

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| 2006 Quadrennial Regulatory Review – |) | MB Docket No. 06-121 |
| Review of the Commission’s Broadcast |) | |
| Ownership Rules and Other Rules Adopted |) | |
| Pursuant to Section 202 of the |) | |
| Telecommunications Act of 1996 |) | |
| |) | |
| 2002 Biennial Regulatory Review – Review of |) | MB Docket No. 02-277 |
| the Commission’s Broadcast Ownership Rules |) | |
| and Other Rules Adopted Pursuant to Section |) | |
| 202 of the Telecommunications Act of 1996 |) | |
| |) | |
| Cross-Ownership of Broadcast Stations and |) | MM Docket No. 01-235 |
| Newspapers |) | |
| |) | |
| Rules and Policies Concerning Multiple |) | MM Docket No. 01-317 |
| Ownership of Radio Broadcast Stations in |) | |
| Local Markets |) | |
| |) | |
| Definition of Radio Markets |) | MM Docket No. 00-244 |
| |) | |
| Ways to Further Section 257 Mandate to Build |) | MB Docket No. 04-228 |
| on Earlier Studies |) | |
| |) | |
| Public Interest Obligations of TV Broadcast |) | MM Docket No. 99-360 |
| Licenses |) | |

OPPOSITION TO PETITION FOR RECONSIDERATION

May 6, 2008

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OPPOSITION TO PETITION FOR RECONSIDERATION

I. INTRODUCTION AND SUMMARY

Pursuant to Section 1.429(f) of the Commission’s rules,¹ Clear Channel Communications, Inc. (“Clear Channel”) hereby opposes the Petition for Reconsideration (the “Petition”) filed in the above-captioned proceedings by Common Cause, Benton Foundation, Consumers Action, Massachusetts Consumers’ Coalition, NYC Wireless, James J. Elekes, and National Hispanic

¹ 47 C.F.R. § 1.429(f).

Media Coalition (collectively, “Petitioners”).² The Petition asks the Commission to modify its *2008 Order*,³ which concluded the 2006 Quadrennial Review of its media ownership rules pursuant to Section 202(h) of the Telecommunications Act of 1996 (the “1996 Act”),⁴ to, among other things, tighten the local radio ownership rule and set the local caps contained therein at levels lower than those authorized by Congress in the 1996 Act.

As shown below, based on the record in this proceeding, the Commission was not required to tighten the rule under even the lenient interpretation of its Section 202(h) duties that the Third Circuit approved in *Prometheus Radio Project v. FCC*.⁵ In addition, and notwithstanding Petitioners’ repeated attempts to distort the Third Circuit’s decision, the FCC in the *2008 Order* adequately responded to the court’s specific concerns relating to the local radio ownership rule. The Commission’s responses were more than sufficient to justify a refusal to tighten the existing limits – which Congress specifically chose twelve years ago in the 1996 Act – in light of competition, diversity, localism, and other factors. In fact, in the twelve years since Congress directed the FCC to relax its pre-existing local radio ownership rule to reflect the current caps, the media marketplace has grown tremendously; the number of local radio stations has increased, and radio broadcasters today face competition from multiple alternative sources of audio programming that either did not exist or were in their infancy in 1996. Furthermore, under

² The Petition was filed on March 24, 2008, and notice of its filing was published in the Federal Register on April 21, 2008. *See* 73 Fed. Reg. 21347 (Apr. 21, 2008). This Opposition is timely filed pursuant to Section 1.429(f) of the Commission’s Rules. *See* 47 C.F.R. § 1.429(f).

³ *2006 Quadrennial Regulatory Review*, Report and Order and Order on Reconsideration, FCC 07-216, MB Docket Nos. 06-121, *et al.* (rel. Feb. 4, 2008) (“*2008 Order*”).

⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996).

⁵ 373 F.3d 372, 390-95 (3d Cir. 2004).

any formulation of the rule, the Commission could not possibly justify requiring owners of existing grandfathered combinations to divest stations that exceed the limits.

The record in this proceeding, if anything, required at the very least relaxation of the local radio ownership rule, rather than tightening. To that end, Clear Channel has filed a petition for review of the *2008 Order* in the United States Court of Appeals for the District of Columbia Circuit.⁶ Clear Channel notes that it is not by this filing requesting any agency reconsideration of the radio ownership rule, that it is exclusively seeking judicial review of the *2008 Order*, and that it files this Opposition for the limited purpose of responding to Petitioners' request for further regulatory restriction on reconsideration. Petitioners' request to tighten the local radio ownership rule should be rejected for the reasons below.

II. THE FCC DOES NOT HAVE CARTE BLANCHE TO INCREASE REGULATORY BURDENS IN THE QUADRENNIAL REVIEW.

Petitioners' suggestion that the Commission has unfettered discretion to increase regulatory burdens under Section 202(h) is premised on a fundamental misunderstanding of its statutory periodic review obligations. To the contrary, the FCC bears a heavy burden under Section 202(h) – a clearly deregulatory Congressional mandate – to justify *retention* of the ownership rules as “necessary in the public interest.”⁷ Recognizing Congress' deregulatory intent in enacting Section 202(h), even the Third Circuit in *Prometheus*, which adopted a construction of the statute that Clear Channel believes is far too lax,⁸ acknowledged that the

⁶ *Clear Channel Communications, Inc. v. FCC*, No. 08-1098 (D.C. Cir. filed Mar. 5, 2008) (consolidated with *Newspaper Ass'n of America, et al. v. FCC*, Nos. 08-1092, *et al.*).

⁷ 1996 Act, § 202(h); *see* Reply Comments of Clear Channel Communications, Inc., MB Docket Nos. 06-121, *et al.*, at 10-13 & n.32 (filed Jan. 16, 2007) (“Clear Channel Reply Comments”); Comments of Clear Channel Communications, Inc., MB Docket Nos. 06-121, *et al.*, at 2-6 (filed Oct. 23, 2006) (“Clear Channel Comments”).

⁸ *E.g.*, Clear Channel Comments, at 5-7.

statute imposes on the Commission “an obligation it would not otherwise have” to periodically justify its ownership regulations.⁹ As the Third Circuit confirmed, Section 202(h) properly provides for the fact that “competitive changes in the media marketplace could *obviate* the public necessity for some of the Commission’s ownership rules.”¹⁰ Indeed, even Petitioners recognize that Congress intended to require the FCC to periodically demonstrate that the media ownership rules “keep pace with the competitive changes in the marketplace.”¹¹

In spite of all of this, Petitioners attempt to turn Section 202(h) on its head. They attack the FCC’s failure to tighten the local radio ownership rule and argue that the refusal to do so amounts to a conclusion that Congress intended the limits that it set in the 1996 Act to be “static,” and that, despite *increases* in competition and the lack of any evidence of harm to diversity or localism flowing from common ownership, the limits now must be *lowered*.¹² This is false. Instead, the Commission in the *2008 Order* properly found that it owed a high degree of deference to Congress’ judgment and could not, in light of that deference and its duties under Section 202(h), adjust the caps downward absent a compelling justification for doing so.¹³ That

⁹ *Prometheus*, 373 F.3d at 395. The court agreed with the FCC that “[t]he text and legislative history of the 1996 Act indicate that Congress intended periodic reviews to operate as an ‘ongoing mechanism to ensure that the Commission’s regulatory framework would keep pace with the competitive changes in the marketplace’ resulting from that Act’s relaxation of the Commission’s regulations, including the broadcast media ownership regulations.” *Id.* at 391 (quoting *2002 Biennial Regulatory Review*, Report, 18 FCC Rcd 4726, 4732-33 (¶¶ 16, 17) (2003), *cert. denied*, 545 U.S. 1123 (2005)); see *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13624-25 (¶¶ 10-12) (2003) (“*2003 Order*”).

¹⁰ *Prometheus*, 373 F.3d at 391 (emphasis added).

¹¹ Pet. 20 (internal citations omitted).

¹² *Id.* at 21.

¹³ *2008 Order* ¶ 122. Petitioners’ contention that Congress’ failure to exempt the local radio ownership rule from Section 202(h)’s periodic review requirement – as it did with respect to the revised 39% national television ownership cap – somehow suggests that deference to Congress’ judgment and that the refusal to re-regulate were unjustified misses the mark entirely. See Pet.

conclusion was required, as the limits that Congress set are, at the very least, the proper *starting point* for analysis, and as competition increases, as it has, they clearly must be relaxed, not tightened. While the *Prometheus* court found that Section 202(h) is not a “one-way ratchet” in the direction of deregulation – an interpretation with which Clear Channel disagrees¹⁴ – it made clear that the FCC could only strengthen rules if the agency “*reasonably* determines that the public interest calls for a more stringent regulation.”¹⁵ The only plausible construction of this mandate is that as competition grows, the ownership limits should be increased from what Congress chose in 1996, and not the other way around.

Plainly, as explained below, a decision to tighten the local radio ownership rule would not have been “reasonable” in light of the increases in competition that have occurred since 1996 and the absence of any harm flowing from common ownership which, if anything, required at least its relaxation. Accordingly, the action that Petitioners claim that the FCC should have taken would have been barred even under the Third Circuit’s flawed interpretation of Section 202(h). At bottom, Petitioners’ argument that the FCC was required to tighten the local radio ownership rule conflicts with the Congressional intent behind Section 202(h), as well as the decisions of two federal courts of appeal that recognize that overriding intent.¹⁶ The result that

21 n.87. This makes no sense; Congress exempted the 39% cap because it did not want the FCC to raise that cap, recognizing that Section 202(h) provides a mechanism for relaxing the ownership rules. It is, instead, Congress’ decision not to exempt the local radio ownership rule from Section 202(h) that is significant, for it makes clear that the FCC is under a continuing obligation to reassess the rule’s appropriateness in light of competitive developments and to loosen it as competition increases.

¹⁴ See, e.g., Clear Channel Reply Comments, at 11-13; Clear Channel Comments, at 6.

¹⁵ *Prometheus*, 373 F.3d at 394-95 (emphasis added).

¹⁶ See Clear Channel Reply Comments, at 10-13; Clear Channel Comments, at 2-6; *Prometheus*, 373 F.3d at 391, 394-95; *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1033, *op’n modified in part on reh’g*, 293 F.3d 537 (D.C. Cir. 2002) (explaining that Congress intended Section 202(h) to “continue the process of deregulation” that the 1996 Act commenced); see also

they seek would also run afoul of fundamental administrative law principles that require agencies to avoid regulating absent demonstration of a genuine problem, and to update their rules to reflect changing circumstances.¹⁷

III. THE FCC COULD NOT POSSIBLY JUSTIFY A DECISION TO TIGHTEN THE LOCAL RADIO OWNERSHIP RULE.

A. Tightening the Rule Was Not Appropriate in Light of Competition.

Petitioners' assertion that the Commission could have justified tightening the local radio ownership rule based on levels of competition in local radio markets belies the record. As an initial matter, Petitioners' statement that the *Prometheus* court "found that existing limits resulted in excessive concentration"¹⁸ misconstrues the Third Circuit's decision. In passing on the specific numerical limits that the FCC had retained, the Third Circuit in actuality simply noted that both deregulatory and anti-deregulatory parties challenged the limits, concluded that the FCC had failed to support the "five equal-sized competitor" rationale that it advanced for the limits, and remanded the rule.¹⁹ Properly construed, insofar as it discussed "concentration" levels in considering the reasonableness of the specific numerical limits at all, the court simply rejected the "five equal-sized competitor" rationale that the Commission had relied on, finding it to lack support in the record.²⁰ In the *2008 Order*, the FCC did not seek to bolster that rationale but, instead, explicitly "*depart[ed] from*" the previously articulated rationale.²¹ In that sense,

Cellco P'ship v. FCC, 357 F.3d 88, 98 (D.C. Cir. 2004) (holding that the 1996 Act's periodic review provisions require the FCC to reevaluate rules in light of competitive market conditions).

¹⁷ See Clear Channel Reply Comments, at 12; Clear Channel Comments, at 4.

¹⁸ Pet. 15.

¹⁹ *Prometheus*, 373 F.3d at 391, 432-34.

²⁰ *Id.*

²¹ *2008 Order* ¶ 117 (emphasis added).

and contrary to Petitioners' misguided contentions, the Commission's analysis fully answers the Third Circuit's specific concern.

Furthermore, Petitioners' argument overlooks the reality that, as Clear Channel has explained before, the transactions that resulted in current "concentration" levels were entirely consistent with – and, indeed, expressly contemplated by – the deregulatory changes to the local radio ownership rule mandated by Congress in the 1996 Act.²² Congress directed those changes based on its recognition that the radio industry was in trouble and needed help to recover, and its view that the synergies and efficiencies associated with increased opportunities for common ownership would allow radio broadcasters to remain viable competitors in the expanding multi-media marketplace while delivering benefits to the public.²³ Petitioners' argument boils down to a circular assertion that, because radio station owners took advantage of statutorily mandated deregulatory changes, re-regulation is required. This simply makes no sense, and would render Congress' deliberate judgment that deregulation was appropriate a near-automatic nullity.

Petitioners' contention that the FCC's finding – with which Clear Channel disagrees – that retaining the *existing* local radio ownership rule is necessary to protect against what the Commission terms "excessive concentration" – mandated *tightening* the existing rule²⁴ is similarly incorrect. In concluding that competitive concerns did not warrant tightening the rule, the FCC provided a host of reasons, all of which Petitioners conveniently overlook. The Commission reasoned that lower limits would: (1) fail to "recognize that a certain level of consolidation can be efficient;" (2) "undermine the benefits that consolidation has brought to the

²² See, e.g., Clear Channel Reply Comments, at 7-8.

²³ See, e.g., *id.* at 8 & n.23. Further, as the record clearly reflects, radio remains far *less* concentrated than a large variety of other industry sectors. See *id.* at 3-4; Clear Channel Comments, at 8.

²⁴ Pet. 15-16 (quoting 2008 Order ¶ 118).

financial stability of the radio industry; (3) “undermine efficiency gains . . . that could bolster [] stations’ financial standing and increase their ability to provide their local communities with quality programming;” and (4) “disrupt the marketplace.”²⁵ Accordingly, contrary to Petitioners’ assertions, it is clear that the FCC *did* “consider whether lowering the local radio limits would better serve the public interest by creating competitive local radio markets,”²⁶ and rightly concluded that it would *not* do so. This conclusion was more than justified based on the record.²⁷

Moreover, despite “concentration” levels that exist in local radio markets, evidence in the record shows that concentration has no impact on advertising prices, which is what the FCC has primarily focused on in analyzing “competition.”²⁸ At worst, the FCC has found that “concentration” causes modest increases in advertising rates.²⁹ However, as the FCC itself acknowledged, another study in the record showed “no differential effects.”³⁰ Clear Channel also submitted its own study by professor Jerry Hausman that demonstrated the absence of any

²⁵ 2008 Order ¶¶ 119-120, 122.

²⁶ Pet. 16.

²⁷ Petitioners note that, in discussing the record evidence on which the agency based its conclusions regarding concentration levels, the FCC cited a study which itself argued that the limits should be lowered. *See id.* The citation of this study for its factual conclusions, however, can hardly be viewed as an implicit endorsement of the study’s legal conclusion regarding the need for lower limits, particularly when the Commission elsewhere in the 2008 Order fully justified its decision *not* to tighten the local radio ownership rules based on competitive concerns.

²⁸ 2008 Order ¶ 118 (discussing impact of common ownership on radio advertising market share and prices).

²⁹ *Id.* (stating that the record shows “appreciable, albeit small, increases in advertising rates” as a result of common ownership).

³⁰ *Id.* ¶ 118 n.381 (citing Tasneem Chipty, *Station Ownership and Programming in Radio* (June 24, 2007), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A6.pdf (released in MB Docket Nos. 06-121, *et al.* as Study 5)).

impact of concentration on advertising rates at all, a conclusion that was bolstered by other material in the record.³¹ In the face of all of this evidence, and contrary to Petitioners' assertion, it would have been, at a minimum, arbitrary and capricious for the FCC to have *tightened* the local radio ownership rule based on purported "competition" concerns.

B. Tightening the Rule Was Not Appropriate in Light of Diversity.

Similarly, Petitioners' assertion that the Commission could have tightened the local radio ownership rule based on diversity concerns misses the mark. Petitioners point out that the Commission declined to rely on format diversity to justify the local radio ownership rule, but in fact analyzed format diversity in the *2008 Order*.³² Contrary to Petitioners' contention, the FCC did not "base[] its entire diversity analysis" on format diversity concerns,³³ but, rather, canvassed the record evidence regarding format diversity in the course of its analysis and found that no harm to format diversity flows from the existing limits.³⁴ At best, then, Petitioners' argument amounts to an assertion that the FCC provided an analysis that was not essential to its ultimate decision, which plainly is not a basis for reconsideration. And, in any case, the record was replete with evidence of the *positive* effects that common ownership has on format diversity.³⁵

³¹ See, e.g., Clear Channel Reply Comments, at 35-38; Clear Channel Comments, at 43-46; Comments of the National Association of Broadcasters, MB Docket Nos. 06-121, *et al.*, at 73-78 (filed Oct. 23, 2006) ("NAB Comments"); Reply Comments of Clear Channel Communications, Inc. on FCC Media Ownership Research Studies, MB Docket Nos. 06-121, *et al.*, at 13-14 (filed Nov. 1, 2007) ("Clear Channel Reply Comments on Studies"); Comments of Clear Channel Communications, Inc. on FCC Media Ownership Research Studies, MB Docket Nos. 06-121, *et al.*, at 8-9 (filed Oct. 22, 2007) ("Clear Channel Comments on Studies").

³² Pet. 16.

³³ *Id.*

³⁴ See *2008 Order* ¶ 129.

³⁵ See, e.g., Clear Channel Reply Comments, at 14-15; Clear Channel Comments, at 17-32; Statement of Professor Jerry A. Hausman (Oct. 2006) (Ex. 2 to Clear Channel Comments); NAB Comments, at 79-84.

In the face of this evidence, a decision to tighten the radio ownership rule based on format diversity concerns would have been arbitrary and capricious.

Petitioners also recycle arguments that the FCC should have examined not format diversity, but instead the number of independent owners in justifying its local radio ownership rule.³⁶ Their contention, however, is based on their own conclusion – unadorned by any support at all – that a drop in the number of independent owners actually has a negative impact on diversity. Further, the agency addressed Petitioners’ arguments on this score, and supplied adequate reasons for rejecting them, in the *2008 Order*.³⁷ The Commission rightly noted, further, that a sufficient number of “media other than radio play an important role in the dissemination of local news and public affairs information,” and thus contribute to viewpoint diversity.³⁸ In any case, there was substantial record evidence that common owners of media properties are either more likely to differentiate their messages or, at least, do not speak with one voice.³⁹ Thus, it is clear that the FCC *did* consider whether viewpoint diversity concerns required lowering the current limits, and rightly concluded that they did not. In the face of the record evidence, any other conclusion would have been arbitrary and capricious.

³⁶ Pet. 17.

³⁷ See *2008 Order* ¶ 128 & n.409.

³⁸ *Id.* ¶ 127.

³⁹ See *id.* ¶ 49 & n.168 (citing Comments of Belo Corp., MB Docket Nos. 06-121, *et al.*, at 16 (filed Oct. 23, 2006); Comments of Freedom of Expression Foundation, Inc., MB Docket Nos. 06-121, *et al.*, at 13-14 (filed Oct. 23, 2006); Comments of Media General, MB Docket Nos. 06-121, *et al.*, at 34-35 (filed Oct. 23, 2006); Comments of Newspaper Association of America, MB Docket Nos. 06-121, *et al.*, at 79-85 (filed Oct. 23, 2006)); Clear Channel Reply Comments, at 24-26; Clear Channel Comments, at 19, 22-23; *see also* Clear Channel Reply Comments on Studies, at 7-9; Clear Channel Comments on Studies, at 7.

Petitioners' claim that the Commission was required to lower the radio ownership limits in order to promote diversity⁴⁰ is also misplaced. Again distorting *Prometheus* in an attempt to have it suit their needs, they rely for this assertion on a statement in the portion of the court's decision that approved of the FCC's *use of* numerical limits, based on concerns that without any such limits there would be high barriers to entry.⁴¹ But this says nothing of the particular levels that the FCC chose to maintain, which the Third Circuit in fact faulted on other grounds and which, as discussed above, the Commission expressly "depart[ed] from" in the *2008 Order*.⁴² Further, the FCC elsewhere in the *2008 Order* properly *rejected* arguments that radio markets have become "locked up" under the current limits today, finding instead that "the evidence shows that a number of transactions are still taking place."⁴³

Finally, Petitioners' complaint that the FCC failed to adequately address issues relating to ownership of radio stations by women and minorities⁴⁴ is unfounded. Here, again, they misconstrue *Prometheus*: The Third Circuit did not say that the FCC had to consider female and minority ownership as a separate factor in the course of evaluating changes to the local radio ownership rule; rather, it faulted the FCC for failing to address the specific proposals advanced by Minority Media and Telecommunications Council ("MMTC") in the course of the 2003 proceeding.⁴⁵ As Petitioners acknowledge,⁴⁶ and as the FCC pointed out in the *2008 Order*,⁴⁷ the

⁴⁰ Pet. 16-17.

⁴¹ *Prometheus*, 373 F.3d at 431-32 (affirming the use of a numerical limits approach based on the FCC's 2003 rationale, which mirrors the rationale now attacked by Petitioners).

⁴² *Id.* at 431-34; *see supra* p. 6.

⁴³ *2008 Order* ¶ 113 n.368.

⁴⁴ Pet. 17-18.

⁴⁵ *See Prometheus*, 373 F.3d at 435 n.82.

agency is now addressing methods to promote broadcast ownership by women and minorities, including all of the proposals that were advanced by MMTC previously, in a separate proceeding. Any arguments regarding the adequacy or inadequacy of the FCC's efforts can and should be presented in that docket, not here. Further, Clear Channel has already explained why the FCC cannot elevate the laudable goal of promoting minority and female ownership of broadcast stations over its statutory duty to ensure that its media ownership rules keep pace with competitive changes in the contemporary media marketplace.⁴⁸ Moreover, Petitioners' far-reaching claim that the Third Circuit "found that a failure to evaluate the impact on minority and female ownership would amount to arbitrary and capricious rulemaking,"⁴⁹ is based on the portion of *Prometheus* concerning the FCC's decision to repeal a specific part of the local television ownership rule – the Failed Station Solicitation Rule ("FSSR").⁵⁰ Because the Third Circuit found that the FSSR was created for the *express purpose* of "ensur[ing] that qualified minority broadcasters had a fair chance to learn that certain financially troubled . . . stations were for sale," the court concluded that the FCC should have addressed the impact of its decision on minority ownership before repealing the FSSR.⁵¹ When viewed in proper context, the cited portion of the court's decision plainly did not amount to a wholesale mandate that the FCC consider female and minority ownership as a separate factor in evaluating the media ownership

⁴⁶ Pet. 18 n.68.

⁴⁷ See *2008 Order* ¶ 2 n.7.

⁴⁸ See Written Ex Parte Presentation of Clear Channel Communications, Inc. on Second Further Notice of Proposed Rulemaking, MB Docket No. 06-121, *et al.*, at 2-5 (filed Nov. 19, 2007).

⁴⁹ Pet. 17-18.

⁵⁰ See *id.* (citing *Prometheus*, 373 F.3d at 421).

⁵¹ See *Prometheus*, 373 F.3d at 420-21. The Commission did so in the *2008 Order*, and decided to reinstitute the FSSR, rendering this discussion from *Prometheus* moot. *2008 Order* ¶ 105.

limits in general, let alone the local radio ownership rule in particular. Each of Petitioners' contentions that diversity concerns required tightening of that rule thus lack merit and should be rejected.

C. Tightening the Rule Was Not Appropriate in Light of Localism.

With respect to localism, Petitioners again recycle the same arguments that they presented before and that the record fully refutes, claiming that common ownership allows broadcasters to decrease the quality and quantity of local programming.⁵² Petitioners also assert that the FCC relied "solely" on Study 4.2 to support its determination that common ownership does not harm localism.⁵³ Both of these contentions are false. The FCC's conclusion that the common ownership permitted under its current local radio ownership rule does not harm localism was based on a thorough assessment of the record, including abundant record evidence that common ownership actually serves to *enhance* localism.⁵⁴ Indeed, while recognizing that parties presented arguments on both sides of the issue, the FCC characterized arguments "that consolidation has benefited localism by giving group owners more resources to provide local news and public interest programming and to undertake initiatives responsive to the local needs

⁵² Pet. 20.

⁵³ *Id.* at 19.

⁵⁴ *See, e.g., 2008 Order* ¶ 125 n.392 (citing Clear Channel Reply Comments, at 26-31; Reply Comments of the National Association of Broadcasters, MB Docket Nos. 06-121, *et al.*, at 53 (filed Jan. 16, 2007); Remarks of Sue Sensenig, Hall Communications, Media Ownership Hearing in Harrisburg, Pennsylvania (Feb. 23, 2007) Transcript at 102-104; Remarks of Bud Walters, President of Cromwell Radio, Media Ownership Hearing in Nashville, Tennessee (Dec. 11, 2006); Remarks of Art Rowbotham, President of Hall Communications, Tampa, Florida (Apr. 30, 2007) Transcript at 69-72)); *see also id.* ¶ 125 (favorably referencing NAB's argument "that the record establishes that station groups are rolling out more news and talk stations and are otherwise providing substantial service to their local listeners," and its conclusion that "common ownership provides affirmative benefits to the public by increasing listening choices and enhancing local service").

and interests of the communities that they serve” as “forceful[.]”⁵⁵ In the face of the record evidence and this amply justified conclusion, a decision to tighten the rule based on localism concerns would clearly have been unreasonable. And, regardless of whether Study 4.2’s findings were found “weak,”⁵⁶ they were not the only evidence in the record supporting the FCC’s determination that the levels of common ownership allowed under the current local radio ownership rule do not harm localism. In any case, a “weak” correlation between ownership and localism simply means that ownership has a minimal impact on localism, which would have rendered it arbitrary in the extreme for the Commission to have *tightened* the rule based on localism concerns. The record as a whole was more than adequate to support the FCC’s conclusion that doing so was not appropriate. Finally, to the extent that localism is a legitimate concern, the FCC is addressing specific proposals to enhance broadcasters’ local service in a separate proceeding.⁵⁷

D. The Additional Reasons that the FCC Provided for Declining to Tighten the Rule Were Adequate.

Petitioners contend that the “FCC provides only two reasons for not lowering the local radio ownership limits” – deference to Congress’ decision to relax the local radio ownership rule in the 1996 Act, and the undue disruption that would result.⁵⁸ This, too, is false. The FCC provided multiple other reasons for declining to tighten the local radio ownership rule, including the following: (1) “a certain level of consolidation can be efficient” and tightening the rule would thus “undermine the benefits that consolidation has brought to the financial stability of the

⁵⁵ *Id.* at ¶ 125.

⁵⁶ Pet. 19.

⁵⁷ See *Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, FCC 07-218, MB Docket No. 04-233 (rel. Jan. 24, 2008).

⁵⁸ Pet. 20.

radio industry;”⁵⁹ (2) the “efficiency gains” from economies of scale can “bolster [] stations’ financial standing and increase their ability to provide their local communities with quality programming;”⁶⁰ (3) “the evidence does not show that consolidation in local markets has harmed localism;”⁶¹ and (4) “common ownership allowable under our tiers is not associated with reductions in format or programming diversity.”⁶² Moreover, as discussed above, the Commission adequately supported its decision that the current limits were sufficient to prevent any harm to competition, and indirectly to diversity or localism. Taken together, the reasons that the FCC gave were more than sufficient to justify its decision not to tighten the local radio ownership rule.

Further, Petitioners’ contention that the FCC was somehow wrong to “defer” to Congress’ measured judgment in the 1996 Act that the prior rule did not serve the public interest and that relaxation was needed at that time to ensure the radio industry’s health and survival is meritless. It was more than reasonable for the agency to defer to Congress on this point, and in its decision it found that tightening the rule today would harm radio station owners’ financial stability, which in turn might cause harm by endangering “the continued service that the public has come to expect.”⁶³ Petitioners’ argument that Section 202(h) could somehow be read to *require* the media ownership rules to be tightened⁶⁴ is also untenable. As shown above, even under the Third Circuit’s lenient reading of the statutory standard, the FCC may only make its

⁵⁹ 2008 Order ¶ 119.

⁶⁰ *Id.* ¶ 120.

⁶¹ *Id.* ¶ 126.

⁶² *Id.* ¶ 128.

⁶³ *Id.* ¶ 119 n.384.

⁶⁴ Pet. 21.

rules stricter if it is “reasonable” to do so. Here, for the reasons set forth above and in Clear Channel’s comments, the FCC could not have satisfied that requirement, for, if anything, the record required the rule to be at least relaxed, not tightened.

Petitioners’ attack on the FCC’s desire to prevent market disruption by tightening the local radio ownership rule⁶⁵ is equally misplaced. While, as discussed below, Clear Channel believes that grandfathering would be required if the FCC were to tighten the rule in response to this Petition and, *a fortiori*, would have been required had the FCC done so in the *2008 Order*, a decision to tighten the rule and *not* to grandfather would certainly have caused disruption as the FCC rightly found. In light of the disruption that would indisputably have resulted from such a rule change, it was more than reasonable for the FCC to conclude that it was inappropriate to make more restrictive changes “absent persuasive evidence” – which it correctly found to be lacking – “that further tightening of the local radio ownership rule would serve the public interest more effectively than the current rule.”⁶⁶

IV. THE FCC COULD NOT POSSIBLY JUSTIFY ELIMINATING THE GRANDFATHERED STATUS OF EXISTING COMBINATIONS OR REQUIRING DIVESTITURE UNDER ANY REVISED LOCAL RADIO OWNERSHIP RULE.

A. The FCC Could Not Justify Eliminating the Grandfathered Status of Existing Combinations Under the Current Rule.

Contrary to Petitioners’ contention,⁶⁷ the FCC could not possibly justify a decision to remove the grandfathered status of existing combinations and require owners to divest stations, acquired in full compliance with the local radio ownership rule prior to 2003, that exceed the current limits. Indeed, the FCC’s 2003 decision to grandfather radio station groups formed prior

⁶⁵ *Id.*

⁶⁶ *2008 Order* ¶ 120.

⁶⁷ Pet. 21-22.

to its rule changes was proper as a matter of law and policy.⁶⁸ Conversely, eliminating the grandfathered status of existing combinations, as Petitioners urge, would disrupt the reasonable business expectations of radio broadcasters and amount to an unconstitutional taking and invalid retroactive regulation under the Fifth Amendment.

As explained above, when Congress increased the local radio ownership limits in 1996, it made clear its intent to encourage consolidation in the radio industry in order to bring about the public interest benefits of group ownership.⁶⁹ Members of Congress explicitly found that “[i]ncreased multiple ownership opportunities will allow radio operators to obtain efficiencies from being able to purchase programming and equipment on a group basis and from combining operations such as sales and engineering.”⁷⁰ Relying on the rule changes brought about by the 1996 Act, radio broadcasters invested substantial sums to consolidate their legally acquired station groups.⁷¹ As the Commission observed, “[m]any broadcasters incurred significant financial risks by acquiring the additional stations permitted under [the radio] rule and are creating business development plans for the future based on these current economies of scale.”⁷²

Thus, the Commission properly recognized in the *2008 Order* the negative consequences that would flow from requiring divestitures, finding that divestitures would “undermine settled

⁶⁸ See, e.g., Reply Comments of Clear Channel Communications, Inc., MB Docket Nos. 02-277, *et al.*, at 10-15 (filed Feb. 3, 2003) (“Clear Channel 2003 Reply Comments”); *cf.* Clear Channel Comments, at 73-76.

⁶⁹ See 141 Cong. Rec. S8076-S8077 (daily ed. June 9, 1995) (statement of Sen. Pressler); 141 Cong. Rec. S8433 (daily ed. June 15, 1995) (statement of Sen. Bryan).

⁷⁰ 141 Cong. Rec. S8424 (daily ed. June 15, 1995) (statement of Sen. Burns).

⁷¹ For example, Clear Channel has spent hundreds of millions of dollars to co-locate commonly owned stations in local markets and to combine offices, staff, production studios, and technical facilities.

⁷² *2008 Order* ¶ 120.

expectations in a market where broadcasters needed regulatory relief to achieve the economies of scale necessary to compete just 10 years ago.”⁷³ Requiring group owners with existing grandfathered combinations to now divest stations in order to come into compliance with the rule would not only eliminate the public interest benefits associated with such combinations and severely disrupt group owners’ business operations, but it would also leave these owners’ investments stranded.⁷⁴ Divestiture, of course, is a harsh remedy, and cannot be required without serious consideration of the adverse impact on industry structure.⁷⁵

Further, requiring group owners with grandfathered combinations to now come into compliance with the rule would be at odds with the Commission’s consistent policy of grandfathering existing combinations when modifying its media ownership rules.⁷⁶ Indeed, the FCC has consistently recognized the need to protect the reasonable expectations of group owners.⁷⁷ Under the Administrative Procedure Act, to depart from this precedent, the

⁷³ *Id.* Similarly, in the 2003 Order, the Commission acknowledged that existing group owners have legitimate “expectations” of recouping their investments in station groups upon sale. 2003 Order ¶ 487.

⁷⁴ *See, e.g.*, Clear Channel Comments, at 75; Clear Channel 2003 Reply Comments, at 11.

⁷⁵ *See, e.g.*, *Amendment of Part 76, Subpart J, of the Commission’s Rules and Regulations Relative to Cable Television Systems*, 97 FCC 2d 65, 75-76 (¶¶ 24-26) (1984); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 603 (1951).

⁷⁶ *See, e.g.*, *Review of the Commission’s Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903, 12965 (¶ 146) (1999) (television LMAs); *id.* at n.97 (television duopolies); *Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 14 FCC Rcd 12559, 12630 (¶ 168) (1999) (cable/broadcast combinations and cable/MDS combinations); *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission’s Rules*, 50 FCC 2d 1046, 1054 (¶ 30) (1975), *recon.* 53 FCC 2d 589 (1975), *aff’d sub nom.*, *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775 (1978) (newspaper/broadcast combinations except in limited “egregious” cases); *see also* Clear Channel Comments, at 75-76; Clear Channel 2003 Reply Comments, at 11-12.

⁷⁷ *See, e.g.*, *Revision of Radio Rules and Policies*, First Order on Reconsideration, 7 FCC Rcd 6387, 6397 (¶ 48) (1992) (declining to restrict the transfer of station groups that were acquired in compliance with the audience share limit adopted in the FCC’s Order but later grew to a level exceeding that limit, because the agency’s goal had been “to promote robust competition,” and “penalizing enterprises that grow into stronger competitors [was] [in]consistent with this

Commission would have to “supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”⁷⁸ In light of the overwhelming evidence that common ownership has resulted in substantial public interest benefits without causing any countervailing harms, the Commission could not justify a decision to change course and require divestiture of stations that are part of radio combinations assembled in full compliance with its pre-2003 local radio ownership rule.

Petitioners also argue that the FCC’s *rejection* of grandfathering as a means to lessen the disruption that it found would flow from tightening the local radio ownership rule is inconsistent with its failure to require divestiture today of combinations that were grandfathered in 2003.⁷⁹ This is absurd. Many of the subject combinations have now been in place for more than a decade, and it would be inconsistent with precedent, settled expectations, and fundamental notions of fairness to require divestiture now. In addition, saying that grandfathering does not provide a solution to the problems that would be created by tightening the radio ownership rule⁸⁰ is simply not the same thing as saying that grandfathering in all cases is “anticompetitive and

objective”); *Revision of Radio Rules and Policies*, Second Order on Reconsideration, 9 FCC Rcd 7183, 7193 (¶ 57) (1994) (permitting transfers of radio time brokerage agreements that were allowable under the FCC’s prior rules but impermissible under its revised regulations, acknowledging that “[t]o hold otherwise, as a general matter, could severely and unnecessarily restrict the marketability of stations and station combinations that involve brokerage agreements and seriously undermine the utility of such agreements”).

⁷⁸ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1971); *see Mazza v. Dep’t of Health and Human Servs.*, 903 F.2d 953, 959 (3rd Cir. 1990). Moreover, Commission action involving a departure from prior policies would be subject to a “hard look” on judicial review. *See Office of Comm’n of United Church of Christ v. FCC*, 707 F.2d 1413, 1425 & n.23 (D.C. Cir. 1983).

⁷⁹ Pet. 22.

⁸⁰ 2008 Order ¶ 120.

hinders new entrants,” as Petitioners claim.⁸¹ The FCC’s decision to grandfather existing combinations in 2003 was fully justified – indeed, required as a matter of law⁸² – and reconsidering it now would be highly capricious.

Finally, requiring group owners with grandfathered combinations to divest stations would violate the Fifth Amendment’s Takings and Due Process clauses⁸³ or, at the very least, raise constitutional questions that must be avoided.⁸⁴ As Clear Channel has previously explained, group owners have a constitutionally protected property right in the value of the investments that they made – at the explicit urging of Congress in the wake of the deregulatory changes made in the 1996 Act – in order to assemble their existing station groups.⁸⁵ “One of the principal and most important rights incident to ownership is alienability, or the right to disposition . . . *as the holder desires.*”⁸⁶ A Commission decision to require divestiture would abrogate group owners’ property rights, which are based on reasonable investment-backed expectations, without just compensation.⁸⁷ Disallowing group owners to enjoy the benefits of their investments in the

⁸¹ Pet. 22.

⁸² See Clear Channel 2003 Reply Comments, at 10-15.

⁸³ The Takings Clause provides that “private property [shall not] be taken for public use, without just compensation.” U.S. Const. amend. V. The Due Process Clause prohibits deprivation of property “without due process of law.” *Id.*

⁸⁴ *Telephone Company-Cable Television Cross-Ownership Rule*, 10 FCC Rcd 7887, 7888 (¶ 4) (1995); see *INS v. St. Cyr*, 533 U.S. 289, 290 (2001); *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 588 (1988); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345-348 (1936) (Brandeis, J., concurring).

⁸⁵ See, e.g., Clear Channel 2003 Reply Comments, at 13-15.

⁸⁶ 63C Am. Jur. 2d *Property* § 35 (2007) (emphasis added); see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 435 (1982). General principles of common law property rights are relevant here. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

⁸⁷ See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (requiring compliance with subsequently enacted regulations is a taking where government encouraged investment in reliance on prior regulatory regime).

future would constitute exactly the kind of governmental “bait and switch” that, absent a “significant threat to the common welfare,”⁸⁸ which does not exist on the record here, the Takings Clause prohibits.⁸⁹

A decision by the Commission to require divestiture would also run afoul of the Due Process Clause,⁹⁰ under which retroactive regulations that “change the legal consequences of transactions long closed” are highly disfavored.⁹¹ A retroactive regulation will be “fundamentally unfair,” and thus violate Due Process, depending on its “legitimate relation to the interest which the Government asserts”⁹² and “the degree of retroactive effect.”⁹³ The lack of any “legitimate” government interest that the FCC could hope to assert by now requiring existing combinations – which the FCC grandfathered five years ago, and which were properly formed, in some cases, over a decade ago – to divest stations in order to come into compliance with the rule would render any such action violative of the Due Process clause. Accordingly, Petitioners’ request to remove the grandfathered status of any existing combinations must be rejected.

⁸⁸ Compare *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 485 (1987).

⁸⁹ See *Kaiser Aetna*, 444 U.S. at 179-80; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011-12 (1984); see also *Connelly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986) (action that “permanent[ly] appropriat[es] [private] assets” displays the “character” of a taking).

⁹⁰ U.S. Const. amend. V.

⁹¹ *Eastern Enters. v. Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); see *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

⁹² *Eastern Enters.*, 524 U.S. at 549 (Kennedy, J., concurring in the judgment and dissenting in part). Accord *id.* at 528-31 (plurality opinion of O’Connor, J.).

⁹³ *Id.* at 549 (Kennedy, J., concurring in the judgment and dissenting in part). Accord *id.* at 530-31 (plurality opinion of O’Connor, J.).

B. The FCC Could Not Justify Requiring Divestiture of Stations Under Any Tightened Local Radio Ownership Rule.

For very the same reasons, the FCC could not possibly justify requiring divestiture under any more restrictive local radio ownership rule that it might adopt in response to the Petition. In 2003, when it switched to the Arbitron market definition, the Commission rightly found that grandfathering was required.⁹⁴ While the FCC notes possible negative implications of grandfathering in the *2008 Order* in the course of rejecting Petitioners' argument that the rule itself should be tightened, relying on the *2008 Order's* reasoning to support a divestiture requirement under any modified local radio ownership rule would constitute a clear departure from precedent, and the FCC has not supplied, and could not supply, the heightened justification required to justify this approach. A refusal to grandfather existing combinations would also, for the reasons set forth above, be unconstitutional.

V. CONCLUSION

As demonstrated above, the Commission could not possibly have justified a decision to tighten the local radio ownership rule or to remove the grandfathered status of existing combinations. Accordingly, the Commission should promptly dismiss or deny the Petition for Reconsideration.

⁹⁴ *2003 Order* ¶ 484.

Respectfully submitted,

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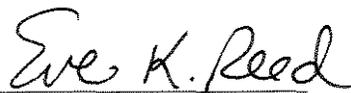
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Dated: May 6, 2008

CERTIFICATE OF SERVICE

I, Eve Klindera Reed, do hereby certify that I have on this 6th day of May, 2008, caused to be mailed by first class mail, postage prepaid, a copy of the foregoing "**Opposition to Petition for Reconsideration**" to the following:

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