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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PROMETHEUS RADIO PROJECT, *ET AL.*,
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

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

REPLY BRIEF OF PETITIONERS NATIONAL ASSOCIATION OF BROADCASTERS AND COALITION OF SMALLER MARKET TELEVISION STATIONS

Jane E. Mago
Jerianne Timmerman
National Association of Broadcasters
1771 N Street, NW
Washington, DC 20036
(202) 429-5430 Telephone
(202) 775-3526 Facsimile
jmago@nab.org

Counsel for Petitioner National Association of Broadcasters

Elaine J. Goldenberg
Joshua M. Segal
Jenner & Block LLP
1099 New York Avenue, NW
Washington, DC 20001
(202) 639-6000 Telephone
(202) 639-6066 Facsimile
egoldenberg@jenner.com

Robert A. Long, Jr.
Enrique Armijo
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 662-5612 Telephone
(202) 778-5612 Facsimile
rlong@cov.com

Counsel for Petitioner Coalition of Smaller Market Television Stations

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INTRODUCTION

NAB's opening brief demonstrates that the Commission's readoption of the top-four/eight-voices local television ownership rule – which has been in effect since 1999, despite having been ruled arbitrary and capricious by the D.C. Circuit eight years ago – was unlawful. For purposes of this rule, which ostensibly is intended to promote competition, the Commission again decided to count only local television stations as "voices," even though the D.C. Circuit invalidated this approach in *Sinclair*, and even though the record before the Commission cannot support the conclusion that local television stations compete only with each other. What is more, the Commission has not demonstrated that its rule actually promotes competition, or justified its change in position from its 2003 Order on this issue. That is particularly true with respect to stations in medium and small markets, whose plight the Commission's 2008 Order never even addressed – even though, as record evidence demonstrated, those stations often have the greatest need for common ownership, from which they are now entirely excluded. *See* NAB Br. 24-52.

The Commission's brief gives stunningly short shrift to these arguments. As to the exclusion of non-broadcast voices from the eight-voices requirement, it simply asserts, tautologically, that the purpose of the rule is to promote competition among local television stations. It brushes aside the rule's anti-

competitive consequences for stations in small and mid-sized markets as little more than an incidental burden of the rule – without regard to the fact that those consequences affect *nearly three-quarters of all markets* and were a principal reason why the Commission rejected the rule in 2003. And the Commission points to nothing supporting its conclusion that its top-four/eight-voices rule in any way advances competition as it has defined the term.

The Commission, in short, has violated the *Sinclair* mandate, run afoul of the requirements of the Administrative Procedure Act, and failed to show that the top-four/eight-voices rule continues to be "necessary in the public interest as the result of competition." Telecommunications Act of 1996, § 202(h), Pub. L. No. 104-104, 110 Stat. 56, 111-12 ("1996 Act"). And neither the Citizen Petitioners nor Intervenors Consumers Union and the Consumer Federation of America have advanced any basis on which the Commission's arbitrary rulemaking can be upheld by this Court – let alone grounds for rejecting the local television rule as insufficiently restrictive. Under the circumstances, vacatur of that rule is required.[1]

The Commission's other ownership rules should, at a minimum, be remanded for the Commission to give further consideration to reducing or repealing their restrictions. The Commission's brief essentially admits that the

[1] The Coalition of Smaller Market Television Stations challenges only the Commission's retention of the local television ownership rule, and accordingly it joins only Parts I and II of this brief.

2008 Order does not justify retention of the current radio-television cross-ownership rule as necessary in the public interest – and the Commission fails to explain why the local television ownership rule and the local radio ownership rule are not sufficient to achieve the stated goal of diversity. As for the newspaper-broadcast cross-ownership rule, the Citizen Petitioners are wrong that the Commission provided inadequate notice or failed to justify changing the long-standing, outmoded ban on cross-ownership. Indeed, the Commission should have gone further to eliminate or substantially loosen the rule. Finally, while the Commission was certainly correct not to tighten local radio ownership restrictions, it should have reformed the local radio rule to permit greater common ownership, in light of the powerful record evidence that such reform would advance the public interest.

ARGUMENT

I. STANDARD OF REVIEW

In describing the applicable standard of review, the Commission suggests that it is entitled to almost complete deference for whatever decisions in makes in the media ownership context. But, as described in NAB's opening brief, the Administrative Procedure Act ("APA") imposes various procedural requirements with which the Commission must comply: the Commission must weigh all significant aspects of the regulatory problem that its policy is designed to address,

acknowledge and explain any policy reversals, and consider all significant comments submitted to the Commission as part of its rulemaking. *See* NAB Br. 22-24; *see also, e.g.*, *Prometheus Radio Project v. FCC*, 373 F.3d 372, 389-90 (3d Cir. 2004); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43-44 (1983); *Pa. Fed'n of Sportsmen's Clubs, Inc. v. Kempthorne*, 497 F.3d 337, 350-51 (3d Cir. 2007); *Natural Resources Defense Council, Inc. v. EPA*, 790 F.2d 289, 315 (3d Cir. 1986). Moreover, the primary cases on which the Commission relies predate passage of the Telecommunications Act of 1996, in which Congress gave content to the term "public interest" in the media ownership context and thereby limited the Commission's discretion in this area. In particular, § 202(h) of the Telecommunications Act requires the Commission to review all ownership rules to "determine whether any of such rules are necessary in the public interest *as the result of competition*" and to "repeal or modify any regulation it determines to be no longer in the public interest." 1996 Act § 202(h) (emphasis added); *see also Prometheus*, 373 F.3d at 390-91.

II. THE FCC'S READOPTION OF THE TOP-FOUR/EIGHT VOICES LOCAL TELEVISION OWNERSHIP RULE WAS UNLAWFUL

A. The Commission Cannot Justify Its Decision To Exclude Non-Broadcast Voices

NAB's opening brief demonstrated that the Commission unlawfully persisted in counting only local broadcast television stations as "voices" for

purposes of the eight-voices component of the local television ownership rule. NAB Br. 25-29. As NAB pointed out, not only does this determination flout the mandate of the D.C. Circuit in *Sinclair*, but the Commission offered no justification for its conclusion – inherent in its selection of relevant "voices" – that local broadcast television stations compete only against each other. *See id.* The Commission's response to these points is cursory and unconvincing.[2]

1. The Commission cannot explain why outlets that compete with television stations are not counted as "voices." In its brief, the Commission does not attempt to defend the proposition that local television stations face no meaningful competition from other outlets for viewers and advertisers – nor could it, in light of the overwhelming record evidence highlighted in NAB's brief. *See* NAB Br. 30-33. Instead, the Commission denies having rested on that proposition at all. FCC Br. 81. According to the Commission, the reason why it excluded other voices – such as newspapers, cable television, satellite television, radio, and the Internet – was simply that "the purpose of the rule is 'primarily to foster competition among local television stations.'" *Id.* (quoting Report and Order and Order on Reconsideration, 23 F.C.C.R. 2010, ¶ 101 (2008) ("2008 Order")). Thus, the Commission contends, "it was reasonable . . . to focus only on other local

[2] The local television rule is addressed at pages 75-83 of the FCC's brief, pages 43-47 of the Citizen Petitioners' brief, and pages 16-19 of the Intervenors' brief.

broadcast stations in determining what voices to count." *Id.*; *see also id.* (asserting that "the agency's 'determination regarding the continued need for the rule does not depend on the competitive impact of other video programming outlets'" (quoting 2008 Order ¶ 101)); Intervenors' Br. 18-19 (asserting without explanation that local television is the relevant "product market").

That response makes no sense. The logic of the Commission's position is that so long as the rule's purpose is to foster competition among a particular group of outlets, it may ignore the impact or even existence of other outlets for purposes of its count of voices. Thus, if this logic were correct, the Commission could arbitrarily assert a desire to foster competition only among local television stations that have certain types of owners or that air particular kinds of programming, and exclude as "voices" all other local television stations in the same viewing area – even though those other stations obviously compete in the same market. That is, of course, an absurd result.

In actuality, whether other outlets compete with local television stations is crucial to determining whether a merger between two television stations is likely to harm competition. If such competition exists, then the existence of those other outlets means that a merger between two television stations is less likely to have any anti-competitive effect – because after the merger, all of the television stations in the market, including the newly merged stations, will continue to face

competitive pressure on various fronts. *Cf. Comcast Corp. v. FCC*, 579 F.3d 1, 7-8 (D.C. Cir. 2009) (vacating the Commission's limit on cable consolidation because the agency had taken insufficient account of the competitive impact of satellite and other non-cable outlets).

By excluding those other outlets from consideration as "voices," the Commission has – despite its protestations – grounded its rule on an unsupported and categorical assumption that such outlets do not compete with local broadcast stations. And by now resting solely on the assertion that "the purpose of the rule is 'primarily to foster competition among local television stations,'" FCC Br. 81 (quoting 2008 Order ¶ 101), the Commission has done nothing more than restate the rule in a way that highlights its arbitrariness.

2. The Commission's decision violates the Sinclair *mandate*. Even if the Commission's decision to count only broadcast television stations as "voices" were defensible on its own terms (which it is not), it still could not be sustained by this Court. That is because the 2008 Order offers no persuasive explanation for why the decision is consistent with the D.C. Circuit's mandate in *Sinclair*, which deemed exclusion of other voices unlawful because the Commission had failed to "provide[] any justification for counting fewer types of 'voices' in the local ownership rule than it counted in its rule on cross-ownership of radio and television stations." *Sinclair Broad. Group Inc. v. FCC*, 284 F.3d 148, 162 (D.C.

Cir. 2002). To justify its decision to once again count fewer types of voices for purposes of the local television ownership rule than for purposes of the radio-television cross-ownership rule, the Commission's Order merely asserted that the latter rule is "designed to foster viewpoint diversity," while the former is necessary only "to preserve competition among broadcast television in local markets." 2008 Order ¶ 100. NAB's opening brief explained why this assertion lacks any merit. *See* NAB Br. 26-29.

The Commission's brief offers almost no resistance to NAB's argument. NAB's brief demonstrated, for instance, how the Commission's own descriptions of the interests served by the local ownership rule reveal that the Commission has dealt with *Sinclair* by conveniently redefining "competition" to include diversity. The Commission counters by fleetingly contending that "NAB ignores the distinction between the benefits of competition and the benefits of diversity." FCC Br. 78. It then cites locally responsive or public affairs-oriented programming as a benefit of increased competition – and, apparently, as a benefit that is not associated with diversity. *Id*.

That is an odd response indeed. As detailed in NAB's opening brief, prior to the 2008 Order and *elsewhere in the 2008 Order itself*, the Commission considered such programming to be a benefit of diversity, not competition. *See* NAB Br. 27-28 (citing 2008 Order ¶ 68 and Report and Order and Notice of Proposed

Rulemaking, 18 F.C.C.R. 13,620, ¶¶ 393-394 (2003) ("2003 Order")). Thus, the "distinction" that the Commission highlights is no distinction at all. The Commission has no answer whatsoever to the fact that, in the 2008 Order, it also described the newspaper-broadcast cross-ownership rule as promoting competition, and described the single-service ownership rules as promoting diversity. NAB Br. 28 (citing 2008 Order ¶ 63 & n.207).

Accordingly, the Commission has failed to establish that the 2008 Order's alleged compliance with *Sinclair* amounts to anything other than an exercise in re-labeling its rules to achieve a particular result. That kind of re-labeling not only fails to give any force to the D.C. Circuit's binding decision, but also is necessarily arbitrary and capricious. In addition, it is insufficient to discharge the Commission's burden under § 202(h) to explain why the retention of the top-four/eight-voices rule is in the public interest.

B. The Commission Failed To Address An Important Aspect Of The Problem Before It Or Justify Its Change In Course

As NAB noted in its opening brief, one of the primary reasons the 2003 Order discarded the top-four/eight-voices rule was the rule's effect on television stations in small and medium-sized markets. *See* NAB Br. 42 (citing 2003 Order ¶¶ 140, 201, 227). In readopting that rule in the 2008 Order, the Commission nowhere even mentioned, much less grappled with, that effect. The Commission now asserts that it was under no obligation to do so. As a matter of black-letter

administrative law, that is simply incorrect. The gap in the Commission's analysis is fatal to the local television ownership rule.

1. The Commission cannot justify its silence on an issue that affects the majority of the nation's markets and was extensively addressed in significant comments. The Commission does not dispute that it entirely failed to address the effect of the rule it adopted on stations in small and medium-sized markets. Rather, it offers two arguments in defense of its silence on this issue, both in a footnote. First, the Commission asserts that its "explanation for retaining the [top-four/eight-voices rule] applies as well to smaller markets," and that "[n]othing in NAB's argument points to anything that would have compelled the Commission to explain why it did not provide an exception to the local television ownership rule for smaller markets." FCC Br. 79 n.24. Second, the Commission asserts that it was particularly justified in ignoring smaller markets because "the Commission's focus on competition goals would be heightened in smaller markets with fewer station competitors." *Id.*

Neither of these perfunctory arguments remotely excuses the Commission's failure to so much as mention stations in smaller markets in the 2008 Order's discussion of local television. It is true, of course, that the Commission is under no obligation to address *all* of the possible effects of a proposed policy on *all* affected parties. But in promulgating a regulation, an agency cannot simply ignore "an

important aspect of the problem" at issue. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Here, there can be no dispute that the effect of the top-four/eight-voices rule on stations in smaller markets is an important aspect of the problem that the Commission was trying to address. Far from being the "exception," as the Commission's brief suggests, FCC Br. 79 n.24, smaller markets are *the rule* – they represent nearly three-quarters of all local television markets. NAB Br. 11 (citing 1/16/07 Coalition Comments 2). For this reason, in the 2003 Order, in contrast to the 2008 Order, the Commission itself paid special attention to the effects of local television restrictions in these markets. 2003 Order ¶ 140; *see also id.* ¶ 201; *Prometheus*, 373 F.3d at 416 ("[T]he Commission's [2003] local television rule is protective of small-market stations."). A regulatory regime that does not even take into account the majority of the regulated markets is necessarily an irrational one.

Here, that irrationality is heightened by the fact that the disregarded markets are ones in which the restrictions in question are especially harmful, and ultimately *defeat* the Commission's stated goals. Extensive comments and data in the record – all of which the Commission ignored – show that the top-four/eight-voices rule actually undermines competition in small and medium-sized markets. As the Commission was informed, that rule prohibits any common ownership in 154 of the country's 210 local television markets, as those markets have fewer than nine

stations. *See* 1/16/07 Coalition Comments 2. In such markets, the evidence demonstrated, stations are especially likely to struggle financially and, as a result, to reduce or eliminate news or other local programming. It is therefore particularly important for these stations to be able to benefit from more efficient ownership structures that enhance a station's ability to provide programming of local interest. *See* NAB Br. 45-46. That need has only grown in recent years. *See, e.g.*, 10/23/06 Coalition Comments 6-9, 13 n.29 (explaining that, since the 2003 Order, "economic pressures have become even more intense and smaller market broadcasters find themselves in an increasingly precarious position"), *cited in* NAB Br. 44. Accordingly, the Commission's rule precludes common ownership in the very markets where it is most needed.

In the face of all of this evidence, the Commission's brief now somewhat tentatively suggests that the top-four/eight-voices rule is *more* necessary in smaller markets, because "the Commission's focus on competition goals would be heightened in smaller markets with fewer station competitors." FCC Br. 79 n.24. Notably, this claim appears nowhere in the 2008 Order. As such, it amounts to a "post hoc rationalization for agency action" on which this Court cannot rely. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). But even aside from this procedural bar, the Commission's assertion cannot withstand scrutiny. It rests on the abstract notion that any limit on stations' ability to enter

into common ownership arrangements necessarily advances competition – a notion that, with respect to small and medium-sized television markets, is utterly divorced from reality. *See, e.g.*, NAB Br. 36-41; *id.* at 41-47 (describing studies and other evidence showing that "due to the growing expense of starting a local news operation, the small and medium market stations currently without local newscasts are highly unlikely to initiate them, unless they are allowed to combine with stations that already have local news operations," and that duopolies in medium and small markets have "enabled stations to add or expand local news programming specifically" (quoting 10/23/06 NAB Comments 99-100)); 2003 Order ¶ 140 (explaining that mergers in small and medium sized markets "would . . . promote competition"). The Commission cannot rely on an unsupported overgeneralization to escape from the consequences of the Order's failure to address comments and evidence demonstrating the benefits of common ownership in smaller markets. *See ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987) (a rulemaking by the FCC is "arbitrary and capricious" unless the Commission "respond[s] to all significant comments").

2. The Commission failed to adequately explain its reversal on whether the current local television ownership rule is necessary in the public interest. The Commission's local television rule is fatally flawed for another reason as well: the Commission failed to provide a satisfactory explanation for a crucial change of

course. As explained in NAB's opening brief, the Commission considered and *rejected* the top-four/eight-voices rule in its 2003, due in large part to that rule's *anti-competitive effects in small and medium-sized markets*. *See* NAB Br. 42-43. Thus, in the 2003 Order, the Commission concluded, on the basis of "numerous empirical studies," that the rule harms competition, "hinder[ing] the realization of efficiencies by prohibiting common ownership of television stations in most [designated market areas]." 2003 Order ¶¶ 140, 147; *see also id.* ¶ 140 (concluding that the rule "prohibits mergers that would increase efficiency in small and mid-sized markets").

But in the 2008 Order readopting the top-four/eight-voices rule, the Commission did not acknowledge that it was shifting its position on this key consideration underlying its previous policy – much less explain why it now believed that the rule would promote competition in smaller markets despite its previous conclusion to the contrary. Of course, the Commission is permitted to reverse itself. But what it may *not* do is reverse itself without acknowledging the change, or providing a reasoned explanation for it. *See Pa. Fed'n*, 497 F.3d at 350-51; *see also FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810-13 (2009); *id.* at 1824 (Kennedy, J., concurring) ("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past."); *Dillmon v. NTSB*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009) ("Reasoned decision making

. . . necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent."). Here, the Commission simply failed to "provide[] a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Prometheus*, 373 F.3d at 420-21 (internal quotation marks omitted).

To the extent that the Commission's brief makes any response to these arguments, it points to the D.C. Circuit's decision in *Association of Public-Safety Communications Officials-International, Inc. v. FCC*, 76 F.3d 395 (D.C. Cir. 1996) ("*APCO*"). *See* FCC Br. 79.[3] But *APCO* is inapposite. For one thing, although *APCO* did involve a policy change by the Commission, it did *not* involve a situation where the Commission, when adopting a new policy, failed to acknowledge or address the factors that led it to adopt the prior policy or why those factors no longer applied. *See APCO*, 76 F.3d at 399-400 (noting the Commission had provided a "reasoned explanation for its change in policy, supported by specific references to the record"). For another, in adopting the new policy in *APCO*, the Commission expressly responded to "each of the petitioners' concerns"

[3] The Commission also suggests in passing that it has particular discretion to change course "where, as here, its prior determination has not survived judicial review." FCC Br. 30. But this Court's *Prometheus* decision in no way relieves the Commission of the requirement to justify its change, since that decision cast no doubt on the Commission's conclusion in the 2003 Order that the top-four/eight-voices rule undermines the goal of competition, particularly in smaller markets. *Compare* FCC Br. 77 (erroneously suggesting that the 2003 Order focused only on whether the rule promoted diversity).

with the new policy during the rulemaking process. *Id*. at 397. In both respects, the Commission's actions in the rulemaking challenged in *APCO* were fundamentally different from its actions here; as a result, *APCO* provides no support for the Commission's treatment of the local television rule in the 2008 Order.

For all of these reasons, the Commission's decision to readopt the top-four/eight-voices rule cannot stand under the APA or § 202(h). By readopting the top-four/eight-voices rule "without any discussion of the effect" on small and medium-sized markets, the Commission engaged in the epitome of "arbitrary and capricious rulemaking." *Prometheus*, 373 F.3d at 421 (quoting *State Farm*, 463 U.S. at 43).[4]

[4] In addition, NAB's opening brief demonstrated that the Commission inadequately justified its decision to prohibit combinations among the top four stations in a market. In particular, the Commission disregarded the comparatively small market share possessed by even the third- and fourth-ranked stations in smaller markets; in 80% of such markets, mergers between these two stations still would not yield an audience share greater than that of the top-ranked station. *See* NAB Br. 46 n.6. In its brief, the Commission asserts that the top-four prohibition is nonetheless justified because "as a general matter" it prevents the market share of two merged stations from overtaking that of the top-ranked station, FCC Br. 82 – yet it does not explain how that can be true "as a general matter" when it is emphatically *not* true for 80% of smaller markets. Nor does the Commission make any attempt to explain its failure to wrestle with the significant comments and evidence in the record on this point. *See* NAB Br. 46 n.6.

C. The Commission Has Not Demonstrated That The Top-Four/Eight-Voices Rule Is Necessary To Promote Competition

As NAB's opening brief pointed out, quite apart from all of the flaws discussed above, the Commission's Order failed, at the most basic level, to explain why restricting common ownership of local television stations would actually promote competition. It is not enough for the Commission merely to highlight certain theoretical benefits of competition – namely, better programming and lower advertising rates – without linking those benefits to the rule it chose. *See* NAB Br. 48-49 (noting speculative nature of Commission's statement that broadcasters' incentives to air high-quality programming "may be diminished by mergers between stations that reduce competition to anti-competitive levels," and noting lack of foundation for Commission's conjecture that common ownership restrictions are necessary to prevent anti-competitive advertising rates).

After all, there is no guarantee that restrictions on common ownership of local television stations will result in increased competition. Such restrictions might well prevent mergers of stations that cannot serve as viable competitors unless they join forces with each other. If the inability of two stations to merge means that they struggle or go out of business entirely, then the public interest in competition is not advanced. *See* 2003 Order ¶¶ 147, 227; *see also* 10/23/06 NAB Comments 94-97; 10/23/06 Coalition Comments 9-12. The record in this matter is

replete with evidence of this very problem. *See* NAB Br. 38-41 (collecting cites to record material).

Amazingly, the Commission's brief offers *no response at all* to these points. It certainly does not establish that the Commission adequately determined that the top-four/eight-voices rule is necessary to promote competition, as opposed to merely restricting common ownership. This absence of a nexus between the Commission's desired outcome and its chosen means provides an independent reason to invalidate its actions. *See State Farm*, 463 U.S. at 43 (agency action is arbitrary unless it "articulate[s] a satisfactory explanation for its action including a rational connection between the facts found and the choice made" (internal quotation marks omitted)).

In addition, to the extent that the Commission's rule actually did promote competition in some way, the Commission has failed to explain why that function is not already adequately served by the antitrust laws, which are fully operative in this context. *See* NAB Br. 49-50. In a footnote, the Commission asserts that "the Court recognized in *Prometheus* that the public interest goals [sic] of preserving competition among local television stations has a different purpose from the goals of the antitrust authorities." FCC Br. 78 n.23 (citing 373 F.3d at 414); *see id.* at 28 n.9. But that recognition stemmed solely from the general fact that the Commission sometimes works to advance goals *other than* competition, such as

diversity and localism. Here, the Commission has disclaimed these other goals as justifications for its local television rule. *See* NAB Br. 49-50. Plainly, the Commission cannot insist that its rule serves only to advance competition while at the same time protesting that the rule covers different territory than the antitrust laws. This is yet another reason why retention of the local television rule is not necessary in the public interest within the meaning of § 202(h).

D. The Citizen Petitioners' And Intervenors' Arguments About The Transition To Digital Television Lack Merit

The Citizen Petitioners argue that the Commission acted unlawfully in not *tightening* the local television ownership rule, citing the transition to digital television as a reason for barring duopolies altogether. Citizen Petitioners' Br. 43-47. As the Commission explains, however, when the 2008 Order was adopted, "the timing and nature of the transition [was] uncertain"; as a result, "[i]t was reasonable for the Commission to move cautiously and not rely on an incomplete transition to a new technology as a basis for making the local television ownership rule more restrictive." FCC Br. 83.

Moreover, the record evidence demonstrates that the predicate for the Citizen Petitioners' argument – namely, that the ability to send a signal with multiple programming streams is equivalent to ownership of multiple stations – is a false one. Most importantly, a broadcaster has no right to demand that a multichannel video programming distributor (such as a cable operator or DBS

provider) carry multiple streams; a single broadcast station, by contrast, has the right to demand carriage for its signal. *See* 5/6/08 NAB Opposition to Petition for Reconsideration 9-12. In addition, while digital technology can be used to provide multiple new programming streams, it is not the equivalent of two full signals. This is so because a broadcaster must allocate the bits transmitted via its digital signal among the services it offers. In some cases, this may be a single high-quality, high-definition programming stream ("HDTV"). In other cases, the broadcaster may allocate the bits to produce two or more lower resolution programming streams. Broadcasters that elect the former option (as many do) transmit no more programming streams than in the analog environment. *See id.* In addition, even where "multicasting" is deployed, it does not provide the same benefits to local broadcasters and to the public that can be afforded by a merger of existing stations, *see* NAB Br. 38-40; 2003 Order ¶¶ 159-161, 164 – for instance, additional resources for local newsgathering.

Intervenors Consumers Union and the Consumer Federation of America, for their part, notably *do not* argue that the local television ownership rule should have been tightened. But they do invoke the digital transition to assert that the Commission's retention of the top-four/eight-voices rule was appropriate. Intervenors claim that the digital transition and other technological advances, such as increasing distribution of television content on the Internet, will have an

uncertain effect on local broadcast stations. As a result, they contend, the Commission acted reasonably in waiting for a future quadrennial review to determine whether to loosen the top-four/eight-voices rule. *See* Intervenors' Br. 17-19. This is not an adequate reason for retaining the rule, however. Some of the technological advances that the Intervenors identify actually counsel in favor of fewer local television ownership restrictions, as restrictions serve little purpose where there is increased competition from the Internet and other new outlets. *See supra* pp. 5-7; NAB Br. 30-33. More importantly, the Commission itself never articulated the justification that the Intervenors now advance. This Court is therefore categorically barred from upholding the Commission's action on this basis. *See, e.g.*, *Hasan v. United States DOL*, 545 F.3d 248, 251 (3d Cir. 2008) (quoting *SEC v. Chenery Corp*., 318 U.S. 80, 95 (1943)).

E. Vacatur, Not Remand, Is The Appropriate Remedy

In a footnote, the FCC argues that, if this Court determines that the local television ownership rule is invalid, it should not vacate that rule. FCC Br. 103 n.33. That is wrong. Vacatur, as opposed to remand, is appropriate where the deficiencies in the invalidated rule are serious and vacatur would not significantly disrupt the agency's regulatory program. *See Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd*., 252 F.3d 246, 263 (3d Cir. 2001). Under this

standard, vacatur of the top-four/eight-voices rule is clearly warranted. *See* NAB Br. 51-52.

The Commission's brief first makes the general assertion that any deficiencies in its rules are not serious ones. *See* FCC Br. 103 n.33. But, as discussed above, the top-four/eight-voices rule is fundamentally flawed in numerous respects. Indeed, that rule was already invalidated eight years ago; since the Commission has not managed to fix its mistakes in the interim, it is plain that the rule is "likely irredeemable," such that the Commission has little hope of *ever* justifying it. *Fox Television Stations, Inc. v. FCC*, 1027 F.3d 1027, 1048 (D.C. Cir.), *modified on reh'g on other grounds*, 293 F.3d 537 (D.C. Cir. 2002). The Commission's failings in the 2008 Order run the gamut from neglecting to explain a change of course, to disregarding overwhelming empirical evidence, to ignoring important aspects of the problem altogether. If these defects are not sufficiently serious to warrant vacatur, it is difficult to imagine what would be. *See Comcast*, 579 F.3d at 9 (vacating rule where Commission failed to follow a previous court mandate and readopted the same rule that already had been held invalid).

The Commission next argues – without addressing the local television rule specifically – that vacatur would cause "substantial disruption" because the "restrictions on media ownership have been in effect for decades." FCC Br. 103 n.33. But the Commission should not be allowed to benefit from its own foot-

dragging in responding to the *Sinclair* mandate by using the longevity of the local television rule as an argument for continuing to leave it in place. Further, the Commission has made no effort to show what disruption would result from additional common ownership of local television stations, and no actual threat of disruption is at all apparent – especially given the other laws that operate to restrict local television ownership, such as the antitrust laws. *See Fox*, 280 F.3d at 1048-49, 1053; *Comcast*, 579 F.3d at 9 (noting lack of disruption from vacatur of cable rule where parties "will remain subject to, and competition will be safeguarded by, the generally applicable antitrust laws"). Accordingly, this Court should vacate, rather than remand, the local television ownership rule.

III. THE COMMISSION ACTED UNLAWFULLY IN RETAINING THE RADIO-TELEVISION CROSS-OWNERSHIP RULE

NAB's opening brief demonstrated that the Commission acted unlawfully in deciding to retain the radio-television cross-ownership rule. Among other failings, the Commission inadequately justified its assertion that "diversity of ownership promotes diversity of viewpoints"; inadequately explained why the single-service ownership rules are insufficient to accomplish its diversity goals; and inadequately demonstrated why television broadcasters should be placed at a severe

disadvantage relative to cable operators. *See* NAB Br. 59-62. The Commission's brief does not even come close to rebutting these points.[5]

As to the assertion that "diversity of ownership promotes diversity of viewpoints," 2008 Order ¶ 82 (quoting 2003 Order ¶ 389), the Commission notes in passing that "the record contained evidence that commonly owned media outlets can also share (and promote) the same viewpoint." FCC Br. 71. But an assertion that commonly owned outlets *can* promote the same viewpoint, in some unknown number of instances, does not support the sweeping statement that "diversity of ownership promotes diversity of viewpoints." That is especially true in view of the record evidence that ownership diversity *does not* promote viewpoint diversity. *See* NAB Br. 60.

Nor does the Commission adequately explain why the local television ownership rule and the local radio ownership rule are not themselves sufficient to achieve the Commission's diversity goals. The Commission argues primarily that the radio-television cross-ownership rule prohibits certain combinations that the single-service ownership rules do not themselves prohibit. FCC Br. 70. NAB does not dispute this point. But the Commission never explains why that incremental

[5] The radio-television cross-ownership rule is addressed at pages 69-75 of the FCC's brief. It is not addressed in the argument sections of the Citizen Petitioners' brief or the Intervenors' brief.

reduction merits regulation. That failure is particularly glaring in view of the very substantial restrictions on common ownership effected by the single-service rules.

Next, the Commission attempts to defend its disparate treatment of broadcasters and cable operators on the ground that "mergers involving cable systems do not pose a serious threat to viewpoint diversity because cable television is not nearly as significant a source of local news as the broadcast media." FCC Br. 72 (citing 2008 Order ¶ 58). But that explanation for the radio-television cross-ownership rule is unsatisfying given the gatekeeping role played by local cable operators. *See* NAB Br. 61. More importantly, it is nowhere to be found in the 2008 Order. Indeed, the paragraph that the Commission cites comes from the portion of the order addressing the newspaper-television cross-ownership rule, not the radio-television cross-ownership rule. The 2008 Order's explanation for the Commission's choice to retain the latter rule never once mentions local news. *See* 2008 Order ¶¶ 82-86. Accordingly, the Commission's newly minted justification for treating broadcasters and cable operators differently is exactly the sort of post hoc rationalization that cannot permissibly serve as a basis for upholding agency action. *See, e.g.*, *Hasan*, 545 F.3d at 251 (quoting *Chenery*, 318 U.S. at 95).

Finally, perhaps aware of the deficiencies of its radio-television cross-ownership ruling, the Commission attempts to salvage its action by rewriting the law governing review of its media ownership rules. The Commission asserts that,

based on the record evidence, it "could not conclude that it would be in the 'public interest' under § 202(h) to *eliminate* the radio/television cross-ownership rule." FCC Br. 71 (emphasis added). But as this Court held in *Prometheus*, the question is not simply whether the Commission can justify *eliminating* an ownership rule. Rather, the Commission must affirmatively demonstrate that *retention* of any rule is "necessary in the public interest." *Prometheus*, 373 F.3d at 395 n.19. In pleading an inability to justify *eliminating* the radio-television cross-ownership rule, the Commission effectively concedes its failure to comply with Section 202(h).

IV. THE COMMISSION WAS JUSTIFIED IN MODESTLY RELAXING THE NEWSPAPER-BROADCAST CROSS-OWNERSHIP RULE AND SHOULD HAVE GONE FURTHER

NAB's opening brief explained that the record evidence amply supported the Commission's decision to relax the complete ban on newspaper-broadcast cross-ownership. Market conditions for newspapers have become far less favorable, creating a need for more efficient ownership structures; in addition, cross-ownership can increase the amount and quality of news reporting. And the Commission's actions represent only a modest effort to accomplish these goals. If anything, the Commission should have gone further to eliminate or substantially loosen the newspaper-broadcast cross-ownership rule. *See* NAB Br. 57-59. The

Citizen Petitioners argue that the Commission went too far, but these arguments lack merit, and this Court should reject them.[6]

The Citizen Petitioners begin by faulting the Commission for not providing adequate notice of the modified rule. But as the Commission's brief observes, the relevant provision of the APA does not require the agency to describe any specific rule proposals when giving notice; instead, it may simply provide a "description of the subjects and issues involved." 5 U.S.C. § 553(b)(3); *see* FCC Br. 36; *Citizens for Health v. Leavitt*, 428 F.3d 167, 186 (3d Cir. 2005). Here, the Commission's notice of proposed rulemaking advised the public that the Commission intended to consider modifying its cross-ownership rules – and that, as part of that undertaking, it intended to consider how those limits might vary to reflect the characteristics of particular markets. The final rule unquestionably fell within the ambit of what the Commission announced it would do. With respect to notice, the APA requires nothing more.

The Citizen Petitioners also mount various attacks on the substance of the modified rule. But as the Commission's brief and the briefs of the Newspaper Association of America and Media General demonstrate, none of these attacks provides a reason to revert to the complete ban on newspaper-broadcast cross-

[6] The newspaper-broadcast cross-ownership rule is addressed at pages 24-36 of the Citizen Petitioners' brief. It is also addressed at pages 4-16 of the Intervenors' brief and pages 33-68 of the FCC's brief.

ownership, which this Court has already concluded is not necessary in the public interest. *See* FCC Br. 54-56; Newspaper Association of America Br. 26-43; Media General Br. 21-39; *Prometheus*, 373 F.3d at 398-400. Certainly, the Citizen Petitioners' arguments do not remotely support the proposition that the Commission and the affected media entities are legally required to continue to operate under an outmoded, thirty-five-year-old ban.

V. THE COMMISSION ACTED UNLAWFULLY IN FAILING TO FURTHER LOOSEN THE LOCAL RADIO OWNERSHIP RULE

As NAB explained in its opening brief, the joint ownership permitted by the current local radio ownership rule has had salutary consequences. NAB Br. 54-57. It has resulted in a greater variety of radio programming, enabled broadcasters to take more risks in the programming they offer, and allowed stations to operate more efficiently. Thus, the rule furthers the public interest in diversity, localism, and competition. The Citizen Petitioners and the Intervenors apparently do not disagree with these conclusions (and neither, of course, does the Commission).[7]

Indeed, if anything, the Commission should have gone even further, permitting greater beneficial common ownership of local radio stations. NAB Br. 57. As NAB's opening brief explained, the current rule has been in place ever since Congress specified it in the 1996 Act as a starting point for reform. *Id.* at 53.

[7] The local radio rule is not addressed in the argument sections of the Citizen Petitioners' brief or the Intervenors' brief. It is addressed at pages 84-91 of the FCC's brief.

But the media landscape has changed a great deal since 1996, and there are now many direct competitors to terrestrial radio, including satellite radio, Internet radio, and DBS- and cable-based music services. *Id.* This competition helps explain why broadcast radio stations have experienced declining revenues and listenership, *id.* at 53-54 – a state of affairs in which allowing greater leeway for common ownership arrangements would advance the public interest and aid the "financial stability of the radio industry." 2008 Order ¶ 119 & n.384.

CONCLUSION

For the foregoing reasons and for the reasons set forth in NAB's opening brief, this Court should vacate the local television ownership rule and, at a minimum, remand the other ownership rules for the Commission to further consider repealing or reducing their restrictions.

Respectfully submitted,

/s/ Elaine J. Goldenberg

Jane E. Mago
Jerianne Timmerman
National Association of Broadcasters
1771 N Street, NW
Washington, DC 20036
(202) 429-5430 Telephone
(202) 775-3526 Facsimile
jmago@nab.org

Elaine J. Goldenberg
Joshua M. Segal
Jenner & Block LLP
1099 New York Avenue, NW
Washington, DC 20001
(202) 639-6000 Telephone
(202) 639-6066 Facsimile
egoldenberg@jenner.com

Counsel for Petitioner National Association of Broadcasters

Robert A. Long, Jr.
Enrique Armijo
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 662-5612 Telephone
(202) 778-5612 Facsimile
rlong@cov.com

Counsel for Petitioner Coalition of Smaller Market Television Stations

CERTIFICATE OF BAR MEMBERSHIP PURSUANT TO LAR 46.1

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

/s/ Elaine J. Goldenberg
Elaine J. Goldenberg

August 16, 2010

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify the following:

This brief complies with the applicable type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 6,695 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure, based upon a word count of the brief using the word count function of the 2003 version of Microsoft Word.

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/s/ Elaine J. Goldenberg
Elaine J. Goldenberg

August 16, 2010

CERTIFICATE OF SERVICE

I, Elaine J. Goldenberg, hereby certify that on August 16, 2010, I electronically filed the foregoing Reply Brief of Petitioners National Association of Broadcasters and Coalition of Smaller Market Television Stations with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that I have mailed the foregoing document by First-Class Mail, postage prepaid, to the below-listed participant in the case who is not a CM/ECF user.

Bruce T. Reese
Bonneville International Corporation
55 North 300 West
Salt Lake City, UT 84101-3580

I further certify that the required number of hard copies of the foregoing document were sent to the Office of the Clerk of the Court on the same day as the E-Brief was transmitted.

/s/ Elaine J. Goldenberg
Elaine J. Goldenberg

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I, Elaine J. Goldenberg, hereby certify that the text of the electronically filed Reply Brief of Petitioners National Association of Broadcasters and Coalition of Smaller Market Television Stations is identical to the text in the hard copies of that brief.

/s/ Elaine J. Goldenberg
Elaine J. Goldenberg

August 16, 2010

CERTIFICATE OF VIRUS DETECTION CHECK

I, Elaine J. Goldenberg, hereby certify that the text of the electronically filed Reply Brief of Petitioners National Association of Broadcasters and Coalition of Smaller Market Television Stations was scanned for viruses using McAfee VirusScan Enterprise 8.7.0i and is virus-free.

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