-four ranked stations produce minimal efficiency gains and little public interest benefit. JA0114-15, Order ¶197. Therefore, even if the efficiency benefits justify relaxing the local television rule, they do not justify elimination of the top-four standard.

NAB argues, for instance, that common ownership of television stations would increase broadcasters' ability to compete for advertising revenues. NAB Br. 39. But the record contains no evidence that *top-four ranked stations*, which are typically affiliates of the Big Four networks, have any difficulty competing for advertising revenue. More importantly, the profitability of television stations is not a relevant public interest concern.<sup>18</sup> NAB also argues that increased consolidation will help facilitate the transition to digital television. NAB Br. 39. However, the FCC found that many top-four stations have already made the transition to digital television. JA0115-16, Order ¶199.

Next, NAB claims that common ownership improves audience ratings and leads to better programming. NAB Br. 40. Again, however, the data suggests only that audience ratings and programming quality might be improved by mergers involving struggling, low-ranked stations. The study cited by NAB concerns

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<sup>18</sup> The Commission has traditionally declined to intervene in cases involving a station's economic situation, even when intervention might improve the broadcaster's service to the community. *See, e.g., Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd. 638, 640 (1988)(abolishing the policy of examining whether a new station would cause economic injury to an existing one).

stations that “have been unable to attract sufficient audience share and advertising revenue to be financially viable.” JA3967, Mark R. Fratrick, BIA Financial Network, *Television Local Marketing Agreements and Local Duopolies: Do They Generate New Competition and Diversity?* (2003). Top-four stations, in contrast, have relatively *high* audience shares. There is no reason to believe that the programming improvements following mergers between the struggling stations in the Fratrick Study would also result from mergers among top-four stations, most of which are robust network affiliates.

Finally, NAB argues that common ownership of broadcast stations can lead to increases in the quantity and quality of local news and public affairs programming. NAB Br. 40-41. But again, NAB misrepresents the findings of the Commission. The Commission explicitly finds that “combinations involving the top-four ranked stations are less likely to yield public interest benefits such as new or expanded local news programming” because “such stations generally are already originating local news.” JA0115, Order ¶198. Most of the increases in quantity and quality of local news to which NAB alludes come about when low-ranked stations, which have offered little or no news programming in the past, are able to increase their offerings following a merger.

NAB’s claim that the quality and quantity of pre-existing news programming will increase when top-four stations are allowed to merge, NAB Br.

47, also ignores the fact that a merger between two stations that already offer news programming often leads to the *elimination* of news programming.<sup>19</sup> Even if there are cases where a combination between two top-four stations would lead to an increase in the quantity or quality of local news programming, such a showing might qualify those stations for a waiver of the top-four restriction. JA0127-28, Order ¶¶227-30.

The examples cited by NAB in fact show only that public interest benefits may arise from a merger of low-ranked or struggling station with a stronger one, not that combinations among the top-four stations would result in similar public interest benefits. NAB's flagship example is that of the merger of WVBT, a "struggling station affiliated with the Home Shopping Network," with a larger NBC affiliate in the same market. NAB Br. 41. The public interest benefits of *this* merger are clear, but they arise only because WVBT "wasn't a serious competitor for viewers." *FCC Field Hearing on Media Ownership*, Richmond, Va. (Feb. 27, 2003)(testimony of Edward Munson)(Addendum 42-48). Top-four stations by definition *are* serious competitors for viewers and most are affiliates of major networks with popular programming lineups. Thus, NAB's example has little if

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<sup>19</sup> For example, Nexstar Broadcasting recently cancelled local newscasts on both of its stations in Billings, Montana. Jan Falstad, *KULR Sold: ABC-6/Fox-4 Drop Local News*, billingsgazette.com, (Oct. 1, 2003), at <http://www.billingsgazette.com/index.php?display=rednews/2003/10/01/build/local/34-tv.inc>. For more examples, see JA4852-54, UCC Comments 39-41.

any bearing on the question at hand: whether combinations between *top-four ranked* stations would bring about significant public interest benefits.<sup>20</sup>

**(b) The FCC must balance any  
purported benefits of consolidation  
against harms to the public interest**

Even if, contrary to the Commission’s findings, combinations among top-four stations would produce significant efficiency benefits, these benefits have to be weighed against public interest harms that would arise from such combinations. The Commission found that allowing a merger between two top-four stations would be anticompetitive and harmful to viewers in local markets. JA0116, Order ¶200. The Commission also found that the top-four standard protects competition between the Big Four networks at a national level. JA0114, Order ¶196.

Moreover, elimination of the top-four standard would harm localism and viewpoint diversity, particularly in the smaller markets about which NAB purports to be concerned. NAB Br. 44. As NAB points out, the top-four standard prevents any mergers in 81 markets that have four or fewer stations and permits only one

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<sup>20</sup> NAB also cites the merger between KFVE and KHCL in the Honolulu market. NAB Br. 43. KFVE’s pre-merger programming “consisted primarily of about eight hours of movies a day, paid programming and syndicated shows,” and “more than half of [KFVE’s] gross revenue came from paid programming and call-in solicitation lines.” JA3949, Comments of Coalition Broadcasters 18. Thus, there is no reason to expect that a combination between two top-four stations, which generally run network programming, would achieve *any* of the same programming improvements seen in the KFVC example. Thus, this example, like the others cited by NAB, is beside the point.

merger in 40 markets with five stations. *Id.* Yet, permitting mergers in these markets would allow one or two owners to control all of the local television advertising and all of the local programming—including news—in these communities, a result which is clearly contrary to the public interest. For example, the Erie, Pa. market has four commercial stations that are network affiliates and one noncommercial PBS affiliate, and all four commercial stations provide local news.<sup>21</sup> Without the top-four standard, the number of owners could be reduced from five to three, and the number of independent local news sources reduced from four to two. Such consolidation would compound the difficulty that many community groups already face in coverage of local issues.<sup>22</sup> FCC rules are particularly important to protect competition and diversity in these smaller markets because it is unlikely that the sale of smaller television stations will come to the attention of the antitrust authorities because they would not be sufficiently large to require pre-merger review.<sup>23</sup>

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<sup>21</sup> JA4594, Bruce M. Owen, *et al.*, Economic Study A, “News and Public Affairs Programming Offered by the Four Top-Ranked Versus Lower-Ranked Television Stations.”

<sup>22</sup> *See, e.g.*, JA4828-30, UCC Comments 15-17.

<sup>23</sup> *See supra* at n.16. For example, in 2002, the top-ranked station in Erie, Pa. (DMA 143), CBS Affiliate WSEE-TV, was sold for \$10 million, far below the \$50 million threshold of Hart-Scott-Rodino. BIA Television Market Report 2003. Indeed, the average sales price for a television station in 2001 was \$45 million. Steve McClellan, *Broadcasting & Cable*, Sept. 30, 2002. Even if antitrust authorities identify a potential competitive problem, they may choose not to take action to prevent the merger. *See* UCC Radio Comments, MM Docket No. 01-317,

Even in larger markets, the top-four standard is essential to prevent excessive market power and control over news and information. For example, without the top-four standard, *one* company could theoretically own the Philadelphia affiliates of CBS, ABC, *and* NBC, for a combined sixty-six percent of the market share. *See* BIA Television Market Report 2003. In conclusion, then, retention of the local television rule, including the top-four restriction, is clearly necessary in the public interest and is not arbitrary and capricious.

**C. The FCC's Decisions To Retain The Local Radio Caps, Use Arbitron Markets And Restrict Transfers Of Radio Station Groups In Excess Of The Caps Are Amply Justified, Consistent With Section 202(h), And Constitutional**

The Commission determined that the local radio rule was still necessary in the public interest and retained the rule with two modifications—it adopted a more rational market definition and included noncommercial as well as commercial stations in each market. JA0132, Order ¶241. The Commission included a grandfathering provision so that group-owners would not have to divest stations if the new market definition reduced the number of stations they could own, but generally prohibited the joint sale of combinations in violation of limits to promote

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22-23 (March 27, 2002)(citing examples of DOJ failing to stop radio mergers in small markets despite high post-merger levels of concentration).

diversity and provide opportunities for new entrants. JA0226-30, Order ¶¶484-488.

Although UCC believes the FCC should have done more to promote diversity and localism in radio, it nonetheless disagrees with Deregulatory Petitioners' claims that changes to the local radio ownership rule are unnecessary, or prohibited by Section 202(h), and that the restriction on the sale of grandfathered station groups constitutes an unconstitutional takings.

**1. The record contains substantial evidence justifying maintenance of the local radio ownership limits**

Clear Channel, the largest radio station owner with more than 1,200 stations nationwide, claims that the Commission failed to demonstrate that concentration in the radio industry justified maintaining the rule's current numerical limits. Clear Channel Br. 29, 34. However, the record demonstrates that radio consolidation has diminished diversity in local markets, made entry by new owners difficult, and even prevented the dissemination of essential emergency information. While the Commission cites just a few examples of industry consolidation, it has adequately justified its decision to maintain the ownership cap. If anything, the record would support tightening the local rules to better promote competition, localism and diversity.

**(a) The record demonstrates massive consolidation in radio industry after the national rule was lifted and local rules relaxed**

Since the passage of the 1996 Act, which repealed the national limits and substantially relaxed the local radio rules, the radio industry has undergone a dramatic transformation. An industry that was once made up of small, independent business owners has quickly become dominated by large, publicly-traded companies. In each of the last six years, about 20% of U.S. radio stations have changed hands in a frenzy of deal-making. JA3638, MOWG 11 at 4. From 1996 to 2002, the number of radio station owners declined by 34%, even though the number of commercial stations increased by 5.4%. JA3637, MOWG 11 at 3. In 1996, the largest radio group-owners had fewer than 65 radio stations each. Today, 10 parent companies dominate the industry and control about two-thirds of both listeners and radio revenue nationwide. Comments of the Future of Music Coalition (“FMC Comments”), MB Docket No. 02-277, 18 (Nov. 20, 2002).

In individual markets, a small number of large owners dominate. The top four firms control 77.1% of the audience share in the top 10 U.S. markets. JA3840, FMC Comments 33. In smaller markets, the numbers are even higher. The audience share of the top four firms in markets 51-100 and 101-289 is 92.5% and 93.9%, respectively. JA3840, FMC Comments 33. Bear Stearns’ analysis also shows that in the top 100 radio markets, the top three radio groups receive a

median of 82.9% of the revenue and 58.9% of the audience. JA5394, Defining Moment in Radio at 12. This has led to extremely high market concentrations, as measured by the Herfindahl-Hirshman Index (“HHI”).<sup>24</sup> From 1993 to 2001, the HHI escalated by an average of 1,293 points in 33 randomly sampled markets. JA3282, UCC Radio Comments, Attachment 2. In six markets, the HHI increased more than 2000 points, and over one-half of the studied markets had HHIs above 3000. *Id.* In most markets, the top two to four station owners dominate commercial audience share. UCC Radio Comments, Attachment 1.

**(b) Consolidation has led to harms that justify the local ownership caps**

The FCC is further justified in maintaining the current ownership caps by evidence in the record that consolidation in the radio industry has decreased racial and gender diversity in station ownership, reduced the amount of locally-produced programming, and limited opportunities for self-expression.

Radio consolidation has impeded the ability of minorities and women to obtain and keep broadcast stations. JA4830-32, UCC Comments 17-19. Specifically, increased concentration has led to increased station prices, which has exacerbated long-standing problems that minorities and women face to obtain

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<sup>24</sup> Under the *Merger Guidelines*, markets with HHIs above 1800 are considered highly concentrated, and mergers raising HHI by over 100 points are examined closely for potential anticompetitive effects. *Merger Guidelines* §1.51.

financing.<sup>25</sup> JA4831, UCC Comments 18. Moreover, the substantial increase in the size of group-owners has led to decreased advertising revenues for minorities and women who tend to own smaller stand-alone and AM stations. JA4831, UCC Comments 18 n.83. Barriers to entry are high because virtually all available radio spectrum has been licensed. JA0149, Order ¶288. As broadcast group-owners have been allowed to own even more stations, opportunities for women, minorities, and small businesses to enter radio broadcasting have been further reduced. Thus, retaining the existing limits is essential.

The record shows that consolidation has also reduced the amount of locally produced radio content. Large group-owners broadcast remotely through satellite feeds from regional or national offices instead of having local employees that produce any programming. FMC Comments 13-14. These remotely-operated radio stations can present real problems. For example, automated radio stations in Minot, N.D. failed to respond to a police radio call requesting help notifying people of a deadly chemical spill.<sup>26</sup> JA0407, Commissioner Adelstein Dissent at 15.

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<sup>25</sup> Radio station prices have increased from hundreds of thousands of dollars to multi-million dollars. JA4831, UCC Comments 18 n.81.

<sup>26</sup> Clear Channel had recently purchased six of the area's seven radio stations and installed automated programming systems with no means of responding to emergency calls. The spill sent a cloud of dangerous gas over the city, killing one man and injuring hundreds more. Blake Nicholson, *Derailment Investigation Growing Old for Residents*, Bismark Tribune (N.D.), Sept. 2, 2003, at 1A.

Not only do these automated radio stations raise public safety concerns, but excessive reliance on centrally-produced programming contravenes the intent of Congress to supply each locality with the means to create and broadcast local programming by mandating equal distribution of licenses and frequencies to each community. 47 U.S.C. §307(b). While Congress intended radio stations to be outlets for local self-expression,<sup>27</sup> the comments contained many examples of group-owners reducing local staff, eliminating local news production, and relying on centralized operations for programming. For example,

- WWNZ in Orlando had an award-winning news staff of six people until Clear Channel, decided to eliminate the news department and air news produced by a service with no physical presence in Orlando. JA4851, UCC Comments 38 n.174.
- Clear Channel subsidiary Premiere Radio Networks, Inc. provides radio programming to more than 7,800 radio affiliates. JA4850, UCC Comments 37.

The resulting loss in locally-produced information means there are fewer opportunities for political candidates and community organizations to air their messages. Similarly, the record shows that musicians have found it difficult to get airtime in their communities because group-owners have a single program director

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<sup>27</sup> See *FCC v. Allentown Broad. Corp.*, 349 U.S. 358, 362 (1955)(noting that §307(b) recognized local need for community radio mouthpiece); *Pinellas Broad. Company v. FCC*, 230 F.2d 204, 205 (D.C. Cir. 1956)(explaining that §307(b) encompasses community needs for programs of local interest and importance, and for organs of local self-expression).

make decisions on a regional or national basis. FMC Comments 31, 61. Thus, the record strongly supports retention of the local radio caps.

**2. The Commission’s decision to use Arbitron markets does not violate Section 202(h)**

Contrary to the claim of NAB, the Commission’s purpose was not to “indirectly” tighten the ownership limits. NAB Br. 10. Instead, the Commission sought to establish a more rational and coherent geographic market definition in light of contour overlap methodology distortions exacerbated by the 1996 Act’s relaxation of radio ownership limits. JA0139-40, Order ¶¶262-63. Moreover, it is unclear whether use of Arbitron markets in fact makes the rules more restrictive. In a study of Viacom-owned stations, a comparison of contour-based and Arbitron markets showed no change in the number of stations Viacom can own in many markets. Indeed, in Rochester, N.Y., the number of stations Viacom can own actually increased. JA5423, Viacom *Ex Parte* Tab 23. Further, the Commission decision to count noncommercial stations effectively allows more common ownership in some markets, making the net effect of the changes unclear.

Even if this change in market definition is viewed as tightening the regulations, the Court should reject NAB and Clear Channel’s argument that 202(h) prevents the Commission from tightening its ownership regulations. *See* NAB Br. 15; Clear Channel Br. 22-25. Both the text of Section 202(h) and

legislative history of the 1996 Act demonstrate that Congress intended that the Commission could modify the ownership rules in either direction, so long as the Commission found the change to be in the public interest.

Section 202(h) states, “The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.” The word “modify” means “to change somewhat the form or qualities of; to alter somewhat.”

*Webster’s Revised Unabridged Dictionary (MICRA Inc. 1998)*. Nothing in this language requires the FCC to modify rules it finds no longer in the public interest only in a deregulatory direction.

Moreover, contrary to the claims of NAB and Clear Channel, neither the Preamble nor the legislative history of the 1996 Act limits the FCC to deregulating. NAB Br. 15; Clear Channel Br. 21. The Preamble establishes that the purpose of the Act is “to promote competition and reduce regulation in order to secure lower prices and higher quality services for American *telecommunications* consumers and encourage the rapid deployment of new *telecommunications* technologies.” 1996 Act, Preamble (emphasis added). Telecommunications is defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” *Id.* at §3 adding new subsection 48, *codified at* 47 U.S.C. §153(43). Telecommunications is a different service than broadcasting, which is defined as

“the dissemination of radio communications intended to be received by the public, directly or by the intermediary or relay stations.” 47 U.S.C. §153(6). Thus, on its face, the Preamble does not even address Congress’ goals pertaining to the broadcast ownership restrictions.<sup>28</sup>

To be sure, legislative history evinces a desire to promote competition in both telecommunications and broadcasting. By promoting competition in the telecommunications service, which has traditionally been provided by monopoly telephone companies, government may reduce regulation without harm to consumers.<sup>29</sup> In broadcasting, however, which has historically been provided on a competitive basis, deregulation of ownership limits can actually reduce competition. Thus, Section 202(h) makes clear that Congress’ intent with respect to broadcasting was only to remove *unnecessary* regulations resulting from changed market conditions while ensuring that the public interest would be served.

The legislative history of Section 202(h) shows that Congress recognized the need for limits on broadcast ownership. The Conferees rejected a House bill that

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<sup>28</sup> Broadcasting and telecommunications have been treated very differently by Congress and the FCC. Broadcasting is governed by Communications Act Title III, 47 U.S.C. §301 *et seq.*, Title II regulates telecommunications, 47 U.S.C. §203 *et seq.*

<sup>29</sup> In the telecommunications context, Congress intended deregulation to occur only after “meaningful competition” was established. *See 2002 Biennial Regulatory Review Report*, 18 FCC Rcd 4726, 4732 n.27 (2003)(noting that the 1996 Act established a competitive checklist for local telecommunications carriers to meet before they could enter the long-distance market).

would have repealed essentially all of the Commission's broadcast ownership rules. *See* CONF. REP. No. 104-458 at 161. Instead, they chose a modified version of the Senate bill that directed the FCC to revise some rules and review others. *See id.* at 161-64. Thus, the 1996 Act reflected a compromise that rejected wholesale deregulation, required relaxation of some regulations to reflect changed market conditions, and directed the FCC to biennially review its regulations to continue to ensure that they served in the public interest, or if not, to modify them to serve the public interest.

Subsequent events confirm that Congress did not intend to limit the FCC to modifying ownership regulations only to further relax them. In a Senate Commerce Committee hearing held immediately after the FCC voted on the decision under review, the Committee Chair noted a need to “clarify” Section 202(h) because the law *does* allow the Commission to “tighten its ownership restrictions if necessary.” *Media Ownership Rules: Hearing before the Senate Commerce, Science and Transportation Comm.*, 108th Cong. (2003)(statement of Senate Commerce Comm. Chairman McCain) 2003 WL 21280523. At the same hearing, all five FCC Commissioners testified that nothing in 202(h) signifies that there is no power to re-regulate. Indeed, Chairman Powell testified that it “doesn’t look like there is a limitation for regulating or deregulating” within the statute. *Testimony of FCC Chairman Powell*, Federal News Service (June 4, 2003). Thus,

it is clear that nothing in Section 202(h) or its legislative history prevents the Commission from tightening its broadcast ownership regulations.

### **3. Restrictions on transfers of large station groups that exceed station caps do not violate the Takings Clause**

Because the changed market definition will result in some existing combinations that violate the local radio limits, the FCC's new rules grandfather existing radio station groups that exceed the new limits. The only limitation is that a group of stations in violation of the rules cannot be sold as group. JA0228-30, Order ¶¶487-88.<sup>30</sup> Clear Channel asserts that this limited restriction on the transferability violates the Takings Clause. Clear Channel Br. 49-50.<sup>31</sup> UCC agrees with the FCC that this limit on transferability does not violate the Takings Clause. The FCC could have opted for far more restrictive limitations including required divestiture of stations that exceed the caps as the FCC did with Supreme Court approval in *NCCB*. 436 U.S. at 776-77. Indeed, UCC writes separately to

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<sup>30</sup> Even within that narrow restriction, the FCC created an exception that allows the grandfathered group to be sold intact to small businesses. JA0229-30, Order ¶¶488-490.

<sup>31</sup> Clear Channel relies on *Loretto v. Teleprompter* to support its argument that property ownership includes the right to dispose of property as the holder desires. 458 U.S. 419, 435 (1982); Clear Channel Br. 49. However, the *Loretto* Court found that a law requiring a landlord to permit installation of cable facilities on physical property constituted a taking because it was a physical occupation of real property. By contrast, a restriction on a license transfer involves neither real property nor a physical occupation.

emphasize that broadcast licensees have no property interest in broadcast licenses and, therefore, a restriction on the ability to transfer cannot constitute a taking.

The Fifth Amendment prohibits the government from taking “private property . . . for public use without just compensation.” U.S. Const. amend. V. The interest must first be one of property in order to be “taken.” Spectrum is not private property. The Court has held that spectrum is part of the public domain and that a broadcaster merely has “use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.” *CBS*, 453 U.S. at 395. *See also Community Television, Inc. v. FCC*, 216 F.3d 1133, 1146 (D.C. Cir. 2000)(calling broadcast spectrum a “valuable public resource”).

The Communications Act explicitly prohibits any ownership of property. Its purpose is to maintain control “over all channels of radio” and to “provide use of such channels, but *not the ownership* thereof.” 47 U.S.C. §301 (emphasis added).

It further provides that:

No station license shall be granted by the Commission until the applicant therefore shall have waived any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same.

*Id.* at §304. *See also id.* at §309(j)(6)(B)-(j)(6)(E) (auctions do not convey ownership or diminish government authority to regulate or reclaim licenses).

Further evidence that broadcasters do not have a property interest in the spectrum is that applications for broadcast licenses require execution of the following waiver of any ownership right in the spectrum:

I hereby waive any claim to the use of any particular frequency as against the regulatory power of the United States because of previous use of the same, whether by license or otherwise, and request an authorization in accordance with this application.

FCC Form 301, p.4. The application also prohibits assignment, transfer, or disposition of a broadcast license without FCC approval, use of the license as loan collateral, and granting a security interest in the license. Form 301 Worksheet #2, p.7. The explicit prohibition on these activities further indicates that broadcast licensees cannot claim ownership rights. *See United States v. General Motors Corp.*, 323 U.S. 377-378 (1945)(property “denote[s] the group of rights inhering in the citizen’s relation to the physical thing, as the right to . . . dispose of it”).

Even if licensees had some limited property interest, the restrictions on transferability are not a taking and they do not impermissibly affect broadcasters’ ability to recoup prior investments. Clear Channel Br. 49-50. To determine whether a taking has occurred, this Court considers three factors: “(1) ‘the extent to which the regulation has interfered with distinct investment-backed expectations’; (2) ‘the economic impact of the regulation on the claimant’; and (3) ‘the character of the governmental action.’” *Borough of Columbia v. Surface*

*Transp. Bd.*, 342 F.3d 222, 235 (3d Cir. 2003)(citing *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224-25 (1986)).

First, the FCC’s regulations do not interfere with “distinct investment-backed expectations” or “reasonable investment-backed expectations.” *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). Clear Channel claims that its expectations for return on investments are affected by the new rules. Clear Channel Br. 49-50. However, broadcast licensees enter the market knowing that the industry is heavily regulated. When a party making a takings claim was aware of the possibility that a regulatory agency’s decisions could affect its expectations, that party “cannot be said to have been surprised that the [agency’s] decisions might thwart its goals.” *Borough of Columbia*, 342 F.3d at 236. Similarly, broadcasters cannot claim that they expected regulations to stay the same. Broadcasting is a highly regulated industry with frequently changing rules.<sup>32</sup> When broadcasters make investments, they accept the risk that subsequent regulatory changes will affect value as an “incident of ownership.”<sup>33</sup> *See Danforth v. United States*, 308 U.S. 271, 285 (1939).

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<sup>32</sup> Moreover, Section 202(h) of the 1996 Act put broadcast licensees on explicit notice that regulations could change by mandating that the FCC biennially review its ownership rules.

<sup>33</sup> In *DirectTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997), investment in equipment based on an expectation that a regulatory scheme would remain constant did not give rise to a takings claim. The fact that satellite broadcasters spent “millions of dollars” in reliance on previous rules did not make alteration of

Second, the economic impact on Clear Channel is nominal at best. Clear Channel retains the right to operate all of its existing station groups, to sell any stations individually or in combinations that do not exceed the caps, or to sell station groups that exceed the caps to small businesses. JA0229-30, Order ¶488.

Third, the restriction on transfers is a legitimate regulation designed to promote longstanding public interest goals of competition, diversity and localism. *See Borough of Columbia*, 342 F.3d at 236 (finding that a legitimate character for the government action is to benefit the “common good”).

Thus, the claim that the restriction on transfers that exceed the new rules violate the Takings Clause must be rejected.

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the rules impermissible. *Id.* The FCC also has the authority to reassign a license to another entity “though investment in broadcasting stations may be large.” *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

## CONCLUSION

For the foregoing reasons, the Court should reject the challenges to the constitutionality of the ownership rules and the arguments of the Deregulatory Petitioners that the FCC should have repealed or further relaxed the rules.

Respectfully submitted,

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December 9, 2003

## CERTIFICATE OF COMPLIANCE

I hereby certify that (1) this brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because the brief contains 13,817 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14-point Times New Roman type.

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## CERTIFICATE OF ADMISSION

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

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