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In The
United States Court of Appeals
For The Third Circuit

PROMETHEUS RADIO PROJECT, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATION COMMISSION, *et al.*,

Respondents.

ON APPEAL FROM THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF OF PETITIONER SINCLAIR BROADCAST GROUP, INC.

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In its opening brief, Sinclair demonstrated that the FCC's re-adoption in 2006 of local television ownership rules that were originally adopted in 1999 (the "1999 Eight Voices Test") is arbitrary and capricious and cannot withstand applicable scrutiny. Sinclair anticipated and refuted many of the FCC's arguments in its initial brief, and there is no need to address those arguments further. Moreover, the FCC did not refute or even address many of Sinclair's arguments. It must therefore be inferred that the FCC has no answer to these arguments and concedes the points made by Sinclair. When the FCC did respond to Sinclair's arguments, its reasoning is inconsistent and unpersuasive. For the reasons shown herein and those provided in Sinclair's initial brief, Sinclair respectfully requests that the Court vacate the FCC's 1999 Eight Voices Test.

I. The FCC Did Not Address Many of the Fatal Defects of the 1999 Eight Voices Test Identified by Sinclair, and Accordingly, Those Points Should be Taken as Conceded.

The FCC turns a deaf ear to many of the arguments raised by Sinclair in its opening brief. For example, Sinclair demonstrated that one of the essential, although indefensible, arbitrary, capricious and unsupportable underpinnings of the FCC's 1999 Eight Voices Test is that all markets, regardless of size, need at least eight independent television voices to ensure that competition exists. Sinclair Br.

at 40-41. As Sinclair pointed out, there is simply no support in the record for the FCC's position.

If the FCC has good reasons for believing Philadelphia, a television market of approximately three million TV households, and Juneau, a market with only approximately twenty-five thousand TV households, each need at least eight different owners of television stations to ensure a competitive television market, those reasons should be easy to express and the evidence supporting that logic should be quite clear. But the FCC's brief does not offer either data or credible logic to support a regulation equating the competitive dynamics in Philadelphia with those in Juneau, or those in New York City (approximately 7.2 million TV households and more than 20 full-power television stations) with those in Glendive, Montana (approximately 4,000 TV households and 1 full-power television station).[1]

Yet all these markets are the same in the eyes of the FCC, as evidenced by its television multiple ownership rules. According to the supposed logic underlying the FCC's rules, all markets need a minimum of eight independent television stations to ensure that adequate competition exists before even one owner may have an interest in a second television station in the market. This defies common sense, as it is unquestionably irrational to treat New York City and

[1] *See* BIA Kelsey, Investing In Television Market Report 2010 (1st ed. 2010).

Glendive as requiring the same number of independent voices to ensure competitive forces in each market. In its brief, Sinclair argued that because the video competition in such markets is vastly different, the FCC's unsupported decision to re-adopt the outdated 1999 Eight Voices Test was classic arbitrary and capricious decisionmaking. Sinclair Br. at 34-42. The FCC's brief did not – because it could not – offer any rebuttal to this obvious point. The FCC's silence thus concedes the point to Sinclair.

The Commission also fails to respond to a very straightforward question raised by Sinclair in its brief (Sinclair Br. at 41): if the FCC believes the number "eight" is so important, why do the vast majority of television markets not even have eight independent television voices? The FCC's brief not only fails to answer the question, it provides no evidence that having fewer than "eight" independently operated television stations in a market (such as six or seven, or even two or three) harms competition, results in higher advertising rates, or harms viewers in any way.[2] As noted by the National Association of Broadcasters and the Coalition of Smaller Market Television Stations in their opening brief (Nat'l Ass'n Br. at 35),

[2] At the same time, the FCC has relaxed its newspaper-broadcast ownership rule even though most cities only have a single independent major daily newspaper and none appear to support as many as eight daily newspapers. Similarly, there is no minimum number of competitive radio voices required in any market. The Commission's patently inconsistent treatment of similar evidence is a model of arbitrary and capricious decisionmaking. *See*, *e.g.*, *Pa. Fed'n of Sportsmen's Clubs, Inc. v. Kempthorne*, 497 F.3d 337, 350-51 (3d Cir. 2007).

the FCC "categorically prohibits *any* common ownership in the nearly 75% of markets nationwide that have fewer than nine stations."

Most markets cannot economically support eight independently owned television stations, but some can support far more than eight. Significantly, the FCC's own table of allocations, which supposedly reflects a "fair, efficient and equitable distribution"[3] of television stations, allocates more stations to larger markets and fewer stations to smaller markets, reflecting economic reality and common sense.

The FCC's 1999 Eight Voices Test attempts to impose on broadcasters an irrational and illusory vision of equality of markets that the FCC itself has contradicted for decades in its allocation process. Certainly, if the FCC believes each market needs eight television stations, it has not put its allocations where its priorities are.[4] It appears that the FCC ignored Sinclair's question because neither the FCC, nor anyone else for that matter, can persuasively demonstrate that eight over-the-air TV stations are the minimum necessary to ensure adequate competition in all television markets, regardless of size. The FCC's brief concedes this critical point by failing to address it at all.

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[3] 47 U.S.C. § 307(b).

[4] The FCC could have easily provided more (or eight) allocations to smaller markets if it believed that doing so was essential to ensure adequate competition, yet it has not done so.

The FCC also fails to respond to Sinclair's argument that the "Top-Four Rule" is irrational because it is based on the untenable presumption that top four-ranked stations are the dominant forces in each and every market, which is not the case. Moreover, the FCC ignored Sinclair's showing in its opening brief that Fox affiliates are unlike those of the other three major broadcast networks. Sinclair Br. at 46-47. A typical Fox affiliate is the fourth-ranked station in its market and provides no daily national news programming, and less local news programming than the typical affiliates of ABC, CBS, and NBC, which are generally the three top-ranked stations in their markets. Sinclair's brief demonstrated that the FCC was wrong to treat the network affiliates the same in fashioning its "Top-Four Rule." Sinclair Br. at 46. The FCC's failure to address this point is telling.

Sinclair's arguments raised straightforward questions about the central premises the FCC used to justify its decision to re-instate out-of-date and far more strict ownership regulations in a statutorily mandated review that requires the Commission to justify its ownership rules to reflect changes in competition, or to repeal or relax them, not to make them more restrictive. The FCC's brief does not respond to many of Sinclair's arguments, and each of Sinclair's arguments are fatal to the FCC's re-adoption of the 1999 Eight Voices Test. Therefore, this Court should infer that the FCC did not defend the local television ownership rule because the FCC cannot do so. *See, e.g.*, *Fox Television Stations, Inc. v. FCC*, 293

F.3d 537, 541 (D.C. Cir. 2002) ("we infer that the Commission's failure to defend [its rule] indicates its inability to do so").

II. The FCC's Brief Is Unpersuasive.

Sinclair's opening brief described in great detail the Commission's determination more than seven years ago in 2003, based upon a lengthy record and numerous empirical studies, that "in light of the myriad sources of competition to local television broadcast stations . . . our current local TV ownership rule is not necessary in the public interest to promote competition . . . [and] does not promote, and may even hinder, program diversity and localism." Sinclair Br. at 37-40.

In response, the FCC says in its brief that it needed to reverse this 2003 determination in order to avoid harming competition among broadcast television stations, which appears to rely solely on the unsupported claim of the AFL-CIO that failing to do so would "result[] in a loss of newscasts and shared news product." FCC Br. at 77. The FCC cannot credibly defend its choice to reject the 2003 rule, which was based on an extensive record including many empirical studies, simply because a trade union, years later, predicted a future diminution of news. While overlooking the fact that the AFL-CIO presented no convincing data at all in support of its argument, the FCC blatantly ignores the substantial record evidence before it that the existence of local marketing agreements ("LMA's") has proven that station combinations actually result in more local news programming.

The FCC's brief attempts to sidestep the agency's own 2003 conclusion that the 1999 Eight Voices Test was "no longer necessary to foster diversity" by arguing that the test is nonetheless "necessary to promote competition" in local markets. FCC Br. at 77. Nowhere, however, does the FCC explain in plain English the distinction between diversity and competition. Among other irreconcilable issues, by "competition" the FCC appears to mean competition for programming, which creates diversity. This Court should not be confused by the FCC's irrational, hair-splitting argument that fostering programming competition is somehow different than fostering viewpoint diversity, which it concedes cannot support its restrictions on multiple ownership.

The FCC's assertion that newspapers, radio, cable television, Internet sources, and other local media do not provide adequate competition to respond to local needs and interests is also indefensible. In the era of MySpace, YouTube, Tivo, Video on Demand, Facebook, Twitter, blogging, Hulu, BitTorrent, 24/7 cable news, Yahoo, countless local newspaper websites, and the overall explosion of video competition on the Internet and elsewhere, the FCC's argument is particularly disingenuous. As the FCC itself states, a benefit of competition is that "local television stations, spurred by competition, will provide dynamic and vibrant alternative fare." FCC Br. at 78. If the goal of competition is to provide diversity, it strains credibility to argue that the rules are needed to promote

competition, even though the rules are, according to the FCC, unnecessary to promote diversity.

As Sinclair pointed out in its brief, the 1999 Eight Voices Test is the very same rule that the D.C. Circuit remanded to the FCC as arbitrary and capricious in *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) ("*Sinclair*"). Sinclair Br. at 8-9. In *Sinclair*, the D.C. Circuit determined that the FCC had not justified why non-broadcast sources (such as newspapers and radio stations) counted as "voices" for the purposes of cross-ownership of different media while the number of "voices" for local television ownership purposes included only broadcast television stations. In 2002, the D.C. Circuit remanded the matter to the FCC, with instructions to better justify the 1999 Eight Voices Test or eliminate it. It is more than eight years later, the video competition that exists today dwarfs that of the time *Sinclair* was decided, and the Commission in its brief remains unable to provide a reasoned explanation for why it counts market "voices" in one way for the 1999 Eight Voices Test and in a different way for its radio-television cross ownership rule. This Court should therefore give force to the D.C. Circuit ruling here and similarly hold that the FCC's 1999 Eight Voices Test remains arbitrary and capricious and contrary to section 202(h).[5]

[5] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56.

The FCC also states that preserving independent ownership of four stations not affiliated with a major network (in addition to independent ownership of four stations so affiliated) will also help ensure the competition for viewpoint diversity. FCC Br. at 80. As with its treatment of other elements of the local television ownership rule, the FCC's brief provides absolutely no support for this erroneous conclusion. Indeed, the FCC specifically cites to expectation of increased "local news and public affairs programming" without any evidence of how many such stations actually provide any material amount of such programming. FCC Br. at 80. The FCC also ignores the hard facts that contravene its position. The majority of markets do not even have eight independent television stations, and in many markets that do have at least eight, one or more of those stations carries religious or home shopping network programming, and little or no news.

In an even further confusing twist of logic, three pages after the FCC claims in its brief (FCC Br. at 78) that other media do not compete with local broadcast stations, the FCC states that it does not find "that local broadcast stations compete only with each other," but rather that this is irrelevant because the purpose of the local ownership rule is to "foster competition among local television stations." FCC Br. at 81. Aside from the diametrically opposed viewpoints expressed by the FCC in the very same brief, a glaring problem with the FCC's argument is that it fails to explain why the FCC needs to foster competition among television stations

given the FCC's acknowledgement that television stations effectively compete with other media.

The FCC further attempts to support the continuation of the "Top-Four" aspect of the 1999 Eight Voices Test by referring to the risk of "well established competitive harms" and "deleterious levels of concentration." FCC Br. at 82. Again, simply making an assertion does not make it so, and the FCC provides absolutely no data or proof of actual harm in support of its position. The unidentified "competitive harms" certainly are not "well-established": the FCC did not see them in the voluminous record as recently as 2003 and no evidence of such harms has been introduced since. Indeed, the evidence in the record shows the opposite, and the experience of long-term LMAs involving two big-4 stations in television markets is benign.

In another remarkable display of inconsistency, the FCC's brief supports its focus on competition for viewpoint diversity as having a "different purpose from the goals of antitrust authorities." FCC Br. at 78 n.23. But just a few pages later the FCC argues that the big-4 restriction prevents harm to "competition in the local broadcast television advertising market" (FCC Br. at 81), which is exactly the area focused on by antitrust authorities like the Department of Justice and the Federal Trade Commission which have far more expertise in these matters than the FCC.

CONCLUSION

For the reasons shown in this brief, and Sinclair's opening brief, and the filings by the National Association of Broadcasters, the Court should vacate the FCC's 1999 Eight Voices Test.

Respectfully submitted,

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I hereby certify that I am a member in good standing of the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply Brief of Petitioner conforms to the rules contained in FRAP 32(a)(5)(A) for a brief produced with a proportional font. This brief contains 2,473 words, not including the Table of Contents and Table of Authorities, permitted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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I hereby certify that a copy of this Reply Brief of Petitioner (1) was submitted in digital format, (2) is an exact copy of the written document filed with the Clerk, and (3) has been scanned for viruses with Symantec AntiVirus and according to the program, is free of viruses.

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