ORAL ARGUMENT NOT YET SCHEDULED

Nos. 08-3078, et al.

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

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

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,
Respondents.

**ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION**

REPLY BRIEF FOR PETITIONERS CBS CORPORATION AND CBS BROADCASTING INC.

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SUMMARY OF THE ARGUMENT

Petitioners CBS Corporation and CBS Broadcasting Inc. ("CBS") hereby respectfully submit this reply brief in response to the briefs of the Federal Communications Commission and the United States, their supporting intervenors, and Citizen Petitioners.

In its opening brief, CBS demonstrated the order's numerous inconsistencies, logical flaws, and failures to consider relevant record evidence. In its response, the Commission all but ignores the heightened standard of review under Section 202(h) that applies to its decision to retain the challenged broadcast media ownership rules and fails to address the vast majority of CBS's substantive administrative law and constitutional arguments. The FCC's failure to grapple with these important issues, much less to rebut them, compels the conclusion that the order on review fails to satisfy Section 202(h), is arbitrary and capricious in violation of Section 706 of the Administrative Procedure Act, and violates the First Amendment.

First, the Commission fails to explain how the very same radio/television cross-ownership limits that it previously found *contrary* to the public interest and in need of repeal could now be "necessary" in the public interest, or how the reimposition of those limits could constitute anything other than arbitrary and capricious agency action. The FCC's only attempt to rebut CBS's challenge to its reversal in course is based upon a clear mischaracterization of the Commission's prior reasoning. Among other things, the FCC does not even try to justify the particular radio/television cross-ownership limits chosen, which were originally implemented in 1999 and which CBS demonstrated to be irrational in the current marketplace. Because the agency cannot meet the applicable test under Section 202(h) or Section 706 of the APA and has no answer to several of CBS's arguments, the Commission's decision to reinstate the radio/television cross-ownership limits cannot stand.

Second, the Commission fails to rebut CBS's argument that the agency did not adequately justify reinstatement of the arbitrary numerical limits in the local television ownership rule. The FCC's response brief—like its decision readopting the rule—entirely ignores this Court's specific admonition that the Commission previously failed to recognize that three-station combinations could have a lesser competitive impact than certain two-station combinations. And, turning a blind eye to the standard under Section 202(h) as well as governing principles of administrative law, the FCC asserts that it need not even address CBS's arguments challenging the Commission's unsubstantiated reversal of its prior decision that the public interest *required* revisions to the local television rule to allow combinations of three television stations in the largest, most diverse markets. Moreover, content to recycle conclusory statements based on the record before the agency in the prior media ownership review, the FCC fails to address CBS's argument that the agency ignored the relevant record evidence showing there was no basis for readopting the restriction on combinations among a market's top four stations. The Commission's decision to reinstate the local television ownership rule in the form adopted in 1999 and struck down by a Court of Appeals nearly a decade ago thus cannot be sustained.

Third, because the FCC's attempted defense of its decision to retain intact the dual network rule relies on the record in the prior media ownership review proceeding, it is obvious that the agency did not consider, as it must under Section 202(h), the transformation in the media marketplace that has taken place in the intervening years. The Commission stresses the supposed uniqueness of the top-four broadcast networks but does not address CBS's argument that the fact that the networks have the greatest audience share does not itself provide a basis for singling them out, particularly in light of the robust competition that the Commission acknowledges they now face.

Finally, the Commission brushes aside CBS's arguments that the media ownership rules unconstitutionally restrict speech. In doing so, the FCC sidesteps the argument that recent market and technological developments have undermined the scarcity rationale for speech restrictions on broadcasters. Further, the Commission's conclusory statement that its media ownership rules are not content-based wholly ignores the fact that its rules are animated by a stated desire to control broadcast content. Accordingly, the broadcast rules must be subject to heightened scrutiny, which the Commission cannot and does not attempt to meet.

ARGUMENT

In addition to the arguments made herein, CBS adopts in whole the arguments made in the reply briefs of the National Association of Broadcasters, Clear Channel Communications, Inc., and the Newspaper Association of America, *et al*.

I. THE FCC FAILED TO JUSTIFY REIMPOSITION OF THE OUTDATED RADIO/TELEVISION CROSS-OWNERSHIP LIMITS.

Rather than attempt to justify its reimposition of the radio/television cross-ownership limits under the applicable standard of review established by Section 202(h) of the Telecommunications Act of 1996, Pub. L, No. 104-104, 110 Stat. 56, § 202(h), or address any of the pertinent case law, the Federal Communications Commission and the United States ("FCC" or "Commission") claim erroneously that the agency's decision must be upheld if it is merely "reasonable." Brief for FCC and United States 3, 69-75 ("FCC Br."). The Commission does not even attempt to rebut CBS's argument that the radio/television cross-ownership limits do not satisfy the heightened burden imposed by Section 202(h), Brief for Petitioners CBS Corporation and CBS Broadcasting Inc. 17-18 ("CBS Br."), only mentioning that provision in reference to the radio/television cross-ownership limits in a single offhand citation, FCC Br. 71. And apart from ignoring the relevant standard, the Commission asserts much wider discretion than is warranted even under the "arbitrary and capricious" standard of Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706 ("APA"). FCC Br. 75.

The Commission also wholly fails to rebut CBS's demonstration that the FCC did not provide an adequate explanation for its about-face from its previous determination that the public interest *required* that the radio/television cross-ownership limits be repealed in the vast majority of markets. CBS Br. 17-27. Thus, as further explained below, the Commission has failed to justify readoption of the radio/television cross-ownership limits under the heightened standard of Section 202(h), whether that provision carries a deregulatory presumption or simply requires that the rule must "remain useful in the public interest" and be supported by "reasoned analysis." CBS Br. 18 (quoting *Prometheus*, 373 F.3d 372, 395 (3d Cir. 2004)). Nor has the FCC satisfied the applicable standard under the APA. Instead, the Commission completely ignores basic principles of administrative law requiring that an agency reversing course "must show that there are good reasons for the new policy," and must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." CBS Br. 19 (quoting *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009)). Because it cannot meet this burden, the Commission attempts to rationalize its reversal by mischaracterizing why the radio/television cross-ownership limits were repealed in all but the smallest markets in the *2003 Order*. The FCC also fails to present any reasoned basis for reimposing the *very same* radio/television cross-ownership limits that were set in 1999, despite the acknowledged transformation of the media marketplace since that time.

A. The Commission Has Not Adequately Explained Why it Reversed Course After Concluding the Public Interest Required Repeal of the Radio/Television Cross-Ownership Limits.

The Commission fails to rebut CBS's argument that it has not adequately explained why the radio/television cross-ownership limits are necessary in the public interest despite increased diversity and competition in the market and the FCC's imposition of an even more restrictive local television ownership rule and the very same local radio ownership rule that was adopted in 1999. CBS Br. 19-20, 23-27. The FCC claims that invalidation of the cross-media limits somehow "remov[ed] the predicate for eliminating the radio/television cross-ownership rule," attempting to rewrite history by arguing that in the *2003 Order* it "had determined that the combination of the local ownership rules and the cross-media limits would provide sufficient protection of viewpoint diversity to render the existing cross-ownership rule unnecessary." FCC Br. 69-70. But nothing in the *2003 Order* stated that it was the "combination" of these limits that rendered the radio/television cross-ownership rule unnecessary. Instead, after explaining that the local ownership rules would protect and preserve diversity, the Commission simply stated "[i]n addition" that the cross-media limits would protect viewpoint diversity. *2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 F.C.C.R. 13620, 13774-5 (¶ 389) (2003) ("*2003 Order*"); *see also* CBS Br. 19.

As CBS pointed out, the Commission reasoned in the *2003 Order* that it was necessary in the public interest to repeal the radio/television cross-ownership limits because the separate local ownership rules "protect and promote competition in the local television and radio markets, and as a result, will also protect and preserve viewpoint diversity." CBS Br. 19-20 (quoting *2003 Order* ¶ 389). The cross-media limits that were adopted in the *2003 Order* did not limit radio/television combinations at all in the vast majority of markets unless they were also co-owned with a newspaper. *2003 Order* ¶ 460 (restricting radio/television combinations only in markets with fewer than three television stations, unless co-owned with a newspaper). Rather, in the vast majority of markets the Commission relied upon the local broadcast ownership rules alone to protect diversity. And because there are no limits on the ownership of newspapers alone—as there are on ownership of both radio and television stations—the Commission's reasoning that elimination of the cross-media limits made it necessary to retain restrictions on newspaper/broadcast combinations certainly cannot be used to justify reimposition of the radio/television cross-ownership rule. Thus, it makes no sense for the Commission to argue now that the elimination of the cross-media limits, which imposed restrictions on radio/television combinations in only a small minority of markets, necessitated reinstatement of the 1999 radio/television cross-ownership limits in all markets. The FCC's creative attempt at revisionist history cannot take the place of the "reasoned analysis" required by this Court under Section 202(h). *Prometheus*, 373 F.3d at 395.

Further, the Commission resorts to circular reasoning in its attempt to explain why the local ownership rules are not sufficient to protect diversity. FCC Br. 70. The FCC states that because the local ownership rules "do not restrict [radio/television] combinations," "there remains a need to retain a [radio/television] cross-ownership rule to ensure that viewpoint diversity is adequately protected." FCC Br. 70 (*quoting 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order on Reconsideration, FCC 07-216, MB Docket No. 06-121, ¶ 84 (Feb. 4, 2008) ("*2008 Order*") (JA____)). But the obvious fact that only a radio/television cross-ownership rule directly limits radio/television combinations in no way explains why such a restriction is necessary in the first place. Reliance on such obviously circular logic is telling evidence that the Commission's decision was arbitrary and capricious. *Bethlehem Steel Corp. v. EPA*, 651 F.2d 861, 874-75 (3d Cir. 1981).

Moreover, the FCC fails even to *acknowledge* its prior determination that the local ownership rules would adequately "protect and preserve viewpoint diversity within those services," and that as a result a radio/television ownership rule was "unnecessary and anachronistic." *2003 Order* ¶ 389. When an agency reverses course, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox*, 129 S. Ct. at 1811. Further, "[a]n agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past." *Id.* at 1824 (Kennedy, J., concurring). The FCC has not satisfied those requirements.

Significantly, the FCC admits that "record evidence in this proceeding 'showed that diversity of ownership does *not* necessarily promote diversity of viewpoints and may even have the opposite effect.'" FCC Br. 71 (quoting NAB Br. 60). Nonetheless, the Commission attempts to justify the radio/television cross-ownership limits using tortured logic and a distorted understanding of Section 202(h). The Commission claims that "the record contained evidence that commonly owned media outlets can also share (and promote) the same viewpoint." *Id.* In support of this proposition, the Commission cites only a single set of conclusory comments filed by Consumers Union. *Id.* But those comments did not even address the sharing of content between radio and television stations; instead, they pertained only to the repurposing of media content on websites. *See* Further Comments of Consumers Union, Consumer Federation of America, and Free Press, MB Docket No. 06-121, at 136-147 (Oct. 22, 2007) (JA____). On this irrelevant basis, the Commission maintains its position that "diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints" and states that "[i]n light of that possibility" 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.

Even if there were some valid basis for promoting diversity of ownership, the Commission had not explained how, despite pursuing the very same aim, it reasoned in 2003 that the local ownership rules necessarily would "protect and preserve viewpoint diversity within those services" and concluded that the radio/television cross-ownership limits were "unnecessary and anachronistic" and, therefore, no longer in the public interest. *Id.* The Commission not only fails to explain how it has now come to the opposite conclusion, but also has conceded that diversity of ownership may *reduce* viewpoint diversity and that there is only a *possibility* that diversity of ownership may increase viewpoint diversity. *See* FCC Br. 71 ("NAB asserts (Br. 60) that record evidence in this proceeding 'showed that diversity of ownership does *not* necessarily promote diversity of viewpoints and may even have the opposite effect.' True enough."). At the very least, the Commission is required to show a "rational connection between the facts found and the choice made." *Prometheus*, 373 F.3d at 390 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)). Here, however, the FCC clearly has not shown that the radio/television cross-ownership rule satisfies Section 202(h) or even explained how the rule is logically connected to increasing viewpoint diversity.

B. The Commission Failed to Provide Any Reasoned Basis for the Specific Radio/Television Cross-Ownership Limits Set.

As CBS explained, once the Commission concluded that there should be a radio/television cross-ownership rule, the agency reflexively reinstituted the very same radio/television cross-ownership limits that were originally adopted in 1999, without any explanation of the basis for the particular limits adopted. CBS Br. 20-21, 23. The Commission has not defended the sole basis asserted in the *2008 Order*—"to maintain the status quo"—for readopting the particular radio/television cross-ownership limits. CBS Br. 20. Because the Commission fails to respond to CBS's arguments, there is a strong inference that the Commission acquiesces in CBS's contentions and has waived any contrary argument. *Beazer East, Inc. v. The Mead Corp*., 412 F.3d 429, 437 n.11 (3d Cir. 2005) (appellee who "failed on appeal to respond to any of [appellant's] arguments on" certain points "waive[d], as a practical matter anyway, any objections not obvious to the court to [those] specific points"); *Cincinnati Ins. Co. v. E. Atl. Ins. Co.*, 260 F.3d 742, 747 (7th Cir. 2001) (drawing inference that appellee acquiesced in appellant's argument by failing to respond). If nothing else, the FCC has made clear that it has no credible response to CBS's arguments and has effectively conceded that "to maintain the status quo" is not an adequate basis for departing from its well-reasoned prior decision and reinstating the previously abandoned 1999 limits. CBS Br. 20; *see also Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1050 (D.C. Cir. 2002)), *modified on reh'g* 293 F.3d 537 (D.C. Cir. 2002) (finding "no basis upon which to reject" petitioner's points "inasmuch as the Commission does not respond to them"). Thus, the Commission has failed to show that the particular limits adopted satisfy Section 202(h) or Section 706 of the APA.

Readoption of the very same limits abandoned five years earlier made no sense in light of the Commission's admission that new media "contribute to diversity." FCC Br. 71 (quoting *2003 Order* ¶ 58). In particular, the Commission does not explain why the radio/television cross-ownership limits should remain as they were in 1999, even though it stated in the *2008 Order* that "developments since the Commission last reviewed its rules show that the diminishment of mainstream media power over information flow is real" and "traditional media sources no longer enjoy the same degree of control over the gathering and delivery of news and information." CBS Br. 25 (quoting *2008 Order* ¶ 36 & n.121 (JA____)).

The FCC argues that, notwithstanding new media's contributions to diversity, it was reasonable to readopt the old limits simply because traditional media remain the top sources for local and national news. FCC Br. 71-72. The mere fact that traditional media continue to lead in this respect, however, in no way justifies continued regulation. The Commission's brief does not even attempt to explain why the increases in diversity and competition created by new media have *no impact whatsoever* on the particular limits that were set in 1999, when new media sources were barely in their infancy. This omission is fatal because the FCC has failed to reconcile its refusal to revise the limits with its discussion of how new media have changed the media marketplace. Accordingly, the Commission cannot delineate the required "rational connection between the facts found and the choice made." *Prometheus*, 373 F.3d at 390 (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43).

The Commission has been chastised in the past for "ignor[ing] the true relevance of competition" by failing to recognize that "normally a company's ability to exercise market power depends not only on its share of the market, but also on the elasticities of supply and demand, which in turn are determined by the *availability* of competition." *Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001); *see also Comcast Corp. v. FCC*, 579 F.3d 1, 7-8 (D.C. Cir. 2009) (vacating cable horizontal ownership cap as arbitrary and capricious where the Commission failed to adequately account for the growing competitive impact of direct broadcast satellite companies on cable). Here, the Commission has focused narrowly on the market share of traditional media, again ignoring the changes in the dynamic media market that have increased competition for broadcast media and have eviscerated any need for limits on radio/television cross-ownership.

As CBS pointed out, "a 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.'" CBS Br. 52 (quoting *Alltel Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir.

1988) (citation omitted)). Here, the Commission has done nothing to rebut CBS's argument that the market is increasingly diverse and that there is no record evidence of a problem related to diversity in radio and television markets. CBS Br. 23-27. Moreover, as discussed above, even if such a problem did exist, the Commission admits that nothing indicates that its proposed radio/television cross-ownership limits would increase diversity. FCC Br. 71.

The Commission also fails to address in any meaningful fashion CBS's argument that the radio/television cross-ownership rule suffers from infirmities similar to the cable/broadcast cross-ownership rule that was vacated in *Fox*. FCC Br. 72-73. The FCC attempts to distinguish the radio/television rule from the cable/broadcast rule solely on the basis that the radio/television rule does not constitute an "across-the-board prohibition of cross-ownership." *Id.* at 73. The Commission, however, fails to rebut a single comparison drawn by CBS. In *Fox*, the Court described the FCC's justification for the rule—to protect competition and diversity—as "at best flimsy." 280 F.3d at 1053. In light of the increasingly diverse media market, the justification rejected in *Fox* is no more persuasive or well-supported today as applied to the radio/television rule than it was as applied to the cable/broadcast rule at the time *Fox* was decided. Moreover, as in *Fox*, the Commission did not account for significant changed facts (the revolution in the media marketplace), explain its departure from its prior decision (that repeal of the rule was necessary in the public interest), or cite any reliable evidence that common ownership harms diversity. CBS Br. 21.

Having attempted to divert attention from the comparison that CBS actually drew to *Fox*, the Commission further ignores the relevant comparison between its current non-regulation of cable/broadcast and its regulation of radio/television cross-ownership. As CBS pointed out, after the *Fox* decision, a cable operator may, in *any* market, operate a cable system, program the great majority of its own cable channels, and own the maximum number of either television or radio stations permitted under the local ownership rules. *Id*. at 22. The Commission fails to explain why local broadcast ownership rules sufficiently protect diversity from cable/broadcast combinations but not from radio/television combinations, citing only the conclusion that cable is not as significant a source of local news as broadcast media. FCC Br. 72.

Moreover, despite acknowledging CBS's argument that the radio/television cross-ownership rule does not meaningfully differentiate among markets, FCC Br. 73 (quoting CBS Br. 22), the Commission does not even attempt to provide an explanation for the particular lines drawn, much less show that the specific limits satisfy Section 202(h). Instead, the FCC recites that: (1) CBS "never explains why applying the least restrictive radio/television cross-ownership limitation would be unreasonable"; and (2) "over time, consolidation of media outlets could cause more markets to fall below the 20-voice threshold." FCC Br. 73. Neither assertion supports reimposition of the rule.

First, as discussed above, the Commission fails to demonstrate any need for the radio/television cross-ownership rule.

Second, as CBS explained, the Commission's "failure to take account of circumstances that appear to warrant different treatment for different parties" constitutes arbitrary and capricious action. CBS Br. 22 (quoting *Petroleum Commc'ns, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994)). In adopting a rule that varies based on the number of independent voices in a market, the Commission itself determined that market size warrants differential regulatory treatment. CBS Br. 22 (*2008 Order* ¶ 80 n.259 (JA____)). The FCC's supporting intervenors, Consumer Federation of America and Consumers Union ("Intervenors"), further echo the view that lines should be drawn according to "market size" based on "the competitive structure of media markets." Intervenors Br. 10. Record evidence shows, however, that the vast majority of markets have more than twenty independent voices and that the numerical limits therefore fail to differentiate meaningfully between markets of widely different sizes. CBS Br. 22-23.

Third, the FCC indicates that "over time" changes in the media market "could" render the lines it has drawn meaningful. FCC Br. 73. Thus, the Commission has effectively conceded that it has not made pertinent distinctions based on the record presented, but rather on the record as it may someday be. *See, e.g.*, *Prometheus*, 373 F.3d at 406 n.33 ("We review an agency's decision for whether it is rationally derived from the record evidence-not whether the agency may (or may not) 'fine tune' the record at the next mandated review."); *see also* Intervenors Br. 11 (explaining that the media ownership rules cannot be based on "future possibilities"). The Commission's failure to draw relevant distinctions shows that the radio/television cross-ownership limits do not satisfy Section 202(h) and are arbitrary and capricious.

Rather than address CBS's argument that the radio/television cross-ownership rule arbitrarily disfavors radio, the FCC sidesteps the matter by contending that CBS "simply takes issue" with the decision to limit combinations to a total of eight media outlets. FCC Br. 74. The Commission's reasoning is faulty for a number of reasons. *First*, CBS "takes issue" with the total number of eight outlets per market that was set in 1999 because it fails to account for developments in the marketplace. *See, e.g.*, CBS Br. 23-27. This concern is separate, however, from CBS's argument that the rule arbitrarily disfavors radio.

Second, the Commission does not deny that the radio/television cross-ownership limits disfavor radio in large markets by treating radio and television in certain respects as though they are equivalent, even though the *2008 Order* concluded that radio plays a lesser role than television. These internal inconsistencies in the *2008 Order* cannot be allowed to stand, *Prometheus*, 373

F.3d at 405, nor can the failure "to take account of circumstances that appear to warrant different treatment for different parties," *Petroleum Commc'ns, Inc.*, 22 F.3d at 1172.

Third, it is irrational for the Commission to set a total number of outlets that can be owned and then to argue that simply because the total number is set, it need not concern itself with the resulting inconsistencies in its decision. FCC Br. 74-75. Instead, as this Court made clear in *Prometheus*, the FCC is *required* to resolve such internal inconsistencies. 373 F.3d at 411.

Fourth, the Commission cites a desire to give broadcasters "flexibility" to justify treating radio as though it were a one-for-one substitute with television in large markets. FCC Br. 74-75. This supposed objective does nothing to reconcile the radio/television cross-ownership rule with the conclusion that radio has a lesser impact on diversity, CBS Br. 28.

In sum, the Commission has fallen far short of making the required showing that the radio/television cross-ownership limits satisfy the standard set in Section 202(h). Moreover, by failing to provide any basis for the specific limits set, the FCC effectively concedes that it has simply drawn an arbitrary line. *See, e.g.*, *Prometheus*, 373 F.3d at 420 (citing *Sinclair Broad. Group Inc. v. FCC*, 284 F.3d 148, 162 (D.C. Cir. 2002).

II. <u>THE FCC FAILED TO JUSTIFY ARBITRARY NUMERICAL LIMITS IN THE LOCAL TELEVISION OWNERSHIP RULE.</u>

The Commission fails to rebut CBS's argument that the agency inadequately justified its decision to retain the arbitrary numerical limits of the local television ownership rule in violation of Section 202(h) and Section 706 of the APA. *See* CBS Br. 29-46. In particular, the FCC glosses over CBS's argument that the agency arbitrarily failed to consider whether triopolies should be allowed in large markets. CBS Br. 30-39. In doing so, the Commission ignored this Court's specific admonition in *Prometheus* that the FCC had erred in not recognizing that a "triopoly could have a lower combined market share than any or all of the duopolies" in a market. 373 F.3d at 418-19. The Commission also fails to refute CBS's extensive showing that the prohibition of mergers between top four-ranked television stations in a market was not justified based on the record evidence. CBS Br. 39-46.

In its struggle to justify the long-outdated local television ownership rule, the Commission points to conclusory comments, attempts to rewrite its well-reasoned justification for loosening the rule in 2003, and tries to muddy a record that shows an increasingly competitive and diverse market. In doing so, the FCC all but ignores the relevant standard of review, referring to Section 202(h) but once in conclusory fashion. FCC Br. 77. Thus, the Commission has done nothing to satisfy Section 202(h). Moreover, the Commission asserts that its decision should be upheld as "reasonable," *see, e.g.*, FCC Br. 79-81, ignoring even ordinary principles of administrative law cited by CBS that require an agency to provide "a reasoned explanation" for reversal of its prior policy, *Fox*, 129 S. Ct. at 1811, to consider relevant information brought to its attention, *Bethlehem Steel*, 651 F.2d at 867, and to adequately account for similar circumstances that warrant different regulatory treatment, *Petroleum Comm'cns*, 22 F.3d at 1172. Thus, the Commission fails to rebut CBS's argument that readoption of the prohibition on triopolies and retention of the top-four restriction on duopolies cannot stand.

A. The Commission Has Provided No Explanation for Its Failure Even to Consider Whether Triopolies Should be Allowed in Large Markets, Despite Concluding in 2003 that such Combinations Advance the Public Interest.

The Commission admits that the *2008 Order* did not address the argument that triopolies should be allowed in certain markets, and does not even attempt to provide a basis for their prohibition in the largest markets. Again citing the wrong standard, the Commission claims that it was only required to provide a "reasonable" explanation for the limits it chose and "need not address the advantages or disadvantages of some different limitation." FCC Br. 79. The Commission's failure to respond should be viewed as a waiver of any objection to CBS's claims, *see Beazer East, Inc.*, 412 F.3d at 437 n.11, and certainly the FCC has provided no valid rebuttal, *see Fox*, 280 F.3d at 1050.

As CBS explained, the Commission reversed course from its prior conclusion that Section 202(h) required the local television ownership rule to be revised to allow triopolies in the largest markets because the rule was "overly restrictive and not necessary to protect competition." CBS Br. 30-31 (quoting *2003 Order* ¶ 153). The Supreme Court requires an agency reversing course to "show that there are good reasons for the new policy" and provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay . . . the prior policy." *Fox*, 129 S. Ct. at 1811. The Commission cites no such reasons and provides no such explanation in its *2008 Order*.

Even if the Commission had not reversed course, this Court would nevertheless require it to "consider[] the relevant information brought to its attention." *Bethlehem Steel*, 651 F.2d at 867. Yet the Commission has provided absolutely no explanation for the fact that its *2008 Order* did not distinguish or even reference the data the FCC found so persuasive in the *2003 Order*. Neither has the Commission provided any explanation as to why its prior approach was flawed. Accordingly, the Commission has failed to reconcile its decision to readopt the 1999 local television ownership rule with Section 202(h) or to explain why that action is not arbitrary and capricious.

The Commission's response also confirms CBS's argument that the FCC simply declared its reversal of its prior decision with no more than an *ipse dixit* explanation relying on conclusory comments. Even though the Commission recognizes that the local ownership rule is no longer necessary to promote diversity, it claims that its 2003 decision must be reversed because "eliminating the [1999 version of the] rule could harm competition among broadcast television stations in local markets." FCC Br. 76 (quoting *2008 Order* ¶ 101). To buttress its claim that the more restrictive rule is "necessary to promote competition in local markets," the Commission asserts "that the existence of other media, including cable, satellite, and the Internet, [do] not sufficiently address this concern" and that it "could not 'rely on competition from cable programmers to respond to local needs and interests.'" FCC Br. 77-78 (quoting *2008 Order* ¶¶ 97-102). The FCC's reasoning is not only illogical and inconsistent, but also flies in the face of market realities and the record before the agency for the particular reasons set forth below.

First, although the FCC asserts that it did not ignore the changes that occurred in the media marketplace between 1999 and 2008, it nonetheless cites only conclusory comments to support its approach regarding triopolies. FCC Br. 76-77 (citing Comments of AFL-CIO, MB Docket No. 06-121 (Oct. 23, 2006) (JA____)). Nowhere has the Commission analyzed the relevant portions of the record, which is replete with evidence that common ownership can create efficiencies that result in expanded local news coverage and the provision of additional programming responsive to the needs and interests of local viewers. CBS Br. 8-9, 36-39. In the face of a record showing vastly increased competition in the media market, the mere assertion that loosening the local television ownership rule "could harm competition" constitutes neither a "good reason[]" nor a "reasoned explanation" for the Commission's jettisoning of the facts and circumstances that underlay its prior decision to relax the rule to permit triopolies in large markets. *Fox*, 129 S. Ct. at 1811.

Second, the Commission did not address CBS's argument that the agency's own video competition reports clearly show that the competitive impact of other video programming outlets on local broadcasters has increased significantly since the *2003 Order* was issued. Although this competition has resulted in broadcasters losing market share and advertising dollars to non-broadcast media, the FCC is content to ignore it. CBS Br. 33-35.

Third, the Commission's claim that non-broadcast voices have increased diversity in the market yet have not impacted competition makes no sense. FCC Br. 76-77. Acknowledging that broadcasters and non-broadcasters compete in the marketplace of ideas, FCC Br. 77-78, but not in the marketplace of audience share or advertising, is nonsensical and completely contrary to the record. *See, e.g.*, CBS Br. 8-9, 36-39; *Prometheus*, 373 F.3d at 420 (invalidating agency rulemaking inconsistent with the record). Such reasoning cannot satisfy the APA's "reasonableness" standard, let alone the heightened standard established by Section 202(h).

To avoid considering the competitive impact of non-broadcast media, the Commission states that the narrow purpose of the rule is "primarily to foster competition among local television stations." FCC Br. 81 (citing *2008 Order* ¶ 101). Intervenors describe this as "defin[ing] the broadcast TV market as a relevant product market." Intervenors Br. 18. The Commission tries to justify this approach by claiming that local television stations "spurred by competition" will produce "dynamic and vibrant fare, including local news and public affairs programming." FCC Br. 78. In so doing, the FCC clearly conflates its stated aim of protecting competition with its goals of preserving diversity and promoting localism. *See* NAB Br. 27.[1] Neither do Intervenors provide any justification for so narrowly defining the relevant market. In any event, these arguments say nothing about triopolies and certainly cannot serve as the reasoned basis for the Commission's policy reversal.

Moreover, by considering only the competition that broadcasters face from other broadcasters, the Commission irrationally fails to recognize the competitive impact of myriad other video programming providers. CBS Br. 33. Intervenors argue that the Commission was justified in readopting its rule limiting local television ownership to two stations in a market because the record showed that broadcast networks remain "overwhelmingly dominant distributors" of news and information. Intervenors Br. 18. But whether television broadcasters retain a

[1] The pliability of the competition/diversity/localism triumvirate makes it susceptible to manipulation to reach a desired result. In that respect, it bears some resemblance to the Commission's tripartite "patently offensive" test in the indecency context. *See Fox Television Stations, Inc. v. FCC*, No. 06-1760, 2010 U.S. App. LEXIS 14293, at *37 (2d Cir. July 13, 2010) (criticizing the Commission for applying "one or more of the factors" without analysis to reach arbitrary results).

leading role says nothing about whether an *absolute prohibition* on triopolies is necessary in the public interest, particularly in a marketplace in which broadcasters are consistently losing market share to non-broadcast media. CBS Br. 35. The FCC ignores evidence that crafting rules that take into account this non-broadcast competition and that allow broadcasters to form triopolies will create stronger broadcasters, thereby fostering competition and promoting the public interest. Its decision thus was arbitrary and capricious for failing to "consider[] the relevant information brought to its attention." *Bethlehem Steel*, 651 F.2d at 867

The Commission also fails to rebut CBS's argument that the FCC's approach to competition here is flatly inconsistent with its approach taken elsewhere. CBS Br. 35. The FCC did not attempt to reconcile its focus on competition among only local broadcast television stations with its decision not to limit the relevant product market to satellite radio providers in the merger between Sirius and XM Satellite Radio. *Id.* at 35-36. Neither does the Commission consider *Comcast Corp. v. FCC*, 579 F.3d 1, 8, 10 (D.C. Cir. 2009) in which the D.C. Circuit vacated the horizontal cable ownership cap based on its rejection of the Commission's similarly myopic view of the video programming market, CBS Br. 36. Having failed to address these inconsistencies, the Commission cannot satisfy the APA, let alone the heightened standard of Section 202(h).

Similarly, the FCC does not attempt to rebut CBS's argument that the Commission's outright prohibition on triopolies irrationally fails to distinguish between small and large markets. CBS Br. 32-33. The Commission does not dispute that the size and diversity of the market are relevant characteristics that require differential treatment of television station combinations. *Id.* at 32-33; *see also* Intervenors Br. 10 (advocating a "market size-oriented approach" for media ownership rules based on the "competitive structure of media markets"). By limiting ownership to no more than two stations, whether a market has as few as eight "voices" or is one of the largest, most diverse markets in the country, CBS Br. at 32, the Commission has refused to "justify its failure to take account of circumstances that appear to warrant different treatment for different parties." *Petroleum Comm'cns*, 22 F.3d at 1172 (citations omitted).

In sum, the FCC fails to rebut CBS's argument that, in reversing course from its prior determination that the public interest required that triopolies be allowed in large markets, the Commission inappropriately "glosses over" the record before it and the extensive analysis that supported its prior decision to loosen the restriction. *PG&E Gas Transmission, NW Corp.* v. FERC, 315 F.3d 383, 390 (D.C. Cir. 1994) (quoting *Greater Boston Television Corp. v FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)). The Commission also entirely ignores this Court's specific statements in *Prometheus* that the Commission erred in failing to recognize that triopolies could have less of an impact on competition than duopolies. Accordingly, the Commission has failed to show that its blanket prohibition of triopolies satisfies Section 202(h) or Section 706 of the APA.

B. The Prohibition of Mergers Between Top Four-Ranked Television Stations in a Market Cannot be Justified on the Record that Was Before the Commission.

The Commission claims that its retention of the top-four restriction "finds support in this Court's decision in *Prometheus*, which determined that the restriction was a reasonable line-drawing decision that was supported by evidence in the record." FCC Br. 82 (citation omitted). As CBS explained in its opening brief, however, even if there was some basis for the Commission to have retained its top-four restriction in 2003, *Prometheus*, 373 F.3d at 418, the record before the Commission when the *2008 Order* was issued could not justify its retention. *See* CBS Br. 39-46. The Commission's response brief merely recycles the conclusory statements made in the *2008 Order*, FCC Br. 82-83, and fails to come to terms with the record that was actually before the FCC, a record that reflects dramatic changes in the data that the Commission deemed relevant in the *2003 Order*, CBS Br. 40-45. The Commission also fails to address CBS's argument that the retention of the top-four requirement, like the prohibition of triopolies, is inconsistent with the approach taken in other recent decisions in determining the relevant market. *See supra* 25.

The Commission attempts to minimize the force of the record with which it was presented, stating that "[t]he fact that there may be particular circumstances" where "the market share of two merged stations will not overtake that of the largest station in the market" "does not substantially undermine the Commission's conclusion that, as a general matter, the rule is necessary to minimize the likelihood that such harms will occur." FCC Br. 82. The Commission does not, however, cite any record evidence supporting its assertion that the top four restriction is necessary as a general matter. Rather, the Commission relies entirely on its conclusions from the *2003 Order*. Section 202(h), however, "requires the Commission to take a *fresh* look at its regulations periodically in order to ensure that they *remain* 'necessary in the public interest.'" *Prometheus*, 373 F.3d at 391 (emphasis added). Reliance on prior conclusions based on an out-of-date record cannot possibly satisfy the requirement that a "fresh look" be taken to account for "competitive changes in the marketplace" and to ensure that rules today "remain 'necessary in the public interest.'" *Id.*

In addition, the Commission fails to address the overwhelming evidence cited by CBS showing that, whatever the facts may have been previously, there is no basis in the present record for the FCC's "cushion" rationale. CBS Br. 40-41. The Commission does not address, let alone rebut, its failure to account for record evidence showing that the "cushion" between the fourth- and fifth-ranked stations in the Top 100 television markets was *smaller* than the cushion between both the second-and third-ranked stations and the third- and fourth-ranked stations. CBS Br. 41. By failing to respond to these arguments, the Commission should be deemed to waive any objection, *see, e.g.*, *Beazer East, Inc.*, 412 F.3d at 437 n.11, and, in any event, makes clear that it has no credible rejoinder, *see Fox*, 280 F.3d at

1050. Having determined that data showing the size of the "cushion" between stations is the "relevant information," it was arbitrary and capricious for the Commission to ignore this record evidence and simply rely on conclusions from the *2003 Order*. *See Bethlehem Steel*, 651 F.2d at 867.

Further straying from the record evidence in the present proceeding, the Commission asserts that "in general" mergers between two top-four stations would harm competition because the top four networks enjoy "a large and growing advantage" over other broadcasters with regard to advertising volume and prices. FCC Br. 82. But the *2008 Order* did not cite *anything* in the record before it to support that proposition. *2008 Order* ¶ 102. Further, the Commission does not even attempt to rebut CBS's argument that the agency ignored record evidence showing significant changes in the media landscape since the Commission's 2002 Biennial Review, including increased competition from non-broadcast video programming, CBS Br. 43-44, as well as a decline in broadcasters' advertising revenue coupled with a corresponding increase for non-broadcast media, *id.* at 44-45. Thus, the Commission's decision "runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *accord Natural Res. Def. Council, Inc. v. EPA*, 790 F.2d 289, 305 (3d Cir. 1986). Further, the FCC's failure to contest the showing by CBS that it ignored this significant record evidence amounts to a concession that it did not "examine[] the relevant data," *Prometheus*, 373 F.3d at 390, and, therefore, could not have performed the "reasoned analysis" required to satisfy Section 202(h).

C. The FCC Reasonably Concluded There Was No Basis in the Record for Further Tightening the Local Television Ownership Rule.

As shown above, the Commission reinstated a previously rejected local television ownership rule with arbitrary numerical limits that cannot be justified in light of the increased diversity and competition in the relevant market. Certainly, nothing in the record before the agency—including statements related to the advent of multicasting—could support the imposition of *greater* restrictions on local television ownership. In this respect, CBS agrees with the FCC's explanation in response to the opening brief of Citizen Petitioners that "[i]t was reasonable for the Commission to move cautiously and not rely on an incomplete transition to new technology as a basis for making the local television ownership rule more restrictive." FCC Br. 83.

Indeed, given the vast increase in competition and diversity, it was more than reasonable for the Commission to decline to tighten the rules on the basis of commenters' speculative claims about the potential impact of multicasting. *See, e.g.*, *City of New York v. FCC*, 814 F.2d 720, 724 n.3 (D.C. Cir. 1987) ("Purely speculative comments, for example, require no agency response."). In any event, multicasting provides no substantive basis for tightening the local ownership rule. Because neither Congress nor the FCC have granted broadcasters must-carry rights for multicast channels, there is no assurance that programming aired on multicast streams will reach the substantial portion of their viewing audience that receives programming via subscription video services. *See* Reply Comments of Belo Corp., MB Docket 06-121, at 18 (Jan. 16, 2007) (JA____); *see also* Comments of NBC Universal, Inc. and NBC Telemundo License Co., MB Docket 06-121, at 26 (Oct. 23, 2006) (JA____). Further, in order to multicast, broadcasters must sacrifice at least some of their ability to broadcast in high-definition, thus putting them at a competitive disadvantage vis-à-vis broadcasters who elect not to multicast as well as their subscription service rivals producing HD programming. *See* Reply Comments of Belo Corp., MB Docket 06-121, at 18 (Jan. 16, 2007) (JA____); Reply Comments of CBS Corporation, MB Docket 06-121, 10 (Jan. 16, 2007) (JA____). Thus, contrary to Citizen Petitioners' claims, multicasting provides no basis for tightening the local television ownership rule.

* * *

In sum, just as it ignored the record before it in the proceeding below, the Commission's response brief has ignored the vast majority of CBS's arguments demonstrating that the numerical limits set in the local television ownership rule are no longer "necessary" in the public interest due to competition and are arbitrary and capricious in violation of the APA. Thus, the local television ownership rule must be struck down based on the Commission's failure to explain why triopolies should not be allowed in the largest markets and because the top-four restriction finds no support in the record before the Commission.

III. THE FCC FAILED TO JUSTIFY RETENTION OF THE DUAL NETWORK RULE.

The Commission continues to rely on a mere tautology rather than explain why the dual network rule remains necessary in the public interest. In the *2008 Order*, the Commission stated that it retained the rule "for the same reasons" given in the *2003 Order* and that, in the *2003 Order*, based on the record before it at the time, the Commission identified what it believed were "several distinctive features of the top four broadcast networks that justified retention of the dual network rule." FCC Br. 93. Its reliance on the *2003 Order*, however, demonstrates that the Commission did not take the required "fresh look at its regulations" to ensure that they have accounted for "competitive changes in the marketplace" and "remain 'necessary in the public interest.'" *Prometheus*, 373 F.3d at 391.

First, the FCC has not denied—nor could it deny—that the record before the Commission revealed a dynamic media market. As CBS pointed out, new technologies have led to greater consumer choice and created audience fragmentation, which in turn creates challenges for the business models of traditional media companies that now must struggle to "maintain their competitive positions." CBS Br. 57-59. The FCC claims that it did not need to confront the significant market changes cited by CBS in considering whether to retain the dual network rule. FCC Br. 94-95. Instead, the Commission argues that these dramatic changes, including "the greater variety of cable and broadcast networks available to viewers" and the "dynamic" nature of the media marketplace, are entirely irrelevant to its retention of the dual network rule because the "clout" of the top-four broadcast networks in the advertising market "remains unrivaled" and "their affiliates are still the primary source of local news programming." *Id.* at 94.

To argue that market changes need not be considered until traditional media are overtaken by their rivals entirely misses the point. As this Court explained, "[i]n a periodic review under § 202(h), the Commission is required to determine whether its then extant rules remain useful in the public interest; if no longer useful, they must be repealed or modified." *Prometheus*, 373 F.3d at 395. Any determination of whether a rule "*remain*[*s*] useful in the public interest" requires that attention be paid to changes in the marketplace since the rule was instituted. Indeed, even apart from Section 202(h), the APA imposes on the Commission a "duty to evaluate its policies over time to ascertain whether they work—that is, whether they actually produce the benefits the Commission originally predicted they would." *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993). The Commission cannot be allowed to "ignore the true relevance of competition," *Time Warner Entm't*, 240 F.3d at 1134, or refuse to consider the growing competitive impact of non-broadcasters on broadcast media, *see, e.g.*, *Comcast*, 579 F.3d at 7-8 (holding that it was arbitrary and capricious for the FCC not to consider the competitive impact of other video programming distributors). Given the acknowledged changes in the dynamic media marketplace, the FCC has failed to show there is a problem that continues to require a regulatory solution, and has failed to justify its conclusion that the dual network rule *remains* necessary to protect competition and localism. *2008 Order* ¶ 139 (JA____).

Second, aside from the fact that the Commission only considered the record before it at the time of the *2003 Order*, the supposedly distinctive features of the top-four broadcast networks identified by the Commission boil down to the mere fact that they are the top-four broadcast networks. Nowhere does the Commission provide a logical explanation of any purportedly unique characteristics of these networks that justify a regulatory disadvantage, much less one sufficient to establish that this differential regulatory treatment is necessary in the public interest. The Commission asserts that the networks comprise a "strategic group," meaning they are "a cluster of independent firms within an industry that pursue similar business strategies," including competing for advertisers that seek to reach large audiences. FCC Br. 93. The Commission never explains, however, why it makes sense to single out the top four networks for differential regulatory treatment, as opposed to focusing on some other subgroup of programmers, for example, the top three or the top six. *See, e.g.*, *Prometheus*, 373 F.3d at 420 ("The deference with which we review the Commission's line-drawing decisions extends only so far as the line-drawing is consistent with the evidence or is not 'patently unreasonable.'") (citing *Sinclair*, 284 F.3d at 162).

Third, the Commission focuses on the fact that the top four networks have the greatest audience share, FCC Br. 93, again without addressing the real issue: whether there is any basis for singling out ABC, CBS, NBC, and Fox for differential treatment, CBS Br. 47-48. Under the dual network rule, the third and fourth ranked broadcast networks cannot combine, CBS Br. 47-48, even though there is no rule in place to prevent the nation's largest cable provider or any cable programming network (regardless of the size of its audience) from purchasing the nation's largest broadcast network. The Commission does not even attempt to explain this discrepancy in treatment, and thus has failed to justify why it is treating similarly situated parties differently. *Petroleum Commc'ns, Inc.*, 22 F.3d at 1172 (citations omitted).

Fourth, the Commission claims that the dual network rule is justified to protect localism because otherwise the top four networks would have "increased economic leverage over their affiliates." FCC Br. 94 (citing *2008 Order* ¶ 611). As with its other proffered defenses of the rule, the FCC's broad assertion does not explain why the dual network rule should apply to the top four networks rather than some other number. Further, notwithstanding the FCC's unsupported claim, nowhere does its brief address why the dual network rule is necessary to protect localism given its reimposition of the stringent local television ownership rule originally enacted in 1999.

In short, there is no basis for concluding that the dual network rule remains necessary in the public interest under Section 202(h) or that it consists of anything other than an arbitrary and capricious handicapping of the top four networks.

IV. THE BROADCAST MEDIA OWNERSHIP RULES VIOLATE THE FIRST AMENDMENT.

A. The Commission Failed to Rebut the Fact that the Scarcity Rationale Has Been Undermined by Market and Technological Developments.

Although the FCC defends the ongoing validity of the scarcity doctrine, nowhere in its brief does it even mention *FCC v. League of Women Voters*, 468 U.S. 364 (1984). There, the Supreme Court explicitly noted that the doctrine would no longer apply when "technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *Id.* at 376 n. 11.

The Commission refuses to engage substantively the argument squarely presented by CBS and others that the scarcity doctrine is no longer factually or theoretically viable. The media marketplace has been radically transformed to offer a multitude of media choices, including what the FCC has recognized is a mature online medium for content delivery. CBS Br. 54. The Commission, however, simply recites that "[t]he abundance of non-broadcast media does not render the broadcast spectrum any less scarce," without even considering the vast changes in the marketplace that the Commission itself recognized in the *2008*

Order had occurred since the *2003 Order* was issued. FCC Br. 96 (quoting *Prometheus*, 373 F. 3d at 402).

Intervenors make several unavailing arguments related to the First Amendment challenges that have been raised in this appeal. *First*, Intervenors argue that an adequate record was not assembled to address the constitutional issues raised and as a result they are not ripe for review. Intervenors Br. 20. However, "[i]t is a general rule that an intervenor may argue only the issues raised by the principal parties and may not enlarge those issues." *Southwestern Penn. Growth Alliance v. Browner*, 121 F.3d 106, 121 (3d Cir. 1997). Because the FCC did not advance this argument but rather addressed the merits of the First Amendment challenges, this Court cannot decline to reach the First Amendment issues on these grounds.

In any event, there is no basis for Intervenors' assertion that "the FCC has not . . . had the opportunity to solicit or examine policy and jurisprudential alternatives to the *Red Lion* doctrine." Intervenors Br. 3. It has been over 25 years since the Supreme Court first called for a signal from the agency on this issue in *League of Women Voters*. The issue has been discussed in numerous FCC proceedings, including the media ownership reviews, but still no action has been taken. Moreover, regardless of the record compiled by the Commission, it is the courts, not agencies, that are the arbiters of the Constitution. *See, e.g.*, *J.J. Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041, 1044 (D.C. Cir. 2009) ("a reviewing court owes no deference to the agency's pronouncement on a constitutional question") (citation omitted); *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1367 (11th Cir. 2002) ("We review constitutional challenges to agency orders *de novo*.").

Second, Intervenors argue that the First Amendment challenges are barred because they have been addressed as law of the case. Intervenors Br. 20. This Court explained in *Prometheus* that even though the Commission's Order was required to be consistent with the remand directives in *Fox* and *Sinclair*, "the decisions themselves do not fit within the law of the case doctrine, under which a prior decision binds only future proceedings in the 'same litigation.'" 373 F.3d. n.11 (citing *Hamilton v. Leavy*, 322 F.3d 776, 786-87 (3d Cir. 2003)). This appeal is not the "same litigation" as *Prometheus*. It is predicated on new petitions for review of the separate, statutorily-mandated review of the broadcast ownership rules that concluded in the *2008 Order* on review. *Id.* And, as in *Prometheus*, here "a different set of parties participated, a different record was compiled, and different results were reached." *Id.* The record at issue includes more than 166,000 sets of comments filed between 2006 and 2007. Further, the rules at issue in the *2008 Order* bear no resemblance whatsoever to the cross-media limits struck down in *Prometheus*, and the underlying rationale in the *2003 Order* has been completely abandoned. Therefore, "the law of the case doctrine does not constrain [this Court's] review here." *Id.*[2]

B. The Commission Failed to Explain Why Its Speech Restrictions Imposed on Broadcasters Should Survive First Amendment Scrutiny.

The Commission attempts to argue that its rules other than the newspaper/broadcast cross-ownership rule are not content-based because "they apply irrespective of the content of any programming." FCC Br. 97 n.30. But content-based restrictions subject to heightened scrutiny are not limited to those regulations that apply only to particular content. The Commission has failed to even address the critical point that its rules are animated by its stated desire to manipulate content. CBS Br. 55. There is no question that the media ownership rules, all of which seek to encourage particular types of programming and to ensure diversity in programming, act to "suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). Content to rely on its argument that heightened scrutiny under the First Amendment does not apply, the FCC effectively has

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[2] Intervenors claim that spectrum scarcity is not the only basis for the regulation of speech. They state that the "licenses awarded by the FCC are valuable rights that bestow a message 'reach' far in excess of what other media outlets and technologies can support" and that these "advantages" are multiplied in light of the ability to multicast. Intervenors Br. 20. Here again, however, these arguments cannot be considered by this Court because the FCC does not advance them. *Southwestern Penn. Growth Alliance*, 121 F.3d at 121.

conceded that its media ownership rules cannot withstand such scrutiny. *See, e.g.*, *Beazer East, Inc.*, 412 F.3d at 437 n.11.

V. CONCLUSION

For these reasons, the radio/television cross ownership-rule, the local television ownership rule, the dual network rule, the newspaper/broadcast cross-ownership rule, and the local radio ownership rule should be vacated,[3] or at a minimum reversed and remanded for further consideration by the Commission.

Respectfully submitted,

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[3] Vacatur of these rules is appropriate for the reasons explained in CBS's Opening Brief. CBS Br. 59-60 n.7. Further, the mere fact that "restrictions on media ownership have been in effect for decades," as the Commission pointed out, provides no logical basis for leaving Constitutionally flawed rules in place. FCC Br. 103 n.33. Relief from unlawful agency action should not be further deferred.

CERTIFICATION PURSUANT TO L.A.R. 46.1

I, James R. Bayes, hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

/s/ James R. Bayes
James R. Bayes

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND L.A.R. 31.1(c)

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and L.A.R. 31.1(c), counsel for CBS Corporation and CBS Broadcasting Inc. certifies that this brief complies with the applicable type-volume limitations of Fed. R. App. P. 32(a)(7)(B). The attached brief for Petitioners 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 it is printed using a proportionally spaced, 14-point Times New Roman typeface and contains 9,611 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This certificate was prepared in reliance on the word count of the word-processing system (Microsoft Word) used to prepare this brief.

The undersigned further certifies that the text of the electronic version of the brief filed is identical to the text in the paper copies filed and the PDF version of this brief submitted via the Third Circuit's electronic filing system has been scanned for viruses using Symantec Endpoint Protection, Version 11, and that no virus has been detected.

/s/ James R. Bayes
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CERTIFICATE OF SERVICE

I, James R. Bayes, hereby certify that on August 16, 2010, I electronically filed the foregoing Reply Brief of Petitioners CBS Corporation and CBS Broadcasting Inc. 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 the required number of hard copies of the foregoing document were sent to the Office of the Clerk of the Court by overnight UPS on the same day as the brief was transmitted.

/s/ James R. Bayes
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